FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v SONA PEAKS PTY LTD & ANOR *[2015] FCCA 137*

Catchwords:
INDUSTRIAL LAW – Fair Work – awarding penalties under the *Fair Work Act 2009* – consideration of factors relevant to the amount of penalty.

Legislation:
Fair Work 2009

Cases cited:
Fair Work Ombudsman and Foure Mile Pty Ltd and Another [2013] FCCA 682
Mornington Inn Pty Ltd v Jordan [2008] FCAFC 70; (2008) 168 FCR 383; (2008) 247 ALR 714; (2008) 171 IR 455
Fair Work Ombudsman v Jaycee Trading Pty Ltd & Anor (No.2) [2013] FCCA 2128

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	SONA PEAKS PTY LTD (ACN 141 459 789)
Second Respondent:	DAVID ANDERSON
File Number:	MLG 933 of 2013
Judgment of:	Judge Riethmuller
Hearing date:	21 March 2014
Date of Last Submission:	15 May 2014
Delivered at:	Melbourne
Delivered on:	23 January 2015

REPRESENTATION

Counsel for the Applicant:	Ms Malishev
Solicitors for the Applicant:	Office of the Fair Work Ombudsman
Counsel for the Respondents:	Mr Anderson appearing in person

THE COURT DECLARES THAT:

(1) The First Respondent breached section 716(5) of *Fair Work Act 2009* by failing to comply with a Compliance Notice.

(2) The Second Respondent was involved in the breach by the First Respondent in Order 1 herein, pursuant to section 550(1) of *Fair Work Act 2009*.

THE COURT ORDERS THAT:

(1) Pursuant to section 546(1) of the *Fair Work Act 2009*, the First Respondent pay into the Consolidated Revenue Fund of the Commonwealth an aggregate penalty of $12,500 for breaching the *Fair Work Act 2009*.

(2) Pursuant to section 546(1) of the *Fair Work Act 2009*, the Second Respondent pay into the Consolidated Revenue Fund of the Commonwealth an aggregate penalty of $3,000 for breaching the *Fair Work Act 2009*.

(3) Payment of the pecuniary penalties referred in Orders 1 to 2 herein be made within 56 days.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE

MLG 933 of 2013

FAIR WORK OMBUDSMAN
Applicant

And

SONA PEAKS PTY LTD (ACN 141 459 789)
First Respondent

DAVID ANDERSON
Second Respondent

REASONS FOR JUDGMENT

1. The Respondents admit to contravening provisions of the Fair Work Act by failing to comply with a compliance notice issued by an inspector with respect to underpayments to an employee totalling $5,037.34.

2. The First Respondent carries on business as "Curry Garden Indian Restaurant" in Bendigo in the State of Victoria. The Second Respondent was the director of the First Respondent and the person who undertook the first respondent's operations.

3. The Applicant was an employee of the First Respondent, employed between May and December of 2012. The employee was a casual employee of 26 years of age. The First Respondent paid the employee $12.50 per hour for hours worked during the first three months of employment and $15.50 per hour for all hours worked thereafter. The employee worked in the restaurant as a waitress, seating customers,

serving food and drinks, cleaning tables, and counting moneys at the end of her shift.

4. The employee was covered by the Restaurant Industry Award 2010 and, having regard to her duties, was classified as a food and beverage attendant grade 2.

5. The First Respondent failed to pay the employee the correct minimum hourly rate for work performed Monday to Friday, casual loading, penalty rates for work on Saturday, penalty rates for work on Sundays and the penalty rates for work on public holidays, and on one occasion, the minimum engagement period of two hours.

6. In this matter, the Fair Work Office attempted to deal with the underpayments simply by way of a contravention letter requesting rectification of the payments. The Second Respondent advised the Fair Work Office that he would not pay the employee the underpayments identified unless conditions were met, including requesting a statement from the employee that she was "kidnapped" and "forced to work for the First Respondent 'against her will'". Not surprisingly, the fair work inspector advised that such bizarre conditions would not be met.

7. Ultimately, a compliance notice was sent by registered mail in May of 2013. However, the Second Respondent continued to refuse to comply, insisting upon the conditions previously outlined, and claiming that the employee had agreed with the rates that were paid and not complained about the rates, and saying that he did not have sufficient funds to make the payment anyway. After further correspondence, the Fair Work Ombudsman commenced proceedings against the Respondents.

8. The proceedings in court were procedurally difficult as a result of the Second Respondent's conduct in the proceedings.

9. Ultimately, in October 2013, offers of payments to the employee by way of rectification on an instalment plan were made.

10. I accept the submissions by the Fair Work Ombudsman that the maximum penalty that may be imposed on the First Respondent is $25,500 and on the Second Respondent is $5,100.

Submissions as to Penalty

11. The parties made submissions as to the factors that were relevant to the penalty in this case. The underpayments in this case represent around 36% of the total entitlements of the employee during a seven month period. This is a significant sum given the low income amount earned by the employee through this employment. As the underpayments were rectified by way of an instalment plan, the employee has ultimately received all of her entitlements, although had to wait a significant period to do so.

12. The Respondents have not previously been the subject of proceedings by the Applicant.

13. The Applicant accepts that the First Respondent is a small business, although the Second Respondent when providing disclosure with respect to his personal circumstances provided documents that indicated he could redraw on his home loan sufficient to have covered the underpayment. Financial statements for the company for the financial year ending June 2012 have been provided, which indicates that the company was trading at a loss in that year, although the subsequent year's financial statements have not been provided to the Fair Work Ombudsman or to the Court.

14. The Respondents argue that the business was operating at a loss, or at best, on a marginal basis, however, this is no answer to a claim of this type for the reasons that I set out in *Fair Work Ombudsman and Foure Mile Pty Ltd and Another* [2013] FCCA 682 at 22 and 23, where I said:

> *22. … The Second Respondent was concerned that the business was not very profitable, and operated at a marginal level. He appeared to hold the view that he was providing a benefit by way of a job to the employee and that this should be borne in mind. It appears to me that this wholly misconceives the nature of the difference between employment and joint venture. Many persons choose to undertake work for a level of reward less than would be set as the minimum in the various awards, on conditions set out under the legislative scheme for employees in the hope of achieving business growth or the establishment of a business that will be significantly more profitable, or valuable, to them in the*

> *long term. It remains every person's right to operate their own business or trading venture and live off the profits that they can generate as they see fit. In this regard, it is common for persons to join together in partnerships or form companies or joint ventures. Significantly, when a person is not a joint venturer or partner, but working simply as an employee, they have no prospects of sharing in the wealth of the business venture in the future (if this comes to pass). It is for those operating a new or marginal business to make an election as to whether or not to seek partners or joint venturers who may be prepared to work for less than the award in a business operation in the hope of making a significant gain in the future. Alternatively, if workers are to be employed, regardless of the state of the business, the minimum terms and conditions must be remunerated on at least the minimum terms and conditions provided for in the legislation and the awards. For the law to be otherwise would simply create a category of underpaid workers who were being exploited to subsidise inefficient or otherwise unprofitable business operations, or business start-up periods.*
>
> *23. For this reason, it is no answer to these breaches to say that a job was being provided which could not be provided if award wages were paid.*

15. Whilst the Second Respondent claims that the restaurant is not profitable, it continues to operate and it has not been placed with a broker for sale. The Second Respondent simply says that the restaurant has been offered for sale by word of mouth.

16. I am not satisfied on the state of the evidence as to the financial position of the restaurant, and importantly I do not accept that it was unprofitable for four years without the Respondents taking more active steps to either cease trading or sell the business.

17. The real issue in this case is that a system of workplace laws has been enacted in Australia to provide for minimum pay and conditions for all employees. It is not open to employers and employees to agree to depart from those minimum standards.

18. It is clear that the breaches in this case were deliberate, as is exemplified by the interactions of the Second Respondent and the Fair Work Ombudsman following the notice. It is also clear that non-compliance with the notice was deliberate.

19. Whilst the Respondents have made admissions which indicate an acceptance of wrongdoing, it seems in the overall scheme of this case that it is more an acceptable of liability rather than an acknowledgement of the inappropriateness of the conduct. Fortunately, the Respondents have rectified the underpayments, and therefore the primary object of the Act has ultimately been achieved. I am not persuaded that the Second Respondent has shown remorse in this case.

20. I note the comments of Stone and Buchanan JJ in *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 at 74 to 76, where their Honours said:

> *74. It is important to note that it is not a sufficient basis for a discount that the plea has saved the cost of a contested hearing – that would discriminate against a person who exercised a right to contest the allegations. A discount may be justified, however, if the plea is properly to be seen as willingness to facilitate the course of justice. Remorse and an acceptance of responsibility also merit consideration where they are shown.*
>
> *75. A conventional consideration in assessing a discount in a criminal case for a plea of guilty is the stage in the proceedings at which the plea is entered. Normally, the maximum discount for this factor, sometimes thought to be 25%, is reserved for a plea made at the first reasonable opportunity although, as was indicated in* Cameron *(at [23] – [24]) there is no obligation to make an early plea to a charge which wrongly particularises the substance to which the charge relates.*
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> *76. As Branson J has pointed out (see* Alfred v Walter Construction Group Limited *[2005] FCA 497) the rationale for providing a discount for an early plea of guilty in a criminal case does not apply neatly to a case, such as the present, where a civil penalty is sought and the case proceeds on pleadings. Nevertheless, in our view, it should be accepted, for the same reasons as given in* Cameron, *that a discount should not be available simply because a respondent has spared the community the cost of a contested trial.* ***Rather, the benefit of such a discount should be reserved for cases where it can be fairly said that an admission of liability: (a) has indicated an acceptance of***

wrongdoing and a suitable and credible expression of regret; and/or (b) has indicated a willingness to facilitate the course of justice. [emphasis added]

21. In this case, the Respondents have not put the Fair Work Ombudsman's office to a trial, although it appears that a conviction would have been inevitable, and the Respondents have, albeit belatedly, made reparation of the payments. Ultimately then it seems to me that a discount of 15% is appropriate given the conduct involved in this case.

22. The conduct of the Respondents is extraordinary in one respect. Had the compliance notice been complied with and the underpayment rectified, s.716 of the Act has the effect that no civil remedy proceedings can be brought, and therefore these proceedings would not have been needed. As Judge Emmett said in *Fair Work Ombudsman v Jaycee Trading Pty Ltd & Anor (No.2)* [2013] FCCA 2128 at paras.41-45:

> *k) Ensuring Compliance with Minimum Standards*
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> *41. The respondents had an opportunity in this case to comply with the Compliance Notice, and address the underpayments or provide explanations as to why they might not have been addressed. Further, the respondents had an opportunity to participate in Court proceedings and to file a defence. The respondents took no such steps, resulting in default judgment being entered against them.*
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> *42. Further, the Orders made by the Court on 31 October 2013 directing that the first respondent pay the employees identified underpayments, remains unfulfilled.*
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> *43. I accept that compliance with minimum standards is an important consideration in considering whether a penalty should be imposed and the size of that penalty. I also accept that the effect of no or an insubstantial penalty being awarded provides no or little incentive for an employer, or other employers, to change their practices.*
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> *l) General Deterrence*
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> *44. I accept the applicant's submissions in relation to the principles relating to general deterrence as follows:*

> *"74. It is well established that "the need for specific and general deterrence" is a factor that is relevant to the imposition of a penalty under the WR Act and the FW Act. See for example, Mowbray FM in* Pangaea, *[26]-[59]*.
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> > *The role of general deterrence in determining the appropriate penalty is illustrated by the comments of* Lander J in Ponzio v B & P Caelli Constructions Pty Ltd *[2007] FCAFC 65; (2007) 158 FCR 543, [93]:*
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> > > *"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 of a kind that I 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."*
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> *45. I accept that employers must provide their employees with the correct entitlement and take steps to respond to correspondence and notices issued by government regulators such as the applicant.*

23. In this case, the conduct of the Respondents indicates a need to impose a penalty not only for specific deterrence, but also to recognise the importance of general deterrence, particularly given that this contravention occurred in an industry where rates of non-compliance with the minimum obligations to employees are high.

24. This is particularly so given the submissions of the Second Respondent which included comments such as "It is the belief of David Anderson the man and it has always been his belief that contract law has always been and still is superior to statute law". The respondent also says, "It is a fact that Sona Peaks Pty Ltd and David Anderson have been losing money for the past two and a half to three years, and, yes, I would have paid [the employee] the award wages and more, had I been making a

profit, not so much because of the award wages but despite it. Happiness is a win-win for all parties always."

25. The Second Respondent makes a number of criticisms of the conduct of the Fair Work Office in their dealings with him and the carrying out the investigations. Regardless of those criticisms of the Fair Work Office, the fact remains that significant underpayments were made to an employee in breach of the existing workplace laws and the notice was not complied with.

26. In all of the circumstances of this case, I impose a penalty on the First Respondent of $12,500, and a penalty upon the Second Respondent of $3000.

I certify that the preceding twenty-six (26) paragraphs are a true copy of the reasons for judgment of Judge Riethmuller

Associate:

Date: 23 January 2015