

FEDERAL CIRCUIT COURT OF AUSTRALIA

*FAIR WORK OMBUDSMAN v THE
SYNDICATE GROUP PTY LTD & ANOR*

[2015] FCCA 2847

Catchwords:

INDUSTRIAL LAW – Contraventions of the *Fair Work Act 2009* (Cth) – statement of agreed facts – compliance notices – failure to pay employees wages and entitlements in full – declarations on admissions – penalties.

Legislation:

Crimes Act 1912 (Cth), s.4AA

Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012 (Cth)

Evidence Act 1995 (Cth), s.191

Fair Work Act 2009 (Cth), ss.539(2), 546, 546(1), 546(2)(a), 546(3), 546(3)(a),
550(1), 550(2) 557(1), 716(2), 716(5)

Cases cited:

Barbaro v The Queen [2014] HCA 2

*Director Fair Work Building Industry Inspectorate v Construction, Forestry,
Mining and Energy Union* [2015] FCAFC 59

Kelly v Fitzpatrick (2007) 166 IR 14

*Mason v Harrington Corporation Proprietary Limited trading as Pangaea
Restaurant and Bar* [2007] FMCA 7

Applicant: FAIR WORK OMBUDSMAN

First Respondent: THE SYNDICATE GROUP PTY LTD
(ACN 163 671 930)

Second Respondent: CLAUDIO LOCASO

File Number: MLG 2550 of 2014

Judgment of: Judge Hartnett

Hearing date: 3 August 2015

Delivered at: Melbourne

Delivered on: 22 October 2015

REPRESENTATION

Counsel for the Applicant:	Ms Krins
Solicitors for the Applicant:	Office of Fair Work Ombudsman
The First Respondent:	No appearance
The Second Respondent:	No appearance

DECLARATION

The First Respondent contravened s.716(5) of the *Fair Work Act 2009* (Cth) ('the Act') by failing to comply with each of the compliance notices.

ORDERS

- (1) Pursuant to s.545 of the Act the First Respondent pay the following amounts:-
 - (a) \$1,074.15 (gross) to Mr Amir Esterman;
 - (b) \$1,389.15 (gross) to Mr Jacob Nicoll;
 - (c) \$3,498.10 (gross) to Mr Moharvind Nunkoo;
 - (d) \$511.99 to Mr Moharvind Nunkoo's superannuation fund;
 - (e) \$1,940.24 (gross) to Ms Karyn Louis; and
 - (f) \$1,208.55 to Ms Karyn Louis' superannuation fund,within 28 days of this Order.

- (2) Pursuant to s.547(2) of the Act interest be paid by the First Respondent on the amounts referred to in order number 1 herein, and calculated to the date of this Order, as follows:-
 - (a) \$57.81 to Mr Amir Esterman;
 - (b) \$74.77 to Mr Jacob Nicoll;
 - (c) \$188.27 to Mr Moharvind Nunkoo;
 - (d) \$27.56 to Mr Moharvind Nunkoo's superannuation fund;
 - (e) \$104.43 to Ms Karyn Louis; and
 - (f) \$65.05 to Ms Karyn Louis' superannuation fund.

- (3) Pursuant to s.559(1) of the Act that in the event the First Respondent is unable to locate any of Mr Amir Esterman, Mr Jacob Nicoll, Mr Moharvind Nunkoo or Ms Karyn Louis, the First Respondent is to pay

the amounts due to them under these Orders into the Consolidated Fund of the Commonwealth, within a further seven days of the date for payment set out in order number 1 herein.

- (4) Pursuant to s.546(1) of the Act a pecuniary penalty of \$12,750 be imposed on the First Respondent in respect of its contravention of s.716(5) of the Act.
- (5) Pursuant to s.546(3)(a) of the Act the First Respondent pay the pecuniary penalty to the Commonwealth within 28 days of these Orders.
- (6) Pursuant to s.546(1) of the Act a pecuniary penalty of \$4,845 be imposed on the Second Respondent in respect of his contravention of s.716(5) of the Act.
- (7) Pursuant to s.546(3)(a) of the Act the Second Respondent pay the pecuniary penalty to the Commonwealth within 28 days of these Orders.
- (8) Pursuant to s.546(3) of the Act any pecuniary penalties imposed be paid into the Consolidated Revenue Fund of the Commonwealth.
- (9) The Applicant has liberty to apply on seven days' notice in the event that any of the preceding orders are not complied with.

**FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE**

MLG2550 of 2014

FAIR WORK OMBUDSMAN
Applicant

And

THE SYNDICATE GROUP PTY LTD
(ACN 163 671 930)
First Respondent

CLAUDIO LOCASO
Second Respondent

REASONS FOR JUDGMENT

1. These proceedings commenced on the filing of an Application and Statement of Claim filed on 16 December 2014. Subsequently in the proceedings, a Statement of Agreed Facts was filed on 8 April 2015, that Statement of Agreed Facts being made by the Applicant, the First Respondent and the Second Respondent for the purposes of s.191 of the *Evidence Act 1995* (Cth).
2. The Applicant relies upon the Application and Statement of Claim, the Statement of Agreed Facts, the Affidavit of Fair Work Inspector Kez Ma, affirmed on 20 May 2015, and the Applicant's Submissions on penalty which are limited as described hereafter. There was no cross-examination of Inspector Ma. I accept his Affidavit evidence.
3. At the hearing of this matter on 3 August 2015, there was no appearance by the First and Second Respondents. The respondents however had signed the Statement of Agreed Facts on 8 April 2015.

4. The Applicant seeks the imposition of pecuniary penalties on the First and Second Respondents in relation to contraventions of the *Fair Work Act 2009* (Cth) ('The Act'). The contraventions concern the failure by the First Respondent to comply with three compliance notices issued under s.716 of the Act.
5. Contraventions of the Act by the First and Second Respondent are admitted in the Statement of Agreed Facts filed on 8 April 2015. Those contraventions of which I am satisfied are as follows:-
 - a) by the First Respondent, the contravention of s.716(5) of the Act by failing to comply with three compliance notices issued by Fair Work Inspector Kez Ma pursuant to s.716(2) of the Act; and
 - b) the Second Respondent;
 - i) admits he was involved within the meaning of s.550(2) of the Act in the contraventions of the First Respondent; and
 - ii) by virtue of s.550(1) of the Act, is taken to have committed those contraventions.

Background

6. Until it ceased trading in or about October 2013, the First Respondent carried on a business whereby it was contracted by Energy Efficient Technologies Pty Ltd ('EETech') to install power boards in homes throughout Victoria as part of the Victorian Government's Victorian Energy Efficiency Target scheme ('VEET scheme'). Mr Locaso was the sole director, secretary and shareholder of the First Respondent and was responsible for ensuring that the First Respondent complied with its obligations under the Act.
7. During the period from 9 October to 24 October 2013, the Applicant received workplace complaints from the following employees in respect of unpaid wages and entitlements arising from their employment with the First Respondent:-
 - a) Mr Amir Esterman;
 - b) Ms Karyn Louis;

- c) Mr Jacob Nicoll; and
 - d) Mr Moharvind Nunkoo.
8. Mr Esterman and Mr Nicoll were employed by the First Respondent in the period from 11 July 2013 to 12 September 2013, and on a casual basis, to install powerboards in Victorian homes requiring the connection of televisions and other electrical appliances to the powerboards in accordance with the VEET scheme. In undertaking this work, the Manufacturing and Associated Industries and Occupations Award 2010 ('Manufacturing Award') applied to their employment.
9. During the period from 15 September 2013 to 14 October 2013, Mr Nunkoo was employed by the First Respondent on a part-time basis as a contact centre and/or channel manager. During this period, the General Retail Industry Award 2010 ('Retail Award') applied to Mr Nunkoo's employment.
10. During the period from 24 June 2013 to 11 October 2013, Ms Louis was employed by the First Respondent on a full-time basis as a recruitment and administration manager. During this period, the Clerks – Private Sector Award 2010 ('Clerks Award') applied to Ms Louis' employment.
11. Following receipt of the workplace complaints in October 2013, the Applicant conducted an investigation. During the investigation, Inspector Ma formed a reasonable belief that the First Respondent had contravened:-
- a) terms of the Manufacturing Award in respect of Mr Easterman, Mr Nicoll and Mr Nunkoo's employment for the period from 11 July to 12 September 2013;
 - b) terms of the Retail Award in respect of Mr Nunkoo's employment for the period from 15 September to 14 October 2013; and
 - c) terms of the Clerks Award and the National Employment Standards (NES) in respect of Ms Louis' employment.

12. On 12 September 2014, Inspector Ma personally served Mr Locaso with:-
- a) a compliance notice pursuant to s.716(2) of the Act in respect of contraventions of the Manufacturing Award relating to the employment of Mr Easterman, Mr Nicoll and Mr Nunkoo. The notice required the First Respondent to pay a total of \$4743.62 in unpaid entitlements to Mr Easterman, Mr Nicoll and Mr Nunkoo;
 - b) a compliance notice pursuant to s.716(2) of the Act in respect of contraventions of the Retail Award relating to the employment of Mr Nunkoo. The notice required the First Respondent to pay a further \$1729.77 in unpaid entitlements to Mr Nunkoo; and
 - c) a compliance notice pursuant to s.716(2) of the Act in respect of contraventions of the Clerks Award and the NES relating to the employment of Ms Louis. The notice required the First Respondent to pay \$3148.79 in unpaid entitlements to Ms Louis, (together the ‘compliance notices’).
13. Collectively, the compliance notices required the First Respondent to pay to the employees a total of \$9622.18 (gross) in unpaid wages and entitlements by 14 October 2014 and produce to the Applicant evidence of its compliance with each of the compliance notices.
14. The First Respondent did not make any payment to any of the employees or their superannuation funds by 14 October 2014 or at all and did not provide any evidence to the Applicant of its compliance with the compliance notices. Further, the First Respondent provided no reasonable excuse for failing to comply with the compliance notices.
15. Section 546(1) of the Act enables this Court to impose a penalty in respect of a contravention of a civil remedy provision. Civil remedy provisions include s.716(5) of the Act, which forms the basis of the admitted contraventions. Section 546(3) of the Act allows the pecuniary penalty or part of the penalty to be paid to a particular person, including the Commonwealth of Australia. Section 546(1) of the Act also allows this Court to impose pecuniary penalties.

16. The Applicant seeks the imposition of penalties on the basis of the content of the statement of agreed facts that establishes the liability of the First and Second Respondents.
17. The principles relevant to determining penalty are established in the superior courts' legal authorities and set out a course for this Court to adopt. The first matter is to identify the separate contraventions involved. Each breach of each separate obligation found in the Act is a separate contravention. Each breach of a term of a workplace instrument, such as the modern award, is a separate contravention.
18. The Court then considers whether the breaches arising constitute a single course of conduct under s.557(1) of the Act, such that multiple breaches should be treated as a single breach. If two or more contraventions contain common elements, this should be taken into account in considering what is an appropriate penalty in all the circumstances for each contravention. The respondents should not be penalised more than once for the same conduct. The penalties imposed by the Court should be an appropriate response to the contravener's conduct. This task is distinct from and in addition to the final application of the "totality principle".¹
19. The Court should then consider the appropriate penalty for the single breaches and, if relevant, each group of contraventions, taking into account all of the relevant circumstances and finally consider whether it is an appropriate response to the conduct which led to the breaches.² The Court should apply an "instinctive synthesis" in making this assessment.³ This is known as an application of the "totality principle".

Maximum Penalties

20. Sections 539(2) and 546(2)(a) of the 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 s.4AA of the *Crimes Act 1912* (Cth) ('the Crimes Act').

¹ *Mornington Inn Proprietary Limited v Jordan* [2008] FCAFC 70 at [41] to [46] (Stone and Buchanan JJ).

² *Kelly v Fitzpatrick* (2007) 166 IR 14 at [30] (Tracey J).

³ *Cousins v Merringtons Proprietary Limited (No 2)* (2008) VSC 340 at [27] (Gray J), and at [55] and [78] (Graham J).

21. From 28 December 2012, the *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012* (Cth) increased the amount of a penalty unit in s.4AA of the Crimes Act from \$110 to \$170. In these proceedings, the contravening conduct occurred entirely after the increase in the value of a penalty unit on 28 December 2012. On that basis, the maximum penalty that may be imposed by the Court upon the respondents for each contravention is as follows:-
- a) In respect of the First Respondent, there are three contraventions with a maximum penalty per contravention of 150 penalty units, being \$25,500 each, a maximum total penalty of \$76,500.
 - b) In respect of the Second Respondent, there are three contraventions with a maximum penalty per contravention of 30 penalty units, being \$5,100 each, a maximum total penalty of \$15,300.

Grouping of Contraventions

22. The Applicant accepts that there are common elements in the respondents' contraventions of s.716(5) of the Act, and that this should be taken into account in considering an appropriate penalty to be imposed. In particular, the three compliance notices, as submitted by the Applicant:-
- a) were all served on the First Respondent at the same time;
 - b) were required to be complied with within the same time, being 14 October 2014;
 - c) related to employees who performed work at the same business; and
 - d) related to the same underlying conduct, being the failure to pay wage entitlements.
23. The Applicant therefore submitted that the three contraventions have sufficient similarity or overlap to be appropriately grouped together as a single contravention. Thus, the maximum penalty the Court could impose in these proceedings, having regard to paragraph 21 above, is:-
- a) \$25,500 in respect of the First Respondent; and

- b) \$5,100 in respect of Mr Locaso.
24. As a result of the Applicant's concessions and submission as described above, I am content to group the contraventions in respect of each respondent as a single contravention.

Factors Relevant to Determining Penalties

25. The factors relevant to the imposition of a penalty under the Act have been summarised by Mowbray FM in *Mason v Harrington Corporation Proprietary Limited trading as Pangaea Restaurant and Bar* [2007] FMCA 7 at [26] to [59] as follows:-
- 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 defendant;
 - 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;
 - 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.

26. This summary was adopted by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14 at [30]. While the summary is a convenient checklist, it does not prescribe or restrict the matters which may be taken into account in the exercise of the Court's discretion.

Consideration of Factors Relevant to these Particular Facts

27. The power of a Fair Work inspector to issue a compliance notice was introduced into the Act to provide a mechanism for dealing with non-compliance with minimum entitlements in the Act as an alternative to issuing Court proceedings for each underlying contravention of an obligation. The affidavit evidence before the Court of Inspector Ma sets out Inspector Ma's interactions with Mr Locaso and attempts to obtain compliance with the compliance notices. The Applicant made considerable efforts to assist the respondents to avoid the need for litigation. The respondents also had ample opportunity to work with the Applicant to arrange for an agreed payment plan of entitlements to the employees, but failed to do so.
28. The nature and extent of the loss to the employees is a significant factor in these proceedings. The underpayments range from between \$4,010.09 to \$1,074.15 per employee and the relevant periods of employment range from only 10 days to three and a half months. Mr Nunkoo was employed by the First Respondent for approximately three months and underpaid a total of \$4,010.09, including superannuation. His workplace complaint form discloses that the underpayment caused him financial stress and he "did not have a place to stay from 1 November 2013". Significantly, the amounts owed to the employees remain outstanding and the employees have been without the benefit of this amount at the time of hearing for a considerable time, being at least then 21 months. The respondents have had the benefit of not paying the amounts due to the employees.
29. The First Respondent has not previously been the subject of proceedings by the Applicant or its predecessors for contraventions of workplace laws. However, the failure to comply with compliance notices does form part of a broader pattern of conduct by Mr Locaso. In June 2013, the Applicant commenced proceedings in this Court against Invivo Group Pty Ltd (In Liq) (ACN 159 703 492) ('Invivo') in relation to alleged underpayment and non-payment of wages and other

breaches of the Act. The penalty hearing took place on 12 June 2015. Mr Locaso is a director of Invivo, which entered into liquidation following the commencement of those proceedings in this Court. He was named as a respondent in those proceedings. Judgment was delivered by Judge Riley on 15 July 2015. The Court declared Mr Locaso to have contravened the Act and ordered him to pay pecuniary penalties of \$11,880 in respect of the contraventions.

30. Invivo operated a similar business to the First Respondent in these proceedings in that it was contracted to install powerboards through Victoria by EETech in accordance with the VEET scheme. Similarly, the complaints which gave rise to the Invivo proceedings alleged underpayment or complete non-payment of wages. As such, the conduct giving rise to the admitted contraventions is not isolated conduct by the Second Respondent. The Court takes this into account, and gives it significant weight.
31. The First and Second Respondents did not appear at the hearing of this matter. Neither the First Respondent nor Mr Locaso have put before the Court any information concerning their financial circumstances, nor did they do so during the Applicant's investigation. Regardless of the size or financial circumstances of the First Respondent or Mr Locaso, this Court determines that the imposition of penalty should mark its disapproval of the conduct of the respondents and set a penalty which serves as a warning to others.
32. The Court is satisfied that the conduct of the First Respondent and Mr Locaso was engaged in with reckless disregard for their obligations. Mr Locaso is, and at all relevant times was, the sole director, secretary and shareholder of the First Respondent. He was responsible for ensuring the First Respondent complied with its legal obligations under the Act. He was responsible for the day-to-day management, direction and control of the First Respondent's operation, and was the person personally served with the compliance notices. He was repeatedly informed both verbally and through correspondence from the Applicant of the consequences of failing to comply with the compliance notices, yet failed to ensure that the First Respondent did so. He was intimately involved in the contraventions by the First Respondent of s.716(5) of the Act.

33. There is no evidence before the Court that Mr Locaso has made any apology to the employees and the First Respondent has not taken any corrective action in respect of the contraventions. The employees remain owed \$9,622.18 gross in unpaid wages and entitlements. Whilst the respondents facilitated the efficient conduct of this proceeding by admitting liability and entering into a Statement of Agreed Facts, the Court finds that the Second Respondent should not be entitled to the benefit of any significant discount, as he has not demonstrated any contrition or undertaken any corrective action.
34. It is well-established that the need for specific and general deterrence is a factor that is relevant to the imposition of a penalty. The VEET scheme under which Mr Nichol, Mr Easterman and, for a period of time, Mr Nuncoo were employed is widespread and ongoing. The imposition of a penalty in this matter will assist in ensuring other providers operating within that scheme are aware of, and compliant with, their employment obligations. There is also in the particular facts of this case a high need for specific deterrence. Although the First Respondent is no longer trading, it remains registered and Mr Locaso remains its director.
35. The respondents need to be left in no doubt that their failure to comply with the compliance notices will not be tolerated, and that employees of the First Respondent and any other business operated by Mr Locaso must be provided with their minimum entitlements.
36. The Applicant submitted to the Court that whilst the penalty imposed must not be crushing or oppressive, it must nevertheless be proportionate to the seriousness of the conduct engaged in by the respondents. That submission is based on legal authority. The Court finds there is a level of seriousness in respect of this conduct. Save for the statement of agreed facts, there is an absence of mitigating factors in this matter.
37. The declarations and orders sought by the Applicant will be made.
38. The Court notes the Applicant made no submission in relation to the amount or range of penalties for the contraventions in the proceedings. That is so, because in *Director; Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015]

FCAFC 59, the Full Court of the Federal Court (Dowsett, Greenwood and Wigney JJ) determined that, in light of the High Court Judgment in *Barbaro v The Queen* [2014] HCA 2, it was no longer appropriate for parties in civil penalty proceedings to:-

- a) make submissions which identify a range of penalties;
- b) nominate specific penalties in respect of particular contraventions;
or
- c) urge the Court to adopt an agreed position on penalties.

I note the High Court of Australia has now heard an appeal in respect of that Full Court of the Federal Court of Australia decision.

39. The Court treats seriously the matters as put before it by the Applicant, in particular, the fact that:-

- a) the amounts owing to the employees by the First Respondent remain outstanding; and
- b) there is a strong need for specific deterrence, given Mr Locaso's involvement in the *Invivo* proceedings and the fact that he remains the director of the First Respondent; and
- c) the conduct of the respondents was deliberate, or at the very least reckless; and
- d) that no evidence has been led by the respondents to mitigate penalty on the basis of either of their financial circumstances. Although, I acknowledge little weight would be given to same.

40. Having considered the above factors and noting the requirements of the totality principle, I determine that the First Respondent should pay a pecuniary penalty of \$12,750 (being 50 per cent of the maximum penalty) and the Second Respondent should pay a pecuniary penalty of \$4,845 (being 95 per cent of the maximum penalty) and shall order accordingly.

I certify that the preceding forty (40) paragraphs are a true copy of the reasons for judgment of Judge Hartnett

Associate:

Date: 22 October 2015