FEDERAL CIRCUIT COURT OF AUSTRALIA

FWO v THE THIRSTY FARMER PTY LTD & ANOR *[2014] FCCA 207*

Catchwords:
INDUSTRIAL LAW – Consideration of penalties to be imposed on respondents for multiple breaches of industrial instruments – respondents now insolvent and no longer participating in proceeding – consideration, and general adoption, of applicant's submissions.

Legislation:
Federal Circuit Court Rules 2001 (Cth), r.13.03B(2)(c)
Bankruptcy Act 1966 (Cth)
Fair Work Act 2009 (Cth)

Cases cited:
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8
Kelly v Fitzpatrick [2007] FCA 1080
Lynch v Buckley Sawmills Pty Ltd (1984) 3 FCR 503
Fair Work Ombudsman v Promoting U Pty Ltd [2012] FMCA 58
Jordan v Mornington Inn Pty Ltd (2007) 166 IR 33
A & L Silvestri Pty Ltd v Construction, Forestry, Mining & Energy Union [2008] FCA 466

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	THE THIRSTY FARMER PTY LTD
Second Respondent:	RENEE LEEANN BATTY
File Number:	MLG 914 of 2013
Judgment of:	Judge Burchardt
Hearing date:	28 November 2013
Date of Last Submission:	28 November 2013
Delivered at:	Melbourne
Delivered on:	20 February 2014

REPRESENTATION

Counsel for the Applicant:	Ms Nicolas
Solicitors for the Applicant:	Fair Work Ombudsman
The Respondents:	No appearance

ORDERS

(1) Pursuant to s.546(1) of the *Fair Work Act 2009* (Cth) ("the FW Act") the First Respondent pay an aggregate penalty of $40,000 in respect of the contraventions referred to in the declarations and orders made by this Court on 14 October 2013 (Default Orders).

(2) Pursuant to s.546(1) of the FW Act the Second Respondent pay an aggregate penalty of $5,000 in respect of the contraventions referred to in the Default Orders.

(3) Pursuant to s.546(3) of the FW Act the First Respondent pay any and all penalties ordered against it pursuant to Order 1 above to the Commonwealth.

(4) Pursuant to s.546(3) of the FW Act the Second Respondent pay any and all penalties orders against her pursuant to Order 2 above in the following matter:

   (a) 41% of the total penalty ordered on the Second Respondent pursuant to Order 2 be paid to Ashlee Lorenz (to a maximum of $8,194.61, being the amount of the underpayment and interested owed to her pursuant to the Default Orders);

   (b) 59% of the total penalty ordered on the Second Respondent pursuant to Order 2 be paid to Pauline Lorenz (to a maximum of $11,654.34, being the amount of the underpayment and interest owed to her pursuant to the Default Orders); and

   (c) If the total amount of the penalties exceeds the amounts owed to the employees as identified in Orders 4(a) and (b) above, then any additional amount is to be paid to the Commonwealth, pursuant to s.546(3)(a) of the FW Act.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE

MLG 914 of 2013

FAIR WORK OMBUDSMAN
Applicant

And

THE THIRSTY FARMER PTY LTD
First Respondent

RENEE LEEANN BATTY
Second Respondent

REASONS FOR JUDGMENT

1. On 14 October 2013 I made orders and declarations in this matter. I entered judgment for the Applicant against the First and Second Respondents pursuant to r.13.03B(2)(c) of the *Federal Circuit Court Rules 2001* ("the Rules") and made certain orders in respect of underpayments to former employees of the First Respondent. I adjourned the matter to 28 November 2013 for further hearing with respect to the Applicant's claim for penalties to be imposed on the Respondents.

2. The declarations made conformed with the terms of the matters proved in the materials that the parties had filed. Although I did not refer to the matter in my very short extempore reasons for judgment given on that day I noted correspondence from the Official Trustee exhibited as exhibit KW8 to the affidavit of Kate Johnene Wanless filed on 10 October 2013 which confirmed the Official Trustee's view that this action was not stayed by operation of the *Bankruptcy Act 1966* (Cth)

("the Bankruptcy Act") and that the Official Trustee had no interest in the matter. The First Respondent is likewise insolvent and similarly there is no objection taken to the Court proceeding to hear and determine the matter.

3. From affidavits filed by Pauline Lorenz and Ashlee Francis Lorenz on 22 November 2013 it is apparent that none of the moneys ordered to be paid have been paid to the employees and it would seem extremely unlikely that this will in fact occur.

4. The respondents did not appear at the final hearing as to the issues of penalty, and accordingly it is inevitably the case that what follows will to a considerable extent follow the applicant's submissions on penalty filed on 26 November 2013.

5. I accept that the maximum penalties that may be imposed by the Court in these proceedings are in respect of the First Respondent $33,000 (300 penalty units) for each contravention, and in respect of the Second Respondent $6,600 (60 penalty units) (see applicant's written submissions, paragraphs 20-22).

6. I further accept the applicant's submission that the Court should both identify the separate contraventions involved and consider whether any of the breaches taken together constitute a single course of conduct and that if appropriate these should be grouped (paragraphs 26-28 of the applicant's written submissions).

7. The next step is for the Court to consider the appropriate penalty to impose in respect of each contravention "*having regard to all of relevant circumstances*" (paragraph 29 of the applicant's written submissions) and finally consider the aggregate in the light of the totality principle.

8. I accept the applicant's submission that the Court should find that there are five groups of contraventions as identified in annexures A and B (see paragraphs 31-40 of the applicant's written submissions). I further accept that while it is inappropriate to consider any list of matters that may be appropriate as some sort of checklist (see Buchanan J in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008]

FCAFC 8 at [91]) but equally accept the list of matters that have been adopted by Tracey J in *Kelly v Fitzpatrick* [2007] FCA 1080 at [14].

9. I accept that the Respondents' conduct in this matter is serious in that the relevant employees were not paid the applicable casual loading or penalty rates and were underpaid both in relation to their minimum rate of pay, and overtime in respect to Ashlee Francis Lorenz. I note that the First Respondent paid a low, flat rate of pay at all times although it traded during evenings and on weekends, periods which would attract penalty rates. I further note that when the matter was first raised with the Respondents, the First Respondent continued to pay the flat rate until August 2012 and did not adjust penalty rate payments.

10. Insofar as the Respondents have asserted that the fact that the business of the First Respondent was a small, family-owned general store and that this might not be a reason for being able to pay the employees' full entitlements**.** I accept the submissions of the applicant that this does not operate as a significant matter in seeking to reduce the penalty (*Lynch v Buckley Sawmills Pty Ltd* (1984) 3 FCR 503 at [508], *Fair Work Ombudsman v Promoting U Pty Ltd* [2012] FMCA 58 at [41]).

11. While it is clear that both Respondents have suffered significant financial difficulty and are now insolvent, the fact is that the underpayments took place throughout the vast majority of the operation of the business and I accept the submission of the applicant (paragraph 56) that:

> "*The evidence rather suggests that the Respondents engaged the Employees with little regard to their lawful obligations to pay their employees, and continued to pay them a low, flat rate of pay over a lengthy period …"*

12. It is a relevant consideration that the loss of the employees was significant (applicant's submissions, paragraphs 58-60).

13. I accept that the First Respondent was a small, family-run general store and that the assets of the First Respondent have been liquidated. The circumstances of such liquidation are by no means clear. Nonetheless**,** a Respondent cannot be absolved from responsibility for their conduct merely because their operations were small in scale. Tracey J said in *Kelly v Fitzpatrick* at [28]:

> *"No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees, rightly, have an expectation that this will occur. When it does not it will, normally, be necessary to mark the failure by imposing an appropriate monetary sanction. Such a sanction "must be imposed at a meaningful level""*

14. I accept that the Respondents are unlikely to be able to pay any of the amounts that may be made against them.

15. Nonetheless**,** I accept with respect the observations of Heerey J in *Jordan v Mornington Inn Pty Ltd* (2007) 166 IR 33 at [99]:

> *"As to the respondent's own financial position, however, in considering the size of a penalty, capacity to pay is of less relevance than the objective of general deterrence:"*

16. In *FWO v Promoting U Pty Ltd*, the Court as presently constituted observed at [57]:

> *"… Respondents cannot hope to have their conduct in effect exonerated by the court merely because they are impecunious. Parliament has set significant penalties for the sort of contraventions that the Respondents engaged in and I do not think it is appropriate for the totality principle to operate simply to ensure that penalties are imposed in suitably insignificant amounts to meet the Respondents' capacity to pay."*

17. In this matter, and bearing in mind that this is an industry well known frequently to give rise to difficulties with award compliance, the need for general deterrence is all the stronger.

18. While the applicant submits (paragraph 87 written submissions) that there is a need for specific deterrence in this instance, I should make it clear that I am not satisfied on the evidence that the Second Respondent is likely to require significant personal deterrence from what on any view has been a catastrophic experience for her in every way.

19. Further, while the Second Respondent was responsible for the day to day management of the First Respondent during the relevant period, to describe such involvement as that of senior management is somewhat illusory in the circumstances.

20. I accept the submission of the applicant (paragraph 91, written submissions) that the cooperation of the Respondents has been fitful at best and I also accept that there has been little by way of contrition.

21. Taking these matters into consideration**,** in my view**,** I should impose penalties of some $40,000 in respect of the First Respondent and $5,000 in respect of the Second Respondent. As Gyles J said in *A & L Silvestri Pty Ltd v Construction, Forestry, Mining & Energy Union* [2008] FCA 466 at [6]:

> "*the discretion is at large. There are no mandatory statutory criteria and it is wrong to regard factors seen as relevant by one court as statutory criteria. Indeed, lists of factors can confuse an essentially straightforward task and lead to over-elaborate reasoning."*

22. I have considered against the totality principle whether or not these figures are likely to be crushing in respect of the Respondents but in my view they are not likely to be so and are an eminently appropriate resolution of the competing considerations that apply.

23. The applicant has sought the penalties it seeks against the First Respondent and that the penalties imposed on the Second Respondent be paid to the underpaid employees. While there are very serious questions as to whether any of these penalties will be ever paid, nonetheless it is quite clear in these circumstances that it is appropriate, for the reasons set out in paragraphs 122-123 of the applicant's written submissions, that this be done. I will make the orders the applicant seeks.

I certify that the preceding twenty-three (23) paragraphs are a true copy of the reasons for judgment of Judge Burchardt

Associate:

Date: 20 February 2014