

# FEDERAL CIRCUIT COURT OF AUSTRALIA

*FWO v WEDDERBURN PETROLEUM PTY LTD*

[2014] FCCA 2645

Catchwords:

INDUSTRIAL LAW – Underpayment of employees – declaration of breaches – orders for payment to employees not complied with – no discount as no cooperation – no contrition – specific and general deterrence required.

Legislation:

*Fair Work Act 2009*, s.546

*Workplace Relations Act 2006*, s.719(6)

Cases cited:

*Cotis v McPherson* [2007] FMCA 2060

*Fair Work Ombudsman v Garfield Berry Farm Pty Ltd & Anor* [2012] FMCA 103

*Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7

*Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543

*Re Trade Practices Commission v CSR Limited* (1991) 13 ATPR 41-076

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

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	WEDDERBURN PETROLEUM PTY LTD
File Number:	MLG 2308 of 2013
Judgment of:	Judge F. Turner
Hearing date:	22 October 2014
Date of Last Submission:	22 October 2014
Delivered at:	Melbourne
Delivered on:	20 November 2014

## **REPRESENTATION**

Solicitors for the Applicant: Office of the Fair Work Ombudsman

The Respondent did not appear

## **ORDERS**

- (1) Pursuant to s.719(6) of the *Workplace Relations Act 2006* (Cth) and s.546(1) of the *Fair Work Act 2009* (Cth) (the “FW Act”), the respondent pay pecuniary penalties in the amount of \$123,915.00 for the contraventions declared in Paragraph 1 of the Orders of Judge Burchardt made 23 July 2014.
- (2) Pursuant to s.546(3)(a) of the FW Act, the pecuniary penalties ordered by the Court be paid into the Consolidated Revenue Fund of the Commonwealth, within 28 days of the date of this order.
- (3) The applicant have liberty to apply on seven days’ notice in the event that either of the preceding orders are not complied with.

**FEDERAL CIRCUIT COURT  
OF AUSTRALIA  
AT MELBOURNE**

**MLG 2308 of 2013**

**FAIR WORK OMBUDSMAN**  
Applicant

And

**WEDDERBURN PETROLEUM PTY LTD**  
Respondent

**REASONS FOR JUDGMENT**

1. This matter involves proceedings by the Fair Work Ombudsman (the “FWO”) against Wedderburn Petroleum Pty Ltd (“Wedderburn”). The proceedings relate to the underpayment by Wedderburn of two employees (“M” and “K”), in which declarations of breaches, and the imposition of penalties for those breaches, are sought.
2. By orders dated 23 July 2014, Judge Burchardt made declarations of breaches by Wedderburn, and ordered:
  - (2) *Pursuant to section 719(6) of the WR Act and section 545(2)(b) of the FW Act, the Respondent pay within 28 days of this Order:*
    - (a) *Ms Murphy the amount of \$21,637.46; and*
    - (b) *Ms Kennedy the amount of \$25,620.91.*
  - (3) *Pursuant to section 722(1) of the WR Act and section 547(2) of the FW Act, the Respondent pay within 28 days of this Order interest on the sums referred to in order 2 above in the following amounts:*
    - (a) *Ms Murphy the amount of \$834.08; and*

*(b) Ms Kennedy the amount of \$987.63.*

3. Wedderburn did not appear on that day, but a copy of the orders has been served on it. The orders set the matter down on 22 October 2014 for the hearing of the application for penalties to be imposed on Wedderburn.
4. At the hearing on 22 October 2014, Mr Crick represented the FWO and Wedderburn did not appear.
5. By the orders of 23 July 2014, the FWO was ordered to file and serve any evidence and submissions on which it seeks to rely in respect of penalty, on or before 5 September 2014. That material was filed on 8 September 2014.
6. Wedderburn was ordered to file and serve any evidence and submissions in reply on or before 10 October 2014. Nothing was filed.
7. At the hearing on 22 October 2014, Mr Crick relied on the material filed by the FWO and made brief oral submissions that:
  - The underpayments to M and K were significant;
  - M was paid half what she was entitled to;
  - No payment of the amounts due to M and K have been made to date;
  - Wedderburn has made deliberate decisions not to pay the correct rates since November 2010, when it made enquiries as to applicable rates;
  - The penalties should not be discounted due to non-cooperation by Wedderburn;
  - An aggregate penalty of between \$123,900.00 and \$189,100.00 (as set out in Annexure A to the written submissions on penalty by the FWO filed 8 September 2014), is appropriate and reasonable, and would not be crushing on Wedderburn; and

- Wedderburn has ceased trading, but there is no evidence of its incapacity to pay; therefore the status of Wedderburn is irrelevant to the quantum of penalties to be imposed.

8. The orders sought by the FWO are as follows:

- (1) *Pursuant to section 719(6) of the Workplace Relations Act 2006 (Cth) and 546(1) of the Fair Work Act 2009 (Cth) (FW Act), the Respondent pay pecuniary penalties for the contraventions declared in Paragraph 1 of the Orders of Judge Burchardt, made 23 July 2014.*
- (2) *An order pursuant to section 546(3)(a) of the FW Act that the pecuniary penalties ordered by the Court be paid into the Consolidated Revenue Fund of the Commonwealth, within 28 days of the date of the order.*
- (3) *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.*
- (4) *Such further or other orders as the Court considers appropriate.*

9. The Court accepts the following submissions of the FWO:

***Principles Relevant to Determining Penalty***

- (19) *In Fair Work Ombudsman v EA Fuller & Sons Pty Ltd & Anor<sup>1</sup>, Judge Driver accepted that the following principles should be taken into account in determining the question of an appropriate penalty:*
  - (a) *The first step for the Court is to identify the separate contraventions involved. Each breach of each separate obligation found in the FW Act in relation to each employee is a separate contravention.<sup>2</sup>*

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<sup>1</sup> [2013] FCCA 5 (19 April 2013).

<sup>2</sup> *Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216 at 223; *McIver v Healey* [2008] FCA 425 at [16] (unreported, Federal Court of Australia, 7 April 2008, Marshall J).

- (b) *Secondly, the Court should consider whether the breaches arising in the first step constitute a single course of conduct.*<sup>3</sup>
- (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. The 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 respondent did.*<sup>4</sup> *This task is distinct from and in addition to the final application of the “totality principle”.*<sup>5</sup>
- (d) *Fourthly, consider the appropriate penalty for the single breaches and, if relevant, each group of contraventions, taking into account all of the relevant circumstances.*
- (e) *Finally, consider whether [the penalty] is an appropriate response to the conduct which led to the breaches.*<sup>6</sup> *The Court should apply an “instinctive synthesis” in making this assessment.*<sup>7</sup> *This is known as an application of the “totality principle”.*

10. The fourth step requires the Court to take into account all relevant circumstances. A list of relevant matters was set out by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 at [26] – [59] as follows:

- a) *The nature and extent of the conduct which led to the breaches;*
- b) *The circumstances in which the conduct took place;*

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<sup>3</sup> *Subsection 557(1) of the FW Act.*

<sup>4</sup> *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).

<sup>5</sup> *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).

<sup>6</sup> *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).

<sup>7</sup> *Merringtons, supra* at [27] (Gray J) and [55] and [78] (Graham J).

- c) *The nature and extent of any loss or damage sustained as a result of the conduct;*
- d) *Any similar previous conduct by the respondents;*
- e) *Whether the breaches were properly distinct or arose out of one course of conduct;*
- f) *The size of the business involved;*
- g) *Whether the breaches were deliberate;*
- h) *Whether senior management was involved;*
- i) *Whether the party committing the breach has exhibited contrition;*
- j) *Whether the party committing the breach has taken corrective action;*
- k) *Whether the party committing the breach has cooperated with the enforcement authorities;*
- l) *The need to ensure compliance with minimum standards by providing effective means for investigation and enforcement of employee entitlements; and*
- m) *The need for specific and general deterrence.*

11. The list is not restrictive of the matters that may be considered: see *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550 at [11].

12. The written submissions for the FWO continue:

***Maximum Penalties***

(20) *Sections 539(2) and 546(2)(a) of the FW Act prescribe the maximum penalties that may be imposed by this Court for contraventions of civil penalty provisions, by reference to “penalty units” within the meaning of section 4AA of the Crimes Act 1912 (Cth) (Crimes Act).*<sup>8</sup>

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<sup>8</sup> *Section 539(2) of the FW Act prescribes the maximum penalty that may be imposed by this Court for a contravention of each of the civil penalty provisions specified in the table in that section. Section 546(2) of the FW Act prescribes that a pecuniary penalty imposed by this Court must not be more than*

- (21) *From 28 December 2012, the Crimes Legislation Amendment (Serious Drugs, Identify Crime and Other Measures) Act 2012 (Cth) increased the amount of a penalty unit in section 4AA of the Crimes Act from \$110 to \$170.*
- (22) *In this proceeding, the majority of the Respondent’s contravening conduct occurred either entirely to the increase in the value of a “penalty unit” on 28 December 2012, or commenced [prior] to that date and continued unchanged beyond it. The single exception is the breach of section 116 of the FW Act, because both public holiday absences for which [K] was not paid her ordinary hourly rate occurred after 28 December 2012 (29 March 2013 – Good Friday, and 25 April 2013 – ANZAC Day).*
- (23) *In the particular circumstances of this proceeding, and consistent with the position adopted by Jessup J in Murrphy v Betezy.com.au Pty Ltd (No 2),<sup>9</sup> the Applicant submits that for the purpose of calculating the maximum penalty for each of the Admitted Contraventions, the applicable values of a penalty unit are those which were applicable at the time of that the contraventions were made or begun, specifically:*
- (a) *\$170 for the public holiday absence contravention; and*
  - (b) *\$110 for all other contraventions.*
- (24) *On that basis, the maximum penalty that may be imposed by the Court upon this Respondent (as a body corporate) for each contravention is set out in the table in Attachment A.*

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*the amount referred to in section 539(2) in respect of an individual. Section 12 of the FW Act provides that “penalty unit” has the same meaning as section 4AA of the Crimes Act.*

<sup>9</sup> [2013] FCA 1146 at [6] to [28]. *In this case Jessup J undertook a considered analysis of the relevant case law to determine whether the increased value of penalty units applied to contraventions of the FW Act which, on the facts before him, had occurred entirely to 28 December 2012. His Honour determined that the relevant value of a penalty unit in that case was the value applicable at the time of the contravention; that is, the lesser penalty which applied to the increase on 28 December 2012.*

## **Consideration of the Five Steps**

### **Step One**

13. Identify the separate contraventions; These have been identified in the declarations made by Judge Burchardt on 23 July 2014, and are set out in Annexure A (supra).

### **Step Two**

14. The Court finds that the breaches do not constitute a single course of conduct. They relate to different breaches, to different employees, to different bases of employment, over different periods.

### **Step Three**

15. The Court finds that the grouping into 11 groups as proposed by the FWO in Annexure A is appropriate.

### **Step Four**

16. The Court will now consider the factors identified in *Mason* (supra).

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

17. The nature of the conduct up until November 2010 was at least reckless and after November 2010 was in deliberate disregard of advice given to Wedderburn. The breaches were extensive and resulted in proportionally significant underpayments to each employee. The failure to provide payslips affected the employees' ability to obtain finance.

### **The circumstances in which the conduct took place**

18. The employees were on low income and needed to seek additional income to enable them to meet their living expenses. They were told to calculate their own wages, take the cash from the till and send a copy of their calculations to Wedderburn. An employer cannot reduce its liability by following that course. Wedderburn had an obligation to ensure that M and K were paid their correct entitlements.

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

19. M has been deprived of \$21,637.46 over a substantial period. K has been deprived of \$25,620.91 over a substantial period. This has resulted in financial difficulties for both employees. None of the shortfall has been paid to the employees.

**Any similar previous conduct by the respondents**

20. No previous conduct is alleged against Wedderburn.

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

21. The Court has considered the appropriate groupings (*supra*).

**The size of the business involved**

22. The Court refers to the following submissions of the FWO:

(58) *In Workplace Ombudsman v Saya Cleaning Pty Ltd*<sup>10</sup> *Federal Magistrate Simpson (as he then was) provided a summary of the case law in this respect:*

*'the First Respondent is a small company and, I infer, has very few 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.'*

*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*

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<sup>10</sup> [2009] FMCA 38 at [26] – [27].

*adherence to industrial instruments arise regardless of their size. Such a factor should be of limited relevance to a Court's consideration of penalty."*

*(59) On that basis, the Applicant submits [and the Court decides] that regardless of the Respondent's financial circumstances and size, of which there is no evidence before the Court, the Court should mark its disapproval of the conduct in question and set a significant penalty which serves as a warning to others.*

**Whether the breaches were deliberate**

23. As stated (supra), the contraventions were at least reckless, and since November 2010 have been deliberate.

**Whether senior management was involved**

24. Senior management did not calculate the wages, but were aware of the award coverage and received regular copies of the wage calculations.

**Whether the party committing the breach has exhibited contrition**

25. Wedderburn has not shown contrition. The whole of the underpayments are outstanding, in total disregard of the orders of Judge Burchardt on 23 July 2014. Wedderburn made no effort to cooperate with the FWO (see Affidavit of T. W. Cunningham affirmed 5 September 2014). This is a significant factor against Wedderburn.

**Whether the party committing the breach has taken corrective action**

26. Corrective action has not been taken by Wedderburn. This is a significant factor.

**Whether the party committing the breach has cooperated with the enforcement authorities**

27. Wedderburn has not cooperated with the FWO.

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

28. Minimum standards must be complied with by employers.

## **The need for specific and general deterrence**

29. There is a need for deterrence.
30. The Court accepts that the most 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.

### **Specific Deterrence**

31. The Court finds a clear need for specific deterrence of Wedderburn. Although there is no detail as to whether Wedderburn continues to operate, it is possible that it will re-engage in a similar conduct in the future. It must be deterred.
32. In *Cotis v McPherson* [2007] FMCA 2060, the Court noted that although there was no prior history of similar conduct, there was an absence of contrition, no attempt to pay the employees and little participation in the proceedings. On that basis, it was said at [19] that “*although the business has closed there is nothing to indicate that if Mr McPherson conducted another business when he is discharged from bankruptcy, similar problems would not occur*”: See also *Fair Work Ombudsman v Garfield Berry Farm Pty Ltd & Anor* [2012] FMCA 103 at [41].

### **General Deterrence**

33. 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) 158 FCR 543 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 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. In some cases, although hardly in this type of contravention, rehabilitation is an important factor.”*

34. The Court finds a total penalty of \$123,915.00 on Wedderburn is an appropriate response to the contraventions. There is no evidence that it is oppressive or will be crushing. A substantial portion of M and K’s entitlements have been withheld from them. The money is still outstanding in flagrant disregard of the orders of 23 July 2014. Wedderburn did not cooperate with the FWO and has not shown any contrition. There is no evidence of an apology to M or K.

### **Step Five**

35. The Court finds the aggregate penalty to be an appropriate response to the conduct resulting in withholding a combined total of \$47,258.37 from M and K, and for not complying with the orders made 23 July 2014. It is at the lower end of the range sought by the FWO and amounts to 38% of the maximum aggregate for the groups. Any less would not represent an adequate penalty when compared with the maximum prescribed by Parliament.
36. The Court makes orders in terms proposed by the FWO as set out at the beginning of this judgment.

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**I certify that the preceding thirty-six (36) paragraphs are a true copy of the reasons for judgment of Judge F. Turner**

Associate:

Date: 20 November 2014

## Annexure A – Proposed Penalty Range and Grouping

Declared Contraventions (alphabetical references are to the Order of Judge Burchardt made 23 July 2014)]	Nature of Contraventions	Maximum Penalty (before Grouping)	Grouping	Maximum Penalty (after Grouping)	Proposed Penalty Range (%)		Proposed Penalty Range (\$)	
					Minimum	Maximum	Minimum	Maximum
Section 182(1) of the Workplace Relations Act [(a)]	Basic periodic rate of pay	\$33,000	<b>Basic Minimum Rate of Pay</b>	\$33,000	60%	80%	\$19,800	\$26,400
Item 5, Sch 16 of the Transitional Act [(c)]	Basic periodic rate of pay	\$33,000						
Section 45 Fair Work Act by reason of Clause 12.6 Modern Award [(e)]	Base rate of pay	\$33,000						
Section 185(2) of the Workplace Relations Act [(b)]	Casual loading	\$33,000	<b>Casual Rate of Pay</b>	\$33,000	60%	80%	\$19,800	\$26,400
Item 5, Sch 16 of the Transitional Act [(d)]	Casual loading	\$33,000						
Section 45 Fair Work Act by reason of Clause 36.3 Modern Award [(f)]	Casual Rate of Pay	\$33,000						
Section 718 Workplace Relations Act by reference to clause 6(f)(iv)(3) Pre-Modern Award [(g)]	Overtime Rates	\$33,000	<b>Overtime Rates</b>	\$33,000	30%	50%	\$9,900	\$16,500
Item 2(1), Sch 16 Transitional Act by reference to clause 6(f)(iv)(3) Pre-Modern Award [(h)]	Overtime Rates	\$33,000						

Section 45 Fair Work Act by reason of Clause 36.3 Modern Award [(i)]	Overtime Rates	\$33,000							
Section 45 Fair Work Act by reason of Clause 43.4 Modern Award [(j)]	Overtime Rates	\$33,000							
Section 718 Workplace Relations Act by reference to clause 6(f)(iv)(3) Pre-Modern Award [(k)]	Saturday Penalty Rates	\$33,000	<b>Saturday Penalty Rates</b>	\$33,000	50%	70%	\$16,500	\$23,100	
Item 2(1), Sch 16 Transitional Act by reference to clause 6(f)(iv)(3) Pre-Modern Award [(l)]	Saturday Penalty Rates	\$33,000							
Section 45 Fair Work Act by reason of Clause 36.3 Modern Award [(m)]	Saturday Penalty Rates	\$33,000							
Section 45 Fair Work Act by reason of Clause 43.3(a) Modern Award [(n)]	Saturday Penalty Rates	\$33,000							
Section 718 Workplace Relations Act by reference to clause 6(f)(iv)(3) Pre-Modern Award [(o)]	Sunday Penalty Rates	\$33,000	<b>Sunday Penalty Rates</b>	\$33,000	50%	70%	\$16,500	\$23,100	
Item 2(1), Sch 16 Transitional Act by reference to clause 6(f)(iv)(3) Pre-Modern Award [(p)]	Sunday Penalty Rates	\$33,000							
Section 45 Fair Work Act by reason of Clause 36.3 Modern Award [(q)]	Sunday Penalty Rates	\$33,000							
Section 45 Fair Work Act by reason of Clause 43.3(b) Modern Award [(r)]	Sunday Penalty Rates	\$33,000							

Section 718 Workplace Relations Act by reference to clause 6(f)(iv)(3) Pre-Modern Award [(s)]	Public Holiday Penalty Rates	\$33,000	<b>Public Holiday Penalty Rates</b>	\$33,000	30%	50%	\$9,900	\$16,500
Item 2(1), Sch 16 Transitional Act by reference to clause 6(f)(iv)(3) Pre-Modern Award [(t)]	Public Holiday Penalty Rates	\$33,000						
Section 45 Fair Work Act by reason of Clause 36.3 Modern Award [(u)]	Public Holiday Penalty Rates	\$33,000						
Section 45 Fair Work Act by reason of Clause 43.3(c) Modern Award [(v)]	Public Holiday Penalty Rates	\$33,000						
Section 44 Fair Work Act by reference to section 116 Fair Work Act [(w)]	Failure to Pay for Public Holiday Absence	\$51,000	<b>None</b>	\$51,000	10%	30%	\$5,100	\$15,300
Regulation 19.4(1) of the Workplace Relations Regulations by reference to Reg 19.9(1) [(x)]	Failure to Make Records relating to Overtime	\$5,500	<b>Record Keeping</b>	\$5,500	60%	80%	\$3,300	\$4,400
Section 535(2) Fair Work Act by reference to regulation 3.34 Fair Work Regulations [(aa)]	Failure to Make Records relating to Overtime	\$16,500						
Regulation 19.4(1) of the Workplace Relations Regulations by reference to Reg 19.11(1), 19.11(3) and 19.11(4) [(y)]	Failure to Make Records relating to Remuneration	\$5,500						
Section 535(2) Fair Work Act by reference to regulation 3.33 Fair Work Regulations [(z)]	Failure to Make Records relating to Remuneration	\$16,500						

Regulation 19.20(1) of the Workplace Relations Regulations [(bb)]	Failure to Issue Payslips	\$5,500	<b>Payslips</b>	\$5,500	60%	80%	\$3,300	\$4,400
Section 536(1) Fair Work Act [(cc)]	Failure to Issue Payslips	\$16,500						
Section 45 Fair Work Act by reason of Clause 29.7(a) Modern Award [(dd)]	Annual Leave	\$33,000	<b>None</b>	\$33,000	30%	50%	\$9,900	\$16,500
Section 45 Fair Work Act by reason of Clause 12.3 Modern Award [(ee)]	Failure to Put Part-time Agreement in Writing	\$33,000	<b>None</b>	\$33,000	30%	50%	\$9,900	\$16,500
<b>TOTALS</b>		<b>\$909,000</b>		<b>\$326,000</b>			<b>\$123,900</b>	<b>\$189,100</b>