

FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v WORLD GYM [2014] FCCA 2201
SUNSHINE PTY LTD & ANOR

Catchwords:

INDUSTRIAL LAW – Application seeking orders for compliance with an order of the Fair Work Commission – breach of a civil remedy provision – consideration of factors relevant to penalty.

Legislation:

Fair Work Act 2009 (Cth) ss.12, 405, 539, 545, 546, 548, 550(1)
Crimes Act 1914 (Cth) s. 4AA
Crimes Legislation Amendment (Serious Drugs Identity Crime and Other Measures) Act 2012 (Cth)
Evidence Act 1995 (Cth) s.191

Cases Cited:

Mayberry v Kijani Investments Pty Ltd. as Trustee for The Dawe Investments Trust Subway Wallsend trading as Subway [2011] FCA 1238
Meadley v Sort Worx Pty Ltd [2013] FCA 1012
Kelly v Fitzpatrick (2007) 166 IR 14
Yorke v Lucas [1985] HCA 65; (1985) 158 CLR 661
Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 2) (2010) 201 IR 234
Australian Competition and Consumer Commission v Energy Australia Pty Ltd [2014] FCA 336
Alogaidi v Agad Property Consulting Pty Ltd [2014] FCCA 1883
Vickery v The Trustee for Roderick Trust t/as Encompass Books & Anor [2014] FCCA 546
Fair Work Ombudsman v Maclean Bay Pty Ltd (No.2) [2012] FCA 557

Applicant: FAIR WORK OMBUDSMAN

First Respondent: WORLD GYM SUNSHINE PTY LTD
ACN 126 599 077

Second Respondent: WAYNE GEORGE MAILING

File Number: (P)MLG1196 of 2014

Judgment of: Judge O’Sullivan

Hearing date: 19 September 2014
Date of Last Submission: 19 September 2014
Delivered at: Melbourne
Delivered on: 19 September 2014

REPRESENTATION

Counsel for the Applicant: Ms Knowles
Solicitors for the Applicant: Fair Work Ombudsman
The First Respondent: Mr Mailing
The Second Respondent: In person

THE COURT DECLARES:

- (1) The first respondent contravened section 405 of the *Fair Work Act 2009* (Cth) (“FW Act”), by failing to comply with the terms of an order of the Fair Work Commission; and
- (2) The second respondent was involved in the first respondent’s contravention of section 405 of the FW Act, pursuant to subsection 550(1) of the FW Act.

THE COURT ORDERS:

- (3) Pursuant to subsection 546(1) of the FW Act the first respondent pay a pecuniary penalty in the amount of \$41,182.50 for the contravention declared in paragraph 1 above.
- (4) Pursuant to subsection 546(1) of the FW Act the second respondent pay a pecuniary penalty in the amount of \$6,426 for his involvement (within the meaning of subsection 550(2) of the FW Act) in the contravention declared in paragraph 1 above.
- (5) Pursuant to subsection 546(3)(a) of the FW Act the pecuniary penalties imposed by order (3) and (4) be paid to the Commonwealth within three months of the date of this order.
- (6) 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**

(P)MLG1196 of 2014

FAIR WORK OMBUDSMAN
Applicant

And

WORLD GYM SUNSHINE PTY LTD
ACN 126 599 077
First Respondent

WAYNE GEORGE MAILING
Second Respondent

REASONS FOR JUDGMENT

(Revised from transcript)

Introduction

1. The Fair Work Ombudsman (“the applicant”) commenced these proceedings, by an application and statement of claim filed on 18 June 2014, against the World Gym Sunshine Pty Ltd (“the first respondent”) and Wayne George Mailing (“the second respondent”). The applicant alleged the first respondent failed to comply with orders made in the Fair Work Commission (“the FWC”) on 17 January 2014 and the second respondent was involved in that contravention.

Background

2. The applicant is able to bring these proceedings by virtue of s.539(2) of the *Fair Work Act 2009* Cth (“the FW Act”). Earlier this year the applicant was contacted by Ms Samaka Sophie Ndege (“Ms Ndege”) who is 24 years of age and was employed by the first respondent, on a casual basis, as a receptionist at the gymnasium operated by the first respondent from 29 August 2011 to 8 October 2012.
3. On or around 8 October 2012 the first respondent terminated Ms Ndege’s employment. On 25 October 2012 Ms Ndege filed an application for unfair dismissal in the FWC against the first respondent.¹
4. There were proceedings in the FWC in May 2013 where the second respondent represented the first respondent. On 14 June 2013 the FWC dismissed a jurisdictional objection to Ms Ndege’s application.²
5. There was then a hearing in the FWC (where again the second respondent represented the first respondent) in relation to Ms Ndege’s unfair dismissal application. On 12 November 2013 Commissioner Lee of the FWC held there was not a valid reason for the termination of Ms Ndege’s employment by the first respondent and that her dismissal was harsh, unjust and unreasonable.³
6. Finally, on 17 January 2014 Commissioner Lee made orders for the first respondent to pay Ms Ndege compensation in the amount of \$2,200.00 (gross), plus 9 percent in superannuation, less taxation within 14 days. After Ms Ndege contacted the applicant, requests were made for the first respondent to comply with the FWC orders.⁴
7. The applicant alleged that notwithstanding the order of the FWC and those requests the respondents had not complied with the order of the FWC. The applicant alleged that as a result the first respondent has contravened s.405 of the FW Act and the second respondent was involved in that contravention.

¹ see exhibit A2

² [2013] FWC 3633

³ [2013] FWC 8434

⁴ see exhibit A7

8. The application filed 18 June 2014, was given a first Court date of 21 July 2014. The orders sought by the applicant were set out in the statement of claim as follows:

“Relief sought

The Applicant seeks:

- 23. A declaration that the First Respondent contravened section 405 of the FW Act by failing to comply with the Order.*
- 24. A declaration that the Second Respondent was involved in the First Respondent’s contravention of section 405 of the Fair Work Act set out in paragraph 23 above, pursuant to subsection 550(1) of the FW Act.*
- 25. An order pursuant to section 545(2) of the FW Act that the First Respondent compensate Ms Ndege by paying her an amount of \$2,200.00 plus 9% in superannuation, less taxation as required by law.*
- 26. An order pursuant to subsection 547(2) of the FW Act that interest be paid to Ms Ndege by the First Respondent on the amount referred to in the order sought in paragraph 25 above.*
- 27. An order that all amounts due to Ms Ndege pursuant to these orders be paid within 14 days.*
- 28. An order pursuant to subsection 546(1) of the FW Act imposing a pecuniary penalty on the First Respondent in respect of the contravention set out in paragraph 23 above.*
- 29. An order pursuant to subsection 546(1) of the FW Act imposing a pecuniary penalty on the Second Respondent for his involvement (within the meaning of subsection 550(2) of the FW Act) in respect of the contravention of section 405 of the FW Act set out in paragraph 23 above.*
- 30. An order pursuant to subsection 546(3)(a) of the FW Act that all pecuniary penalties imposed be paid to the Commonwealth within 28 days.*
- 31. An order that the Applicant have liberty to apply on seven days notice in the event that any of the preceding orders are not complied with.*
- 32. Such further or other orders as the Court considers appropriate.”*

9. On the first Court date Mr Crick appeared on behalf of the applicant and the second respondent (a director of the first respondent) appeared in person and on behalf of the first respondent. After hearing submissions from both parties the Court made the following orders:

“THE COURT ORDERS THAT:

- 1. The First Respondent and Second Respondent each file and serve a response and any defence by not later than 4.00 pm on 22 August 2014.*
- 2. The Applicant file and serve any reply by not later than 4.00pm on 12 September 2014.*
- 3. The proceedings be adjourned for hearing on Friday 19 September 2014 at the Federal Circuit Court of Australia at Melbourne commencing at 10.00 am.”*

10. On 26 August 2014 the second respondent filed a ‘statement of defence’ although not in the prescribed format. In the ‘statement of defence’ it was said:

- “1. The Second Respondent was not the controlling mind of the First Respondent as he only owned 15% of the Controlling entity and he was unable to force the other 85% unit holders to put in the money to pay the Order.*
- 2. The Second Respondent was unable to control or force the First Respondent to pay the order as the First Respondent has no funds to pay.*
- 3. The Second Respondent was unaware he would be responsible for the order made against the First Respondent and when he became aware of this he immediately put the funds in from his own pocket to pay the order.”*

11. No further material had been filed by either party since that date.

The hearing

12. The matter returned to Court for hearing today, Friday, 19 September 2014. Ms Knowles appeared on behalf of the applicant and the second respondent who is still a director of the first respondent appeared in that capacity and in person.

13. Today the parties sought leave, which was granted, to file in Court a Statement of Agreed Facts (“S.O.A.F”) which is Annexure A to these reasons.⁵ The S.O.A.F was prepared following discussions between the parties and the opportunity for the respondents to obtain legal advice.
14. It is not controversial the orders⁶ made on 17 January 2014 by the FWC were:
- “1. Within 14 days of the date of this Order, World Gym Sunshine Pty Ltd is to pay compensation to Samaka Sophia Ndege in the amount of \$2,200.00 gross, plus 9 per cent in superannuation, less taxation as required by law.”*
15. In the S.O.A.F the respondents now admit:
- “3. The First Respondent admits to contravening section 405 of the Fair Work Act 2009 (Cth) (FW Act), by contravening the terms of an order of the Commission made on 17 January 2014 (Admitted Contravention).*
- 4. The Second Respondent admits to his involvement in the Admitted Contravention described in paragraph 3 above.”*
16. At today’s hearing the applicant relied on the application, statement of claim, and the S.O.A.F. By consent the applicant also relied on the *viva voce* evidence from Ms Ndege and Inspector Saunders. Save for the S.O.A.F the respondent did not seek to lead any evidence and was content to tender only two exhibits.⁷ Aside from the evidence upon which they relied both parties made submissions on the appropriate penalty.
17. As a result of the above and the admissions made by the respondents in the S.O.A.F the proceedings before the Court now only concern the question of what penalties should be imposed for the admitted contraventions by the respondents of the FW Act.

Consideration

18. The orders of the FWC were made under Part 3-2 of the FW Act which deals with unfair dismissal. Section 405 of the FW Act, falling within

⁵ S.O.A.F marked as exhibit A1, see s.191 *Evidence Act 1995* (Cth)

⁶ see PR546939

⁷ see exhibits R1 & R2

Part 3-2 of the FW Act provides that a person to whom an order under that part applies must not contravene a term of that order. Section 539 of the FW Act provides that a contravention (amongst other things) of s.405 is a civil remedy provision.

19. The Court has the power to make any order it considers appropriate if it is satisfied that the first respondent has contravened a civil remedy provision (see s.545(1) FW Act). By s.545(2)(h) of the FW Act the Court has the power to order a payment of compensation for loss that a person has suffered “because of” a contravention. However no such order was sought by the applicant.
20. The applicant has standing to apply for the orders it seeks (see s.539(2) FW Act). The approach to what is effectively an application seeking an order for compliance with orders of the FWC has been the subject of at least 2 decisions of the Federal Court (*see Mayberry v Kijani Investments Pty Ltd. as Trustee for The Dawe Investments Trust Subway Wallsend trading as Subway* [2011] FCA 1238 per Katzmann J and *Meadley v Sort Worx Pty Ltd* [2013] FCA 1012 per Tracey J).
21. Section 545 of the FW Act confers on the Court broad powers to grant relief to persons who have suffered as a result of a contravention of a civil remedy provision. Had the orders of the FWC been complied with Ms Ndege would have been entitled to the compensation referred to in the order. Ms Ndege has been deprived of this up and until 20 August 2014 (when after the commencement of these proceedings she received the payment) because of the first respondent’s failure to comply with the order of the FWC. There is no reason Ms Ndege should not have been entitled to the monies due pursuant to the orders of the FWC within 14 days and as a result the evidence is she has sustained a loss.
22. The position of the first respondent (at least to the extent it had been articulated by the second respondent) did not take issue with the FWC orders. In any event there had been no appeal from the FWC orders. I am satisfied the first and second respondents would have been well aware they were expected to comply with the FWC orders. Despite claims to the contrary, there is no real evidence the first respondent was or is insolvent or unable to comply with the FWC order.

Penalty

23. The applicant has sought the imposition of a pecuniary penalty on the first and second respondents because of the first respondent's failure to comply with the FWC orders and the second respondent's involvement with that contravention. Counsel for the applicant referred to a number of decisions that have considered the appropriate penalty for the same sort of contravention as is now admitted by the respondents.⁸

24. As Katzmann J said in *Mayberry v Kijani Investments Pty Ltd. as Trustee for the Dawe Investments Trust Subway Wallsend trading as Subway* [2011] FCA 1238 at [20]:

“The Court may make a pecuniary penalty order in addition to any other order. This is a proper case to make such an order. Employers, no less than employees, are expected to comply with the orders of Fair Work Australia. Failure to do so is liable to bring the system of regulation of industrial disputes into disrepute. Kijani’s conduct signifies a refusal to accept the umpire’s decision. It should not go unpunished.”

25. In terms of the approach to fixing an appropriate penalty, in *Meadley v Sort Worx Pty Ltd* [2013] FCA 1012 Tracey J said:

“41. In exercising this power the Court is required “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”: see Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560 at 580 (per Buchanan J).

42. In Kelly v Fitzpatrick (2007) 166 IR 14 at [14] I identified a number of factors which were potentially relevant and applicable in determining an appropriate penalty. These factors were:

- The nature and extent of the conduct which led to the breaches.
- The circumstances in which that conduct took place.

⁸ see *Alogaidi v Agad Property Consulting Pty Ltd* [2014] FCCA 1883 and *Vickery v The Trustee for Roderick Trust t/as Encompass Books & Anor* [2014] FCCA 546

- The nature and extent of any loss or damage sustained as a result of the breaches.
- Whether there had been similar previous conduct by the respondent.
- Whether the breaches were properly distinct or arose out of the one course of conduct.
- The size of the business enterprise involved.
- Whether or not the breaches were deliberate.
- Whether senior management was involved in the breaches.
- Whether the party committing the breach had exhibited contrition.
- Whether the party committing the breach had taken corrective action.
- The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and
- The need for specific and general deterrence.

Each of these considerations, to varying degrees, bear on the determination of a penalty in the present case.”

26. Section 550 of the FW Act provides that a person (in this case that includes the second respondent) who is involved in a contravention of a civil remedy provision is treated as having contravened the civil remedy provision. Section 546 of the FW Act enables a Court to impose a penalty upon a person who has contravened a civil remedy provision.
27. Under the FW Act the maximum penalty that can be imposed on the first respondent is 300 penalty units and on the second respondent is 60 penalty units.
28. Section 12 of the FW Act provides that “*penalty unit*” has the same meaning as the *Crimes Act 1914* (Cth). At the time the contravention took place, section 4AA of that Act defined “*penalty unit*” to be \$170⁹. Accordingly, the maximum penalty the Court can impose on the first respondent is \$51,000 and on second respondent is \$10,200.

⁹ *Crimes Legislation Amendment (Serious Drugs Identity Crime and Other Measures) Act 2012*

29. The nature and extent of the conduct, the circumstances in which it took place and the loss or damage sustained have already been referred to. The Court should take into account that whilst there is no evidence that the first and second respondents have previously offended this is a very serious matter. Ms Ndege, with the assistance of the applicant, has had to go to the cost, expense and time of seeking compliance with the FWC orders through these proceedings. Ms Ndege and the applicant ought to have been entitled to expect that the first respondent would abide by the umpire's decision (i.e. the FWC order). There is no evidence of any appeal or other action taken by the respondents in relation to this. The conduct in question (failure to comply with the FWC Order) involved senior management including in the form of the second respondent who, on the evidence, was involved at every stage of the proceedings in the FWC and did not answer requests to comply.
30. This was a small business however that is no excuse.¹⁰ There is, nothing to suggest that first respondent has shown any insight into, let alone remorse for, its behaviour, nor is there anything to demonstrate cooperation with the applicant save only at the door of the Court and after the commencement of these proceedings. There is no evidence that the failure to comply with the FWC orders is not deliberate. Everything points to the likelihood that the first respondent until the commencement of these proceedings has wilfully ignored them.
31. The applicant's submissions emphasised the importance of enforcing the system of industrial regulation and that the respondents' conduct threatened to bring orders of the FWC into disrepute. There is no evidence to mitigate the seriousness of the conduct. Any penalty should be imposed at sufficient level to deter the first respondent from similar conduct along with a significant measure of general deterrence so that others understand the need to accept the umpire's decision and comply with orders of the FWC.¹¹
32. The same considerations should apply in determining penalty in respect of the conduct of the second respondent who is involved in several other businesses. The material before the Court makes clear the second respondent who represented the first respondent during the proceedings

¹⁰ see *Kelly v Fitzpatrick (supra)* at [30]

¹¹ see *Fair Work Ombudsman v Maclean Bay Pty Ltd (No.2)* [2012] FCA 557 at [27]

before the FWC was involved in the contravention. The material before the Court makes clear the second respondent was directly involved in what can only be described as the deliberate conduct by the first respondent in not complying with the FWC order. However there should be some further discount to any penalty imposed on the second respondent for his co-operation (albeit at the door of the Court).

33. The approach to accessory liability is set out in decisions such as *Yorke v Lucas* [1985] HCA 65; (1985) 158 CLR 661 and *Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 2)* (2010) 201 IR 234 at [198]. It is important to note that liability under this provision does not require proof of the legal consequence of those facts, or proof of intent. In any event the second respondent has now made admissions he was involved in the contravention.
34. Given the decision in *Australian Competition and Consumer Commission v Energy Australia Pty Ltd* [2014] FCA 336 I have taken into account and accept the submissions made on behalf of the applicant as to the appropriate penalty.
35. Given the maximum penalty that may be imposed, I find that the proper penalties given all of the above are for the first respondent to pay \$41,182.50 and for the second respondent to pay \$6,426.00.
36. The applicant sought an order for payment of the penalty to consolidated revenue. In accordance with s.546(3) of the FW Act that is an appropriate order but it should be paid in full within 3 months. Therefore there will be a declaration to mark the unlawful conduct of the first and second respondents and orders as set out at the beginning of these reasons for decision for the reasons set out above.

I certify that the preceding thirty six (36) paragraphs are a true copy of the reasons for judgment of Judge O'Sullivan

Associate:

Date: 19 September 2014

“Annexure A”

IN THE FEDERAL CIRCUIT COURT
OF AUSTRALIA
REGISTRY: MELBOURNE
FAIR WORK DIVISION

File number: **MLG1196/2014**

FAIR WORK OMBUDSMAN

Applicant

WORLD GYM SUNSHINE PTY LTD

(ACN 126 599 077)

First Respondent

WAYNE GEORGE MAILING

Second Respondent

STATEMENT OF AGREED FACTS

1. This Statement of Agreed Facts is made by the parties in these proceedings for the purposes of section 191 of the *Evidence Act 1995* (Cth).

A. THE APPLICATION

2. On 17 June 2014, the Applicant filed an Application and Statement of Claim in this Court against the First and Second Respondents (**Statement of Claim**), in respect of the First Respondent's contravention of an order of the Fair Work Commission (**Commission**) and the Second Respondent's involvement in that contravention.

B. ADMITTED CONTRAVENTION

3. The First Respondent admits to contravening section 405 of the *Fair Work Act 2009* (Cth) (**FW Act**), by contravening the terms of an order of the Commission made on 17 January 2014 (**Admitted Contravention**).

4. The Second Respondent admits to his involvement in the Admitted Contravention described in paragraph 3 above.

Filed on behalf of	The Applicant, First Respondent and Second Respondent				
Prepared by	Daniel Crick	Lawyer's code			
Name of law firm	Fair Work Ombudsman				
Address for service in Australia	Level 5, 414 La Trobe Street, Melbourne				
	State	Victoria	Postcode	3000	
Email	daniel.crick@fwo.gov.au		DX		
Tel	03 9954 2942	Fax	03 6216 0321	Attention	Daniel Crick

C. AMOUNT OUTSTANDING AND RELIEF SOUGHT

5. The Parties agree that the Admitted Contravention is the non-payment within 14 days as required by the Order to Ms Samaka Sophia Ndege, the subject of the Order, in the amount of \$2,200 gross, plus 9 per cent in superannuation, less taxation as required by law (**Amount Outstanding**).

D. THE PARTIES AND RELEVANT EMPLOYEE

The Applicant

6. The Applicant is and was at all material 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 FW Act;
 - (b) a Fair Work Inspector pursuant to section 701 of the FW Act; and
 - (c) a person with standing under subsection 539(2) of the FW Act to apply for orders in respect of contraventions of civil remedy provisions under the FW Act.

The First Respondent

7. World Gym Sunshine Pty Ltd (ACN 126 599 077) (**First Respondent**):
- (a) since 18 July 2007, is a company incorporated under the *Corporations Act 2001* (Cth);
 - (b) is capable of being sued in its corporate name;
 - (c) is a constitutional corporation within the meaning of section 12 of the FW Act; and
 - (d) during the period from around 29 August 2011 to 8 October 2012 (**Employment Period**) was a “national system employer” within the meaning of section 14 of the FW Act.
8. During the Employment Period, the First Respondent was the employer of Ms Samaka Sophia Ndege (**Ms Ndege**).
9. During the Employment Period, the First Respondent operated a gymnasium and fitness club providing health and fitness services from premises at 130 Harvester Road, Sunshine in the State of Victoria (**Business**).

The Second Respondent

10. Wayne George Mailing (**Second Respondent**), is and was at all material times:
- (a) a natural person capable of being sued;
 - (b) the sole director of the First Respondent;

- (c) the secretary of the First Respondent;
- (d) the owner of one half of the issued share capital in Melbourne Contractors Pty Ltd (ACN 059 119 649), which is the sole shareholder of the First Respondent; and
- (e) a person legally obliged to ensure that the First Respondent complied with the Order of the Fair Work Commission referred to in paragraphs 19 to 20 below.

The Employee

- 11. During the Employment Period, the First Respondent employed Ms Ndege on a casual basis, to perform the role of a receptionist in the Business.
- 12. On or around 8 October 2012, the First Respondent terminated Ms Ndege's employment.
- 13. On or around 25 October 2012, pursuant to section 394(1) of the FW Act, Ms Ndege lodged an application for an unfair dismissal remedy in Fair Work Australia (as it then was), now the Commission, in respect of the termination of her employment by the First Respondent (**proceeding U2012/14920**).
- 14. On or around 14 June 2013, within the meaning of Division 2, Part 3-2 of the FW Act, the Commission found that Ms Ndege was protected from unfair dismissal at the time of being dismissed.
- 15. On 2 September 2013, the proceeding U2012/14920 was heard by the Commission. The Second Respondent represented the First Respondent at that hearing.
- 16. On or around 12 November 2013 (**Merits Decision**), within the meaning of Division 3, Part 3-2 of the FW Act, the Commission found that:
 - (a) Ms Ndege had been unfairly dismissed;
 - (b) reinstatement of Ms Ndege was inappropriate;
 - (c) an order for payment of compensation was appropriate in all the circumstances.
- 17. On or around 17 January 2014 (**Remedy Decision**), the Commission:
 - (a) confirmed its finding that reinstatement of Ms Ndege was inappropriate;
 - (b) confirmed its finding that an order for payment of compensation was appropriate in all the circumstances;
 - (c) ordered the payment of compensation to Ms Ndege by the First Respondent.

18. On 2 December 2013, the Second Respondent made written submissions on behalf of the First Respondent regarding what order for compensation ought to be made by the Commission.

E. THE ORDER OF THE FAIR WORK COMMISSION

19. On 17 January 2014, the Commission made an order pursuant to section 392 of the FW Act against the First Respondent (**Order**).
20. The terms of the Order were that the First Respondent, within 14 days of the date of the Order, was to pay compensation to Ms Ndege in the amount of \$2,200.00 gross, plus 9 per cent in superannuation, less taxation as required by law.

F. CONTRAVENTION OF THE ORDER

21. The Commission gave the Order to the First Respondent and Second Respondent by email and post on or about 17 January 2014.
22. The First Respondent did not, within 14 days of the date of the Order:
- (a) make any payment to Ms Ndege; or
 - (b) make any contribution of superannuation on behalf of Ms Ndege.
23. By reason of the matters agreed in paragraph 22 above, the First Respondent contravened a term of the Order and, as a result, contravened section 405 of the FW Act.

G. ACCESSORIAL LIABILITY

24. At all relevant times, the Second Respondent was:
- (a) the legal controlling mind of the First Respondent;
 - (b) in respect of proceeding U2012/14920:
 - (i) the person who represented the First Respondent;
 - (ii) a person who made decisions on behalf of the First Respondent, or who was ultimately responsible for the First Respondent's decisions;
 - (iii) the person received the Order on or about 17 January 2014.
25. The Second Respondent had actual knowledge of the existence and terms of the Order.
26. The Second Respondent:
- (a) had actual knowledge of the Admitted Contravention; and
 - (b) was a participant in the Admitted Contravention.

27. By reason of the matters agreed in paragraphs 10 and 24 to 26 above, the Second Respondent:
- (a) was knowingly concerned and involved in (within the meaning of subsection 550(2) of the FW Act) the Admitted Contravention; and
 - (b) by reason of subsection 550(1) of the FW Act, is taken to have contravened that provision.

H. PAYMENT OF THE AMOUNT OUTSTANDING

28. By reason of the Admitted Contravention, the First Respondent owed Ms Ndege the Amount Outstanding.
29. On 20 August 2014, the Second Respondent on behalf of the First Respondent made a payment to Ms Ndege in the amount of \$1,496.00, being an amount of \$2,200 gross less 32% taxation.
30. By reason of the steps taken by the Second Respondent described in paragraph 29 above, the wages component of the Amount Outstanding has now been rectified in full.

DATED: 19 SEPTEMBER 2014



Office of the Fair Work Ombudsman
For the Applicant



Mr Wayne George Mailing
For the First and Second Respondents