

FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v GLOBAL WORK AND TRAVEL CO. PTY LTD & ORS [2015] FCCA 495

Catchwords:

INDUSTRIAL LAW – Penalty – failure to keep records relating to leave entitlement.

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

Legislation:

Fair Work Act 2009 (Cth), ss.12, 14, 45, 44, 357(1), 535(1), 546 and 550
Corporations Act 2001 (Cth)

Cases cited:

ACCC v Yellow Page Marketing BV (No.2) [2011] FCA 352;
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8;
Blandy v Coverdale NT Pty Ltd ACN 102 611 423 [2008] FCA 1533;
Construction, Forestry, Mining and Energy Union v Cahill (2010) 194 IR 461;
Darlaston v Risetop Construction Pty Ltd [2011] FMCA 220;
Fair Work Ombudsman v A Dalley Holdings Pty Ltd [2013] FCA 509;
Fair Work Ombudsman v Australian Shooting Academy Pty Ltd [2011] FCA 1064;
Fair Work Ombudsman v Bosen Pty Ltd [2011] VMC 81;
Fair Work Ombudsman v Maclean Bay Pty Ltd (No 2) [2012] FCA 557;
Fair Work Ombudsman v Offshore Marine Services Pty Ltd [2011] FCA 498;
Fair Work Ombudsman v Promoting U Pty Ltd & Anor [2012] FMCA 58;
Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2) [2012] FCA 408;
Fair Work Ombudsman v VS Investment Group Pty Ltd & Anor [2013] FCCA 208;
Fair Work Ombudsman v Tiger Telco Pty Ltd (in liq) [2012] FCA 479;
Fryer v Yoga Tandoori House Pty Ltd [2008] FMCA 288;
Gibbs v Mayor, Councillors and Citizens of City of Altona (1991) 37 FCR 216;
Kelly v Fitzpatrick [2007] FCA 1080;
McIver v Healey [2008] FCA 425;
Mason v Harrington Corporation Pty Ltd t/as Pangea Restaurant & Bar [2007] FMCA 7;
Mornington Inn Pty Ltd v Jordan [2008] FCAFC 70;
Ponzio v B & P Caelii Constructions Pty Ltd (2007) 158 FCR 543;
Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550;

Stuart-Mahoney v Construction, Forestry, Mining and Energy Union [2008] FCA 1426;
Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor [2009] FMCA 38;
John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union (No.2) [2009] FCAFC8; (2009) 187 IR 400;
Construction, Forestry, Mining and Energy Union v Williams [2009] FCAFC 171; (2009) 191 IR 455;
Fair Work Ombudsman v Praglowski [2010] FMCA 621;
Fair Work Ombudsman v Happy Cabby Ltd & Anor [2013] FCCA 397;
Fair Work Ombudsman v Jay Group Services Pty Ltd & Ors [2014] FCCA 2869;
The Director of the Fair Work Building Inspectorate v Linkhill Pty Ltd (No.9) [2014] FCCA1124;
A & L Silvestri Pty Ltd v Construction, Forestry, Mining and Energy Union [2008] FCA 466;
Fair Work Ombudsman v Jetstar Airways Ltd [2014] FCA 33;
Wong v The Queen [2001] HCA 64; (2001) 207 CLR 584;
Markarian v The Queen [2005] HCA 25; (2005) 228 CLR 357;
Finance Sector Union v Commonwealth Bank of Australia [2005] FCA 1847; (2005) 147 IR 462;
Australian Competition and Consumer Commission v Telstra Ltd [2010] FCA 790; (2010) 188 FCR 238;
Comcare v Post Logistics Australasia Pty Limited [2012] FCAFC 168;
Fair Work Ombudsman v Crocmedia Pty Ltd [2015] FCCA 140;
Fair Work Ombudsman v Bedington [2012] FMCA 1133;
Fair Work Ombudsman v Wegra Investmetns Pty Ltd & Ors [2014] FCCA 933;
Fair Work Ombudsman v Theravanish Investments Pty Ltd & Ors [2014] FCCA 1170;
Fair Work Ombudsman v AJR Nominees Pty Ltd (No.2) [2014] FCA 128

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	GLOBAL WORK & TRAVEL CO. PTY LTD
Second Respondent:	GLOBAL WORK & TRAVEL CO. (AUSTRALIA) PTY LTD
Third Respondent:	CARLY DEBORAH HIMMELMAN
Fourth Respondent:	JURGEN ANDREAS HIMMELMAN
Fifth Respondent:	PIERRE MICHAEL HIMMELMAN
File Number:	BRG 550 of 2013

Judgment of: Judge Vasta
Hearing date: 24 February 2015
Date of Last Submission: 24 February 2015
Delivered at: Brisbane
Delivered on: 24 February 2015

REPRESENTATION

Counsel for the Applicant: Ms C. Hartigan
Solicitors for the Applicant: Fair Work Ombudsman
Counsel for the First Respondent: Mr J.W. Merrell
Solicitors for the First Respondent: Aitken Legal
Counsel for the Second Respondent: Mr J.W. Merrell
Solicitors for the Second Respondent: Aitken Legal
Counsel for the Third Respondent: Mr J.W. Merrell
Solicitors for the Third Respondent: Aitken Legal
Counsel for the Fourth Respondent: Mr J.W. Merrell
Solicitors for the Fourth Respondent: Aitken Legal
Counsel for the Fifth Respondent: Mr J.W. Merrell
Solicitors for the Fifth Respondent: Aitken Legal

THE COURT DECLARES

- (1) That the Second Respondent contravened:
 - (a) Section 357(1) of the *Fair Work Act 2009* (Cth) by representing to Ms Stewart, Ms Baldwin and Ms Tomlinson that the contracts of employment under which they were engaged were contracts for services under which they performed, or would perform work, as independent contractors;
 - (b) Section 45 of the *Fair Work Act 2009* (Cth) by failing to pay:
 - (i) Overtime loadings to Ms Stewart and Ms Baldwin pursuant to clause 29.2(a) of the Modern Award; and
 - (ii) Annual leave loadings to Ms Stewart, Ms Baldwin and Ms Tomlinson pursuant to sub clause 32.3 of the Modern Award.
 - (c) Section 44 of the *Fair Work Act 2009* (Cth) by failing to pay:
 - (i) Ms Stewart, Ms Baldwin and Ms Tomlinson for their ordinary hours of work on a public holiday pursuant to s.116 of *Fair Work Act 2009* (Cth);
 - (ii) Ms Stewart, Ms Baldwin and Ms Tomlinson for their accrued but untaken annual leave entitlements at the time of termination of employment pursuant to s.90(2) of *Fair Work Act 2009* (Cth).
 - (d) Subsection 535(1) of the *Fair Work Act 2009* (Cth) by failing to make or keep employment records in respect of Ms Stewart, Ms Baldwin and Ms Tomlinson.
- (2) That the Third Respondent was involved in each of the contraventions committed by the Second Respondent as outlined in paragraph one (1) above.
- (3) That the Fifth Respondent was involved in each of the contraventions committed by:
 - (a) The First Respondent as outlined in the Order of Judge Jarrett of 13 October 2014 within the meaning of s.550(2)(a) and (c) of the *Fair Work Act 2009* (Cth);

- (b) The Second Respondent as listed in paragraph one (1) above within the meaning of s.550(2)(a) and (c) of the *Fair Work Act 2009* (Cth).

THE COURT ORDERS ON A FINAL BASIS:

- (4) That the First Respondent pay penalties in the sum of \$60,018.75 in respect of the contraventions outlined in the Order of Judge Jarrett of 13 October 2014 pursuant to s.546(1) of the *Fair Work Act 2009* (Cth).
- (5) That the Second Respondent pay penalties in the sum of \$56,306.25 in respect of the contraventions outlined in paragraph one (1) above pursuant to s.546(1) of the *Fair Work Act 2009* (Cth).
- (6) That the Fifth Respondent pay penalties in the sum of \$12,003.75 in respect of his involvement in the contraventions outlined in the Order Judge Jarrett of 13 October 2014 pursuant to s.546(1) of the *Fair Work Act 2009* (Cth).
- (7) That the Third and Fifth Respondents jointly pay penalties in the sum of \$11,261.25 in respect of their involvement in the contraventions outlined in paragraph one (1)(a) to (d) above pursuant to s.546(1) of the *Fair Work Act 2009* (Cth).
- (8) That the First, Second, Third and Fifth Respondents pay the penalties to the Consolidated Revenue of Fund of the Commonwealth in accordance with s.546(3) of the *Fair Work Act 2009* (Cth) within ninety (90) days from the date of these Orders.
- (9) That the Applicant have liberty to apply on seven (7) days' notice in the event that any of the preceding orders are not complied with.

**FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT BRISBANE**

BRG 550 of 2013

FAIR WORK OMBUDSMAN
Applicant

And

GLOBAL WORK & TRAVEL CO. PTY LTD
First Respondent

GLOBAL WORK & TRAVEL CO. (AUSTRALIA) PTY LTD
Second Respondent

CARLY DEBORAH HIMMELMAN
Third Respondent

JURGEN ANDREAS HIMMELMAN
Fourth Respondent

PIERRE MICHAEL HIMMELMAN
Fifth Respondent

REASONS FOR JUDGMENT

(Ex tempore)

1. This proceeding is for the Court to determine the appropriate quantum that the First respondent, Second respondent, Third respondent and Fifth respondent will pay to the Commonwealth for contraventions of the *Fair Work Act 2009* (Cth) (“the Act”). The contraventions can be grouped as breaches of s.357(1) of the Act, breaches of s.45 of the Act, breaches of s.44 of the Act and breaches of s.535(1) of the Act.

2. The First Respondent, Global Work & Travel Company Proprietary Limited was, at all relevant times:
 - a) a company incorporated under the provisions of the Corporations Act;
 - b) able to be sued in and by its corporate name and style;
 - c) a constitutional corporation within the meaning of s.12 of the *Fair Work Act 2009* (Cth);
 - d) a national system employer within the meaning of s.14 of the *Fair Work Act 2009* (Cth); and
 - e) the operator of a retail travel agency selling inbound and outbound working holiday programs to the general public at two addresses, one at Southport and one at Main Beach.

3. The Second respondent, Global Work & Travel Co. (Australia) Proprietary Limited, was at all relevant times:
 - a) a company incorporated under the provisions of the *Corporations Act 2001*;
 - b) able to be sued in and by its corporate name and style;
 - c) a Constitutional corporation within the meaning of s.12 of the *Fair Work Act 2009* (Cth);
 - d) a national system employer within the meaning of s.14 of the *Fair Work Act 2009* (Cth); and
 - e) the operator of a licensed travel agency offering retail travel services primarily to customers of the first respondent at both the Southport and Main Beach offices.

4. The Third respondent, Carly Deborah Himmelman, is and was a director of the First and Second Respondents; the company's secretary of the Second Respondent; a shareholder of the two companies that hold shares in the First and Second Respondents; jointly responsible, along with the Fifth Respondent, for the overall direction, management and supervision of the Second Respondent's operations; jointly

responsible, along with the Fifth respondent, for the overall direction, management and supervision of the terms and conditions of employees of the second respondent, including in relation to industrial instruments and arrangements, setting and adjusting pay rates and determining wages and conditions of employment. She is also the wife of the Fifth Respondent and the mother of the Fourth Respondent.

5. The Fourth Respondent, Jurgen Andreas Himmelman, is and was at all material times a director of the First and Second Respondents; the company secretary of the First Respondent; a shareholder of the First Respondent, and a shareholder of a company that holds shares in the First and Second Respondents; jointly responsible, along with the Fifth Respondent, for the overall direction, management and supervision of the First Respondent's operations; and jointly responsible, along with the Fifth Respondent, for the overall direction, management and supervision of the terms and conditions of employees of the First Respondent, including in relation to industrial instruments and arrangements setting and adjusting pay rates and determining wages and conditions of employment. He is the son of the Third and Fifth Respondents.
6. The Fifth Respondent, Pierre Michael Himmelman, is and was at all material times a former director and company secretary of the second respondent; president of the Canadian division of the group of companies to which the First Respondent belongs; a shareholder of one of the two companies that holds shares in the First and Second Respondents; jointly responsible, along with the Fourth respondent, for the overall direction, management and supervision of the First Respondent's operations; jointly responsible, along with the Third Respondent, for the overall direction, management and supervision of the Second Respondent's operations; jointly responsible, along with the Fourth Respondent, for the overall direction, management, supervision of the terms and conditions of employees of the First Respondent, including in relation to industrial instruments and arrangements setting and adjusting pay rates and determining wages and conditions of employment; and jointly responsible, along with the Third Respondent, for the overall direction, management and supervision of the terms and conditions of employees of the Second Respondent, including in relation to industrial instruments and

arrangements setting and adjusting pay rates and determining wages and conditions of employment. He is the husband of the Third Respondent and father of the Fourth Respondent.

7. The First Respondent engaged the following persons as sales consultants for the outbound working holiday programs: Mr Ehsan Sanei, Ms Louisa Canning. The First Respondent engaged Ms Raewyn Ah Koy as a program coordinator and recruitment officer for its inbound holiday programs. The Second Respondent engaged the following persons as travel agents: Ms Amanda Stewart, Ms Lauren Baldwin and Ms Corinne Tomlinson. I will refer to these six persons as “complainants”.
8. Mr Sanei, Ms Canning and Ms Ah Koy, Ms Stewart, Ms Baldwin and Ms Tomlinson were engaged by either of the First or Second Respondents for the following periods:
 - a) Mr Sanei, 8 January 2011 to 24 October 2011;
 - b) Ms Canning, 4 January 2011 to 28 October 2011;
 - c) Ms Ah Koy, 1 July 2012 to 5 October 2012;
 - d) Ms Baldwin, 9 July 2012 to 12 October 2012;
 - e) Ms Stewart, 28 February 2011 to around 3 February 2012; and
 - f) Ms Tomlinson, 28 May 2012 to 27 October 2012.
9. With respect to those relationships, the Applicant and Respondents have agreed to the making of a number of declarations and orders that are set out in paragraph 8 of the agreed statement of facts,

“8. In conjunction with the Applicant, the Respondents respectively agree to the making of declarations and orders in the terms set out below:

(a) A declaration that the First Respondent contravened subsection 357(1) of the FW Act by representing to Mr Sanei, Ms Canning and Ms Ah Koy that the contracts of employment under which they were engaged were contracts for services under which they performed, or would perform work, as an independent contractor;

(b)A declaration that the First Respondent contravened section 45 of the FW Act by failing to pay:

(i) minimum wages to Mr Sanei and Ms Canning pursuant to clause 17 of the Modern Award;

(ii) overtime loadings to Mr Sanei and Ms Canning pursuant to clause 29.2(a) of the Modern Award; and

(iii) annual leave loadings to Mr Sanei and Ms Canning pursuant to subclause 32.3 of the Modern Award.

(c)A declaration that the First Respondent contravened Section 44 of the FW Act by failing to pay:

(i) minimum wages to Ms Ah Koy pursuant to the National Minimum Wage pursuant to section 293 of the FW Act;

(ii) Mr Sanei, Ms Canning and Ms Ah Koy for their ordinary hours of work on a public holiday pursuant to section 116 of the FW Act;

(iii) Mr Sanei his accrued entitlement to paid personal/carer's leave pursuant to section 99 of the FW Act; and

(iv) Mr Sanei, Ms Canning and Ms Ah Koy for their accrued but untaken annual leave entitlements at the time of termination of employment pursuant to subsection 90(2) of the FW Act.

(d)A declaration that the First Respondent contravened subsection 535(1) of the FW Act by failing to make or keep employment records in respect of Mr Sanei, Ms Canning and Ms Ah Koy.

(e)A declaration that the Second Respondent contravened subsection 357(1) of the FW Act by representing to Ms Stewart, Ms Baldwin and Ms Tomlinson that the contracts of employment under which they were engaged were contracts for services under which they performed, or would perform work, as independent contractors;

(f) A declaration that the Second Respondent contravened section 45 of the FW Act by failing to pay:

(i) overtime loadings to Ms Stewart and Ms Baldwin pursuant to clause 29.2(a) of the Modern Award; and

(ii) annual leave loadings to Ms Stewart, Ms Baldwin and Ms Tomlinson pursuant to subclause 32.3 of the Modern Award.

(g) A declaration that the Second Respondent contravened section 44 of the FW Act by failing to pay:

(i) Ms Stewart, Ms Baldwin and Ms Tomlinson for their ordinary hours of work on a public holiday pursuant to section 116 of the FW Act;

(ii) Ms Stewart, Ms Baldwin and Ms Tomlinson for their accrued but untaken annual leave entitlements at the time of termination of employment pursuant to subsection 90(2) of the FW Act.

(h) A declaration that the Second Respondent contravened subsection 535(1) of the FW Act by failing to make or keep employment records in respect of Ms Stewart, Ms Baldwin and Ms Tomlinson.

(i) A declaration that each of the Fourth and Fifth Respondents was involved in each of the contraventions committed by the First Respondents was involved in each of the contraventions committed by the First Respondent as listed at paragraph 8(a) to (d) above within the meaning of subsections 550(2)(a) and (c) of the FW Act.

(j) A declaration that each of the Third and Fifth Respondents was involved in each of the contravention committed by the Second Respondent as listed at paragraph 8(e) to (h) above.

(k) An order that the First and Second Respondent each pay penalties in respect of the contraventions outlined above from paragraph 8(a) to (h) pursuant to subsection 546(1) of the FW Act.

(l) An order that the Fifth Respondent pay penalties in respect of his involvement in the contraventions outlined from paragraphs 8(a) to (d) pursuant to subsection 546(1) of the FW Act.

(m) An order that the Third and Fifth Respondents each pay penalties in respect of the contraventions outlined from

paragraph 8(e) to (h) pursuant to subsection 546(1) of the FW Act.

(n) An order requiring each of the First, Second, Third and Fifth Respondents to pay the penalties to the Consolidated Revenue Fund of the Commonwealth in accordance with subsection 546(3) of the FW Act.

(o) An order that the Fourth Respondent commences training within 3 months conducted by an accredited trainer, on Commonwealth workplace laws and instruments, including but not limited to the rights and responsibilities of employers under the FW Act and Modern Awards and the distinction between employees and independent contractors and complete any training, assessed as required by the accredited trainer.

(p) An order that the Fourth Respondent inform the Applicant at the completion of the training in order (o) that he has completed the training in compliance with that order and provide to the Applicant evidence in writing of its completion.

(q) An order that the Fourth Respondent immediately inform the Applicant in writing if he is not complying with order (o) above.

(r) An order that the Applicant have liberty to apply on seven days' notice in the event that any of the preceding orders are not complied with."

10. As can be seen from those matters, the Fourth Respondent has already had sanctions put upon him. I have been told that he has complied with those sanctions already and, obviously, these orders will not involve him at all.
11. To my mind, the sham contracting is the reason by which all of the other breaches occurred.
12. As a result the Respondents treated the six workers or complainants as if they were individual contractors, and thus the breaches of s. 44, s.45 and s.535 of the *Fair Work Act 2009* (Cth) occurred. These resulted in underpayments being made as follows:
 - a) Mr Sanei of \$9568.59;

- b) Ms Canning of \$8479.91;
 - c) Ms Ah Koy \$745.20;
 - d) Ms Stewart of \$3205.09;
 - e) Ms Baldwin \$1402.41; and
 - f) Ms Tomlinson \$1849.18.
13. The Respondents in their material depose to the fact that they used an online questionnaire on the ATO (Australian Tax Office) website, and the results of the questionnaire allowed them to classify the six complainants as individual contractors.
14. Whilst one cannot prove that such an event did not happen, it is to my mind a matter where, if it did happen, the Respondents must have answered such questions in a manner to ensure that the results of the questionnaire would show the person to be an individual contractor rather than an employee. It is my view that if such a questionnaire were answered absolutely truthfully, the result would have been that these six complainants would have been classified as employees.
15. This seems to be so when one looks at the affidavit of the complainant Ms Canning. In that affidavit, at paragraphs 24 to 32, she talks about the ABN. It seems that she was the only one of the six complainants that did not have an ABN beforehand. She said that she had been asked if she had obtained an ABN yet, but she was confused about why she needed one. She was told that she would be taxed at 48 per cent and that she “can’t work here without one”, and that it was needed so that they can work out her tax properly.
16. In early 2011, Ms Canning went to the Australian Tax Office website and made an online application for an ABN. She answered all the questions on the application truthfully and received a response that she was not eligible for an ABN. She deposes to receiving a telephone call from a lady from the ATO who asked her questions about her engagement with the First Respondent. She was asked questions such as, “*Do you bring your own computer to work,*” and, “*What do you say when you answer the phone at work?*” She deposed that she answered the questions honestly.

17. The lady had told her words to the effect, “*You’re not eligible for an ABN because you are an employee, rather than a contractor. You will need to make a complaint against the company you work for. You should not have an ABN.*” She said that she did bring the contents of that conversation to the notice of the First Respondent through the Fourth Respondent. It seems to me that such an incident should have sounded an alarm that the employment practices were not as they should have been. One would have hoped that this would have been a sign to seek some professional HR advice. However, this did not occur.
18. On 8 August 2012, the Australian Tax Office advised the Second Respondent that the relationship they had between themselves and the complainant Ms Stewart was one of employer and employee for the purposes of the *Superannuation Guarantee (Administration) Act (1992)*. One would have thought that this was then the second warning that the Respondents had to review their employment practices.
19. It was not until later in 2012 that the six complainants contacted the Fair Work Ombudsman to complain about their employment treatment. The respondents were then aware of the Fair Work investigation.
20. In April 2013, the Respondents did change their employment practices so that all persons supposedly employed on a contract were then made employees. The sham contracts were no longer then in existence. A contravention letter was sent to the respondents on 24 May 2013 and, on 18 June 2013, the Respondents paid back to each of the six complainants the amounts of money they had underpaid.
21. The matter then came to this Court and, after quite a deal of material was filed, an agreed statement of facts was filed on 8 September 2014. On 13 October 2014, a consent order was made against the First and Fourth Respondents.
22. What is then left to me is the assessment of quantum. This has not been an easy task. Just like sentencing in the criminal division, the assessment of quantum of civil damages under this Act is an imprecise science, but is guided by principle. The parties have referred me to a number of authorities. They are:-

- *ACCC v Yellow Page Marketing BV (No.2)* [2011] FCA 352;

- *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8;
- *Blandy v Coverdale NT Pty Ltd ACN 102 611 423* [2008] FCA 1533;
- *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 194 IR 461;
- *Darlaston v Risetop Construction Pty Ltd* [2011] FMCA 220;
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- *Fair Work Ombudsman v Bosen Pty Ltd* [2011] VMC 81;
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- *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2)* [2012] FCA 408;
- *Fair Work Ombudsman v VS Investment Group Pty Ltd & Anor* [2013] FCCA 208;
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- *Kelly v Fitzpatrick* [2007] FCA 1080;

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- *Mason v Harrington Corporation Pty Ltd t/as Pangea Restaurant & Bar* [2007] FMCA 7;
- *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70;
- *Ponzio v B & P Caelii Constructions Pty Ltd* (2007) 158 FCR 543;
- *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550;
- *Stuart-Mahoney v Construction, Forestry, Mining and Energy Union* [2008] FCA 1426;
- *Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor* [2009] FMCA 38;
- *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (Supra)
- *John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union (No.2)* [2009] FCAFC8; (2009) 187 IR 400;
- *Construction, Forestry, Mining and Energy Union v Williams* [2009] FCAFC 171; (2009) 191 IR 455;
- *Fair Work Ombudsman v Praglowski* [2010] FMCA 621;
- *Fair Work Ombudsman v Happy Cabby Ltd & Anor* [2013] FCCA 397;
- *Fair Work Ombudsman v Jay Group Services Pty Ltd & Ors* [2014] FCCA 2869;
- *The Director of the Fair Work Building Inspectorate v Linkhill Pty Ltd (No.9)* [2014] FCCA1124;
- *A & L Silvestri Pty Ltd v Construction, Forestry, Mining and Energy Union* [2008] FCA 466;
- *Fair Work Ombudsman v Jetstar Airways Ltd* [2014] FCA 33;
- *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584;
- *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357;

- *Kelly v Fitzpatrick* (Supra);
- *Finance Sector Union v Commonwealth Bank of Australia* [2005] FCA 1847; (2005) 147 IR 462;
- *Ponzio v B & P Caelii Constructions Pty Ltd* (Supra);
- *Australian Competition and Consumer Commission v Telstra Ltd* [2010] FCA 790; (2010) 188 FCR 238;
- *Comcare v Post Logistics Australasia Pty Limited* [2012] FCAFC 168;
- *Fair Work Ombudsman v Crocmedia Pty Ltd* [2015] FCCA 140;
- *Fair Work Ombudsman v Bedington* [2012] FMCA 1133;
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- *Fair Work Ombudsman v Theravanish Investments Pty Ltd & Ors* [2014] FCCA 1170;
- *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (Supra); and
- *Fair Work Ombudsman v AJR Nominees Pty Ltd (No.2)* [2014] FCA 128.

I have regard to all these authorities.

23. It seems the factors relevant to the imposition of the penalty are settled and from both the parties there is agreement that the matter of *Mason v Harrington Corporation Proprietary Limited Trading As Pangaea Restaurant and Bar* (Supra) does summarise the factors relevant to determining penalties.
- Circumstances in which the conduct took place;
 - Nature and extent of any loss or damage;
 - Similar previous conduct;

- Whether the breaches were properly distinct or arose out of the one course of conduct;
- Size of the company;
- Deliberateness of the breaches;
- Involvement of senior management;
- Corporation's contrition, corrective action and cooperation with the enforcement authorities;
- Ensuring compliance with minimum standards by providing effective means for investigation and enforcement of employee entitlements;
- Deterrence.

24. Whilst the sum of money that the six complainants were underpaid may seem small and the fact that the period in which they are employed was also of short duration, nevertheless, the sums were significant for those particular workers. There was discussion had between myself and the Bar table as to the offset of moneys, but, in the end, the fact is that it is undisputed that the sums of money I have previously detailed were underpaid.

25. To my mind, the most serious conduct involved the sham contracting. The results of sham contracting can be far-reaching. I can understand the persons in the position of the respondents as employers wishing to minimise their exposure to the costs of employees by having a contract system. Such a system, as they had envisaged, would mean that they were only liable for more employee costs when there was a resultant surge in income to the business because of the efforts of those employees. However, such an arrangement must always be fair. I adopt the words of the Minister who when introducing this Act to the Parliament said that:

“While the Government fully supports genuine independent contracting arrangements, it will not tolerate the use of sham arrangements and considers the people found to have knowingly disguised an employment relationship in this way should be subject to penalties.”

The Minister further went on:

“These penalties will send a clear message to employers that this is sought of unscrupulous behaviour will not be tolerated.”

26. The problem with sham contracting is that a person who is a true employee does not have the protections that are mandated under the *Fair Work Act 2009* (Cth). As Barnes FM (as he was then known) said in *Darlaston v Risetop Construction Proprietary Limited* (Supra) at paragraph 48:

“48. The indirect avoidance of entitlements by sham contracting cannot be measured in monetary terms. As pointed out, a contractor does not have recourse to paid sick leave. It can be inferred that such a person may be more likely to work when not well than an employee who has the protection of regulated standards of paid sick leave. Matters such as maximum weekly hours, requests for flexible working arrangements, parental leave and related entitlements, annual leave, public holidays and notice of termination and redundancy pay may be similarly devalued and even effectively negated by such sham contractual arrangements. The award which would have applied to the workers as employees is in evidence before the Court. It contains such protections. It may be that other rights that employees have or may have recourse to, such a protection for unfair dismissal, are negated and avoided by such arrangements.”

To my mind, this is why such behaviour needs to be condemned in the strongest terms by this Court.

27. I acknowledge what was said by Lander J in *Ponzio v B&P Caelli Constructions Proprietary Limited* (Supra), where his Honour said:

“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... 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...”

28. I regard to two ‘warnings’ as I have termed them, as aggravating factors. To continue the contract system after these two incidents, illustrates a deliberate ignorance of the Respondents’ obligations as employers. It was only because of the forceful interference by the Applicant that the Respondents changed their ways.
29. I view the actions of the Respondents as a course of conduct in relation to each employee but as a separate course of conduct involving each particular employee.
30. To my mind, the sham transactions are far more serious than either of the parties before me purported them to be.
31. As to the other matters, I see those contraventions as stemming from the contravention of the sham transactions under s.357 of the Act. Therefore, in fixing the penalties, I have concentrated on the contravention of s.357 rather than the others. The other contraventions I have decided to give far lesser penalties than those that were urged upon me.
32. According to the way in which the parties wished me to approach the matter, I have had regard to the tables that both parties have constructed in their submissions (Respondents’ material at paragraph 74 and the Applicant at paragraph 98 of their submissions). Both are agreed that for the breaches of s.357 the maximum penalty is \$33,000.00 for a corporation and \$6,600 for a real person. For the breaches of s.45 of the *Fair Work Act 2009* (Cth), the maximum is also \$33,000.00 and \$6,600, and for breach of s.535 the maximum penalty is \$16,500.00 and \$3,300. There was broad agreement by the parties as to the effect of s.577 on the groupings. The table I have produced at the end of the judgment reflects that agreement.
33. With regard to the breaches of s.357 of the *Fair Work Act 2009* (Cth) I, as I say, find that such breach is far more serious than either party has outlined to me. In the ordinary circumstance, I would order penalties of \$23,100 and \$4,620 respectively or, 70 per cent of the maximum for each breach in this case. For the breaches of s.45 and s.44 of the *Fair Work Act 2009* (Cth), I find these contraventions far less serious because they result from the breaches of s.357 and would issue penalties of \$1,650.00 and \$330 respectively for each of those or five

per cent of the maximum. For the penalty of the s.535 breach I would also only give a penalty of \$825.00 and \$165 respectively, which is, again, five per cent. If one were adding those matters up, then the penalty used in the tables that have been provided to me would be the First Respondent having a total of \$80,025.00, the Second Respondent, \$75,075.00; the Fifth Respondent alone, \$15,505.00; and the Third and Fifth respondent, \$14,515.00. Those are the parameters from which I am then working.

34. Those penalties are the raw penalties. The fact is that there has been quite a deal of material in mitigation. This is the first infraction of the Fair Work Act committed by any of the Respondents. The fact is that the Respondents have changed their whole employment arrangements. This would not have been an easy thing to do, and yet by April of 2013 all employees were not on contracts but were now full employees with the full protection of the Act.
35. The matter has proceeded relatively quickly, and there has been quite a deal of cooperation in that this matter has not had to go to a full hearing. Having said that, it is obvious that such a full hearing may not have been in the Respondents' best interests as it would seem to me likely that the Applicant would have been successful on most of the matters upon which they claimed in the Statement of Claim. Nevertheless, this has saved a great deal of Court time and a great deal of taxpayer money being expended by the Fair Work Ombudsman, and there should be credit for that. As well as that, I have had regard to the state of the companies and of the Third and Fifth Respondents as to what sort of impact such penalties would have
36. As averted to earlier, such penalties should not be crushing. However, the penalty should be significantly serious enough so that a message is well and truly sent. In my view, these penalties I will impose achieve that goal. For the reasons of the remorse, for reasons of the way in which the company is now doing things and the financial situations of both the company and the individuals, in my view, those penalties that I have looked at should be discounted by a factor of 25 per cent. In my calculations, this means for the First Respondent a total pecuniary penalty of \$60,018.75, for the Second Respondent a total of \$56,306.25,

for the Fifth Respondent a total of \$12,003.75, and for the Third Respondent and Fifth Respondent a total of \$11,261.25.

First Respondent

Provision Contravened	Maximum penalty for group	Penalty as a percentage of maximum	Penalty	Actual penalty once 25% discount Is applied
1. s 357(1) of the FW Act – Mr Sanei	\$33,000	70%	\$23,100	\$17,325
2. s 357(1) of the FW Act – Ms Canning	\$33,000	70%	\$23,100	\$17,325
3. s 357(1) of the FW Act – Ms Ah Koy	\$33,000	70%	\$23,100	\$17,325
4. s 45 FW Act and cl 17 Modern Award	\$33,000	5%	\$1,650	\$1,237.50
5. s 44 FW Act and s 293 FW Act	\$33,000	5%	\$1,650	\$1,237.50
6. s45 FW Act and cl 29.2(a) Modern Award	\$33,000	5%	\$1,650	\$1,237.50

7. s44 FW Act and s116 FW Act	\$33,000	5%	\$1,650	\$1,237.50
8. s44 FW Act and s99 FW Act	\$33,000	5%	\$1,650	\$1,237.50
9. s44 FW Act and s90(2) FW Act	\$33,000	5%	\$1,650	\$1,237.50
10. s535(1) FW Act	\$16,500	5%	\$825	\$618.75
Total	\$313,500		\$80,025	\$60,018.75

Second Respondent

Provision Contravened	Maximum penalty for group	Suggested penalty range	Penalty	Actual penalty once 25% discount Is applied
1. s 357(1) FW Act – Mr Baldwin	\$33,000	70%	\$23,100	\$17,325
2. s 357(1) FW Act – Ms Stewart	\$33,000	70%	\$23,100	\$17,325
3. s 357(1) FW Act – Ms Tomlinso	\$33,000	70%	\$23,100	\$17,325

n				
4. s 45 FW Act and cl 29.2(1) Modern Award	\$33,000	5%	\$1,650	\$1,237.50
5. s 44 FW Act and 116 FW Act	\$33,000	5%	\$1,650	\$1,237.50
6. s 44 FW Act and s90(2) FW Act s.45 FW Act and cl 32.3 Modern Award	\$33,000	5%	\$1,650	\$1,237.50
7. s 535(1) FW Act	\$16,500	5%	\$825	\$618.75
Total	\$214,500		\$75,075	\$56,306.25

Fifth Respondent involvement in First Respondent's Contraventions

	Maximum	Suggested	Penalty	Actual penalty once
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Provision Contravened	penalty for group	penalty range		25% discount Is applied
1. s 357(1) of the FW Act – Mr Sanei	\$6,600	70%	\$4620	\$3,465.00
2. s 357(1) of the FW Act – Ms Canning	\$6,600	70%	\$4620	\$3,465.00
3. s 357(1) of the FW Act – Ms Ah Koy	\$6,600	70%	\$4620	\$3,465.00
4. s45 FW Act and cl 17 Modern Award	\$6,600	5%	\$330	\$247.50
5. s44 FW Act and s 293 FW Act	\$6,600	5%	\$330	\$247.50
6. s45 FW Act and cl 29.2(a) Modern Award	\$6,600	5%	\$330	\$247.50
7. s44 FW Act and s116 FW Act	\$6,600	5%	\$330	\$247.50
8. s44 FW Act and	\$6,600	5%	\$330	\$247.50

s99 FW Act				
9. s44 FW Act and s90(2) FW Act	\$6,600	5%	\$330	\$247.50
10. s 535(1)	\$3,300	5%	\$165	\$123.75
Total	\$62,700		\$16,005	\$12,003.75

Third and Fifth Respondents' involvement in Second Respondent

Provision Contravened	Maximum penalty for group	Suggested penalty range	Penalty	Actual penalty once 25% discount Is applied
1. s 357(1) FW Act – Mr Baldwin	\$6,600	70%	\$4,620	\$3,465.00
2. s 357(1) FW Act – Ms Stewart	\$6,600	70%	\$4,620	\$3,465.00
3. s 357(1) FW Act – Ms Tomlinson	\$6,600	70%	\$4,620	\$3,465.00
4. s 45 FW Act and cl 29.2(1) Modern Award	\$6,600	5%	\$330	\$247.50

5. s 44 FW Act and 116 FW Act	\$6,600	5%	\$330	\$247.50
6. s 44 FW Act and s90(2) FW Act s.45 FW Act and cl 32.3 Modern Award	\$6,600	5%	\$330	\$247.50
7. s 535(1) FW Act	\$3,300	5%	\$165	\$123.75
Total	\$42,900		\$15,015	\$11,261.25

37. The order that the Applicant urged upon me was that such be paid to the Consolidated Revenue Fund of the Commonwealth within 30 days. In my view, that should be extended to 90 days, and that there be liberty to apply on seven days' notice for any reason whatsoever.

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

Date: 5 March 2015