FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v MILDURA BATTERY COMPANY PTY LTD & ANOR *[2014] FCCA 192*

Catchwords:
INDUSTRIAL LAW – Underpayment of employee entitlements – steps involved in assessing penalties – application of the principle of *parsimony* – effect on penalty of media coverage.

Legislation:
Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012 (No 167, 2012)
Crimes Act 1914, s.4F(1)
Fair Work Act 2009
Federal Circuit Court Act 1999, ss.52, 547
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009, Item 5, Sch. 16
Workplace Relations Act 1996

Cases cited:
Fair Work Ombudsman v Access Embroidery (Australia) Pty Ltd & Anor [2012] FMCA 835
Fair Work Ombudsman v Bedington [2012] FMCA 1133
Fair Work Ombudsman v Foure Mile Pty Ltd & Anor [2013] FCCA 682
Fair Work Ombudsman v Hongyun Chinese Restaurant Pty Ltd (In Liquidation) & Ors [2013] FCCA 52
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
Mornington Inn Pty Ltd v Jordan [2008] FCAFC 70
Rojas v Esselte Australia Pty Limited (No 2) [2008] FCA 1585
Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor [2009] FMCA 38

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	MILDURA BATTERY COMPANY PTY LTD
Second Respondent:	MICHAEL JOHN MARQUICK
File Number:	MLG 682 of 2013

Judgment of:	Judge Turner
Hearing date:	4 December 2013
Date of Last Submission:	4 December 2013
Delivered at:	Melbourne
Delivered on:	17 February 2014

REPRESENTATION

Solicitors for the Applicant:	Office of the Fair Work Ombudsman
Counsel for the Respondents:	Mr Biviano
Solicitors for the Respondents:	Martin Irwin & Richards

THE COURT DECLARES THAT:

(1) The first respondent contravened:

(a) Section 182(1) of the *Workplace Relations Act 1996* (the "WR Act") by failing to pay Mr Sutherland a basic periodic rate of pay at least equal to the guaranteed basic periodic rate of pay payable under the Storage Services Pay Scale from 20 May 2007 to 30 June 2009;

(b) Item 5 of Schedule 16 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the "Transitional Act") by failing to pay Mr Sutherland a basic periodic rate of pay at least equal to the guaranteed basic periodic rate of pay payable under the Storage Services Pay Scale from 1 July 2009 to 31 December 2009;

(c) Section 45 of the *Fair Work Act 2009* (the "FW Act") by failing to pay Mr Sutherland minimum wage rates in accordance with cl.15.1 of the Modern Award from 1 January 2010 to 4 May 2013;

(d) Clause 24.2.1 of the Pre-Modern Award by failing to pay Mr Sutherland at the rate of time and a half for the first two hours of overtime worked each week from 20 May 2007 to 30 June 2009;

(e) Item 2(1) of Schedule 16 to the *Transitional Act* by failing to pay Mr Sutherland at the rate of time and a half for the first two hours of overtime worked each week in accordance with cl.24.2.1 of the Pre-Modern Award from 1 July 2009 to 31 December 2009;

(f) Section 45 of the FW Act by failing to pay Mr Sutherland at the rate of time and a half for the first two hours worked in excess of an average of 38 hours per week in accordance with cl.24.1 of the Modern Award from 1 January 2010 to 4 May 2013;

(g) Section 44(1) of the FW Act by failing to pay Mr Sutherland at his base rate of pay for his ordinary hours of work during a period of annual leave from 26 June 2011 to 2 July 2011 in accordance with s.90(1) of the FW Act; and

(h) Section 45 of the FW Act by failing to pay Mr Sutherland annual leave loading of 17.5% in addition to his rate of pay at the time of taking annual leave from 26 June 2011 to 2 July 2011 in accordance with cl.26.4(a) of the Modern Award.

(2) The second respondent was involved in each of the first respondent's contraventions identified in paragraph 1 above.

THE COURT ORDERS THAT:

(3) Pursuant to s.719(6) of the WR Act and s.545(2)(b) of the FW Act the first respondent pay Mr Sutherland $66,580.17, being the amount owed to him as a result of the contraventions identified in paragraph 1 above, within 28 days of the date of this order. The amount outstanding was reduced by the first respondent paying $2,500.00 on 23 December 2013 and $1,000.00 on 29 January 2014. The balance now owing is $63,080.17.

(4) Pursuant to s.722(1) of the WR Act and s.547(2) of the FW Act the first respondent pay to Mr Sutherland interest of $3,230.05 on the amount owed to him specified in order 3 above within 28 days of the date of this order.

(5) Pursuant to s.719(1) of the WR Act and s.539(2) of the FW Act, the first respondent pay an aggregate penalty of $39,270.00 in respect of the contraventions identified in paragraph 1 above.

(6) Pursuant to s.719(1) of the WR Act and s.539(2) of the FW Act, the second respondent pay an aggregate penalty of $7,854.00 in respect of his involvement in the contraventions identified in paragraph 1 above.

(7) Pursuant to s.841(a) of the WR Act and s.546(3)(a) of the FW Act, the penalties referred to in paragraphs 5 and 6 be paid to the Commonwealth within 90 days of the date of the order.

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

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE

MLG 682 of 2013

FAIR WORK OMBUDSMAN
Applicant

And

MILDURA BATTERY COMPANY PTY LTD
First Respondent

MICHAEL JOHN MARQUICK
Second Respondent

REASONS FOR JUDGMENT

1. This is an application for the imposition of penalties and declarations of breaches of the *Fair Work Act 2009* (the "FW Act"), and Regulations thereunder, the *Workplace Relations Act 1996* (the "WR Act") and Regulations thereunder; and of applicable Awards.

2. At the hearing on 4 December 2013 Ms Nicholas appeared on behalf of the applicant and Mr Biviano of Counsel for the respondents.

3. The parties signed a Statement of Agreed Facts ("SOAF") on 2 August 2013.

4. It is agreed:

    - That Mildura Battery Company Pty Ltd (the "first respondent") is a corporation in the business of selling batteries on a wholesale basis [10];

- That Mr Michael John Marquick (the "second respondent") is a director of, and responsible for the daily operations of the first respondent [11];
- That the second respondent has accessorial liability for the breaches by the first respondent involved in this matter;
- That Mr Wayne Sutherland has been a full time employee of the first respondent since 10 February 2005;
- That between 20 May 2007 and 4 May 2013, Mr Sutherland was under-paid $66,580.17 [7];
- That at the date of hearing (being 4 December 2013) none of the amount of $66,580.17 had been paid to Mr Sutherland.
- That the breaches fall into two groups, plus two other breaches as follows: Part [H]

    1. Non-payment of minimum wages
    2. Under-payment of overtime
    3. Under-payment of annual leave
    4. Non-payment of an annual leave loading

5. The maximum penalty for each respondent for the breaches are:

	First Respondent	Second Respondent
1.	$33,000.00	$6,600.00
2.	$33,000.00	$6,600.00
3.	$33,000.00	$6,600.00
4.	$33,000.00	$6,600.00
Total	$132,000.00	$26,400.00

6. It was argued for the respondents that the applicable value of a penalty unit was that which applied immediately before 28 December 2012. (On 28 December 2012 the value of a penalty unit was increased from $110.00 to $170.00 [*Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012* (No 167, 2012)]). The applicant accepted that as 94% of the contravening conduct occurred prior to 28 December 2012, the maximum penalties are as set out above (Applicant's Submissions on Penalty filed 1 November 2013 at [20]).

7. The Court notes s.4F(1) of the *Crimes Act 1914 (Cth)* which provides:

> *(1) Where a provision of a law of the Commonwealth increases the penalty or maximum penalty for an offence, the penalty or maximum penalty as increased applies only to offences committed after the commencement of that provision.*

Discount for Contrition and Early Admissions

8. The applicant submits that a 15% discount should be applied for contrition. Initially the respondents sought a discount of 30%, but in their Written Submissions on Penalty filed 27 September 2013 at [45] they referred to the statement in *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 at [75] that:

> *"Normally, the maximum discount for this factor, sometimes thought to be 25%, is reserved for a plea made at the first reasonable opportunity…"*

The respondents reduced their claim to a 20% discount (Exhibit "R1" and Transcript ("T") p.53, l.22).

9. In the matter of *Fair Work Ombudsman v Bedington [2012] FMCA 1133* Jarrett FM (as he then was) determined that a modest discount of 10% was appropriate in circumstances where the respondent:

a) had cooperated in the investigation and the conduct of the proceedings; and

b) made an early acknowledgment of liability and entered into an agreed statement of facts; but

c) had taken no corrective action; and

d) the underpayment remained outstanding.

10. Here, neither respondent has apologised directly to the employee (Affidavit of Wayne Sutherland affirmed 5 September 2013 (the "Sutherland Affidavit") at [23]); the second respondent apologised in his Affidavit sworn 20 August 2013 (the "Marquick Affidavit") at [27]. The Court does not find that there has been *"a suitable and credible expression of regret"* to the employee.

11. In the matter before the Court, the second respondent sought advice about the first respondent going into voluntary liquidation, and makes an inappropriate submission, that if a high penalty is imposed, the first respondent may go into liquidation, two employees will lose their jobs, and Mr Sutherland may never recover his entitlements. The root cause of those possible repercussions is the failure by the respondents to comply with the law.

12. The submission above does not indicate a willingness to facilitate the course of justice in a way that will lead to Mr Sutherland recovering what is owed to him. During the course of the hearing the respondents offered to pay Mr Sutherland his entitlements by an initial payment of $2,500.00 and then at $1,000.00 per month (T p.74, l.3). At that rate Mr Sutherland would not be paid his full entitlement for 5 years – the Court finds that offer to be absurd, and questions the genuineness of any contrition. $2,500.00 was paid on 23 December 2013 and $1,000.00 on 29 January 2014.

13. The Court notes that in the cases brought to its attention, 30% has been the maximum discount given for contrition. The conduct of the respondents in not apologising directly to the employee, and the first respondent paying only a small amount of the money due to Mr Sutherland since it was notified of the calculations on 13 March 2013, leads the Court to find that a discount of no more than 15% is appropriate. That discount is set out in Annexure 'A' and 'B' (pp. 36 and 37) of the applicant's submissions on penalty.

14. In those Annexures, the applicant proposes penalties in the ranges set out below:

For the first respondent – Annexure 'A'

Group	Range	Proposed Minimum Penalty	Proposed Maximum Penalty
1	60 – 70%	$16,830.00	$19,635.00
2	40 – 50%	$11,220.00	$14,025.00
3	10 – 20%	$2,805.00	$5,610.00
4	10 – 20%	$2,805.00	$5,610.00
Totals		$33,600.00	$44,880.00

For the second respondent – Annexure 'B'

Group	Range	Proposed Minimum Penalty	Proposed Maximum Penalty
1	60 – 70%	$3,366.00	$3,927.00
2	40 – 50%	$2,244.00	$2,805.00
3	10 – 20%	$561.00	$1,122.00
4	10 – 20%	$561.00	$1,122.00
Totals		$6,732.00	$8,976.00

15. 60%-70% is proposed for the minimum wage group because of the significant period of the breaches and the amount of underpayment (T p.10, l.10). 40%-50% is proposed for the overtime group because of the significant period of breach and the amount of the underpayment (T p.11, l.5). 10%-20% is proposed for the annual leave breaches because there was one breach only under each factor involving lesser underpayments than in the other groups (T p.11, l.20).

16. Allowing for a discount of 20%, the respondents propose penalties within the ranges set out in Exhibit 'R1' as follows:

Contravention	Range as to Maximum	Amount	Less Discount for admissions at 20%
First Respondent			
1.Minimum Wages Contraventions	30%-50%	$9,900.00 – $16,500.00	$7,920.00 – $13,200.00
2.Overtime Contraventions	20% – 40%	$6,600.00 – $13,200.00	$5,280.00 – $10,560.00
3.Annual Leave Contraventions	10% – 20%	$3,300.00 – $6,600.00	$2,640.00 – $5,280.00
4.Loading Contraventions	10% – 20%	$3,300.00 – $6,600.00	$2,640.00 – $5,280.00
Total			$18,810 – $34,320.00

Second Respondent			
1.Minimum Wages Contraventions	30%-50%	$1,980.00 – $3,300.00	$1,584.00 – $2,640.00
2.Overtime Contraventions	20% – 40%	$1,320.00 – $2,640.00	$1,056.00 – $2,112.00
3.Annual Leave Contraventions	10% – 20%	$660.00 – $1,320.00	$528.00 – $1,056.00
4.Loading Contraventions	10% – 20%	$660.00 – $1,320.00	$528.00 – $1,056.00
Total			$3,696.00 – $6,864.00

Steps in Assessing Penalties

Step 1

17. The Court is to identify each of the separate contraventions involved. They are identified in the SOAF. It is agreed that they fall into the four groups as set out on p.36 of the applicant's submissions and reflected in the tables above.

Step 2

18. The Court is to consider whether the breaches constitute a single course of conduct. It is agreed that the breaches fall into four groups (supra).

Step 3

19. The Court is to identify where two or more breaches have common elements so that the respondents are not penalised more than once for the same conduct. The Court accepts that the breaches fall into four groups. A single penalty will be applied to each group, so that the respondents will not be penalised more than once for the same conduct.

Step 4

20. The Court is to consider the appropriate penalty for each group, taking into account the relevant circumstances (post).

Step 5

21. The Court is to look at the aggregate penalty and consider whether it is an appropriate response to the conduct that led to the breaches. This is the *'instinctive synthesis'* or *'totality principle'*.

22. The Court accepts that the following considerations are potentially relevant in determining penalty:

    a) The nature and extent of the conduct which led to the breaches;

    b) The circumstances in which the conduct took place;

    c) The nature and extent of any loss or damage sustained as a result of the conduct;

d) Any similar previous conduct by the respondents;

e) Whether the breaches were properly distinct or arose out of one course of conduct;

f) The size of the business involved;

g) Whether the breaches were deliberate;

h) Whether senior management was involved;

i) Whether the party committing the breach has exhibited contrition;

j) Whether the party committing the breach has taken corrective action;

k) Whether the party committing the breach has cooperated with the enforcement authorities;

l) The need to ensure compliance with minimum standards by providing effective means for investigation and enforcement of employee entitlements; and

m) The need for specific and general deterrence.

23. These factors were set out in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 at [26] – [59]. The list is not exhaustive and the Court must 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: see *Kelly v Fitzpatrick* (2007) 166 IR 14 at [14]. It is necessary for the Court to give careful consideration to the circumstances in the case before it: *Rojas v Esselte Australia Pty Limited (No 2)* [2008] FCA 1585.

24. The Court accepts the written submissions for the respondents that it may also have regard to:

- The financial position of the respondents; and
- Whether the penalty is oppressive having regard to the financial position of the respondents.

25. The Court accepts the second respondent's evidence that the employee agreed to continue in employment without a wage increase. The employee is unable to recall the conversation [Sutherland Affidavit at [7] (supra)], and is unable to deny that the conversation took place.

26. The second respondent says that he obtained advice from Mr Seymour (from Austlink) that such an arrangement could be made (Marquick Affidavit at [16]).

27. Even if such an arrangement was reached, it does not absolve the respondents from liability, as it is trite law that an employee cannot contract out of their statutory entitlements; the alleged agreement may however, be relevant to penalty.

28. The Court will address the considerations in *Mason* (supra).

The nature and extent of the conduct which led to the breaches.

29. The second respondent states that he relied on advice as to not paying a higher rate to Mr Sutherland and not paying him annual leave loading. The breaches occurred over 6 years from 20 May 2007 to 4 May 2013.

The circumstances in which that conduct took place.

30. Mr Sutherland is a low paid employee who was underpaid:

- 32% of his minimum wage entitlements;
- 43% of his overtime entitlements;
- 33% of his annual leave entitlements; and
- 100% of his annual leave loading (Applicant's submissions at [55])

The second respondent relied on advice that he was able to employ Mr Sutherland on the conditions that he applied.

The nature and extent of any loss or damage sustained as a result of the breaches.

31. The extent of the loss sustained by Mr Sutherland is grave. He deposes that it was a struggle to pay his bills on time, at one stage his car broke down and he could not afford to fix it; at times he had to ride a bicycle

to get around [Sutherland Affidavit (supra)]. The effect on his life has been profound.

Whether there had been similar previous conduct by the respondent.

32. There are no allegations of previous similar conduct by the respondents.

Whether the breaches were properly distinct or arose out of the one course of conduct.

33. The breaches have been grouped.

The size of the business enterprise involved.

34. The first respondent is a small business with two employees.

35. In *Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor* [2009] FMCA 38, Simpson FM (as he then was) provided a summary of the case law in this respect at [26] –[30]:

> *"The first respondent is a small company and, I infer, has very few if any assets. However as Justice Tracey said in Kelly v Fitzpatrick (supra):*
>
> > "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."
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> *In Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412 at paras.27 to 29 it was said:*
>
> > "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 a Court's consideration of penalty."

36. The Court accepts that it is clear the size of the business provides no excuse for non-compliance, and that penalties should be set by

reference to the objective seriousness of the contravening conduct, at a level that will serve as a deterrent to others.

Whether or not the breaches were deliberate.

37. Ignorance of the law is no excuse: see *Fair Work Ombudsman v Access Embroidery (Australia) Pty Ltd & Anor* [2012] FMCA 835 at [40] – [49]. It is incumbent on employers to make all necessary enquiries to ascertain their employees' proper entitlements and pay their employee at the proper rates: *Fair Work Ombudsman v Hongyun Chinese Restaurant Pty Ltd (In Liquidation) & Ors* [2013] FCCA 52 at [35].

38. The contraventions were not deliberate (prior to the investigation) but were careless (as admitted in the respondent's written submissions at [37]), and by Mr Biviano at the hearing (T p.49, l.30). After the respondents were advised on 24 September 2012 that Mr Sutherland was being underpaid (Marquick Affidavit at [19]), the minimum wage and overtime contraventions continued (SOAF at [75]). Those continuing contraventions were deliberate or negligent in the extreme.

39. The evidence shows that the second respondent turned his mind to the question of whether Mr Sutherland could continue on at his old rate of pay after he completed his training, and whether an annual leave loading would be payable. There is an obligation on an employer to obtain accurate reliable advice from an appropriate source. The first respondent was aware of the issues but failed to seek authoritative advice. Further, the second respondent made an enquiry with his accountant 14 years before the breach and made no effort to update or check the advice (T p.12 [5]).

Whether senior management was involved in the breaches.

40. The second respondent is a director of the first respondent and has been fully involved in the breaches.

Whether the party committing the breach had exhibited contrition.

41. Contrition has been considered (supra), and is minimal.

Whether the party committing the breach had taken corrective action.

42. The respondents have not taken corrective action. The full $66,580.17 remained outstanding at the hearing. The respondents are not prioritising the rectification of the underpayments over their other financial interests.

43. Notwithstanding commencement of these proceedings on 20 May 2013, it is alleged that the respondents paid Mr Sutherland less than his minimum wage entitlements from 1 January 2013 to 14 September 2013 [Applicant's submissions on penalty at [88] and [89] and Annexure "WPS1" to the Sutherland Affidavit (supra)]. That lack of corrective action shows that the respondents have learnt little of their need to comply with statutory requirements and to obtain authoritative advice. The respondents cannot say '*we cannot afford to pay and will go into liquidation if a heavy penalty is imposed'*. To allow businesses to operate in that way would:

> *"…simply create a category of underpaid workers who were being exploited to subsidise inefficient or otherwise unprofitable business operations…": Fair Work Ombudsman v Foure Mile Pty Ltd & Anor* [2013] FCCA 682 at [22] to [23] per Judge Riethmuller.

44. Mr Biviano states from the bar table that the second respondent will make a monthly telephone call to the Fair Work Ombudsman to check on rates (T p.74, l.40). That may help prevent future breaches but is not a matter that should lead to a reduction in penalty.

Whether the party committing the breach had cooperated with the enforcement authorities.

45. The respondents have co-operated with the enforcement authorities.

The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and

46. There is a need to ensure compliance with minimum employee entitlements.

The need for specific and general deterrence.

47. There is a need for specific and general deterrence.

48. The respondents raise the principle of *Parsimony*. The Court accepts the written submissions of the applicant (at [146] to [148]) on the issue as follows:

> *"146. The respondent submit [at p.57-59 of their Penalty Submissions] that the principle of parsimony is relevant to the determination of penalty in this matter, such that the minimum penalty consistent with the objectives of sentencing be imposed.*
>
> *147. The Federal Court recently considered the application of the principle if parsimony to civil penalty proceedings in the industrial law context in Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2013] FCA 1014 at [49] to [55] where Gordon J determined that:*
>
> > *"[54] The sentencing task in imposing civil penalties in the industrial law context is substantially different from those involving the imposition (or the possibility of the imposition) of a custodial sentence. For example, the sentencing options in the present industrial law context are limited by the statute – a monetary penalty where the statute imposes a maximum penalty: cf Trade Practices Commission v Farrow (1995) 95 ALR 53 at 65 and Australian Securities and Investments Commission v Petsas (2005) 23 ACLC 269 at [16]. The liberty of the subject is not at risk in civil penalty proceedings under the BCII Act.*
> >
> > *[55] The task of the sentencer under the BCII Act is sufficiently described as fixing a penalty that is just in all the circumstances. Separate reference to notions of parsimony has the capacity to mislead if it distracts from the need to fix the just and appropriate penalty. It has the capacity to mislead because the reference to 'parsimony' means different things in different contexts. In the current context, the common law principle (the selection of the least severe sentencing option open to a sentencer which achieves the purpose or purposes of punishment in the case and therefore achieves the ultimate aim of protecting society) adds little, if anything, to the task of sentencer under the BCII Act of fixing a penalty that is just and appropriate in all the circumstances."*

148. Accordingly the Applicant submits that it is not a question of the 'minimum' penalty, but imposing an appropriate penalty in all of the circumstances. As noted by Buchanan J in Merringtons, at [91]: (Australian Opthalmic Supplies Pty Ltd v McAlary-Smith 165 FCR 560)

> *"At the end of the day the task of the court 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."*

Financial Circumstances

49. The Court accepts the written submissions of the applicant at [149] to [150]:

> *149. To the extent that the Respondents seek to advance an argument that the penalties should be determined by reference to their financial position, the Applicant refers to the comments of Heerey J in Jordan at [99]:*
>
> > *"As to the respondent's own financial position, however, in considering the size of a penalty, capacity to pay is of less relevance than the objective of general detterrence: Leahy (No 2) at [9]. In any event, to the extent that financial hardship might mitigate what would otherwise be an appropriate penalty, such an argument would need to be based on evidence."* (The Court is unable to find the *Jordan* reference but accepts the principle as stated).
>
> *150. The Applicant respectfully submits that the Respondents' evidence does not demonstrate the dire financial circumstances alleged by the Respondents…"* The Court accepts that submission.
>
> *151. The Second Respondent has equity of approximately $135,000 in a property jointly owned with his wife (Marquick Affidavit [44]) and receives an income in the form of fees and dividends from the First Respondent (Marquick Affidavit [46]). The Applicant also notes that both the First Respondent and Marquick Wholesalers had loans outstanding to the Second Respondent and/or his wife (being the other shareholder) as at 30 June 2012 in the amount of $31,872.93 and $13,441.67 respectively"* [Annexure 'RJC1' to the Affidavit of Robert Court sworn 25 November 2013 (the "Court Affidavit")].

50. The Court notes that Annexure 'RJC1' shows the loans as at 30 June 2013 to have been $32,804.03 and $6,653.95 respectively.

51. Mr Biviano produced a summary of accounts of the first respondent and Mick Marquick Wholesalers Pty Ltd. Ms Nicholas submits that the *"net asset"* figures are otherwise referred to as *"retained profits in that business"* (T p.24, l.2). If that is so, the retained profit of the first respondent for the year to 30 June 2013 was $15,291.80 and for Mick Marquick Wholesalers for the same period, $67,808.24.

52. Mr Biviano submits whether the net assets are profits *"depends on how the profit is attributed"* (T p.28, l.6). The parties referred to Annexure 'RJC1' to the Court Affidavit.

53. Ms Nicholas referred to *"non current assets"* in the accounts of the first respondent showing loans to *M. Marquick* in 2012 of $25,452.20 and in 2013 of $25,652.03. No explanation is given of whether those loans can be called in for payment, or how the second respondent disposed of the money, which perhaps could have been used to pay to Mr Sutherland the monies owing to him. Mr Biviano concedes that the loans "*are amounts owing to the company on the books*" (T p.32, l.6).

54. The Court accepts the submission by Ms Nicholas that the financial records do not establish that the first respondent is in financial difficulty.

55. Ms Nicholas referred to the submissions for the second respondent that any significant financial penalty will result in his *"financial ruin"* (the Marquick Affidavit at [52]).

56. As Ms Nicholas points out, the second respondent deposes that his income from the business in 2013 was $43,000.00 ([46] and Annexure 'MJM4' to the Marquick Affidavit (supra)); his wife's income in 2012 was $70,940.00 [Annexure RJC4 to the Court Affidavit (supra)], and slightly less in 2013 (T, p.35, l.3).

57. The Court notes also that the second respondent and his wife are joint proprietors of their house in which they have equity of $135,000.00 (Marquick Affidavit at [44]). Mr Biviano told the Court that the bank will not allow the second respondent to redraw on the mortgage (T p.56, l.31) but that does not prevent the second respondent from

liquidating the property, and repaying the loan from the first respondent (supra).

58. Mr Biviano submits that Annexure 'RJC2' to the Court Affidavit (supra) shows that there is a loan to the first respondent of $27,000.00 which is payable to Mick Marquick Wholesalers Pty Ltd (T p.70, l.5). The second respondent owned and operated Mick Marquick Wholesalers Pty Ltd in 1997 (Marquick Affidavit at [3]). There is no evidence that he has ceased to own and operate it. The second respondent therefore has an asset of $27,000.00. There is no evidence about when it can be recalled.

59. On the evidence the Court does not find that dire financial circumstances have been established for either respondent.

60. As to the second respondent's medical condition the applicant submits as follows:

> *(152) The Second Respondent deposes to various matters impacting his health, and provides a letter from the his General Practitioner date 26 September 2013 [Annexure MJM 2 to his Affidavit of 17 October 2013] making very general statements about the Second Respondent's working capacity without coming to any particular prognosis. This includes referring to medical complaints and conditions affecting the Second Respondent for a decade or more, without establishing any particular connection to the Second respondent current capacity to work or recent change to such.*

The Court notes that the letter from Dr Murphy in Annexure MJM2 [to the Affidavit of Michael John Marquick sworn 16 October 2013] recommends that the second respondent should "*continue to work in the future if he feels capable of it, but I am doubtful that he will be able to work at the level he has in recent years*".

> *(153) While the Applicant has sympathy for the Second Respondent's circumstances, The letter from his doctor does not confirm the extent to which the Second Respondent's health may impact on his future earning capacity, or the basis on which his GP has come to any of the views outlined in his correspondence. The Applicant submits that the doctor's letter does not satisfy the test for opinion evidence as set out in Makita (Australia) Pty Ltd v Sprowles has not been satisfied, namely to furnish the trier of fact*

with criteria enabling evaluation of the validity of the experts conclusion. Rather, the letter includes vague unsworn statements which are not able to be tested or clarified by the Applicant. Further the letter proceeds to make comments about the Second Respondent which suggests that the Doctor is advocating for the Second Respondent in respect of matters which extend beyond his professional role. These opinions should be given no regard. For these reasons, the Applicant submits that this information, being imprecise hearsay evidence, should be excluded from the Court's consideration of penalty.

61. The Court does not find that the evidence of the second respondent's medical condition warrants a reduction in penalty that the Court would otherwise consider to be just and appropriate in the circumstances.

Media Coverage

62. The respondents complain about media coverage of their breaches in the Sunraysia Daily on 17 June 2013. The Court accepts the applicant's submissions as follows:

> *"124. …the embarrassment suffered as a result of the publicity flowing from enforcement action is one of the prices to pay, or an 'inevitable consequence' of the Respondent's conduct and is therefore not relevant in mitigating the penalty to be imposed.*
>
> *125. …In* Fair Work Ombudsman v Cleaners NSW Pty Ltd *[2009] FMCA 683, Federal Magistrate Driver (as he then was) stated at [25]:*
>
> > "…I do not accept the criticisms made by the company of the Fair Work Ombudsman's litigation policy. Actions taken by the Fair Work Ombudsman to enforce compliance with the Workplace Regulations Act are taken in part to create publicity in order to achieve a normative effect upon the behaviour of employers. That is appropriate. That publicity is no doubt an embarrassment to the company and that embarrassment is a penalty in itself. The bringing of proceedings in the court, and the publicity attending those proceedings, are part of a general process for deterring contraventions of the Workplace Relations Act."
>
> *126. The authorities also indicate that generally the impact of media coverage will only operate to mitigate penalty where the effect of the media coverage has been 'adverse'. The meaning of 'adverse', discussed by the Federal Court in the matter of* Eva v

Southern Motors Box Hill Pty Ltd *30 FLR 213 (Eva) at 222-223 has been widely adopted by subsequent courts in considering the impact of publicity on civil penalties sought by regulators.*

127. In Eva, Justice Smithers noted that publicity of such proceedings may be justified, but stated that as 'defendants are regarded as innocent until the contrary is proved, appropriate restraint in tone and content is required.' His Honour further said 'adverse publicity is often one of the inevitable consequences of wrongdoing and in most cases is without influence in the assessment of the appropriate penalty. But adverse publicity initiated by the prosecuting authority itself requires special consideration.

…

129. The Courts' approach to potential 'adverse' publicity, as a consequence of media releases issued by regulators, is well summarised in the decision of Hansen J in Cousins v Merringtons Pty Ltd (No 2) [2008] VSC 340 (Cousins) at 59-65.

130. At paragraphs [60] – [62] of Cousins, Hansen J cited and adopted a line of authority (including Eva) regarding the relevance of adverse publicity, and stated at [61] that:

> "The above cases indicated that 'adverse' means unfair or incorrect reporting. They recognise that a prosecutor may issue a media release concerning a case but where that occurs before the trial 'appropriate restraint in tone and content is required' to avoid the defendants suffering damage that would not have occurred had the media release been fair and accurate. Subject to that a reasonably worded, accurate news release serves a useful purpose; without it the media is left to make their own inquiries and compile their own summaries, which carries a risk of inaccuracy.'

131. Hansen J found there was no unfairness or inaccuracy in the press releases issued in respect of that matter and they 'were appropriate to be published pursuant to the statutory function of informing people of fair trading issues and alerting the media in succinct terms to the commencement of the case and decision on liability"[63].

132. Hansen J further stated, at [65-66] that:

> "[65] It is also to be borne in mind that publicity of the type complained of is foreseeable as the consequence of conduct

such as that engaged in by the defendants. In truth the defendants are the authors of their own misfortune. That engaged in the offending conduct and then thumbed their nose at the attempts of the plaintiff to resolve the problems without resort to litigation.

[66] In my opinion, also, no reasonable complaint could be made of the newspaper articles, including the industry paper. It was not alleged that they, or indeed the press releases, suffered from any particular unfairness or inaccuracy or misleading element. Rather, the submission was that taken together they constituted adverse publicity which ought to be taken account of as a factor mitigating against the grant of relief as the Court may otherwise consider just in the circumstances. I reject the submission. In my view the publicity referred to was the mere and foreseeable consequence of the conduct engaged in. Were it otherwise, the fact of publicity of relevant matters by the moving party in the litigation or the media generally, might have the effect of limiting the exercise of statutory power conferred for the protection of the public.'

133. The Applicant submits that the information released in this matter was fair, accurate, presented the same type of information as releases in relation to the other litigations by the Applicant, and hence was not in any way 'adverse' as contemplated by the Courts.

63. Mr Biviano submits that the media release was *'adverse'* because *"it does not paint my client in a great light"* (T, p.75, l.6). The Court decides that, be that as it may, it does not make the release *'adverse'* in the relevant sense. The Court finds that there was nothing 'adverse' in media release and that it ought not mitigate the penalties to be imposed.

Legal Costs Incurred

64. The mere fact that the respondents incurred costs relating to the proceedings ought have no relevance to penalty, as they have resulted from the respondent choosing to obtain legal advice. The legislation sets out the maximum penalties to be imposed without mention of deduction for costs. Costs are not a consideration relevant to penalty as set out in *Mason* (supra). Further, the respondents have not prepared any evidence to support the claim to have costs taken into account. Mr

Biviano merely submits that *"the Court can have judicial notice that litigation costs money and that it is expensive"* (T p.79, l.44).

Specific Deterrence

65. The Court finds that there is a definite need for specific deterrence. Although there are submissions that the respondents may cease trading, it is possible that they will continue. In circumstances where these proceedings were on foot, and the respondents continued to underpay Mr Sutherland, they seem to have learnt little, and penalties must be imposed that will act to prevent further breaches.

66. The first respondent submits that specific deterrence is not required because of the stress caused by these proceedings. That stress has not caused compliance, since the respondents were aware of their breaches.

General Deterrence

67. There is a need to show other employers that the minimum statutory entitlements of employers must be accorded to the employees.

Step 4 continued

68. Having regard to all the circumstances that the Court considers to be relevant, the Court finds that the appropriate penalty for each respondent is at the middle of the range proposed by the applicant. The Court accepts the written submissions of the applicant as follows:

(158)"The contraventions involve breaches of important statutory protections relating to acceptable workplace conduct in relation to a low-paid worker, and the Court has warned that a "light-handed" approach to contraventions of these types of provisions is no longer appropriate (Finance Sector Union v Commonwealth Bank of Australia (2005) 147 IR 462 [14]).

(159) It is of fundamental importance that the Respondent and the public are deterred from conduct of this nature.

(160)Taking into account all of the matters outlined above, the Applicant submits that the Court should impose penalties against each of the Respondents in the ranges of:

(a) 60% to 70% of the maximum available in respect of the minimum wage contravention, which resulted in a very substantial underpayment to a low paid worker over an extended period, which remains outstanding;

(b) 40% to 50% of the maximum available in respect of the overtime contravention, which also occurred over a lengthy period and resulted in a significant underpayment;

(c) 10% to 20% of the maximum available in respect of the;

(i) Underpayment of annual leave; and

(ii) Failure to pay annual leave loading;

Acknowledging the impact of the underpayment of this base level entitlements, although only during a limited period.

(161) Following this approach (as set out in Annexures A and B to these submissions), it is the Applicants submission that the aggregate penalty for each of the Respondents should be within the range of:

(a) $33,660 to $44,880 in respect of the First Respondent; and

(b) $6,732 to $8,976 in respect of the Second Respondent.

(162) While the Applicant submits that the penalties imposed must not be crushing or oppressive, they must nevertheless bear relativity to the seriousness of the conduct engaged in by the Respondents (*FWO v Promoting U Pty Ltd & Anor* [2012] FMCA 58) *The Applicant notes however that it may be appropriate in the circumstances to allow the Respondent's a longer period to pay any penalties that may be imposed.*

(163) In consideration of these matters, the Applicant submits that imposing an aggregate penalty on each Respondent within the range proposed in paragraph 161 above would be an appropriate response to the contraventions in this matter."

Step 5

69. The Court is to look at the aggregate penalties and decide whether they are an appropriate response to the conduct that led to the breaches. The Court finds that the penalties imposed are an appropriate response. The Court refers to the decision in *FWO v Promoting U Pty Ltd & Anor* [2012] FMCA 58:

> *"…the Respondents cannot hope to have their conduct in effect exonerated by the Court merely because they are impecunious. Parliament has set significant penalties for the sort of contraventions that the Respondents engaged in and I do not think it is appropriate for the totality principle to operate simply to ensure that penalties are imposed in suitably insignificant amounts to meet the Respondent's capacity to pay".*

70. The Court does not find that the penalties will be crushing or oppressive. They are an appropriate response to the conduct that led to the breaches.

71. The Court imposes an aggregate penalty on the first respondent of $39,270.00 and an aggregate penalty on the second respondent of $7,854.00.

Interest

72. Pursuant to s. 547 of the *Federal Circuit Court Act 1999* (the "FCC Act") and s. 722 of the WR Act, the Court must on application (Statement of Claim [59] SOAF Attachment 'A') award interest between the day the cause of action arose, and the day the order is made, unless there is good cause to the contrary. Section 52 of the FCC Act provides for interest at the rate of the cash rate plus 6%. Section 723 of the WR Act provides that the rate under s.52 of the FCC Act applies under the WR Act. The Court awards interest of $3,230.05.

73. The Court makes declarations and orders in the form agreed to in Exhibit "FWO1", incorporating the amounts ordered above.

I certify that the preceding seventy-three (73) paragraphs are a true copy of the reasons for judgment of Judge Turner

Associate:

Date: 17 February 2014