

# FEDERAL CIRCUIT COURT OF AUSTRALIA

*FAIR WORK OMBUDSMAN v TIMRYL PTY LTD &  
ANOR*

[2014] FCCA 382

Catchwords:

INDUSTRIAL LAW – Fair Work – awarding penalties under the *Fair Work Act 2009* – consideration of factors relevant to the amount of penalty.

Legislation:

*Fair Work Act 2009*, s.345

*Corporations Act 2001*, s.553B

*Workplace Relations Act 1996*, s.719

*Bankruptcy Act 1966*

*Superannuation Guarantee (Administration) Act 1992*

Cases cited:

*Mason v Harrington Corporation Pty Ltd (trading as Pangaea Restaurant and Bar)* [2007] FMCA 7

*Dwelly v Timryl Pty Ltd* (unreported decision of Chambers M, 24 March 2009, number XC00344391)

*Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor* [2012] FMCA 258

*Fair Work Ombudsman v Orwill Pty Ltd & Ors* [2011] FMCA 730

*Fair Work Ombudsman v Hongyun, Chinese Restaurant Pty Ltd (In Liquidation) & Ors* [2013] FCCA 52

*Mathers & Anor v Commonwealth of Australia* [2004] FCA 217; (2004) 22 ACLC 624; (2004) 134 FCR 135

*Cotis v Macpherson* [2007] FMCA 2060; (2007) 169 IR 30

Applicant: FAIR WORK OMBUDSMAN

First Respondent: TIMRYL PTY LTD

Second Respondent: MARK SICILIANO

File Number: MLG 614 of 2012

Judgment of: Judge Riethmuller

Hearing date: 28 October 2013

Date of Last Submission: 28 October 2013

Delivered at: Melbourne

Delivered on: 7 March 2014

## **REPRESENTATION**

Counsel for the Applicant: Ms Richards S.C

Solicitors for the Applicant: Office of the Fair Work Ombudsman

Counsel for the Respondents: There being no appearance by or on behalf of the Respondents.

## **ORDERS**

### **THE COURT DECLARES THAT:**

- (1) The Second Respondent was involved in the following breaches:
  - (a) Sections 44, 45, 90, 99, 116, 323(1), 344(e), 345(1), 535(1) and 536(1) of the *Fair Work Act 2009* (Cth); and
  - (b) Clauses A.2.3 and A.25 of Schedule A, 23.1, 24.2, 27.1(a) and 29.3(a) of the *Clerical and Administrative Employees (Victoria) Award 1999 [AP773032]*.

### **THE COURT ORDERS THAT:**

- (2) Pursuant to section 546(1) of the *Fair Work Act 2009* (Cth), the Second Respondent pay into the Consolidated Revenue Fund of the Commonwealth a penalty of \$60,000 for breaching the *Fair Work Act 2009* (Cth) and the *Clerical and Administrative Employees (Victoria) Award 1999 [AP773032]*.
- (3) Payment of the pecuniary penalties referred in order-2 above be made within 60 days.

- (4) Pursuant to section 545(1) of the *Fair Work Act 2009*, the Commonwealth pay to a superannuation fund nominated by the **employee**, [Ms C], the sum of \$2,358.36 from the penalties that are recovered from the Second Respondent.

**FEDERAL CIRCUIT COURT  
OF AUSTRALIA  
AT MELBOURNE**

**MLG 614 of 2012**

**FAIR WORK OMBUDSMAN**  
Applicant

And

**TIMRYL PTY LTD**  
First Respondent

**MARK SICILIANO**  
Second Respondent

**REASONS FOR JUDGMENT  
AS CORRECTED**

1. The Applicant, in this case, the Fair Work Ombudsman, seeks the imposition of penalties for contraventions that arose with respect to the employment of Ms C by Universal Bakery (the first respondent), between April 2010 and February 2011, when Ms C was employed as a clerical assistant. The First Respondent operates a commercial bakery in Victoria. The Second Respondent is a director and shareholder of the First Respondent and responsible for the overall management of the business.
2. The maximum penalties that may be imposed, under various sections breached (other than ss.535(1) and 536(1)), are \$33,000 for each breach. For ss.535(1) and 536(1), the maximum penalty is \$16,500 for each breach. With respect to Mr Siciliano, as an individual, the maximum penalty for the breaches of the various sections, (again, other than ss.535 to 536), is \$6,600, and with respect to the latter two sections, \$3,300.

3. The Applicant suggests grouping the contraventions, as some of the contraventions involve a course of conduct. The first course of conduct is the failure to pay Ms C any wages with respect to three distinct pay periods. The second is the making of unlawful deductions, on the basis of her making mistakes performing the work, on eight separate occasions. The third course of conduct is the failure to pay Ms C the correct base rate of pay, and the fourth being the failure to make the correct payments for annual leave.
4. On this basis the maximum penalties payable by the business would be \$396,000, and by the individual, \$72,600. For convenience, I attach a copy of the schedule prepared by the Applicant setting out the breaches and ranges calculated by them.

**Annexure A - Penalties sought for Universal Bakery**

1	2	3	4	5	6	7	8	9
Provision	Description	Maximum penalty	Group #	Groupings	Maximum grouped penalty	Penalty range	Low penalty range	High penalty range
s 323 FW Act	Wages in full monthly	\$33,000	1	Wage frequency	\$33,000	60 to 80%	\$19,800	\$26,400
cl 23.1 Award	Wages weekly	\$33,000						
cl A.2.3 Award	Minimum wage	\$33,000	2	Base rate of pay	\$33,000	60 to 80%	\$19,800	\$26,400
cl A.2.5 Award	Minimum wage	\$33,000						
s 99 FW Act	Personal leave	\$33,000	3	Personal Leave	\$33,000	60 to 70%	\$19,800	\$23,100
s 116 FW Act	Public holidays	\$33,000	4	Public holiday	\$33,000	60 to 70%	\$19,800	\$23,100
s 90(1) FW Act	Annual Leave	\$33,000	5	Annual leave	\$33,000	60 to 80%	\$19,800	\$26,400
cl 29.3(a) Award	Annual leave loading	\$33,000						
cl 27.1(a) Award	Overtime	\$33,000	6	Overtime contraventions	\$33,000	60 to 80%	\$19,800	\$26,400
s 90(2) FW Act	Annual leave on termination	\$33,000	7	Annual leave on termination	\$33,000	60 to 80%	\$19,800	\$26,400
cl 24.2 Award	Superannuation	\$33,000	8	Superannuation contravention	\$33,000	60 to 80%	\$19,800	\$26,400
s 323(1) FW Act	Deductions	\$33,000	9	Deductions contraventions	\$33,000	60 to 80%	\$19,800	\$26,400
s 344(e) FW Act	Undue influence/pressure	\$33,000	10	Undue influence or pressure	\$33,000	60 to 80%	\$19,800	\$26,400
s 345(1)(a) FW Act	Misrepresentation	\$33,000	11	Misrepresentation	\$33,000	60 to 80%	\$19,800	\$26,400
s 535(1) FW Act	Record keeping	\$16,500	12	Record keeping	\$16,500	60 to 80%	\$9,900	\$13,200
s 536(1) FW Act	Pay slips	\$16,500	13	Payslip contraventions	\$16,500	60 to 80%	\$9,900	\$13,200
<b>Total</b>		<b>\$495,000</b>			<b>\$396,000</b>		<b>\$237,600</b>	<b>\$310,200</b>

**Annexure B - Penalties sought for Mr Siciliano**

1	2	3	4	5	6	7	8	9
Provision	Description	Maximum penalty	Group #	Groupings	Maximum grouped penalty	Penalty range	60% of maximum penalty	80% of maximum penalty
s 323 FW Act	Wages in full monthly	\$6,600	1	Wage frequency	\$6,600	60 to 80%	\$3,960	\$5,280
cl 23.1 Award	Wages weekly	\$6,600						
cl A.2.3 Award	Minimum wage	\$6,600	2	Base rate of pay	\$6,600	60 to 80%	\$3,960	\$5,280
cl A.2.5 Award	Minimum wage	\$6,600						
s 99 FW Act	Personal leave	\$6,600	3	Personal Leave	\$6,600	60 to 70%	\$3,960	\$4,620
s 116 FW Act	Public holidays	\$6,600	4	Public holiday	\$6,600	60 to 70%	\$3,960	\$4,620
s 90(1) FW Act	Annual Leave	\$6,600	5	Annual leave	\$6,600	60 to 80%	\$3,960	\$5,280
cl 29.3(a) Award	Annual leave loading	\$6,600						
cl 27.1(a) Award	Overtime	\$6,600	6	Overtime	\$6,600	60 to 80%	\$3,960	\$5,280
s 90(2) FW Act	Annual leave on termination	\$6,600	7	Annual leave on termination	\$6,600	60 to 80%	\$3,960	\$5,280
cl 24.2 Award	Superannuation	\$6,600	8	Superannuation	\$6,600	60 to 80%	\$3,960	\$5,280
s 323(1).FW Act	Deductions	\$6,600	9	Deductions	\$6,600	60 to 80%	\$3,960	\$5,280
s 344(e) FW Act	Undue influence/pressure	\$6,600	10	Undue influence or pressure	\$6,600	60 to 80%	\$3,960	\$5,280
s 535(1) FW Act	Record keeping	\$3,300	11	Record keeping	\$3,300	60 to 80%	\$1,980	\$2,640
s 536(1) FW Act	Pay slips	\$3,300	12	Payslip	\$3,300	60 to 80%	\$1,980	\$2,640
<b>Total</b>		<b>\$92,400</b>			<b>\$72,600</b>		<b>\$43,560</b>	<b>\$56,760</b>

5. It appears to me that, in the circumstances, this is a reasonable approach to ensure that the penalty is imposed upon the substance of the conduct engaged in by the respondents. In *Mason v Harrington Corporation Pty Ltd (trading as Pangaea Restaurant and Bar)* [2007] FMCA 7, Mowbray FM set out a number of factors that would ordinarily be considered in order to determine an appropriate penalty. I have adopted his Honour's list, noting that it does not limit the relevant factors, but simply identifies factors that would ordinarily be relevant.

**Circumstances in which the conduct took place and the nature and extent of the conduct.**

6. Here, the conduct occurred between April 2010 and February 2011. The employee was employed to work as a clerical officer in the business, taking orders from clients and collating those orders. The

employee resigned in February 2011 and filed a complaint with the applicant with respect to the underpayment of wages. The underpayments were not insignificant in this case, including:

- a) failing to pay the employee the correct base rate of pay (which also gave rise to multiple contraventions with respect to annual leave, leave loading, personal leave entitlements et cetera);
  - b) failing to pay wages weekly or fortnightly;
  - c) non-payment with respect to three discreet weeks of work;
  - d) failing to pay superannuation contributions; and
  - e) failing to pay accrued annual leave entitlements upon termination.
7. The employer made a number of deductions from the employee's wages to cover costs of errors it was said she made when collating customer orders. This was not permitted by the Act, nor was it authorised in writing by the employee. The events, with respect to under-payment, show a significant course of conduct undermining the employee's entitlements.
8. The employer also misrepresented that that it was able to lawfully employ the employee upon the terms set out in her terms and conditions of employment. The terms fell below the lawful minimum entitlements under the Award, under the Fair Work Act, that were nonetheless presented by the employer to the employee. At best, this must have been reckless conduct in that in *Dwelly v Timryl Pty Ltd* (unreported decision of Chambers M, 24 March 2009, number XC00344391), the company was successfully prosecuted for its failure to pay minimum statutory entitlements to clerical employees, on occasions, before the employment of this employee. Section 345 of the *Fair Work Act 2009* provides:

**345. Misrepresentations**

*(1) A person must not knowingly or recklessly make a false or misleading representation about:*

*(a) the workplace rights of another person; or*

*(b) the exercise, or the effect of the exercise, of a workplace right by another person.*

*(2) Subsection (1) does not apply if the person to whom the representation is made would not be expected to rely on it.*

9. The clear purpose of this section is to oblige employers to ensure that they do not knowingly or recklessly misrepresent the minimum entitlements to employees, particularly given the power imbalance in the employment relationship that is usually present between employers and employees.
10. This was not a case involving a sophisticated employee, or one who was represented by a capable industrial advocate or union. As a result, she has accepted employment on conditions below the minimum lawful entitlements, believing that she had to accept the terms if she wanted the job.

### **Undue influence and pressure**

11. During the course of the employee's employment, she made mistakes when collating orders from clients. As a result of an implied threat that her employment would be terminated, she orally agreed to have the cost of her errors deducted from the wages payable to her. It seems clear that this agreement was only reached under at least an implied threat of terminating her employment, and therefore, as a result of the power imbalance between the employer and employee. The employer, in this case, has not sought to dispute these claims or challenge these allegations.

### **Recording keeping and payslip contraventions**

12. The employer, in this case, failed to issue payslips to the employee, despite being specifically asked for them. As I have said in an earlier decision, *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor* [2012] FMCA 258 at 67, the failure to issue payslips dis-empowers employees, “creating a structure within which breaches of the industrial laws can easily be perpetrated”.

13. In this case, the result was that the employee had difficulty in determining whether or not she was receiving her correct entitlements or indeed, being paid at all. It was pointed out by Lucev FM, as his Honour then was, in *Fair Work Ombudsman v Orwill Pty Ltd & Ors* [2011] FMCA 730 at 21 that the failure to create payslips also impedes investigations to determine whether or not there are breaches of the Act occurring.
14. In the context of a case involving an employer who had previously been successfully prosecuted for breaches of the Act, the failure to provide payslips appears to me to be a serious breach by the employer.

### **The nature and extent of the loss or damage**

15. The employee was underpaid a total of \$9,012.65 over a 10-month period. This is a significant underpayment for an employee in a clerical position. Whilst the wages underpayment appears to have been rectified, (by paying the after tax amounts to the employee), the superannuation contributions of \$2,358.36 have not yet been paid. It is not suggested that any interest was paid to the employee to recompense her for being held out of her wages for a significant period of time. Not surprisingly, given the modest income the employee was earning from this position, she has had difficulty paying bills and meeting expenses as a result of the late payment of wages.

### **Similar conduct**

16. Unfortunately, Universal Bakery (Timryl Pty Ltd), under the management of Mr Siciliano, has had a significant history of underpaying employees. It has been the subject of adverse findings, in the Magistrates Court of Victoria, with respect to a clerical employee and three full-time truck drivers. In August of 2011, the Federal Magistrates Court determined that the same business underpaid a delivery driver in 2008. Between February and December 2010 the relevant authority was corresponding with Mr Siciliano concerning the delivery driver's complaint, a time at which this employee was working for the business.

17. In addition to the judicial determinations, there have been a number of complaints made concerning Universal Bakery, which resulted in action being taken by inspectors to recover underpayments, each one being resolved when Universal Bakery rectified the underpayment. The evidence shows that Mr Siciliano was the point of contact with inspectors for five of the six prior complaints, that he provided records to the inspectors in one of the six prior complaints, and was directly responsible for rectifying at least one of the underpayments in that he signed the cheque.
18. In the circumstances of the case, I accept that the First Respondent has a significant prior history, and that the Second Respondent has been significantly involved in that. This is a significant factor when I consider the question of penalty.

### **Course of conduct**

19. I have set out above my views with respect to the course of conduct and the approach that I propose to take, which reduces the overall maximum penalty that would otherwise possibly be imposed.

### **The size of the business**

20. In this case, there is no specific evidence as to the exact size of the business, however it must be of reasonable size given that there have been a number of claims with respect to full-time truck drivers working with the business and there are clerical staff. It does not appear that this could be said to be a small business where there may only be one or two staff members. Nor is this a new or fledgling business that may have made errors in establishing its systems, given that it has been incorporated since 1980 and that Mr Siciliano has been a director of the First Respondent since 1995.

### **Whether breaches are deliberate**

21. A long history of complaints about the business and non-compliance indicates that, at best, the business takes a reckless attitude to employee entitlements, and at worst, sets out to take advantage of those in need of employment, who are working in positions where they are least

likely to have the skills and support necessary to ensure their workplace rights are enjoyed by them. As Judge Riley has pointed out, in *Fair Work Ombudsman v Hongyun, Chinese Restaurant Pty Ltd (In Liquidation) & Ors* [2013] FCCA 52 at 35, "...it is incumbent upon employers to make all necessary enquiries to ascertain their employees' proper entitlements and pay their employees at the proper rates."

22. In this case, it must have been apparent to Mr Siciliano, (the relevant person in the employer's company), that there was a serious problem with respect to identifying the proper entitlements and the workplace rights of employees, given the number of actions and complaints that had been made prior to this particular incident. This could not be said to be a case where the employer had simply overlooked, or even negligently failed to ensure that their obligations to the employee were fulfilled.
23. There is no evidence in this case that the respondents took any steps, whatsoever, to ensure that the employee was receiving her correct entitlements, even though they were already the subject of a number of complaints and investigations with respect to employee entitlements. It is difficult not to conclude that the employer's attitude in this case was simply cavalier if not exploitative.

### **Involvement of senior management**

24. It is clear that Mr Siciliano was directly involved in the breaches relating to this employee. He processed her pays, wrote her cheques, and even paid her in cash when wages were not paid on time. He spoke to her on a number of occasions about outstanding wages, and received her resignation. The evidence is that he was the "hands and brains" of the business. It was Mr Siciliano who impliedly threatened to terminate her employment if she did not agree to deductions from her wages, leading to the undue influence contravention.

### **Contrition, corrective action and cooperation**

25. Nothing indicates that there has been any contrition on the part of the respondents. However, I do take into account the corrective action in

making the payments that were due, although the superannuation remains unpaid.

### **Deterrence**

26. It appears clear that in this case there is a need for specific deterrence. It is also important that in cases of this type, where there is repetition of contravening conduct with respect to a number of employees, that the penalty provides an appropriate deterrent to those who may not take the requirements seriously, even after previous penalties.

### **Admissions in this case**

27. Limited admissions were made by the First Respondent and no admissions were made by the Second Respondent. The matter was listed for hearing to determine liability, at which point the Applicant filed submissions and evidence. The respondents took no part in the proceedings and ultimately the proceedings ended with default judgment.
28. There was limited cooperation with authorities and limited production of documents that were requested for the investigation.

### **Considering penalties as a whole**

29. I take into account that I must consider the penalties in totality to determine the penalty that is appropriate, given the gravity of the circumstances of this case, but not a penalty that is crushing or oppressive.
30. Unfortunately, no information has been filed with respect to the financial circumstances of either the business or Mr Siciliano. It was raised in argument that the business may be the subject of proceedings, seeking that the company be wound up in the Supreme Court, but there is no evidence of this.
31. The First Respondent may soon be placed into liquidation. I have no evidence as to the debts of the First Respondent, and in particular whether there are both arm's length creditors and creditors who are

persons or entities associated with the First Respondent, its directors or shareholders. If the penalty had the effect of reducing the funds available to arm's length creditors, it seems to me it would be inappropriate as it would effectively just be a penalty upon other employees or creditors such as suppliers.

32. Fortunately, this potential problem is overcome by s.553B of the *Corporations Act 2001* which provides:

***553B Insolvent companies--penalties and fines not generally provable***

*(1) Subject to subsection (2), penalties or fines imposed by a court in respect of an offence against a law are not admissible to proof against an insolvent company.*

*(2) An amount payable under a pecuniary penalty order, or an interstate pecuniary penalty order, within the meaning of the Proceeds of Crime Act 1987, is admissible to proof against an insolvent company.*

33. An offence against a law has been found to include a Trade Practices Act civil penalty: see *Mathers & Anor v Commonwealth of Australia* [2004] FCA 217; (2004) 22 ACLC 624; (2004) 134 FCR 135 at [24] – [29]. *Mather's* case was applied under s.719 of the *Workplace Relations Act 1996* and the *Bankruptcy Act 1966* (see *Cotis v Macpherson* [2007] FMCA 2060; (2007) 169 IR 30).

34. In the circumstances, I impose the following penalty:

a) A penalty of \$60,000 upon the Second Respondent.

35. Whilst I would have imposed a penalty of \$300,000 on the First Respondent, the Applicant advises that the First Respondent has been placed into liquidation, thus the proceeding against the First Respondent is automatically stayed.

36. I am satisfied on the material that it is unlikely the employee will receive her superannuation entitlements from the First Respondent. I therefore order that the sum of \$2,358.36 from the fine received from the Second Respondent be paid to a superannuation fund nominated by the employee.

37. As the conduct with respect to the employee's superannuation may also be a breach of the *Superannuation Guarantee (Administration) Act 1992*, I direct that this judgment be referred to the relevant authorities.

---

**I certify that the preceding thirty-seven (37) paragraphs are a true copy of the reasons for judgment of Judge Riethmuller**

Associate:

Date: 11 March 2014

## **CORRECTIONS**

- (1) On page 2 of the Coversheet, the Orders were corrected to remove the declaration which referred to the First Respondent and references to the First Respondent in Order 2.
- (2) On page 3 of the Coversheet, the Orders were corrected to remove references to the First Respondent and a typographical error in Order 4 was corrected.
- (3) On page 6 of the Reasons for Judgment, the references to the First Respondent were removed from para.34 and para.35 was inserted to explain the removal of those references.
- (4) On page 6 of the Reasons for Judgment, the references to the pending liquidation were removed from para.36.