FEDERAL COURT OF AUSTRALIA

Fair Work Ombudsman v Jetstar Airways Ltd [2014] FCA 33

Citation:	Fair Work Ombudsman v Jetstar Airways Ltd [2014] FCA 33
Parties:	**FAIR WORK OMBUDSMAN v JETSTAR AIRWAYS LTD (NZBN 9429036201136), JETSTAR GROUP PTY LTD (ACN 003 901 353) and JETSTAR AIRWAYS PTY LTD (ACN 069 720 243)**
File number(s):	NSD 495 of 2012
Judge(s):	**BUCHANAN J**
Date of judgment:	6 February 2014
Catchwords:	**INDUSTRIAL LAW** – penalty – breach of modern award – pilots required to bear the cost of training by deductions from salary – unauthorised deduction from pilot's salary – whether breach was flagrant or wilful – whether need for deterrence – where penalty should be fixed to ensure that the risk of contravention is not seen as an acceptable cost of doing business
Legislation:	*Air Pilots Award 2010* (Cth), cl 16.5 *Fair Work Act 2009* (Cth), ss 14, 45, 323(1), 324, 324(2), 345(1)(a), 550(2)(c)
Cases cited:	*Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54 *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249
Date of hearing:	19 December 2013
Place:	Sydney
Division:	FAIR WORK DIVISION
Category:	Catchwords
Number of paragraphs:	58
Counsel for the Applicant:	Mr JJE Fernon SC and Ms E Raper
Solicitor for the Applicant:	Fair Work Ombudsman

Counsel for the Respondents:	Mr F Parry SC and Mr R Dalton
Solicitor for the Respondents:	Herbert Smith Freehills

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
FAIR WORK DIVISION **NSD 495 of 2012**

BETWEEN:	**FAIR WORK OMBUDSMAN** **Applicant**
AND:	**JETSTAR AIRWAYS LTD (NZBN 9429036201136)** **First Respondent**
	JETSTAR GROUP PTY LTD (ACN 003 901 353) **Second Respondent**
	JETSTAR AIRWAYS PTY LTD (ACN 069 720 243) **Third Respondent**

JUDGE:	**BUCHANAN J**
DATE OF ORDER:	**6 FEBRUARY 2014**
WHERE MADE:	**SYDNEY**

THE COURT DECLARES THAT:

1. The Second Respondent, Jetstar Group Pty Ltd (ACN 003 901 353), contravened:

    1.1 section 45 of the Fair Work Act ("the FW Act") in that as an employer covered by the *Air Pilots Award 2010* (Cth) ("the Award"), it employed six cadet pilots (namely, Mosca, Wladyslawski, Stockley, Webster, Hull and Hessell) in circumstances where it had required them to do line training and required them to bear the cost of that training and failed to reimburse them for these costs, contrary to the requirements of clause 16.5 of the Award; and

    1.2 section 323(1) of the FW Act (by failing to pay all wages in full to Thomas Hessell).

2. The Third Respondent, Jetstar Airways Pty Ltd (ACN 069 720 243), pursuant to s 550(2)(c) of the FW Act, was involved in each of the contraventions set out in paragraph 1 and is thereby taken to have engaged in the same contraventions.

THE COURT ORDERS THAT:

3. The Second Respondent pay the following penalties pursuant to s 546(1) of the FW Act to a total amount of $45,000 for the declared contraventions in paragraph 1 above, being:

   3.1 a penalty of $20,000 in respect of its contravention of s 45 of the FW Act in respect of clause 16.5 of the Award; and

   3.2 a penalty of $25,000 in respect of its contravention of s 323(1) of the FW Act.

4. The Third Respondent pay the following penalties pursuant to s 546(1) of the FW Act to a total amount of $45,000 for the declared contraventions in paragraph 2 above, being:

   4.1 a penalty of $20,000 in respect of its involvement in the contravention of s 45 of the FW Act in respect of clause 16.5 of the Award; and

   4.2 a penalty of $25,000 in respect of its involvement in the contravention of s 323(1) of the FW Act.

5. All pecuniary penalties imposed by the Court, pursuant to s 546(3) of the FW Act, be paid to the Consolidated Revenue Fund of the Commonwealth within 28 days of these orders.

6. The proceedings otherwise be dismissed.

7. No order as to costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

IN THE FEDERAL COURT OF AUSTRALIA
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FAIR WORK DIVISION **NSD 495 of 2012**

BETWEEN:	**FAIR WORK OMBUDSMAN** **Applicant**
AND:	**JETSTAR AIRWAYS LTD (NZBN 9429036201136)** **First Respondent**
	JETSTAR GROUP PTY LTD (ACN 003 901 353) **Second Respondent**
	JETSTAR AIRWAYS PTY LTD (ACN 069 720 243) **Third Respondent**
JUDGE:	**BUCHANAN J**
DATE:	**6 FEBRUARY 2014**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

BUCHANAN J:

INTRODUCTION

1 These proceedings, commenced on 2 April 2012, concern allegations of breach of a Federal award – the *Air Pilots Award 2010* (Cth), made by the Fair Work Commission on 4 September 2009 ("the Award"). The applicant initially alleged that each of the respondents had breached identified provisions of the *Fair Work Act 2009* (Cth) ("the FW Act"). The proceedings were listed for hearing in December 2013. Two days before the hearing was to commence, the parties announced that they had reached agreement about a number of matters raised by the application and statement of claim, that the second and third respondents would admit liability for identified matters, and that the parties had agreed that I should take submissions about penalties to be imposed on one of the days listed for hearing.

BACKGROUND

2 The first respondent ("Jetstar New Zealand") is incorporated in accordance with the laws of New Zealand. It is a wholly owned subsidiary of the third respondent. The second respondent ("Jetstar Group") is incorporated in Australia. It is also a wholly owned

subsidiary of the third respondent. The third respondent ("Jetstar Airways") is incorporated in Australia. It is a wholly owned subsidiary of Qantas Airways Limited ("Qantas"). At the relevant time, the senior management team of Jetstar Airways included: the Chief Executive Officer, Mr Bruce Buchanan; the Executive Manager Operations, Mr Mark Dal Pra; the Chief Pilot, Captain Mark Rindfleish; the Manager Flying Operations and Resources, Mr Matthew Bell; the Head of Human Resources, Mr Rohan Garnett; and the Manager of Employee Relations, Mr Tim Nuttall. A recruitment specialist engaged by Jetstar Airways, Ms Leah Golias, provided advice and services in connection with the events described below. An industrial relations consultant, Mr John Farrow, also provided advice to Jetstar Airways in relation to those matters.

3 The Jetstar companies provide airline services in Australia, New Zealand and the Asia/Pacific region. For that purpose, the various companies employ pilots. Those pilots who are employed by a "national system employer" within the meaning of s 14 of the FW Act are entitled to the provisions of the Award. Jetstar Group and Jetstar Airways are each a national system employer.

4 The agreement reached by the parties, that the second and third respondents (but not the first respondent) were liable to penalties in the present proceedings, was supported by a statement of agreed facts, which was accompanied by a series of annexed documents. The parties agreed that Jetstar Group contravened s 45 of the FW Act and s 323(1) of the FW Act and that Jetstar Airways was "involved" in Jetstar Group's contraventions pursuant to s 550(2)(c) of the FW Act and thereby liable for both contraventions.

5 The provisions of the FW Act to which I have referred (and s 324) are as follows:

> **45 Contravening a modern award**
>
> A person must not contravene a term of a modern award.
>
> Note 1: This section is a civil remedy provision (see Part 4-1).
>
> Note 2: A person does not contravene a term of a modern award unless the award applies to the person: see subsection 46(1).
>
> …
>
> **323 Method and frequency of payment**
>
> (1) An employer must pay an employee amounts payable to the employee in relation to the performance of work:
>
> (a) in full (except as provided by section 324); and

(b) in money by one, or a combination, of the methods referred to in subsection (2); and

(c) at least monthly.

Note 1: This subsection is a civil remedy provision (see Part 4-1).

Note 2: Amounts referred to in this subsection include the following if they become payable during a relevant period:

(a) incentive-based payments and bonuses;

(b) loadings;

(c) monetary allowances;

(d) overtime or penalty rates;

(e) leave payments.

…

324 Permitted deductions

(1) An employer may deduct an amount from an amount payable to an employee in accordance with subsection 323(1) if:

(a) the deduction is authorised in writing by the employee and is principally for the employee's benefit; or

(b) the deduction is authorised by the employee in accordance with an enterprise agreement; or

(c) the deduction is authorised by or under a modern award or an FWC order; or

(d) the deduction is authorised by or under a law of the Commonwealth, a State or a Territory, or an order of a court.

Note 1: A deduction in accordance with a salary sacrifice or other arrangement, under which an employee chooses to:

(a) forgo an amount payable to the employee in relation to the performance of work; but

(b) receive some other form of benefit or remuneration;

will be permitted if it is made in accordance with this section and the other provisions of this Division.

Note 2: Certain terms of modern awards, enterprise agreements and contracts of employment relating to deductions have no effect (see section 326). A deduction made in accordance with such a term will not be authorised for the purposes of this section.

(2) An authorisation for the purposes of paragraph (1)(a):

(a) must specify the amount of the deduction; and

(b) may be withdrawn in writing by the employee at any time.

(3) Any variation in the amount of the deduction must be authorised in writing by the employee.

…

550 Involvement in contravention treated in same way as actual contravention

…

(2) A person is ***involved in*** a contravention of a civil remedy provision if, and only if, the person:

…

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or …

(emphasis in original)

6 The provision of the Award which was admittedly breached was cl 16.5, which is in the following terms:

16. Training—classifications

…

16.5 Where employment commences under this award the pilot's service required to be undertaken by the prospective employer, prior to commencing employment, during training period will be recognised and any training required to be conducted at the employee's cost will be reimbursed to the pilot.

7 The breach of s 323(1) by failing to pay wages in full concerned a deduction from the salary of an individual pilot which was not authorised by him.

AGREED FACTS

8 The basic facts recounted above, and the matters which follow, are derived from the statement of agreed facts. That statement and its accompanying documents was, ultimately, the only evidence led in the proceedings.

9 In 2009, Jetstar Airways decided to implement a cadet pilot program. The program was to have two aspects. It included persons who already held a commercial pilot's licence. Six pilots in that group are the subject of the present proceedings. A second stream concerned persons who had no prior flying experience and needed to obtain a commercial pilot's licence as an initial step towards employment in connection with Jetstar passenger jet operations. No person in the second group is the subject of the present proceedings.

10 On about 4 November 2009, Mr Nuttall sent an email to Mr Farrow, the industrial relations consultant. Mr Nuttall advised Mr Farrow that Jetstar Airways was hoping to

establish a cadet pilot program. The proposal included arrangements to recover costs of training by way of salary sacrifice over a period of years. Mr Farrow responded about one week later saying (amongst other things):

> …The consequence of being an employer under the modern award is that you must pay award pay rates and the employer becomes responsible for the cost of required training and for recognising service during the training period.

11 Over the ensuing months, Jetstar Airways developed a method by which it would employ and pay cadet pilots in the cadet pilot program. One option identified was to employ them through Jetstar New Zealand using a New Zealand individual employment agreement. Funding for the training was to be provided initially by Jetstar Airways, but the cost of the training was to be a cost to the cadet pilots.

12 On 2 June 2010, Jetstar Airways issued a press release announcing the launch of the cadet pilot program, using employment by Jetstar New Zealand as a core component. In July 2010, Ms Golias conducted interviews, and then final interviews, with applicants. She also provided administrative support to Mr Nuttall. She was not involved, however, in decision-making, which was the province of Mr Nuttall, Mr Bell and Mr Dal Pra.

13 On 2 August 2010, four cadets with whom the present proceedings are concerned were accepted – Messrs Stockley, Mosca, Webster and Wladyslawski. They were each provided with a funding agreement to execute and a copy of a proposed New Zealand contract. The funding agreement provided for repayment of the cost of the cadet pilot program. On 9 August 2010, they attended an induction session at which representatives of Jetstar Airways told them that it was "highly likely" that they would be employed in Australia when their training had concluded. Two further applicants with whom the present proceedings are concerned were accepted later – Mr Hull and Mr Hessell. Between 6 August 2010 and 21 October 2010, each of the six cadet pilots signed the funding agreement. The total cost which they each agreed to repay was AUD$84,000. (That total cost appears to have been divided equally between "ground" training and "check to line" training.)

14 On 15 November 2010, there was a meeting between representatives of Jetstar Airways and representatives of Jetstar pilots. The minutes of that meeting disclose that Mr Dal Pra advised that 24 cadets were starting in New Zealand and would be "employed through New Zealand". Captain Darren Davis, the Jetstar Pilots Council Chairman, apparently protested the arrangement. His protests were met with a response (as recorded) that Jetstar required greater flexibility.

15 After the six cadet pilots earlier identified had completed their ground training, they were employed under contracts of service by Jetstar New Zealand. The contracts were prepared by Mr Nuttall. Each contract provided for a home base of either Auckland or Christchurch, New Zealand. Messrs Webster, Stockley, Mosca and Wladyslawski commenced their employment on 18 October 2010; Mr Hull commenced on 13 December 2010; and Mr Hessell commenced on 17 January 2011. Despite their nominal employment by Jetstar New Zealand based in New Zealand, the six cadet pilots undertook line training in Australia with Australian training captains employed by Jetstar Airways. Although they may have attended some observation flights in New Zealand, they did not operate an aircraft in New Zealand during their employment with Jetstar New Zealand. For the majority of the time they were employed by Jetstar New Zealand, they were rostered for duties from a port on the eastern seaboard of Australia.

16 The six pilots successfully checked to line on the following dates:

- Mr Wladyslawski – 15 February 2011;
- Mr Webster – 24 February 2011;
- Mr Mosca – 3 March 2011;
- Mr Stockley – 20 March 2011;
- Mr Hull – 23 May 2011; and
- Mr Hessell – 2 July 2011.

17 On 9 March 2011, the six cadet pilots were informed that, due to restrictions imposed by the Civil Aviation Safety Authority, they would be required to be based in Australia.

18 They were then offered employment by Jetstar Group pursuant to a written contract. Initially, it was proposed that in addition to repaying training costs (said to be owed to Jetstar New Zealand) they would be subject to a bond of up to $60,000. That proposal was not acceptable to the pilots. A revised offer proposed a bond of $2,500 a year for six years or a flat amount of $10,000. The first group of four cadet pilots accepted this proposal on 8 April 2011. Mr Hull accepted on 21 May 2011. Mr Hessell refused to sign the contract, but was employed nevertheless.

19 The proposed contract provided for a salary sacrifice arrangement and for deductions from salary to repay the training costs said to be owed to Jetstar New Zealand. On 31 May

2011, Mr Bell sent an email to Mr Keith Abbott, "Head of People" at Jetstar Airways (with a copy to Captain Rindfleish) which said the following:

> I understand we offered Australian employment to the remaining cadets employed in NZ – I need to let you know that we may have cost ourselves the value of their in flight training (42K) per cadet as the modern award does not permit a prospective employer to charge for training – see clause 16.5.

20 In their statement of agreed facts, the parties recorded:

> 86. By at least May 2011, senior managers including Bell, Abbott and Rindfleish understood that the Modern Award would apply to the Cadet Pilots if they became employed by the Second Respondent and that the Second Respondent may have to pay the full cost of the Cadet Pilots' Check to Line Training.

21 I accept as a convenient summary the following submission made in writing by counsel for the respondents:

> 16. The second respondent accepts that by the time the cadets were doing their line training, the cadets were effectively earmarked for employment in Australia with the second respondent and that, as their prospective employer, the second respondent required the cadets to undertake and complete their line training. The first four cadets were told that it was "highly likely" that they would be employed in Australia at the conclusion of their line training (SAF [51]). All their flying was in Australia and by March 2011 was required by CASA to continue to be done in Australia (SAF [76]). Clause 2.1.1 of the employment contract with the second respondent (**Jetstar Group Contract**) required the cadets to obtain and maintain all applicable licences and qualifications required by the company for the employment to commence. Necessarily, this carried with it the prerequisite of having completed the line training.

22 The facts thereby reflected serve to engage the operation of cl 16.5 of the Award, and impose an obligation on Jetstar Group to reimburse the cadet pilots for at least the cost of line training to which they were subject.

23 Nevertheless, as recorded by the parties statement of agreed facts, the following occurred:

> 87. From June 2011 until September 2011, the Second Respondent made deductions from the Cadet Pilots' wages in relation to the training costs owed to the First Respondent under the Funding Agreement:
>
> (a) a total of $3,500.00 was deducted from the wages of Wladyslawski between June 2011 and September 2011, where in that period Wladyslawski's salary was $17,203.94;
>
> (b) a total of $3,500.00 was deducted from the wages of Webster between June 2011 and September 2011, where in that period Webster's salary was $15,723.52;

(c) a total of $3,500.00 was deducted from the wages of Mosca between June 2011 and September 2011, where in that period Mosco's [sic] salary was $18,614.83;

(d) a total of $3,500.00 was deducted from the wages of Stockley between June 2011 and September 2011, where in that period Stockley's salary was $14,785.36;

(e) a total of $2,625.00 was deducted from Hull between July 2011 and September 2011, where in that period Hull's salary was $17,378.97; and

(f) a total of $875.00 [was] deducted from Hessell in September 2011, where in that period Hessell's salary was $13,334.51.

24 Before the first of those deductions was made, on 17 May 2011 the Australian Federation of Air Pilots ("the AFAP") had commenced proceedings against Jetstar Group in this Court. The proceedings alleged that Jetstar Group had contravened, or proposed to contravene, identified clauses of the Award (although not, specifically, cl 16.5). Although cl 16.5 was not the subject of specific attention in the application or statement of claim filed by the AFAP, the proceedings did attack the bond arrangements, the salary sacrifice arrangements and the requirement for pilots to bear the cost of obtaining and maintaining minimum qualifications for particular aircraft types. On 12 December 2011, the AFAP proceedings were discontinued by private agreement. That agreement was reached in circumstances where the cadet pilots had been informed that the amounts deducted from their salary would be refunded and those payments were in fact refunded. The cadet pilots were also informed that the funding agreement (including the bond) would no longer apply. The steps by which those matters were accomplished were described in the statement of agreed facts in the following way:

89. On 29 August 2011, the Cadet Pilots were provided with a document titled "Transition of Cadet Pilots from Employment with Jetstar Airways Limited and Jetstar Group Ply Ltd to Jetstar Airways Pty Limited". Clause 13 of the "Transition of Cadets from Employment with Jetstar Airways Limited and Jetstar Group Pty Ltd to Jetstar Airways Pty Limited" document stated that if the Cadet Pilots accepted a contract with the Third Respondent they would receive a letter from the First Respondent stating that the Funding Agreement would no longer apply and that any liability they had to make payments under that Funding Agreement would be extinguished.

90. Clause 16 of the document said that if the Cadet Pilots accepted a contract with the Third Respondent then any money they had paid to the First Respondent under the Funding Agreement would be refunded by Jetstar.

91. On 2 September 2011, the Cadet Pilots received a letter from the Third Respondent offering them employment with the Third Respondent pursuant to the EBA. Enclosed with the letter was a copy of a contract of employment and a document entitled "Flexi-Line (Part-time) Under the Jetstar Airways

Pilots Agreement 2008" (**the Flexi-Line Contract**). The letter stated that if the Cadet Pilots accepted the Flexi-Line Contract, then the Funding Agreement would be extinguished and the Cadet Pilots would not be required to pay back the training costs.

92. The Cadet Pilots accepted the terms of the Flexi-Line Contract and commenced working for the Third Respondent on dates between 3 and 8 September 2011. Specifically, the First Group of Cadet Pilots commenced employment with the Third Respondent on 3 September 2011, Hull commenced employment with the Third Respondent on 6 September 2011 and Hessell commenced employment with the Third Respondent on 8 September 2011.

93. On 21 October 2011, the Cadet Pilots received a letter from the First Respondent stating that the Funding Agreement no longer applied and that any liability under that agreement was discontinued. The letter stated that the repayments would be reimbursed to the Cadet Pilots by the end of October 2011.

94. In October 2011, the Third Respondent refunded the Cadet Pilots the amounts deducted from their salary, as particularised in paragraph 87 above, by the Second Respondent pursuant to the salary sacrifice agreement.

95. On 12 December 2011, the AFAP proceedings were discontinued. The terms on which the proceedings were discontinued was by way of a private agreement between the AFAP and Jetstar Group Pty Ltd (ACN 003 901 353). There was no order of penalty imposed by the Court.

25 From the facts agreed by the parties, I draw a number of conclusions. First, Jetstar Airways and its subsidiaries set out to minimise the cost to itself or any of them of the training which would necessarily be involved in the cadet pilot program which it decided to introduce. To that end, it nominated employment arrangements with Jetstar New Zealand which bore no real relationship to operational reality. Despite advice in clear terms about the potential liability under the Award if pilots from the cadet pilot program were employed by an Australian operating entity, Jetstar Group imposed upon cadet pilots a requirement of repaying the cost of training. In Mr Hessell's case, that conduct included the deduction of an amount from his salary which he had declined to authorise. As a percentage of salary earned, the deductions were, in most cases, substantial. The arrangements made for employment by Jetstar Airways, and the waiver and eventual refund of the amounts deducted, occurred in circumstances where proceedings had been commenced in this Court challenging aspects of the employment arrangements which had been directed by Jetstar Airways, including the requirement that cadet pilots be responsible for the cost of their training.

PENALTY

26 The parties have agreed that the contraventions of the Award and the FW Act arose from an overall course of conduct. Accordingly, two penalties only should be fixed against Jetstar Group and two penalties for knowing involvement against Jetstar Airways. Those penalties relate to a breach by Jetstar Group of s 45 of the FW Act by virtue of contravening cl 16.5 of the Award and a contravention of s 323(1) of the FW Act by failing to pay wages in full to Mr Hessell. The maximum penalty prescribed by the FW Act for each of those contraventions is $33,000. Accordingly, the maximum penalties to which the Jetstar Group and Jetstar Airways are each exposed is $66,000.

27 The applicant proposed that I should fix a penalty of $16,500 for each contravention – i.e. at the mid-range of the available range of penalties. The respondents submitted that a penalty of $10,000 should be fixed for the contraventions of s 45 and that the contraventions of s 323 should attract little or no penalty.

28 I accept as accurate the following principles advanced in the written submissions for the respondents:

> **B. Penalty fixing principles**
>
> 3. The Court has a broad discretion. There are no statutory criteria, so the discretion is effectively "at large" (See observation of Gyles J in *A & L Silvestri Pty Limited v Construction, Forestry, Mining and Energy Union* [2008] FCA 466 at [6]), subject to the general objects of the Act and the maximum penalties prescribed.
>
> 4. The Court's task in assessing penalty is one of "instinctive synthesis", arriving at a single result which takes due account of all relevant factors in the particular case (*Wong v The Queen* (2001) 207 CLR 584 at [74]-[76] per Gaudron, Gummow and Hayne JJ; *Markarian v The Queen* (2005) 228 CLR 357 at [37] per Gleeson CJ, Gummow, Hayne and Callinan JJ). Reference to lists of factors cited in other cases (e.g. *Construction, Forestry, Mining & Energy Union v Coal & Allied Operations Pty Ltd (No 2)* (1999) 94 IR 231 at [8]; *Kelly v Fitzpatrick* (2007) 166 IR 14 at [14]) may be useful but should not be used rigidly. Ultimately, the Court's task is "to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations." (*Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at [91]; *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* (2008) 171 FCR 357 at [58].)
>
> 5. That confidence is sustained by approaching the penalty fixing discretion in a manner that ensures the relevant purposes of the FW Act are met. The Court has frequently identified the primary object of civil penalties is punishment and deterrence (*Finance Sector Union v Commonwealth Bank of Australia* (2005) 147 IR 462 at [60], [72]; *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543; 162 IR 444 at [93]-[94]; *ACCC v Telstra* (2010) 188

FCR 238 at [203]). Those objectives are closely allied with the overall objective of upholding the relevant statutory purposes (*Comcare v Post Logistics Australasia Pty Limited* [2012] FCAFC 168 at [76] considering the civil penalty regime under the *Occupational Health & Safety Act 1991* (Cth)).

6. The ultimate control on the exercise of the discretion is the requirement that the penalty be proportionate to the gravity of the contravening conduct. To that end, as the final step in the exercise of the penalty fixing discretion, the Court must ensure that the totality of the penalties imposed are just, appropriate and proportionate to the contraventions when viewed collectively (*Australian Ophthalmic Supplies* at [23]-[25] per Gray J, [54] and [73] per Graham J, [102] per Buchanan J).

Nature of the breach

29 One complexity in the present case that was not resolved by the agreement of the parties is that, although the parties agreed that a breach of s 45 had occurred through a failure to apply cl 16.5 of the Award, they did not agree in all respects precisely how the breach occurred.

30 The applicant submitted that, upon employment, cl 16.5 required Jetstar Group to positively and actively assume liability for the pre-existing debt owed by the cadet pilots. By contrast, the respondents accepted only that, when deductions of amounts from salary were actually made (by Jetstar Group), Jetstar Group became liable to then reimburse those amounts and could have done so (without breach) in the next monthly pay cycle. The difficulty with this approach is that it would permit Jetstar Group to create the occasion for reimbursement and allow it to retain deducted amounts for up to a month, without any breach occurring. I do not accept that construction.

31 In light of the admissions of breach, I do not need to come to a final view about the issue. However, my tentative view is that the obligation of reimbursement must take its context from the practical circumstances in respect of which it operates. Accordingly (in circumstances where cl 16.5 of the Award operated), if costs had been met by a cadet pilot, reimbursement directly to the pilot would be required upon employment. Alternatively, where a debt had been incurred but not discharged, the employer would, upon employment, become liable to discharge the debt either directly or by way of reimbursement.

32 On the facts of the present case, no training costs were actually met by any of the relevant cadet pilots until deductions were made from their salary. Nevertheless, in my view, from the time of employment, and for so long as a debt remained enforceable, Jetstar Group

was required to either reimburse that cost to the pilot to permit discharge of the debt, or to actively and permanently indemnify the cadet pilot in relation to it. It could not take money in purported satisfaction of the debt. Where cl 16.5 of the Award applied, making any deduction from salary was, in my view, conduct which was a breach of s 45 of the FW Act.

33 Another factor which should be mentioned is that although the settlement with the AFAP involved extinguishment of any suggested debt for both aspects of the training, the amended statement of claim (referred to below) concentrated, so far as Jetstar Group was concerned, on an alleged obligation to reimburse the cost of line training. In the present proceedings, the respondents only admitted an obligation to reimburse the cost of line training (but not ground training).

34 The fact that only contraventions relating to a claimed debt for line training were alleged and admitted does not affect any of the factors discussed below, so far as the fixing of penalties is concerned.

Assessing the appropriate penalty

35 It is not necessary in the present case to rehearse all the various factors which are sometimes advanced as ones to which the Court should pay regard when fixing penalties for civil contraventions. I will mention the factors upon which the parties concentrated.

36 In its written submissions, to answer the argument of the applicant that it had showed no “contrition” or “remorse”, the respondents argued that Jetstar Group had done so in a practical and effective way by reimbursing the deducted amounts and by Jetstar Airways waiving the balance of the cost of training before the present proceedings were commenced. I do not regard those actions as probative evidence of contrition or remorse. They appear to have been taken in response to (or at least contemporaneously with) the proceedings commenced by the AFAP and no doubt reflected the assessment then made of the prospects of Jetstar Group successfully defending those proceedings.

37 In fact, I have no evidence of the attitude of any of the respondents beyond a bare admission that contraventions occurred and penalties should be fixed. There is therefore no basis upon which to conclude that the respondents regret their conduct or intend that it not be repeated. No further statement was made about the matter either during submissions, written or oral. Such matters may not be taken into account to increase any penalty otherwise appropriate. The significance of a lack of evidence showing contrition or remorse is that no

occasion arises to consider, on that account, any discount from a penalty otherwise appropriate.

38 Similarly, there is no basis for a discount because the respondents made admissions two days before trial, 18 months or so after the proceedings were commenced. Those admissions are not evident in any of the three defences which were filed, including the further amended defence filed less than two weeks before the admissions were made. In the present case, I see no occasion, therefore, upon which to discount from any penalty on the basis of an early admission of liability.

39 I conclude, therefore, that no occasion arises in the present case to consider any discount from penalties otherwise justified. What then of the matters which should otherwise influence the amount of those penalties?

40 The submission for the respondents was that a penalty should be fixed which is effectively low in the overall range. The respondents accepted that the concept of general deterrence was "pertinent" but contended that specific deterrence was not necessary. The unauthorised deduction from Mr Hessell's salary was described in the written submission as a "technical" breach. I do not accept either of those contentions, for reasons discussed below.

a) Contravention of s 45 of the Fair Work Act

41 The respondents have admitted some (but not all) of the conduct alleged in the proceedings brought against them by the applicant. They have neither explained nor attempted to justify any of it. The practical consequences of the alleged conduct, now admitted, were that the respondents used their vastly superior bargaining power to effectively brush aside any personal resistance by cadet pilots, not desisting until the AFAP stepped in. Even then, when the present proceedings were commenced, no admission was made in the pleaded facts that indicated any practical acceptance of the illegal nature of the conduct of either Jetstar Group or Jetstar Airways. In my view, the present is a clear case for a penalty to incorporate elements for both general and specific deterrence, so far as it is useful to do so having regard to the permissible range fixed by the FW Act.

42 During the course of oral submissions, I raised with counsel for the applicant and the respondents my concern that the facts and circumstances known to Jetstar Group, and to Jetstar Airways, might suggest that the (now admitted) breaches of the FW Act were flagrant or wilful, justifying not only more serious penalties than the applicant had proposed (a step in

any event within the discretion of the Court), but ones which approached the maximum permissible penalties.

43 The reason for my concern was that on the facts referred to in the written submissions, set out above, it seemed open to conclude that deduction from the salaries of cadet pilots was clearly contrary to known award obligations and known facts. However, I have come to the view that the matter may not be that straightforward.

44 As an element in the analysis, it is convenient to refer first to the pleadings as they stood after several amendments.

45 In an amended statement of claim filed on 29 October 2013, the applicant pleaded, first (so far as training costs were concerned), that Jetstar New Zealand employed the cadet pilots and was responsible for the cost of their training. That allegation has not been pursued. Next, the amended statement of claim pleaded that Jetstar Group was liable to reimburse cadet pilots for the cost of training as follows:

> **Employment with the Second Respondent**
>
> 78 After completing their check to line training the Cadet Pilots were offered employment as a Cadet Pilot with the Second Respondent on the basis of Leave Without Pay (**LWOP**) from the First Respondent pursuant to a written contract between each of the Cadet Pilots and the Second Respondent (**Jetstar Group Offer**).
>
> **PARTICULARS**
>
> (a) The Cadet Pilots checked to line on the following dates:
>
> (i) Wladyslawski - 15 February 2011;
>
> (ii) Webster - 24 February 2011;
>
> (iii) Mosca - 3 March 2011;
>
> (iv) Stockley - 20 March 2011;
>
> (v) Hull - 23 May 2011; and
>
> (vi) Hessell - 2 July 2011.
>
> (b) *"Cadet"* is defined in Schedule 1 of the Jetstar Group Offer as *"a pilot who is appropriately trained, licensed and endorsed to act as a First Officer, but is not required to hold an Airline Transport Pilot Licence (ATPL)"*.
>
> 79 The Jetstar Group Offer stated that the Cadet Pilots were to have completed their check to line training prior to being employed with the Second Respondent.
>
> **PARTICULARS**

Clause 2.1.1 of the Jetstar Group Offer states that it is a pre-condition of employment that the cadet obtain and maintain all valid and applicable licence(s) and qualifications required by the Company or by the Civil Aviation Authority necessary for the performance of their duties.

…

Failure to pay training costs

…

109 … the Cadet Pilots were required to have completed their check to line training prior to being offered employment with the Second Respondent.

PARTICULARS

Clause 2.1.1 of the Jetstar Individual Contract.

110 The Second Respondent has not reimbursed the Cadet Pilots for the cost of the check to line training.

111 By reason of the matters alleged in paragraphs 79 and 109 and by acting as alleged in paragraph 110, in breach of section 45 of the FW Act, the Second Respondent contravened clause 16 of the Award.

46 By a further amended defence filed on 20 November 2013, the respondents pleaded:

Employment with the Second Respondent

78. They admit paragraph 78.

79. They admit paragraph 79.

…

Alleged failure to pay training costs

…

109. As to paragraph 109:

a) at no stage during their employment with the first respondent were the Cadet Pilots undertaking the in-flight component of their ACP training as a requirement of employment with the second respondent;

b) at the time that the Cadet Pilots were offered employment with the second respondent, they had already been checked to line;

c) they otherwise deny paragraph 109.

110. As to paragraph 110:

a) the only ACP training costs borne by the Cadet Pilots were those amounts deducted by the second respondent in the period July to September 2011 as alleged at paragraph 88 of the statement of claim;

b) even if (which is denied) the training costs borne by the Cadet Pilot by these deductions went to covering the costs of the in-flight training component of the ACP training, the second respondent was

under no obligation under the Award to reimburse the Cadet Pilots for those costs because:

1) clause 16.2 had no application because the in-flight component of the ACP training was not concerned with the reaching or maintaining of minimum qualifications for an aircraft type;

2) the second respondent had no obligation under clause 16.5 of the Award to pay for the costs of the in-flight component of their ACP training because the Cadet Pilots undertook that training with the first respondent at a time, and in circumstances where, the second respondent had made no offer of employment to the Cadet Pilots, conditional or otherwise.

c) further, and in any event, by November 2011, any obligations the second respondent had to reimburse the Cadet Pilots was discharged by the third respondent on its behalf.

d) they otherwise deny paragraph 110.

111. They deny paragraph 111.

47 In substance, therefore, the respondents did not then accept that at any relevant time Jetstar Group had required the cadet pilots to undertake training, such that it (Jetstar Group) was liable to reimburse the cost of that training.

48 I am not prepared, upon reflection, to dismiss the possibility that an argument along those lines might have had prospects of success, depending on how the facts fell out. Clause 16.5 of the Award (set out earlier) is engaged by a "requirement" of "the prospective employer". It may have been difficult for the applicant to establish that Jetstar Group (as opposed to Jetstar Airways) had required the training to be done, had not the necessary admissions been made. I cannot exclude the reasonable possibility that a respectable view was held on behalf of Jetstar Group at the time the deductions were made that it was permissible to do so, subject to the circumstances of Mr Hessell, discussed further below.

49 I am therefore satisfied that I should not conclude that the breach of s 45 of the FW Act by Jetstar Group was flagrant, or approaching a worst possible case. As the liability of Jetstar Airways is derivative, it must have the benefit of the same approach.

50 However, although a penalty at, or near, the maximum penalty would therefore not be appropriate, I nevertheless regard the breaches here as ones which merit more than the light penalties proposed by the respondents and as more serious than would be reflected by fixing a penalty precisely at the mid-range proposed by the applicant.

51 Making every allowance I can for the possibility that at one time a respectable view to the contrary may have been held, the analysis offered by the respondents at paragraph 16 of their submissions (set out earlier) appears to me to state the position in a way which is compelling and should, with respect, have been apparent to the management of the second and third respondents at the time the deductions were made. So much has now in fact been admitted in paragraph 86 of the statement of agreed facts (set out earlier).

52 So far as I can judge from the evidence which the parties have chosen to put before me, the conduct of Jetstar Group and Jetstar Airways was calculated solely by reference to their assessment of their own commercial interests and their determination that the cadet pilots should be ultimately responsible for the cost of their training. The second and third respondents undertook their contravening conduct notwithstanding advice (the substance of which is now accepted) that what they were proposing to do, and did do, was contrary to the Award and the FW Act. I think it appropriate to mark the Court's disapproval of what was done. Having regard to the factors which I have already mentioned, the penalties which I am permitted to impose, within the available range of penalties, will doubtless have little serious impact upon the respondents, but they will go a little way at least to meeting the observations by this Court in *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249 (at [62]-[63], [68]); that a penalty should be fixed, if possible, with a view to ensuring that the risk of punishment is not seen as an acceptable cost of doing business. Those observations were recently endorsed by the High Court in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54 (at [64] and [66]).

b) Contravention of s 323 of the Fair Work Act

53 In my view, the breaches of s 323(1) of the FW Act were even more serious, albeit only a single deduction was made from Mr Hessell's salary before an accommodation was reached while the AFAP proceedings were current.

54 Mr Hessell's authority for the deduction was sought, but withheld. It was suggested in argument that he was primarily concerned with the training bond, but it does not matter what his immediate motivation was. The protection of employees from unauthorised deductions from their wages or salaries is an important one. The deduction should not have been made.

ORDERS

55 I assess a penalty for the breaches of s 45 of the FW Act in each case at $20,000.

56 I assess a penalty for the breaches of s 323(1) of the FW Act in each case at $25,000.

57 I am satisfied that the total penalties against each of the second and third respondents of $45,000 do not offend against the totality principle.

58 I make the declarations as agreed by the parties, incorporating penalties in the amounts set out above.

I certify that the preceding fifty-eight (58) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Buchanan.

Associate:

Dated: 6 February 2014