

FEDERAL CIRCUIT COURT OF AUSTRALIA
*FAIR WORK OMBUDSMAN v WESTLINK
INTERNATIONAL PTY LTD & ANOR*

[2014] FCCA 2891

Catchwords:

INDUSTRIAL LAW – Fair work – pecuniary penalties – breaches of award – agreed statement of facts – declarations made as agreed by parties – consideration of matters relevant to penalty.

Legislation:

Evidence Act 1995 (Cth), s.191

Fair Work Act 2009 (Cth), ss.3, 546(1), 557

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth), Sch.18, Prt 3, item 14.

Workplace Relations Act 1996 (Cth), ss.3, 719(1), 719(2)

Cases cited:

Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 246 ALR 35

Fair Work Ombudsman v Hongyun Chinese Restaurant Pty Ltd (in liq) [2013] FCCA 52

Fair Work Ombudsman v Promoting U Pty Ltd [2012] FMCA 58.

Fair Work Ombudsman v Maclean Bay Pty Ltd (No 2) [2012] FCA 557

Kelly v Fitzpatrick [2007] FCA 1080

Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar [2007] FMCA 7

Mornington Inn Pty Ltd v Jordan [2008] FCAFC 70

Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union [2008] FCAFC 170

Ponzio v B & P Caelli Constructions Pty Ltd [2007] FCAFC 65

Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550

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

Applicant:

FAIR WORK OMBUDSMAN

First Respondent:

WESTLINK INTERNATIONAL PTY LTD
(ACN 005 935 437)

Second Respondent:

BRIAN O'HALLORAN

File Number:

MLG 648 of 2013

Judgment of:

Judge Hartnett

Hearing date: 15 August 2014
Further Submissions: 1 September 2014
Delivered at: Melbourne
Delivered on: 11 December 2014

REPRESENTATION

Counsel for the Applicant: Ms Hartigan
Solicitors for the Applicant: Office of the Fair Work Ombudsman
The First Respondent: Mr Brian O'Halloran
The Second Respondent: In Person

THE COURT DECLARES THAT:

- (1) The First Respondent contravened:-
 - (a) section 185(2) of the *Workplace Relations Act 1996* (Cth) ('the WR Act') in that it failed to pay Mr Robert Morrison ('the employee') a casual loading at least equal to the casual loading payable under a preserved Australian Pay and Classification Scale ('the Victorian Shops Pay Scale') derived from the award comprising the *Shop, Distributive and Allied Employees Association - Victorian Shops Interim Award 2000 [AP796250]* ('the Pre-Reform (Shops) Award') as applied by the *Shop Distributive and Allied Employees Association - Victorian Shops (Roping In No.1) Award 2003* ('Pre-Reform (Roping-In) Award') (together, the Pre-Reform Award) between 10 May 2007 to 13 November 2007;
 - (b) section 45 of the *Fair Work Act 2009* (Cth) ('FW Act') in that it failed to pay the employee the casual rates for a Retail Worker in Grade 1 in accordance with clause 13.2 of the *General Retail Award 2010* ('the Modern Award') between 1 July 2010 and 5 September 2010;
 - (c) clause 10.4.2(a)(i) of the Pre-Reform (Shops) Award in that it failed to pay the employee, in addition to the hourly rate payable to a full-time employee, an additional 25 per cent for all work performed in any week in which two or more public holidays occur between 10 May 2007 and 30 June 2009;
 - (d) item 2(1) of Schedule 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) ('the Transitional Act') (Clause 10.4.2(a)(i) of the Pre-Reform (Shops) Award) in that it failed to pay the employee, in addition to the hourly rate payable to a full-time employee, an additional 25 per cent for all work performed in any week in which two or more public holidays occur between 1 July 2009 and 31 December 2009;
 - (e) section 45 of the FW Act in that it failed to pay the employee, in addition to his casual rate of pay, a penalty at least equal to 25 per

cent of that actual basic periodic rate of pay for all work performed in any week in which two or more public holidays occur in accordance with clause A.6.2 of the Modern Award from 1 January 2010 to 30 June 2010;

- (f) clause 10.4.2(d)(iv) of the Pre-Reform (Shops) Award in that it failed to pay the employee at the rate of double time and a half for all work he performed on public holidays from 10 May 2007 to 30 June 2009;
- (g) item 2(1) of Schedule 16 of the Transitional Act (Clause 10.4.2(d)(iv) of the Pre-Reform (Shops) Award) in that it failed to pay the employee, at the rate of double time and a half for all work he performed on public holidays from 1 July 2009 to 31 December 2009;
- (h) section 45 of the FW Act in that it failed to pay the employee, at the rate of double time and a half for all work performed on a public holiday in accordance with clause A.6.2 of the Modern Award from 1 January 2010 to 30 June 2010;
- (i) clause 6(c) of the Pre-Reform (Roping-In) Award in that it failed to pay the employee, in addition to his casual rate of pay, a penalty at least equal to 25 per cent of that actual basic periodic rate of pay for all work performed between 7:00am and 6:00pm on a Saturday from 10 May 2007 to 13 November 2007;
- (j) section 45 of the FW Act in that it failed to pay the employee, a penalty rate for all time worked between 7:00am and 6:00pm on Saturday in accordance with clause A.5.4 of the Modern Award from 1 July 2010 to 5 September 2010;
- (k) clause 6(d) of the Pre-Reform (Roping-In) Award in that it failed to pay the employee, in addition to his casual rate of pay, at the rate of double time for all time worked on a Sunday from 10 May 2007 to 30 June 2009;
- (l) item 2(1) of Schedule 16 of the Transitional Act (Clause 6(d) of the Pre-Reform (Roping-In) Award) in that it failed to pay the employee, in addition to his casual rate of pay, at the rate of

double time for all time worked on a Sunday from 1 July 2009 to 31 December 2009;

- (m) section 45 of the FW Act in that it failed to pay the employee, in addition to his casual rate of pay, a penalty at least equal to 100 per cent of the ordinary rate of pay for all time worked on a Sunday in accordance with clause 29.4(d) of the Modern Award from 1 January 2010 to 5 September 2010; and
- (n) clause 32.4.12(b) of the Pre-Reform (Shops) Award, as it continued to apply pursuant to item 2(1) of Schedule 16 and item 7 of Schedule 3 of the Transitional Act, by failing to pay the employee at the time that his employment ended, the amount that would have been payable to the employee had he taken the balance of his accrued annual leave.

- (2) The Second Respondent was involved in each of the contraventions specified in order 1 above within the meaning of s.728(1) of the WR Act and s.550(1) of the FW Act.

THE COURT ORDERS THAT:

- (1) Pursuant to s.719(6) of the WR Act and s.545(2) of the FW Act and within 90 days, the First Respondent pay to the employee \$29,792.72.
- (2) Pursuant to s.722(1) of the WR Act and s.547(2) of the FW Act, the First Respondent pay interest on the underpayment amount referred to in the preceding order.
- (3) In the event the First Respondent is unable to locate the employee, the First Respondent pay the amount as set out in orders 1 and 2 above to the Consolidated Revenue Fund of the Commonwealth pursuant to s.559(1) of the FW Act, within the time provided by these orders.
- (4) Pursuant to s.719(1) of the WR Act and s.546(1) of the FW Act, the First Respondent pay an aggregate penalty of \$66,000 in respect of the contraventions referred to in Declarations 1(a) to 1(n) above.
- (5) Pursuant to s.719(1) of the WR Act and s.546(1) of the FW Act, the Second Respondent pay an aggregate penalty of \$9,900 in respect of the contraventions referred to in Declarations 1(a) to 1(n) above.

- (6) Pursuant to s.841(a) of the WR Act and s.546(3)(a) of the FW Act, all penalties imposed on the First and Second Respondents be paid to the Commonwealth.
- (7) The payment of penalties referred to in orders 4 and 5 above be made within 90 days of the date of this Order.
- (8) 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 648 of 2013

FAIR WORK OMBUDSMAN
Applicant

And

WESTLINK INTERNATIONAL PTY LTD
(ACN 005 935 437)
First Respondent

BRIAN O'HALLORAN
Second Respondent

REASONS FOR JUDGMENT

1. These proceedings commenced on 10 May 2013 when the Applicant filed an Application and Statement of Claim. The Applicant claimed the Respondents underpaid a former employee the sum of \$29,792.72.
2. The Applicant relies upon the following:-
 - a) its Application and Statement of Claim filed 10 May 2013;
 - b) the Statement of Agreed Facts filed 24 September 2013;
 - c) the Affidavit of Mr Robert Morrison ('the employee') affirmed on 5 June 2014;
 - d) the Affidavit of the Second Respondent affirmed on 20 June 2014;
and
 - e) the Response filed by the respondents on 8 August 2014.

Background

3. The alleged contraventions of workplace laws occurred over the period between late 2005 and 5 September 2010 and affected one former employee of the First Respondent, who made an underpayment complaint to the Applicant on 10 January 2012.
4. The First Respondent was registered in accordance with the *Corporations Act 2001* (Cth) in 1981 and has operated a business trading as “Glenelg Auction Centre” in Portland in the State of Victoria since 2003.
5. The Second Respondent is one of two shareholders of the First Respondent and was sole director of the First Respondent until 29 July 2010.
6. The employee was employed on a casual basis as a retail worker, performing a variety of work including receiving and preparing for sale furniture or other goods, general customer service, processing sales and generally helping out in the Auction Centre. There was no written contract of employment or terms of engagement between the First Respondent and the employee.
7. The First Respondent’s business practice was to pay the employee at a flat hourly rate of pay for all hours worked, regardless of whether the work was performed at night, on weekends, or public holidays.
8. The First Respondent did not pay the additional rates and loadings in relation to the performance of work as prescribed in the applicable Industrial Instruments. The First Respondent also made no provision for annual leave in accordance with the *Shop, Distributive and Allied Employees Association - Victorian Shops Interim Award 2000 [AP796250]* (‘Pre-Reform (Shops) Award’).

Agreed facts

9. This is a civil penalty proceeding. A Statement of Agreed Facts was filed by the Applicant and the Respondents in these proceedings for the purposes of s.191 of the *Evidence Act 1995* (Cth).

10. The First Respondent admitted to contravening the provisions set out in the Declaration of the Court made this day and, in conjunction with the Applicant, agreed to the making of declarations and orders in the terms as ordered by the Court, save of course as to the quantum of penalty to be imposed by the Court.
11. The Applicant is and was at all relevant times:-
 - a) a statutory appointee of the Commonwealth appointed by the Governor General by written instrument pursuant to Division 2 of Part 5-2 of the *Fair Work Act 2009* (Cth) ('FW Act');
 - b) a Fair Work Inspector pursuant to s.701 of the FW Act;
 - c) a person with standing to bring these proceedings; in relation to conduct that occurred before 1 July 2009, in accordance with item 13(1) of Part 3 of Schedule 18 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) ('the Transitional Act') (as a person who could have made this application pursuant to s.718(1) of *Workplace Relations Act 1996* (Cth) ('the WR Act'); and
 - d) a person with standing under s.539(2) of the FW Act and item 16(1) of Schedule 16 to the Transitional Act to apply for orders in respect of contraventions of Civil remedy provisions of the FW Act that occurred on or after 1 July 2009.
12. The First Respondent is and was at all relevant times:-
 - a) since 18 November 1981, a corporation registered in accordance with the *Corporations Act 2001* (Cth);
 - b) capable of being sued in its corporate name;
 - c) a constitutional corporation within the meaning of s.4(1) of the WR Act and s.12 of the FW Act;
 - d) an employer within the meaning of s.6(1) of the WR Act;
 - e) a national systems employer within the meaning of s.14(1)(a) of the FW ACT; and

- f) in the business of selling a wide variety of goods including new, used and antique furniture, office goods, white goods, rugs, machinery, carpet, books, pictures, clothing, giftware, garden pots, by retail sale and auction ('the Business').
13. The First Respondent was at all relevant times:-
- a) trading under the name of 'Glenelg Auction Centre';
 - b) carrying on the business at 171 Browning Street, Portland in the State of Victoria; and
 - c) the employer of the employee from around late 2005 until 5 September 2010.
14. The Second Respondent is and was at all relevant times:-
- a) one of two shareholders of the First Respondent;
 - b) until 29 July 2010, the sole director of the First Respondent;
 - c) responsible for the day to day management, direction and control of the First Respondent's operations and the Business;
 - d) aware of and responsible for setting and adjusting wage rates for the employee;
 - e) responsible for negotiating the employee's leave entitlements; and
 - f) from at least February 2008, aware of the requirement to pay minimum wages (in relation to both ordinary hours and penalty rates for weekend work) having been advised by the Workplace Ombudsman that the *Shop, Distributive and Allied Employees Association - Victorian Shops Interim Award 2000 [AP796250]* ('the Pre-Reform (Shops) Award') as applied by the *Shop Distributive and Allied Employees Association - Victorian Shops (Roping In No.1) Award 2003* ('Pre-Reform (Roping-In) Award') (together, 'the Pre-Reform Award') applied to the First Respondent's business in the course of resolving a complaint received by another former employee of the First Respondent.

15. Mr Morrison, the employee, was at all relevant times an adult employee of the First Respondent, having been born on 12 August 1961.
16. At all relevant times from around late 2005 until about 5 September 2010, the employee was employed by the First Respondent on a casual basis as a retail worker to perform duties that included:-
 - a) the receiving and preparing for sale and/or display furniture or other goods in the shop including, in some instances, assembly and pricing of goods;
 - b) merchandising goods within the store;
 - c) general customer service;
 - d) processing the sale of goods; and
 - e) general administration duties on the computer.
17. During his employment, the employee worked as required by the First Respondent depending on the needs of the business, for example the timing of auctions held by the First Respondent.
18. The employee regularly worked on the weekends and public holidays and his hours of work fluctuated between working either more or less than 38 hours per week.
19. The employee received regular weekly payments from the First Respondent for the hours he worked, which were:-
 - a) initially in the amount of \$15 per hour for each hour worked;
 - b) on or around 6 November 2007, increased to, but then never exceeded, the amount of \$20 per hour; and
 - c) payments made at a flat rate that did not vary according to the hours worked by the employee.
20. The employee's employment ended on 5 September 2010.
21. The employee did not receive any payment from the First Respondent on termination of his employment.

Underpayments

22. By failing to pay the employee the casual loading rate of pay for each hour he worked as determined by the applicable legislative instruments, the First Respondent underpaid the employee the amount of \$3,255.57.
23. By failing to pay the employee the weekly public holiday rate for each hour he worked during public holiday weeks, the First Respondent underpaid the employee the amount of \$508.33.
24. By failing to pay the employee the public holiday rates for each hour he worked on a public holiday the First Respondent underpaid the employee the amount of \$2,728.50.
25. By failing to pay the employee the Saturday penalty rates for each hour he worked on a Saturday, the First Respondent underpaid the employee the amount of \$647.34.
26. By failing to pay the employee the Sunday penalty rates for each hour he worked on a Sunday, the First Respondent underpaid the employee the amount of \$14,186.82.
27. By failing to pay the employee his accrued but untaken annual leave upon termination of his employment on 5 September 2010, the First Respondent underpaid the employee the amount of \$10,502.38.
28. The employee was underpaid the gross amount of \$31,828.94 during the course of his employment by the First Respondent. At various times however the employee was paid wages in excess of his minimum entitlements. These totalled \$2,036.22.
29. Thus the First Respondent underpaid the employee a total of \$29,792.72 ('the total underpayment').
30. The total underpayment has not been rectified by the First Respondent.

Accessorial liability of the Second Respondent

31. The Second Respondent admits that he:-
 - a) had actual knowledge of the factual matters which comprised the contraventions admitted by the First Respondent; and

- b) was an intentional participant in the factual matters which comprised the contraventions admitted by the First Respondent.
32. The Second Respondent admits that he:
- a) aided, abetted, counselled or procured; and/or
 - b) has been, by his acts or omissions, directly or indirectly, knowingly concerned in or a party to the contraventions admitted by the First Respondent; and
 - c) pursuant to s.728(1) of the WR Act and s.550(1) of the FW Act, was involved in, and is therefore to be treated as having himself contravened the provisions (and each of them) admitted herein to be contravened by the First Respondent.

Investigations

33. In the period from 10 January 2012 to 7 November 2012, the Applicant conducted an investigation into the Complaint. The First and Second Respondents participated in the Applicant's investigation process.
34. Earlier in time, the Workplace Ombudsman received a complaint from a former employee at 'the Glenelg Warehouse', Ms Louise Merton Bond ('Ms Merton Bond') on 14 December 2007.
35. The First Respondent was Ms Merton Bond's employer and the Second Respondent was the representative of the employer during the investigation.
36. Following investigation of the complaint, the Workplace Ombudsman determined that Ms Merton Bond had been underpaid an amount of \$8,264.61. The underpayment arose from a failure of the employer to pay the correct minimum rate of pay and the correct weekend penalty rates in accordance with the Victorian Shops Pay Scale and the Pre-Reform Award.
37. The Workplace Ombudsman advised the First Respondent of the outstanding amount. The underpayment was voluntarily rectified by the First Respondent and the complaint was finalised in March 2008 with no further action taken by the Workplace Ombudsman.

Grouping of Contraventions

Course of conduct

38. The admitted contraventions occurred repeatedly during the employee's employment with the First Respondent by reason of the First Respondent paying the employee a flat hourly rate of pay that was below the minimum casual rate of pay provided for by the industrial instruments.
39. The Applicant accepts that the respondents are entitled to the benefit of s.719(2) of the WR Act and s.557 of the FW Act in relation to the repeated contraventions of each of the provisions. On this basis the Applicant submits that the contraventions constitute 14 separate courses of conduct.

Common elements

40. It is open to the Court to group separate contraventions together where the contraventions may be said to overlap with each other or involve the potential punishment of the respondents for the same or substantially similar conduct.
41. The Applicant accepts that some of the 14 contraventions have common elements and that this should be taken into account in considering an appropriate penalty to ensure that the respondents are not punished more than once for the same or substantially similar conduct.
42. The Applicant submits that the contraventions should be grouped into five separate groups:-
 - a) casual loading contraventions;
 - b) public holiday loading contraventions;
 - c) Saturday penalty rate contraventions;
 - d) Sunday penalty rate contraventions; and
 - e) annual leave on termination contraventions.

The Respondents make no submissions in that regard.

43. The Court accepts the grouping proposed by the Applicant. This grouping gives rise to a maximum penalty that could be imposed on the First Respondent of \$165,000 (\$33,000 x 5) and on the Second Respondent of \$33,000 (\$6,600 x 5).

The imposition of penalties

44. The aggregate penalty ranges proposed by the Applicant are:-
- a) \$77,220 to \$92,070 in respect of the First Respondent; and
 - b) \$15,444 to \$18,414 in respect of the Second Respondent.

The Applicant's proposed penalty ranges include a discount for the admissions made by the respondents. The respondents sought the imposition of minimum penalties without specification. The power for this Court to order the imposition of pecuniary penalties arises under the *Workplace Relations Act 1996* (Cth) ('the WR Act') for contraventions occurring prior to 1 July 2009,¹ and under the FW Act for contraventions occurring on or after 1 July 2009.²

Factors relevant to penalty

45. A non-exhaustive list of factors relevant to the imposition of a penalty was usefully summarised by Mowbray FM (as he then was) in *Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar*³ Those factors include:-
- 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;

¹ *Workplace Relations Act 1996* (Cth), s.719(1).

² *Fair Work Act 2009* (Cth), s.546(1); *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), Sch.18, Prt 3, item 14.

³ [2007] FMCA 7 at [26] to [59].

- 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, taken corrective action and co-operated with the enforcement authorities;
- j) the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and
- k) the need for specific and general deterrence.

46. This summary was adopted by Tracey J in *Kelly v Fitzpatrick*.⁴ While the summary is a convenient checklist, it does not prescribe or restrict the matters which may be taken into account in the exercise of the Court's discretion.⁵ The discretion remains at large.

Nature and extent of the conduct

47. The respondents' conduct in this matter is serious as submitted by the Applicant, involving a substantial underpayment of basic entitlements to a low paid worker which occurred over a significant period of time.

48. The First Respondent obtained the benefit of the underpayments with the payment of the flat rate of pay effectively reducing their wage costs, thereby advantaging the First Respondent in the retail industry.

49. Significantly, the underpayment has not yet been rectified. This is particularly concerning given the lengthy time period that has passed since the cessation of the employee's employment. The First Respondent's business is continuing to trade. The employee has suffered in trying to recoup monies owed to him.

⁴ [2007] FCA 1080 at [14].

⁵ *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550.

Similar previous conduct

50. The respondents' have not previously been the subject of proceedings by the Applicant or its predecessors for contraventions of workplace laws. There has however been the earlier complaint referred to in paragraphs 34-37 of these reasons.

Size and financial circumstances

51. The Business has employed more than 40 people since 2003. Some of them are still employed by the First Respondent. The Business also employed an office manager. There is no evidence as to how many employees the First Respondent has currently. Nevertheless, the Second Respondent appearing in person on the penalty hearing, and claiming the respondents have no funds to expend on legal fees, submitted that the First Respondent's business is a small business. The Court accepts this to be so, albeit it can give little weight to the financial material provided by the respondents post the hearing. The material appears to indicate that the Second Respondent receives little or no income from the operations of the business, to which I give some weight, but there is insufficient explanation with respect to the First Respondent's financial position. It is simply inadequate.
52. In *Workplace Ombudsman v Saya Cleaning Pty Ltd*, Simpson FM (as he then was) provided a summary of the case law in this respect:-

"[26] ... as Justice Tracey said in Kelly v Fitzpatrick (above):

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.

Deliberateness of the breaches

53. The Applicant submits that the respondents' previous conduct is relevant and of a similar nature to the matters currently before the Court. This similar prior conduct shows that the warning given to the

First Respondent in 2008 did not result in sufficient steps being taken to prevent further contraventions.

54. The Applicant acknowledges that the First Respondent raised the employee's rate of pay to a flat rate of \$20 per hour when the employee told him that a flat rate of \$15 per hour was not good enough and that \$20 would "at least start to be getting near to what I should be getting paid". However, despite this request the respondents did not take any steps to find the correct rates of pay for the employee.

Contribution

55. The Applicant acknowledges that the respondents have made full admissions in relation to the contraventions at an early stage of the proceedings, demonstrating a degree of acceptance of wrongdoing. However, there is no evidence of rectification of the under-payments in full or in part. These have been outstanding for some years. They represent an avoidance of responsibility.

Deterrence

56. It is well-established that the need for specific and general deterrence is a factor that is relevant to the imposition of a civil penalty.⁶ The Applicant noted the comments of Lander J in *Ponzio v B & P Caelli Constructions Pty Ltd* where His Honour said:-

"The penalty must recognise the need for deterrence, both personal and general. In regard to personal deterrence, an assessment must be made of the risk of re-offending. 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 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

⁶ *Workplace Relations Act 1996* (Cth), s.3, *Fair Work Act 2009* (Cth), s.3.

cases, general deterrence will be the paramount factor in fixing the penalty.”⁷

57. In respect of specific deterrence, I think the imposition of a penalty will of itself be highly likely to deter the respondents from any further contraventions.
58. The retail industry is highly competitive. I accept that there is a need for general deterrence in the retail industry and that it is important in the public arena, to confirm that employers such as the First Respondent, must not evade their Workplace Relations law obligations - even in circumstances where they may have, from time to time, cash flow problems.

Totality

59. It is important for the Court to take a final look at the aggregate penalty to determine whether it is an appropriate response to the conduct which led to the breaches, and is not oppressive or crushing.⁸ Is, as a matter of intuitive synthesis, the penalty appropriate.
60. Taking into account the matters referred to above in these reasons, an appropriate level of penalty in the exercise of my discretion is 40 per cent of the applicable maximum. This is a total of \$66,000 in respect of the First Respondent and a total of \$13,200 in respect of the Second Respondent. Turning then to the application of the totality principle, the imposition of a penalty at that level on the Second Respondent would be crushing. I propose to impose a penalty of 30 per cent of the maximum penalty being \$9,900.

I certify that the preceding sixty (60) paragraphs are a true copy of the reasons for judgment of Judge Hartnett

Associate:

Date: 11 December 2014

⁷ [2007] FCAFC 65 at [93].

⁸ See *Kelly v Fitzpatrick* [2007] FCA 1080 at [30], *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 246 ALR 35.