

FEDERAL CIRCUIT COURT OF AUSTRALIA

*FAIR WORK OMBUDSMAN v WEDDERBURN
PETROLEUM PTY LTD (No.2)*

[2015] FCCA 2750

Catchwords:

INDUSTRIAL LAW – Penalty hearing – contraventions of *Fair Work Act* – failure to comply with order of Fair Work Commission – failure to appear and comply with Court order – applicant granted leave to proceed – appropriate penalty.

Legislation:

Fair Work Act 2009 (Cth), ss.405, 546
Evidence Act 1995 (Cth), s.191
Crimes Act 1914 (Cth), s.4AA
Federal Circuit Court Rules 2001

Cases cited:

Fair Work Ombudsman v Wedderburn Petroleum Pty Ltd [2015] FCCA 2011
Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar [2007] FMCA 7
Kelly v Fitzpatrick (2007) 166 IR 14
Australian Ophthalmic Supplies Pty Ltd v Mc Alary-Smith [2008] FCAFC 8
Fair Work Ombudsman v Roselands Fruit Market Pty Ltd [2010] FMCA 599
Gibbs v Mayor, Councillors and Citizens of City of Altona (1992) 37 FCR 216
McIver v Healey [2008] FCA 425
Mornington Inn Pty Ltd v Jordan [2008] FCAFC 70
Amanda Page v Wedderburn Petroleum Pty Ltd T/A Wedderburn Petroleum Caltex Tasco [2014] FWC 2595
FWO v Wedderburn Petroleum Pty Ltd [2014] FCCA 2645
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412
Ponzio v B & P Caelli Constructions Pty Ltd [2006] FCA 1221
Fair Work Ombudsman v Maclean Bay Pty Ltd (No.2) [2012] FCA 557
Meadley v Sort Worx Pty Ltd [2013] FCA 1012
Mayberry v Kijani Investments Pty Ltd [2011] FCA 1238
Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union (2008) 171 FCR 357; (2008) 177 IR 243; [2008] FCAFC 170
Construction Forestry Mining & Energy Union v Coal & Allied Operations Pty Ltd (No.2) (1999) 94 IR 231

Applicant: FAIR WORK OMBUDSMAN

Respondent: WEDDERBURN PETROLEUM PTY LTD
(ACN 113 349 670)

File Number: MLG 763 of 2015

Judgment of: Judge O'Sullivan

Hearing date: 7 October 2015

Date of Last Submission: 7 October 2015

Delivered at: Melbourne

Delivered on: 7 October 2015

REPRESENTATION

Counsel for the Applicant: Ms Hall

Solicitors for the Applicant: Fair Work Ombudsman

Counsel for Respondent: No appearance

Solicitors for the Respondent: No appearance

ORDERS

- (1) Pursuant to Rule 13.03B(2)(d) and 13.03C(1)(e) of the *Federal Circuit Court Rules 2001* (the Rules) the applicant have leave to proceed this day in the face of the defaults by the respondent pursuant to Rule 13.03A(2)(a),(b) (i),(ii),(iii) and (vii) of the *Federal Circuit Court Rules 2001* (“the Rules”).
- (2) Pursuant to s.546(1) of the *Fair Work Act 2009* (Cth) (FW Act) the respondent to pay \$20,000 by way of a pecuniary penalty in respect of the contravention of s.405 of the FW Act declared on 23 July 2015..
- (3) Pursuant to s.546(3)(e) of the FW Act the penalty referred to in order (2) above be paid to the Commonwealth within 28 days of this order.
- (4) The applicant serve the respondent with a copy of these orders within 14 days.

AND THE COURT NOTES

A: Rule 16.05 of the Rules

**FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE**

MLG 763 of 2015

FAIR WORK OMBUDSMAN

Applicant

And

WEDDERBURN PETROLEUM PTY LTD

(ACN 113 349 670)

Respondent

REASONS FOR JUDGMENT

(Revised from transcript)

1. In April 2015 the Fair Work Ombudsman (the applicant) commenced proceedings against Wedderburn Petroleum Pty Ltd (the respondent).
2. For the reasons set out in *Fair Work Ombudsman v Wedderburn Petroleum Pty Ltd* [2015] FCCA 2011 (the principal judgment) on 23 July 2015 the Court made the following orders:

“THE COURT DECLARES:

Upon the admissions which the respondent is taken to have made consequent upon defaults by the respondent, under Rule 13.03A(2)(a)(b)(i)(ii)(iii)(vii) of the Federal Circuit Court Rules 2001 (Cth) (“the Rules”) the Court declares pursuant to Rule 13.03B(2)(c) of the Rules that the respondent contravened section 405 of the Fair Work Act 2009 (Cth) (“FW Act”) by failing to comply with an Order of the Fair Work Commission dated 16 April 2014.

THE COURT ORDERS THAT:

Pursuant to Rule 13.03B(2)(d) of the Rules and section 545(2)(b) of the FW Act, the respondent pay Ms Amanda Page an amount of \$5,000 as required by law, within 28 days of this Order.

Pursuant to Rule 13.03B(2)(d) of the Rules and section 547(2) of the FW Act, the respondent pay interest to Ms Page on the amount referred to in paragraph 2 above, \$398.22 within 28 days of this Order.

Pursuant to Rule 13.03B(2)(d) of the Rules and section 559(1) of the FW Act, in the event that the respondent is unable to locate Ms Page within 28 days from the date of this Order, the respondent pay the outstanding amounts referred to in paragraphs 2 and 3 above to the Commonwealth forthwith.

*The matter be fixed for a penalty hearing on **7 October 2015** commencing at 10:00 am at the Federal Circuit Court of Australia at Melbourne.*

The respondent file and serve anything to be relied on for the purpose of order 5 above 14 days prior.

The applicant is to file and serve the respondent with a copy of these orders within 14 days.

AND THE COURT NOTES:

Rule 16.05.”

3. The background to these proceedings is set out in the principal judgment at paragraphs 1-13. At paragraphs 14-20 of the principal judgment the Court explained the reasons for the declarations made and orders referred to in paragraph 2 above.
4. Pursuant to the above mentioned orders, the matter returned to Court today for a penalty hearing. The applicant, was represented by Ms Hall. There was no appearance by and or on behalf of the respondent.
5. The applicant referred to the affidavit of Ms Banes filed 30 September 2015 which evidenced that the applicant had complied with the abovementioned orders in so far as it was required to serve the respondent with the orders made on 23 July 2015.

6. The applicant sought leave to proceed with the penalty hearing in the absence of the respondent, and in reliance on Rule 13.03A, 13.03B and 13.03C of the *Federal Circuit Court Rules 2001* (“the Rules”).
7. There was no appearance by the respondent at the penalty hearing. In the circumstances the Court was satisfied that the respondent was aware of the hearing.
8. Rule 13.03B(2) of the Rules provides:

“(2) If a respondent is in default, the Court may:

- (c) if the proceeding was commenced by an application supported by a statement of claim or the Court has ordered that the proceeding continue on pleadings - give judgment against the respondent for the relief that:
 - (i) the applicant appears entitled to on the statement of claim; and*
 - (ii) the Court is satisfied it has power to grant; or**
- (d) give judgment or make any other order against the respondent.”*

9. Pursuant to rule 13.03(A)(2), the Rules define when a respondent is in default. Circumstances giving rise to such a default which so far as is presently relevant include failure to:

*“comply with an order of the Court in the proceeding; or
file and serve a document required under the Rules; or
defend the proceeding with due diligence.”*

10. Rule 13.03C also provides for the Court to make orders on default as follows:

“13.03C Default of appearance of a party

- (1) If a party to a proceeding is absent from a hearing (including a first court date), the Court may do 1 or more of the following:
 - (a) adjourn the hearing to a specific date or generally;**

- (b) *order that there is not to be any hearing, unless:*
 - (i) *the proceeding is again set down for hearing; or*
 - (ii) *any other steps that the Court directs are taken;*
 - (c) *if the absent party is an applicant — dismiss the application;*
 - (d) *if the absent party is a party who has made an interlocutory application or a cross-claim — dismiss the interlocutory application or cross-claim;*
 - (e) *proceed with the hearing generally or in relation to any claim for relief in the proceeding.*
- (2) *If a party to a proceeding is absent from a hearing, the Court may also make an order of the kind mentioned in subrule 13.03B (1), (2) or (4), or any other order, or may give any directions, and specify any consequences for non-compliance with the order, that the Court thinks just.”*

11. The respondent had not sought any adjournment of the penalty hearing or provided any explanation for their absence.
12. The conduct of the respondent in their failure to comply with the orders and the Rules of the Court and their failure to defend the proceedings with due diligence led to the applicant making an application for the penalty hearing to proceed undefended. There were grounds to proceed with an undefended hearing pursuant to rule 13.03B(2)(d) for any default by the respondent as set out in rule 13.03A(2)(a) & (b) and on the basis of rule 13.03C(1)(e) of the Rules.
13. In the circumstances set out above the Court decided it is appropriate that the penalty hearing proceed in the absence of the respondent.
14. In addition to the material referred to in the principal judgment the applicant relied on:
 - a) the affidavit of Ms Banes filed 30 September 2015; and
 - b) the submissions filed 17 July 2015.
15. These proceedings concern contraventions of the FW Act which are contraventions of civil remedy provisions of the FW Act.

16. The applicant is a Fair Work Inspector pursuant to s.701 of the FW Act and a person with standing under s.539 of the FW Act to commence these proceedings.
17. Section 546 of the FW Act enables a Court to impose a penalty upon a person who has contravened a civil remedy provision.
18. Section 12 of the FW Act provides that “*penalty unit*” has the same meaning as in the *Crimes Act 1914* (Cth). Section 4AA of the *Crimes Act 1914* defined “*penalty unit*” to be \$170 at the time the contravention occurred.¹
19. The maximum penalties with respect to the contravention referred to in the principal judgement is \$51,000 for the respondent.

Approach to penalty proceedings

20. The factors which may be taken into account in the assessment of penalty are well established. The factors relevant to the imposition of a penalty were summarised by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 [26]-[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 respondent;*
- 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;*

¹ See *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012* (Cth) which amended the value of a penalty unit for offences after 28 December 2012.

- 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.”*

21. This summary was adopted by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14. In *Australian Ophthalmic Supplies Pty Ltd v Mc Alary-Smith* [2008] FCAFC 8 Buchanan J after referring to the decision in *Kelly v Fitzpatrick* (supra) said at [9]:

“9. *Checklists of this kind can be useful providing they do not become transformed into a rigid catalogue of matters for attention. At the end of the day the task of the Court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations... ”*

22. In *Fair Work Ombudsman v Roselands Fruit Market Pty Ltd & Anor* [2010] FMCA 599 Driver FM summarised the approach the Court should follow in these sorts of proceedings at [22] to [26] as follows:

“22. *The first step for the Court is to identify the separate contraventions involved. Each breach of each separate obligation found in the AFPCS, the NAPSA is a separate contravention of a term of an applicable provision for the purposes of s.719.²*

23. *However, s.719(2) provides for treating multiple breaches, involved in a course of conduct, as a single breach.*

24. *Secondly, to the extent that two or more contraventions have common elements, this should be taken into account*

² *Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216 at 223; *McIver v Healey* [2008] FCA 425 at [16] (unreported, Federal Court of Australia, 7 April 2008, Marshall J).

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 what the respondent did.³ This task is distinct from and in addition to the final application of the “totality principle”.⁴

25. *Thirdly, the Court will then consider an appropriate penalty to impose in respect of each course of conduct, having regard to all of the circumstances of the case.*
26. *Fourthly and finally, having fixed an appropriate penalty for each group of contraventions or course of conduct, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to the conduct which led to the breaches.⁵ The Court should apply an “instinctive synthesis” in making this assessment.⁶ This is what is known as an application of the ‘totality principle’.”*

Contraventions

23. As identified in the principal judgment the respondent failed to comply with an order of the Fair Work Commission which is a contravention of a civil remedy provision. The maximum penalty for the contravention by the respondent is \$51,000.

Considerations

24. In submissions upon which it relied the applicant addressed the Court on the relevant considerations. It was submitted in this case that they include:
 - a) the circumstances in which the conduct took place;

³ *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 at [46] (Graham J) (unreported, Full Court of the Federal Court of Australia, 20 February 2008, Gray, Graham and Buchanan JJ) (*Merringtons*).

⁴ *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 at [41]-[46] (Stone and Buchanan JJ) (unreported, Full Court of the Federal Court of Australia, 7 May 2008, Gyles, Stone and Buchanan JJ) (*Mornington Inn*).

⁵ See *Kelly v Fitzpatrick* (2007) 166 IR 14 at [30] (Tracey J) (*Kelly*); *Merringtons*, supra at [23] (Gray J), [71] (Graham J) and [102] (Buchanan J).

⁶ *Merringtons*, supra at [27] (Gray J) and [55] and [78] (Graham J).

- b) the nature and extent of any loss or damage;
 - c) any similar previous conduct;
 - d) the size of the respondent's business;
 - e) the deliberateness of the breach;
 - f) the involvement of senior management;
 - g) the respondents contrition, corrective action and cooperation with the enforcement authorities;
 - h) ensuring compliance with minimum standards; and
 - i) deterrence.
25. I accept that in this case those are relevant considerations to take into account in arriving at an appropriate penalty.

Circumstances in which the conduct took place and nature and extent of the conduct

26. The applicant submitted:

“54 The Applicant acknowledges that these proceedings relate to a single contravention of a civil penalty provision of the FW Act. However, it is submitted that the context in which the conduct occurred is highly relevant to an assessment of the culpability of the Respondent and the gravity of the contravention.

55 The Applicant submits that the Respondent's contravention of section 405 of the FW Act occurred in the context of a broader disregard by the Respondent of its legal obligations and the workplace relations system as a whole.

*56 The contravention involves the Respondent effectively ignoring an Order made by the FWC. The FWC Order was made following an Application by Ms Page for a remedy for unfair dismissal against the Respondent (the **Unfair Dismissal Proceedings**).*

57. In commenting on the conduct of the sole director of the Respondent, Mr Dunn, during the Unfair Dismissal

Proceedings, Commissioner Ryan made the following observations:

‘Since the Applicant’s application was received by the Commission every attempt to contact Mr Craig Dunn has proven fruitless. Even a hand delivered letter from the Commission to Mr Dunn’s residential address directing him to contact my Chambers failed to elicit any response from Mr Dunn.’⁷

58. *The Commission determined that the Respondent had unfairly dismissed the Employee and in accordance with section 390(1) of the FW Act Ms Page was entitled to compensation.⁸*
59. *The subsequent decision by the Respondent to ignore the FWC Order effectively undermined the dispute mechanism regime prescribed by the FW Act and the decision of the industrial umpire designated to determine unfair dismissal disputes. This had the effect of causing Ms Page further loss in circumstances where she had properly sought and been granted a remedy under the FW Act. It is submitted that such a contravention should be viewed as especially significant given the importance of an effective enforcement and remedy regime to ensuring ongoing compliance with workplace law.*
60. *Furthermore, the conduct should be viewed in the context of the Respondent displaying a broad and persistent disregard for the workplace relations regime and the important FWC and judicial processes through which this regime is enforced. Not only has the Respondent completely failed to engage in this proceeding, but the Respondent also failed to participate Unfair Dismissal Proceedings which gave rise to this contravention.*
61. *This disregard for the determination of the industrial umpire echoes the Respondent’s conduct in earlier proceedings before this Court. Notably, the Respondent has previously had default judgment entered against it for a failure to properly defend proceedings brought in the Federal Circuit Court in respect of prior contraventions of the FW Act.⁹*

⁷ *Amanda Page v Wedderburn Petroleum Pty Ltd T/A Wedderburn Petroleum Caltex Tasco* [2014] FWC 2595 (**Page v Wedderburn Petroleum Pty Ltd**), [13].

⁸ *Page v Wedderburn Petroleum Pty Ltd*, [18] – [20].

⁹ *FWO v Wedderburn Petroleum Pty Ltd* [2014] FCCA 2645 (20 November 2014) (**FWO v Wedderburn Petroleum Pty Ltd (1)**).

Moreover, the Respondent has failed to comply with orders made in these proceedings.¹⁰

62. *It is submitted that the conduct of the Respondent demonstrates a persistent disregard for the substantive minimum protections set down by the FW Act and a disdain for the important enforcement tools under the Fair Work regime and court processes. Such conduct should be viewed as particularly serious and damaging to the workplace relations regime as a whole.”*

27. I accept the applicant’s submissions and note the respondent’s conduct and the circumstances in which it occurred warrants consideration of the need for a significant penalty.

Nature and extent of any loss or damage

28. The applicant submitted:

“63. In this matter the Employee, Ms Page, was entitled to be paid compensation of \$5000 awarded to her by the Commission by 30 April 2014.

64. *It is submitted that the loss to her of this compensation is significant, particularly in circumstances where the Commission was satisfied that her termination by the Respondent had been harsh, unjust or unreasonable. Commissioner Ryan noted in his decision in the Unfair Dismissal Proceedings that Ms Page was vulnerable and had significant barriers to obtaining alternatively employment.¹¹*

65 *It is submitted that in these circumstances, the failure of the Respondent to pay compensation as awarded to Ms Page should be viewed as causing her a considerable loss.”*

29. In submissions before the Court Ms Hall indicated that notwithstanding the orders made in the principal judgment the respondent had still not complied with the order of the Fair Work Commission (“the Commission) and the loss sustained by Ms Page by reason of the respondent’s contravention should be taken into account and it will be.

¹⁰ *FWO v Wedderburn Petroleum Pty Ltd (1)*; Hall Affidavit, paragraph 18

¹¹ *Page v Wedderburn Petroleum Pty Ltd*, [21].

Similar previous conduct

30. The applicant submitted:

*“66. The Respondent has previously been subject of litigation in this Court by the FWO for breaches of the FW Act in respect of the underpayment of two other employees (the **Underpayment Proceeding**).¹²*

67. The Underpayment Proceeding was the subject of an Order of Judge Burchardt dated 23 July 2014, which included a declaration by the Court declared that the Respondent had contravened a number of civil remedy provisions. The Court ordered that the Respondent pay within 28 days amounts totalling \$49,080.08 to the two employees affected by the contraventions.¹³

68. The Underpayment Proceeding was subsequently listed for a penalty hearing on 20 November 2014. The Respondent did not appear at this hearing. On 20 November 2014, Judge Turner made pecuniary penalty orders against the Respondent in the amount of \$123,915.00.

69. To date, the Respondent has failed to comply with previous Court Orders made on 23 July 2014 and 20 November 2014 for rectification of underpayments and an order for payment of pecuniary penalties.¹⁴

*70. It is submitted that this **previous conduct** is highly relevant and **should be regarded as a significant aggravating factor in this case.**”(emphasis added)*

31. I accept the applicant’s submission and find that this consideration is a considerable aggravating factor in this case and warrants consideration of a significant penalty.

The size of the respondent’s business

32. The applicant submitted:

“71. There is no evidence before the Court as to whether the Respondent continues to trade. It is evident that ASIC appears to intend to commence strike off action against the

¹² FWO v Wedderburn Petroleum Pty Ltd (1).

¹³ Warnock Affidavit, paragraphs 29 - 31

¹⁴ Warnock Affidavit, paragraphs 29 to 31

*Respondent*¹⁵. However, the Respondent's complete failure to engage in any of the processes relevant to this matter means that there is limited information before the Court as to the assets and liabilities of the Respondent entity.

72. *In these circumstances, the Applicant submits that this factor should not be attributed any weight in relation to the determination of penalty. In Rajagopalan v BM Sydney Building Materials Pty Ltd it was said: 'Obligations by employers for adherence to industrial instruments arise regardless of their size. Such a factor should be of limited relevance to a Court's consideration of penalty.'*¹⁶

73. *On that basis, the Applicant submits that regardless of the Respondent's financial circumstances and size, of which there is no evidence before the Court, the Court should mark its disapproval of the conduct in question and set a significant penalty which serves as a warning to others.'*

33. Compliance with order of the Commission let alone the Court is not dependant on the size of the business concerned.

The deliberateness of the breach

34. The applicant submitted:

"74. Again, the complete failure of the Respondents to participate in any aspect of these or the FWC proceedings, means that there is no evidence before the Court explaining its non-compliance with the FWC Order.

75 *The Applicant submits that the Respondent's conduct in these, the FWC and the Underpayment proceedings demonstrates a pattern of conduct involving an apparently deliberate contravention of Australian workplace laws, followed by a complete failure to engage with the relevant enforcement authorities which makes it difficult, if not impossible for the Respondent's workers to obtain their minimum entitlements and enforce their legal rights. This conduct appears to be the Respondent's mode of operation which, the Applicant submits, should be met with a very significant penalty underlining the callousness of this*

¹⁵ Hall Affidavit, paragraph 6

¹⁶ [2007] FMCA 1412 at paras.27 to 29.

behaviour and discouraging other employers to act in this manner.”

35. In this case on what is before the Court the contraventions by the respondent can be considered to be deliberate and tells in favour of a significant penalty.

The involvement of senior management

36. The applicant submitted:

“76. There is no evidence before the Court as to the current management structure of the Respondent.

77. The parties notified of the decision and FWC Order included Mr Craig Dunn at the email address cd@roofplum.com.au.¹⁷ This supports an inference that Mr Dunn, the sole director of the Respondent at the time of the contravention, was or should reasonably have been aware of the FWC Order.”

37. The material before the Court makes clear the officers of the respondent were involved in the proceedings before the Commission and involved in the contravening conduct.

The respondent’s contrition, corrective action and cooperation with the enforcement authorities

38. The applicant submitted:

“78. This factor involves three related, yet separate elements. Each of them is relevant in this case.

Cooperation with authorities

79. The Respondent has not provided any co-operation to the Office of the Applicant during the initial investigation of this matter. Indeed, the Respondent has failed to respond to numerous attempts at contact through a variety of channels.¹⁸

¹⁷ Warnock Affidavit, paragraph 27

¹⁸ Warnock Affidavit, paragraphs 12 - 23; Hall Affidavit paragraphs 10 to 12 and 17 to 18

80. *Once proceedings were commenced, the Respondent has completely disregarded the Court's processes necessitating an application for default judgment. The Respondent is not represented by a legal practitioner, it has not appeared at the directions hearing of this proceeding held on 2 June 2015 and it has not filed any documents, including a notice of address for service, a response or a defence.*
81. *Accordingly, the Applicant submits that the Respondent's co-operation in this matter has been non-existent.*

Corrective action

82. *The Respondent has not paid the compensation owing to the Employee pursuant to the FWC Order.*

Contribution

83. *There is no evidence that the Respondent has made any apology to the Employee in this matter or has expressed any regret or genuine remorse.*
84. *Indeed it is submitted that the Respondent's conduct in failing to accept the findings of the Commission or comply with its Orders demonstrate both a lack of contrition and a lack of respect for the legal process.*
85. *It is further submitted that the failure to the Respondent to make payment for either rectification of underpayments or payment of pecuniary penalties in accordance with the Orders of Judges Burchardt and Turner in respect of previous findings of contraventions of the FW Act.*

Discounts for Contribution, Corrective Action and Co-operation

86. *Where respondents co-operate and make admissions early in the course of an investigation or soon after the commencement of proceedings, it is appropriate to allow a discount of penalty.¹⁹*
87. *The Applicant submits that the Court should not allow any discount of penalty in light of the lack of any evidence of cooperation, corrective action or contrition in this case."*
39. On the material before the Court there is no basis for considering a discount for these factors.

¹⁹ *Mornington Inn* at [75] per Stone and Buchanan JJ.

Ensuring compliance with minimum standards

40. The applicant submitted:

“88. One of the principal objects of the FW Act is ‘ensuring fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing access and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms...[emphasis added]’

89. It is submitted that the contravention in this matter serves to subvert this objective by undermining the dispute resolution procedures set down by the FW Act for unfair dismissal and therefore undermining the public confidence in the Commission as a means of obtaining and enforcing an appropriate remedy.

90. The potential ramifications of a Respondent ignoring an Order of the FWC are significant and this is reflected in the substantial penalties set by the legislature for a contravention of section 405 of the FW Act.

91. The Applicant submits that it is important that a penalty for a contravention of this kind be set at a meaningful level.”

41. I accept the submissions of the applicant that the potential ramifications for the enforcement of minimum standards of allowing unilateral refusal to comply with the umpires decision to go without sanction warrants consideration of a significant penalty.

General Deterrence

42. The applicant submitted:

“92. It is well-established that “the need for specific and general deterrence” is a factor that is relevant to the imposition of a penalty. See for example, the comments of Mowbray FM in Pangaea.²⁰

²⁰ *Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar* [2007] FMCA 7 at [26]-[59].

93. *In Ponzio v B & P Caelli Constructions Pty Ltd,*²¹ *Lander J summarised the role of general deterrence in determining the appropriate penalty as follows:*

In regard to general deterrence, it is assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend: *Yardley v Betts* (1979) 22 SASR 108. The penalty therefore should be of a kind that it would be likely to act as a deterrent in preventing similar contraventions by likeminded persons or organisations. If the penalty does not demonstrate an appropriate assessment of the seriousness of the offending, the penalty will not operate to deter others from contravening the section. However, the penalty should not be such as to crush the person upon whom the penalty is imposed or used to make that person a scapegoat. In some cases, general deterrence will be the paramount factor in fixing the penalty: *R v Thompson* (1975) 11 SASR 217.²²

94. *Similar weight was given to the concept of general deterrence by Marshall J in Fair Work Ombudsman v Maclean Bay Pty Ltd (No 2).*²³ “The need for general deterrence cannot be understated. Rights are a mere shell unless they are respected.”
95. *The unfair dismissal remedy is an important protection available to be sought be commencing proceedings at the Commission under the FW Act.*
96. *The 2013/2014 Annual Report of the Fair Work Commission states that unfair dismissal applications constitutes a significant proportion of the workload of the Commission. In the 2013/2014 financial year for example, 14,979 such applications were lodged with the Commission.*²⁴
97. *A significant amount of public resources are therefore invested in providing this forum to determine such disputes and provide remedies for employees who can establish that they have been unfairly dismissed and are entitled to protection from same.*
98. *In addition to the affected parties to such proceeding having a reasonable expectation that Orders made by the*

²¹ [2006] FCA 1221

²² (2007) 158 FCR 543, [93].

²³ [2012] FCA 557 at [29].

²⁴ Hall Affidavit, paragraph 19

Commission will be complied with, the broader community is entitled to expect that all parties will comply with the determinations and orders made by the Commission in performing its statutory functions. If a party to a Commission proceeding is able to ignore orders made by the Commission, this significantly undermines the community's expectation and confidence that the law will protect against breaches of the FW Act.

99. *These matters indicate that general deterrence in contraventions of this type is a factor of significant import and one which the Court should give appropriate weight in determining penalty.*

100. *In Meadley v Sort Worx Pty Ltd [2013] FCA 1012, Tracy J emphasised the importance of general deterrence in cases involving non-compliance with an Order of the Commission:*

“The Commission is charged with the responsibility of ensuring that employees are accorded the protection from proscribed adverse action to which they are entitled under the Act. When the Commission finds that an employee has been unfairly dismissed and makes remedial orders those orders must be complied with unless a stay is granted pending appeal. An employer is not entitled unilaterally to determine to ignore an order made by the Commission. This was not a case in which the employer was unable to meet its obligations; it simply chose not to do so. This was a serious contravention and the need for general deterrence weighs as a heavy consideration in fixing penalty.”²⁵

101. *Further, in Fair Work Ombudsman v World Gym Sunshine Pty Ltd & Wayne George Mailing [2014] FCCA 2201, which was a decision of your Honour relating to non-compliance with a Fair Work Commission order, it was noted that:*

“Any penalty should be imposed at sufficient level to deter the first respondent from similar conduct along with a significant measure of general deterrence so that others understand the need to accept the umpire's decision and comply with orders of the FWC.”

102. *In Mayberry v Kijani Investments Pty Ltd [2011] FCA 1238 at [20], Justice Katzmann noted:*

²⁵ At paragraph 45

“Employers, no less than employees, are expected to comply with the orders of Fair Work Australia. Failure to do so is liable to bring the system of regulation of industrial disputes into disrepute. Kijani’s conduct signifies a refusal to accept the umpire’s decision. It should not go unpunished.”

43. I accept there is a need for general deterrence to ensure it is clearly understood no one is entitled to unilaterally ignore an order of the Commission. As, Marshall J said in *Fair Work Ombudsman v Maclean Bay Pty Ltd (No.2)* [2012] FCA 557 at [29]:

“It is important to ensure that the protections provided by the Act to employees are real and effective and properly enforced. The need for general deterrence cannot be understated. Rights are a mere shell unless they are respected.”

Specific Deterrence

44. The applicant submitted:

“103. The need for specific deterrence is significant in this case as the Respondent has not accepted responsibility for the Declared Contraventions or taken steps to rectify those contraventions. In fact, the Applicant submits that the Respondent has taken steps to deliberately avoid its obligations.

104. Although ASIC strike-off action appears likely, the Respondent remains an incorporated company. Further, the Applicant notes that Mr Dunn appears to be a Director of a further 10 entities.²⁶

105. The compliance history in this matter is also highly relevant and the Respondent has been held to have previously contravened provisions of the FW Act by this Court and remains in breach of the Orders made by this Court on [date] November 2014.

106. In Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union, Gray J observed:

“Specific deterrence focuses on the party on whom the penalty is to be imposed and the likelihood of that party being involved in a similar breach in the future. Much will

²⁶ Second Banes Affidavit, paragraph 4

depend on the attitude expressed by that party as to things like remorse and steps taken to ensure that no future breach will occur".²⁷

107. *The Applicant submits that the penalties in this case need to be imposed at a level sufficient to make the contravening conduct unprofitable and the prospect of any future contraventions commercially undesirable.*"

45. In relation to specific deterrence, Gray J observed in *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* (2008) 171 FCR 357; (2008) 177 IR 243; [2008] FCAFC 170 at [37] that:

"Specific deterrence focuses on the party on whom the penalty is to be imposed and the likelihood of that party being involved in a similar breach in the future. Much will depend on the attitude expressed by that party as to things like remorse and steps taken to ensure that no future breach will occur."

46. The issue of specific deterrence in respect of the respondent looms large in this proceeding. The applicant's submissions illustrate a pattern of flagrant disregard for decision of the umpire by the respondent which warrant consideration of a significant penalty.

Consideration of appropriate penalty

47. In light of the submissions referred to above and on the material before the Court the factors that are most relevant to the determination of an appropriate penalty in this matter are:

- a) the respondent's actions, or complete inaction, demonstrating a deliberate disregard of workplace laws and the institutions which enforce those laws;
- b) the respondent's significant history of non-compliance with their statutory obligations and past Court orders;
- c) the need for general deterrence in this matter to protect the important role of and the public's confidence in the Commission;
and

²⁷ (2008) 171 FCR 357 at [37].

- d) the manifest need for specific deterrence to discourage those associated with the respondent from engaging in similar conduct in the future.

48. Therefore, as the Court:

- is directed by the relevant authorities to consider what is appropriate in all the circumstances of this case;²⁸ and
- in its discretion in relation to penalty is not fettered by a checklist of mandatory criteria;²⁹ and
- is satisfied the penalty for the contravening conduct is appropriate.

I make the orders as set out at the beginning of these reasons.

I certify that the preceding forty-eight (48) paragraphs are a true copy of the reasons for judgment of Judge O'Sullivan

Associate:

Date: 7 October 2015

²⁸ See *Construction Forestry Mining & Energy Union v Coal & Allied Operations Pty Ltd (No.2)* (1999) 94 IR 231.

²⁹ See *Australian Ophthalmic Supplies Pty Limited v McAlary-Smith* [2008] FCAFC 8.