

INDUSTRIAL RELATIONS COURT OF SOUTH AUSTRALIA

FAIR WORK OMBUDSMAN

v

DRAGON TEA HOUSE PTY LTD
First respondent

XIAO XU ZHOU
Second Respondent

JURISDICTION: Fair Work Act 2009

FILE NO: 8875 of 2014

HEARING DATE: 26 May 2015

JUDGMENT OF: Industrial Magistrate SM Lieschke

DELIVERED ON: 11 September 2015

CATCHWORDS:

*Contravention of payslip obligations - Pecuniary penalty - Operator and owner of Chinese restaurant did not provide any payslips to two foreign employees over an eighteen month period - Whether second respondent attempted to deceive FWO Inspectors by creating and providing false payslips following its spot audit of a s 457 visa holder's employment records or whether second respondent genuinely misunderstood the inspectors' requirement - Vulnerable foreign workers - **Held:** Pecuniary Penalties of \$5,100 imposed on first respondent and \$1,360 imposed on second respondent - Ss 536, 546, 550 & 557 Fair Work Act 2009*

Mason v Harrington Corporation Pty Ltd [2007] FMC 7

REPRESENTATION:

Applicant:	Mr N Healey
Respondent:	Mr A Jones
Solicitors:	
Applicant:	FWO
Respondent:	Butler Lawyers

These reasons for decision are uncorrected and subject to revision before external publication and distribution.

Introduction

- 1 A pecuniary penalty is to be imposed on Dragon Tea House Pty Ltd (Dragon) for its admitted failure to provide any payslips to two employees during the period December 2013 to June 2014, contrary to an employer's legal obligations under the Fair Work Act 2009.
- 2 A pecuniary penalty is also to be imposed on Xiao Xu Zhou, the sole director of Dragon and operator of its business the Dragon Tea House, as a person involved in Dragon's admitted contraventions.
- 3 The business was newly established in August 2013. It employed Lu Peng as restaurant manager from around 19 December 2013. Ms Zhou had arranged for Dragon to sponsor Mr Peng under a sub-class 457 visa. She did the paperwork for this herself. Dragon also employed Xiao Li from around 2 December 2013 in a front of house role. Ms Li was working subject to a sub-class 419 student visa.
- 4 On 24 June 2014 two Inspectors visited the business premises of Dragon to assess whether Dragon was complying with its obligations as sponsor of Mr Peng's sub-class 457 visa. This included a requirement to view Dragon's time records and payslips.
- 5 The Inspectors say Ms Zhou confirmed that her business did issue pay slips to employees, but could not then produce any as pay records were kept by her accountant. As a result Ms Zhou was issued a written notice requiring her to provide a copy of Mr Peng's "most recent payslip" by 5pm the following day.
- 6 Ms Zhou promptly contacted her accountant and was provided a blank payslip template. She then prepared two payslips in Mr Peng's name covering the two previous fortnights, signed them and emailed copies to the Inspectors within the required timeframe.
- 7 The inspectors believed they had communicated clearly and effectively with Ms Zhou, whereas Ms Zhou now says she did not understand what a payslip was until she spoke to her accountant. She also denies telling the Inspectors that Mr Peng did receive payslips. She thought she was simply being required to prepare a payslip for a recent period and to forward it to the Inspectors.
- 8 A few days later an Inspector returned to Dragon's business premises to discuss the provided payslips with Ms Zhou. On that occasion the Inspector met Ms Li, as Ms Zhou was not present. Ms Li told the Inspector she was paid each week but did not receive any payslips.

- 9 After noting an apparent deficiency in the provided payslips and in view of the information from Ms Li an Inspector arranged to meet with Ms Zhou on 21 July. In response to questions from the Inspector Ms Zhou said the payslips provided were created after the 24 June inspection, were not provided to Mr Peng and that Dragon had not issued payslips to its employees since the business commenced.
- 10 As a result the Inspector issued an infringement notice to Dragon in the sum of \$850, payable within 28 days. Ms Zhou sought waiver of the fine after the 28 days had elapsed. The request was denied but the time for payment was extended to 2 October 2014. As nothing was paid the infringement notice was withdrawn by notice of 24 November 2014. These proceedings were filed on 16 December 2014.

The contraventions

- 11 Section 536(1) of the *Fair Work Act* 2009 provides that “An employer must give a pay slip to each of its employees within one working day of paying an amount to the employee in relation to the performance of work.” As this law is a civil remedy provision, contravention of it exposes an employer and any person involved to a pecuniary penalty.
- 12 Ms Zhou agrees she had the capacity to control and direct the conduct of Dragon, including in relation to issuing payslips, and that she knew Dragon did not give any payslips to its employees.
- 13 As a result of the above circumstances and with the consent of all parties, I find that Dragon Tea House Pty Ltd contravened s 536(1) by failing to issue any payslips to Mr Peng between 19 December 2013 and 24 June 2014, or to Ms Li between 2 December 2013 and 24 June 2014, and that Ms Zhou was ‘involved’, within the meaning of s 550(2)(c). Ms Zhou must therefore be taken to have also contravened s 536.

Assessment of penalty

- 14 The maximum penalty that may be imposed on the first respondent as a corporation for a contravention of s 536 is \$25,500. The maximum penalty that may be imposed on the second respondent as an individual is \$5,100.
- 15 All parties appropriately agree that each respondent is liable for a single penalty based on a single contravention. This follows from the repeated failures to provide payslips being treated as a single contravention, having arisen from the single course of conduct by Dragon of not providing any payslips to the employees for over six months.¹

¹ See s 557

- 16 In determining the appropriate penalties I have had regard to the non-exhaustive list of considerations identified in *Mason v Harrington Corporation Pty Ltd*.²
- 17 Provision of accurate payslips is fundamental to employees understanding and checking their wages. The regular provision of accurate payslips hinders an employer's ability to maintain false records and to engage in underpaying employees. An absence of payslips necessarily hinders the important compliance efforts of the FWO.
- 18 The contravention in this case commenced when the business hired its first two employees and continued for six months until the FWO's audit of the 457 visa holder employee. The contravention is not the result of a technical breach or a temporary lapse of a compliant system.
- 19 The employees were vulnerable foreign workers, who were in a poor position to check they were not being cheated out of their lawful minimum wages.
- 20 While Dragon was a small business it was successfully established from new and then sold by early December 2014. The simple obligation to provide payslips was not onerous or unreasonable for this business.
- 21 Ms Zhou has lived and worked in Australia for eighteen years, where she has had two children. She has an extensive history of being centrally involved in a range of companies and businesses, some with a former husband, some with her current husband, and some alone. She was also able to sponsor a Chinese national worker under the 457 visa program, and complete much of the paperwork herself, albeit with assistance from Mr Peng's migration agent. She had the support of an accountant and clearly had a reasonable level of business acumen.

Factual disputes.

- 22 The applicant submits Ms Zhou was aware of the payslip obligation but deliberately chose not to comply. This was likely due to disregard of the risk of sanction and considering there to be only a very small chance of complaint from the vulnerable foreign employees.
- 23 The FWO further submits Ms Zhou engaged in a deliberate course of deceptive conduct when first questioned by the inspectors, by falsely confirming she provided payslips to Mr Peng, and then by submitting copies of payslips that were never in fact provided. The FWO bears the onus of proof of these allegations.

² [2007] FMC 7

- 24 Ms Zhou strongly denies these allegations. She attributes the Inspectors' misunderstanding to her difficulties of speaking English as her second language.
- 25 In resolving this factual dispute the Court received affidavit evidence from Inspectors Hunter, Doe, and Alexander and from Ms Zhou. Additional oral evidence was received from Inspectors Hunter and Doe, and from Ms Zhou.
- 26 While Ms Zhou's two affidavits and oral evidence were interpreted into English from Mandarin at her request, I place no weight on this factor to support her claim of limited comprehension of spoken English. I have considered however whether the use of an interpreter in court may have introduced some distortion to Ms Zhou's oral evidence.
- 27 Ms Zhou denies Inspector Hunter asked for a copy of a payslip of Mr Peng; only how often he was paid. Ms Zhou denied telling Inspector Hunter that she did issue payslips after being shown an example of a payslip. Ms Zhou's evidence is of asking Inspector Hunter on quite a few occasions what she meant. Ms Zhou also thought the inspectors did not ask if she needed an interpreter on 11 November. Ms Zhou claims that on that occasion Inspector Alexander agreed for her to make regular payments of \$50 to pay off the expiation fine.
- 28 In each instance Ms Zhou's evidence is in direct conflict with the evidence of Inspectors Hunter and Alexander. Inspectors Hunter, Alexander and Doe also attested to there being no apparent difficulty of clear communication with Ms Zhou. Inspector Doe checked her understanding of English and she did not indicate any difficulty. When Inspector Doe gave Ms Zhou a fact sheet regarding payslips on 21 July she did not indicate any prior lack of understanding or inability to read it.
- 29 Ms Zhou said she first become aware of payslips when her accountant told her about them and provided a payslip template on 24 June. She then said she first became aware of payslips when Inspector Doe spoke to her; that was on 21 July.³ Ms Zhou explained this discrepancy by saying the accountant never pointed out that a payslip was different to a timebook.⁴
- 30 This supposedly accounted for her forwarding two payslips for June to the Inspectors, but not providing any payslips to Mr Peng or Ms Li after then. The explanation sits oddly with her accountant's email of 24 June, in English, enclosing a payslip "template", when she already kept a form of employee timebooks.

³ tr p 34

⁴ tr p 28

- 31 In assessing this body of conflicting evidence I have had regard to the clear and consistent evidence of the three Inspectors. In my opinion it is extremely unlikely that each inspector got it so wrong. I also consider the inconsistencies in Ms Zhou's evidence, and her explanations, to be vague and unsatisfactory.
- 32 I also reject Ms Zhou's submission that she was disadvantaged in ascertaining an employer's obligations as she has only lived in Australia as an adult for eighteen years.
- 33 As a result I unreservedly prefer the evidence of the Inspectors that Ms Zhou was asked to produce payslips, was shown an example, and specifically confirmed that she did provide payslips. I find Ms Zhou did not misunderstand the simple request being made of her, was then aware of payslips, and that she answered deceptively in order to satisfy the Inspectors' request. I find she also attempted to mislead the Inspectors by falsely providing payslips that were never provided to Mr Peng. I further find that Ms Zhou has maintained this deceptive conduct throughout these proceedings.
- 34 I conclude that the contraventions of s 536 were deliberate, and undertaken by senior management.
- 35 In determining the appropriate penalty, considerations of specific and general deterrence are important. The first respondent now operates another food business, and the second respondent manages it. While I accept the first respondent has been compliant subsequent to these events, the second respondent's deceptive conduct places greater focus on the need for specific deterrence. The respondents are to be reminded of their need for ongoing compliance by the penalties. General deterrence is also important because this type of contravention is difficult to detect, especially with vulnerable workers, and is a fundamental breach of the National Employment Standards.
- 36 I have placed no weight on the first respondent's failure to pay the expiation fee included in the initial infringement notice. Whether or not it chose to disregard that notice was a matter for the first respondent. Its failure to pay cannot be an aggravating factor as it now faces a more serious penalty regime, has exposed the second respondent to a penalty, and has caused it to incur significant legal expenses.
- 37 I have taken into account the absence of any allegation of loss to the employees resulting from the contravention.
- 38 I accept the respondents have exhibited a significant level of contrition through their concession of liability after the proceedings were instituted, subsequent cooperation with the FWO, and formal statement of remorse.

A reduction of 20% of the penalties I would otherwise have imposed will be granted.

- 39 Having regard to the above considerations, and after commencing with penalties of one quarter of the maximum for the first respondent and one third for the second respondent, I fix the first respondent's penalty at \$5,100 and the second respondent's penalty at \$1,360.
- 40 The penalties should be paid to the applicant in accordance with s 546(3)(b).

Summary

- 41 I impose a pecuniary penalty of \$5,100 on Dragon Tea House Pty Ltd for its contravention of s 536.
- 42 I order Dragon Tea House Pty Ltd to pay the penalty direct to the applicant within 21 days.
- 43 I impose a pecuniary penalty of \$1,360 on Xiao Xu Zhou, as a person involved in the contravention of s 536 by Dragon Tea House Pty Ltd.
- 44 I order Xiao Xu Zhou to pay the penalty direct to the applicant within 21 days.

PUBLICATION OF THESE REASONS

It is the practice of this Court to publish its reasons for decision in full on the Internet. If any party or person contends that these reasons for decision should not be published in full the party or person must make an application within seven days of the delivery of these reasons. The application shall be by an Application for Directions with a supporting affidavit and should be addressed to the presiding member(s). If no such application is lodged within the time specified these reasons will be published in accordance with the Court's usual practice.