

FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v OZONE MANUFACTURING PTY LTD (IN LIQUIDATION) & ANOR [2014] FCCA 2887

Catchwords:

INDUSTRIAL LAW – Penalty imposed in respect of breach of award – agreed penalty to be paid in instalments – application to vary instalment regime – matters to be considered.

Legislation:

Fair Work Act 2009, s.546

Cases cited:

Heller Capital Ltd v Richard Albarran [2009] NSWSC 403

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	OZONE MANUFACTURING PTY LTD (IN LIQUIDATION)
Second Respondent:	SIMON FORBES OKE
File Number:	ADG 65 of 2013
Judgment of:	Judge Brown
Hearing date:	17 November 2014
Date of Last Submission:	17 November 2014
Delivered at:	Adelaide
Delivered on:	10 December 2014

REPRESENTATION

Counsel for the Applicant: Ms Carter

Solicitors for the Applicant: Office of the Fair Work Ombudsman

Counsel for the Respondent: In person

ORDERS

- (1) That order (4) of the orders of the court made on 11 March 2014 be varied so that the penalty of \$28,000.00 (twenty eight thousand dollars) imposed on the second respondent Simon Forbes Oke be paid in monthly instalments of \$500.00 (five hundred dollars) until paid in full with the first payment to be paid on 14 December 2014 and on the fourteenth day of each month or closest business day thereto.
- (2) In the event that the second respondent obtains full time employment prior to the payment in full of the penalty imposed upon him by the court in its orders of 11 March 2014 he is directed to inform the applicant of such employment whereupon the penalty, unless the parties agree otherwise, is to be paid in monthly instalments of \$2,125.00 (two thousand one hundred and twenty five dollars) to be paid on the fourteenth day of each month or closest business day thereto until the penalty is paid in full.
- (3) The application filed on 27 August 2014 is dismissed.

**FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT ADELAIDE**

ADG 65 of 2013

FAIR WORK OMBUDSMAN
Applicant

And

OZONE MANUFACTURING PTY LTD (IN LIQUIDATION)
First Respondent

SIMON FORBES OKE
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. On 25 March 2013, the Fair Work Ombudsman (“the FWO”) commenced proceedings, in this court, against Ozone Manufacturing Pty Ltd (“Ozone”) and Simon Forbes Oke alleging several breaches of provisions of the *Fair Work Act 2009* (Cth) (“the Act”). These breaches concerned underpayment of wages and breaches of applicable industrial awards.
2. Mr Oke was, at material times, the majority shareholder of Ozone and its sole director. He was the controlling mind of Ozone, which designed, manufactured and distributed environmental control products.
3. Ozone employed eight relevant persons. The FWO alleged that these persons were not properly paid in accordance with the provisions of several awards, including the *Manufacturing and Associated Industries and Occupations Award 2010* and the *Professional Employees Award 2010*.

4. As a consequence the FWO commenced contravention proceedings against both Ozone and Mr Oke. The amount of underpayment was \$38,104.38 for the period between January and October 2012. Ozone has now been placed into liquidation.
5. The contravention proceedings were concluded, on 11 March 2014, before Judge Lindsay, formally a judge of this court. Mr Oke appeared on his own behalf. He admitted his part in breaching the relevant award provisions, so far as the relevant employees of Ozone were concerned. It was agreed between him and the FWO that an appropriate civil penalty would be \$28,000.00. This agreement was subsequently ratified by the court.
6. In these circumstances, Judge Lindsay made an order that Mr Oke pay a penalty, in an aggregate amount of \$28,000.00, pursuant to the provisions of section 546 of the *Fair Work Act*. As previously indicated, this penalty was less than the amount of wages underpaid to the employees concerned.
7. Pursuant to section 546(3) of the Act the court may order that any pecuniary penalty, or part thereof, be paid to the Commonwealth or some other designated person. The orders made on 11 March 2014 envisaged the penalty in question being distributed between the eight underpaid employees in proportion to the amount underpaid to him or her.
8. At the time of the making of the penalty order, Mr Oke was not employed. In these circumstances, it was agreed between him and the FWO that the penalty levied against Mr Oke would be paid in instalments. It was agreed that he would pay five monthly instalments of \$500.00 commencing on 25 March 2014 and thereafter he would pay twelve further monthly instalments of \$2,125.00 each.
9. At first instance, these instalments were to be paid to the FWO, as collector of public moneys, but would be distributed regularly to the employees concerned. The orders envisaged that the penalty would be paid in full by the end of August 2015.
10. However, if Mr Oke fails to pay any one instalment, at the time stipulated in the orders, any remaining outstanding balance becomes

due to be paid as a lump sum, within fourteen days of the date of default. Thereafter, by necessary implication, if the lump sum is not paid, it would be open to the FWO to commence enforcement proceedings against Mr Oke.

The current application

11. On 27 August 2014, Mr Oke filed an application in a case seeking to vary the payment schedule specified in the orders of Judge Lindsay made on 11 March 2014. In lieu of the monthly payments of \$2,125.00, he seeks to pay the penalty by way of monthly instalments of \$500.00 until the penalty is paid in full.
12. In support of his application, he deposed that he remained unemployed, and accordingly, by way of necessary implication, unable to pay the sum required.
13. Mr Oke's application was listed before me on 9 October 2014. Ms Carter, counsel for the FWO, submitted that her client was unable to agree to Mr Oke's proposal without further evidence being provided by him in respect of his current financial circumstances and his prospects of obtaining employment in the future. In particular, the FWO wished to know what attempts Mr Oke had made to obtain employment.
14. In these circumstances, the proceedings were further adjourned until 17 November 2014 and the following orders were made:

“The applicant in a case, Mr Oke, file an affidavit within 21 days of today's date setting out his current financial circumstances including the following:

- a. his current source of income and/or financial support if any including social security payments and how long such payments have been subsisting;*
- b. his rent/mortgage payments on a monthly basis and whether such payments are made by any other person;*
- c. details of his other essential living expenses including motor vehicle expenses and whether such payments are made by any other person;*

- d. *details of any assets including motor vehicles or real estate in his possession or control;*
- e. *his attempts to find employment in the past 12 months and his prospects of gaining employment in the next 12 months;*
- f. *relevant details of his health and any medical condition he may have and if it is asserted that he is incapacitated as to gaining employment.*

Further consideration of the matter is adjourned to 17 November 2014 at 9:30am (Australian Central Summer Time) NOTING Mr Oke is at liberty to attend by telephone.”

15. On 14 November 2014, in accordance with this order, Mr Oke filed a further affidavit regarding his financial circumstances. He deposes that he currently has no income and does not receive social security payments. It is his position that he is financially supported by his wife.
16. Currently, Mr Oke lives in rented accommodation, which he shares with his wife. The rental contract is in her name and she pays the rent. Mr Oke deposes that he owns no real estate or motor vehicles, and nor does his wife, apart from a 1993 Mitsubishi motor vehicle valued at approximately \$1,000.00.
17. In March of 2012, Mr Oke began treatment for a malignant melanoma. He has also suffered a depressive illness in conjunction with this condition. It is also Mr Oke’s position that his employment prospects have been negatively affected by the circumstances surrounding the liquidation of Ozone and the earlier court proceedings.
18. In all these circumstances, it is Mr Oke’s assertion that he is likely to continue to be unable to secure employment, commensurate with his skills and experience, for the next twelve months or so. During this period, he will remain reliant on his wife for financial support.
19. Mr Oke deposes that he was self-employed, in the field of environmental technology, for approximately twenty-three years. During this period, he drew little or no wages from his business in the expectation that he would be able to sell it, for a significant sum, when it and the technologies related to it had become fully developed.

20. However, the company fell into dispute with the Australian Taxation Office in respect of research and development taxation offsets. The amounts of money involved were significant, so far as Mr Oke was concerned. This dispute was ultimately resolved against Ozone, which led to the demise of the company. In these circumstances, the FWO had discontinued its proceedings against Ozone.
21. Accordingly, it is Mr Oke's position that he is not in a position to pay the monthly instalments as currently calculated in the sum of \$2,125.00. Underpinning his position is the assertion that any enforcement proceedings ultimately commenced by the FWO are likely to be fruitless.
22. As such, in his submission, his proposal that he pay the penalty by way of instalments of \$500.00 per month, for at least the next twelve months, represents the best possible outcome for the FWO and by implication the former employees of Ozone, at this stage, otherwise the most likely scenario will be that he will be rendered bankrupt and the employees will receive nothing further.

The FWO's Response

23. The FWO has filed a lengthy affidavit outlining its position.¹ The FWO is critical of Mr Oke for being late in paying the first instalment of \$500.00 late and only alerting it to the fact that he had failed to gain employment at a late stage.
24. The FWO objects to Mr Oke's proposal to amend the earlier orders by reducing the amount of monthly instalments to \$500.00 which will necessarily extend the time in which the penalty will be paid in full. Mr Whittaker calculates that the penalty will be paid by October of 2018 rather than July of 2015 as originally envisaged.
25. As the order of 11 March 2014 was designed to ensure that the employees, who had been underpaid received some recompense within a reasonable timeframe, it is the FWO's position that it would be unfair to them and contrary to both public policy and the intention of the penalty order for the court to accede to Mr Oke's application.

¹ See affidavit of Tegan Whittaker filed 6 October 2014

Conclusions

26. McDougall J of the Supreme Court of New South Wales discussed principles relevant to the payment of judgement debts by means of instalments in *Heller Capital Ltd v Richard Albarran*.² His Honour found that the following factors were relevant to the making of an instalment order in the first place:
- whether the enforcement debtor was employed;
 - the enforcement debtor's means of satisfying the order;
 - whether the order debt, including interest, would be satisfied within a reasonable period of time;
 - the necessary living expenses of the enforcement debtor;
 - other liabilities of the enforcement debtor;
 - whether, having regard to the availability of other enforcement means, the making of an instalment order would be consistent with the public interest in enforcing money orders efficiently and expeditiously.
27. In *Heller Capital* McDougall J cited authority which indicated that an instalment order should not be made if it was obvious that its making would be futile. Nor would it be a proper exercise of discretion to make such an order if the amount proposed to be paid would not enable some reduction in the amount of the judgement debt.
28. The amount of time allowed for payment of a judgement debt and the amount of each instalment must be reasonable. What is reasonable is a question of fact in each case but "*requires attention to the amount of the judgement debt and the time for which it will be outstanding, or more accurately the time before which it will be satisfied...*"³
29. I approach the current application on the basis that these comments are apposite to an application to vary an instalment order previously made.

² *Heller Capital Ltd v Richard Albarran* [2009] NSWSC 403

³ *Ibid* at paragraph 10

With these considerations in mind, I turn to the specific facts of this matter.

30. Mr Oke is not currently employed. The earlier order was made on the assumption that he was likely to be employed within six months or so. That has not proved to be the case. The tenor of his evidence now is that his employment prospects have been considerably retarded by adverse publicity flowing from the failure of Ozone and press releases originating from the FWO relating to the *Fair Work Act* proceedings against him.
31. It is his evidence that any prospective employer is likely to do an internet search on his name and such a search will inevitably lead the searcher to press releases naming him. He asserts a belief that this effect will diminish over time. In this context he submits that he is likely to obtain a position in around twelve months' time.
32. Mr Oke's evidence regarding his current level of health is imprecise. He submits that he built up considerable skills and expertise during his twenty three year association with Ozone. He deposes that he has attempted to broaden his skill set since the failure of Ozone. In my view, on the basis of this evidence, it is difficult to reach the conclusion that Mr Oke will, more likely than not, be employed by October/November 2015.
33. It would seem to be the case that Mr Oke has no other identifiable means of satisfying the debt or perhaps more importantly there appear to be no alternate mechanisms of enforcement other than bankruptcy. Mr Oke has no identifiable assets. This is an important factor which militates in favour of his application. It may provide the only means by which the judgement debt is recouped from him.
34. On Mr Oke's proposal it would be a period of around four and a half years between the imposition of the penalty against him and its full expiation. This cannot be regarded as an expeditious means of recovery given the amount of the penalty in question.
35. In this context, it is an important consideration that the intent of the penalty imposed was primarily to provide some recompense to the employees concerned who were the victims of breaches of the

protective provisions of the *Fair Work Act*. If this recompense is provided in irregular and inconsequential payments over a long period of time, the intent of the order is likely to be eroded.

36. On the evidence available to me, which I acknowledge the FWO is not able to subject to any great degree of scrutiny, it appears to be the case that Mr Oke lives modestly and is wholly dependent upon his partner for support.
37. In all these circumstances, there is a degree of uncertainty regarding the provenance of both past instalment payments and prospective ones. The implication of Mr Oke's evidence being that they come from a person or persons close to him, but whom neither he nor the court can compel to continue such payments.
38. I have come to the conclusion, albeit with some reluctance, that to dismiss the application, with the outcome that the full amount of the debt in question becomes immediately payable, will have the likely effect of no further monies being recouped from Mr Oke because further enforcement proceedings will be fruitless.
39. It seems to me to be preferable, for all concerned, including the former employees of Ozone that the penalty continues to be acquitted in some way, even if the mechanism proposed results in payments which are modest and protracted. At the end of the day, considerations of pragmatism dictate that something, no matter how modest, is better than nothing.
40. Accordingly, I have decided to accede to Mr Oke's application, with the proviso that if he obtains full time employment, he will be required to inform the FWO of this occurrence and thereafter the monthly payments are to be restored to the sum of \$2,125.00 until the penalty is paid in full.
41. For all these reasons, the orders of the court will be as set out at the commencement of these reasons for judgment.

I certify that the preceding forty-one (41) paragraphs are a true copy of the reasons for judgment of Judge Brown

Associate:

Date: 10 December 2014