

# FEDERAL CIRCUIT COURT OF AUSTRALIA

*FAIR WORK OMBUDSMAN v ABSYNTHES RESTAURANT PTY LTD & ANOR* [2015] FCCA 58

**Catchwords:**

INDUSTRIAL LAW – Penalty hearing – failure to comply with compliance notice issued under Fair Work Act.

**Legislation:**

*Crimes Act 1914* (Cth), s.4AA

*Fair Work Act 2009*, ss.546(1), 546(3)(a), 550(1), 550(2), 557(1), 716, 716(2), 716(4A), 716(5), 716(6), 717

**Cases cited:**

*Workplace Ombudsman v Saya Cleaning Pty Ltd* [2009] FMCA 38

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	ABSYNTHES RESTAURANT PTY LTD
Second Respondent:	MEYJITTE BOUGHENOUT
File Number:	BRG 1181 of 2013
Judgment of:	Judge Jarrett
Hearing date:	5 June 2014
Date of Last Submission:	6 June 2014
Delivered at:	Brisbane
Delivered on:	23 January 2015

## **REPRESENTATION**

Counsel for the Applicant: Mr Prain

Solicitors for the Applicant: Fair Work Ombudsman

Solicitor for the First and Second Respondents: Mr Lee

Solicitors for First and Second Respondents: Lee Lawyers

## **ORDERS**

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

- (1) The First Respondent contravened s.716(5) of the *Fair Work Act 2009* (Cth) by failing to comply with a notice issued to it and dated 3 October, 2013.
- (2) The Second Respondent was, within the meaning of s.550(2) of the *Fair Work Act 2009* (Cth), involved in the First Respondent's contravention set out in declaration (1) above.

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

- (3) Pursuant to s.546(1) of the *Fair Work Act 2009* (Cth) the First Respondent pay a pecuniary penalty of \$12,750 in respect of the contraventions the subject of the declarations above.
- (4) Pursuant to s.546(1) of the *Fair Work Act 2009* (Cth) the Second Respondent pay a pecuniary penalty of \$2,550 in respect of his involvement in the First Respondent's contraventions the subject of the declarations set out above.
- (5) Pursuant to s.546(3)(a) of the *Fair Work Act 2009* (Cth) all pecuniary penalties imposed be paid to the Commonwealth within 30 days of the date of these orders.

**FEDERAL CIRCUIT COURT  
OF AUSTRALIA  
AT BRISBANE**

**BRG 1181 of 2013**

**FAIR WORK OMBUDSMAN**  
Applicant

And

**ABSYNTHE RESTAURANT PTY LTD**  
First Respondent

**MEYJITTE BOUGHENOUT**  
Second Respondent

**REASONS FOR JUDGMENT**

1. By this application, the Fair Work Ombudsman alleges that the first respondent has breached a provision of the *Fair Work Act 2009* (Cth) in that it did not comply with a compliance notice properly served upon it within the time limited for compliance with it. The applicant seeks the imposition of a pecuniary penalty upon the first respondent for its contravention.
2. The applicant alleges that the second respondent was involved in the first respondent's contravention and is also liable to the imposition of a pecuniary penalty.
3. The respondents admit the allegations against them. The Court's task is to determine the penalties that ought to be imposed upon each respondent for those breaches.
4. I have been assisted in this matter by the extensive written submissions filed on behalf of each of the parties and the agreement reached between the parties about the facts reflected in a statement of agreed facts filed in the proceedings.

## The Contravention

5. Relevantly s.716 of the Fair Work Act provides:

### *716 Compliance notices*

#### *Application of this section*

*(1) This section applies if an inspector reasonably believes that a person has contravened one or more of the following:*

*(a) a provision of the National Employment Standards;*

*(b) a term of a modern award;*

...

#### *Giving a notice*

*(2) The inspector may, except as provided by subsection (4), give the person a notice requiring the person to do either or both of the following within such reasonable time as is specified in the notice:*

*(a) take specified action to remedy the direct effects of the contravention referred to in subsection (1);*

*(b) produce reasonable evidence of the person's compliance with the notice.*

*(3) The notice must also:*

*(a) set out the name of the person to whom the notice is given; and*

*(b) set out the name of the inspector who gave the notice; and*

*(c) set out brief details of the contravention; and*

*(d) explain that a failure to comply with the notice may contravene a civil remedy provision; and*

*(e) explain that the person may apply to the Federal Court, the Federal Circuit Court or an eligible State or Territory Court for a review of the notice on either or both of the following grounds:*

*(i) the person has not committed a contravention set out in the notice;*

*(ii) the notice does not comply with subsection (2) or this subsection; and*

*(f) set out any other matters prescribed by the regulations.*

...

#### *Relationship with civil remedy provisions*

*(4A) An inspector must not apply for an order under Division 2 of Part 4-1 in relation to a contravention of a civil remedy provision by a person if:*

*(a) the inspector has given the person a notice in relation to the contravention; and*

*(b) either of the following subparagraphs applies:*

*(i) the notice has not been withdrawn, and the person has complied with the notice;*

*(ii) the person has made an application under section 717 in relation to the notice that has not been completely dealt with.*

*Note: A person other than an inspector who is otherwise entitled to apply for an order in relation to the contravention may do so.*

*(4B) A person who complies with a notice in relation to a contravention of a civil remedy provision is not taken:*

*(a) to have admitted to contravening the provision; or*

*(b) to have been found to have contravened the provision.*

#### *Person must not fail to comply with notice*

*(5) A person must not fail to comply with a notice given under this section.*

*Note: This subsection is a civil remedy provision (see Part 4-1).*

*(6) Subsection (5) does not apply if the person has a reasonable excuse.*

6. The issuing of a compliance notice is a power given to Fair Work Inspectors which is designed to be a method by which non-compliance with obligations imposed by the Fair Work Act might be enforced. It is an alternative to court proceedings: *Fair Work Bill 2008*, Explanatory Memorandum at [2673].
7. The first respondent operates a restaurant business called Absynthe Restaurant at Surfers Paradise, Queensland. The second respondent is, and at all material times was, the sole director, secretary and shareholder of the first respondent. He was ultimately responsible for making decisions on behalf of the first respondent regarding the terms and conditions upon which persons would be employed by the first respondent, the work to be performed, and the time, method and the manner of payments to employees including in respect of an employee of particular interest in this case, Leslie John Hutchen.
8. Between 5 October, 2011 and 4 May, 2012 the first respondent employed Mr Hutchen as an apprentice chef in the restaurant. At the commencement of his employment Mr Hutchen was eighteen years of age.
9. On 22 May, 2012 Mr Hutchen made a complaint to the applicant alleging that the first respondent had not made a payment to him in respect of wages and accrued annual leave.
10. After conducting an investigation into the complaint, Inspector Polzin, a Fair Work Inspector, formed a belief that the first respondent had contravened the Fair Work Act in that it had not complied with:
  - a) certain provisions of the National Employment Standards; and
  - b) some terms of the *Restaurant Industry Award 2010*in respect of Mr Hutchen's employment. The contraventions alleged that the first respondent failed to pay Mr Hutchen his minimum employee entitlements under the National Employment Standards and the Award.
11. On 1 November, 2012 Inspector Polzin wrote to the first respondent and suggested that the first respondent had contravened the Fair Work Act in certain respects relating to Mr Hutchen's employment. The

letter required the first respondent to rectify the identified contraventions by payment of the sum of \$3,910.06 to Mr Hutchen on or before 18 November, 2012. The payment was not made and some email correspondence passed between Inspector Polzin and the second respondent.

12. On 22 November, 2012 Inspector Polzin wrote again to the first respondent recording that it had failed to remedy the contraventions identified in the earlier correspondence. Further email correspondence ensued in which the second respondent, on behalf of the first respondent, admitted that Mr Hutchen had been paid according to an incorrect rate. In an email of 4 December, 2012 the second respondent said: "I did get legal advice...".
13. On 12 February, 2013 Inspector Polzin gave to the first respondent a notice pursuant to s.716(2) of the Fair Work Act requiring the first respondent to rectify the contraventions identified in the earlier correspondence, within 28 days of the date of the notice. She handed the notice to the second respondent on behalf of the first respondent. He told Inspector Polzin that he would pass the notice on to his solicitor and that he (presumably meaning the first respondent) would not be paying the amount sought in the notice. The amount sought in the notice was less than the amount sought in the letter of 1 November, 2012.
14. On 27 March, 2013 Inspector Polzin made a written request that the second respondent participate in an interview. He did not respond to the request immediately, but later in April, 2013 he sought a meeting with Inspector Polzin. That meeting took place on 23 April, 2013. At that meeting the second respondent acknowledged the contraventions, but again refused to pay the amount sought by the applicant. His refusal to do so was because Mr Hutchen had not worked out his period of notice when he left the first respondent's employment. The second respondent insisted on deducting one week's pay from the amount quantified by the applicant. Consequently, he paid nothing. The amount quantified by the applicant, however, did not include an amount for Mr Hutchen's notice period.
15. Further email correspondence ensued. The second respondent stood his ground, as did Inspector Polzin.

16. By way of letter on 24 June, 2013 Inspector Polzin withdrew the notice given on 12 February, 2013 as a result of receiving further information from the Department of Education and Training (Queensland) about the wage rates to which Mr Hutchen was entitled. Further investigations ensued.
17. On 3 October, 2013, Inspector Polzin gave a further notice pursuant to s.716(2) of the Fair Work Act that required the first respondent to:
  - a) remedy the contraventions identified therein by paying to Mr Hutchen \$4,195.29 (gross) by 17 October, 2013; and
  - b) produce reasonable evidence of compliance with the notice by providing Inspector Polzin with written documentation that confirmed payment to Mr Hutchen as required by the notice.
18. Inspector Polzin gave the notice to the first respondent by handing it personally to the second respondent. When she did so the second respondent told her that the first respondent would not be complying with the notice. He said that he would pass the notice on to his lawyer. It is this notice that is now the subject of these proceedings.
19. The first respondent did not comply with the notice in any respect. The first and second respondents admit that the first respondent failed to comply with the notice.
20. The applicant commenced these proceedings on 18 December, 2013. On 28 May, 2014 and more than five months after the proceedings were commenced, the first respondent paid Mr Hutchen the sum of \$4,195.29.
21. The second respondent admits that he was involved in the first respondent's contravention of s.716(5) of the Fair Work Act. It was he who determined that the first respondent would not comply with the notice given to the first respondent on 3 October, 2013.

## **Consideration of penalty**

22. At the outset it is appropriate to record that in my view, the submissions of both parties tend to miss the point of this application. The contravention in respect of which the Court might impose a

pecuniary penalty in this case is the first respondent's failure to comply with the notice given to it pursuant to s.716(2) of the Fair Work Act. The second respondent is liable to a pecuniary penalty because of his liability pursuant to s.550(1) of the Fair Work Act.

23. The compliance notice given to the first respondent on 3 October, 2013 set out a number of contraventions alleged by the applicant against the first respondent in respect of Mr Hutchen's employment. Both parties' submissions seem to proceed on the basis that it is the contraventions identified by the 3 October notice which should attract attention in this case for the purposes of setting the pecuniary penalties. For example, the written submissions for the first and second respondents suggest that it is appropriate to "group" the contraventions pursuant to either s.557(1) of the Fair Work Act or the general law, for the purposes of fixing the penalty. But there are no contraventions to group in this case. There is only one contravention alleged against the first respondent in respect of which the second respondent is also liable.

24. By way of further example, the applicant submits that Mr Hutchen was a "vulnerable worker" by virtue of him being an apprentice and aged eighteen at the date of his commencement of employment with the first respondent. The applicant relies upon statements by Simpson FM (as his Honour then was) in *Workplace Ombudsman v Saya Cleaning Pty Ltd* [2009] FMCA 38 at [20], where his Honour said:

*... The vulnerability of these employees and the way they were exploited by the respondents is a significant factor when assessing the quantum of penalty.*

25. But in my view, those submissions are not to the point. The contravention with which I have to deal is a failure by the first respondent to comply with a notice given to it pursuant to s.716(2) of the Fair Work Act. I am not dealing with the underlying contraventions that caused the Fair Work Inspector to give that notice to the first respondent. In those circumstances, it is difficult to see how the circumstances of the employee whose employment was the subject of the notice are relevant. The culpable conduct of the first respondent is its failure to comply with the statutory obligations cast upon it to respond to the notice given to it pursuant to s.716 of the Act.

26. I accept the applicant's submission that the failure by the first respondent to comply with the notice should be seen in the context of the efforts made by the applicant to assist the first respondent to meet its obligations under the Fair Work Act and to avoid the need for litigation. It is clearly the case that the first and second respondents had ample opportunity to work towards a resolution of the issues dealt with in the notice with the applicant prior to these proceedings being issued, but failed to do so.
27. There is no evidence that either the first respondent or the second respondent raised with the applicant any difficulties with understanding the nature and extent of the actions required of them by the two notices given by the Fair Work Inspector to the first respondent. Indeed, the evidence makes it clear that the first respondent, by the second respondent, understood what was required by the notice, and accepted that it had underpaid Mr Hutchen as Inspector Polzin alleged. The respondents had the benefit of legal advice about that as early as December, 2012.
28. The compliance notice served upon the first respondent set out what was required of the first respondent. It made clear that there were steps that the first respondent could take to address the contraventions that were alleged against it. It specifically said:

*You may apply to the Federal Court, Federal Circuit Court or eligible State or Territory Court for a review of this Notice if:*

- a) You dispute that you have committed the contravention(s) referred to above; and/or*
- b) You dispute that this Notice complies with subsections 716(2) or 716(3) of the FW Act.*

29. That advice is consistent with s.717 of the Fair Work Act. Section 717 sets out what the first respondent might have done if it determined not to pay the amount specified in the notice. It provides as follows:

***717 Review of compliance notices***

*(1) A person who has been given a notice under section 716 may apply to the Federal Court, the Federal Circuit Court or an eligible State or Territory Court for a review of the notice on either or both of the following grounds:*

*(a) the person has not committed a contravention set out in the notice;*

*(b) the notice does not comply with subsection 716(2) or (3).*

*(2) At any time after the application has been made, the court may stay the operation of the notice on the terms and conditions that the court considers appropriate.*

*(3) The court may confirm, cancel or vary the notice after reviewing it.*

30. Neither the first respondent, nor the second respondent, took up the opportunity presented by s.717 of the Act to challenge the allegations of contravention made against the first respondent in the notice.
31. The respondents argue that the evidence demonstrates that the second respondent was clearly confused about the allegations made in the compliance notice, given the history of interaction between the second respondent and Inspector Polzin.
32. However, I am not at all convinced that there was any real confusion on the part of the second respondent about what was being alleged. As early as December, 2012 the second respondent acknowledged that the first respondent had used the incorrect pay rates to pay Mr Hutchen. The change in the amounts claimed between the first compliance notice given in February, 2013 and the second in October, 2013 was due to the use of updated rates provided by the Department of Education and Training (Queensland) in respect of Mr Hutchen.
33. In any event, even if the second respondent was confused as he claims, the evidence makes clear that the second respondent had access to both financial advice (from his or the first respondent's accountant) and legal advice in respect of the compliance notices issued by the applicant, and he took their advice.
34. The second respondent was responsible for the day to day management, direction and control of the first respondent's operations. He was responsible for determining the terms and conditions upon which Mr Hutchen was engaged by the first respondent. The second respondent was personally served with the compliance notice and was informed of the consequences of failing to comply with it. The second respondent's

conduct was the cause of the first respondent's contraventions of the Act.

35. The applicant points to the underpayment suffered by Mr Hutchen in his employment and the fact that he was held out of his money for a long period of time. In my view, however, that matter is of only marginal significance. Whilst it is relevant to recognise that Mr Hutchen was underpaid \$4,195.25 and that he did not receive that money until five months after these proceedings were commenced (having been out of pocket in excess of two years), the culpable behaviour in this case is the refusal of the first respondent to meet its statutory obligations under s.716 of the Fair Work Act.
36. It has been said on numerous occasions that one of the principal objects of the Fair Work Act is to provide a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions for all employees. In order to promote that object, Fair Work Inspectors have certain compliance powers. I accept the applicant's submission that the purpose of the powers conferred on Fair Work Inspectors (including the power to issue compliance notices under s.716(2) of the Act) is to provide the applicant with an effective means for investigating and enforcing compliance with minimum standards and industrial instruments. The compliance notice mechanism in s.716(2) of the Act is an efficient and effective means of ensuring compliance in a timely and cost effective way. The use of the administrative compliance notice procedure in straightforward contraventions such as those the subject of the notice in this case, avoids the cost to the public purse associated with prosecuting proceedings through courts.
37. The first and second respondents' conduct is conduct which undermines the utility and effectiveness of a fundamental object of the Act. The failure to comply with the notice of 3 October, 2013 was clearly a contumelious disregard of the first respondent's obligations under the Fair Work Act. That is especially so where the first respondent did not take up the opportunity to challenge the compliance notice in the way provided in s.717 of the Act. Instead, it did nothing.
38. The first respondent has been in operation since December, 2005 and has provided evidence of employing 8 employees. Whilst the second respondent has asserted that the first respondent is experiencing

financial difficulties, neither the first respondent nor the second respondent has provided any financial material to support that submission.

39. In any event, the obligation to comply with the Fair Work Act and, in particular, s.716 falls just as heavily on small businesses and individuals as it does on large employers or businesses. For present purposes the Fair Work Act draws no distinction between employers of different sizes and resources. Subject to ss.716(6) and 717, it is incumbent on all employers to comply with the requirements of a compliance notice issued pursuant to s.716(2) of the Act.
40. The failure to comply with the compliance notice in this case was a deliberate act undertaken by the first respondent, at the behest of the second respondent. It demonstrated deliberate disregard for the obligations imposed upon the first respondent by the Fair Work Act.
41. I accept that the Court should mark its disapproval of the conduct in question and set an appropriate penalty which serves as a warning to others that the disregard of a notice issued pursuant to s.716(2) of the Act may come with a heavy price. A penalty which deters conduct such as that displayed by the first respondent in this case by others is appropriate.
42. Neither the first respondent (through the second respondent) nor the second respondent has expressed any contrition in respect of the contravention. The respondents' submissions attempt to explain away the failure to comply with the notice or take any other step authorised by the Fair Work Act by:
  - a) looking to the conduct of Mr Hutchen;
  - b) looking to the conduct of other persons who worked for the first respondent;
  - c) suggesting that the second respondent did not understand his, or the first respondent's obligations; and
  - d) asserting confusion by reason of the change relating to the underpayment amount between the first and second compliance notices.

43. But none of these matters excuse or explain the first respondents' failure to comply with the notice. The terms of each notice were clear. The respondents had access to legal advice. If they wished to challenge the validity of what was alleged against the first respondent, the procedure was set out in s.717 of the Act. Instead, the respondents did nothing except engage in what might be described as obfuscation and avoidance.
44. Whilst this application has proceeded by way of a statement of agreed facts and a penalty hearing, thus avoiding the necessity of a trial on the application as a whole, my view is that those matters should attract no discount on the penalty to be imposed because:
- a) despite acknowledging the underpayment of Mr Hutchen as early as December, 2012, the respondents initially sought to defend these proceedings;
  - b) the respondents both denied the gravamen of the allegations made against them;
  - c) it was not until they filed amended defences and the agreed statement of facts on the day of the penalty hearing before me that there was a formal admission by either respondent of the contravention; and
  - d) given the nature of the case and the contravention alleged against the respondents' the denials and their defence to the proceedings could not have succeeded.
45. Moreover, the way in which the respondents have conducted their response to these proceedings does not demonstrate any contrition or remorse on their part. Rather, it is merely an acceptance of the inevitable.

## **Conclusion**

46. The failure to comply with a notice properly issued by the applicant in the course of its investigations and the discharge of its statutory functions is serious. Recipients of such notices should be left under no misapprehension about their obligations to comply with those notices.

47. Ordering penalties at a meaningful level for the failure to comply with a compliance notice will demonstrate that such notices are to be taken seriously. It is important that recipients of such notices understand that they are to be taken seriously and that there are benefits to employers, employees and the community alike if they are treated seriously.
48. Had the first respondent chosen to comply with the notice before these proceedings were issued, it would have avoided the imposition of any penalty at all: s.716(4A) of the Act.
49. The maximum penalty that may be imposed by the Court on the first respondent is 150 penalty units or \$25,500. The maximum that might be imposed upon the second respondent 30 penalty units or \$5,100. At the time the contravention was committed, the value of a penalty unit as defined in s.4AA of the *Crimes Act 1914* (Cth) was \$170.00.
50. Having regard to the matters that I have canvassed above, and taking into account that:
- a) the first respondent has not been found to have contravened the Fair Work Act on any previous occasions; and
  - b) the underpayments the subject of the compliance notice have been paid, albeit late
- in my view a penalty for the first respondent which serves all relevant purposes is one fixed at \$12,750. An appropriate penalty for the second respondent is one fixed at \$2,550.00. That is so because the evidence reveals that the second respondent was intimately involved in the first respondent's contravention.
51. The applicant seeks the making of declarations about the contravention. The parties have agreed in the statement of agreed facts that declarations ought be made. It is, in any event otherwise appropriate to make the declarations.
52. I make the declarations and orders set out at the commencement of these reasons.

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**I certify that the preceding fifty-two (52) paragraphs are a true copy of the reasons for judgment of Judge Jarrett**

Associate:

Date: 23 January 2015