FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v SOLEIMANI & ANOR *[2014] FCCA 2380*

Catchwords:
INDUSTRIAL LAW – Penalty hearing for contraventions of *Fair Work Act 2009* – admitted liability for contraventions – agreed penalty range – applicable test for penalty.

Legislation:
Fair Work Act 2009, ss.45, 546(3), 546(1), 535(1), 44(1), 90(11), 90(2), 536(1), 536(2), 712, 539(2), 12
Crimes Act 1914, s.4AA(1)
Fair Work Regulations 2009, rr.3.33(3), 3.37(1), 3.46(1)(d), 3.46(5)(b)

Cases cited:
Gibbs v Mayor, Councillors & Citizens of City of Altona (1992) 37 FCR 216 at 223 (Gibbs)
McIver v Healey [2008] FCA 425 at 16 (unreported, Federal Court of Australia, 7 April 2008 Marshall J
Australian Opthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8 AT [46] (Graham J) (unreported, Full Court of the Federal Court of Australia, 20 February 2008, Gray, Graham and Buchanan JJ) (Merringtons)
Mornington Inn Pty Ltd v Jordan [2008] FCAFC 70 at [41] – [46] (Stone & Buchanan JJ) (unreported, Full Court of the Federal Court of Australia, 7 May 2008, Gyles, Stone and Buchanan JJ) (Mornington Inn)
Mason v Harrington Corporations Pty Ltd [2007] FMCA
Australian Building and Construction Commissioner v Construction Forestry, Mining Employees Union [2012] FCA 189
Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor [2012] FMCA 258 at [67]
Fair Work Ombudsman v Saya Cleaning Pty Ltd [2009] FMCA 28 at [20]
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412
Fair Work Ombudsman v La Kosta Childcare Centre & Kindergarten Pty Ltd [2012] FMCA 551 at [59]
Fair Work Ombudsman v CAN 052182180 Pty Ltd & Uri Burke [2013] FCCA 688
Fair Work Ombudsman v Orwill Pty Ltd & Ors [2011] FMCA 730 at [21]
Re Trade Practices Commission v CSR Limited (1991) 13 ATPR 41-076
Plancor Pty Ltd v Liquor, Hospitality & Miscellaneous Union (2008) 171 FCR 357; (2008) 177 IR 243: [2008] FCAFC 170 at [37]
Ponzio v B & P Cailli Constructions Pty Ltd (2007) 158 FCR 543: (2007) 162 IR 444: [2008] FCAFC 65 at [93]

Community & Public Sector Union v Telstra Corporation Limited (2001) 108 IR 228; [2001] FCA at [230]-[231]
Fair Work Ombudsman v Maclean Bay Pty Ltd (No.2) [2012] FCA 557
Williams v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union [2010] FCA 754
Cruse v Multiples Ltd (2008) 172 FCR 279 at [59]
Australian Competition Consumer v Midland Brick Co Pty Ltd (2004) 207 ALR 329 at [20] to [21]
Fair Work Ombudsman v Kenwood Industries Pty Ltd (No.2) [2010] FCA 1156
Fair Work Ombudsman v Tiger Telco Pty Ltd (in liq) [2012] FCA 479 at [36]
Australian Competition and Consumer Commission v Dataline.net.au Pty Ltd [2006] FCA 1427, Kiefel J, at [52] to [59]

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	FARDIN SOLEIMANI
Second Respondent:	BEVERLY JANET SOLEIMANI
File Number:	MLG 947 of 2013
Judgment of:	Judge Jones
Hearing date:	4 August 2014
Date of Last Submission:	4 August 2014
Delivered at:	Melbourne
Delivered on:	7 November 2014

REPRESENTATION

Counsel for the Applicant:	Ms Knowles
Solicitors for the Applicant:	Fair Work Ombudsman
Counsel for the Respondent:	Mr Pauline
Solicitors for the Respondent:	Betteridge Legal Consulting

THE COURT DECLARES UPON ADMISSIONS MADE BY THE FIRST AND SECOND RESPONDENTS THAT:

1. The First and Second respondent contravened:

In respect of minimum wages:

A. Section 45 of the Fair Work Act 2009 ("the Act") by virtue of a contravention of clause A.2.3 of the *General Retail Industry Award* 2010 ("the Modern Award"), by failing to provide Ms Carter with the minimum wage in the *Shop, Distributive and Allied Employees Association – Victorian Shops Interim Award 2000* [AR796250] ("the Pre-Modern Award") from on or about 7 May 2010 to immediately before the first pay period commencing on or after 1 July 2010;

B. Section 45 of the Act by virtue of a contravention of clause A.2.5 of the Modern Award, by failing to provide Ms Carter with the transitional minimum wages as an 18 year old Retail Employee Level 1 from the first pay period commencing on or after 1 July 2010 to 12 August 2010;

C. Section 45 Act of the Act by virtue of a contravention of clause A.3.5 of the Modern Award, by failing to pay Ms Carter with the transitional minimum wages for a Retail Employee Level 3 from 13 August 2010 to 25 November 2012;

D. Section 45 of the Act by virtue of a contravention of clause 29.4(a) of the Modern Award, by failing to pay Ms carter an additional 25% penalty loading for ordinary hours worked after 6.00pm Monday to Friday from on or about 7 May 2010 to 25 November 2012;

In respect of Saturday rates:

E. Section 45 of the Act by virtue of a contravention of clause A.6.2 of Schedule A of the Modern Award, by failing to pay Ms Carter an additional amount for time worked within ordinary hours between 7.00am and 6.00pm on Saturdays from on or about 7 May 2010 to immediately before the first pay period commencing on or after 1 July 2010 in accordance with clause 18.2.1 of the Pre-Modern Award;

F. Section 45 of the Act by virtue of a contravention of clause A.6.4 of Schedule A of the Modern Award, by failing to pay Ms Carter the transitional penalty rates for Saturday work (phasing out the entitlement in clause 18.2.1 of the Pre-Modern Award) from the first pay period commencing on or after 1 July 2010 to 25 November 2012;

G. Section 45 of the Act by virtue of a contravention of clause A.7.3 of Schedule A of the Modern Award, by failing to pay Ms Carter the transitional penalty rates for Saturday work (phasing in the entitlement in clause 29.4(b)) from the first pay period commencing on or after 1 July 2010 to 25 November 2012;

In respect of Sunday rates:

H. Section 45 of the Act by virtue of a contravention of clause 29.4(c) of the Modern Award, by failing to pay Ms Carter an additional 100% penalty loading for all hours worked on a Sunday from on or about 7 May 2010 to 25 November 2012;

In respect of public holiday rates:

I. Section 45 of the Act by virtue of a contravention of clause 29.4(d) of the Modern Award, by failing to pay Ms Carter an additional 150% penalty loading for work on a public holiday between 7 May 2010 and 25 November 2012;

In respect of overtime rates:

J. Section 45 of the Act by virtue of a contravention of clause 29.2(a) of the Modern Award, by failing to pay Ms Carter time and a half for the first three hours and double time thereafter for hours worked in excess of the ordinary hours of work, outside the span of hours (excluding shift work) or roster conditions prescribed by the Modern Award (Overtime);

K. Section 45 of the Act by virtue of a contravention of clause 29.2(c) of the Modern Award, by failing to pay Ms Carter double time for Overtime worked on Sundays and double time and a half for Overtime worked on public holidays;

In respect of annual leave payments:

L. Section 44(1) of the Act by virtue of a contravention of section 90(1) of the Act, by failing to pay Ms Carter at her base rate of pay for her ordinary hours of work during periods of annual leave taken between 7 May 2010 and 25 November 2012;

In respect of leave loading:

M. Section 45 of the Act by virtue of a contravention of clause 32.3 of the Modern Award, by failing to pay Ms Carter annual leave loading of 17.5% of her minimum wage during periods of annual leave between 7 May 2010 and 25 November 2012;

In respect of annual leave on termination:

N. Section 44(1) of the Act by virtue of a contravention of section 90(2) of the Act, by failing to pay Ms Carter the amount that would have been payable to her had she taken her accrued annual leave at the time of her termination on 25 November 2012;

In respect of fortnightly wage payments:

O. Section 45 of the Act by virtue of a contravention of clause 23 of the Modern Award, by failing to pay Ms Carter her wages due at least fortnightly between 7 May 2010 and 25 November 2012;

In respect of meal breaks:

P. Section 45 of the Act by virtue of a contravention of clause 31.1 of the Modern Award, by failing to provide Ms Carter with a break of at least 30 but no more than 60 minutes (Meal Break) for shifts of between 5 and 10 hours, and an additional Meal Break for shifts of 10 hours or more, from on or about 20 May 2010 to 25 November 2012;

In respect of laundry allowance:

Q. Section 45 of the Act by virtue of a contravention of clause 20.2(b) of the Modern Award, by failing to pay Ms Carter an

allowance of $6.25 per week for laundering her uniform between 20 May 2010 and 25 November 2012;

In respect of superannuation:

R. Section 45 of the Act by virtue of a contravention of clause 22.2 of the Modern Award, by failing to pay Ms Carter superannuation contributions of at least 9% of Ms Carters ordinary time earnings from on or around 7 May 2010 to on or around 31 October 2011 to a superannuation fund for Ms Carter's benefit;

In respect of record keeping:

S. Section 535(1) of the Act by failing to make, and keep for seven years, employee records of the following kind:

i. Details of Ms Carter's entitlement to loadings, penalty rates and allowances as prescribed by regulation 3.33(3) of the *Fair Work Regulations 2009* ("Regulations"); and

ii. A record showing the date on which superannuation fund contributions were made for the benefit of Ms Carter in accordance with regulation 3.37(1) of the Regulations;

In respect of payslips:

T. Section 536(1) of the Act by failing to issue Ms Carter with pay slips at all in respect of wages paid during the period from on or around 7 May 2010 to on or around 30 June 2011;

U. Section 536(2) of the Act by failing to include the following information in pay slips issued to Ms Carter from on or around 1 July 2011 to 25 November 2012:

i. The date on which the relevant payment was made in accordance with regulation 3.46(1)(d) of the Regulations; and

ii. The amounts of superannuation contributions that the Respondents were liable to make in relation to the

payment period, and the name, or name and number, of any fund to which contributions will be made in accordance with regulation 3.46(5)(b) of the Regulations.

THE COURT ORDERS THAT:

(1) The First Respondent is to pay penalties pursuant to s.546(1) of the *Fair Work Act 2009* to a total amount of $19,805, in respect of the First Respondent's contraventions listed in the declarations as set out above.

(2) The Second Respondent is to pay penalties pursuant to s.546(1) of the *Fair Work Act 2009* to a total amount of $19,805, in respect of the Second Respondent's contraventions listed in declarations as set out above.

(3) Pursuant to section 546(3) of the Fair Work Act, the First and Second respondents each pay the penalties specified in orders (1) and (2 as follows:

(a) $9,000 on or before 7 February 2015; and

(b) $10,805 on or before 7 May 2015.

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

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE

MLG 947 of 2013

FAIR WORK OMBUDSMAN
Applicant

And

FARDIN SOLEIMANI
First Respondent

BEVERLY JANET SOLEIMANI
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. This is an application to determine an appropriate penalty in relation to admitted breaches/contraventions of the *Fair Work Act 2009* ("the Act"), the *Shop, Distributive and Allied Employees Association – Victorian Shops Interim Award 2000* ("pre-Modern Award") and the *General Retail Industry Award 2010* ("the Award").

2. The parties have tendered a statement of agreed facts ("the SAF") which sets out the admitted contraventions. The respondents, by way of Defence filed 17 September 2013, have admitted liability for the contraventions. The contraventions relate to the employment of Aishlinn Carter and occurred over the period from around 7 May 2010 to around 25 November 2012.

3. The admitted contraventions are in summary (SAF at [28] to [84]):

    a) contraventions of s.45 of the Act by reason of the failure of the respondents to:

i) pay Ms Carter minimum wages in accordance with Schedule A of the Award;

ii) pay Ms Carter penalty loading (as a casual) rates in accordance with clause 29.4(a) of the Award;

iii) pay Ms Carter Saturday penalty loading in accordance with clause 18.2.1 of the pre-Modern Award and clause 29.4(b) of the Award;

iv) pay Ms Carter Sunday penalty loading in accordance with clause 29.4(c) of the Award;

v) pay Ms Carter public holiday penalty loading in accordance with clause 29.4(d) of the Award;

vi) pay Ms Carter overtime rates in accordance with Clause 29.2(a) and (c) of the Award;

vii) pay Ms Carter annual leave loading in accordance with clause 32.3 of the Award;

viii) pay Ms Carter laundry allowance in accordance with clause 20.2(b) of the Award;

ix) make adequate superannuation contributions to a superannuation fund for Ms Carter's benefit in accordance with clause 22.2 of the Award;

x) provide Ms Carter with meal breaks in accordance with clause 31.1 of the Award; and

xi) failure to make fortnightly wage payments in accordance with clause 23 of the Award.

b) contravention of s.44(1) of the Act by reason of the failure of the respondents to pay Ms Carter her annual leave at the minimum rate prescribed under s.90(1) and her annual leave on termination in accordance with s.90(2) of the Act;

c) contravention of s.535(1) of the Act and regulations 3.33(3) and 3.37(1) of the *Fair Work Regulations 2009* ("the Regulations") by

failing to make and keep records relating to Ms Carter during her employment; and

d) contravention of s.536(1) and s.536(2) of the Act and regulations 3.46(1)(d) and 3.46(5)(b) of the Regulations by failing to provide Ms Carter with payslips during her employment and include prescribed information on the payslips.

4. The parties are not agreed in relation to the penalty to be paid by the respondents and whether the Court should make declarations as to the contraventions.

5. The aggregate penalty ranges recommended by agreement of the parties are: [1]

(a) First respondent: $18,088.50 – $20,333.00; and

(b) Second respondent: $18,088.50 – $20,333.00.

6. The proposed penalty ranges include a 20% discount of the maximum penalty for each respondent for cooperation by the Respondents.[2]

Background

7. The factual summary that follows largely draws from the SAF.

8. The contraventions occurred over the period of Ms Carter's employment from on or about 7 May 2010 to on or about 25 November 2012. On 8 January the FWO received a Workplace Complaint Form dated 2 January from Ms Carter.

9. The respondents are partners in a business trading under the name 'Bad Workwear' ("the Business"), which has been in operation since 19 August 2002.

10. The Business involves the sale of building and construction clothing and work wear at five retail outlets and one warehouse at locations including Northland Shopping Centre in Preston where Ms Carter was employed to work.

[1] Applicant's Submission on Penalty at [18]
[2] Ibid at [19]

11. Between 7 May 2010 and 12 August 2010, Ms Carter was employed as a full-time sales person and was paid her hourly rate in cash, generally once every four weeks (SAF at [5], [6] and [7]).

12. Between 13 August 2010 and about 25 November 2012, Ms Carter was identified by the respondents and other employees of the respondents as the 'manager' of the Northland Store (SAF at [8]).

13. During this period, Ms Carter predominantly worked alone, with another staff member generally only working in the evenings and on weekends (SAF at [9]).

14. Ms Carter was born on 21 December 1991 and was 18 years of age when she commenced employment with the respondents (SAF at [5]) She says the job with the respondents was her second job.[3]

15. At all relevant times the respondents were bound by the Act and the Award in relation to Ms Carter's employment (SAF at [16] to [23]).

16. The pre-Modern Award applied in respect of the respondents and their employees prior to 30 June 2009. The Pre-Modern Award is the applicable transitional instrument for the purposes of calculating Ms Carter's rates of pay pursuant to the transitional arrangements set out in Schedule A of the Award (SAF at [24] to [27]).

17. The Respondents:

    (a) were required to pay Ms Carter $135,471.71 in respect of her period of employment;

    (b) paid Ms Carter $78,634.04 in respect of her period of employment; and

    (c) underpaid Ms Carter a total of $56,837.67 (the "Underpayment"). (SAF at [11] – [15])

18. The Respondents have admitted the Underpayment (SAF at [13]) and the Contraventions. (SAF at [111])

[3] Affidavit of Aishlinn Murray Carter filed 12 June 2014 at [3]

19. After receiving the Workplace Complaint from Ms Carter, Inspector Tan, of the FWO issued two notices to produce in relation to Ms Carter's employment with the respondents pursuant to s.712 of the Act. There was substantial compliance by the respondents. On 6 March 2013, the applicant received from Ms Joanna Betteridge an email confirming she was instructed to act on behalf of the respondents. On 6 May 2013, Ms Betteridge confirmed by letter that the respondents declined the invitation to participate in a recorded interview with Inspector Tan. On 3 June 2013, Inspector Tan issued the respondents a determination of contravention letter (SAF at [99] to [105]).

20. Proceedings were initiated by the applicant on 26 June 2013. An amended statement of claim to correct an error identified by the respondents was filed on 10 September 2013 by the applicant. On 17 September 2013, the respondents filed a defence admitting the majority of the allegations in the amended statement of claim. On 19 February 2014 the applicant filed a further amended statement of claim making further minor amendments as agreed between the parties. This further amended statement of claim alleged a total underpayment of $56,837.67 (SAF at [106] to [110]).

21. On 30 May 2014, the respondents paid Ms Carter the net amount of her underpayment and the required superannuation contribution to the REST superannuation fund (SAF at [112] to [113]).

Legislation

22. The Court has a discretion as to whether to impose penalties for the contraventions and as to the level of those penalties: s.546 of the Act.

23. Section 539(2) of the Act prescribes the following maximum penalties that may be imposed on an individual for contraventions of that Act:

    a) 60 penalty units for a contravention of s.44(1) and s.45; and

    b) 30 penalty units for a contravention of s.535 or s.536.

    The relevant penalty unit is $110.00: s.12 of the Act and s.4AA(1) of the *Crimes Act 1914*.

24. The maximum penalties that can be imposed by the Court here are:

- $6,600.00 for each contravention of s.44 and s.45 of the Act; and
- $3,300.00 for each contravention of s.535 or 536 of the Act.

Approach to determining penalty

25. The approach to be adopted in determining the question of appropriate penalty is as follows:

(a) the first step for the Court is to identify the separate contraventions involved. Each contravention of an obligation found in the Award is a separate contravention;[4]

(b) secondly, the Court should consider whether the contraventions arising in the first step constitute a single course of conduct, such that multiple contraventions should be treated as a single contravention;

(c) thirdly, to the extent that two or more contraventions have common elements, this should be taken into account in considering what is an appropriate penalty in all the circumstances for each contravention. Each Respondent should not be penalised more than once for the same conduct. The penalties imposed by the Court should be an appropriate response to what the Respondents did.[5] This task is distinct from and in addition to the final application of the "totality principle";[6]

(d) fourthly, determine an appropriate penalty to impose in respect of each contravention (whether a single contravention alone or as part of a course of conduct), having regard to all of the circumstances of the case; and

(e) finally, having fixed an appropriate penalty for each group of contraventions or course of conduct, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate

[4] *Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216 at 223 (Gibbs); *McIver v Healey* [2008] FCA 425 at [16] (unreported, Federal Court of Australia, 7 April 2008, Marshall J).
[5] *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 at [46] (Graham J) (unreported, Full Court of the Federal Court of Australia, 20 February 2008, Gray, Graham and Buchanan JJ) (Merringtons).
6 *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 at [41]-[46] (Stone and Buchanan JJ) (unreported, Full Court of the Federal Court of Australia, 7 May 2008, Gyles, Stone and Buchanan JJ) (Mornington Inn).

response to the conduct which led to the breaches.[7] The Court should apply an "instinctive synthesis" in making this assessment.[8] This is known as the "totality principle".

26. **Attachment A** to the Applicant' submissions summarises the parties' agreed position regarding the maximum penalties applicable to the separate contraventions in this case.

Identification of contraventions

27. I am satisfied that each of the contraventions of sections 44, 45, 535 and 536 of the Act have been identified and admitted by the respondents.

Grouping of Contraventions – Course of Conduct and Common Elements

28. I am satisfied that the parties agreement to treat repeated contraventions of each separate term of the Award and the repeated contraventions of record-keeping and pay slips pursuant to sections 535 and 536 of the Act as a single contravention of the applicable civil provision and civil remedy provision pursuant to s.557(1) of the Act, is appropriate.

29. I am satisfied that the parties agreement that contraventions relating to minimum wage and Saturday penalty rates be grouped into two groups, as follows:

    a) failure to pay minimum wage as prescribed in Schedule A of the Award; and

    b) failure to pay penalty rates for Saturday work described in schedule A of the Award

    is appropriate as they have common elements and arise out of a similar course of conduct.

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7 See *Kelly v Fitzpatrick* (2007) 166 IR 14 at [30] (Tracey J) (Kelly); Merringtons, supra at [23] (Gray J), [71] (Graham J) and [102] (Buchanan J).

8 *Merringtons*, supra at [27] (Gray J) and [55] and [78] (Graham J).

30. I am also satisfied that the parties agreement to group together the following contraventions:

a) failure to pay the overtime rates prescribed for work on Monday to Friday, Sundays and public holidays;

b) failure to make or keep employee records; and

c) failure to issue payslips

is appropriate as they have common elements and arise out of a similar course of conduct.

31. I am also satisfied that the remaining contraventions, being: separate obligations, arising in different factual circumstances and attracting different rates of pay should be treated as separate contraventions with each attracting an appropriate penalty. These contraventions are:

Failure to pay Ms Carter her entitlements to penalty rates for work on evenings, Sunday and public holidays, payment for annual leave taken, annual leave loading and annual leave termination;

a) failure to provide meal breaks;

b) failure to pay laundry allowance;

c) failure to pay sufficient superannuation; and

d) failure to pay wages at least fortnightly.

32. The result is that the admitted contraventions can be grouped into 15 separate groups of contraventions for the purpose of considering a penalty.

Factors relevant to penalty

33. A convenient checklist of the factors that the Court might consider in determining penalty include the matters that were identified by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 at [26]-[59] and adopted by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14; [2007] FCA 1080 at [14]. That list is as follows:

(a) The nature and extent of the conduct which led to the breaches.

(b) The circumstances in which that conduct took place.

(c) The nature and extent of any loss or damage sustained as a result of the breaches.

(d) Whether there had been similar previous conduct by the respondent.

(e) Whether the breaches were properly distinct or arose out of the one course of conduct.

(f) The size of the business enterprise involved.

(g) Whether or not the breaches were deliberate.

(h) Whether senior management was involved in the breaches.

(i) Whether the party committing the breach had exhibited contrition.

(j) Whether the party committing the breach had taken corrective action.

(k) Whether the party committing the breach had cooperated with the enforcement authorities;

(l) The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and

(m) The need for specific and general deterrence.

34. The Court must of course be mindful of the caution expressed by Buchanan J in *Australian Opthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560; (2008) 246 ALR 35; [2008] FCAFC 8 at [91] as follows:

> *Check lists of this kind can be useful providing they do not become transformed into a rigid catalogue of matters for attention. At the end of the day the task of the Court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations. There is no suggestion in the present case that the*

learned magistrate made any relevant error in her identification of the matters which she should consider in fixing penalties.

35. In *Australian Building and Construction Commissioner v Construction Forestry, Mining Employees Union* [2012] FCA 189, Bromberg J said, in a slightly different legislative context, at [19] – [23]:

> *[19] The relevant considerations required for an assessment of the appropriate penalty to be imposed for a breach of the BCII Act have been discussed at length by this Court: see* Stuart-Mahoney v CFMEU *[2008] FCA 1426 at [40] (Tracey J);* Temple v Powell *[2008] FCA 714; (2008) 169 FCR 169 at [56]-[78] (Dowsett J);* Cahill v CFMEU *(No 4) [2009] FCA 1040 at [9]- [10] (Kenny J).*
>
> *[20] As the parties have proposed an agreed penalty to be imposed in these proceedings, the relevant question for the Court is whether that agreed penalty is "appropriate in all the circumstances":* Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd *[2004] FCAFC 72 at [51] (Branson, Sackville and Gyles JJ) where the Full Court adopted the reasoning of Burchett and Kiefel JJ (with whom Carr J agreed) in* NW Frozen Foods Pty Ltd v ACCC *[1996] FCA 113; (1996) 71 FCR 285 at 298-299.*
>
> *[21] In* Mobil *at [51], the Full Court listed the principles enunciated in NW Frozen Foods including that:*
>
> > *it is the Court's responsibility to determine the appropriate penalty;*
> >
> > *determining the quantum of a penalty is not an exact science;*
> >
> > *there is a public interest in promoting settlement of litigation, particularly where it is likely to be lengthy;*
> >
> > *the view of the regulator, as a specialist body, is a relevant, but not determinative consideration on the question of penalty;*
> >
> > *in determining whether the proposed penalty is appropriate, the Court examines all the circumstances of the case;*
> >
> > *where the parties have put forward an agreed statement of facts, the Court may act on that statement if it is appropriate to do so in the circumstances of the case;*

where the parties have jointly proposed a penalty, it will not be useful to investigate whether the Court would have arrived at that precise figure in the absence of agreement;

the question is whether that figure is, in the Court's view, appropriate in the circumstances of the case;

in answering that question, the Court will not reject the agreed figure simply because it would have been disposed to select some other figure; and

it will be appropriate if within the 'permissible range'.

[22] The 'permissible range' of penalties refers to that range that would be permitted by the Court, which is neither manifestly inadequate nor manifestly excessive, and only where the agreed penalty falls outside the permissible range should the court depart from the figure agreed by the parties: see Wells v Locano Management Pty Ltd *[2008] FCA 1034 at [23] (Jessup J);* Ponzio v B & P Caelli Constructions *[2007] FCAFC 65; (2007) 158 FCR 543 at [129] (Jessup J) and* Alfred v CFMEU *[2011] FCA 556 at [68] (Tracey J).*

[23] The CFMEU contended, and I agree, that the following principles should also inform the exercise of the Court's discretion:

(a) Proportionality: that any penalty imposed should not exceed that which is appropriate or proportionate to the gravity of the contravention found proven in the light of its objective circumstances: Hoare v the Queen *[1989] HCA 33; (1989) 167 CLR 348 at 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ). See also the* Veen v The Queen (No 1) *[1979] HCA 7; (1979) 143 CLR 458 at 467-468 (Stephen J) and 482-483 (Jacobs J) and 495 (Murphy J);* Veen v The Queen (No 2) *[1988] HCA 14; (1988) 164 CLR 465 at 472 (Mason CJ, Brennan, Dawson and Toohey JJ), 485-486 (Wilson J), 490-491(Deane J) and 496 (Gaudron J). This approach has been adopted in relation to contraventions of the BCII Act:* Stuart v CFMEU *[2010] FCAFC 65; (2010) 185 FCR 308 at [30] (Moore J).*

(b) Parsimony: the Court must ensure that it imposes the minimum term consistent with the attainment of the relevant purposes of sentences taking care that the punishment is only for the crimes before the Court: R v Valentini *[1980]*

FCA 133; (1980) 48 FLR 416 at 420 (Bowen CJ, Muirhead and Evatt JJ).

(c) Penalty maximum: that the maximum penalty should be reserved for the worst type of contravention: Veen v The Queen (No 2) at 478 (Mason CJ, Brennan, Dawson and Toohey JJ); Stuart v CFMEU *at [30] (Moore J).*

36. The parties jointly recommend the agreed penalty ranges (at [5] above) on the basis that they are within the permissible range of penalties in all the circumstances of this matter.

Applicant's Submissions

37. The Applicant relies upon the following material in support of these submissions:

a) Application filed on 28 June 2013;

b) Further Amended Statement of Claim filed on 19 February 2014 (Further Amended SOC);

c) SAF;

d) Affidavit of Aishlinn Marie Carter affirmed 11 June 2014 (the Carter Affidavit);

e) Affidavit of Daniel Tan affirmed on 11 June 2014 (the Tan Affidavit);

f) Affidavit of Tina Annette Debevc affirmed on 11 June 2014 (the Debevc Affidavit); and

g) Affidavit of Beverly Janet Soleimani sworn 27 June 2014 and amended at the hearing (the Soleimani Affidavit).

38. The Applicant submits that the penalties are appropriate because of the following key factors:

a) the significant amount of the Underpayment associated with the Respondents' failure to meet fundamental entitlements such as the minimum hourly rates of pay for Ms Carter; penalty rates associated with work performed on nights, weekends or public

holidays; overtime; and the failure to pay accrued annual leave on termination;

b) the contraventions occurred over an extended period of time and spanned a broad range of entitlements and employer obligations;

c) the vulnerability of Ms Carter, who was young, relatively inexperienced in employment and reliant on the safety net of minimum wages; and

d) as a result of prior and contemporaneous interactions with the office of the Applicant, the Respondents were on notice of their obligations pursuant to the Modern Award and FW Act, and were aware of how to ascertain or clarify any further information required by contacting the office of the Applicant;

e) the limited evidence of genuine contrition and the Respondents' failure to promptly implement corrective action after being advised by the Applicant in June 2013 to do so (SOAF 104); and

f) the need for specific deterrence, and general deterrence in the retail industry.[9]

Respondents Submissions

39. The respondents rely on their submissions, the Soleimani affidavit and the affidavit of Joanna Betteridge sworn on 27 June 2014 as redacted by agreement between the parties.

40. The respondents submit that a penalty at the lower end of the proposed agreed range between the parties is appropriate in the circumstances.

41. The respondents deny that they were aware or had been advised about their obligations to pay minimum entitlements under the Award or Act.

42. The respondents submit that a significant proportion of the underpayment arises from it applying the incorrect classification of Ms Carter.

[9] Applicant's Outline of Submission on Penalty at [21].

43. They argue that, at the time Ms Carter commenced employment, there were significant changes in Award coverage by reason of the transition from the pre-modern Award to the Award. In particular they submit:

> *9. Ms Carter was a junior retail employee who opened and closed the shop. Under the pre—modern award, the classification provisions relevant to a junior retail employee who opened and closed the shop were different…*
>
> *10. Under the pre—modern award, Ms Carter could only have been classified as a Retail Worker Grade 1, as she was a "shop assistant". She could not have been classified as a Retail Worker Grade 2 because she had no qualifications as required by that classification. Under the pre-modern award, in order for her to be classified as a clothing and footwear shop manager it would have been necessary for her to have been "entrusted with the control of superintendence of a shop notwithstanding she may be under the orders of another person who does not devote his or her whole time to the management of such shop" (clause 14).*[10]

44. By comparison, the respondents submit, the Retail Employee Level 3, Schedule B of the award includes at B.3.2 a new indicative task "opening and closing of premises and associated security". The relevant extracts of the classifications referred to by the respondents are set out in Attachment A to this decision.

45. The respondents submit that the applicant's reliance on the Andrews complaint (which was investigated and finalised over the period 8 October 2009 to 18 May 2010) is misconceived as "*the applicant expressly did not make any determination in relation to the issue of the proper classification of Ms Andrews as a Manager."*

The nature and extent of the conduct which led to the breaches

46. I agree with the applicant that the contraventions represent a failure to provide basic and important conditions and entitlements under the Act. These include minimum wage entitlements (including during annual leave), laundry allowance, penalty rates including evening, weekend and public holidays; annual leave on termination, adequate

[10] Respondent's Outline of Submissions on Penalty at [9] to [10]

superannuation contribution as well as the provision of meal breaks and pay slips.

47. Ms Carter was not given payslips for the duration of her employment. She was therefore deprived of the opportunity to check if her pay was correct: *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor* [2012] FMCA 258 at [67].

48. The contravening conduct extended over the duration of Ms Carter's employment, some 18 months. I agree with the applicant's submission that I can infer it is likely the conduct would otherwise have continued but for Ms Carter's resignation.

49. The evidence is that the respondents failed to maintain proper employment records in relation to Ms Carter's employment and the only evidence before the Court of attempts by the respondents to ascertain their obligations under the Award and the Act, are two telephone calls to the Fair Work Infoline. The second respondent complains that her conversation with a person called "Victor" was unhelpful as was the website.[11] She deposes she was left feeling confused and uncertain and not confident she had been given the correct information. She says she did try a second time, on 10 May 2010, ringing the Fair Work Infoline and spoke to a person called "Victor." The telephone call was terminated by the second respondent (because she was busy). No further steps were taken by either the first or second respondent to follow up on these queries.

The circumstances in which that conduct took place

50. I am satisfied, having regard to Ms Carter's young age at the time she was employed, the fact she was reliant on the minimum wage, had limited employment experience and hence limited knowledge of her entitlements, that she was a vulnerable employee.

51. In *Fair Work Ombudsman v Saya Cleaning Pty Ltd* [2009] FMCA 38 at [20], (*Saya Cleaning*), Simpson FM explained the consequences for a respondent of the exploitation of vulnerable workers as follows:

[11] Soleimani Affidavit at [17 to 22]

Ms Iglesias was 18 years of age at the time of the contraventions concerning her. Mr Elbehidi was a person who had newly arrived in Australia from Iraq. It is reasonable to conclude that he had limited experience both of working in Australia and of his legal entitlements. Both employees were vulnerable employees. The vulnerability of these employees and the way they were exploited by the respondents is a significant factor when assessing the quantum of penalty: Cotis v Pow Juice Pty Ltd *[2007] FMCA 140 at [57-58];* Jones v Hanssen Pty Ltd *[2008] FMC 291 at [8]*.

52. The applicant submits that the Respondents were aware of the requirement to pay Ms Carter in accordance with the Award having regard to the fact that the conduct occurred in circumstances where:

a) the Respondents had been advised about and resolved previous complaints relating to employment obligations to pay minimum entitlements. This includes the Andrews Complaint, which involved extensive interaction and correspondence with the Fair Work Inspectorate (Debevc Affidavit [14]);

b) the Second Respondent knew that the Modern Award applies to retail employers and their employees (Debevc Affidavit at [14 (p),(q),(hh) and (ii]) Tan Affidavit [11], [14] – [15]; Soleimani Affidavit [5] –[7]);

c) the Second Respondent had previously contacted the Fair Work Info Line to obtain information about their employment obligations including a call on 10 May 2010, shortly after Ms Carter commenced employment (Debevc Affidavit at [6] – [10]; Soleimani Affidavit at [17] – [22]);

d) the Second Respondent acknowledges that she did not seek advice about the proper classification of Ms Carter under the Modern Award (Soleimani Affidavit 25);

e) there is evidence that the First Respondent insisted that Ms Carter was not allowed to take meal breaks because he did not want the shop to be unattended or for other workers to be unsupervised (Carter Affidavit at [32] – [33]);

f) there is also evidence that the Respondents had a casual attitude to employment-related obligations and paperwork generally (Soleimani Afiidavit at [1]. [12]

53. The second respondent deposes that she has always tried to get the correct information regarding payments due to staff (Soleimani Affidavit at [22]). Other than her communications with the Fair Work Infoline there is no evidence to support this assertion by the second respondent.

54. The Respondents had an 'overarching responsibility' as an employer to ensure compliance with employment laws. As this Court observed in: *Fair Work Ombudsman v Hongyun Chinese Restaurant Pty Ltd (In Liquidation)* [2013] FCCA 52 at [46].

> *"…it is incumbent upon employers to make all necessary enquiries to ascertain their employees' proper entitlements and pay their employees at the proper rates."*

55. The requirement for an employer to keep records is fundamental to the ability to check that correct payments and entitlements are accorded to employees.

56. I am not satisfied that the respondents took all necessary steps to ascertain Ms Carter's proper entitlements and to pay her.

The nature and extent of any loss or damage sustained as a result of the breaches

57. Ms Carter's financial loss was $56,837.67 gross (SAF at [13]). This was more than 40% of her total entitlement for the period of her employment, which is a significant underpayment for an employee reliant on Award minimum.

58. She was deprived of these amounts during her employment, after her employment ended with the respondents and until the underpaid amounts were rectified by the Respondents on 30 May 2014 (SAF at [112]). She was not paid interest on that amount as this becomes payable upon order of the Court.

[12] Applicant's submission on penalty at [48] to [49]

59. Ms Carter's evidence is that the respondent's failure to provide meal breaks made it difficult for her during her employment to eat or rest properly or indeed visit the toilet (Carter Affidavit at [32] to [35]). She says that the respondents' conduct contributed to financial difficulties for her, undermining her ability to support herself and forcing her to rely on others to make ends meet (Carter Affidavit at [35] to [37]). It is to be noted that the circumstances were made worse by the fact that, during the period after the termination of employment, she was not employed following the birth of her child (Carter Affidavit at [49]).

60. The applicant submits that the extent of Ms Carter's loss is made more significant because of the failure of the respondents to properly classify Ms Carter. They argue that this failure had a snowball effect in relation to the other breaches of the award; such as penalty rates. As will be seen below the respondent submits that their failure to properly classify Ms Carter was understandable given the particular environment; being the transitional arrangements from the pre - Modern award to the Award and the fact that the issue of the appropriate classification was, in the circumstances, one that was susceptible to argument.[13]

61. The respondents, nevertheless, concede that:[14]

> *21. The contraventions occurred and the quantum of loss was more substantial because the respondents failed to keep up with the new classification under the modern award, or get independent legal advice or employer association advice about how the modern award classification affected their liability. Their ignorance of their liability is, it is accepted, no excuse.*

Whether there had been similar previous conduct by the defendant

62. The respondents have not previously been the subject of proceedings by the applicant or its predecessors for contraventions of workplace laws.

[13] Respondent's Outline of Submissions On Penalty at [20]
[14] Respondent's Outline of Submissions On Penalty at [21]

Whether the breaches were properly distinct or arose out of the one course of conduct

63. The Court has found that the breaches fall into 15 groups.

The size of the business enterprise involved

64. The second respondent deposes that the business is a small business which she operates with her husband (the first respondent) (Soleimani Affidavit at [1]). No evidence is provided to support this assertion. In any event, accepting that the business was a small one does not absolve the respondents of their obligations under the Act.

65. In *Saya Cleaning Pty Ltd* Simpson FM (as his Honour then was) stated at [26] to [27]:

> *26.The first respondent is a small company and, I infer, has very few if any assets. However as Justice Tracey said in* Kelly v Fitzpatrick *(supra):*
>
> > "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."
>
> *27.In* Rajagopalan v BM Sydney Building Materials Pty Ltd *[2007] FMCA 1412 at paras.27 to 29 it was said:*
>
> > "Employers must not be left under the impression that because of their size or financial difficulty that they are able to breach an Award. Obligations by employers for adherence to industrial instruments arise regardless of their size. Such a factor should be of limited relevance to a Court's consideration of penalty."

66. I find that the size of the business is of limited relevance in determining penalty.

Whether or not the breaches were deliberate

67. The applicant does not submit that the contraventions by the respondent were deliberate. It does however submit that the

respondents were aware of their obligations and ought to have complied with them. The applicant's submissions at [68] to [70] in relation to this consideration is extracted below:

68. As referred to above, the Admitted Contraventions occurred in circumstances where the Respondents:

(a) were aware of the application of the FW Act and the Modern Award to their employees;

(b) were aware of the minimum rates of pay arising under the Modern Award, and the fact that this was impacted by the Ms Carter's age and duties;

(c) had had a variety of interactions with the office of the Applicant, including in writing, by telephone, in person, online and through the Fair Work Infoline;

(d) knew how to contact the office of the Applicant to seek information and to clarify their obligations;

(e) had been advised of the requirement to pay, amongst other things, minimum rates of pay, penalty rates, overtime and for annual leave, and to provide meal breaks for employees;

(f) had been advised of the need to keep records and issue payslips;

(g) had previously rectified significant amounts arising from employees performing similar work to Ms Carter, and for the same or similar hourly rate of pay;

(h) had been advised of the possible consequences of failure to comply with workplace laws, namely pecuniary penalties and underpayments [SOAF 104].

69. The Applicant submits that the Previous Complaints involved alleged conduct by the Respondents that is relevant and of a similar character to the matters currently before the Court. The interactions with the Respondents including correspondence and telephone calls in relation to the Previous Complaints demonstrate this (see paragraphs 66 and 67). The Respondents' involvement with the office of the Applicant in resolving the Previous Complaints did not result in steps

being taken to prevent further allegations of or actual contraventions: the Respondents simply continued to conduct the Business as they had before.

70. In the Applicant's submission, this background demonstrates that the Respondents were clearly on notice of their obligations, and simply did not take appropriate steps to ensure that their business practices complied. Had this occurred the present contraventions would not be before the Court today.

68. The applicant submits that the respondents have acted in respect of Ms Carter at the very least with disregard for their obligations under the Award. The respondents concede that it "was in disregard of the obligations of an employer" and that it "should have obtained proper advice regarding their obligations. "[15]

69. The respondents submit, however, at least in relation to the issue of the classification of Ms Carter that there are factors the Court should take into account. In summary these are that the transitional arrangements from the pre-Modern Award to the Modern Award were complicated (including the differences in the content of the classification under the two awards for Shop Manager); the Andrews complaint did not involve a final determination by the applicant that Ms Andrews was employed as a Shop Manager under the pre- Modern Award; the respondents made a genuine attempt by telephoning the Wage Infoline to understand its obligations.

70. The respondents also dispute the correctness of the following assertions by the applicant; that they were *"clearly on notice of their obligations", "had previously been provided with detailed advice in respect of substantially the same facts as those admitted in these proceedings during the investigation of the Andrews complaint", "were aware of the minimum rates of pay arising under the modern award", "knew how to contact the office of the applicant to seek information and to clarify their obligations"*, had previously rectified *"significant"* amounts.

[15] Respondent's Outline of Submissions On Penalty at [19]

71. The second respondent deposes that she does not have a HR background but has always tried to be fair in business including her dealings with her employees whom she has considered in the past as part of almost an extended family. She claims that as a family business finding time and resources for all her duties is difficult. She deposes that she disagrees in significant ways with the content of Mr Tan's affidavit in relation to his conversations and meetings with her. She concedes that Inspector Tan told her the name of the Modern Award and that it would come into effect in July 2010 but deposes that he told her it was the General Shops Retail Award not the General Retail Industry Award. She denies that Inspector Tan gave her any information on overtime and says he did not mention the transitional provisions. She deposes that she recalls very little about the Andrews complaint save to say that Inspector Tan had specifically told her that Ms Andrews classification was yet to be determined.

72. The second respondent deposes that she found the telephone call she made to the Wage Infoline with a person named "Victor" "*not helpful at all.*" She deposes that he did not appear to know how to apply the award. Consequently, she deposes that she utilised a figure given by Inspector Tan for the new adult rate of $15.29. She relies on notes she took during her meeting with it Mr Tan on 20 February 2010 (Annexure "PJS 1", Solemani affidavit). These notes record, in hand writing, an adult rate of $15.29 followed by the application of percentages of that rate, including a person of 17 years of age resulting in $9.17. The second respondent deposes that she was informed by the first respondent, that when Ms Carter commenced employment, she was 17 years old. It is to be noted that Ms Carter was paid a flat hourly rate of $10 per hour from 7 May 2010 to 30 June 2011, $13 an hour from 1 July 2011 to 29 March 2012 and $16 an hour from 30 March 2012 until on or about 25 November 2012.

73. The second respondent deposes that she did try again to contact the applicant's Wage Infoline in a subsequent call with a person called "Peter" but was unable to talk because she was busy.

74. The respondents submit that the correct classification of an employee is a matter on which reasonable minds can differ and relies on the decision of Judge Whelan in *Fair Work Ombudsman v La Kosta*

Childcare Centre and Kindergarten Pty Ltd [2012] FMCA 551 at [59]. They submit that in this matter their admission that Ms Carter performed tasks which fell within the definition of Retail Employee Level 3 under the award was made "*primarily because it is clear, and accepted, that one of the duties was opening and closing the Northland store*". The respondents submit that the issue of proper classification could have been open to debate in these proceedings. They argue that a close analysis of the classification provisions of the award and the facts (established by tested evidence) may well have led the Court to doubt whether Ms Carter was properly classified as a Retail Employee Level 3. They submit that properly advised they have chosen not to contest that issue. [16]

75. I am satisfied that the breaches by the respondents were not deliberate.

76. I am also prepared to accept the respondents' submission that there were difficulties in easily understanding the appropriate classification for Ms Carter under the Award. I accept that the new classification structure under the Award was not in substantially the same form as the pre-Modern Award classification structure.

77. However, I am not satisfied they took adequate steps to ascertain their obligations under the Award. The evidence is that on 10 May 2010 (shortly after Ms Carter commenced employment), the second respondent telephoned the Fair Work Infoline and, amongst other things, asked about employees in management positions. I accept that she terminated the call because she was busy. However, it is clear that the second respondent made no further effort to clarify with the regulatory authority the question of the application of the classification structure under the Award to employees who might be in a management position. There was no reason proffered why the second respondent did not again telephone the Fair Work Infoline after she cut short her conversation with "Peter" in May 2010.

78. I am also not satisfied that there were any extenuating circumstances which might explain the failure of the respondents to ascertain their obligations to pay Ms Carter her entitlements to penalty rates for evening, public holidays and weekend work; her entitlements to

[16] Respondent's Outline of Submissions On Penalty at [15] to [16]

overtime, annual leave loading and accrued annual leave on termination and laundry allowance. There is no explanation for their failure to provide Ms Carter with meal breaks and provide her with pay slips during the course of her employment.

79. I am satisfied that, as a consequence of her conversation with "Victor" on 26 February 2010, the second respondent understood that overtime was paid under the award and that penalty rates were paid on Saturdays and Sundays and for evening work on Thursdays and Fridays.[17] The transcript of the conversation discloses that the second respondent was informed of the name of the Award and that it would come into effect in July 2010.[18]

80. The failure of the respondents to provide employees with payslips and meal breaks was raised by the applicant in correspondence regarding the Jones complaint as was the failure to pay pro rata annual leave upon termination of Ms Jones' employment.[19]

81. The failure of the respondents to provide its employees with meal breaks and the failure to pay penalty rates was raised by the applicant in correspondence regarding the Andrews complaint.[20]

82. Having regard to the evidence of communications between the respondents and the applicant, I am satisfied that, so far as the requirements to pay overtime, penalty rates, accrued annual leave on termination, and to provide meal breaks and payslips, the respondents were or ought to have been aware of their obligations under the Award. I agree with the applicant that, so far as these matters are concerned, the respondents were on notice regarding their obligations to Ms Carter. I am satisfied the respondents were given advice by the applicant in relation to their obligations to pay overtime, penalty rates, accrued annual leave on termination and to provide meal breaks and payslips.

83. I accept the actual underpayments flowing from the failure to pay penalty rates, overtime, annual leave payments, annual leave loading and accrued annual leave on termination of employment and adequate superannuation contributions increased in quantum by reason of their

[17] Debevic Affidavit, Annexure TAD-2 at p.21 to 25.
[18] Ibid at p. 23.
[19] Debevic Affidavit, Annexure TAD-3 at p.32
[20] Debevic Affidavit, Annexure TAD-4

failure to pay Ms Carter under the correct classification rate and will take this into account in determining penalty.

Whether senior management was involved in the breaches

84. The respondents were partners of the business and responsible for the management of the first respondent and it's employees at the relevant times. Consequently, senior management were involved in the breach.

Whether the party committing the breach had exhibited contrition

85. In her affidavit, the second respondent deposes that she regrets any underpayment made to Ms Carter as well as the failure to provide her with meal breaks. At [26] she deposes:

> *"I apologise to Ms Carter for my failure to correctly pay her entitlements, which was not intentional on the part of the partnership, and was as a result of my failure to appreciate and understand our obligations pursuant to the Modern Award. We are sorry for any hardship which this has caused to Ms Carter."*

86. The applicant is critical of the respondents for not providing an apology or explanation directly to Ms Carter. The respondent refers to Ms Carter's affidavit in which she deposes that on 25 November 2012, she sent the first respondent a text message which included the following, "*don't contact me further*."[21] In my view this message did not preclude the respondents apologising directly to the applicant by way of correspondence.

87. I accept that the action of the respondents in entering into an agreed statement of facts with the applicant, making admissions as to the contraventions, cooperating with the applicant during the investigation of Ms Carter's complaint and the rectification of the underpayment to Ms Carter on 30 May 2014, is evidence the Court can take into account in relation to contrition. In these circumstances, I would give some weight in determining the penalty to the contrition shown.

Whether the party committing the breach had taken corrective action

[21] Carter affidavit at[44]

88. Clearly, the respondent has taken corrective action in the form of rectifying the underpayment to Ms Carter in full on 30 May 2014. As conceded by the applicant there is evidence of corrective action implemented by the respondents, including by:

a) implementing a new accounting/payroll system that works out ordinary and penalty rates, superannuation and taxations, and annual leave loading;

b) issuing detailed payslips;

c) paying wages directly into employees' bank accounts;

d) drafting position descriptions for Level 1 and Level 3 employees to assist in correctly and consistently classifying staff;

e) creating a new form for collecting employee personal information on commencement;

f) implementing new recruitment processes;

g) providing rosters that include meal breaks;

h) no longer requiring employees to wear uniforms; and

i) seeking advice about employment-related matters and compliance from a private consulting company.

89. The applicant submits however that this corrective action was only taken after four complaints involving similar conduct were referred to it and its predecessor. It notes that there is no evidence that the respondents have engaged in an audit to identify whether other employees have been underpaid.

90. In correspondence dated 26 February 2010, from the second respondent to the applicant, during the course of the investigation of the Andrews complaint, the second respondent stated, "*to avoid further ambiguities occurring in the future, we are currently in the process of*

introducing a HR software package into the business, as I mentioned, to assist in meeting up obligations, as an employer."[22]

91. It is patently clear that the respondents, notwithstanding their advice to the applicant in February 2010 that they were taking corrective action to ensure they met their obligations under the award, did not do so until after Ms Carter made her complaint to the applicant. The applicant is entitled to be somewhat sceptical of the respondent's commitment to fully implement these corrective actions. However, I am satisfied that in the circumstances of these proceedings, where admissions have been made in the context of an agreed statement of facts and, in light of the penalty that will flow, the respondents are likely to implement appropriate corrective action. The respondents would be wise to undertake an audit as suggested by the applicant to ensure that it's employees have been paid in accordance with the Award obligations.

92. I will take into account the fact that the respondents have now taken corrective action to ensure they meet their obligations to their employees under the Award and the Act. Against this, however, I will factor in the failure of the respondents to act in a timely manner on the advice given by them to the applicant in February 2010.

Whether the party committing the breach cooperated with enforcement authorities;

93. The applicant's written submissions in relation to co-operation are at [86] to [88] and are extracted in full:

86. Where Respondents have co-operated and have made admissions early in the course of a matter and have otherwise cooperated to reduce the time and cost of the proceedings, it is appropriate to allow a discount of penalty. In considering the application of penalty discount for cooperation, the statements of Stone and Buchanan JJ in Mornington Inn Pty Ltd v Jordan [2008] FCAFC 70 at 74-76 per Stone and Buchan are apposite:

> *"... the benefit of such a discount should be reserved for cases where it can be fairly said that an admission of liability: (a) has*

[22] Debevic Affidavit, Annexure TAD-4 at p.64

indicated an acceptance of wrongdoing and a suitable credible expression of regret; and/or (b) has indicated a willingness to facilitate the course of justice." 19

87. The Applicant submits that a discount of 20% on penalty is appropriate in this case, in recognition of the Respondents' admissions and early and ongoing co-operation with the Applicant during the investigation and the proceedings, including by:

a) after the commencement of proceedings, consenting to amendments to the Statement of Claim in order to correct typographical issues;

b) participating in discussions with the Applicant to enter into the SOAF.

88. In so doing, the Respondents have saved the Court and the parties the resources and costs associated with a liability hearing in this matter. The Applicant has incorporated that discount into the proposed penalty ranges set out in Attachment A.

94. I am satisfied that the respondents have disclosed an acceptance of their wrongdoing. Although I have found there was nothing preventing the respondents from directly apologising to the applicant by written correspondence, the respondents have shown their contrition in other ways. Further, the respondents have co-operated during the course of the investigation of the complaint and following the commencement of the proceedings. I accept that full rectification of the underpayment was not possible until the filing of the further Amended Statement of Claim on 19 February 2014. The respondents rectified the underpayment around two months later. I am satisfied that the respondents have therefore indicated a willingness to facilitate the course of justice.

95. I consider that weight should be given to reflect the extent of this cooperation is appropriate in the circumstances.

The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements

96. A fundamental object of the Act is to provide a guaranteed safety net of minimum terms and conditions for employees. Significant penalties are

prescribed for non-compliance. As observed by his Honour Turner J in *Fair Work Ombudsman v CAN 052 182 180 Pty Ltd & Uri Burke* [2013] FCCA 688 (*Uri Burke*), central to the ability to investigate and enforce are the requirements to provide payslips and keep records.[23] The evidence discloses that the obligation on the respondents to provide their employees with payslips was brought to the respondent's attention, in the course of the "Jones" complaint in late 2001. The failure of the respondents to rectify this in a timely manner is demonstrative of a serious disregard for their obligations under the Act. The failure of the respondents to comply with their obligations under the Award and Act, in circumstances where as I have found they were on notice regarding these obligations, is a factor I will give weight to in determining the penalty to apply.

The need for specific and general deterrence

97. The Court accepts that a fundamental purpose of a civil penalty is to ensure compliance with the law. The object of a penalty is to *"put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act"*: see *Re Trade Practices Commission v CSR Limited* (1991) 13 ATPR 41-076.

98. In relation to specific deterrence, Gray J observed in *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* (2008) 171 FCR 357; (2008) 177 IR 243; [2008] FCAFC 170 at [37] that:

> *Specific deterrence focuses on the party on whom the penalty is to be imposed and the likelihood of that party being involved in a similar breach in the future. Much will depend on the attitude expressed by that party as to things like remorse and steps taken to ensure that no future breach will occur.*

99. In relation to general deterrence, Lander J noted in *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543; (2007) 162 IR 444; [2007] FCAFC 65 at [93]:

> *In regard to general deterrence, it is assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend:* Yardley v Betts *(1979) 22 SASR 108. The penalty therefore should be*

[23] Also see *Fair Work Ombudsman v Orwill Pty Ltd & Ors* [2011] FMCA 730 at [21]:

> *of a kind that it would be likely to act as a deterrent in preventing similar contraventions by like minded persons or organisations. If the penalty does not demonstrate an appropriate assessment of the seriousness of the offending, the penalty will not operate to deter others from contravening the section. However, the penalty should not be such as to crush the person upon whom the penalty is imposed or used to make that person a scapegoat. In some cases, general deterrence will be the paramount factor in fixing the penalty:* R v Thompson *(1975) 11 SASR 217.*

100. Similarly, in *Community and Public Sector Union v Telstra Corporation Limited* (2001) 108 IR 228; [2001] FCA 1364 at 230-231, Finkelstein J said:

> *... even if there be no need for specific deterrence, there will be occasions when general deterrence must take priority, and in that case a penalty should be imposed to mark the law's disapproval of the conduct in question, and to act as a warning to others not to engage in similar conduct ....*

101. In *Fair Work Ombudsman v Maclean Bay Pty Ltd (No 2)* [2012] FCA 557, Marshall J observed at [29]:

> *"It is important to ensure that the protections provided by the Act to employees are real and effective and properly enforced. The need for general deterrence cannot be understated. Rights are a mere shell unless they are respected."*

Specific Deterrence

102. I have earlier dealt with the factors relevant to the question of specific deterrence. I am satisfied that there has been an acceptable level of contrition by the respondents and am satisfied that they have taken steps to ensure the contraventions are not likely to occur in the future.

General Deterrence

103. There is also a considerable need in this case for general deterrence. There must be a clear message to employers that not paying vulnerable employees will not be tolerated. I agree with the submissions of the applicant that the contraventions in this matter concern a failure to meet fundamental entitlements, that the penalties should be imposed at a meaningful level so as to deter other employers in this industry (the retail industry) from committing similar contraventions and leave them in no doubt as to the consequences should this occur.

104. I agree with the observations made in previous decisions of this Court that the retail industry tends to attract vulnerable employees, particularly young or casual employees.[24] As noted by Judge Turner in *Uri Burke* at [9] , "*there is a need for general deterrence in the retail industry given frequent proceedings for contraventions in that industry in recent years...*"

Other issues

105. There are no other relevant matters.

The amount of the penalties for the breaches

106. I am satisfied having regard to the considerations set out above that the agreed range of penalties fall within the permissible range of appropriate penalty. They are neither manifestly inadequate nor manifestly excessive.

107. As noted earlier, for the purpose of the calculation of the range of penalty agreed to by the parties, the maximum penalty for contraventions of the Award have been discounted by 20% resulting in an amount of $5,280 and the maximum penalty for contravention of the Act has been discounted by 20% resulting in an amount of $2,650. This discount reflecting an agreed amount for cooperation by the respondent. I shall refer to the amounts of $5,280 and $2,650 as "discounted maximum penalty".

108. The penalty range agreed to for each respondent is $18,088.50 to $20,333. The applicant submits that the penalty which is appropriate for each respondent should be at the top of the range and the respondent submits that should be at the bottom of the range. I have taken the submission of the parties as representing their reasons for the proposed penalty range for each respondent. I have taken into account the extent of the respondents' contrition and cooperation. I have taken into account my findings that the respondents failure to pay Ms Carter at the appropriate classification rate occurred in circumstances which were complicated but that the respondents did not take appropriate or adequate steps to ascertain their obligations. I have also taken into account the respondents' conduct in contravening the Award and the

[24] Brobbel v Darrell Lea Chocolate Shops Pty Ltd [2008] FMCA 714 at [36]

Act in circumstances where I have found that it was aware or should have been aware of its obligations to pay penalty rates, overtime, annual leave loading accrued untaken annual leave on termination, and to provide meal breaks and payslips.

109. I am satisfied that in relation to the following contraventions which have been grouped, the penalty should be set at 30% of the discounted maximum penalty:

- failure to pay Saturday penalty;
- failure to pay Sunday penalty;
- failure to pay public holiday penalty;
- failure to pay accrued untaken annual leave on termination;
- failure to provide meal breaks;
- failure to issue payslips and include prescribed information on payslips issued.

110. I am satisfied that in relation to the following contraventions which have been grouped the penalty should be set at 25% of the discounted maximum penalty):

- failure to pay minimum wages;
- failure to pay periods of annual leave;
- failure to pay evening penalty
- failure to pay wages at least fortnightly;
- failure to pay sufficient superannuation;

111. I am satisfied that in relation to the:

- failure to pay overtime rates the applicable penalty should be 50% of the discounted maximum penalty;
- failure to pay annual leave loading the applicable penalty should be 10% of the discounted maximum penalty;

- failure to pay laundry allowance the applicable penalty should be 15% of the discounted maximum penalty;

- failure to make or keep employee records the applicable penalty should be 20% of the discounted maximum penalty.

112. The total penalty which shall apply to each of the respondents is therefore $19,805.00.

The Totality Principle

113. I note that the proper approach in determining penalty is to impose a penalty for each contravention, and then, as a check, to consider whether the aggregate penalty is appropriate for all of the contraventions as a whole.

114. Having fixed a penalty, I have taken a final look at the aggregate penalty and determined it is an appropriate response to the conduct which led to the contraventions and is not oppressive.

Should the Court make Declarations

115. The applicant urges the Court to make declarations pursuant to section 16 of the *Federal Circuit Court of Australia Act 1999* (Cth).

116. The respondent opposes the making of declarations on the basis that the applicant has made admissions, that attachment A of its submissions on penalty sufficiently describe the nature of the conduct which attracts penalties. The respondent relies on decisions of the Federal Court which are to the effect that declarations have a utility in circumstances in which contraventions have been found to have occurred but where no penalty is imposed as the orders can make clear the nature of the conduct which attracted those penalties: *Williams v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2010] FCA 754 per Jessup J and the Full Federal Court in *Cruse v Multiplex Ltd* (2008) 172 FCR 279 at [59].

117. The applicant submits that there is a public interest in granting declaratory relief in proceedings brought by a regulator in order to record the seriousness of contravention and to explain the basis for the imposition of pecuniary penalties: *Australian Competition and*

Consumer Commission v Midland Brick Co Pty Ltd (2004) 207 ALR 329 at [20] to [21]. The applicant relies on the decision by his Honour McKerracher J in *Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 2)* [2010] FCA 1156 who stated in respect of contraventions of the *Workplace Relations Act 1996 (Cth)* :

> *There may be a public interest in the granting of declaratory relief in regulatory proceedings to record the contraventions' seriousness and to explain the basis for the imposition of pecuniary penalties and other relief. A declaration in this case may indicate the importance of compliance with statutory standards, particularly in the employment of low paid and/or vulnerable employees. I will grant declaratory relief.*

118. In *Fair Work Ombudsman v Tiger Telco Pty Ltd* (in liq) [2012] FCA 479 at [36] Bromberg J stated:

The declarations sought will have educative utility and serve the public interest: Australian Competition and Consumer Commission v Yellowpage Marketing BV (No 2) [2011] FCA 352 at [68], [69] (Gordon J).

119. In *Australian Competition and Consumer Commission v Dataline.net.au Pty Ltd* [2006] FCA 1427, Kiefel J, at [52] to [59], considered the rationale for the previous approach taken by the Courts. Her Honour came to the view that the previous approach may no longer be warranted, particularly in public interest cases and particularly if the declarations are preceded by a statement that they are made upon admissions. Her Honour relevantly stated:

57 .... The question is whether declarations should be made on deemed admissions, given that there has been no adjudication by the Court on the facts and the declarations may give the impression that there has. 58 The power to grant declarations (s 21 Federal Court of Australia Act 1976 (Cth)) is unconfined. Order 35A itself imposes no constraints upon the relief sought. Refusals to make declarations in cases of default are based upon a practice, not a rule of law. The practice is one of long standing and might be seen as derived from views about litigation which pre-date more recent concerns expressed by the courts as to the costs of unnecessary litigation, the management of cases and

efficiency overall. Views expressed in older cases may not take account of the increase in the use made of declaratory orders in developing areas of law which may involve matters of public interest. A caution with respect to the use of older authority is made in the White Book Service 2003 to the English Civil Procedure Rules 1998 (40.20.2). 59 It may no longer be correct to have a practice which operates as a prohibition in every case of default and preferable to consider the circumstances pertaining to the particular case and the purpose and effect of the declaration. Millett J made declaratory orders in Patten v Burke Publishing Co Ltd [1991] 1 WLR 541 where justice to the plaintiff required it. The order however operated principally inter partes and it might be doubted whether it would be of interest to other persons. Cases such as this, involving the protection of consumers, are of public interest. Declarations are often utilised in such cases to identify for the public what conduct contributes a contravention and to make apparent that it is considered to warrant an order recognising its seriousness. It is however important that there be no misunderstanding as to the basis upon which they are made. This could be overcome by a statement, preceding the declarations, that orders are made 'upon admissions which [the respondent in question] is taken to have made, consequent upon non-compliance with orders of the Court'."

120. I am satisfied that, notwithstanding that admissions had been made by the respondents, in the circumstances of this case where proceedings have been brought by a regulator and in relation to contraventions of the Award and the Act, the contraventions are by a business in the retail industry, which has been recognised to employ significant proportions of vulnerable employees, as was the case in this matter, there is utility in the Court making declarations. I will, in making the declarations, ensure that there is no misunderstanding as to the basis upon which they are made.

I certify that the preceding one hundred and twenty (120) paragraphs are a true copy of the reasons for judgment of Judge Jones

Associate:

Date: 7 November 2014

Attachment A

Shop, Distributive and Allied Employees Association – Victorian Shops Interim Award 2000

14. WAGES

Adults	**Wages per week of 38 hours Award rate $**
CLOTHING AND FOOTWEAR SHOPS MANAGER i.e. the person for the time being entrusted with the control or superintendence of a shop notwithstanding he or she may be under the orders of another person who does not devote his or her whole time to the management of such shop:	
(a) In charge of two or more persons	
(b) Working singly or in charge of one person	

Retail Industry Award 2010

Schedule B - Classifications

B.3 Retail Employee Level 3

B.3.1 An employee performing work at a retail establishment at a higher level than a Retail Employee Level 2.

B.3.2 Indicative of the tasks which might be required at this level are the following:

- Supervisory assistance to a designated section manager or team leader,
- Opening and closing of premises and associated security,
- Security of cash, or
- Fitting of surgical corset.

B.3.2 Indicative job titles which are usually within the definition of a Retail Employee 3 include:

- Machine operators,
- 2IC to Dept Manager,
- Senior Salesperson,
- Corsetiere,

- Driver Selling Stock,
- Cook (Not Qualified) in a cafeteria,
- Senior LPO, including an armed LPO,
- LPO Supervisor,
- Designated second-in-charge of a section (i.e. senior sales assistant),
- Designated second-in-charge to a service supervisor, or
- Person employed alone, with responsibilities for the security and general running of a shop.