FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v TOTAL PROJECT MARKETING PTY LTD (IN LIQUIDATION) & ORS *[2014] FCCA 451*

Catchwords:
INDUSTRIAL LAW – Application for imposition of pecuniary penalties for breaches of Fair Work Act – grouping of contraventions.

Legislation:
Fair Work Act 2009, ss.12, 90(1), 90(2), 44, 45, 550, 550(1), 546(2), 557(1)
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009, items 5 and 5(3) of Schedule 9, item 5 of Schedule 16, Part 3
Workplace Relations Act 1996, ss.182(1), 183, 204, 208, Division 2, Part 7

Cases cited:
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8
CPSU v Telstra Corporation Limited (2001) 108 IR 228
Dowling v Kirk [2007] FMCA 2106
Flattery v Italian Eatery t/as Zeffirelli's Pizza Restaurant [2007] FMCA 9
Fair Work Ombudsman v Kensington Management Services Pty Ltd (No.2) [2012] FMCA 586
Fair Work Ombudsman v VS Investment Group Pty Ltd & Anor [2013] FCCA 208*Ponzio v B & P Gae/Ii Constructions Pty Ltd* (2007) 158 FCR 543
QR Limited v Communications Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia [2010] FCAFC 150
Seymour v Stawell Timber Industries Pty Ltd (1985) 70 ALR 391

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	TOTAL PROJECT MARKETING PTY LTD (ACN 107 207 812) (IN LIQUIDATION)
Second Respondent:	ADRIAN KEITH PARSONS
Third Respondent:	KAREN NICOLE PARSONS
File Number:	BRG 1144 of 2012
Judgment of:	Judge Jarrett

Hearing date:	4 March 2014
Date of Last Submission:	4 March 2014
Delivered at:	Brisbane
Delivered on:	10 March 2014

REPRESENTATION

Counsel for the Applicant:	Ms Coulthard
Solicitors for the Applicant:	Office of the Fair Work Ombudsman
Counsel for the Second and Third Respondents:	Mr Dwyer
Solicitors for the Second and Third Respondents:	Thynne & Macartney

ORDERS

THE COURT DECLARES THAT:

(1) The second respondent was involved in the contraventions declared on 6 May, 2013 to have been committed by the first respondent within the meaning of s.550(2) of the *Fair Work Act 2009* (Cth);

(2) The third respondent was involved in the contraventions declared on 6 May, 2013 to have been committed by the first respondent within the meaning of s.550(2) of the *Fair Work Act 2009* (Cth);

THE COURT ORDERS THAT:

(3) Pursuant to s.546(1) of the Fair Work Act the second respondent pay penalties totalling $28,000 for his involvement in the contraventions set out in the declarations made on 6 May, 2013 (as amended on 4 March, 2014);

(4) Pursuant to s.546(1) of the Fair Work Act that the third respondent pay penalties totalling $28,000 for her involvement in the contraventions set out in the declarations made on 6 May, 2013 (as amended on 4 March, 2014); and

(5) The penalties imposed on the second and third respondent be paid within twenty-eight days of the date of the order to the Commonwealth Consolidated Revenue Fund.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT BRISBANE

BRG 1144 of 2012

FAIR WORK OMBUDSMAN
Applicant

And

TOTAL PROJECT MARKETING PTY LTD (ACN 107 207 812) (IN LIQUIDATION)
First Respondent

ADRIAN KEITH PARSONS
Second Respondent

KAREN NICOLE PARSONS
Third Respondent

REASONS FOR JUDGMENT

1. On 6 May 2013, I declared that:

1) The First Respondent contravened:

a) item 5 of schedule 16 of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (subsection 182(1) of the Workplace Relations Act 1996), by failing to comply with the transitional Australian Pay and Classification Scale derived from the Property Sales Award Queensland – State 2005 to pay Donna Evans and Robyn Frohlich at least the guaranteed basic periodic rate of pay;

*b) the First Respondent contravened the following provisions of the Fair Work Act 2009 (Cth) (**FW Act**):*

*i) section 45 of the FW Act, by failing to comply with clause 14 of the Real Estate Industry Award 2010 (**Modern***

Award*) by failing to pay Donna Evans, Robyn Frohlich and Katrina Carroll (then known as Katrina Collyer) at least the minimum wage;*

ii) section 45 of the FW Act, by failing to comply with clause 17 of the Modern Award by failing to pay Donna Evans and Katrina Carroll their commission entitlements;

iii) section 44 of the FW Act, by failing to comply with section 90(1) of the FW Act by failing to pay Robyn Frohlich at least her minimum wage for annual leave taken during employment;

iv) section 44 of the FW Act, by failing to comply with section 90(2) of the FW Act by failing to pay Katrina Carroll and Robyn Frohlich at least their minimum wage for annual leave entitlements at termination of their employment;

v) section 44 of the FW Act by failing to comply with clause 25.4 of the Modern Award by failing to pay Robyn Frohlich and Katrina Carroll their annual leave loading and accrued annual leave entitlements upon termination of their employment; and

vi) section 45 of the FW Act, by failing to comply with clause 25.4 of the Modern Award by failing to pay Robyn Frohlich annual leave loading on annual leave taken during her employment.

2. The first respondent had liquidators appointed to it on 6 September, 2013. Accordingly, these proceedings, as far as they relate to the first respondent, are stayed pursuant to s.471B of the *Corporations Act 2001* (Cth).

3. The second and third respondents are alleged to have been involved in the first respondent's contraventions within the meaning of that term as used in s.550(1) of the *Fair Work Act 2009* (Cth). The second and third respondents admit their involvement as alleged by the applicant.

4. These reasons relate to the determination and imposition of pecuniary penalties upon the second and third respondents for the breaches of the first respondent set out above.

Background Facts

5. The first respondent operated a real estate marketing business within Queensland. At varying times the first respondent employed Ms Donna Evans, Ms Katrina Collyer and Ms Robyn Frohlich.

6. The second respondent was the managing director of the first respondent for the period from 28 January, 2003 to 15 July, 2011. He was also the secretary of the first respondent for the period from 28 January, 2003 to 15 July, 2011. He was the sole shareholder of the first respondent. He had control of the day-to-day management of the first respondent and was principally responsible for recruiting and engaging employees, and in particular Ms Evans, Ms Collyer and Ms Frohlich. He was principally responsible for determining the terms and conditions by which employees were engaged by the first respondent.

7. The parties accept that the second respondent was responsible for ensuring that the first respondent complied with its legal obligations to its employees under the Fair Work Act.

8. The third respondent was appointed a director of the first respondent on 15 July, 2011. She was at times responsible for setting employees' rostered hours of work. She communicated with employees about their rosters and annual leave, she was aware of the employee's hours of work, the wages paid to the employees, the wages and commissions which the third respondent believed the employees were entitled to be paid and responsible for administrative duties including the payment of wages and commission to the employees.

9. The parties accept that the third respondent was also responsible for ensuring that the first respondent complied with its legal obligations to its employees under the Fair Work Act.

10. On 23 October, 2009 Ms Donna Evans commenced employment with the first respondent as a Project Sales Consultant in accordance with a letter of appointment dated 23 October, 2009. According to the terms of her engagement, she was to be paid $450.00 per week plus commission. Her duties included:

    a) marketing the sale of units 'off the plan';

b) conducting sales in the relevant display centres;

c) answering and registering client enquiries;

d) registering client interest;

e) facilitating the entering of contracts for purchase;

f) attending inspections with clients;

g) attending settlements;

h) attending sales meetings;

i) attending training sessions;

j) attending property seminars; and

k) writing sales reports.

11. In mid-December, 2009 the second respondent verbally notified Ms Evans that at the beginning of 2010, the first respondent would no longer pay a wage to Ms Evans, but commission only. After 15 January, 2010 the first respondent ceased to pay a wage to Ms Evans but paid an advance to Ms Evans of $450.00 per week against future commissions. At Ms Evans' request, the first respondent ceased payment of the said advance with the final advance made on 8 March, 2010.

12. On or about 14 June, 2010 Ms Evans' resigned her employment.

13. On or about 23 October, 2009 Ms Collyer commenced employment with the first respondent as a Project Sales Consultant in accordance with her letter of appointment dated 26 October, 2009. According to the terms of her engagement, she was to be paid $450.00 per week plus commission. Her duties included:

a) marketing the sale of units 'off the plan';

b) conducting sales in the relevant display centres;

c) answering and registering client enquiries;

d) registering client interest;

e) facilitating the entering of contracts for purchase;

f) attending inspections with clients;

g) attending settlements;

h) attending sales meetings;

i) attending training sessions;

j) attending property seminars; and

k) writing sales reports.

14. On or about 21 January, 2010 Ms Collyer resigned her employment.

15. On 19 November, 2009 Ms Robyn Frohlich commenced employment with the first respondent as Brisbane Sales Manager in accordance with a letter of appointment dated 19 November, 2009. According to the terms of her engagement, she was to be paid $450.00 per week plus commission. Her duties included:

a) marketing the sale of units 'off the plan';

b) conducting sales in the relevant display centres;

c) answering and registering client enquiries;

d) registering client interest;

e) facilitating the entering of contracts for purchase;

f) attending inspections with clients;

g) attending settlements;

h) attending sales meetings;

i) attending training sessions;

j) attending property seminars;

k) writing sales reports;

l) overseeing sales of all Brisbane projects;

m) managing sales staff at the various Brisbane sales offices;

n) training sales staff; and

o) providing weekly reports on all Brisbane projects.

16. Ms Frohlich ceased holding the position and performing the duties of Brisbane Sales Manager on 17 December, 2010. On 18 December 2010, the first respondent appointed Ms Frohlich to the position of Senior Sales Consultant in accordance with a letter of appointment dated 18 December, 2010. During the period from 18 December, 2010 to 8 February, 2011 Ms Frohlich's duties in her new position included:

a) marketing the sale of units 'off the plan';

b) conducting sales in the relevant display centres;

c) answering and registering client enquiries;

d) registering client interest;

e) facilitating the entering of contracts for purchase;

f) attending inspections with clients;

g) attending settlements;

h) attending sales meetings;

i) attending training sessions;

j) attending property seminars;

k) writing sales reports;

l) having responsibility for the onsite sales office at Varsity Lakes;

m) liaising with external agents to complete presentations to their clients; and

n) providing weekly reports.

17. On or about 8 February, 2011 Ms Frohlich resigned her employment with the first respondent.

18. From the commencement of the employment of each of Ms Evans, Ms Collyer and Ms Frohlich to 31 December, 2009 their basic periodic rates of pay were set by the transitional Australian Pay and Classification Scale derived from the *Property Sales Award Queensland – State* 2005. That is so because:

    a) pursuant to item 5 of Schedule 9 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, the first respondent was required to comply with Division 2 of Part 7 of the *Workplace Relations Act 1996* (save for certain exclusions not relevant to these proceedings) in respect of payment of wages to Ms Evans, Ms Collyer and Ms Frohlich;

    b) pursuant to s.208 of the WR Act, the coverage provisions for an Australian Pay and Classification Scale (APCS) derived from a pre-reform wage instrument are the coverage provisions contained within that pre-reform wage instrument; and

    c) the *Property Sales Award Queensland – State 2005* was the pre-reform wage instrument that bound the first respondent immediately before 27 March, 2006.

19. The parties accept that pursuant to s.204 of the WR Act, at all material times the award coverage provisions at clause 1.5 of the *Property Sales Award Queensland – State 2005* applied to Ms Evans and Ms Frohlich as employees and to the first respondent as their employer.

20. The parties also accept that pursuant to item 5(3), part 3 of Schedule 9 of the Transitional Act upon the WR Act repeal day (being 1 July, 2009) the APCS derived from the *Property Sales Award Queensland - State 2005* became a transitional minimum wage instrument as a transitional APCS.

21. Pursuant to clause 1.6.14 of the transitional APCS, the work performed by Ms Evans in the period from 23 October, 2009 to 31 December, 2009 was of a kind covered by the transitional APCS within the classification “Property Sales Person”.

22. Pursuant to clause 1.6.15 of the transitional APCS, the work performed by Ms Frohlich in the period from 19 November, 2009 to 31 December,

2009 was of a kind covered by the transitional APCS within the classification "Property Sales Person (Advanced)".

23. During the period from 23 October, 2009 to 31 December, 2009 and pursuant to s.182(1) of the WR Act, the first respondent was required to pay Ms Evans a basic periodic rate of pay of $14.31 as provided for in the transitional APCS for her guaranteed hours of work.

24. It was a term of Ms Evans' employment stated in the letter of appointment (referred to in paragraph 10 above) that Ms Evans' duties would be performed:

    a) over 5 rostered shifts amounting to 30 hours per week over the 7 day working week; and

    b) outside those times inspect new projects being released and attend client appointments.

25. On a date between 23 October, 2009 and 12 November, 2009 the second respondent orally directed Ms Evans to work more than 30 hours per week in performing her duties. Pursuant to that direction, from 13 November, 2009 to 14 June, 2010 Ms Evans worked at least 38 hours per week for the first respondent.

26. During the period from 23 October, 2009 to 31 December, 2009 Ms Evans worked a total of 318 guaranteed hours being:

    a) 30 guaranteed hours per week between 23 October, 2009 and 12 November, 2009; and

    b) 38 guaranteed hours per week between 13 November, 2009 and 31 December, 2009.

27. Thus, for the period from 23 October, 2009 to 31 December, 2009 Ms Evans was entitled to be paid a total amount of $4,550.58 in respect of her guaranteed hours of work. However, during that period the first respondent only paid her $4,050.00. She was underpaid by $500.58.

28. The parties agree that in that respect the first respondent contravened item 5 of schedule 16 of the Transitional Act (by virtue of contravening s.182(1) of the WR Act).

29. Ms Frohlich was similarly underpaid. During the period from 19 November, 2009 to 31 December, 2009 she was entitled to a basic periodic rate of pay at least equal to the applicable rates in the Transitional APCS for her guaranteed hours of work, determined in accordance with s.183 of the WR Act. For the relevant period she was entitled to be paid $5,238.60 for her guaranteed minimum hours of work. However, she was only paid $5,057.13 by the first respondent. She was underpaid $181.47.

30. The parties agree that in that respect the first respondent contravened item 5 of schedule 16 of the Transitional Act (by virtue of contravening s.182(1) of the WR Act).

31. It is uncontentious that from 1 January, 2010 the first respondent was covered by the *Real Estate Industry Award 2010* in relation to the employment of Ms Evans, Ms Collyer and Ms Frohlich.

32. The work performed by Ms Evans and Ms Collyer in the period from 1 January, 2010 until the cessation of their employment was of a kind covered by the Award and was within the classification "Property Sales Representative". The work performed by Ms Frohlich in the period from 1 January, 2010 to 17 December, 2010 was of a kind covered by the Award and was within the classification "Property Sales Supervisor''. The work performed by Ms Frohlich in the period from 18 December, 2010 to 8 February, 2011 was of a kind covered by the Award and was within the classification "Property Sales Representative".

33. The minimum wage that the first respondent was required to pay Ms Evans from 1 January, 2010 to 14 June, 2010 was $14.31 per hour. During the period from 1 January, 2010 to 14 June, 2010 Ms Evans worked 912 hours for the first respondent. She was entitled to be paid $13,050.72 but she was only paid $2,700.00. She was underpaid $10,350.72.

34. The parties accept that in that respect the first respondent contravened s.45 of the Fair Work Act.

35. During 1 January, 2010 to 21 January, 2010 the parties agree that Ms Collyer worked 105 hours for the first respondent. For that work she

was entitled to be paid $1,502.55 but she was only paid $1,125.00. The first respondent underpaid her by $377.55.

36. The parties agree that in that respect the first respondent contravened s.45 of the Fair Work Act.

37. Ms Frohlich was engaged as a full time employee. During the period from 1 January, 2010 to 8 February, 2011 Ms Frohlich worked a total of 2,150.8 hours. She was entitled to be paid $35,497.85, but she was paid only $33,942.87 by the first respondent. The first respondent underpaid her $1,554.98.

38. The parties agree that in that respect the first respondent contravened s.45 of the Fair Work Act.

39. The parties agree that, by reason of cl.17 of the Award, in addition to the underpayment of basic wages, Ms Evans was entitled to a portion of the commission paid to the first respondent in accordance with her letter of appointment. She was entitled to:

    a) commission on sales in respect of, amongst others, the following projects:

        i) Mon Komo – 1% of the sale price for sales made herself; and

        ii) Petrie on the Park – 1.25% of the sale price;

    b) commission on sales made with another employee (of the first respondent) which would be split 50/50 unless otherwise agreed.

40. The parties agree that Ms Evans was entitled to be paid commissions in respect of the following sales:

    a) Units 802a, 901 and 707 on the Mon Komo project; and

    b) Unit 38 Petrie on the Park.

41. She was also entitled to share in commissions with Ms Frohlich in respect of the sale of units 1003 and 1204 on the Mon Komo project.

42. The parties agree that the first respondent was required to pay Ms Evans commission on the sales referred to above in the sum of

$22,643.75. The first respondent did not pay Ms Evans' any of that commission.

43. The parties agree that in that respect the first respondent contravened s.45 of the Fair Work Act.

44. Similarly, Ms Collyer was entitled to a portion of the commission paid to the first respondent in accordance with her letter of appointment. She was entitled to commission in respect of the sale of unit 403a on the Mon Komo project. She was also entitled to share in commission with Ms Frohlich in respect of the sale of unit 503a on the Mon Komo project. Ms Collyer's share of the commission on those sales totalled $4,346.33. She received none of it from the first respondent.

45. The parties agree that in that respect the first respondent contravened s.45 of the Fair Work Act.

46. Further, the parties agree that during Ms Collyer's employment, the first respondent was required to pay Ms Collyer:

    a) pursuant to s.90(1) of the Fair Work Act, her base rate of pay for her ordinary hours of work during a period of annual leave;

    b) pursuant to clause 25.4 of the Award, a loading of 17.5% of her minimum weekly wage for the annual leave.

47. Pursuant to s.90(2) of the Fair Work Act, on termination of her employment, the first respondent was required to pay Ms Collyer the amount in respect of any accrued but untaken annual leave (plus annual leave loading).

48. As at the termination of Ms Collyer's employment, she had an accrued annual leave balance of 29.4615 hours. The first respondent did not pay her any of her annual leave entitlements when her employment was terminated. She was entitled to a payment of $421.59 in that respect. She was also entitled to $73.78 by way of annual leave loading. She was therefore underpaid $495.37.

49. The parties agree that in that respect the first respondent contravened s.44 of the Fair Work Act.

50. During Ms Frohlich's employment, the first respondent was required to pay Ms Frohlich:

    a) pursuant to s.90(1) of the Fair Work Act, her base rate of pay for her ordinary hours of work during a period of annual leave;

    b) pursuant to cl.25.4 of the Award, a loading of 17.5% of her minimum weekly wage for the annual leave.

51. The parties agree that in contravention of s.90(1) of the Fair Work Act, the first respondent failed to pay Ms Frohlich an amount of $1,035.42 in respect of annual leave taken during her employment. Further, the first respondent failed to pay Ms Frohlich her annual loading in the amount of $181.20.

52. Moreover, at the time of the termination of her employment, Ms Frohlich was entitled to $1,188.29 in respect of accrued but untaken annual leave plus annual leave loading of $207.95. She was underpaid $2,612.86 in respect of these entitlements upon the termination of her employment.

53. The parties agree that in these respects the first respondent contravened s.44 of the Fair Work Act.

Summary of underpayments

Ms Evans

54. By reason of the contraventions set out above, the first respondent underpaid Ms Evans a total of $33,495.05.

55. On 14 June, 2010 Ms Evans terminated her employment with the first respondent without giving the required notice. In accordance with cl.11.2 of the Award, the first respondent was entitled to withhold $543.78 from any monies due to her upon termination.

56. Therefore, the net underpayment to Ms Evans was $32,951.27.

Ms Collyer

57. By reason of the contraventions set out above, the first respondent underpaid Ms Collyer the amount of $5,219.25.

58. On 21 January, 2010 Ms Collyer terminated her employment with the first respondent without giving the required notice. As was the case with Ms Evans, the first respondent was entitled to withhold $418.57 from any monies due because of the failure to give proper notice.

59. Therefore, the net underpayment to Ms Collyer was $4,800.68.

Ms Frohlich

60. By reason of the contraventions set out above the first respondent underpaid Ms Frohlich the amount of $4,349.31.

61. On 8 February, 2011 Ms Frohlich terminated her employment with the first respondent without giving the required notice. As was the case with Ms Evans and Ms Collyer, the first respondent was entitled to withhold $628.90 from any monies due to Ms Frohlich because of the failure to give proper notice.

62. Therefore, the net underpayment to Ms Frohlich was $3,720.41.

63. The total amount that the first respondent underpaid the above three employees is $41,472.36.

64. On 31 October, 2013 the second and third respondents rectified those underpayments and the employees have now received their entitlements.

Consideration

65. The second respondent admits that he:

a) was responsible for ensuring that the first respondent complied with its legal obligations to the employees under the Fair Work Act;

b) was involved in the first respondent's contraventions of the Fair Work Act within the meaning of s.550 of the Fair Work Act; and

c) by way of his acts or omissions, was directly or indirectly knowingly concerned in or a party to, each of the first respondent's contraventions.

66. By reason of s.550(1) of the Fair Work Act, the second respondent is therefore to be treated as having himself engaged in the contraventions.

67. Similarly the third respondent admits that she:

a) was responsible for ensuring that the first respondent complied with its legal obligations to the employees under the Fair Work Act;

b) was involved in the first respondent's contraventions within the meaning of s.550 of the Fair Work Act; and

c) by way of her acts or omissions, was directly or indirectly knowingly concerned in or a party to, each of the first respondent's contraventions.

68. By reason of s.550(1) of the Fair Work Act, the third respondent is therefore to be treated as having herself engaged in the contraventions.

69. The admissions of the second and third respondents carries with them acknowledgments by each of them that they:

a) had knowledge of the essential facts constituting the contraventions;

b) were knowingly concerned in the contraventions; and

c) were intentional participants in the contraventions based on actual knowledge of the essential facts constituting the contraventions although they did not necessarily know that the facts in question constituted the contraventions.

see generally *Dowling v Kirk* [2007] FMCA 2106 at [33].

70. Section 546(2) of the Fair Work Act prescribes the maximum penalty that may be imposed by this Court for each breach of the Fair Work Act to be, in the case of an individual, 60 penalty units.

71. Item 16 of Schedule 16 of the Transitional Act modifies s.546(2) of the Fair Work Act so that the maximum penalty for a breach of item 6 of Schedule 16, in the case of an individual, is also 60 penalty units.

72. Section 12 of the Fair Work Act provides that "penalty unit" has the same meaning as in the *Crimes Act 1914*. For the relevant period, s.4AA of the Crimes Act defined a "penalty unit" to be $110.00.

73. The parties agree that the maximum penalty that may be imposed by the Court, against the second and third respondents for each breach of the Transitional Act and the Fair Work Act is $6,600.

The Contraventions

74. The Applicant submits that there are contraventions of 11 separate provisions by the first respondent, as follows:

a) 2 contraventions of the Transitional Act being the failure to pay Ms Evans and Ms Frohlich the correct rate of pay; and

b) 9 contraventions of the Fair Work Act, being:

i) 3 contraventions of s.45 of the Fair Work Act for failing to pay each of the employees at least the minimum wage in accordance with the Award;

ii) 2 contraventions of s.45 of the Fair Work Act for failing to pay Ms Collyer's and Ms Evans' commission entitlements in accordance with the Award;

iii) 1 contravention of s.44 of the Fair Work Act for failing to pay Ms Frohlich for annual leave taken during her employment in accordance with the National Employment Standard (NES) (s.90(1) of the Fair Work Act);

iv) 1 contravention of s.45 of the Fair Work Act for failing to pay Ms Frohlich annual leave loading in respect of leave taken during her employment, in accordance with clause 25.4 of the Award;

v) 2 contraventions of s.44 of the Fair Work Act for failing to pay Ms Frohlich and Ms Collyer, upon termination of their

employment, an amount in respect of accrued but untaken annual leave that would have been payable had they taken that annual leave, in accordance with the NES (s.90(2) of the Fair Work Act).

75. The second and third respondents agree with the identification of the contraventions set out above. The applicant's submissions and the respondents' concessions are consistent with the declarations made on 6 May, 2013. On the basis of that identification, each party submits that the maximum penalty that might be imposed upon each of the second and third respondents is $72,600.00 each.

76. However, the applicant submits that, in accordance with s.557(1) of the Fair Work Act (as modified by Schedule 16 of the Transitional Act), the following contraventions committed by the respondents arose out of a course of conduct by the first respondent and, as such, each group are to be taken to constitute a single contravention:

a) the 2 contraventions of the Transitional Act (paragraph 34(a) above);

b) the 3 contraventions of s.45 of the Fair Work Act for failing to pay each of the employees at least the minimum wage in accordance with the Award;

c) the 2 contraventions of s.45 of the Fair Work Act for failing to pay Ms Collyer's and Ms Evans' commission entitlements in accordance with the Award; and

d) the 2 contraventions of s.44 of the Fair Work Act for failing to pay Ms Frohlich and Ms Collyer, upon termination of their employment, an amount in respect of accrued but untaken annual leave that would have been payable had they taken that annual leave, in accordance with the NES.

77. The applicant submits, and the respondents accept, that if the Court accepts the above groupings of contraventions, the second and third respondents will each be taken to have committed six contraventions, with a maximum penalty of $39,600.00. However, I do not understand how the contraventions can be properly so grouped according to s.557(1) of the Fair Work Act as submitted by the applicant. Even if I

accepted the applicant's submissions about grouping pursuant to s.557(1) of the Act, it seems that there are only four groups of contraventions, not six. Moreover, the suggested grouping appears inconsistent with the orders sought by the applicant – there are five separate penalties proposed by the applicant in respect of each respondent.

78. In any event, I do not agree with the parties' submissions about the application of s.557(1) of the Fair Work Act. In *Fair Work Ombudsman v VS Investment Group Pty Ltd & Anor* [2013] FCCA 208 I explained:

> *12. The applicant contends, and the second respondent appears to agree, that the second respondent has admitted to a combined total of eleven contraventions of Items 2(1) and 5 of Schedule 16 of the Transitional Act and ss.45, 536 and 712(3) of the Fair Work Act in respect of the employees.*
>
> *13. In my view, however, that is not so. Each contravention must be identified separately and insofar as there has been a failure by the first respondent to pay each of the employees their entitlements under a relevant industrial instrument, there is a contravention. Thus, in respect of each of the 27 employees there is a contravention of the relevant industrial instrument (and legislative provision) each time the first respondent failed to pay to that employee the appropriate and correct basic rate of pay, any casual loading, and any other loadings payable pursuant to that instrument. It is impossible to tell upon the evidence before the Court or the submissions made by the parties just how many contraventions are involved in this case.*
>
> *14. In my view, the approach adopted by the applicant (and accepted by the second respondent) to treat the failure to pay each of the subject employees the basic periodic rates of pay for their classification during December, 2009 (for example) as a single contravention is flawed. In respect of each employee there is a contravention each time the first respondent failed to pay that employee his or her entitlements pursuant to the industrial instruments. Such an approach is consistent with authority: see for example* McIver v Healey [2008] FCA 425, Gibbs v Mayor, Councillors and Citizens of the City of Altona *[1992] FCA 374;(1992) 37 FCR 216:* Fair Work Ombudsman v Praglowski *[2010] FMCA 621 at [49];* Seymour v Stawell Timber Industries

> Pty Ltd *(1985) 9 FCR 241 at 266-267 per Gray J (with whom Northrop J agreed at 245.* Fair Work Ombudsman v Security Protection Services Pty Ltd & Ors *[2010] FMCA 252 at [24] – [38];* Fair Work Ombudsman v Kingsford Carwash Pty Ltd & Anor (No.2) *[2012] FMCA 1210.*

79. So too, in this case, in respect of each of the 3 employees there is a contravention of the relevant industrial instrument (and legislative provision) each time the first respondent failed to pay to that employee the correct basic rate of pay, commission, annual leave entitlements and any loadings. It is impossible to tell upon the evidence before the Court or the submissions made by the parties just how many contraventions are involved in this case.

80. Having said that, when one has recourse to s.557(1) of the Fair Work Act, it becomes clear that the imprecision in the evidence is no bar to the Court performing its task. After erroneously stating that s.557(2) of the Fair Work Act did not apply to Schedule 16 of the Transitional Act (I had no regard to item 16(1)(f) of Schedule 16 to the Transitional Act), in *VS Investments* I attempted to further explain:

> *19. Moreover, in my view s.557(1) does not require the Court to treat the alleged contraventions of s.45 of the Fair Work Act (by failure to pay basic rates of pay for example) in respect of multiple employees, as one contravention. The failure to pay a basic rate of pay to one employee over time might properly be seen as a course of conduct. However, the failure to pay a basic rate of pay to a number of employees should not, in my view, be seen as a "course of conduct" for the purposes of s.557(1) unless it is the result of a single decision made by the employer. The failures to pay basic rates of pay to a number of different employees are several and separate courses of conduct in respect of each employee which is dependent upon the decision made in respect of that employee. So much seems to be accepted by the approach of Marshall J in* McIver v Healey *(above).*
>
> *20. Thus, to the extent that in respect of each employee there has been a failure to pay basic rates of pay, or casual loading, or any other form of loading, I am content to treat those multiple contraventions as a single contravention of each of the relevant requirements in accordance with s.557(1), but it seems to me*

> *inappropriate to treat as one contravention, a failure to pay multiple employees the same type of entitlement.*

81. Applying s.557(1) of the Fair Work Act results in the relevant contraventions in this case being properly grouped as set out in paragraph 74 above. That is to say, there are 11 contraventions to be considered *after* the application of s.557(1) of the Act, not before. Before the application of s.557(1) of the Act, the contraventions are numerous, but the application of s.557(1) means that in respect of each employee, breaches of the same term in respect of the same employee are to be taken as one contravention because those numerous breaches arise out of a course of conduct by the first respondent.

82. In their written submissions, the second and third respondents suggest that multiple breaches of the same term of an award provision, or of the Fair Work Act in respect of multiple employees must be treated as one contravention pursuant to s.557(1). In support of that contention, they point to three authorities. However, the point is best explained by Gray J in *Seymour v Stawell Timber Industries Pty Ltd* (1985) 70 ALR 391 at 416 – 417. That case involved a failure to pay wages, allowances and other money to two apprentices following the appointment of an external administrator to their employer. One of the issues was whether the breaches in respect of the two employees could be aggregated because they were said to arise out of a course of conduct. His Honour said:

> …*Mr Ginnane contended, however, that the breaches with respect to Hughes were to be regarded as having arisen out of a separate course of conduct from those with respect to Miller, and that the court was required to deal with two breaches under s 119(1a). The three cases to which I have just referred do not touch the question whether a separate "course of conduct" exists when an employer is guilty of identical breaches of the same term of an award with respect to more than one employee. In* Jarrad v Melbourne and Metropolitan Tramways Board *(1978) 21 ALR 201 at 209, it was held that the standing down of a number of employees was to be treated as a single breach.* In Townsend v General Motors-Holdens Ltd *(1981) 50 FLR 355a single penalty was imposed in respect of a failure to give proper notice to two employees of a shut-down. It seems to have been assumed that the two breaches had arisen out of a single "course of conduct".* In

> Rowe v Capital Territory Health Commission *(1982) 39 ALR 39 at 65; 62 FLR 383 at 412, it was held that a "course of conduct" did not exist in respect of failure to pay proper wages to two student nurses; the nurses had begun employment in separate years, and were affected by separate decisions of the employer as to the manner in which they would be treated. Keely J expressed the view that: "Any other breaches in respect of student nurses enrolled in the 1980 two-year course would have arisen out of the one course of conduct." This judgment was upheld by a Full Court on appeal, without discussion of this point: see* Rowe v Capital Territory Health Commission *(1982) 2 IR 27. In the present case, the breaches with respect to each of the apprentices arose from a single act by the respondent in purporting to dismiss a number of its employees. That act, and any failure to pay any employee which arose from it, is properly described as a course of conduct, for the purposes of s 119(1a). The court is, therefore, obliged to treat the matter as involving one breach.*

83. In my view, further aggregation under s.557(1) of the Act is not appropriate on the facts of this case, because I am not satisfied that, on the facts agreed between the parties (as distinct from the conclusions that might be drawn from those facts), the treatment of each employee and the breaches relevant to each employee arose out of a course of conduct that affected all three employees such that multiple contraventions concerning more than one employee are to be taken as a single contravention as the parties contend. There is no evidence of a single decision taken in respect of all three employees, or any two employees that would suggest that there was a course of conduct.

84. But that is not the end of the matter. Whereas s.557(1) requires the Court to treat multiple contraventions of the same provision as one contravention in the circumstances set out in that section, there is also a discretion to further aggregate the contraventions to the extent that two or more contraventions have common elements that should be taken into account when considering what is an appropriate penalty in all the circumstances for each contravention or course of conduct. It is open to the Court to group separate contraventions together where those various contraventions may be said to overlap with each other and involve potential punishment of the respondents for the same or similar conduct: *Fair Work Ombudsman v Kensington Management Services Pty Ltd (No.2)* [2012] FMCA 586 at [16] – [19]. The words of Smith FM at [19] in *Kensington* bear repeating:

> *19. The mere presence of a 'course of conduct' for the purposes of the statutory aggregation of contraventions repeated over a period of time usually does not necessarily lead to a further aggregation under this principle,* ***and there is a need to identify something which justifies it****. The authorities clearly hold that the adoption of a further grouping or aggregation of penalties is discretionary (cf. Mornington Inn (supra) at [58]).* In Construction, Forestry, Mining and Energy Union v Cahill *[2010] FCAFC 39, Middleton and Gordon JJ said:*
>
> > [39] As the passages in *Williams* [2009] FCAFC 171; 262 ALR 417 explain, a "course of conduct" or the "one transaction principle" is not a concept peculiar to the industrial context. It is a concept which arises in the criminal context generally and one which may be relevant to the proper exercise of the sentencing discretion. The principle 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. Bare identity of motive for commission of separate offences will seldom suffice to establish the same criminality in separate and distinct offending acts or omissions.**
>
> (my emphasis)

85. I accept the applicant's contention that the contraventions relating to the underpayment of Ms Frohlich's annual leave entitlements and the contraventions relating to the underpayment of Ms Frohlich's annual leave loading have common elements. That is, notwithstanding that they are separate contraventions of particular obligations upon the first respondent, it is clear enough that the failure to pay Ms Frohlich's leave loading arose directly out of the respondents' failure to pay Ms Frohlich for the annual leave that she took during the course of her employment with the first respondent.

86. The applicant submits that the contraventions relating to the underpayment of wages under the Transitional Act and those relating to the underpayment of wages under the Fair Work Act should not be grouped because they do not have common elements and are not part

of a "course of conduct". However, in my view they should be so grouped.

87. The applicant points out that it is sometimes the case that contraventions relating to underpayment of wages only amount to separate contraventions because of the technicality associated with the introduction of the Modern Award system (i.e. because the underpayments that occurred before 1 January, 2010 constitute a breach of a pre-Modern Award, whereas the underpayments that occurred on or after 1 January 2010 constitute a breach of the Modern Award, and therefore cannot be pleaded as a single contravention). In such circumstances, the Court may be minded to group the technically distinct contraventions for the purpose of apportioning penalty, so as to avoid penalising a respondent more than once for what is, in reality, one form of contravening conduct.

88. However, the applicant submits that this case is distinguishable from those circumstances because the underpayments that occurred after the introduction of the Award arose, not out of a continuation of the same pre-Award conduct, but a different course of conduct brought about by the first respondent's unilateral decision to convert Ms Evans and Ms Collyer's wages to an "advance" on commissions. I accept those submissions.

89. There is nothing in the submission of either the applicant or the respondent that attempts to identify the matters which justify the further aggregation of the contraventions identified by me into the six (or five) groups identified by the parties. I am not persuaded that the contraventions identified by me should be further aggregated.

90. In any event, whilst it is seemingly appropriate to "group" contraventions together to be dealt with in a way so as to ensure that the same criminality is not punished twice, that is not the same as grouping them together to be dealt with as a single contravention. In *QR Limited v Communications Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2010] FCAFC 150 Keane CJ and Marshall J said:

> *49. Even if s557(2) does not apply to a case to oblige to treat as one contravention all the consequences of a particular piece of*

*conduct, it is open to the Court, in an appropriate case, to take into account, as a matter of discretion, the circumstance that the same acts or omissions have resulted in multiple contraventions by multiple breaches of a term cast in similar language in each of multiple agreements, by imposing a lesser penalty or even no penalty in respect of breaches of some terms, while imposing a substantial penalty in respect of breaches of other terms (*Gibbs v Mayor, Councillors and Citizens of Altona *[1992] FCA 374; (1992) 37 FCR 216 at 233;* Kelly v Fitzpatrick *[2007] FCA 1080; (2007) 166 IR 14 at 17).*

91. According to that passage, the multiple contraventions that arise out of the same acts or omissions do not lose their character as separate and distinct contraventions (i.e., they are not grouped as a "single" contravention), but rather for the purpose of imposing a penalty, some might attract a greater or lesser penalty depending upon the circumstances of the case.

92. In my view, the contraventions that should be the subject of separate penalty are as follows:

a) 2 contraventions of the Transitional Act being the failure to pay Ms Evans and Ms Frohlich the correct rate of pay; and

b) 9 contraventions of the Fair Work Act, being:

i) 3 contraventions of s.45 of the Fair Work Act for failing to pay each of the employees at least the minimum wage in accordance with the Award;

ii) 2 contraventions of s.45 of the Fair Work Act for failing to pay Ms Collyer's and Ms Evans' commission entitlements in accordance with the Award;

iii) 1 contravention of s.44 of the Fair Work Act for failing to pay Ms Frohlich for annual leave taken during her employment in accordance with the National Employment Standard (NES) (s.90(1) of the Fair Work Act);

iv) 1 contravention of s.45 of the Fair Work Act for failing to pay Ms Frohlich annual leave loading in respect of leave taken during her employment, in accordance with clause 25.4 of the Award;

v) 2 contraventions of s.44 of the Fair Work Act for failing to pay Ms Frohlich and Ms Collyer, upon termination of their employment, an amount in respect of accrued but untaken annual leave that would have been payable had they taken that annual leave, in accordance with the NES (s.90(2) of the Fair Work Act).

Circumstances relevant to penalty

93. The second and third respondents have admitted that they were each responsible for ensuring that the first respondent complied with its legal obligations to its employees under the Fair Work Act. Prior to the introduction of the Award on 1 January, 2010, Ms Evans and Ms Frohlich were paid a weekly wage less than their respective entitlements under the transitional APCS. There is no explanation in the evidence or the statement of agreed facts as to why that occurred.

94. In mid-January, 2010 the first respondent altered the terms of employment of Ms Evans and Ms Collyer by offsetting their weekly wages against commissions earned and to be earned and reducing the rate of commission they would earn on the Mon Komo Project (from 1% to 0.75% on the first $2,000,000 of sales in a calendar month). The second respondent communicated this alteration to Ms Evans and Ms Collyer. There is no explanation in the evidence or the statement of agreed facts as to why that occurred.

95. From 1 January, 2011 the first respondent also altered Ms Frohlich's terms of employment such that her wage became "conditional" upon her achieving key performance indicators. The second respondent communicated this alteration to Ms Frohlich. There is no explanation in the evidence or the statement of agreed facts as to why that occurred.

96. I accept the applicant's submissions that there is no evidence to suggest that the conduct took place in any circumstances other than the second and third respondents seeking to increase the profitability of the first respondent, at the expense of its employees. I also accept that there is no evidence to suggest that the conduct would not have continued if

each of the employees had not resigned (as they did) from their employment.

97. The changes to the terms of Ms Evans', Ms Collyer's and Ms Frohlich's employment were imposed unilaterally by the respondents. Ms Evans and Ms Collyer did not agree to them. The new arrangements for Ms Frohlich unlawfully made her wage conditional upon her achieving performance indicators. The first respondent did not enter into written agreements with Ms Frohlich regarding the changed commission rates, as required by cl.17 of the Award.

98. The first respondent failed to pay Ms Frohlich and Ms Collyer their leave entitlements under the Award and the NES. I accept that there is nothing to suggest that the first respondent would have rectified this behaviour had the employees remained in their employment.

99. The first respondent's contraventions resulted in total underpayments to the employees of $41,472.36. I accept that the underpayment to Ms Evans is particularly serious because it is a substantial underpayment over a relatively short period of time. The respondents, by their written submissions concede that the breaches are serious. According to the respondents, the contraventions go to the fundamental entitlements of employees covered by both legislation and an award. The contraventions by the respondents continued over the entire period between June, 2009 and February, 2011 in respect of the employment of Ms Evans, Ms Collyer, and Ms Frohlich.

100. The respondents submit that the seriousness of the contraventions in relation to the conversion of Ms Frohlich's employment to a commission only basis is mitigated because:

a) in September, 2010 Ms Frohlich had moved to Kingscliff from Brisbane;

b) this resulted in her having a four hour commute to and from work each day;

c) she subsequently approached the second respondent and secured work with the first respondent on the Gold Coast;

d) a condition of being granted this 'transfer' was the conversion of her wages to commission only employment; and

e) Ms Frohlich appeared to have consented to the variation, albeit a variation not in compliance with the Award.

101. I take those matters into account, however, they are of little moment because they demonstrate that either:

a) the second and third respondents were oblivious to the first respondent's obligations as Ms Frohlich's employer; or

b) they deliberately took advantage of her situation knowing that to act in the way that they did breached the Award.

102. Whilst the second and third respondents submit that there is no evidence tendered by the applicant, nor any allegation that the respondents wilfully and deliberately disregarded their obligations under the Fair Work Act or the Award, I accept that all contraventions the subject of these proceedings were deliberate as they arise from deliberate decisions taken to alter the employees' terms of employment. I do not accept that the second or third respondent deliberately set out to contravene the provision of the Fair Work Act or the award, but that is something which is entirely different to the proposition that the contravening conduct itself was deliberate. I accept the applicant's submission that the evidence supports a finding that the first respondent was motivated to increase its profitability at its employees' expense and that motivated the deliberate actions on its part.

103. The second and third respondents were clearly the decision makers in respect of the offending conduct about which the applicant now complains. The second and third respondents admit that they were each responsible for ensuring that the first respondent complied with its legal obligations to its employees under the Fair Work Act. There is no evidence before the Court that the contraventions were attributable to any other person.

104. The second and third respondents submit that the first respondent's business was a small business without a dedicated human resources officer. I am not sure that is of any particular relevance in this case. The employees of small concerns are just as much entitled to the

protections of the Fair Work Act as are the employees of this country's largest employers. The obligations to comply with the provisions of the Fair Work Act and the relevant industrial instruments fall just as heavily upon the shoulders of the operators of small businesses as they do upon the shoulders of large enterprises.

105. Neither the second nor the third respondents cooperated with the investigation carried out by the applicant in this matter. Neither participated in a recorded interview regarding the allegations raised by the investigation.

106. These proceedings were commenced on 24 December, 2012. It was not until 31 October, 2013 that the second and third respondents finalised the rectification of the total underpayment to Ms Evans, Ms Collyer and Ms Frohlich.

107. It was not until 29 January, 2014 that the applicant and the second and third respondents filed a statement of agreed facts whereby the second and third respondents admitted their involvement in the first respondent's contraventions. That has shortened and assisted the litigation process and reduced costs to the public purse. I take that into account.

108. Otherwise, I accept that there is no evidence of any genuine contrition by the respondents for their contraventions, such as an apology to the employees.

109. Despite the submission of the applicant to the contrary, I am of the view that there should be no discount of any penalty to be imposed upon the respondents by reason of any "cooperation". I am not satisfied that the admission of liability by the second and third respondents is an indication of an acceptance of wrongdoing and a suitable credible expression of regret. There is no explanation as to why rectification of the relevant underpayments took until the end of October, 2013 to be made.

110. The need for specific and general deterrence is a factor that is relevant to the imposition of a penalty. I accept that given the seriousness of the respondents' conduct, there is a particular need for the Court to impose a penalty that will deter the second and third respondents from similar

conduct in the future. That is especially so given that the respondents submit that:

> *17. However, it is submitted that the Court may have judicial notice that the industry in which the respondents and the complainants worked is one where there is commonly disregard for industrial instruments. This is not offered as an excuse, but rather a contextual consideration as to the nature of the contraventions.*

111. The submission also demonstrates the need for the penalty to effect an apparent need for the general deterrence of the common disregard of industrial instruments in the real estate industry. I bear in mind the comments of Lander J in *Ponzio v B & P Gaelli Constructions Pty Ltd* (2007) 158 FCR 543 at [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 103. 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."*

112. Given the second and third respondents' submissions, it seems that "*a clear message needs to be sent to both the [employer] and the industry in general that underpayment of wages will not be tolerated*": *Flattery v Italian Eatery t/as Zeffirelli's Pizza Restaurant* [2007] FMCA 9 at [66]

113. Based upon the groupings I have set out above, the maximum penalty to be imposed upon each respondent is $72,600.00, comprising 11 contraventions with a maximum penalty of $6,600.00 per contravention.

114. In respect of each contravention of the Transitional Act, being the failure to pay Ms Evans and Ms Frohlich the correct rate of pay, given

the matters referred to above, I consider an amount which is 50% of the maximum ($3,300.00) is appropriate.

115. In respect of each of the 3 contraventions of s.45 of the Fair Work Act for failing to pay each of the employees at least the minimum wage in accordance with the Award, I consider an amount which is 50% of the maximum ($3,300.00) is also appropriate.

116. In respect of each of the 2 contraventions of s.45 of the Fair Work Act for failing to pay Ms Collyer's and Ms Evans' commission entitlements in accordance with the Award I consider an amount which is 50% of the maximum ($3,300.00) is also appropriate.

117. In respect of each of the contraventions of s.44 of the Fair Work Act for failing to pay Ms Frohlich for annual leave taken during her employment in accordance with the National Employment Standard (NES) (s.90(1) of the Fair Work Act), I consider an amount which is 50% of the maximum ($3,300.00) is appropriate. I consider that no further penalty is appropriate in respect of the contravention of s.45 of the Fair Work Act for failing to pay Ms Frohlich annual leave loading in respect of leave taken during her employment, in accordance with clause 25.4 of the Award.

118. In respect of each of the 2 contraventions of s.44 of the Fair Work Act for failing to pay Ms Frohlich and Ms Collyer upon termination of their employment, an amount in respect of accrued but untaken annual leave that would have been payable had they taken that annual leave, in accordance with the NES (s.90(2) of the Fair Work Act), I consider an amount which is 50% of the maximum ($3,300.00) is appropriate.

Summary of Penalties

119. In summary therefore, the penalties in respect of each respondent are:

a) contravention of the Transitional Act being the failure to pay Ms Evans the correct rate of pay – $3,300.00;

b) contravention of the Transitional Act being the failure to pay Ms Frohlich the correct rate of pay – $3,300.00;

c) contravention of s.45 of the Fair Work Act for failing to pay Ms Evans at least the minimum wage in accordance with the Award – $3,300.00;

d) contravention of s.45 of the Fair Work Act for failing to pay Ms Collyer at least the minimum wage in accordance with the Award – $3,300.00;

e) contravention of s.45 of the Fair Work Act for failing to pay Ms Frohlich at least the minimum wage in accordance with the Award – $3,300.00;

f) contravention of s.45 of the Fair Work Act for failing to pay Ms Evans' commission entitlements in accordance with the Award – $3,300.00;

g) contravention of s.45 of the Fair Work Act for failing to pay Ms Collyer's commission entitlements in accordance with the Award – $3,300.00;

h) contravention of s.44 of the Fair Work Act for failing to pay Ms Frohlich for annual leave taken during her employment in accordance with the National Employment Standard (NES) (s.90(1) of the Fair Work Act) – $3,300.00;

i) contravention of s.45 of the Fair Work Act for failing to pay Ms Frohlich annual leave loading in respect of leave taken during her employment, in accordance with clause 25.4 of the Award – nil;

j) contravention of s.44 of the Fair Work Act for failing to pay Ms Frohlich upon termination of her employment, an amount in respect of accrued but untaken annual leave that would have been payable had she taken that annual leave, in accordance with the NES (s.90(2) of the Fair Work Act) – $3,300.00; and

k) contravention of s.44 of the Fair Work Act for failing to pay Ms Collyer upon termination of her employment, an amount in respect of accrued but untaken annual leave that would have been payable had she taken that annual leave, in accordance with the NES (s.90(2) of the Fair Work Act) – $3,300.00.

120. Having determined an appropriate level of penalty for each of the contraventions, I must now look at the aggregate of those penalties –- $33,000.00 and determine whether that amount is out of proportion to the overall conduct of the respondents.

121. The question is whether the penalty provides an appropriate response to the conduct which led to the breaches: see *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 at [71].

122. A reduction in penalty is not necessarily appropriate The Court must engage in an "instinctive synthesis" and arrive at a figure which should be "just and appropriate": *Australian Ophthalmic Supplies Pty Ltd* (above) at [71].

123. The conduct which led to the breaches occurred over a few months in respect of Ms Collyer, about 6 months in respect of Ms Evans and 20 months in respect of Ms Frohlich. The respondents have filed no evidence to explain their conduct, or that of the first respondent.

124. For the respondents, it is relevant to bear in mind that there is no suggestion of any prior contraventions of the first respondent's industrial obligations. The underpayments have been rectified in full.

125. Having regard to the matters referred to in these reasons, I conclude that a "just and appropriate" total penalty is $28,000.00 for each respondent.

I certify that the preceding one hundred and twenty-five (125) paragraphs are a true copy of the reasons for judgment of Judge Jarrett delivered on 10 March, 2014.

Associate:

Date: 10 March 2014