FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v THERAVANISH INVESTMENTS PTY LTD & ORS *[2014] FCCA 1170*

Catchwords:
INDUSTRIAL LAW – Penalty – age discrimination – s.351 *Fair Work Act 2009* (Cth) – penalty imposed.

INDUSTRIAL LAW – Penalty – failure to keep records relating to leave entitlement – failure to keep records relating to termination – s.535 *Fair Work Act 2009* (Cth) – r.3.40 *Fair Work Regulations 2009* (Cth) – r.19.12 *Workplace Relations Regulations 2006* (Cth) – penalty imposed.

INDUSTRIAL LAW – Penalty – agreed statement of facts – factors going to penalty – deterrence – quantum of penalty – totality principle.

INDUSTRIAL LAW – Penalty – factors going to penalty – closed corporation – small business – effect of penalty on dual directors/shareholders.

Legislation:
Fair Work Act 2009 (Cth) s.351, s.535, s.557, s.793
Fair Work Regulations 2009 (Cth) r.3.36, r.3.40
Industrial Relations Act 1999 (Qld) s.43
Workplace Relations Act 1996 (Cth)
Workplace Relations Regulations 2006 (Cth) r.19.12

Cases cited:
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 4) [2013] FCA 930
Construction, Forestry, Mining and Energy Union v Cahill [2010] FCAFC 39
Fair Work Ombudsman v A Dalley Holdings Pty Ltd [2013] FCA 509
Fair Work Ombudsman v AJR Nominees Pty Ltd (No 2) [2014] FCA 128
Fair Work Ombudsman v Offshore Marine Services Pty Ltd [2012] FCA 498
Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2) [2012] FCA 408
Fair Work Ombudsman v Wegra Investments Pty Ltd and Ors [2012] FMCA 933
Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	THERAVANISH INVESTMENTS PTY LTD
Second Respondent:	NOPPORN THERAVANISH
Third Respondent:	MICHAEL ANURUT THERAVANISH
File Number:	BRG 866 of 2012
Judgment of:	Judge Burnett
Hearing dates:	17 – 20 March 2014
Date of Last Submission:	20 March 2014
Delivered at:	Brisbane
Delivered on:	2 April 2014

REPRESENTATION

Senior Counsel for the Applicant:	Mr J. Murdoch QC
Junior Counsel for the Applicant:	Ms G. Dann
Solicitors for the Applicant:	Fair Work Ombudsman
Senior Counsel for the Respondent:	Mr P. J. Davis QC
Junior Counsel for the Respondent:	Mr M. Lazinski
Solicitors for the Respondent:	Chan Lawyers

ORDERS

THE COURT DECLARES THAT:

(1) The First Respondent, Theravanish Investments Pty Ltd, contravened the following provisions:

(a) section 351(1) of the *Fair Work Act 2009* (**FW Act**) in that the First Respondent took adverse action against Mr Cheng Peng Lee (**Mr Lee**) by dismissing an employee, Mr Lee, by letter dated 16 august 2011 with effect from 5 September 2011 because of his age;

(b) section 351(1) of the FW Act, in that the First Respondent took adverse action against Mr Lee by altering the position of Mr Lee to his prejudice on or about 29 August 2011 by refusing to communicate further with him about his employment with the First Respondent because of his age;

(c) regulation 19.12 of the *Workplace Relations Regulations 2006* (Cth) by failing, for the period from 5 September 2005 to 30 June 2009 to make a record relating to Mr Lee that set out the accrual of leave, any leave taken and the balance of Mr Lee's entitlement to leave from time to time;

(d) section 535 of the FW Act in that the First Respondent failed to make and keep for seven years records that set out the balance of Mr Lee's entitlement to leave from time to time in accordance with regulation 3.36(1)(b) of the *Fair Work Regulation 2009* (**Regulations**);

(e) section 535 of the FW Act in that the First Respondent failed to make and keep an employee record relating to the termination of Mr Lee's employment that set out the name of the person who acted to terminate Mr Lee's employment and whether Mr Lee's employment was terminated by consent; or by notice; or summarily; or in some other manner in accordance with regulation 3.40 of the Regulations.

(2) The Second Respondent was (within the meaning of subsection 550(2) of the FW Act) involved in the First Respondents' contraventions set out in declaration 1 above.

(3) The Third Respondent was (within the meaning of subsection 550(2) of the FW Act) involved in the First Respondents' contraventions set out in declaration 1 above.

THE COURT ORDERS THAT:

(4) The First Respondent is to pay compensation, pursuant to 545(2)(b) of the FW Act, in the amount of $10,000 to Mr Lee for the loss that Mr Lee suffered due to the First Respondent's contraventions of section 351 of the FW Act as set out in declaration 1 above within 14 days of these Orders being made.

(5) The First Respondent is to pay penalties pursuant to subsection 546(1) of the FW Act to a total amount of $20,790 in respect of the First Respondent's contraventions listed in paragraph (1) above, which is made up of:

(a) a penalty of $4,620 in respect of its contravention of section 351(1) of the FW Act by taking adverse action against Mr Lee (dismissal) because of his age;

(b) a penalty of $2,310 in respect of its contravention of section 351(1) of the FW Act by taking adverse action against Mr Lee (refusal to communicate further with him about his employment) because of his age;

(c) a penalty of $9,240 in respect of its contraventions of regulation 19.12 of the WR Regulations and section 535 of the FW Act by failing to make an employee record relating to Mr Lee that set out the accrual of leave, any leave taken and the balance of Mr Lee's entitlement to leave form time to time;

(d) a penalty of $4,620 in respect of its contravention of section 535 of the FW Act in that the First Respondent failed to make and keep and an employee record relating to the termination of Mr Lee's employment.

(6) The Second Respondent is to pay penalties pursuant to subsection 546(1) of the FW Act to a total amount of $4,180 in respect of the Second Respondent's involvement in the contraventions of the First Respondent listed in declaration (1) above, which is made up of:

(a) a penalty of $880 in respect of her involvement in the contravention outlined in order 5(a) above;

(b) a penalty of $440 in respect of her involvement in the contravention outlined in order 5(b) above;

(c) a penalty of $1,870 in respect of her involvement in the contravention outlined in order 5(c) above;

(d) a penalty of $990 in respect to her involvement in the contravention outlined in order 5(d) above.

(7) The Third Respondent is to pay penalties pursuant to subsection 546(1) of the FW Act to a total amount of $4,180 in respect of the Third Respondent's involvement in the contraventions of the First Respondent listed in declaration (1) above, which is made up of:

(a) a penalty of $880 in respect of his involvement in the contravention outlined in order 5(a) above;

(b) a penalty of $440 in respect of his involvement in the contravention outlined in order 5(b) above;

(c) a penalty of $1,870 in respect of his involvement in the contravention outlined in order 5(c) above;

(d) a penalty of $990 respect of his involvement in the contravention outlined in order 5(d) above.

(8) An order pursuant to subsection 546(3) of the FW Act that all pecuniary penalties imposed by the Court be paid to the Consolidated Revenue Fund of the Commonwealth within twenty-eight days of the date of the Order.

(9) 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 BRISBANE

BRG 866 of 2012

FAIR WORK OMBUDSMAN
Applicant

And

THERAVANISH INVESTMENTS PTY LTD
First Respondent

NOPPORN THERAVANISH
Second Respondent

MICHAEL ANURUT THERAVANISH
Third Respondent

REASONS FOR JUDGMENT

(Revised from Transcript)

1. This application concerns contraventions of the *Fair Work Act 2009* (Cth) ("**FW Act**") by the respondent corporation and its directors/shareholders, who conduct a restaurant business on the Gold Coast. The matter was initially listed for contested hearing but, following negotiations undertaken in the lead up to trial, liability has been resolved. Only the matter of penalty now remains alive for disposal. A product of the settlement negotiations was a comprehensive statement of agreed facts and, as the title suggests, it details those matters agreed between the parties. The agreement represents something less than the case advanced on the pleadings, a matter I will address in due course.

2. Broadly, the facts agreed between the parties are that the respondents carry on the business of a Thai restaurant, trading as "*Chiangmai Thai Restaurant*," at various locations on the Gold Coast, including Broadbeach and Surfers Paradise. Until the businesses were sold in 2010, they operated similar restaurants at Nobby Beach and Robina. The First Respondent employed collectively about 100 to 130 employees prior to 17 January 2013. It was the employer of Mr Cheng Peng Lee ("**the complainant**") from about 22 September 1996 to 5 September 2011. It continues to employ workers and operate businesses at Broadbeach and Surfers Paradise.

3. The Second Respondent, Nopporn Theravanish, is a director of the First Respondent and has held that position from when it was first incorporated on 11 July 1996. She is also a 50 per cent shareholder in the First Respondent. It is not in contest that she is a person who had control of and directed the First Respondent's day to day operations, including by compiling rosters, approving leave and determining the terms and conditions upon which the workers were engaged by the First Respondent. All of these activities were undertaken within the scope of her actual or apparent authority. By operation of s.793(2) FW Act, her state of mind in relation to the relevant conduct was also the state of mind of the First Respondent.

4. The Third Respondent, Michael Anurut Theravanish, is also a director of the First Respondent, and has been since 11 July 1996. He too is a 50 per cent shareholder of the First Respondent and, at all times, was a director who had duties with respect to the First Respondent's operations. Since 24 December 2003 he has been one of the liquor licensees and the nominee of the licence for the Surfers Paradise restaurant.

5. He has been the lessee for the premises for the Surfers Paradise restaurant since 24 December 2004. The premises were owned by a corporation, Jaithep Investments Pty Ltd, of which he was also a director. He signed letters on behalf of the First Respondent addressed to the complainant which are material to this application. His conduct was engaged in on behalf of the First Respondent and within the scope of his actual authority. In respect of his state of mind, for the conduct

relevant to these proceedings his state of mind was that of the First Respondent.

6. The complainant was an employee of the First Respondent. He was born on 5 September 1946 in Singapore and he turned 65 on 5 September 2011. His native language is Hokkien. In or about September 1996 he commenced employment with the First Respondent and he was engaged from that time in the First Respondent's business on a full-time basis. During his employment period of about 15 years, he worked at least five days per week in the restaurants at Broadbeach, Nobby Beach and Surfers Paradise.

7. He worked at the Surfers Paradise restaurant from approximately 2010 until 5 September 2011, when his employment was terminated. During that time, his duties included taking orders, serving dishes, serving water, setting tables and greeting and assisting customers when asked to by the manager. At all times the First Respondent was bound by the FW Act in relation to its employment of the complainant and his employment conditions in relation to long service leave were regulated by s.43 of the *Industrial Relations Act 1999* (Qld). It is not in contest that he had accrued long service leave in accordance with that legislation.

8. In 2010 the complainant became aware that he was entitled to his long service leave. In late 2010 he had a conversation with the Second Respondent when he asked about his entitlement to long service leave. It is agreed that during that conversation the Second Respondent informed the complainant that she would check with the First Respondent's accountant and asked if he was going to retire. It seems that between the October and November 2010 the complainant asked the Second Respondent on two occasions at the Surfers Paradise restaurant if he was able to take long service leave.

9. Ultimately, in November or December 2010 the Second Respondent spoke by telephone with the complainant's son, Mr Sheng Kwang Lee, about the progress of his request for long service leave. The son asked the Second Respondent to come back to him with an answer in a week or thereabouts concerning that entitlement. About two weeks later the Second Respondent and the son spoke by telephone. The Second Respondent told him that the complainant did have an entitlement to

long service leave, however she did not know exactly when he could take that leave as she would have to reallocate other staff and balance the leave entitlement with the needs of the busy December and January holiday period.

10. In or about January 2011 there was a conversation then between the complainant and the Second Respondent when the complainant again asked the Second Respondent if his long service leave had been approved. On that occasion he was advised that the leave had been approved. The complainant and the Second Respondent verbally agreed at that time that the employee would take 13 weeks of long service leave between 17 April 2011 and 19 July 2011.

11. Prior to commencing the leave, the complainant was working full-time at the restaurant. He was performing the duties that I have earlier outlined and he was being paid $16.03 per hour, which was above the minimum rate for a Level 1 Food and Beverage attendant but below the rate for a Level 2 Food and Beverage attendant as provided for in the Restaurant Industry Award 2010. He performed his duties and the respondents had not raised with him any issues about his work performance, nor had they made any arrangements with him to vary his employment status from full-time to part-time.

12. Accordingly, the complainant commenced his long service leave as planned on 17 April 2011. When he was due to return from that long service leave, the Second Respondent informed him that he would work part-time. On 19 July 2011 the complainant spoke by telephone with the Second Respondent and was informed that he was not rostered for work in the week commencing 18 July 2011; that is, the week after his return from long service. On 19 July 2011, his son spoke by telephone with the Second Respondent and arranged for a meeting between the two of them and the complainant on 22 July 2011.

13. On that day they met at the Surfers Paradise restaurant and the complainant raised concerns and queries about his past pay and other issues. It follows that on or about 5 August 2011 the complainant wrote an undated letter to the First Respondent which stated:

"*This letter serves to formally document the complaints brought to your attention during our meeting on 22/07/2011 and seeks for a resolution to the matters contained within.*

The complaints are summarised as follows:

1. Subsequent to my return to work from Long Service Leave on 19/07/2011 I was informed by you that I have not been rostered to work, even though the date of 19/07/2011 was the scheduled date of my return.

2. Subsequent to my return to work from Long Service Leave on 19/07/2011 you further advised me that my full time employment would cease to continue and the terms of my employment would change to a part time role.

The reason provided was that I was unwilling to undertake additional training courses to fulfil the manager's role within the restaurant operations. There was no written communication provided to me advising me of this significant change."

14. The letter subsequently dealt with complaints concerning underpayment, with a general observation that the estimated underpayment totalled $60,000.00. There were further complaints about unpaid leave loadings and also non-payment of full entitlements for any public holidays. On the last page, the letter noted:

"*I also take this opportunity to advise that I am prepared to return to my full time role (subject to addressing the outstanding entitlements issue), however note this episode has and will likely strain our working relationship. Moving forward, if you cannot foresee a tenable working relationship it may be an option for you to terminate my employment and make my position redundant, naturally I would expect the proper severance entitlements be paid if you choose this stance.*"

15. On 16 August 2011 the Third Respondent wrote to the complainant and advised him that his employment with the First Respondent would cease on 5 September 2011 because of his age:

"*We refer to your undated letter and advise that we do not accept the assertions which you have made in your letter.*

We note that you suggest we make you redundant and pay you out. We are not prepared to do this. You stated verbally that you will not come back to work until this matter is resolved.

We would further point out that it is the policy of the Company that we do not employ any staff that attains the retirement age which in your case is 65 years.

We believe that you will attain that age on 5th September 2011 at which time your employment will cease because of your age.

Yours faithfully

THERAVANISH INVESTMENTS PTY LTD."

16. On 23 August 2011, the complainant responded. He stated, in part:

"*I acknowledge receipt of your letter dated 16 August 2011 and note your position declaring 'the company' "do not employ any staff that attains the retirement age." In my case you refer to the age of 65 years.*

In previous discussions, Nopporn explicitly highlighted the terms of my full time employment would cease because I was unwilling to undertake additional training courses to fulfil the 'manager's' role. I am now shocked to discover my age is also a point of contention.

I suspect both Nopporn and yourself had ulterior motives in altering my employment status. My suspicions are now confirmed.

It must be pointed out, my effectiveness as a food and beverage attendant when I turn 65 is no less than my effectiveness at the age of 64. Your stance to cease my employment at the age of 65 is irrefutably an act of blatant discrimination.

I will also use this opportunity to reiterate my wish for you to respond to my unpaid entitlement claims (outlined within the 'undated' letter I wrote to you – the same letter you acknowledged receipt of in the opening paragraph of your reply letter dated 16 August 2011).

I maintain the view you have not properly remunerated me and furthermore I assert you have contradicted the provisions contained within the Restaurant and Industry Award. I compel you to review my claims and respond accordingly.

In light of your prejudiced stance, I enjoy my job and the interaction I have with the rest of the team at Chiangmai Thai Restaurant. Again, I take this opportunity to express my willingness to return to my full time role at the restaurant."

17. The respondents replied by letter of 29 August 2011, stating:

> "*We refer to your letter of the 23rd August 2011 and would advise once again that we do not agree with any of your claims.*
>
> *We would point out that the retirement age for males is 65 years and as advised we do not employ any person after that date.*
>
> *We object to the way you have written to us.*
>
> *You seem to want to ignore our last letter, and we advise you that we do not wish to enter into any further correspondence with you.*"

18. For their part, the respondents say that the letters of 16 August 2011 and 29 August 2011 were drafted by their accountant, Mr Brian Gent, at the request of the Second Respondent in order to address the complainant's complaint. They say that Mr Gent sent each of the draft letters to the Second Respondent in accordance with their instructions to provide advice and assistance.

19. In his affidavit, Mr Gent stated that he was a public accountant and registered tax agent, having practised as such since February 1959. He said that although his general duties included preparing monthly financial records, lodging business activity statements and income tax returns, he also gave general employment advice and drafted correspondence and documents on behalf of the First Respondent from time to time. In respect of these matters, he recalled that in about August 2011 he had been contacted by the Second Respondent about the complainant's letter which, at that time, principally addressed the complaint about outstanding wages and entitlements.

20. Mr Gent stated that he had told the Second Respondent that she was not required to calculate the wages and that as the complainant had accepted his wage, signed the roster and received payslips each week without complaint he was not entitled to claim that he had been under paid. Of course, those matters are simply incorrect. Furthermore, he advised the Second Respondent that as the complainant was demanding a $60,000 underpayment of wages and refusing to return to work until the underpayment issues were resolved, the First Respondent could terminate his employment as he contended that the complainant was reaching the retirement age of 65 provided for under the FW Act. He

says that he did this after researching the FW Act, and recalled a provision that stated that the retirement age was 65 years. This advice was patently incorrect.

21. He says that he told the Second Respondent that he would draft a letter to send to the complainant in response to the undated letter the complainant sent. He says that to this end he had been provided with printed letterheads of the First Respondent and that he drafted a letter in response on or about 16 August 2011 which was then forwarded for completion by the Second Respondent.

22. He also acknowledges having drafted the second letter which was forwarded by the respondents. The Third Respondent acknowledges that he read and signed the letters dated 16 August 2011 and 29 August 2011. It is accepted that Mr Gent had no qualifications, background or experience in relation to workplace relations or industrial relations law. It is further accepted that he had not attended any professional development courses, seminars or workshops in respect of workplace relations.

23. It is also accepted that the Second and Third Respondents did not take any steps to ascertain whether Mr Gent had any relevant qualifications or experience in relation to employment matters. Nor did they seek or obtain advice from any other person with relevant qualifications or experience. As the First Respondent was the alter ego of the Second and Third respondents, it follows that it also failed to undertake these inquiries.

24. It is admitted that the complainant was hurt by the conduct of the respondents. It is also acknowledged that he has not obtained any employment since the dismissal.

25. The Applicant received a complaint in relation to the dispute on or about 1 September 2011, and subsequently commenced an investigation. In the course of the investigation it offered to interview Second and Third respondents. It is acknowledged that the respondents denied any wrongdoing and did not admit to any liability during the investigation.

26. Considering the background facts, it is now accepted that a number of contraventions have occurred and that they fall broadly into two classes. The first contravention is in respect of discrimination. The second involves contraventions concerning record keeping.

27. The discrimination contraventions are twofold. First, that the respondents contravened s.351(1) FW Act by taking adverse action against the complainant by dismissing him by letter dated 16 August 2011 with effect from 5 September 2011 because of his age. Secondly, they contravened s.351(1) FW Act by taking adverse action against the complainant by altering his position to his prejudice on or about 29 August 2011 by refusing to communicate further with him about his employment with the First Respondent because of his age.

28. The second class concerns bookkeeping contraventions, as reflected by the failure of the First Respondent to make records relating to the complainant, as required by r.19.12 *Workplace Relations Regulations 2006* (Cth) ("**WR Regulations**"), that set out:

    a) the accrual of leave;

    b) any leave taken; and

    c) the balance of the complainant's entitlement to leave from time to time.

    The First Respondent admits this contravention.

29. Subsequently, for the period 1 July 2009 to 9 September 2011, the respondents also admit to contraventions of the FW Act and *Fair Work Regulations 2009* (Cth) ("FW Regulations"), which provided that the First Respondent was required to make and keep for seven years a record for the complainant which set out his entitlement to leave.[1] Further, pursuant to s.535 FW Act and r.3.40 FW Regulations, it was required to make and keep for seven years an employee record relating to the complainant's termination of employment that set out the name of the person who acted to terminate his employment and whether his employment was terminated by consent or by notice or summarily or in

[1] As provided for by r.3.36(1), r.3.36(2)(b) FW Regulations.

some other manner. It is accepted that the First Respondent did not keep those records.

30. Accordingly, the First Respondent admits by reason of those matters that it contravened s.535 FW Act. Each of the Second and Third Respondents also accept that they are accessorily liable in respect of the First Respondent's conduct. So far as the Second Respondent is concerned, she admits that she had actual knowledge that the First Respondent had dismissed the complainant because of his age and that it had altered his position, to his prejudice, because of his age. She admits that she had knowledge that the First Respondent did not keep the records required by r.19.12 in respect of accrual of leave and the balance of the employee's entitlement to leave from time to time.

31. She further admits that she had knowledge that the First Respondent did not make and keep for seven years an employee record for the complainant that set out the balance of his entitlement to leave from time to time and that the First Respondent did not make and keep for seven years an employee record relating to the complainant's termination of employment that set out the name of the person who acted to terminate his employment and whether the employee's employment was terminated by consent or by notice or summarily or in some other manner. She admits that she was, by her acts or omissions, involved in each of the contraventions of the First Respondent which are alleged against it and is taken, therefore, to have contravened each of them herself.

32. Likewise, the Third Respondent admits that he had actual knowledge of the matters that I have just outlined concerning the contraventions as particularised in the context of the Second Respondent. Accordingly, he too admits that he was involved in each of the contraventions of the First Respondent in the manner alleged and that he too has contravened each of those provisions himself.

33. It follows, by reason of those matters, that the complainant has suffered economic and non-economic loss. It is accepted that had the First Respondent's admitted contraventions not occurred the employee would have continued working at least 38 hours per week at the Surfers Paradise restaurant, and that he has suffered loss of earnings by reason of that matter. Furthermore, there is a concession on the part of the

respondents that the complainant suffered non-economic loss and damage, including the denial of an opportunity to remain a full-time employee of the First Respondent, denial of an opportunity to return to paid employment with the First Respondent and non-economic loss, including hurt, humiliation, stress, anxiety and inconvenience.

34. Insofar as those complaints are concerned, the parties agree that a sum of $10,000.00 affords adequate compensation, and I accept that assessment as reasonable. Orders will be made to that effect.

35. Concerning the approach to penalty, the principles are now well settled. In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 4)* [2013] FCA 930, Murphy J summarised the general principles:

> "*[16] The purposes to be served by the imposition of penalties are threefold:*
>
> *1. Punishment - which must be proportionate to the offence in accordance with prevailing standards;*
>
> *2. Deterrence - both specific and general; and*
>
> *3. Rehabilitation.*
>
> …
>
> *[17] Courts exercising industrial jurisdiction have identified a range of factors for assessing the appropriate penalty which, while not mandatory considerations, may be relevant to the circumstances of a particular case. These include:*
>
> *(a) the nature and extent of the conduct;*
>
> *(b) the circumstances in which the conduct took place;*
>
> *(c) the period of the conduct;*
>
> *(d) the nature and extent of any loss or damage sustained as a result of the conduct;*
>
> *(e) whether there has been similar previous conduct by the respondents;*
>
> *(f) whether the contraventions arose out of one course of conduct;*

(g) whether senior management was involved in the conduct;

(h) whether any contrition has been exhibited;

(i) whether any corrective action has been taken;

(j) the cooperation of the respondents; and

(k) the need for deterrence.

[18] However, the Court's task in assessing penalty is one of "instinctive synthesis" … This process requires the Court to take all relevant factors into account to arrive at a single result which takes due account of them all … Care should be taken with the use of a checklist setting out the range of relevant factors as they give rise to a risk of transforming the process of instinctive synthesis into the application of a rigid catalogue of matters for attention …

[19] Proportionality and consistency commonly operate as a final check on the penalty assessed, but the penalty should not be derived from comparing the case which is the subject of the assessment with any other particular case …

[20] The totality of the penalties imposed must also be appropriate. The totality principle requires that the total penalty for all related contraventions ought not exceed what is proper for all contravening conduct involved: Trade Practices Commission v TNT Australia Pty Limited (1995) ATPR 41-375 at [20] per Burchett J. The rationale of the principle is to ensure that the proposed penalty is proportionate when the contraventions are viewed collectively."

36. There is a significant degree of commonality between the submissions of both parties on the governing principles, but they depart from agreement on a number of matters which I will address in due course. These points of departure give rise to the significantly divergent conclusions contended for by each of the parties.

37. It is relevant to note that the provisions of Part 3-1 FW Act are for the benefit of employees. They are protective and remedial in nature and the relevant terms should not be construed narrowly. A construction that promotes the purpose or objects of Part 3-1 is to be preferred over one that does not.

38. Acknowledging those underlying principles, the respondents accept that they have taken adverse action, being the dismissal and other conduct, against the complainant because of his age. The Applicant has set out in tabular form the contraventions alleged and particularised the maximum penalty per contravention against each respondent.[2]

39. I have taken into account that the s.351 contraventions provide for a maximum of 300 penalty units for the corporation and 60 penalty units for the individual. The r.19.12 penalty is 50 penalty units for the corporation and 10 for the individual. The s.535 and r.3.36 penalty is 150 penalty units for the corporation and 33 for the individual.

40. Although I have outlined the broad principles identified by Murphy J above, it is appropriate that I also note the four step process that is conventionally applied in the context of determining penalty. The first is to identify each occurrence of the contraventions. Each contravention is a separate contravention of the provisions of the respective acts and thus should be identified individually.

41. Secondly, the Court must have regard to s.557(1) FW Act. That provision is applicable, at least in part, to these circumstances. It provides that where two or more contraventions of a term in applicable provisions or civil remedy provisions are committed by the same person, and the contraventions arose out of the same course of conduct, those contraventions will be taken to constitute a single contravention. That principle has some application here; it does not apply in respect of the age discrimination contravention, but does have effect in respect of the record contraventions.

42. Third, the respondents should not be penalised more than once for the same conduct. It is open to the Court to group separate contraventions which overlap with each other and involve potential punishment for the same or substantially similar conduct. I note that this notion has some significance in this case because of the common mistaken principle which forms the substratum of the contraventions.

43. Finally, having fixed an appropriate penalty for each breach, the Court should then take a final look at the aggregate penalty to determine

[2] Annexure A.

whether it is an appropriate response to the conduct which led to the breaches. At this stage the Court should apply the instinctive synthesis test in making the assessment, having regard to the totality principle.

44. The respondents have admitted the essential facts to found the contraventions, however, they contend that the context surrounding them must also be considered.

45. Dealing first with the age discrimination complaint, the respondents contend that a short time after the complainant returned from his long service leave, that is, on or about 22 July 2011, there was a meeting on that day. That meeting was to discuss issues concerning the complainant's employment with the First Respondent. It is contended for the respondents that there is no suggestion that they avoided speaking with the complainant or his son, or sought to do anything to avoid the settlement of what they regarded to be a legitimate dispute.

46. It seems that there is no doubt that there was a dispute as to the extent of the underpayment by the employee. It is, in my view, unquestionable that there was indeed an underpayment of wages. So much is I think accepted by the subsequent agreement to pay moneys, however, as the respondents contend, it was not anywhere near the amount that was contended for by the complainant at the time. The respondents contend that it was a wages claim that really took up the most part of the allegations contained in the first letter.

47. For instance, they noted that on the last page of that first letter it was stated, "*I also take this opportunity to advise that I am prepared to return to my full time role (subject to addressing the outstanding entitlement issue),*" which meant, on the respondents' contention, that the complainant was only prepared to return to work upon the payment of $60,000.00 or some other negotiated figure. The respondents contend that this was the basis for their subsequent conduct.

48. Likewise, the respondents contend that it is fair to conclude that there was a genuine dispute about wages by reference to subsequent correspondence, citing the statement "*You stated verbally that you will not come back to work until this matter is resolved,*" being a reference to the issue identified in the first letter as discussed no doubt at the

meeting on 22 July 2011. The respondents note that this particular assertion was never denied.

49. Ultimately, the respondents contend that what can be seen from the course of correspondence is that the dispute between the parties as at 22 July 2011 had nothing to do with long service and age, but was essentially a complaint about an underpayment of wages. The Second Respondent says, putting the letters in context, that having regard to those matters she sought the advice of her accountant, who drafted the letters.

50. Although the letters used language such as "*it is the policy of the Company that we do not employ any staff that attains the retirement age* …" the respondents say that there is no such policy, and that the passages drafted by Mr Gent, which they accepted in the draft letter and employed themselves, constituted an infelicitous use of language. In any event, what was really occurring was that there had been a complaint about wages by the complainant, and that was the true focus of the letter.

51. Age was a material issue and it was squarely raised in the correspondence by the respondents. However, notwithstanding my broad acceptance of the way in which these events unfolded, the fact remains that the complaint did extend beyond matters of age.

52. The letter of 29 August 2011 contained the statement "… *we advise that we do not wish to enter into further correspondence with you*." The respondents accept that this constituted the second breach of the FW Act.

53. However, I do accept that it is a breach that was inextricably connected to and bound up with the first breach and, as was submitted, the second breach can hardly be practically considered as separate and distinct given that the underlying issue (termination at age 65) was apparent in all correspondence. The advice given by Mr Gent was plainly wrong, but it was that underlying principle that informed the wrongheadedness on the part of all the respondents to this proceeding.

54. As is noted, the fact that there might be an overinflated wages claim that initiated all these difficulties does not, in my view, diminish the

respondents' failings, but it at least provides some explanation for their reaction and the escalation of the dispute between them and the complainant. So far as Mr Gent is concerned, although I have earlier outlined in broad terms his evidence, I accept the respondents' engagement of Mr Gent as their long time adviser. Arguably, Mr Gent ought to have drawn to their attention his lack of knowledge and experience in the workplace relations field. Workplace relations matters involve more than simple accounting exercises and, if nothing else, I think that the respondents now appreciate that. Having said that, I reject the Applicant's submission that it was unreasonable for the respondents to rely upon Mr Gent. I am satisfied, and I do find, that it was reasonable for the respondents to seek and rely upon the advice of Mr Gent.

55. Mr Gent had been their adviser for nearly 20 years. They had a longstanding and trusted relationship with him. He failed them and they must pay the price, but to find otherwise as was contended by the applicant, in my view, respectfully ignores reality. Small businesses rely heavily upon the advice of financial advisers in all matters. This experience, will no doubt, constitute a hard learned lesson for the respondents, but I comprehend that it is difficult for small businesses to keep abreast of workplace and other regulation, particularly given the proliferation of regulation in recent years. Accordingly, businesspeople are now more dependent than ever on advisers, such as accountants, to assist them.

56. In this instance their accountant has overreached, and it is unfortunate that that has occurred, but I am not satisfied that in relying upon their accountant's advice, as they have done for the last 20 years, they acted unreasonably.

57. I turn then to the specific matters to be considered. The first is the nature and extent of the conduct. The Applicant submits that on a plain reading of the letters of 16 and 29 August 2011 there was a deliberate decision to dismiss the complainant when he turned 65 years of age.

58. The Applicant contended that the letters each identified the complainant's age as the reason for the respondents' conduct. It accordingly argues that this is not a technical contravention of the law, as dismissing an employee because of age is a very straightforward,

serious and fundamental breach. Acting to alter an employee's position to the employee's prejudice because of their age is also a breach, and the Applicant contends that this demonstrates a profound lack of understanding of the respondents' statutory obligations.

59. As the Applicant contended, the contraventions do, and did, have an inherently serious impact upon the complainant, who it contends should be regarded as a vulnerable worker due to his age and linguistic circumstances. Furthermore, the Applicant contends that the conduct in question relates to a fundamental breach of the respondents' obligations under the general protection provisions of the FW Act. The purpose of the FW Act is to provide a protection from workplace discrimination, and to provide effective relief for persons who have been discriminated against, victimised, or otherwise adversely affected as a result of the contravention of the general protection provisions. It was submitted that in this context the nature of the respondents' contraventions were serious.

60. Further, in respect of the record keeping contraventions, the failure to keep records in accordance with the WR Regulations and FW Regulations made it difficult for the complainant to determine the extent of his leave entitlements. Having said that, the discrimination breach is one which is of very narrow compass. It was not one of policy, but one of reaction to a conflict which arose between the parties principally concerning outstanding salary and entitlements.

61. It is also one which I think reflects a general misunderstanding within the community about retirement and the retirement age. This misunderstanding has been evident ever since self-funded superannuation retirement has been permitted retirement to commence at 55, and the ongoing discussion about elevation of the pensionable age from 65 to 67 and beyond. That, of course, does not excuse the respondents' conduct, and while I accept that in this instance there has been a profound lack of understanding of the respondents' statutory obligations, I do not think that that error is entirely free of misunderstanding in the broader community. I consider it to be the case that the community still does not understand that retirement ages are not compulsory and that workers may elect to work beyond them. The law protects that right.

Nature and extent of the loss or damage

62. The Applicant submits that the nature and extent of the loss that the complainant suffered was significant and warrants the imposition of penalty. The contravening conduct resulted in his employment with the First Respondent ending and he has not obtained other employment since then. To some extent I accept that it is unclear whether he would have continued for a lengthy period of time beyond this employment given the exchanges contained in the correspondence, although I accept that at least he intended to return to work after his return from long service leave, and certainly would have worked for the foreseeable future.

63. The Applicant also submits that the contravention involves attitudes towards persons who may be regarded as older which are inconsistent with legislative requirements and community expectations. I accept that this is an area where there is a significant degree of disinformation and community misunderstanding, although the award of penalties in this instance will serve to inform the community of the difficulties attached to this issue.

Similar previous conduct

64. There is no suggestion that there has been any similar conduct by the respondents on prior occasions.

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

65. The Applicant submits that whilst the dismissal of the complainant was the ultimate consequence of the respondents' actions, each of the contraventions in s.351(1) involves an individual act or omission. That is, of course, the way in which the complaints have been asserted and are accepted by both parties.

66. The letter of 29 August 2011 involves an act or omission of refusing to acknowledge an allegation of discrimination and refusing to further communicate with the complainant, in addition to the act of purporting to terminate. The Applicant submits that the contraventions should not

be grouped and should be viewed separately subject to an overall check for finality.

67. For the respondents it is contended that here the two charges under s.351(1) FW Act clearly arise out of the same course of conduct. They contend that what has occurred is that there has been a dispute with the complainant. Action has been taken to dismiss him and then a decision has been made not to enter into a discussion about that decision. In *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39 at [39] it was said:

> "*The principle* [of commonality] *recognises that where there is an interrelationship between the legal and factual elements of two or more offences for which an offender has been charged, care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality. That requires careful identification of what is "the same criminality" and that is necessarily a factually specific enquiry …*"

68. Having regard to that, it is submitted that the appropriate approach is one which was adopted by Gilmour J in *Fair Work Ombudsman v Offshore Marine Services Pty Ltd* [2012] FCA 498 to impose one global penalty for both breaches. There have in this instance been two offences, but there has been one underlying mistake of principle which has given rise to the difficulty in this instance. Contextually I think that the difference in approach is immaterial because even if not grouped, upon the adoption of the totality principle the difficulty in settling punishment will be addressed.

69. In any event, as my reasons will demonstrate, I have chosen to adopt the view that two punishments ought be awarded, but in order to reflect the commonality of the underlying error of principle the punishments ought vary to acknowledge that matter.

70. In respect of the record keeping complaints, the Applicant submits that this approach will be appropriate. That is, the amendment of legislation over time has had the effect of giving rise to additional contraventions in circumstances where, but for a change in legislation, the respondent would have been afforded the benefit of the statutory course of conduct provisions.

71. The Applicant accepts that it is appropriate to group the two record keeping contraventions together and to separately group the contravention relating to the recording of the termination of the complainant's employment. I accept that as an appropriate approach. Furthermore, the Applicant submits that it is proper for the Court to consider that a portion of the group is subject to a lower maximum penalty when considering the appropriate penalty overall. Subject to the principle of totality, I broadly accept the Applicant's submissions on that point.

72. The Applicant further submits that it would be inconsistent to group the failure to record leave balances with the contravention relating to the recording of termination of the complainant's employment, as the failure to keep records in relation to the recording of leave balances is quite separate from the failure to keep records as required upon the termination of Mr Lee's employment. I accept that observation.

73. However, I have further views in relation to the record keeping matters. In my view, ultimately, these are the most egregious contraventions in the context of this application. I am satisfied that the respondents' systems were manifestly inadequate. Its advice was poor, and for a business employing between 100 to 130 staff it ought to, and must, do better. Poor records not only lead to disputes in respect of wages and entitlements, as arose in this instance, but also may lead to the short changing of employees of their due entitlements.

74. Poor record keeping cannot be tolerated in an industry in which labour is a significant input factor. The defects appear to be systemic and must be rectified. That these misdemeanours occurred in the modern technological age is particularly troubling, especially given the availability of computer programs such as MYOB or QuickBooks, which include payroll functions that can be programmed to maintain records that deal with the areas in which the respondent has been found wanting in this instance.

Size of the First Respondent

75. The next consideration is the size of the respondent corporation. I have earlier noted from the agreed facts that the company is a closely held

corporation. The shareholdings are held exclusively by each of the Second and Third Respondents, who each hold equal numbers of shares. I note the Applicant's assertion that the First Respondent is a mid-sized business. This appears to be based upon the number of the First Respondent's employees.

76. However, I think that determinations as to the size of a business are best informed by the quantum of the company's capitalisation, rather than the number of employees. While no direct evidence of capitalisation was placed before the Court, from the facts I infer that the capitalisation of the company is small and that it is a small business. It is the experience of this Court that businesses of that size often employ between 100 to 130 employees.

77. However, notwithstanding the fact that the business is a small one, it is well accepted that the law applies equally to small business as it does to large. The matter of moment, in my view, relates to the matter I have earlier addressed, and that is the number of employees and the need for better systems to be in place where a small enterprise has more than a handful of employees.

Deliberateness of the breach

78. The respondents sought advice from their accountant, who it is now acknowledged did not have the appropriate qualifications or experience to provide advice in relation to workplace relations matters. It is evident that they did not seek or obtain further advice from any person with workplace relations qualifications or experience. It is accepted by all that the authorities make it clear that ignorance is no excuse for non-compliance with legal obligations.

79. However, as was contended by Senior Counsel for the respondents, while the Second and Third Respondents acknowledge their involvement, I accept their statements that they did not wilfully seek to breach the FW Act. They reasonably relied upon Mr Gent, and did not set out to intentionally breach in respect of either the age discrimination or the failings in record keeping.

Involvement of senior management

80. In relation to the consideration of the involvement of senior management, it is submitted that senior management played a major part in the contraventions of the First Respondent. I accept this basic premise, however I think that this submission overreaches. The Second and Third Respondents were the shareholders and directors of the respondent corporation, which was their alter ego. This submission would carry more force if it were applied to a situation where management was distant from the ownership of the enterprise. While it is true that the First Respondent's managers were the cause of the contraventions, the impact of that fact is degraded when one considers the self-evident nature of such a statement. The shareholders of the First Respondent did not rely upon some other person or group of persons to carry out managerial tasks on their behalf; they were one and the same. The co-dependent relationship between the respondents meant that their actions, and the consequences, were all bound together. Therefore, in this context, to point to the involvement of 'senior management' and suggest that there was a clear delineation between ownership and management is to impose a false notion of separation.

Contrition, corrective action and cooperation

81. So far as the First Respondent's contrition or corrective action and cooperation with the enforcement authorities is concerned, it is contended that there was minimal contrition or remorse. It is noted that an agreement that it is appropriate for an employee to receive a payment of compensation as a measure of corrective action may demonstrate a degree of remorse.[3] However, that of itself is insufficient. The Applicant submits that if contrition is to be demonstrated so as to justify any entitlement to a discount on a penalty, the respondents would have to offer frank admissions of wrongdoing and apologies to the employee who had been wrongfully treated.

82. It was contended that there is no evidence of an apology or remorse. The matter was listed for hearing for five days. It required nine orders for directions along the way and ultimately a statement of agreed facts

[3] *Fair Work Ombudsman v A Dalley Holdings Pty Ltd* [2013] FCA 509.

was only entered into on the day following the due date for the commencement of trial. It was submitted that there was no appropriate basis for discount of penalty where admissions are made after the start of a hearing. The Applicant contended that the evidence of cooperation was limited, as demonstrated by the Second and Third Respondents' non-acceptance of the offer to participate in an electronically recorded interview.

83. For the respondents it was contended that the refusal to accept the invitation to participate in a record of interview was undertaken on legal advice and, of course, was within their rights. However, all that said, it is apparent from the Statement of Claim that there was much in dispute.

84. Perhaps the process which led to the settlement evidences the difficulty of prosecuting this sort of claim in the manner in which it was. The difficulty with pleading the claim, rather than proceeding by way of complaint, is that it makes it difficult for parties to see common ground. When called upon to particularise, the Applicant delivered a list seeking 17 declarations in respect of the contraventions contended for in the Statement of Claim. As the respondents had admitted the 'records' contraventions on the pleadings (in respect of which three orders are sought), the Applicant then abandoned 12 of the 14 other declarations sought concerning the age contraventions.

85. The fact that so many claims were abandoned does not suggest unreasonableness on the part of the respondents in not settling the proceeding earlier. Given the well settled principles in relation to the imposition of penalties, one wonders what the Applicant thought was to be achieved by conjuring up as many complaints as it did from what was essentially one failure by the respondents, manifested in the two contraventions it now accedes to. I am not persuaded that this is a case where it could be said that the respondents' failure to settle early demonstrates unreasonableness having regard to the course of the proceedings.

86. In relation to corrective action with regard to the record keeping issues, it is obvious that corrective action has been undertaken. So far as the matter of age discrimination is concerned, it seems unlikely that there is a need for any further corrective action given that mandatory

retirement is no longer a matter of policy as was originally stated in the correspondence.

Ensuring compliance with minimum standards by providing effective means for investigation and enforcement of employee entitlements

87. The Applicant contends that one of the principal objects of the FW Act is the maintenance of an effective safety net and effective enforcement mechanisms. It says that the substantial penalties set by the legislature for breaches of minimum entitlements reinforce the importance of compliance; I accept that submission. With respect to the contravention of s.351(1) FW Act, the Applicant contended that when imposing a penalty it is imperative for the Court to set a penalty range that reinforces the fundamental importance of compliance with the general protection provisions.

88. The Applicant noted the explanatory memorandum to the FW Act, which describes the purpose of the general protection provisions as to ensure "*fairness and representation at the workplace by recognising the right to freedom of association and preventing discrimination and other unfair treatment.*" It also noted that the memorandum made it clear that that part was intended to rationalise, but not diminish, those protections formerly contained in the *Workplace Relations Act 1996* (Cth). Accordingly, it is submitted that there is a need to send a strong message to employers that they must comply with the general protections provisions of the FW Act.

89. Furthermore, the Applicant submits that it is particularly relevant that the unlawful age discrimination event was first contained in the 16 August 2011 letter. In the 23 August 2011 reply, the employee protested that his dismissal due to age was "*irrefutably an act of blatant discrimination*." Yet undeterred by that, the respondents repeated their position concerning his dismissal. Unquestionably, that matter, having been drawn to the respondents' attention, ought to have been revisited by them, and it follows that this is perhaps the most serious oversight by the respondents in respect of that part of those complaints. Broadly, I accept these submissions.

Deterrence

90. Concerning deterrence, it is well established that the need for specific and general deterrence is a factor that is relevant to the imposition of penalty under the FW Act. The role of general deterrence in determining the appropriate penalty has been illustrated by the comments of Lander J in *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543, where his Honour noted:

> "*[93] … In regard to general deterrence, it is assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend: Yardley v Betts (1979) 22 SASR 108. The penalty therefore should be of a kind that it would be likely to act as a deterrent in preventing similar contraventions by like minded persons or organisations. If the penalty does not demonstrate an appropriate assessment of the seriousness of the offending, the penalty will not operate to deter others from contravening the section. However, the penalty should not be such as to crush the person upon whom the penalty is imposed or used to make that person a scapegoat. In some cases, general deterrence will be the paramount factor in fixing the penalty: R v Thompson (1975) 11 SASR 217 …*"

91. The Applicant says that the penalties in this case should be imposed at a meaningful level so as to deter other employers from committing similar contraventions. In particular, it submits that there is a need for strong general deterrence, in the sense that the Court should mark its disapproval of the respondents' conduct and impose a penalty at a level which will serve as a warning to like-minded people.

92. Further, it submits that the Court would recognise specifically that the need for general deterrence is particularly high in industries which attract workers who are unskilled, young, lowly paid and vulnerable. It submits that the same principle applies to workers who are vulnerable because they are older and it particularly applies in the hospitality industry, which attracts workers of these kinds.

93. In relation to general deterrence, the respondents contend that it only becomes a real factor if the case is a proper vehicle to promote general deterrence; they argue that this case is not such a vehicle. They say that the facts of this case are peculiar as, for instance, there was a dispute between the complainant and the respondents based on outstanding

wages and entitlements. They also note that the employee possibly repudiated his own employment by engaging in anticipatory breach. They also draw attention to the complainant's expressed desire not to be further employed by the First Respondent, and the respondents' attempts to ensure that they were acting lawfully by obtaining the (incorrect) advice of Mr Gent.

94. This is a case where I think it is appropriate for there to be a penalty which reflects more general deterrence rather than specific deterrence, for reasons that I will address. However, adopting the considerations addressed by Lander J, I must also be careful that this case does not become a vehicle for the respondents to become a scapegoat in the pursuit of some purist view.

95. I am informed by counsel for the Applicant that this is the first time that an age discrimination case of this kind has come before the Court. It argues that this factor alone highlights the need for what is described in its submissions as "*extremely stiff*" penalties. However, I think it is apparent that this is because such infringements do not frequently occur. Therefore, while there is a need to send a general signal to the community, I do not think that there is any particularly pressing call for strong general deterrence in relation to age discrimination. As such, the matter is best viewed as a traditional general protections contravention involving circumstances of age discrimination.

Specific deterrence

96. On the issue of specific deterrence, the Applicant submits that there is a need for specific deterrence in this matter because the First Respondent continues to operate restaurants and employ staff. I accept that contention, but I also accept that in this instance the First Respondent has taken steps to correct its bookkeeping issues, and no doubt the penalties I impose will serve to reinforce the significance of these matters.

Considerations for the imposition of penalty

97. Each of the parties addressed penalties, however, before specifically looking to the matters that were discussed I shall consider the

imposition of penalties in the context of the respondents. It is not in dispute that the Second and Third Respondents are the only shareholders of the First Respondent; it is a corporate de facto partnership. This is not an uncommon arrangement, and many small businesses are structured that way.

98. The legislation does not distinguish between small and large businesses. As noted earlier, the size of a business is best determined by reference to capitalisation. Large businesses are also usually composed of a broad number of shareholders who are distinct from the executive or managerial personnel of the business. The FW Act does not, and need not, descend into that sort of detail, however, in my view, these are relevant considerations for a court.

99. In its submissions, the Applicant contends that separate and significant penalties should be imposed on each of the respondents. In that regard it relies upon the observations in *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2)* [2012] FCA 408. I will address that and other cases in a moment.

100. Before proceeding, I think that the practical way in which the First Respondent's corporate structure functions needs to be reflected upon. There are two shareholders who are also directors and managers. When the enterprise succeeds, it makes a profit and that profit is retained or distributed between the two shareholders. In either case, when a penalty is imposed upon a corporation it reduces the profit available for distribution or reinvestment. It has, in that sense, a direct impact upon those who are its shareholders and who, incidentally, are also its managers.

101. On the other hand, if the enterprise is a large enterprise which employs professional managers, such a problem usually does not arise. In such corporations, the shareholding is more broadly disbursed. Accordingly, when a penalty is imposed and the profitability of the enterprise is diminished by a factor equating with the penalty, the impact upon individual shareholders is not only diluted but oftentimes is not, in any significant sense, felt by those in management. It is in that context that separate penalties are most appropriate.

102. As I have stated, the First Respondent is a corporation in respect of which the Second and Third Respondents are its only shareholders and directors. It follows that any penalty imposed upon the First Respondent will constitute an indirect but effective penalty upon the Second and Third Respondents, which would have to be borne by them in addition to any personal penalties imposed.

103. The difficulty is deciding whether it is fair that the Second and Third respondents suffer what would be in effect a dual penalty for the same conduct. In my view, this conundrum can be addressed and has been addressed previously. However, there has been no uniformity of approach. It is, as a starting principle, accepted that the culpability of each of the respondents must be assessed individually in the context set by the legislation having regard to the maximum penalty, as was noted by Buchanan J in *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2)* at [8], where his Honour said:

> "*The culpability of each respondent must be assessed individually and in the context set by the maximum penalty prescribed in each case.*"

104. *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2)* was a case involving effectively a dual director/shareholder. In that instance there was only one personal respondent, who was also the shareholder of the respondent corporation. His Honour did not descend into any particular explanation as to how he dealt with the issue of the separateness, except to note that it is important that the assessment be taken individually.

105. It seems from his Honour's reasons that there was a particularly egregious contravention of the Act, for as he noted at [9]:

> "*Nothing that was put on behalf of the respondents provides any reason to ameliorate the penalties. I regard the breaches in this case as very serious. They appear to me to have involved a deliberate, calculated and systematic refusal to comply with the requirements of the WR Act and to take advantage of the vulnerability of the complainant employees.*"

106. His Honour, in the course of the trial, made particularly unfavourable findings of credit against the personal respondent, noting that his

"*arrangements were a sham and deceitful*." No doubt those factors influenced his approach to the totality of the penalty.

107. In another case dealing with closed corporations, *Fair Work Ombudsman v AJR Nominees Pty Ltd (No 2)* [2014] FCA 128, the issue of suspension of penalties was put before the court, although determined against the respondent. However, for reasons that I will address in a moment, the approach of the court there was to adopt a rationalisation of the difficulty through application of the totality principle. At [68], Gilmour J stated:

> "*[68] The court must fix a penalty appropriate for each individual contravention and then, at the end of the process, consider whether the aggregate is appropriate for the total contravening conduct: McDonald v R (1994) 48 FCR 555 at 556, citing Mill v R (1988) 166 CLR 59 at 62–63; Pearce v R (1998) 194 CLR 610 at [45] per McHugh, Hayne and Callinan JJ.*
>
> *[69] The principle is designed to "ensure that the aggregate of penalties imputed is not such as to be oppressive or crushing": Stuart-Mahoney at [60].*
>
> ***Penalties***
>
> *[70] Having regard to all of the foregoing and subject to the question of totality, I would assess the following penalties for contraventions of the following sections of the FW Act upon AJR Nominees for the respective contraventions and upon* [the Second Respondent] *by reason of his being involved in those contraventions.*

	AJR Nominees	**Minniti**
s 340	18,000	3,250
s 343(1) (coercion)	18,000	3,250
s 44(1) (failure to give 5 weeks' notice — or pay in lieu)	6,000	1,250
s 44(1) (failure to pay accrued annual leave)	3,000	550
	45,000	8,300

> *[71] There was a degree of overlap in the conduct of the respondents across all four contraventions at least because the objective of each was to avoid paying Bill his statutory*

entitlement. Bearing this in mind and having regard to the principle of totality I would impose the following penalties.

	AJR Nominees	**Minniti**
s 340	14,000	2,500
s 343(1) (coercion)	14,000	2,500
s 44(1) (failure to give 5 weeks' notice — or pay in lieu)	4,500	1,000
s 44(1) (failure to pay accrued annual leave)	2,500	500
	35,000	6,500

…"

108. It can be seen from the table that was set out at [70] that his Honour essentially assessed the appropriate penalty for each of the two respondents, that is, the corporate respondent and the director. At [71], after undertaking the totality assessment, he set out again in tabular form a penalty which took into account all those other considerations including, I infer, the issue of the director shareholding.

109. It is to be noted, by reference to the totals imposed, that the sum of the penalties imposed upon the corporation and the shareholder, provided from [71] as the final penalties, is something slightly less than the total which would have been imposed on the corporate respondent upon the initial assessment of the penalties provided for at [70]. I have found his Honour's reasoning and approach applicable in this instance.

110. Before proceeding I should note one further case that was placed before me: *Fair Work Ombudsman v Wegra Investments Pty Ltd and Ors* [2012] FMCA 933. In that instance the Court was considering the imposition of penalties for a closely held corporation. The learned judge decided to impose a penalty upon the corporation and then adjourned the assessment of penalties upon the shareholder, subject to the shareholder performing an offer to pay the penalties imposed upon the corporation.

111. There were a number of features of that case which I think militate against it providing an appropriate process in this instance. First, it seems that the corporate respondent in that instance was in the process

of being wound up. It follows that while penalties were imposed upon it, the director did offer to pay the penalties and, if he did, it was understood that no further penalties would be imposed upon the director personally.

112. Secondly, and perhaps more significantly, in that case there was a real issue about whether or not the Applicants were able to sustain their claim on accessorial liability. It is evident from the reasons that his Honour was not convinced that the evidence was sufficient to accept the plea which had been put before him on behalf of the respondent director. Ultimately what appears to have been settled upon as a process for the imposition of penalty reflected a compromise whereby a practical approach was taken to have the penalties paid and the matter resolved.

113. That said, I agree with the observations made by his Honour at [69]:

> "*Imposing civil penalties on each of the first and second respondents would be futile* [that being a reference to the prospective insolvency of the corporate respondent]. *It would also be unfair in my view. Mr Wegener should be held to account for the contraventions his company committed. However, he should not be punished separately.*"

114. The respondents have urged upon me the prospect of suspension of the penalty. However, for the reasons provided by Gilmour J at [72] to [78] of *Fair Work Ombudsman v AJR Nominees Pty Ltd (No 2)*, it appears that suspension will only be available in very unusual circumstances. I do not think that this case is such an instance but prefer the approach his Honour adopted.

115. I turn then to the specific penalties in respect of the age discrimination offences. The Applicant contends that the penalties should be at the high end. It proposed penalties that reflected 80 per cent of the maximum. The respondents contend for penalties at the lower end. While I accept that there is a need for there to be a signal sent to the community, I do not think that a penalty of 80 per cent is anywhere near appropriate, having regard to the circumstances and the nature of the contraventions.

116. Further, I think due regard has to be had to the respondents' position, namely that they acted on wrong advice. Their actions were not done with any *mala fides*, and I should note further that there is no likelihood that there would be any need for specific deterrence, having regard to the fact that this penalty should serve to reinforce in the mind of the respondent the nature of the contravention.

117. I have come to the view that an appropriate 'base penalty' is 20 per cent of the maximum (60 penalty units).

118. So far as the second s.351 FW Act contravention is concerned, as I have earlier noted, the common principle informing that contravention was the understanding in relation to retirement age and, accordingly, an appropriate penalty of 30 penalty units ought to be imposed.

119. In my view, the record keeping contraventions are the more egregious. They are particularly concerning given that the respondents employ over a hundred employees. They more commonly arise and represent the greatest potential for harm and I think that a clear message needs to be sent to the industry at large to caution employers about their obligations to employees. To send such a message will also remind employers of the need to keep abreast of developments in workplaces relations, if necessary through the agency of those that advise them, and will remind them of the need to have advisers with appropriate skills and knowledge.

120. In relation to the combined r.19.12/s.535 contravention, I consider penalties of 120 penalty units for the first contravention and 60 penalty units for the second contravention to be appropriate.

121. Adopting those base penalty units across to the second and Third Respondents proportionately, that would be 12 penalty units for the first contravention, 6 penalty units for the second, 24 penalty units for the third, and 12 penalty units for the fourth. I note that that gives a value of $29,700.00 for contraventions against the First Respondent, $5940.00 against the Second Respondent, and $5940.00 against the Third Respondent.

Penalty amounts

122. When one has regard to the totality approach referred to by Gilmour J, I have come to the view that 70 per cent of the base penalty ought be applied. That would result in the following penalty awards:

- first s.351 contravention – 42 penalty units ($4,620.00);
- second s.351 contravention – 21 penalty units ($2,310.00);
- r.19.12/s.535 contravention – 84 penalty units ($9,240.00); and
- second s.535 contravention – 42 penalty units ($4,620.00).

123. When taken across to the Second and Third respondents, and allowing for some minor adjustments for fractions and rounding as appropriate, the penalties for the Second and Third respondents shall be:

- first s.351 contravention – 8 penalty units ($880.00);
- second s.351 contravention – 4 penalty units ($440.00);
- r.19.12/s.535 contravention – 17 penalty units ($1,870.00); and
- second s.535 contravention – 9 penalty units ($990.00).

124. That amounts to penalties of $20,790.00 against the First Respondent, $4,180.00 against the Second Respondent and $4,180.00 against the Third Respondent. Those figures roughly equate with the total value of the penalties that would otherwise be imposed upon the First Respondent at the base rate.

125. I will otherwise make declarations in accordance with the draft minute of order which was handed up at the end of submissions.

I certify that the preceding one hundred and twenty-five (125) paragraphs are a true copy of the reasons for judgment of Judge Burnett

Date: 16 October 2014

Annexure A

First Respondent			
Contravention	Max penalties	Proposed penalty %	Proposed penalty amount
Section 351(1) FW Act – the employer took adverse action against Mr Lee by dismissing him because of his age	$33,000.00	80%	$26,400.00
Section 351(1) FW Act – the employer took adverse action against Mr Lee by altering his position to his prejudice by refusing the communicate further with him about his employment because of his age	$33,000.00	80%	$26,400.00
Failure to make and keep records relating to leave under r.19.12 WR Act	$5,500.00	40%	$6,600.00
Section 535 FW Act – that the employer failed to make and keep for seven years records that set out the balance of Mr Lee's entitlement to leave from time to time in accordance with r.3.36(1)(b) FW Regulations	$16,500.00		
Total	$99,000.00		$62,700.00
Second Respondent			
The Second Respondent was involved in the contravention of s.351(1) FW Act – the employer took adverse action against Mr Lee by dismissing him because of his age	$6,600.00	80%	$5,280.00
The Second Respondent was involved in the contravention of s.351(1) FW Act – the employer took adverse action against Mr Lee by altering his position to his prejudice by refusing the communicate further with him about his employment because of his age	$6,600.00	80%	$5,280.00
The Second Respondent was involved in the failure to make and keep records relating to	$1,100.00	40%	$1,320.00

leave under r.19.12 WR Act			
The Second Respondent was involved in the contravention of s.535 FW Act that the employer failed to make and keep for seven years records that set out the balance of Mr Lee's entitlement to leave from time to time in accordance with r.3.36(1)(b) FW Regulations	$3,300.00		
The Second Respondent was involved in the failure to make and keep records relating to the termination of Mr Lee's employment under s.535 FW Act	$3,300.00	20%	$660.00
Total	$19,800.00		$12,540.00
Third Respondent			
The Third Respondent was involved in the contravention of s.351(1) FW Act – the employer took adverse action against Mr Lee by dismissing him because of his age	$6,600.00	80%	$5,280.00
The Third Respondent was involved in the contravention of s.351(1) FW Act – the employer took adverse action against Mr Lee by altering his position to his prejudice by refusing to communicate further with him about his employment because of his age	$6,600.00	80%	$5,280.00
The Third Respondent was involved in the failure to make and keep records relating to leave under r.19.12 WR Act	$1,100.00	40%	$1,320.00
The Third Respondent was involved in the contravention of s.535 FW Act that the employer failed to make and keep for seven years records that set out the balance of Mr Lee's entitlement to leave from time to time in accordance with r.3.36(1)(b) FW Regulations	$3,300.00		

The Third Respondent was involved in the failure to make and keep records relating to the termination of Mr Lee's employment under s.535 FW Act	$3,300.00	20%	$660.00
Total	$19,800.00		$12,540.00