

FEDERAL CIRCUIT COURT OF AUSTRALIA

*FAIR WORK OMBUDSMAN v MORDEL PTY LTD
& ANOR*

[2015] FCCA 1434

Catchwords:

INDUSTRIAL LAW – Civil penalty provisions – underpayments – considerations relevant to penalty.

Legislation:

Fair Work Act 2009, ss.45, 535, 535(1), 550(1), 557, 557(1), 716, 716(2)
Federal Circuit Court Rules 2001, rr.13.03A(2), 13.03B(2)(c)

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	MORDEL PTY LTD (ACN 147 505 771)
Second Respondent:	DOUGLASS CHARLES KIDD
File Number:	BRG 1132 of 2014
Judgment of:	Judge Jarrett
Hearing date:	18 May 2015
Date of Last Submission:	18 May 2015
Delivered at:	Brisbane
Delivered on:	18 May 2015

REPRESENTATION

Counsel for the Applicant: Ms Hartigan

Solicitors for the Applicant: Fair Work Ombudsman

No appearance by the First or Second Respondents

ORDERS

THE COURT DECLARES THAT:

- (1) Upon the admissions which the first respondent is taken to have made, consequent upon default by the first respondent pursuant to subrule 13.03A(2) of the *Federal Circuit Court Rules 2001 (FCC Rules)*, the Court declares that the First Respondent contravened the following civil remedy provisions:
 - (a) s.45 of the *Fair Work Act 2009 (FW Act)* by failing to pay minimum rates to Mr Shaun Eggerling, Ms Lois Leonard, Mr David Mallory and Ms Rachel Thornton (**Underpayment Employees**) in accordance with clause A.2.5 of Schedule A of the *Security Services Industry Award 2010 (Award)*;
 - (b) s.45 of the FW Act by failing to pay casual loading to the Underpayment Employees in accordance with clause A.5.4 of Schedule A of the Award;
 - (c) s.45 of the FW Act by failing to pay permanent night work penalty rates to Mr Eggerling, Ms Leonard and Mr Mallory in accordance with clause A.7.3 of Schedule A of the Award;
 - (d) s.45 of the FW Act by failing to pay Saturday span penalty rates to Mr Eggerling, Mr Mallory and Ms Thornton in accordance with clause A.7.3 of Schedule A of the Award;
 - (e) s.45 of the FW Act by failing to pay Sunday span penalty rates to the Underpayment Employees in accordance with clause A.7.3 of Schedule A of the Award;
 - (f) s.45 of the FW Act by failing to pay overtime loadings to Ms Leonard, Mr Mallory and Ms Thornton in accordance with clause 23.3 of the Award;
 - (g) s.716(5) of the FW Act by failing to comply with a compliance notice with respect to Mr Eggerling;

- (h) s.716(5) of the FW Act by failing to comply with a compliance notice with respect to Ms Thornton;
 - (i) s.535 of the FW Act by failing to make and keep for 7 years, records prescribed by regulation 3.33(1)(b) of the *Fair Work Regulations 2009*, namely gross and net wages paid to employees, with respect to Mr Mark Fornasiero; and
 - (j) s.535 of the FW Act by failing to make and keep for 7 years, records prescribed by regulation 3.33(2) of the *Fair Work Regulations 2009*, namely hours worked by an employee, with respect to Mr Fornasiero.
- (2) Upon the admissions which the second respondent is taken to have made, consequent upon default by the second respondent pursuant to subrule 13.03A(2) of the FCC Rules, the Court declared that the second respondent was involved in each of the contraventions admitted by the first respondent as listed in the declarations sought at paragraphs 1(a) to (j) above pursuant to subs.550(1) of the FW Act.

THE COURT ORDERS THAT:

- (1) Default judgment is entered for the Applicant against the first and second respondents pursuant to rule 13.03B(2)(c) of the FCC Rules.
- (2) Pursuant to s.545(2)(b) of the FW Act, the first Respondent:
 - (a) pay to Mr Eggerling an amount of \$759.28;
 - (b) pay to Ms Leonard an amount of \$2,949.76;
 - (c) pay to Mr Mallory an amount of \$4,272.99;
 - (d) pay to Ms Thornton an amount of \$1,722.86within 28 days of the Court's order.
- (3) Pursuant to s.547(2) of the FW Act the first respondent pay the Underpayment Employees interest on the sum referred to in order 2 above.
- (4) Pursuant to subs.559(1) of the FW Act, in the event the first respondent is unable to locate Mr Eggerling, Ms Leonard, Mr Mallory or Ms

Thornton within the time prescribed in order 2, the respondent pay the amount due to the Commonwealth within a further 7 days.

- (5) The first respondent pay to the Commonwealth a pecuniary penalty in respect of the contraventions identified in these declarations fixed in the sum of \$75,000.
- (6) The second respondent pay a penalty in respect of the first respondents contraventions identified in these orders and declarations fixed in the sum of \$15,000.
- (7) Pursuant to subs.546(3)(a) of the FW Act, the first and second respondents pay their respective penalty amounts to the Commonwealth within 28 days of this order.

**FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT BRISBANE**

BRG 1132 of 2014

FAIR WORK OMBUDSMAN
Applicant

And

MORDEL PTY LTD (ACN 147 505 771)
First Respondent

DOUGLASS CHARLES KIDD
Second Respondent

REASONS FOR JUDGMENT

ex tempore

1. By an application filed on 23 February, 2015 the Fair Work Ombudsman, seeks relief against Mordel Pty Ltd and Douglass Charles Kidd for alleged breaches of the *Fair Work Act 2009* (Cth). The application was accompanied by a statement of claim that sets out in detail the allegations made against the first and second respondents.
2. Essentially, it is claimed that the first respondent was the employer of four people, Shaun Eggerling, Lois Leonard, David Mallory and Rachel Thornton. In respect of each of those employees the first respondent had underpaid them not just their basic rate of pay, but also other loadings to which they were entitled by reason of an award which governed their employment and other provisions of the Fair Work Act. I will refer in more detail shortly to those matters.

3. The statement of claim also alleges that the second respondent was involved in the contraventions of the Fair Work Act by the first respondent in the sense in which that phrase is used in s.550(1) of the Fair Work Act.
4. I am satisfied that the application and statement of claim were served upon the respondents. The proceedings have been before the Court on a number of occasions now. At no time has the first respondent or the second respondent filed a response or a defence to the proceedings.
5. I am satisfied that the respondents have been notified by the applicant on each occasion that the matter was to be before the Court. Neither respondent has appeared on any occasion when the proceedings have been before the court. When the matter was called this morning there was again no appearance by the respondents.
6. Accordingly, I am satisfied that the respondents are in default for the purposes of rule 13.03A(2) of the *Federal Circuit Court Rules 2001*, and that by reason of the respondents' default I am able to proceed in the respondents' absence.
7. Pursuant to rule 13.03B(2)(c), the applicant seeks default judgment. Because these proceedings were commenced by an application and a statement of claim, the applicant does not need to satisfy me by way of evidence of the matters described in the statement of claim. The Court might give judgment against the respondent for the relief that the applicant appears entitled to on the statement of claim and the Court is satisfied it has power to grant.
8. However, because some of the relief sought by the applicant involves the exercise of a discretion, in particular the making of declarations and the imposition of pecuniary penalties, it is necessary for the applicant to file some evidence to inform the Court's discretion about those matters. The applicant has done that in this case.
9. The statement of claim reveals that the four employees to whom I have already referred were employed by the first respondent. Its business was providing security services in various places and locations around Central Queensland. According to the statement of claim, each of the four respondents were underpaid their basic rates of pay, Eggerling by

\$419.98, Leonard by \$1679.92, Mallory by \$2469.67, and Thornton by \$1071.60.

10. They were also entitled to be paid but were not paid casual loading in accordance with an award which governed their employment. According to the statement of claim, the amounts not paid by way of casual loading were \$103.27 in respect of Eggerling, \$246.95 in respect of Leonard, \$535.43 in respect of Mallory, and \$226.38 in respect of Thornton.
11. They were also entitled to be paid what is described in the statement of claim by reference to the award as “permanent night span work penalty”. Eggerling, Leonard and Mallory were each deprived of that payment. The particulars are in the statement of claim.
12. They were also entitled to what is described as “Saturday span penalty”, and the employees Eggerling, Mallory and Thornton were all deprived of those penalty payments.
13. Sunday span penalty payments were also due to each of the four employees and they went unpaid as well.
14. They were also entitled to be paid overtime loading and Leonard, Mallory and Thornton did not receive overtime loading in accordance with their entitlements. The particulars, again, are set out in the statement of claim.
15. According to the evidence, the first respondent’s employment practices have been the subject of a number of complaints and the applicant had been given to investigate the first respondent and its practices for some time. In consequence of the investigations in relation to the particular employees concerned in these proceedings, on 27 May, 2014 the applicant issued two compliance notices pursuant to s.716(2) of the Act to the first respondent.
16. Section 716 of the Act sets out a regime whereby a recipient of such a notice might challenge the assertions made in the notice. However, the first respondent, and for that matter the second respondent, did nothing about those compliance notices.

17. The compliance notices related to the contraventions to which I have already referred.
18. The statement of claim also reveals that the first respondent failed to keep records of the gross and net amounts paid to another employee Mr Fornasiero and records of the hours worked by Mr Fornasiero. Each of those failures was a breach of s.535(1) of the Act.
19. The relief to which the applicant appears entitled certainly, in my view, is the declaratory relief that the applicant seeks. The applicant is also entitled to the orders that are sought with respect to the payments to be made to the employees which reflect the underpayments to which they have been subjected.
20. Accordingly, I am satisfied that I should declare as follows:
 - (1) Upon the admissions which the first respondent is taken to have made, consequent upon default by the first respondent pursuant to subrule 13.03A(2) of the *Federal Circuit Court Rules 2001*, the Court declares that the First Respondent contravened the following civil remedy provisions:
 - (a) s.45 of the *Fair Work Act 2009* by failing to pay minimum rates to Mr Shaun Eggerling, Ms Lois Leonard, Mr David Mallory and Ms Rachel Thornton (Underpayment Employees) in accordance with clause A.2.5 of Schedule A of the *Security Services Industry Award 2010* (Award);
 - (b) s.45 of the FW Act by failing to pay casual loading to the Underpayment Employees in accordance with clause A.5.4 of Schedule A of the Award;
 - (c) s.45 of the FW Act by failing to pay permanent night work penalty rates to Mr Eggerling, Ms Leonard and Mr Mallory in accordance with clause A.7.3 of Schedule A of the Award;
 - (d) s.45 of the FW Act by failing to pay Saturday span penalty rates to Mr Eggerling, Mr Mallory and Ms Thornton in accordance with clause A.7.3 of Schedule A of the Award;

- (e) s.45 of the FW Act by failing to pay Sunday span penalty rates to the Underpayment Employees in accordance with clause A.7.3 of Schedule A of the Award;
 - (f) s.45 of the FW Act by failing to pay overtime loadings to Ms Leonard, Mr Mallory and Ms Thornton in accordance with clause 23.3 of the Award;
 - (g) s.716(5) of the FW Act by failing to comply with a compliance notice with respect to Mr Eggerling;
 - (h) s.716(5) of the FW Act by failing to comply with a compliance notice with respect to Ms Thornton;
 - (i) s.535 of the FW Act by failing to make and keep for 7 years, records prescribed by regulation 3.33(1)(b) of the *Fair Work Regulations 2009*, namely gross and net wages paid to employees, with respect to Mr Mark Fornasiero; and
 - (j) s.535 of the FW Act by failing to make and keep for 7 years, records prescribed by regulation 3.33(2) of the *Fair Work Regulations 2009*, namely hours worked by an employee, with respect to Mr Fornasiero.
- (2) Upon the admissions which the second respondent is taken to have made, consequent upon default by the second respondent pursuant to subrule 13.03A(2) of the *Federal Circuit Court Rules 2001*, the Court declared that the second respondent was involved in each of the contraventions admitted by the first respondent as listed in the declarations sought at paragraphs 1(a) to (j) above pursuant to subs.550(1) of the Fair Work Act.

ORDERS DELIVERED

21. I now turn to the question of penalties. The task of the court in imposing pecuniary penalties is to mark the Court's disapproval of the contravening conduct by the respondent, to deter similar contraventions, both in respect of the respondent who is the subject of the proceedings and more generally, and impose a formal punishment upon the respondent for the contraventions of the Act.

22. The contraventions in this case that need to be considered are numerous. The applicant has set out in the written submissions filed in support of this application at paragraph 69 a table which records the particular contraventions that are the subject of this application. In respect of each of the contraventions comprising a failure to pay to each of the employees either their basic minimum rate of pay or any of the loadings to which they were entitled, each time there was a failure to make one of those payments there was a breach of the relevant provision of the Fair Work Act or the award.
23. The contraventions spanned a relatively short period of time – weeks in respect of each employee. There are four employees involved. There are numerous failures to pay the correct rates. The contraventions are therefore numerous. But s.557 of the Fair Work Act provides for multiple contraventions of particular penalty provisions of the Act to be dealt with as one contravention in certain circumstances.
24. Here the contraventions of s.45 of the Act are amenable to the operation of s.557(1) of the Act. The exercise of identifying which multiple contraventions must be treated as one contravention for the purposes of s.557(1) has been undertaken by the applicant in paragraph 69 of the written submissions. When one has regard to that table and leaving aside the failure to comply with compliance notices and keep relevant records, there are 21 contraventions. One in respect of each separate entitlement to which each employee was entitled.
25. There are separate contraventions in respect of s.716(5) and separate contraventions in respect of s.535 of the Act. They add another four single contraventions to the list.
26. The imposition of a penalty, however, in respect of each individual contravention might work an injustice to the respondents. Where the contraventions have common elements, the Court has a discretion to treat those contraventions either by grouping them together and imposing a more moderate penalty across all of those contraventions or by imposing penalties in respect of some of the contraventions and not imposing penalties in respect of the others.
27. As the written submissions make clear, one of the matters which is of interest to the Court in imposing a penalty is the way in which the

contraventions have arisen and whether in respect of different employees, the contraventions might be said to have been the product of a single decision by the employer. Where the contravening conduct is the result of a single decision of an employer, that might afford some basis for treating many contraventions together so that the same culpable conduct is not punished more than once. However, the onus of establishing that multiple contraventions are the result of a single decision of the employer lies on the employer.

28. Here, there is no evidence to suggest that there was a single decision which informed the contraventions in respect of each of the employees. The contraventions in respect of each of the employees ought to be dealt with separately. However, in respect of each of the four employees it would seem that the failure to pay the correct rates, casual loadings and other loadings to which they were entitled is probably most likely due to a decision by the employer to pay a flat rate of pay or a rate of pay which was not worked out by reference to the relevant industrial requirements.
29. That is to say, the various underpayments in respect of each employee are likely the result of a single decision by the employer in respect of that particular employee. That would mean then that in respect of each of the contraventions concerning Mr Egling, Ms Leonard, Mr Mallory and Ms Thornton it would be appropriate to impose a penalty in respect of the breach of the basic wage entitlements in respect of each of those employees, and then consider what, if any, penalty might be imposed in respect of the balance of the contraventions for each of those employees. That way, the prospect of punishing the first respondent more than once for the same culpable behaviour might be avoided.
30. As the written submissions for the applicant demonstrate, if the exercise that I have just described was not undertaken the maximum penalties to which the first respondent might be exposed exceed \$1.1 million, and the penalties to which the second respondent might be exposed exceed \$70,000.
31. A number of matters are relevant to the fixing of a penalty. I accept the applicant's submissions that the evidence demonstrates that there is a repeated failure by the first respondent to provide to the four employees that have been named their basic entitlements.

32. I accept that the evidence demonstrates that the second respondent's conduct towards those employees and the Fair Work Ombudsman's investigation into this case might best be described as disingenuous.
33. The respondents have conducted the relevant business since 2010. The requirement to pay wages in accordance with the Security Services Industry Award was apparently made known to the respondents no later than September, 2013. There have been along the way acknowledgements by the respondents of their contraventions of the Act, but yet nothing was done.
34. The evidence reveals that there was some compliance notices issued. I have already referred to those, but there was no response to the notices.
35. I have already set out the amounts by which the employees were underpaid. They are set out similarly in the statement of claim.
36. The applicant suggests that the first respondent has not been previously the subject of proceedings for contraventions of workplace laws, but having regard to the evidence, that is probably more a matter of good luck than good management.
37. The material before me demonstrates that the first respondent's business is probably best described as a small business, but in my view that does not matter too much because employees of small businesses are just as much entitled to the protections of the Fair Work Act as employees of larger businesses. The size of a business and its financial position is of interest, however, because it says something about the capacity of the business to be able to absorb and deal with a pecuniary penalty. The size of the employer's business assists to inform the level of that penalty that might be imposed so that the penalty is imposed at a meaningful level. Here, there is no evidence from the respondents about the financial position of either respondent.
38. I am satisfied that the contraventions in this case having regard to the evidence, were deliberate. That is a significant finding but the evidence informs that finding.
39. The underpayments remain outstanding. There has been no real attempt by the first respondent to ameliorate its contravening conduct. There are no expressions of contrition on the part of the respondents.

RECORDED : NOT TRANSCRIBED

40. In respect of each of the employees and the non-payment of their respective entitlements it seems appropriate in my view to treat, as I have already indicated, the various contraventions in respect of each individual employee as arising out of a course of conduct referable to each of those employees, and to impose a penalty in respect of what I might describe as the principal contravention relating to the underpayment of basic wage rates and then not imposing any penalty in respect of the balance of the contraventions relating to that employee.
41. In respect of each of the employees it seems to me that they should be all treated the same, that is, the same penalty ought to be imposed in respect of each of the employees because the contravening conduct in respect of each of them is of the same nature.
42. In respect of each of them it seems to me that in respect of the first respondent a pecuniary penalty which is 40 per cent of the maximum, or \$20,400 is appropriate. Totalled together for each of the four employees that is a total pecuniary penalty of \$81,600.
43. In respect of the failure to comply with the compliance notices I intend to treat those, as the applicant suggests, as a single contravention and impose a penalty for one of them, but not the other. A penalty of 50 per cent of the maximum is appropriate or \$12,750.
44. I take a similar approach to the contraventions of s.535(1) and impose a penalty of \$12,750.
45. The penalties then total \$96,100. I am required to consider whether that total penalty is a proper response to the culpability of the first respondent and its contravening conduct. In my view a total penalty of \$75,000 more properly reflects the first respondent's culpability in respect of the contraventions to which I have just referred. In respect of those contraventions I will impose a single penalty of \$75,000.
46. In respect of the second respondent there is no reason, it seems to me, to depart from the approach that I have adopted in respect of the first respondent, that is to say in respect of the principal contraventions, if I can call them that, there ought to be a penalty of \$16,320.

47. In respect of the compliance notices and the failure to comply with those an appropriate penalty is \$2,550, and similarly \$2,550 for the breach of s.535(1).
48. The total penalty in those circumstances for the second respondent then is \$21,420. Applying the totality principle and adopting the reasoning that I have taken with respect to the first respondent it seems to me that a total penalty of \$15,000 in respect of the second respondent is appropriate.
49. In those circumstances I will add to the orders that I have already pronounced, an order that the first respondent pay to the Commonwealth a pecuniary penalty in respect of the contraventions identified in these declarations fixed in the sum of \$75,000. I further order that the second respondent pay a penalty in respect of the first respondent's contraventions identified in these orders and declarations fixed in the sum of \$15,000, and that each of those penalties be paid to the Commonwealth of Australia.

RECORDED : NOT TRANSCRIBED

50. I order that the penalty be paid within 28 days of today.

I certify that the preceding fifty (50) paragraphs are a true copy of the reasons for judgment of Judge Jarrett delivered on 18 May, 2015.

Associate:

Date: 28 May 2015