

FEDERAL COURT OF AUSTRALIA

Potter v Fair Work Ombudsman [2014] FCA 1171

Citation: Potter v Fair Work Ombudsman [2014] FCA 1171

Appeal from: *Fair Work Ombudsman v Quincolli Pty Ltd* [2011] FMCA 139

Parties: **JUDITH MADGE POTTER v FAIR WORK OMBUDSMAN**

File number(s): NSD 249 of 2013

Judge(s): **YATES J**

Date of judgment: 7 November 2014

Catchwords: **PRACTICE AND PROCEDURE** – applications for disbursement of moneys paid into Litigant’s Fund

Legislation: *Workplace Relations Act 1996* (Cth)
Fair Work Act 2009 (Cth)

Cases cited: *Fair Work Ombudsman v Quincolli Pty Ltd* [2011] FMCA 139
Quincolli Pty Ltd v Fair Work Ombudsman [2013] FCA 321
David Securities Pty Limited v Commonwealth Bank of Australia (1992) 175 CLR 353

Date of hearing: 29 October 2014

Place: Sydney

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 29

The Appellant: In person

Counsel for the Respondent: Ms C Howell

Solicitor for the Respondent: Office of the Fair Work Ombudsman

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 249 of 2013

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

**BETWEEN: JUDITH MADGE POTTER
 Appellant**

**AND: FAIR WORK OMBUDSMAN
 Respondent**

JUDGE: YATES J

DATE OF ORDER: 7 NOVEMBER 2014

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The appellant's application dated 4 April 2014 be dismissed.
2. The stay on 11 April 2013 of Orders 1 to 39 and 45 made by the Federal Magistrates Court of Australia (**the Federal Magistrates Court**) on 18 February 2013 (proceeding number SYG1898 of 2010) be lifted.
3. Pursuant to rule 2.43 of the *Federal Court Rules 2011*, the money paid into the Litigant's Fund on 19 April 2013 by Quincolli Pty Ltd (in liquidation) (**the company**) in the amount of \$20,762.00 be paid from the Litigant's Fund to the Consolidated Revenue Fund of the Commonwealth of Australia within 28 days of the date of this order.
4. The money paid pursuant to Order 3 above, in part payment of Orders 1 to 33 made by the Federal Magistrates Court on 18 February 2013, be disbursed by the respondent to the former employees of the company named in the Schedule to these orders, such payments to be made in the amounts specified in column 5 therein.
5. Payment to the former employees referred to in Order 4 above be made within 90 days of the date of this order.
6. If at the expiration of the 90 day period provided in Order 5 above, the respondent is unable to locate any former employee named in the Schedule to make payment in accordance with Orders 4 and 5 above, any amount owed to the former employee is to

remain in the Consolidated Revenue Fund of the Commonwealth as unclaimed moneys pursuant to s 726 of the *Workplace Relations Act 1996* (Cth) and s 559(1) of the *Fair Work Act 2009* (Cth).

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

Schedule

1	2	3	4	5
No.	Former employee of Quincolli Pty Ltd	Outstanding underpayment	Underpayment as percentage of total underpayment of \$193,419.36 (to 2 decimal places)	Amount owing to employees being percentage of total underpayment applied to Stay Monies of \$20,762
1	Linda Jean Albany	\$3,545.67	1.83%	\$380.60
2	Melanie Rachel Barry	\$6,367.72	3.29%	\$683.52
3	Wendy Buck	\$41.87	0.02%	\$4.49
4	Karen Maree Defries	\$1,400.12	0.72%	\$150.29
5	Theresa Johanna Duits	\$12,191.20	6.30%	\$1,308.63
6	Amy Rose Farnham	\$2,403.82	1.24%	\$258.03
7	Fiona Maree Fehrenbach	\$247.62	0.13%	\$26.58
8	Maria Assunta Gambone	\$7,050.05	3.64%	\$756.77
9	Jillianne Fay Garratty	\$14,160.14	7.32%	\$1,519.98
10	Maureen Mary Heron	\$6,061.11	3.13%	\$650.61
11	Janel Maree Hyam	\$16,119.91	8.33%	\$1,730.34
12	Naomi Hyam	\$1,303.16	0.67%	\$139.88
13	Sarah Jane Irvine	\$14,692.90	7.60%	\$1,577.16
14	Luseane Kanongata'a	\$3,649.73	1.89%	\$391.77
15	Megan Kelly	\$76.76	0.04%	\$8.24
16	Christine Mary Kiely	\$11,124.57	5.75%	\$1,194.13
17	Leanne Karen Laverty	\$2,986.11	1.54%	\$320.53
18	Jade Leece	\$1,661.99	0.86%	\$178.40
19	Jo-Ann Lewis	\$8,462.93	4.38%	\$908.43
20	Nadine Wendy Maguire	\$43.61	0.02%	\$4.68
21	Tina Lee Malady	\$8,306.74	4.29%	\$891.66
22	Christopher Rene Martens	\$5,454.58	2.82%	\$585.50
23	Barbara Ann Maybury	\$3,784.03	1.96%	\$406.18
24	Paul Vincent Meagher	\$9,401.13	4.86%	\$1,009.14
25	Tania Morandini	\$961.40	0.50%	\$103.20
26	Anne Patricia Nute	\$835.89	0.43%	\$89.73
27	Belinda Michelle Oxford	\$5,652.12	2.92%	\$606.71
28	Leanne Toni Perry	\$1,060.61	0.55%	\$113.85
29	Lynette Richardson	\$17,467.04	9.03%	\$1,874.95
30	Susan Carol Roy	\$10,695.70	5.53%	\$1,148.10
31	Diane Margaret Sprott	\$150.03	0.08%	\$16.10
32	Tracy Kaye Walsh	\$12,291.99	6.36%	\$1,319.45
33	Kane Wilkins	\$3,767.11	1.95%	\$404.37
TOTALS		\$193,419.36	100%	\$20,762.00

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 249 of 2013

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

**BETWEEN: JUDITH MADGE POTTER
 Appellant**

**AND: FAIR WORK OMBUDSMAN
 Respondent**

JUDGE: YATES J

DATE: 7 NOVEMBER 2014

PLACE: SYDNEY

REASONS FOR JUDGMENT

1 There are two competing applications before the Court with respect to the disbursement of money paid into Court and deposited in the Litigant's Fund (**the Fund**) on 19 April 2013. The money was paid into Court in response to an order made by me on 11 April 2013, in the following circumstances.

Background

2 Quincolli Pty Limited (in liquidation) (**the company**) was one of a number of corporate entities through which the appellant and her husband, Norman Potter, conducted a business which operated a number of call centres in Australia and overseas. The sole directors and shareholders of the company were the appellant and her husband. The company was the entity through which, until 2011, employees at a call centre in Nowra, New South Wales (**the call centre**) were engaged.

3 In August 2010, the respondent filed an application in the Federal Magistrates Court of Australia (**Federal Magistrates Court**) for orders against the company and the appellant in relation to various alleged underpayments in respect of employees at the call centre. In about March 2011, employees of the company were transferred to another company controlled by the appellant and her husband. The call centre business continued, and the

employees generally continued in the same roles with the new employer. Thereafter, the company did not trade.

4 On 28 November 2011, the Federal Magistrates Court found that the company had underpaid 33 employees at the call centre. The Federal Magistrates Court found that the company had committed various contraventions of the *Workplace Relations Act 1996* (Cth) and the *Fair Work Act 2009* (Cth). The appellant was found to be an accessory to the contraventions: *Fair Work Ombudsman v Quincolli Pty Ltd* [2011] FMCA 139.

5 On 18 February 2013, the Federal Magistrates Court made orders requiring:

- payments totalling \$193,419.36 to be made by the company to its former 33 employees for the purpose of rectifying underpayments of wages and other entitlements under the Clerical NAPSA; and
- penalties totalling \$81,000 to be paid by the company, and penalties totalling \$26,500 to be paid by the appellant, in respect of the various contraventions to which I have referred.

6 On 19 February 2013, the company (as first appellant) and the appellant (as second appellant) filed a notice of appeal in this Court in which they appealed from the whole of the judgment of the Federal Magistrates Court. Shortly thereafter, the company and the appellant filed an interlocutory application seeking a stay of the orders that had been made below.

7 The interlocutory application came before me for hearing. On 11 April 2013, I made the following orders:

1. Orders 1 to 39 inclusive (in respect of the first appellant) and orders 40 to 45 inclusive (in respect of the second appellant) made by the Federal Magistrates Court of Australia in proceeding no SYG1898 of 2010 on 18 February 2013 be stayed pending the final determination of the appellants' appeal, on condition that the first appellant pays into Court the sum of \$20,762 on or before 19 April 2013.
2. Within 3 days of the sum being paid into Court, the Registrar notify each party in writing that the sum has been received.
3. The stay take effect on and from the date that the said sum is paid into Court.
4. Subject to further or other order, the said sum be paid into the Litigants' Fund pursuant to r 2.42(1)(b) of the Federal Court Rules 2011.

8 On 19 April 2013, \$20,762 was paid into Court and deposited in the Fund.

9 Judgment in the appeal was given on 7 March 2014. The judgment did not affect the orders made for payments to the company's 33 former employees. An application for special leave to appeal to the High Court was dismissed on 15 August 2014.

10 The appellant seeks an order that the money paid into Court be disbursed to her. The respondent seeks an order that this money be released to the Commonwealth subject to a requirement that it be disbursed, on a proportionate basis, to the employees who have been underpaid, as set out in a schedule provided to the Court.

Consideration

11 To understand the basis on which the appellant seeks an order that the money be paid to her, it is necessary to descend to some more detail concerning the circumstances in which the payment came to be made on 19 April 2013.

12 In my reasons for making the orders on 11 April 2013 (*Quincolli Pty Ltd v Fair Work Ombudsman* [2013] FCA 321) (**my earlier reasons**), I made certain findings about the financial position of the company (there referred to as the first appellant) and the involvement of the appellant (there referred to as the second appellant) with the company.

13 At [13]-[14], I said:

13 The appellants say that they are unable to pay the penalties and, in the case of the first appellant, the sums ordered to be paid to employees at the Nowra Call Centre. The appellants say that, if no stay is granted, and the first appellant is required to pay the sums as ordered, as well as the penalties imposed on it, liquidation will be its only course.

14 Some evidence has been adduced of the respective financial positions of the appellants. As I will come to explain, the evidence of the second appellant's financial position is, to say the least, scant. I will deal, firstly, with the first appellant's financial position, as revealed by the evidence, and then turn to consider the second appellant's financial position.

14 At [15]-[16], I found:

15 It emerged in the course of the second appellant's evidence in the proceeding before the Federal Magistrates Court that, on 5 March 2011, the employment of the employees at the Nowra Call Centre was transferred to a company called Browns Road Pty Limited. Both the first appellant and Browns Road Pty Limited are companies controlled by the second appellant and her husband, Norman Charles Potter. In her affidavit read in this application, the second appellant said that the first appellant's "physical assets" – being some call centre stations, desks, chairs, telephones and headsets – were purchased by "Well Done Contact Centres" which, I infer, is the name of a business which

now conducts the Nowra Call Centre.

16 The second appellant's affidavit includes a copy of the first appellant's 2012 tax return and an accountant's declaration made on 28 March 2013 showing the first appellant's current financial position. This material records that the first appellant has total current assets of \$20,762 and total debts of \$69,810, said to be derived wholly from shareholders' loans. I note that the second appellant and Mr Potter are recorded as the first appellant's only shareholders. The first appellant's current year loss is \$7,064. The first appellant's 2012 tax return reports that it had total income for the relevant year of \$2,829 and total expenses of \$8,286. It thus reports a loss of \$5,457. The second appellant's affidavit makes clear that the first appellant's only present asset is the sum of \$20,762 comprising funds in a bank account. There is no evidence that the first appellant is currently trading and, from the available evidence, I infer that it is not trading, has not traded for some time, has no intention of trading and has no capacity to trade absent some support from the second appellant and Mr Potter.

15 I pause to note that, in the course of her present application, the appellant suggested that I had proceeded on a misconception that a company's current assets are the same thing as its cash position. I proceeded on no such misconception. As the above quote makes clear, it was the appellant's own evidence that the company's total current assets were represented by funds in a bank account. I relied on that evidence, as well as other evidence given by the appellant as to the company's financial position, and her own financial position, at the time the application for a stay was made.

16 At [17] of my earlier reasons, I found:

17 It is plain that the first appellant is a creature of the second appellant and her husband. Its financial fate rests in their hands. They are its only apparent creditors. The available evidence indicates that the first appellant is insolvent, and has been insolvent for some time.

17 At [23]-[25], I concluded:

23 Taking all these matters into account, I am persuaded that a stay of orders 1 to 33 inclusive made by the Federal Magistrates Court concerning payments to the employees at the Nowra Call Centre should be granted, but only on condition that the first appellant pays into Court the sum of \$20,762 on or before 19 April 2013. The funds are to be held pending the determination of the appeal and then disbursed as the Court shall order.

24 In coming to this determination, I have endeavoured to balance the interests of all those affected by the bringing of the appeal. I appreciate that a stay in respect of the orders concerning the employees at the Nowra Call Centre will delay the payment of their entitlements (or some part of them), as presently determined. However, it would be unrealistic for me not to take into account the parlous financial position of the first appellant and the practical likelihood that those employees will not receive a timely payment in any event. On the

other hand, should the first appellant make the payments, or some part of them, and subsequently succeed in its appeal, it may be difficult for it to obtain repayment of the sums in question. Although the appellants offered an undertaking to the Court not to dispose of any assets of the first appellant pending the determination of their appeal, in my view, the better course is to order that the funds be paid into Court as a condition of granting a stay. This reflects my view that the first appellant's prospects of success in the appeal are not strong insofar as they concern these orders.

25 Given that, on the material before me, the outcome of the appellants' severity appeals appears to be dependent on their appeal in relation to the first appellant's liability to pay its former employees, it seems to me to be appropriate that the penalty orders made by the Federal Magistrates Court also be stayed on the same condition.

18 These paragraphs reflect my reasons for making the conditional stay order. I was concerned to ensure that, what seemed to be the company's only available assets (the appellant having given evidence that the company's "physical" assets had been previously transferred to another company controlled by the appellant and her husband), be effectively preserved by payment into Court to provide some limited protection for the company's former employees in respect of the sums that the company had been ordered to pay to them.

19 Closer to the time when payment under the conditional stay order was to be made, the appellant formed the view that the company had insufficient funds to pay \$20,762. On 17 April 2013, the company offered to pay a lesser sum (\$16,000) into Court. I declined to vary the orders I made on 11 April 2013, having accepted the evidence advanced by the appellant at the hearing of the stay application. On 18 April 2013, the appellant and her husband caused a liquidator to be appointed to the company in a creditors' voluntary liquidation.

20 On 19 April 2013, the appellant caused the sum of \$20,762 to be paid into Court. The immediate source of these funds was a joint bank account held by the appellant and her husband. These funds, in turn, appear to have been provided by Well Done International Pty Limited, whose sole director is the appellant's husband. At a later time, the appellant withdrew the sum of \$26,500 from her superannuation account with AMP and deposited that sum in the joint account. That sum represents the total amount of the fines which the appellant had been ordered to pay by reason of her accessorial liability to which I have referred above. It seems, however, that it was used, in part, to repay Well Done International Pty Limited.

21 I mention these facts because the appellant's argument is that, ultimately, she was the source of the \$20,762 paid into Court on 19 April 2013 and that, therefore, that sum should now be paid to her.

22 The appellant contended that she caused the payment into Court to be made in the belief that she, and not the company, could make the payment to secure the benefit of the stay. She submits that this was a "mistake" which would entitle her to recover the money so paid on a restitutionary basis, based on *David Securities Pty Limited v Commonwealth Bank of Australia* (1992) 175 CLR 353. I do not accept that submission.

23 The terms of the orders made on 11 April 2013 are clear. The stay was granted on condition that the company pay into Court the sum of \$20,762 on or before 19 April 2013. However, there is nothing in the orders that either specifies the precise source of the funds from which that payment was to be made or would prevent such payment being made for and on behalf of the company in fulfilment of the condition that had been imposed.

24 In the present application, the appellant says that at the time that payment was required in order to secure the stay, the company had insufficient funds and had, in any event, been placed in liquidation by her and her husband the previous day. She therefore decided to make the payment in fulfilment of the condition.

25 Accepting that to be the case, and accepting that the appellant can be regarded as the ultimate source of the funds in question, the payment made into Court can only be taken as having been proffered and made in fulfilment of the condition imposed – that is, as a payment proffered and made for and on behalf of the company. Moreover, the Court accepted the payment as one made for and on behalf of the company, in fulfilment of the condition that had been imposed. There was no "mistake".

26 Further, the appellant cannot claim that the payment resulted in some form of unjust enrichment. The payment was made to secure the stay in favour of both the company and the appellant, as the appellant intended. The appellant enjoyed the benefit of the stay pending the final determination of the appeal, also as she had intended. Given the evident purpose for which the payment into Court was required to be made, it would now be unconscionable to permit the appellant to call for disbursement of the money to her, simply because she can be regarded as the ultimate source of the funds used to fulfil the condition imposed on the company.

27 For these reasons, I decline to make the order sought by the appellant. The next question is, should the orders sought by the respondent be made?

28 I am satisfied that the orders sought by the respondent should be made. I have already referred to the purpose for which the orders of 11 April 2013 were made. The liquidator of the company has been fully informed of the respondent's application. He has not sought to appear on the hearing of the application, and has indicated no opposition to the orders sought. More importantly, he makes no claim on the money that was paid into Court.

Disposition

29 For these reasons, the appellant's application should be dismissed and the respondent's application should be granted. Orders will be made as sought by the respondent.

I certify that the preceding twenty-nine (29) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Yates.

Associate:

Dated: 7 November 2014