FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v GHORBANI-PALANGI *[2014] FCCA 447*

Catchwords:
INDUSTRIAL LAW – Underpayment of employee entitlements – penalty to be imposed – factors in assessing penalty.

Legislation:
Fair Work Act 2009, ss.546(3), 557
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009
Workplace Relations Act 1996, ss.719(2), 841, 182(1)

Cases cited:
Fair Work Ombudsman v Foure Mile Pty Ltd & Anor [2013] FCCA 682
FWO v Promoting U Pty Ltd & Anor [2012] FMCA 58
Kelly v Fitzpatrick (2007) 166 IR 14
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
New Image Photographics Pty Ltd v Fair Work Ombudsman [2013] FCA 1385
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412
Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor [2009] FMCA 38

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	MOUSSA GHORBANI-PALANGI
File Number:	MLG 759 of 2013
Judgment of:	Judge F. Turner
Hearing date:	5 February 2014
Date of Last Submission:	5 February 2014
Delivered at:	Melbourne
Delivered on:	24 March 2014

REPRESENTATION

Solicitors for the Applicant: Office of the Fair Work Ombudsman

Solicitors for the Respondent: Schembri & Co Lawyers

THE COURT DECLARES THAT:

(1) The Respondent contravened:

(a) subsection 182(1) of the *Workplace Relations Act 1996* (the "WR Act") in that he was involved in the employer's failure to pay Mr Praputthaweechai a rate at least equal to the basic periodic rate of pay payable to Mr Praputthaweechai under the *Metals Pay Scale* from 11 March 2008 to 30 June 2009;

(b) Item 5 of Schedule 16 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the "Transitional Act") in that he was involved in the employer's failure to pay Mr Praputthaweechai at a rate at least equal to the basic periodic rate of pay payable under the *Metals Pay Scale* from 1 July 2009 to 31 December 2009;

(c) subsection 185(2) of the WR Act in that he was involved in the employers failure to pay Mr Praputthaweechai a casual loading at least equal to the guaranteed casual loading payable under the *Metals Pay Scale* from 11 March 2008 to 30 June 2009;

(d) Item 5 of Schedule 16 to the Transitional Act in that he was involved in the employer's failure to pay Mr Praputthaweechai a casual loading at least equal to the guaranteed casual loading percentage under the *Metals Pay Scale* from 1 July 2009 to 31 December 2009;

(e) Section 45 of the *Fair Work 2009* (the "FW Act") in that he was involved in the employer's failure to pay Mr Praputthaweechai the minimum weekly wage prescribed in cl.24.1(a) of the *Manufacturing and Associated Industries Award 2010* ("the Modern Award") plus the casual loading of 25 per cent, in accordance with clause 14.1 of the Modern Award from 1 January 2010 to 25 May 2012.

THE COURT ORDERS THAT:

(2) Pursuant to subsection 719(1) of the WR Act and subsection 546(1) of the FW Act, the respondent pay a penalty of $7,854.00. in respect of his involvement in the contraventions identified.

(3) Pursuant to s.841 of the WR Act and subsection 546(3) of the FW Act, the respondent pay the penalty of $7,854.00 to KP in compensation for damage suffered by KP as a result of the contraventions.

(4) In the event the respondent is unable to locate KP, the respondent pay the $7,854.00 to the Commonwealth pursuant to subsection 726(1) of the WR Act and subsection 559(1) of the FW Act.

(5) The applicant have liberty to apply on seven days' notice in the event that any of the preceding orders are not complied with.

(6) All of the above payments are to be made within 60 days of the date of these orders.

(7) All extant applications are dismissed and the matter is removed from the list of pending cases.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE

MLG 759 of 2013

FAIR WORK OMBUDSMAN
Applicant

And

MOUSSA GHORBANI-PALANGI
Respondent

REASONS FOR JUDGMENT

1. This is an application by an officer of the Fair Work Ombudsman (the "FWO") for the imposition of penalties on the respondent for breaches of the *Workplace Relations Act 1996* (the "WR Act") and the *Fair Work Act 2009* (the "FW Act").

2. The FWO filed a Statement of Claim on 29 May 2013. It is claimed:

    - That M.G.P. Electrical Pty Limited ("MGP") was the employer of Mr Kanthawat Praprutthaweechai ("KP") on a casual basis from 11 March 2008 until 25 May 2012.

    - That On 9 May 2013 MGP entered into *'a creditors' voluntary winding up'*.

    - That the respondent was the sole director, secretary and shareholder of MGP with responsibility for the running of the business.

    - That KP was employed as an adult process worker.

- That MGP was bound by the *Metal, Engineering and Associated Industries Award 1998* (the "Pre-Reform Award") in relation to KP up until 31 December 2009.

- That MGP was bound by *the Manufacturing and Associated Industries Award 2010* ("the Modern Award") in relation to KP on and from 1 January 2010.

- That up until 31 December 2009 MPG was bound to pay KP a basic periodic rate of pay at least equal to the guaranteed basic periodic rate of pay under the Metals Pay Scale derived from the Pre-Reform Award.

- That from 1 January 2010 MGP was bound to pay KP an hourly rate calculated from the Modern Award.

- That MGP underpaid KP a total of $22,473.03.

- That the respondent was knowingly concerned, involved in and is liable for the breaches.

3. The FWO seeks declarations that the respondent failed to pay KP his entitlements.

4. The FWO seeks the imposition of penalties on the respondent for the alleged breaches.

5. The FWO seeks an order that the respondent pay to KP the amount underpaid ($22,473.03) plus interest thereon. Alternatively, it seeks compensation for damage suffered by KP as a result of the contraventions. As $1,300.00 of the underpayments have been paid to KP by the respondent, the total due should be amended to $21,173.03.

6. Alternatively to the orders sought for the underpayment and interest to be paid to KP, the FWO seeks an order under s.841 of the WR Act and s.546(3) of the FW Act that the respondent pay KP from any penalties ordered, an amount equal to the underpayments, as compensation for damage suffered by KP as a result of the underpayments (Statement of Agreed Facts filed 30 September 2013 ("SOAF") Attachment 'A' at [3]).

7. The FWO seeks an order that any amount ordered, in excess of the underpayments and interest thereon, be paid to the Commonwealth.

8. The FWO seeks that in the event that the respondent is unable to locate KP, the respondent pay the underpayment plus interest to the Commonwealth.

9. The FWO seeks an order that all amounts to be paid by the respondent, be paid within 60 days of the orders of the Court.

10. The parties reached a Statement of Agreed Facts ("SOAF") as filed on 30 September 2013.

11. In the SOAF the respondent admits contravening:

- Section 182(1) of the WR Act, the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the "Transitional Act") and the FW Act through being involved in the underpayments to KP.

12. The parties agree in the SOAF:

- That the total underpayment to KP was $22,473.03.
- That KP was at all relevant times employed by MGP as an adult process worker.
- That MGP was bound by the pay scales alleged.
- That since the respondent was advised of the contraventions by letter on 14 December 2012, none of the underpayments had been rectified as at 30 September 2013 [it was agreed before the Court on 5 February 2014, that $1,300.00 had been paid by the respondent (Transcript "T" p.3, l36-42)].
- That on 9 May 2013, MGP entered into a '*creditors' voluntary winding up'* with the effect that:

  (a) KP "*would only be paid the Total Underpayment…* (or part thereof) *…if any dividends were available after the liquidation process was complete*".

(b) "*The FWO would be prevented from commencing civil proceedings against* (MGP) *…except with leave of the Federal Court*."

- That KP is not eligible to recover any underpayment through the *Fair Entitlements Guarantee* (the "FEG") because his employment did not end less than six months before the appointment of the liquidator.

- That on 21 May 2013 the respondent offered to pay KP $3,000.00 in instalments over six months, but only $1,300.00 has been paid.

- That the declarations and orders as set out in Attachment 'A' to the SOAF be made.

13. On 25 November 2013 the respondent filed an Outline of Submissions in which it is submitted:

- That the breaches were a single course of conduct (s.719(2) of the WR Act and s.557 of the FW Act) and should be taken to be a single contravention [s.557 and s.719(2) (supra)] for which the maximum penalty is 60 penalty units (60 x $110 = $6,600.00).

- That the breaches were not deliberate.

- That the respondent was unaware of any underpayment.

- That having agreed to the factors including those outlined in *Kelly v Fitzpatrick (2007)* 166 IR 14, an appropriate remedy is 20% of the overall maximum.

14. On 17 December 2013, the FWO filed its Submissions on Penalty. The FWO submits:

- That the respondent has paid KP only $900.00 of the underpayments (a total of $1,300.00 has now been paid).

- That by reason of MGP going into liquidation, from any penalties imposed, an amount up to the amount of the total underpayments be paid to KP (SOAF Attachment 'A' at [3]).

- That a total penalty of 20% of $6,600.00 is not appropriate.

15. The FWO submits that the contraventions fall into two groups being *"the failure to pay basic periodic rate of pay"* and *"failure to pay casual loading"* (Attachment 'A' to the Submissions on Penalty).

16. The FWO submits that the total maximum penalty is $13,200.00 of which the respondent should pay 50-70%, after a 15% discount for cooperation, resulting in a penalty range of between $5,610.00 and $7,854.00.

17. The FWO submits that the entitlement to a *'casual loading'* is a distinct and separate entitlement, from the entitlement to an '*hourly rate of pay'*, and therefore they should be grouped separately. The Court accepts that submission (post).

18. As to the factors listed in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 the FWO makes the following submissions; and the Court accepts them.

Nature and extent of the conduct

19. That there was a substantial underpayment to a low paid worker over a significant period.

Circumstances in which the conduct took place

20. The amounts paid to KP were below the statutory minimums throughout the four years of KP's employment. Although the respondent states that he was not aware of any obligation to pay minimum rates that were higher than the contractual rates agreed upon (Affidavit of the respondent filed 16 October 2013 at [9]), ignorance of the law is no excuse: see *Kelly* (supra). Indeed, the respondent examined the relevant award during KP's employment (Affidavit of the respondent filed 16 October at [11]), but failed to do so with sufficient diligence to ascertain KP's correct entitlements, and the respondent was at best negligent.

Nature and extent of loss

21. The underpayment of $22,473.03 (gross) represents 17% of KP's lawful entitlements during the four years [$129,708.53 (Statement of Claim Attachment 'A') / $22,473.03 = 17%].

Rectification

22. The respondent has paid instalments to KP totalling $1,300.00 despite stating in his affidavit filed 16 October 2013 [29] that he intended to make regular monthly payments.

Financial position of the employer

23. The FWO submits that the poor financial position of the employer in no way excuses the contraventions: see *Fair Work Ombudsman v Foure Mile Pty Ltd & Anor* [2013] FCCA 682 [22]-[23].

Similar previous conduct

24. The FWO is not aware of any previous similar contraventions being proven.

One Course of conduct

25. The FWO submits that the contraventions fall into two groups (supra).

Size and Financial Circumstances.

26. The FWO accepts that the employer was a small business and is now in liquidation, but submits that there is no evidence of the respondent's financial position.

27. The FWO referred to the decision in *Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor* [2009] FMCA 38 at [26] – [27], which referred to the decision of Tracey J in *Kelly* (supra) at [28] that:

> *"No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees, rightly, have an expectation that this will occur. When it does not it will, normally, be necessary to mark the failure by imposing an appropriate monetary sanction. Such a sanction "must be imposed at a meaningful level": see Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd [2001] ATPR 41-815 at [13]."*

28. The FWO referred to the decision in *Rajagopalan v BM Sydney Building Materials Pty* Ltd [2007] FMCA 1412 at [27], where it was decided:

> *"Employers must not be left under the impression that because of their size or financial difficulty that they are able to breach an award. Obligations by employers for adherence to industrial instruments arise regardless of their size. Such a factor should be of limited relevance to the Court's consideration of penalty."*

Deliberateness of the breaches

29. The FWO accepts that the breaches were not deliberate but submits that they were at least negligent.

Involvement of senior management

30. The respondent was at all times the sole director, secretary and shareholder of the employer, and was responsible for the employer's decisions relating to KP (SOAF [6] and [39]-[41]).

Contrition

31. The FWO notes that the respondent has not apologised or expressed remorse to KP. The Court finds that as the respondent has paid some of the amount owed to KP by instalments, and has given an undertaking to pay (post); he is showing contrition and remorse.

Corrective action

32. The FWO submits that the obligations to rectify the underpayments fall's on the employer (MGP) and not on the respondent personally. Therefore any personal commitment to repay, or repayments by the respondent should be a mitigating factor when assessing the appropriate penalties for him.

Co-operation

33. The FWO submits that a discount in the vicinity of 15% should be allowed to the respondent for his co-operation with the FWO.

Ensuring compliance with minimum standards

34. The FWO submits (and the Court accepts) that this is vital.

Deterrence

35. The Court holds that employers and persons *'knowingly concerned'* in breaches of minimum standards, and like-minded persons, must be deterred from such conduct. The Court refers to the following submissions by the FWO:

> *"61. The Applicant notes the comments of Lander J in* Ponzio v B & P Caelli Constructions Pty Ltd[1] *(Ponzio), where his Honour said:*
>
> > *"There are three purposes at least for imposing a penalty: punishment; deterrence; and rehabilitation. The punishment must be proportionate to the offence and in accordance with the prevailing standards of punishment: R v Hunter (1984) 36 SASR 101 at 103. Therefore the circumstances of the offence or contravention are especially important. The penalty must recognise the need for deterrence, both personal and general. In regard to personal deterrence, an assessment must be made of the risk of re-offending. In regard to general deterrence, it is assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend: Yardley v Betts (1979) 22 SASR 108. The penalty therefore should be of a kind that it would be likely to act as a deterrent in preventing similar contraventions by like-minded persons or organisations. If the penalty does not demonstrate an appropriate assessment of the seriousness of the offending, the penalty will not operate to deter others from contravening the section. However, the penalty should not be such as to crush the person upon whom the penalty is imposed or used to make that person a scapegoat. In some cases, general deterrence will be the paramount factor in fixing the penalty: R v Thompson (1975) 11 SASR 217. In some cases, although hardly in this type of contravention, rehabilitation is an importance factor."*

36. The FWO refers to the decision of:

> *"62. Gray J in* Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union[2]*, observed at [37]:*

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[1] *[2007] FCAFC 65; (2007) 158 FCR 543 at 559-60 (Lander J).*
[2] *(2008) 171 FCR 357*

> *"Specific deterrence focuses on the party on whom the penalty is to be imposed and the likelihood of that party being involved in a similar breach in the future. Much will depend on the attitude expressed by that party as to things like remorse and steps taken to ensure that no future breach will occur"*

37. The FWO notes at [63]: *"that the Respondent is currently involved in five other companies (SOAF at 7)"*.

38. The FWO submits that:

> *"63. …the Respondent has not put on any evidence as to the financial position of these other companies but does refer to "draw[ing] funds from the company when the accounts allow" and produces evidence of this occurring for the preceding three months (Ghorbani Affidavit at 22). Given the current status of the Employer as being in liquidation, one can only assume that the "company" to which the Respondent refers in his Affidavit is one of those listed in the SOAF (at 7). This indicates that at least one of the companies of which the Respondent is involved, is earning an income sufficient to allow the Respondent to draw from. No evidence has been provided as to whether any of those companies currently employ workers.*
>
> *64. In the absence of any evidence from the Respondent in this respect, the Applicant submits that the Court should give no or limited weight to the Respondent's submission the "any penalty, combined with the deterrent effect of the cost, inconvenience and stress involved in being a respondent to a civil penalty proceeding will be sufficient specific deterrence of the Respondent".*
>
> *65. Further, the Applicant rejects the Respondent's submission at paragraph 10(l) and (m) of his Penalty Submissions that the "cost, inconvenience and stress involved in being the respondent to a civil penalty proceeding will be sufficient specific deterrence of the Respondent".*

Costs

39. The FWO submits that:

> *"66. The mere fact of the Respondent having incurred costs related to these proceedings ought be of no relevance to the question of penalty. The incurring of some level of legal costs is an inevitable consequence of a respondent choosing (as most*

will) to obtain legal advice or representation in connection with proceedings brought under the FW Act.

67. The Applicant submits that it is reasonable and open to the Court to infer that, in setting the maximum penalties applying to contraventions of civil remedy provisions of the FW Act, Parliament would have contemplated that a person facing such a penalty would also be likely to have incurred some level of legal costs, particularly when Parliament has given consideration to how costs would be dealt with in section 570 of the FW Act.

68. To allow a discount on penalty on account of the mere fact of having incurred some costs would in effect to reduce the applicable maximum penalties that have been judged by Parliament to be appropriate.

69. The Applicant further highlights that the Respondent, in his Penalty Submissions, has made only a bare assertion to the effect that costs he has purportedly incurred have had a deterrent impact. The Respondent has provided no evidence regarding the quantum or basis on which costs were incurred, or any other details regarding the costs referred to. The Respondent has also not provided any evidence to support his assertion that specific deterrence has been achieved. As such, the Applicant submits that there is no basis for the Court to make any findings regarding the impact of the Respondent's costs in this matter.

70. Moreover, the Applicant notes that section 570 of the FW Act provides that a party to proceedings in a court exercising jurisdiction under the FW Act may only recover its legal costs in limited circumstances, including where such costs have been incurred by reason of the other party's unreasonable act or omission[3].

71. Having regard to section 570 of the FW Act, the Applicant submits that:

> *(a) there is a clear legislative intention that the jurisdiction be "no costs" unless the very high threshold in subsection 570(2) has been satisfied; and*
>
> *(b) legal costs that arise as an ordinary incidence of litigation conducted in a reasonable manner are to be borne*

[3] *The threshold set by subsection 570(2) of the FW Act is high, in that the Court's discretion to award costs should only be exercised in a clear case: Saxena v PPF Asset Management Ltd [2011] FCA 395, at [5]-[6]: Construction, Forestry, Mining and Energy Union and Others v Clark 170 FCR 574 at [29].*

by the Respondents, such costs also being the inevitable result of a respondent being prosecuted for having contravened Commonwealth workplace laws.

72. To obtain a discount on penalty by reason of costs incurred would, in the Applicant's submission, be to circumvent the intention of the legislation that:

(a) the jurisdiction be primarily a "no-costs" jurisdiction; and

(b) a party may only recover its costs where the high threshold set by subsection 570(2) has been satisfied.

73. Further, the consideration of costs as a measure of deterrence would operate to the benefit of those respondents with the means to obtain legal representation, and is not a factor with general application in respect of penalty.

74. The Applicant also submits that any "inconvenience" or "stress" suffered by the Respondent as a result of these proceedings is not relevant in mitigating the penalty to be imposed and are "inevitable consequences" to the Respondent's conduct with respect to his involvement in the Admitted Contraventions.

General Deterrence

75. The role of general deterrence is determining the appropriate penalty was illustrated by the comments of Lander J in 'Ponzio' referred to above. Similarly in CPSU v Telstra Corporation Limited[4] (2001) Finkelstien J said:

"even if there be no need for specific deterrence, there will be occasions when general deterrence must take priority, and in that case a penalty should be imposed to mark the law's disapproval of the conduct in question, and act as a warning to others not to engage in similar conduct."

76. Employers should be in no doubt that they have a positive obligation to ensure compliance with the obligations they owe to their employees under the law. Recently, in Fair Work Ombudsman v Maclean Bay Pty Ltd (No2)[5] Marshall J observed:

[4] *(2001) 108 IR 228 at 231*
[5] *[2012] FCA 557*

> *"It is important to ensure that the protections provided by the Act to employees are real and effective and properly enforced. The need for general deterrence cannot be understated. Rights are a mere shell unless they are respected."*[6]

77. The contraventions in the current proceedings concern the payment of wages, below the award minimum wage by way of applying a contractual rate of pay.

78. The Applicant submits that for these reasons, general deterrence is important in the present case and the Court should mark its disapproval of the Respondent's conduct and set a penalty which serves as a very real warning to others[7].

40. The Court accepts the FWO's submissions (above.)

41. The FWO submits further:

Recommendations as to penalty

79. The determination of the correct penalty to be imposed on the Respondent is ultimately a matter for the Court[8].

80. Having regard to the above factors relevant to penalty, the Applicant recommends aggregate penalties be imposed on the Respondent for the contraventions within the mid-high range (being 50-70% of the maximum). The calculations of the penalty amounts with respect to each group of contraventions are set out in the table in Attachment A and take into account the discount of 15% ….

Totality

81. Having fixed an appropriate penalty for each course, the Court should take a final look at the aggregate penalty to determine whether it is an appropriate response to the conduct which led to the breaches, and is not oppressive or crushing[9].

82. In his Affidavit, the Respondent deposes to various matters impacting his health and general well-being, and provides various documents purporting to be evidence of his medical condition [Ghorbani Affidavit at 23-27 and Annexure "E").

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[6] *Ibid at [29]*
[7] *See paragraph [25] of Kelly, supra, and the cases cited therein.*
[8] *Merringtons, at [91] per Buchanan J.*
[9] *See Kelly, supra [30]; Merringtons, supra at [23] per Gray J, [71] per Graham, J, [102] per Buchanan J.*

83. While the Applicant has sympathy for the Respondent's circumstances, the documentation annexed to his Affidavit does not confirm the extent to which his health may impact on his future earning capacity and primarily relates to a period between 2004 and 2011 and is accordingly of limited, if any, relevance to the issue of penalty.

84. Further, to the extent that the Respondent's evidence and annexed documentation regarding his medical condition is relied on with respect to his failure to cooperate fully in the FWO's investigation, the Applicant submits that the doctor's letters and other medical documentation does not satisfy the test for opinion evidence as set out in Makita (Australia) Pty Ltd v Sprowle[10]s, namely to furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusions. Rather, the letters and other medical documentation include statements which are not able to be tested or clarified by the Applicant.

85. For these reasons, the Applicant submits that this information, being imprecise hearsay evidence, should be excluded from the Court's consideration as to penalty or given only very limited weight.

86. The Applicant submits that whilst the penalty imposed must not be crushing or oppressive, it must nevertheless bear relativity to the seriousness of the conduct engaged in by the Respondent[11].

87. The Applicant further submits that imposing an aggregate penalty on the Respondent within range proposed in paragraph 80 above would be an appropriate response to the contraventions in this matter.

42. The Court accepts the submissions above.

43. The Court notes that in Attachment "A" to the FWO's Submissions on penalty (attached), the FWO provides first for a 15% discount for cooperation, and then a further discount for the factors in *Mason* (supra). The range of penalties proposed by the applicant is from 42.5% to 59.5% of the maximum ($2,805.00/$6,600.00 = 42.5%; $3,927.00/$6,600.00 = 59.5%).

44. At the hearing before the Court on 5 February 2014 Ms Malishev appeared for the applicant and Mr Magowan of Counsel for the

[10] *(2001) 52 NSWLR 705; (2001) NSWCCR 218; [2001] NSWCA 305 at [59]*
[11] *Fair Work Ombudsman v Promoting U Pty Ltd &Anor [2012] FMCA 58*

respondent. The written submissions were spoken to. The following was added.

45. Mr Magowan submitted that the breaches form a single course of conduct that fall into one group. That submission is rejected

46. Ms Malishev submitted that they fall into two groups and referred to the decision in *New Image Photographics Pty Ltd v Fair Work Ombudsman* [2013] FCA 1385 where at [56]-[57] Collier J decided:

> *"On the facts of this case, it appears clear that the entitlement to an ordinary rate of pay and the obligation of the employer to pay the ordinary rate of pay were different from the entitlement to a casual loading and the obligation to pay an employee a casual loading.*
>
> *I do not consider that there was substantial overlap between the different entitlements, such that the Court properly should have treated the contravention as a single contravention of the legislation. In this case his Honour treated underpayments of ordinary time, and underpayments of casual loadings to which Ms Keen was entitled, as distinct contraventions of different provisions conferring entitlements upon Ms Keen. In my view the approach adopted by his Honour was correct."*

47. That decision is relevant to the present matter. The Court finds that the conduct here falls into two groups.

48. The respondent gave the following undertaking to the Court.

> *"I intend to pay the employee by instalments… the difference between any penalty imposed by the Court and the total $21,373.00 as* (my) *finances allow"*.

49. The respondent should note that the undertaking has influenced the Court in determining the amount of penalty imposed on him and the Court expects compliance by the respondent.

50. The Court imposes a penalty of $7,854.00 on the respondent. That penalty will not be crushing or oppressive and bears relativity to the seriousness of the conduct engaged in by the respondent: see *FWO v Promoting U Pty Ltd & Anor* [2012] FMCA 58. It is an appropriate response to the contraventions.

51. The Court makes declarations and orders as set out in Attachment "A" of the SOAF as amended herein.

I certify that the preceding fifty-one (51) paragraphs are a true copy of the reasons for judgment of Judge F. Turner

Associate:

Date: 24 March 2014

ATTACHMENT A

	Description of Contravention (after course of conduct and grouping	Provisions contravened	Maximum Penalty	Maximum Penalty Less 15% discount	Applicant's submissions on penalty
1.	**Failure to pay basic periodic rate of pay**	section 182(1) of the WR Act and item 5 of schedule 16 of the Transitional Act;	$6,600	$5,610	Mid-high: 50-70% ($2,805 - $3,927)
2.	**Failure to pay casual loading**	section 185(2) of the WR Act, item 5 of schedule 16 of the Transitional; Act and section 45 of the FW Act, under clause 14.1 of the Modern Award; and	$6,600	$5,610	Mid-high: 50-70% ($2,805 - $3,927)
		Total:	**$13,200**	**$11,220**	**$5,620 - $7,854**