

FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v SHAH

[2014] FCCA 270

Catchwords:

INDUSTRIAL LAW – Penalties – where matter finalised by agreement – assessment of penalties.

Legislation:

Fair Work Act 2009 (Cth), ss.44, 45, 99, 116, 323, 546, 550, 559

Cases cited:

Wells v Locarno Management Pty Ltd [2008] FCA 1034

Mason v Harrington Corporation Pty Ltd [2007] FMCA 7

Kelly v Fitzpatrick (2007) 166 IR 14

Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550

Applicant: FAIR WORK OMBUDSMAN

Respondent: TUFIQ SHAH

File Number: SYG 1324 of 2013

Judgment of: Judge Raphael

Hearing date: 11 February 2014

Date of Last Submission: 11 February 2014

Delivered at: Sydney

Delivered on: 11 February 2014

REPRESENTATION

Solicitors for the Applicant: Fair Work Ombudsman

For the Respondent: In Person

ORDERS

- (1) The Respondent, Mr Tufiq Shah, was involved in each of the contraventions committed by General Practice Support Services Pty Ltd (In Liquidation) (ACN 082 708 147) (**GPSS**) (within the meaning of subsection 550(1) of the *Fair Work Act 2009* (Cth) (**FW Act**)) as set out below:
 - (a) section 44 of the FW Act by failing to pay Ms Seed, Ms Ballantyne, Ms Anderson, Ms Sutherland, Ms Brown, Ms Harbeck and Ms Stefanovic their annual leave entitlements during the Employment Period in contravention of subsection 90(2) of the FW Act;
 - (b) section 45 of the FW Act by virtue of contravening subclause 14.3 of the *Health Professional and Support Services Award 2010* (**Health Modern Award**), in failing to pay Ms Seed an amount sufficient to meet her minimum rate of pay entitlement;
 - (c) section 45 of the FW Act by virtue of contravening subclause 22.2 of the Health Modern Award in failing to make superannuation contributions to superannuation funds for the benefit of Ms Seed, Ms Ballantyne, Ms Harbeck and Ms Stefanovic;
 - (d) section 45 of the FW Act by virtue of contravening clause 14 of the *Nurses Award 2010* (**Nurses Modern Award**), in failing to pay Ms Sutherland and Ms Brown an amount sufficient to meet the minimum rate of pay entitlement;
 - (e) section 45 of the FW Act by virtue of contravening subclause 20.2 of the Nurses Modern Award in failing to pay superannuation contributions to superannuation funds for the benefit of Ms Sutherland and Ms Brown;

- (f) section 45 of the FW Act by virtue of contravening clause 14 of the *Medical Practitioners Award 2010* (**Medical Modern Award**), in failing to pay Dr Dowsett and Dr Ee an amount sufficient to meet the minimum rate of pay entitlement;
 - (g) section 45 of the FW Act by virtue of contravening subclause 19.2 of the Medical Modern Award in failing to make superannuation contributions to superannuation funds for the benefit of Dr Dowsett and Dr Ee;
 - (h) section 44 of the FW Act by failing to pay Ms Brown personal/carer's leave during the Employment Period in contravention of section 99 of the FW Act;
 - (i) section 44 of the FW Act by failing to pay Ms Seed, Ms Ballantyne, Ms Sutherland and Ms Brown for absence on a public holiday during the Employment Period in contravention of section 116 of the FW Act; and
 - (j) section 323 of the FW Act by failing to make payments to Ms Seed, Ms Sutherland, Ms Brown, Dr Dowsett and Dr Ee within the method and frequency required by section 323 of the FW Act
- (2) The Respondent is to pay penalties pursuant to subsection 546(1) of the FW Act to a total amount of \$22,176.00 in respect of the Respondent's contraventions listed in paragraph 1 above, which is made up of:
- (a) a penalty of \$3,696.00 be imposed on the Respondent, in respect of his involvement in the contravention set out in paragraph 1(a);
 - (b) a penalty of \$3,696.00 be imposed on the Respondent, in respect of his involvement in the contravention set out in paragraph 1(b);
 - (c) a penalty of \$3,168.00 be imposed on the Respondent, in respect of his involvement in the contravention set out in paragraph 1(c), (e) and (g);
 - (d) a penalty of \$3,696.00 be imposed on the Respondent, in respect of his involvement in the contravention set out in paragraph 1(d);
 - (e) a penalty of \$3,696.00 be imposed on the Respondent, in respect of his involvement in the contravention set out in paragraph 1(f);

- (f) a penalty of \$2,112.00 be imposed on the Respondent, in respect of his involvement in the contravention set out in paragraph 1(h);
 - (g) a penalty of \$2,112.00 be imposed on the Respondent, in respect of his involvement in the contravention set out in paragraph 1(i);
- (3) Pursuant to sub-section 546(3)(c) of the FW Act the penalty amounts specified at Order 2 are to be paid to the following listed former employees of GPSS, in the manner agreed between that parties, in the following amounts proportionate to the loss suffered by the employees as a result of the contraventions:
- (a) Donna Seed - \$6,248.02;
 - (b) Kerrie Anderson - \$1,663.64;
 - (c) Eileen Ballantyne - \$1,061.35;
 - (d) Peta Harbeck - \$1,644.27;
 - (e) Lili Stefanovic - \$751.03;
 - (f) Patricia Dowsett - \$4,593.83;
 - (g) Li Cheng Ee - \$3,799.68;
 - (h) Jessica Sutherland - \$1,617.17;
 - (i) Samantha Brown - \$797.00.
- (collectively, **Employees**);
- (4) If the Respondent is unable to locate any employee to pay the amount set out in Order 3 the Respondent is to pay any such amount to the Consolidated Revenue Fund of the Commonwealth pursuant to section 559(1) of the FW Act.
- (5) The payments referred to in Orders 3 and 4 are required to be made within three months of the date of these orders, by three equal monthly instalments of \$7,392.00.
- (6) 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 SYDNEY**

SYG 1324 of 2013

FAIR WORK OMBUDSMAN

Applicant

And

TUFIQ SHAH

Respondent

REASONS FOR JUDGMENT

1. The respondent in these proceedings was the sole director and shareholder of a company known as General Practice Support Services Pty Ltd (in liquidation) (ACN 082 708 147) (GPSS). This was a business which operated and managed a number of medical centres, which provided medical services by qualified medical practitioners. The business employed nurses and other non-medically qualified staff in 14 medical centres throughout Australia.
2. On 3 April 2013 GPSS was placed under external administration. But prior thereto, commencing on 5 October 2012, the Fair Work Ombudsman had received complaints from nine employees, including two medical practitioners, of under-award payments being made to them for the services they were providing to medical centres. The Fair Work Ombudsman calculated that as a result of the failures to make payments these employees were underpaid a total of \$70,747.44. The failures to pay constituted breaches of the Health Modern Award, the Nurses Modern Award, the Medical Modern Award, and sections 99, 116 and 323 of the *Fair Work Act 2009* (Cth).

3. Because the company which had primary responsibility for payment of these employment benefits was in liquidation, the Fair Work Ombudsman took the matter up with Mr Shah, controlling mind of the company, as a person involved in the contraventions. After some time and by negotiation, Mr Shah agreed with the findings of the Fair Work Ombudsman as to the losses incurred by his staff members. And he agreed to consent to orders being made against him indicating that he had contravened the Act and was deserving of penalties. After further negotiations between the parties, those penalties were also agreed. The manner in which the agreement has been negotiated takes into account both the requirements to group contraventions and to consider whether or not the contraventions occurred as a single course of conduct.
4. The Fair Work Ombudsman has provided the court with a very detailed outline of submissions that goes not only into the history of the matter, but also the relevant law. The submissions emphasise that whatever arrangements may have been tentatively agreed to between the parties, it is for the court to make its own mind up as to what constitutes an appropriate penalty for each of the contraventions. On the other hand, the authorities make it clear that where agreement has been reached, then the court should consider whether or not the agreed figures constitute an appropriate penalty and are within the range of penalties that a properly advised court would come to. The Fair Work Ombudsman's submissions quote from a decision of Jessup J, *Wells v Locarno Management Pty Ltd* [2008] FCA 1034 at [23], where his Honour observed:

“The court is not bound by the agreement of the parties as to the level of penalty which should be imposed in a case such as the present. However, the court will not depart from an agreed figure merely because it might otherwise have been disposed to award some other figure. The predictability involved in the resolution of penal proceedings in accordance with a pre-trial agreement reached by the parties is something which should, as a matter of public policy, be regarded as beneficial. Only where the agreed penalty falls outside the permissible range should the court depart from the figure agreed by the parties. In this context, the permissible range is the range which would be permitted by the court, that is, a range within which the penalty is neither manifestly inadequate nor manifestly excessive.”

5. In coming to the figures which have been agreed, the Fair Work Ombudsman demonstrates within the submissions how the factors first summarised by Mowbray FM in *Mason v Harrington Corporation Pty*

Ltd [2007] FMCA 7, and later adopted by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14, have been taken into account. Of course, as Buchanan J said *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550, this summary is a convenient checklist, but it does not prescribe or restrict the matters which may be taken into account in the exercise of the court's discretion.

6. I do not propose to go through each and every one of these matters, because they are, as I have said, dealt with thoroughly in the submissions, which will be kept with the file. What I can say in regard to these breaches of the Act and Awards, is that they are matters which do require a penalty that takes seriously into account both general and specific deterrence. I say this because the contraventions include failure to pay ordinary time wages, and the failure to pay superannuation over quite a considerable period of time for a rather large number of employees, and this is not something that is to be encouraged in respect of any employer. If employers are unable to meet their obligations to their employees, then they have a responsibility to discuss their company's future with properly qualified advisors, and not to use as working capital money to which others are entitled, particularly when those others are the very persons who are making the business proceed.
7. In regard to specific deterrence, I have been made aware of the fact that, although GPSS has been placed into liquidation, Mr Shah is still a director of other companies which are operating the same businesses. It must be made very clear to him that this sort of conduct cannot reoccur. He has told me today that he has put his house in order with regard to other employees, and I am prepared to accept that statement. But one of the main reasons why I propose to accept the agreed penalties put forward by the parties is that, to my mind, at something in excess of 50 per cent of the maximum penalties, they constitute appropriate deterrents.
8. I also accept the submission that, notwithstanding the contraventions, Mr Shah should be afforded the usual 20 per cent discount for his early admission and his co-operation with the Fair Work Ombudsman. The penalties have been based upon the figures after deducting that discount.
9. At the commencement of the hearing I expressed concern to Mr Shah that the money was, indeed, paid to the employees as the orders provided, and rather than demand that the money be immediately

payable, it totalling \$22,176.00, I have determined that the money should be paid by three equal monthly instalments of \$7,392.00. I agree with the submissions of the Fair Work Ombudsman, which are accepted by Mr Shah, that the payments should be made to the employees in the proportions in which they have suffered the loss because Mr Shah has not indicated that he does not intend personally to reimburse these employees the debt owed to them by the company. It may be that there is a very small dividend payable to the employees who have priority in these matters, but that is only a matter of conjecture. What is known is that a deed of company arrangement under which Mr Shah was going to pay \$100,000.00 to the administrator did not eventuate.

10. In all these circumstances, I am satisfied that the respondent, Mr Shah, contravened the Acts and the Awards in the manner set out in the application and in the submissions, and I am satisfied that the penalties proposed by the Fair Work Ombudsman and agreed to by him – which are fully set out on page 19 of the submissions – are the appropriate penalties in a case such as this. In order to ensure that the penalties are paid in the most appropriate and expeditious way to the employees, the parties have come to a further agreement and Ms Nicholas, on behalf of the Fair Work Ombudsman, has agreed that short minutes of order, slightly amended from those that are presently before me, will be prepared and which will be signed by the court and put into the formal orders. I am grateful to both Ms Nicholas and Mr Shah, in his own way, for the manner in which this matter has been dealt with. It is a serious case but, thankfully, the difficulties that the employees have encountered have not been added to by the requirement to appear in court and go through possible cross-examination. The court itself is grateful for it being relieved of the necessity of a lengthy hearing.

I certify that the preceding ten (10) paragraphs are a true copy of the reasons for judgment of Judge Raphael

Associate:

Date: 18 February 2014