

FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v HAIR INDUSTRIE MT DRUITT PTY LTD [2015] FCCA 3426

Catchwords:

INDUSTRIAL LAW – Pecuniary penalties – failure to comply with notice under s.716(5) of the *Fair Work Act 2009* (Cth) (**Act**) demanding payment of amounts claimed to be owing to an employee under an award and under s.90(2) of the Act.

Legislation:

Fair Work Act 2009 (Cth), ss.90(2) , 539(1), 546(1), 682(1)(c), 716, 716(1), 716(2), 716(5)
Crimes Act 1914 (Cth), s.4AA

Hair and Beauty Industry Award 2010,

Cases cited:

[2010] FCA 977; (2010) 199 IR 373

Mason v Harrington Corporation Pty Ltd [2007] FMCA 7

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	HAIR INDUSTRIE MT DRUITT PTY LTD
File Number:	SYG 1755 of 2014
Judgment of:	Judge Manousaridis
Hearing date:	23 October 2014
Delivered at:	Sydney
Delivered on:	22 December 2015

REPRESENTATION

Counsel for the Applicant: Mr N Read

Solicitors for the Applicant: Fair Work Ombudsman

No appearance behalf of or by the respondent

ORDERS

- (1) Pursuant to s.546(1) of the *Fair Work Act 2009* (Cth) (**FW Act**) the respondent pay to the Commonwealth a pecuniary penalty in the sum of \$21,000.
- (2) The respondent pay the pecuniary penalty referred to in order 1 within 28 days from the day on which these orders are made or within such further time as the applicant agrees or the Court directs.
- (3) The parties have liberty to apply in relation to the implementation of these orders.

**FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY**

SYG 1755 of 2014

FAIR WORK OMBUDSMAN
Applicant

And

HAIR INDUSTRIE MT DRUITT PTY LTD
Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant (**FW Ombudsman**) seeks an order pursuant to s.546(1) of the *Fair Work Act 2009* (Cth) (**FW Act**) that the respondent (**Hair Industrie**) pay a pecuniary penalty in relation to Hair Industrie's contravention of s.716(5) of the FW Act. That subsection provides that a person must not fail to comply with a notice given under s.716 of the FW Act.

Background

2. Hair Industrie conducted a hairdressing business in Mount Druitt. From 25 July 2012 Hair Industrie employed Ms Cummins as a permanent part-time senior hairdresser.
3. On or about 18 March 2013 Ms Cummins complained to the FW Ombudsman that Hair Industrie had not paid to Ms Cummins wages for her last day of work, or outstanding annual leave entitlements, or wages in lieu of notice. On or about 10 June 2013 Ms Cummins further complained that Hair Industrie did not pay in full penalty rates that were due to her for working on Saturdays, Sundays, and public

holidays, that Hair Industrie did not pay a tool allowance, and that Hair Industrie did not provide to Ms Cummins any pay slips.

4. After investigating Ms Cummins' complaints, an inspector of the FW Ombudsman formed the reasonable belief that Hair Industrie had contravened the *Hair and Beauty Industry Award 2010* (**Award**), being a modern award for the purposes of the FW Act that covered Ms Cummins and Hair Industrie, and that Hair Industrie had contravened provisions of the "*National Employment Standards*" (**NES**) within the meaning of the FW Act. On 19 November 2013 an inspector of the FW Ombudsman issued a notice under s.716 of the FW Act requiring Hair Industrie pay to Ms Cummins \$4,668.56 by 13 December 2013, and to provide evidence that Hair Industrie had complied with the notice within seven days of doing so.
5. Subsection 716(2) of the FW Act provides that an inspector may give to a person a notice requiring the person to take the action specified in the notice to remedy the direct effects of one or more of the contraventions identified in s.716(1) of the FW Act. That subsection applies, however, only if an inspector reasonably believes that a person has contravened one or more of the provisions or terms referred to in s.716(1) of the FW Act. One of the contraventions referred to in s.716(1) of the FW Act is the failure to comply with a term of a modern award. Subsection 716(5) of the FW Act, which requires that a person to whom a notice under s.716(2) has been issued must not fail to comply with the notice, is a "*civil remedy provision*" within the meaning of s.539(1) of the FW Act.
6. On 16 April 2014, an inspector of the FW Ombudsman informed Hair Industrie by letter that the compliance notice of 19 November 2013 was withdrawn, and that Hair Industrie would be issued with a new compliance notice. The inspector issued a new compliance notice on 16 April 2014 requiring Hair Industrie to pay to Ms Cummins \$4,668.39, being the sum of minimum hourly rates of pay, Saturday penalty rates, Sunday penalty rates, public holiday penalty rates, tool allowance, accrued annual leave, and annual leave loading that the notice alleged Hair Industrie failed to pay to Ms Cummins. The compliance notice required Hair Industrie to pay the amount by 7 May 2014 and to provide evidence of compliance within 7 days of Hair Industrie paying

the amount to Ms Cummins. Hair Industrie failed to comply with the compliance notice.

7. The FW Ombudsman applied to this Court for relief, claiming that Hair Industrie had contravened s.716(5) of the FW Act by failing to comply with a compliance notice. Hair Industrie did not file any response to the application and, on 16 September 2014, I entered default judgment against Hair Industrie.

Principles

8. There is only one contravention of the FW Act, namely, Hair Industrie's not complying with the compliance notice; and the maximum penalty that may be imposed for that contravention is \$25,500.¹
9. The factors that may be taken to be relevant to assessing the amount of a pecuniary penalty are those that were identified by Mowbray FM in *Mason v Harrington Corporation Pty Ltd*.² These are:
 - 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 party committing the breach;
 - 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;

¹ Under Item 33 of the table to s.539(2) of the FW Act the maximum penalty is 30 penalty units. Under s.546(2) of the FW Act Hair Industrie, as a body corporate, is liable to 5 times the maximum number of penalty units. Under s.12 of the FW Act, "penalty unit" is given the meaning assigned to that term by s.4AA of the *Crimes Act 1914* (Cth). As at 7 May 2014, being the date by which Hair Industrie was required to comply with the compliance notice, s.4AA of the *Crimes Act 1914* (Cth) defined "penalty unit" to be \$170.

² [2007] FMCA 7. In *Kelly v Fitzpatrick* [2007] FCA 1080; (2007) 166 IR 14 at [14] Kenny J adopted this same list of factors as "potentially relevant and applicable".

- h) whether senior management was involved in the breaches;
 - i) whether the party committing the breach had exhibited contrition;
 - j) whether the party committing the breach had taken corrective action;
 - k) whether the party committing the breach had cooperated with the enforcement authorities;
 - l) the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and
 - m) the need for specific and general deterrence.
10. Although any one or more of these factors may be relevant to the assessment of a pecuniary penalty in any given case, the factors must not be treated as a checklist.³ With this reservation in mind, I will consider those factors that are relevant to the circumstances of this case.

Assessment of pecuniary penalty

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

11. The nature of the conduct which led to Hair Industrie's contravention is its failure to comply with the compliance notice. There is no evidence to suggest Hair Industrie made any attempt to comply with the notice. That, however, does not exhaust the conduct that it is relevant to examine; for the notice was issued in relation to contraventions of the Award and of NES which an inspector of the FW Ombudsman had reasonable grounds for believing Hair Industrie had engaged in. The contraventions of which the inspector had reasonable grounds for believing Hair Industrie had engaged in were Hair Industrie's failing to pay the minimum rates prescribed by cl.17 of the Award, the penalty rates for Saturday, Sunday, and public holidays prescribed by cl.31.2(b), cl.31.2(c), and cl.35.2(a) of the Award respectively, the tool allowance prescribed by c.21.10(b) and Schedule A.7 of the Award, and the

³ *Australian Building & Construction Commissioner v Construction, Forestry, Mining and Energy Union (No.2)* [2010] FCA 977; (2010) 199 IR 373 at [10] (Barker J)

failure to pay annual leave accrued and annual leave loading as required by s.90(2) of the FW Act.

12. I must bear in mind that it is no element of a contravention of s.716(5) of the FW Act that the person to whom a notice under s.716(2) of the FW Act has been issued has in fact contravened any of the provisions identified in the compliance notice. A penalty for a contravention of s.716(5) of the FW Act cannot, therefore, be assessed on the assumption that the person to whom a compliance notice has been issued has contravened those provisions. Nevertheless, account should be taken of the contraventions alleged in the notice, at least where the person against whom the notice is issued has not indicated he or she disputes the matters alleged in the notice. Hair Industrie has not indicated it disputes any of the matters alleged in the compliance notice that was served on it. It is, therefore, appropriate to take into account the nature of the contraventions alleged in the compliance notice.

The circumstances in which that conduct took place

13. The failure by Hair Industrie to comply with the compliance notice occurred in circumstances where an inspector of the FW Ombudsman attempted to contact the director of Hair Industrie, Mr Choukair, on a number of occasions but to which Mr Choukair made no attempt to respond. That manifests a disregard by Hair Industrie of the obligations the compliance notice imposed on Hair Industrie, and an unwillingness to comply with obligations Hair Industrie had in relation to Ms Cummins under the Award, and under s.90(2) of the FW Act.

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

14. Ms Cummins sustained a loss of \$4,668.39 as a result of Hair Industrie not complying with the compliance notice. That is a significant underpayment. It is particularly significant given that Ms Cummins had been employed by Hair Industrie for only about seven months.

The size of the business enterprise involved

15. There is no evidence of the financial circumstances of Hair Industrie. There is nothing, therefore, to suggest that Hair Industrie would be unable to pay a pecuniary penalty that may be imposed on it.

Whether or not the breaches were deliberate

16. The compliance notice was served on Hair Industrie and, as I have already noted, an inspector of the FW Ombudsman attempted without success to make contact with its director. I find the failure of Hair Industrie to comply with the compliance notice was deliberate.

Contrition, cooperation, and corrective action

17. There is no evidence Hair Industrie has expressed contrition; nor is there any evidence it has taken any corrective action or has attempted to cooperate with the FW Ombudsman.

General and specific deterrence

18. The FW Ombudsman submits that, quite apart from the need to send a message to the community and, in particular, employers, that employers must provide their employees their lawful entitlements, and set penalties at a level that generally deter employers from not providing employees their lawful entitlements, there is a particular need to deter employers in the hair and beauty industry. The FW Ombudsman referred to cases that have been brought against employers in that industry, and to the results of an audit the FW Ombudsman conducted in 2013 of the hair and beauty industry's compliance with the FW Act.⁴ The audit revealed that of the 858 businesses audited, 55% had not complied with the FW Act.⁵
19. As for specific deterrence, the penalty should be set to communicate to Hair Industrie there is a substantial cost to ignoring a compliance notice. That will serve to deter Hair Industrie from ignoring any future compliance notice. It should also deter Hair Industrie from failing to comply with its obligations to its employees.

Overall assessment

20. In my opinion, the penalty should be set at the upper end of the scale. It is difficult to imagine a more complete and deliberate contravention of s.716(5) of the FW Act. Hair Industrie has not disputed the allegations contained in the compliance notice that it did not pay to Ms Cummins

⁴ The audit was conducted pursuant to s.682(1)(c) of the FW Act.

⁵ Applicant's Penalty Submissions, 17.10.2014, [57]

entitlements under the Award and under s.90(2) of the FW Act; Hair Industrie has not asserted or attempted to assert it is unable to pay the amounts demanded in the compliance notice; Hair Industrie has not paid or attempted to pay the amount claimed; and Hair Industrie has ignored attempts made by the FW Ombudsman inspectors to discuss the matters that gave rise to the issue of the compliance notice. Further, given it has not disputed the compliance notice, Hair Industrie's failure to comply with it is tantamount to its having failed to comply with basic obligations under the Award and s.90(2) of the FW Act.

21. In my opinion, \$21,000 is the appropriate pecuniary penalty that should be imposed for the contravention by Hair Industrie of s.716(5) of the FW Act.

Conclusion and disposition

22. I propose to order that Hair Industrie pay a pecuniary penalty in the sum of \$21,000. I also propose to order that Hair Industrie pay the pecuniary penalty within twenty eight days and that it pay the penalty to the Commonwealth.

I certify that the preceding twenty-two (22) paragraphs are a true copy of the reasons for judgment of Judge Manousaridis

Associate:

Date: 22 December 2015