

# FEDERAL CIRCUIT COURT OF AUSTRALIA

*FAIR WORK OMBUDSMAN v SCOTT'S PAINTING SERVICES [2015] FCCA 3317*

Catchwords:

INDUSTRIAL LAW – Fair Work Act – minimum standards – penalties – breach of terms of modern award – matters to be taken into account in assessing appropriate penalties – employees concerned considered to be vulnerable to exploitation – consideration of general and specific deterrence.

Legislation:

*Fair Work Act 2009*, ss.45, 712

Cases cited:

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

*Fair Work Ombudsman v Java Spice Australia Pty Ltd* [2015] FCCA 2930

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	SCOTT AERON DAVENPORT TRADING AS SCOTT'S PAINTING SERVICES (ABN 53 865 165 772)
File Number:	DNG 41 of 2014
Judgment of:	Judge Young
Hearing date:	19 November 2015
Date of Last Submission:	19 November 2015
Delivered at:	Darwin
Delivered on:	19 November 2015

## REPRESENTATION

Solicitors for the Applicant: Ms S Clayden of Fair Work Ombudsman

No appearance by the Respondent

## **ORDERS**

- (1) Pursuant to subsection 546(1) of the FWA the Respondent pay a total pecuniary penalty fixed in the sum of \$15,000.00.
- (2) Pursuant to subsection 546(3)(a) of the FWA the pecuniary penalty imposed are to be paid into the Consolidated Revenue Fund of the Commonwealth within 30 days of this order.

**FEDERAL CIRCUIT COURT  
OF AUSTRALIA  
AT DARWIN**

**DNG 41 of 2014**

**FAIR WORK OMBUDSMAN**  
Applicant

And

**SCOTT AERON DAVENPORT TRADING AS SCOTT'S PAINTING  
SERVICES (ABN 53 865 165 772)**  
Respondent

**REASONS FOR JUDGMENT**

**Ex Tempore**

1. These reasons for judgment were delivered orally. They have been corrected from the transcript. Grammatical errors have been corrected and an attempt has been made to render the orally delivered reasons amenable to being read.

**Introduction**

2. This is a penalty hearing in relation to breaches of the *Fair Work Act 2009*. The Respondent has failed to appear. The breaches were the subject of declarations made by Judge Brown on 19 June 2015. Declarations were made by consent, I am told, after a mediation between the parties on or about 21 May 2015. That mediation resulted in declarations by consent in relation to 6 categories of offence and I will summarise them rather than describe them precisely in the words of the declarations. The individual declarations related to four employees and the offences have been grouped for the purpose of penalty.

3. The first group is contraventions of section 45 of the *Fair Work Act 2009* (hereinafter referred to as “the Act”) by a failing to pay three employees their minimum rates of pay for ordinary hours. The second was a further contravention of that section by failing to pay those three employees their casual loading for all ordinary hours of work. The third is a contravention of section 45 by failing to pay the employees their penalty rates for overtime work on Saturday. The fourth is a contravention of section 45 by failing to pay a fourth employee his penalty rates for overtime work on a Sunday. The fifth is a contravention of section 45 by failing to pay the employees their wages for ordinary hours work no later than Thursday on each week. The sixth is a contravention of section 712(3) of the Act by failing to comply with a notice to produce records that was issued by the Applicant to the Respondent on 14 March 2014.
4. The consent judgment provided for the Respondent to repay the four employees the total amount of the underpayment which was \$5,940.37. Interest was also to be paid to them. The fourth order made by consent by Judge Brown was that if the Respondent was unable to locate any of the employees the Respondent was to pay the amounts referred to – that is, \$5,940.37 plus interest – to the Commonwealth. I pause to note here that I was told from the bar table by Ms Clayden, counsel for the Applicant, that it is aware of the addresses of each of the four employees. They would appear, to put it in colloquial terms, to have been backpackers holidaying in Australia and working legally pursuant to a visa. They have now returned to France and their whereabouts are known to the Applicant. I was told from the bar table by Ms Clayden that an inquiry was made very recently of those four employees as to whether or not the Respondent had complied with the order that he pay them the amounts of underpayment. I was told from the bar table that he had not. There is no sworn evidence that that is the case but I really have no reason to doubt the instructions that Ms Clayden has received.
5. A further element of the consent orders made by Judge Brown was that the Respondent was to register with the Fair Work Ombudsman’s “My Account” portal and complete the profile “Minimum rates and award options in ordinary language” within two months. That is, as I understand it, a short online education course for employers. The Respondent was to provide within a month of that – in other words,

within three months of the order on 19 June 2015 – provide to the Applicant his “My Account” registration number. In other words, to satisfy the applicant that he had complied with the consent orders. He has failed to do that.

6. He also agreed to an order that within a two month period he would complete all the education courses designed for employers available on the Fair Work Ombudsman website and provide evidence to the Applicant that that had been completed within a further one month. Ms Gribben, who is a Fair Work inspector, has deposed in an affidavit that none of that has happened. So the matter comes before me in circumstances where I am satisfied that the Respondent has failed to pay the employees the underpayment and has failed to undertake the education process that he agreed to undertake on 19 June 2015.
7. The background to the matter is relatively straightforward. As I have mentioned, the four employees involved were backpackers. They were working legally in Australia. Three of them were employed by the Respondent as painters for 13 days over the New Year period in 2013/2014. The fourth was employed for a five day period over that same time. The employee who worked the five days was paid a single cash payment of \$300 and the other three employees, who worked 13 days, were paid a single lump sum payment of \$450 each. I am satisfied that it must have been obvious to the Respondent that these payments were not in accordance with the minimum standards set out in the Act and that those payments constituted a deliberate and knowing underpayment of those employees.
8. Ms Clayden has submitted, and I accept, that these employees were vulnerable in the sense that they were foreigners, they were here presumably for a relatively short time and they were probably not very familiar with the regulatory regime that operates in Australia. They were at a disadvantage when it came to pursuing or claiming their rights. I was not told precisely how this contravention was discovered but I am satisfied that in these important senses these were vulnerable employees and that their vulnerability was deliberately exploited.
9. Ms Clayden submitted, and I accept, that important elements to consider in imposing a penalty in this case are the necessity to ensure compliance with minimum employment standards set out in the Act

and, in relation to the failure to respond to the notice to produce, the necessity of ensuring compliance with the regulatory and enforcement regime under that Act. She also submitted that one additional aspect relates to fairness of competition among the employers. Obviously enough if one employer can get away with underpaying employees that employer has an unfair competitive advantage as against other employers. I accept that is also to be taken into account.

10. The second main point that Ms Clayden made is the need to have regard to the considerations set out in cases such as *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7. Those considerations include: the nature and extent of the conduct leading to the breaches, the circumstances in which the conduct took place, the nature and extent of any loss or damage sustained as the result of the breaches, whether there has been similar previous conduct (there is none in this particular case), whether the breaches were properly distinct or arose out of one course of conduct. This last consideration has been taken into account by what I am satisfied is an appropriate grouping of separate instances occurring in a course of conduct into five groups of contraventions with the sixth group consisting of one offence. Other considerations include whether senior management was involved in the breaches – the Respondent is sole trader in this case; whether the party committing the breaches has exhibited contrition – in this case quite the opposite; whether the Respondent has failed to pay the underpayment or participate in the education process that was contemplated by the consent orders, whether the party committing the breaches has taken corrective action – in this case he has not and whether the party committing the breaches has cooperated with the enforcement authorities – the cooperation in this case was relatively minimal in the sense that Mr Davenport did, to his credit, consent to appropriate orders after a mediation. That cooperation has not extended beyond that. He has not complied with the orders to which he consented to. Most particularly he has not complied with the order that he repay the employees. I am satisfied that the cooperation that was given was in all likelihood cooperation forced on him by convenience and does not demonstrate in any sense contrition or a determination to make good the wrong done by the contraventions.

11. In this case I also need to take into account the need to ensure compliance with minimum standards, and, finally, the need for specific and general deterrence. I am satisfied that those final points – the need for specific and general deterrence - are important in this case. The conduct of the Respondent is, of course, highly relevant and the amount of underpayments was considerable.
12. In relation to each of the individual employees, as I have mentioned, one employee was paid \$300 for approximately five days' work. The total underpayment there was \$451.82. In relation to a second employee who worked 13 days that employee was paid \$450, which was an underpayment of \$1,799.73. A third employee, again, who worked 13 days was paid \$450. That constituted an underpayment of \$1,889.09. A fourth employee also worked 13 days and was paid \$450, constituting an underpayment of \$1,799.73. As previously mentioned that amounts to a total underpayment of \$5,940.37.
13. In the case of the three employees who were the subject of the most serious underpayment they were paid somewhere between 20 and 25 per cent of their entitlement - a very serious underpayment in my view. As I have mentioned, I infer that, given the magnitude of the underpayment, it was a deliberate and knowing one.
14. I am satisfied that both specific and general deterrence are appropriate in this case. Ms Clayden submitted that non-compliance with minimum standards is commonplace in the building and construction industry in the Northern Territory. I might say that it is not restricted only to the building and construction industry. As the case of *Fair Work Ombudsman & Java Spice Australia Pty Ltd* [2015] FCCA 2930 demonstrates in the Northern Territory and specifically in Darwin non-compliance extends to other industries including the hospitality industry.
15. Ms Clayden pointed to that case and suggested it was of relevance in indicating how I should approach the question of penalty. I am satisfied that it is a comparable case although there are some significant differences. There was in that case, if not previous contraventions, then some indication that there have been earlier concerns regarding the Respondent in that case.

16. The underpayment in that case was also somewhat less, as I understand it - a couple of thousand dollars over a relatively short period. The significant difference, of course, is the Respondent there was a corporation, and, therefore, the penalties available are five times those available for an individual. In that case, the penalties imposed on a corporation in comparable circumstances amounted to, on my calculation, \$73,000.
17. In this case I have considered whether or not there should be some reduction in penalty for the Respondent's cooperation by consenting to the orders and thereby avoiding the trouble and expense of a trial. I do allow some slight reduction for that, and the amount that I would allow in the overall consideration of the penalty is \$500. I think the appropriate allowance is minimal, considering that the Respondent has failed, in my view, to comply with the most significant part of the order that would demonstrate a remorseful attitude, that is, paying the employees the amount they were underpaid.
18. I will impose the penalties by reference to an amended schedule handed up by Ms Clayden, which groups the offences into six categories. The six categories being:
  - (1) failure to pay the required minimum rate of pay;
  - (2) failure to pay casual loading;
  - (3) failure to pay Saturday overtime;
  - (4) failure to pay Sunday overtime;
  - (5) failure to pay wages by not later than the end of ordinary hours on Thursday in each week; and
  - (6) failure to comply with the notice to produce records or documents.
19. In relation to the failure to pay the required minimum rate of pay, I impose a penalty of \$5,000. In relation to the failure to pay casual loading I impose a penalty of \$2,000. In relation to the failure to pay Saturday overtime I impose a penalty of \$2,000. In relation to the failure to pay Sunday overtime I impose a penalty of \$2,000. In relation to the failure to pay wages no later than the end of ordinary

hours on Thursday in each week I impose a penalty of \$2,000. In relation to the sixth group, which has one member, the failure to comply with a notice to produce records I impose a penalty of \$2,000. That is a total of \$15,000.

20. Payment must be made within 30 days.

---

**I certify that the preceding twenty (20) paragraphs are a true copy of the reasons for judgment of Judge Young**

Associate:

Date: 11 December 2015