

FEDERAL CIRCUIT COURT OF AUSTRALIA

*FAIR WORK OMBUDSMAN v QUALITY FOOD
WORLD PTY LTD*

[2016] FCCA 207

Catchwords:

INDUSTRIAL LAW – Fair Work – awarding penalties under the Fair Work Act 2009 – consideration of factors relevant to the amount of penalty.

Legislation:

Fair Work Act 2009, ss.44, 45, 87, 116, 535

Workplace Relations Act 1996, ss.182, 232, 234, 235

Workplace Relations Regulations 2006

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

Cases cited:

Fair Work Ombudsman v. Foure Mile Pty Ltd [2013] FCCA 682

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	QUALITY FOOD WORLD PTY LTD
File Number:	MLG 783 of 2012
Judgment of:	Judge Riethmuller
Hearing date:	24 September 2015
Date of Last Submission:	8 October 2015
Delivered at:	Melbourne
Delivered on:	11 February 2016

REPRESENTATION

Counsel for the Applicant:	Mr J Mckenna
Solicitors for the Applicant:	Office of the Fair Work Ombudsman
Counsel for the Respondent:	Mr P Bick Q.C.

Solicitors for the Respondent: Madison Lawyers

THE COURT DECLARES

(1) The Respondent contravened:

In respect of minimum wages

- (a) section 182(1) of the *Workplace Relations Act* 1996 (Cth) (**WR Act**) by failing to pay the basic periodic rate of pay for all ordinary hours worked during the period from 1 July 2007 to 30 June 2009 (the **WR Act Period**);
- (b) section 182(1) of the WR Act and item 5 of Schedule 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009 (Cth) (**Transitional Act**), by failing to pay the basic periodic rate of pay for all ordinary hours worked during the period 1 July 2009 to 31 December 2009 (the **Bridging Period**);
- (c) section 45 of the *Fair Work Act* 2009 (Cth) (**FW Act**) by virtue of a contravention of clause A.3.3 of the *Food, Beverage and Tobacco Manufacturing Award* 2010 [MA000073] (the **Modern Award**), by failing to pay the basic periodic rate of pay for all ordinary hours worked during the period 1 January 2010 until the first pay period on or after 1 July 2010;
- (d) section 45 of the FW Act, by virtue of a contravention of clause 20.1 of the Modern Award by failing to pay the minimum hourly rate of pay for all ordinary hours worked during the period on or after 1 July 2010 to 31 March 2011;

In respect of overtime rates of pay

- (e) section 45 of the FW Act by virtue of a contravention of clause 33.1 (a) of the Modern Award by failing to pay overtime rates of pay for work done outside of the ordinary hours of work on any day or shift in the period from 1 January 2010 to 31 March 2011 (**FW Act Period**);

In respect of public holidays

- (f) section 44(1) of the FW Act by virtue of a contravention of section 116 of the FW Act by failing to pay the minimum hourly

rate of pay for absence from their employment on a public holiday during the FW Act Period;

- (g) section 44(1) of the FW Act by virtue of a contravention of section 116 of the FW Act by failing to pay any amount in respect of absence from their employment on a public holiday during the FW Act Period;

In respect of the underpayment of annual leave

- (h) section 235(1) of the WR Act by failing to pay the basic periodic rate of pay for periods of annual leave taken during the WR Act Period;
- (i) section 235(1) of the WR Act and item 6(1) of Schedule 16 of the Transitional Act by failing to pay E.K.at least equal to the basic periodic rate of pay for periods of annual leave taken during the Bridging Period;
- (j) section 87(2) of the FW Act by failing to pay the rate required by clause 34.3 of the Modern Award for periods of annual leave taken during the FW Act Period;

In respect of leave loading

- (k) section 45 of the FW Act by virtue of a contravention of clause 34.5 of the Modern Award by failing to annual leave loading for periods of annual leave taken during the FW Act Period;

In respect of failure to accrue annual leave

- (l) section 234(2) of the WR Act by failing to credit annual leave pursuant to section 232(2) of the WR Act during the WR Act Period;
- (m) section 234(2) of the WR Act and item 6(1)(a) of Schedule 16 of the Transitional Act by failing to credit annual pursuant to section 232(2) of the WR Act during the Bridging Period;
- (n) section 44(1) of the FW Act by virtue of a contravention of section 87(2) of the FW Act by failing accrue annual leave in

accordance with section 87(1) of the FW Act during the FW Act Period;

In respect of annual leave on termination

- (o) section 235(2) of the WR Act by failing to pay the basic periodic rate of pay at the time of termination in respect of untaken and accrued annual leave entitlement during the WR Act Period;
- (p) section 235(2) of the WR Act and item 6(1)(a) of Schedule 16 of the Transitional Act by failing to pay the basic periodic rate of pay at the time of termination in respect of untaken and accrued annual leave entitlement during the Bridging Period;
- (q) section 44(1) of the FW Act by virtue of a contravention of section 90(2) by failing to pay amounts in respect of untaken and accrued annual leave on termination during the FW Act Period;

In respect of record keeping

- (r) regulations 19.4(1) and (2); 19.5(1); 19.6(1); 19.8(1)(c), (d) and (e); 19.9(1); 19.11 (1) and 19.12(1) of the *Workplace Relations Regulations 2006 (Cth) (WR Regulations)* by failing to make and keep employee records in the required form and containing the required content during the WR Act Period; and
- (s) sections 535(1) and 535(2) of the FW Act by virtue of contraventions of regulations 3.31(1); 3.32(c), (d) and (e); 3.33(1), (2) and (3); 3.34 and 3.36(1) of the *Fair Work Regulations 2009 (FW Regulations)* during the Bridging Period and FW Act Period.

ORDERS

Rectification and Pecuniary Penalties

- (1) The Respondent pay, within 28 days, any residual underpayment amounts which have yet to be rectified to the employees, and in the amounts, set out in Annexure A to these Orders.

- (2) In the event that the Respondent is unable to locate and make payment to one or more of the of the employees listed in Annexure A within 28 days the Respondent must instead, within a further 14 days:
- (a) pay the amounts to the Commonwealth pursuant to section 559(1) of the FW Act; and
 - (b) advise the Applicant in writing of:
 - (i) the names of the employees to whom payment has not been made;
 - (ii) the amount of underpayment and interest outstanding to each such employee; and
 - (iii) information in the Respondent's possession which may assist the Applicant to locate and remit payment to the employees.
- (3) Pursuant to subsection 719(6) of the *Workplace Relations Act* 1996 (Cth) (**WR Act**), regulation 14.1 of the *Workplace Relations Regulations* 2006 (**WR Regulations**) and subsection 546(1) of the *Fair Work Act* 2009 (Cth) (**FW Act**), the Respondent pay a pecuniary penalty in an amount fixed at \$85,000.00.
- (4) Pursuant to subsection 841(a) of the WR Act and subsection 546(3)(a) of the FW Act, the pecuniary penalty specified in Order 3 is to be paid to the Commonwealth within 28 days of the service of this Order on the Respondent.

ADDITIONAL ORDERS BY CONSENT

Workplace Relations Training

- (5) That within three months of the date of this order, all management staff of the First Respondent whose duties relate to the administration of, and compliance with, applicable Australian workplace laws and instruments will undertake workplace relations compliance training (**Training**) on the following terms:
- (a) the management staff of the First Respondent who will participate in the Training includes but is not limited to Mr Atar Schwartz,

Mr Erez Shahak, Mr Edralyn Santos, Ms Veronica Feliciano and Mr Saman Jayasinghe;

- (b) the Training will relate to compliance with the *Fair Work Act* 2009 (Cth) (“**FW Act**”) and the Food, Beverage and Tobacco Manufacturing Award 2010 [MA000073] (the **Award**) including the First Respondent's obligations in respect of leave entitlements; classification of employees; rates of pay; overtime and penalty rates;
- (c) the Training will be conducted by an accredited training provider or employment law specialist and paid for by the First Respondent;
- (d) the First Respondent will provide evidence of:
 - (i) the training materials used and information delivered in the course of the training;
 - (ii) attendance of the relevant personnel at the Training to the Applicant within 14 days of the Training being provided (including the name and position of all attendees and the dates on which the Training was attended); and
- (e) for a period of one year from the date of this order, the First Respondent will ensure that training is conducted in the manner prescribed above in relation to any new or existing employees or contractors who, after the date of this order, acquire managerial responsibilities that relate to the administration of and compliance with Australian workplace laws and instruments on behalf of the First Respondent.

Future Workplace Relations Compliance

- (6) Within three months of the date of this order the First Respondent will:
 - (a) obtain written legal advice to ensure ongoing compliance with Australian workplace laws and instruments, including but not limited to the FW Act and the Award and accurate classification of Employees (**Advice**); and

- (b) provide to the Applicant, within 30 days of the date of obtaining the Advice, details of the systems and processes implemented as a result of the Advice obtained to ensure such ongoing compliance.

Future Audits

- (7) The First Respondent will engage an external accounting professional or an employment law specialist, at the First Respondent's expense, to conduct an audit of the First Respondent's compliance with all applicable Commonwealth of Australia workplace laws and instruments relating to the pay and conditions of all Employees (the **Audit**), on the following terms:
 - (a) the Audit period will be for the sample period of the months of June to August of the calendar year immediately following the making of final orders in this proceeding, with such Audit to be finalised by 30 November of that year ;
 - (b) the First Respondent will provide to the Applicant, within 14 days of the finalised Audit being provided to the First Respondent, a copy of the Audit report, methodology and supporting documentation, including the outcomes of the Audit;
 - (c) in the event that the Audit discloses contraventions of any applicable Australian workplace laws, the First Respondent will rectify all such contraventions within 28 days of the Audit being provided to the First Respondent, including rectification of any underpayments to the Employees;
 - (d) the First Respondent will provide evidence of rectification of any contraventions identified as a result of the requirement at paragraph 4(c) above to the Applicant within 28 days of the Audit being provided to the First Respondent.

Information On Workplace Rights And Entitlements

- (8) The First Respondent will, within three months of the date of this order, provide written information to all current employees of the First Respondent informing them of their rights and entitlements under Australian workplace laws and instruments (the **Information**) on the following terms:

- (a) The Information will be in a format approved by the Applicant;
and
 - (b) The First Respondent will provide proof of the distribution of the Information to its current employees to the Applicant within 14 days of the Information being provided.
- (9) The First Respondent will provide a copy of the Information to all new employees engaged by the First Respondent after the initial distribution referred to above.
- (10) The Applicant have liberty to apply to the Court on seven days' notice should the Respondents fail to comply with any of the above Orders.

**FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE**

MLG 783 of 2012

FAIR WORK OMBUDSMAN
Applicant

And

QUALITY FOOD WORLD PTY LTD
Respondent

REASONS FOR JUDGMENT

1. The applicant brings proceedings against the respondent for the imposition of penalties for contraventions by the respondent of the *Workplace Relations Act 1996* and *Workplace Relations Regulations 2006*, and the *Fair Work Act 2009 Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.
2. The respondent operates a business importing, producing, packaging and distributing on a wholesale basis various foodstuffs throughout Australia, including products such as dips and condiments and antipasti. The respondent has been operating since 2002.
3. In 2011, following a complaint by employees, the Fair Work Ombudsman investigated the respondent and audited its payments to employees. It transpired that there had been underpayments to 46 employees totalling \$149,137.42.
4. The parties are agreed that declarations with respect to the contravention should be made, that penalties are required to be

imposed. Rectification has largely been made, although some underpayments are yet to be effected, and may have to be placed in the unclaimed moneys fund in trust for employees that cannot be located. The parties are also agreed that orders with respect to educative and auditing steps should be made for the purpose of educating the management of the company.

5. There is significant evidence before the court that the company has employed in recent times an in-house account, Mr Jayasinghe, who has done significant work regularising the company's operations with respect to the employees, calculating the underpayments and effecting them, and in putting in place appropriate systems and arrangements so as to minimise the prospect of this happening again in the future. I have no reason to doubt the matters sent out in Mr Jayasinghe's affidavit and the steps that he has taken since coming to the business to remedy the business operations with respect to their industrial obligations, although I note some of the breaches cover periods of the time when he was employed.
6. It is accepted that the contraventions should be grouped into five groups as follows:
 - a) contraventions relating to the payment of the minimum wage – maximum grouped penalty of \$33,000;
 - b) penalties with respect to failure to pay appropriate overtime – maximum penalty \$33,000;
 - c) penalties with respect to non-payment for public holidays – maximum penalty \$33,000;
 - d) penalties with respect to non-payment of annual leave – maximum penalty \$33,000;
 - e) penalties with respect to annual leave loading – maximum penalty \$33,000;
 - f) penalties with respect to accrued annual leave and payment thereof on termination – maximum penalty \$33,000;

- g) penalties with respect to the failure to keep records in accordance with the Act and regulations – maximum penalty \$16,500.
7. The total maximum penalties for the contraventions, as grouped, comes to \$214,500. The Fair Work Ombudsman argues for the imposition of penalties in the range of \$77,880 to \$95,040.
8. The applicant points to a number of factors that the applicant says are specific in this matter, namely:
- a) the seriousness of the conduct, given the amounts and number of employees involved;
 - b) that there had been prior complaints against the business, and as such, the respondent was on notice of the existence of the statutory minimums;
 - c) the failure of the respondent to take steps to obtain appropriate information and put in place appropriate structures once aware of the workplace laws system;
 - d) an initial reluctance on the part of the respondent to assist with the inquiries of an investigation;
 - e) the significant steps that have now been taken by the respondent to remedy its future compliance;
 - f) and the rectification of the significant portion of the underpayment amount;
 - g) the need for ongoing vigilance by the respondent to ensure ongoing compliance; and
 - h) the need for specific and general deterrence.
9. To this, the respondent adds significant matters:
- a) that the repayments by way of rectification that the respondent has made are to all of the employees the respondent was able to locate;
 - b) that any penalty will have an impact on future operation of the business, which continues to employ approximately 50 people;

- c) that the respondent has no prior penalties that have been imposed upon it; and
- d) that the respondent did cooperate with the Fair Work Ombudsman and has made admissions at an earlier stage in the proceedings.

Nature and extent of the conduct

10. The conduct involved extended over a period between October 2007 and March 2011 with underpayments to individual employees ranging from as little as \$125.82 to as much as \$10,218.15. The respondent has made payments to those employees which could be located, leaving some \$28,933.45 outstanding, which the respondent has committed to pay to the Commonwealth pursuant to section 559(1) of the Fair Work Act so that it is available to the employees when they are located.
11. The conduct occurred over a lengthy period and involved significant sums of money, in some cases a particularly significant proportion of the income of a worker on the lowest end of the salary scale. The conduct undermines the key purpose of the industrial laws to provide a minimum level of entitlements for all employees. There is little doubt that it was a systematic failure to comply with the law, and it extended to significant failures with respect to record-keeping by the business. The respondent accepts that its record-keeping practices were significantly deficient.
12. Whilst it is accepted that there were approximately 50 employees at the time of the audit by Fair Work Australia, the business currently has around 90 employees. Employees are often recruited from a migrant agency in Dandenong or through recruitment of friends and family of existing employees. Most of the employees were from non-English speaking backgrounds, new to Australia, and had limited knowledge of the rights and protections afforded to them under the Australian workplace laws. Some were in Australia only on student visas. It is submitted by the applicant that, in these circumstances, the employer has a heightened responsibility to ensure that it is complying with the obligations owed to those employees, as their background and knowledge base leaves them with little understanding of their rights under the Australian workplace laws. I take into account these circumstances on the basis that these breaches affected a group of

employees least able to protect their own rights, and least able to locate and obtain employment in the community.

13. The company was on notice, as a result of seven previous interactions with the applicant, prior to the audit commencing in 2010. The first of the previous complaints dated back to 2007. There is no doubt that it is incumbent upon employers to make all necessary enquiries to ensure that they are meeting the employees' proper entitlements under the workplace laws.
14. It is inexcusable in a situation where the business has such a large number of employees and a significant history of interaction with the Fair Work Ombudsman's office, it would not have complied with the relevant requirements.
15. The submission that the employment of mainly migrant employees from non-English speaking backgrounds as being a positive aspect to the operation of the business because those employees may not otherwise be able to gain employment because of their limited language skills is, in my view, naïve. A business that employs members of the community with limited English language skills, at appropriate rates, is to be commended. A business that does not pay community members who have the limited language skills appropriate rates of pay to meet at least the statutory minimum leans more on the side of exploitation of those least able to insist upon their rights, than demonstrating positive community spirit by providing employment for those with language skills that do not equip them well for locating employment. The argument is not dissimilar to that put by businesses that claim they are providing employment in an industry that's not profitable to justify paying employees less than the award rate (for example, see the comments in *Fair Work Ombudsman v. Four Mile Pty Ltd* [2013] FCCA 682).

Nature and extent of the loss

16. The amount of the underpayment is significant in this case and the number of workers affected by it are significant. The number of employees who have not been able to be located may never receive their full entitlements. It is a positive aspect that the respondent says

that it now pays its employees slightly above the minimum rates, according to their classifications under the current award.

Similar previous conduct

17. In this case, the respondent's counsel is right to point out that there are no previous penalties that have been imposed upon the respondent for breach of the workplace laws. However there has been extensive involvement with the Fair Work Ombudsman's office, including correspondence and breach notices, all of which would have made the respondent well aware that there were significant obligations upon it under the industrial law regime. In these circumstances, there are not previous penalties that have been imposed and I do not take the previous matters into account as being in the nature of, as the respondent puts it, "prior relevant convictions". However, the previous conduct is relevant in determining the circumstances of these offences and the awareness of the respondent of its obligations in a general sense.

Size and circumstances of the respondent

18. The respondent points to a number of business factors that placed economic pressure upon the business and difficulties with respect to obtaining credit facilities. The respondent says that it now has 98 people in employment, and that it has not made a profit in the last two financial years as a result of overheads rebuilding the business and changing compliance practices. The business is certainly a significant one, given that its monthly payroll in 2014 was in the region of \$200,000, showing an annual turnover on wages alone of \$2.4 million. I do not accept that the respondent is a small business, but would categorise it as a medium business given the significant number of employees and a reasonably large turnover. Ultimately, on the material before me, I am not persuaded that the appropriate level of penalties will cause the business to fail.
19. Whilst the total amount of underpayments subject of agreement for the purpose of this determination is little under \$150,000 it is submitted that this is conservative as a result of the difficulty with respect to record keeping. As this is a penalties proceedings it is appropriate that I proceed on the basis that the underpayments that have been

established inform the penalty, not the possibility that there may be a greater amount which has not been proved. I also take into account that the factory premises were burned in 2012.

20. Much has been made of the company's financial position, and a large volume of documents have been produced but what has not been produced is profit and loss statements and balance sheets for the last few years, nor the tax returns for those years. It would be apparent to the respondent that no realistic understanding could be achieved with any degree of confidence of its financial position without these basic financial documents which would inevitably be insisted upon in any process for purchase or sale of a business. In these circumstances I am not persuaded by the material before me as to what the true state of the financial circumstances of the business actually is despite the various documents that have been produced.
21. I am unable to form any clear view as to the true financial state of the venture in the absence of more appropriate financial records.

Deliberateness of the breaches

22. The respondent says that the breaches occurred through ignorance of the respondent and that significant steps have been taken to change the practices of the respondent. I accept the latter part of the submission. With respect to the submission that the underpayments were caused by ignorance, it must be seen in the context of a number of interactions with the Fair Work Ombudsman's office, the result of which is that the ignorance was either wilful blindness or recklessness with regard to the obligations of the respondent.

Involvement of senior management

23. As a medium sized business, it is clear that the senior management group within the business must have been aware, and at the very least a senior manager for the respondent was directly involved in setting wages, overseeing wages and related issues. I note however, that the senior manager directly involved and was described as a contractor, working on behalf of his own company which was billed for these services.

Contrition, corrective action and cooperation

24. Significant corrective action has been taken by the respondent, which now appears to be properly cooperating with the Fair Work Ombudsman's office. The employment of Mr Jayasinghe as the accountant has led to a significant change in conduct by the respondent. The respondent has made full admissions and cooperated with the Fair Work Ombudsman's office. The Fair Work Ombudsman's office accepts that a discount should be made in the order of 20 per cent to reflect this cooperation.
25. Most significantly, the respondent has, to the extent it can on a practical level, paid the employees who have been underpaid. Rectification is a significant factor as the central purpose of the Act is to ensure employees receive their entitlements.
26. I'm not persuaded that the conduct of the respondent has demonstrated genuine contrition having regard to the fact that during the investigation a threat was made to "Just close the business tomorrow and sack all the workers" if the matter was going to go to court. Statements were also made minimising the effect of the underpayment on the basis that at \$70,000 per year this was "only 10 per cent of the payroll so it was only 10 per cent" of the payroll.
27. Another matter that indicates a lack of genuine contrition include claims that the employees had not come forward with complaints, which must be viewed in circumstances of employees having low skill levels and poor English language skills.
28. Whilst the respondent's submissions portray the newly employed accountant in a particularly positive light, this is inconsistent with evidence by the inspector, Mr Harroll, at paragraphs 10 to 18 of his affidavit that the accountant, Mr Saman Jayasinghe had been made aware of the application of the modern award including overtime clauses, yet in his affidavit he denies knowledge of the relevant award.
29. The Fair Work inspector Mr Harroll specifically drew Mr Jayasinghe's attention to contraventions of the modern award in April 2012 (Harroll affidavit paragraphs 10-18) where yet employees were still paid a flat rate of \$16 per hour until early 2013 (see Mr Jayasinghe's affidavit

paragraph 17). And looked at as a whole, it appears more likely that the processes that have been put in place and the more recent conduct of the respondent is to ensure it meets the bare minimum requirements, that does not lead me to the view that it has demonstrated contrition when considering the matter as a whole.

30. The corrective action is significant in this case, but must be viewed in light of the fact that the corrective action is only putting in place the standard of employment operations that is expected of every normal business in Australia. In their sense I accept the submissions of the applicant that these matters remove an aggravating factor from the nature of the offences.
31. I accept that despite non-corporation or frustrating conduct the Respondent has more recently cooperated with the Fair Work Ombudsman and by admitting the contraventions save considerable legal expenses for the regulator and court time.
32. In this case the failure to maintain proper wage records and documents have had a significant impact upon the ability of the Fair Work Ombudsman to investigate, and denying employees of appropriate minimum records and overwhelm any realistic prospect of obtaining advice to insist upon their rights.
33. In this case I am persuaded there is a need for the specific deterrence with respect to this business given its history of operations, and there is clearly a need for general deterrence. On the material before me I am not persuaded that a penalty in the order sought by the Fair Work Ombudsman would be crushing for the respondent.
34. Considering the matter as a whole I find that the following penalties are appropriate:
 - a) with respect to the minimum wage breaches \$25,000;
 - b) with respect to the failure to pay overtime \$15,000;
 - c) with respect to the failure to pay public holidays that were not worked \$12,500;
 - d) the underpayment of annual leave \$12,500;

- e) failure to pay annual leave loading \$5000;
- f) failure to pay accrued leave \$15,000; and
- g) failure to engage in proper record keeping \$10,000;

Total \$85,000.

I certify that the preceding thirty four (34) paragraphs are a true copy of the reasons for judgment of Judge Riethmuller

Date: 11 Feb 2016

Correction

1. *Certification date amended to delivery date.*