FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v CUTS ONLY THE ORIGINAL BARBER PTY LTD & ORS *[2014] FCCA 2381*

Catchwords:
INDUSTRIAL LAW – Penalties – hair and beauty industry – failure to pay minimum wages, correct penalty rates, annual leave loading and accrued annual leave on termination – specific and general deterrence – involvement of senior management – cooperation with authorities – rectification.

Legislation:
Australian Fair Pay and Conditions Standard
Fair Work Act 2009, ss. 12, 14(1)(a), 44, 44(1), 45, Pt.2-2, ss. 90(2), 539(2), 546(1), 546(3)(a), 550, 550(1), Div.2 of Pt. 5-2, s.701
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009
Hair and Beauty Industry Award 2010 [MA000005], cls.19, 31.2(a), 31.2(b), 31.2(c), 33.3, 35.3, A.2.5 of sch.A, A.6.4 of sch.A, A.7 of sch.A, level 1 of sch.B
Hairdressing and Beauty Services - Victoria - Award 2001 [AP806816]
Workplace Relations Act 1996

Cases cited:
Australian Competition and Consumer Commission v Dataline.net.au Pty Ltd (2006) 236 ALR 665; (2008) ASAL 55-176; (2007) ATPR 42-138; [2006] FCA 1427
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560; (2008) 246 ALR 35; [2008] FCAFC 8
Community and Public Sector Union v Telstra Corporation Limited (2001) 108 IR 228; [2001] FCA 1364
Fair Work Ombudsman v Fed Up Deli & Catering Pty Ltd (in liquidation) (ACN 118 143 972) [2012] FMCA 738
Fair Work Ombudsman v Hongyun Chinese Restaurant Pty Ltd (in liquidation) [2013] FCCA 52
Fair Work Ombudsman v Humidifresh Industries Pty Ltd [2012] FMCA 954
Kelly v Fitzpatrick (2007) 166 IR 14; [2007] FCA 1080
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd (2004) ATPR 41-993; [2004] FCAFC 72
Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union (2008) 171 FCR 357; (2008) 177 IR 243; [2008] FCAFC 170
Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543; (2007) 162 IR 444; [2007] FCAFC 65
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412

Applicant:	FAIR WORK OMBUDSMAN
First respondent:	CUTS ONLY THE ORIGINAL BARBER PTY LTD (ACN 067 416 835)
Second respondent:	PAUL MARK SALTER
Third respondent:	GEORGE DIMARIS
File number:	MLG 935 of 2013
Judgment of:	Judge Riley
Hearing date:	14 August 2014
Date of last submission:	14 August 2014
Delivered at:	Melbourne
Delivered on:	22 October 2014

REPRESENTATION

Solicitor advocate for the applicant:	Eric Leahy
Solicitors for the applicant:	Office of the Fair Work Ombudsman
Solicitor advocate for the respondents:	Corrina Dowling
Solicitors for the respondents:	NRA Legal

THE COURT DECLARES THAT, having regard to the admissions made by the first, second and third respondents in the statement of agreed facts filed in this proceeding**:**

(1) the first respondent contravened:

(a) s.45 of the *Fair Work Act 2009* in that it failed to pay Ms Sarah (or Serra) Bejjani (the **employee**) the required minimum rate of pay pursuant to cl.19 of the *Hair and Beauty Industry Award 2010* (the **Modern Award**) between 26 January 2012 and 9 August 2012;

(b) s.45 of the *Fair Work Act 2009* in that it failed to pay the employee the required minimum rate of pay pursuant to cl.A.2.5 of the Modern Award between 10 August 2012 and 11 November 2012;

(c) s.45 of the *Fair Work Act 2009* in that it failed to pay the employee the appropriate overtime rates in accordance with cl.31.2(a) of the Modern Award during the period between 26 January 2012 and 11 November 2012 (**the relevant period**);

(d) s.45 of the *Fair Work Act 2009* in that it failed to pay the employee the correct penalty rate for time worked between 7:00 a.m. and 6:00 p.m. on a Saturday in accordance with cl.A.6.4 of the Modern Award in the relevant period;

(e) s.45 of the *Fair Work Act 2009* in that it failed to pay the employee the correct penalty rate for time worked between 7:00 a.m. and 6:00 p.m. on a Saturday in accordance with cl.A.7 of the Modern Award in the relevant period;

(f) s.45 of the *Fair Work Act 2009* in that it failed to pay the employee the correct penalty rate of 100% of the ordinary rate of pay for all time worked on a Sunday in accordance with cl.31.2(c) of the Modern Award in the relevant period;

(g) s.45 of the *Fair Work Act 2009* in that it failed to pay the employee at the correct rate of double time and a half for all work performed on a public holiday in accordance with cl.35.3 of the Modern Award in the relevant period;

(h) s.45 of the *Fair Work Act 2009* in that it failed to pay the employee, in addition to her ordinary minimum wage, a loading of 17.5% during her periods of annual leave taken in the relevant period, in accordance with cl.33.3 of the Modern Award; and

(i) s.44 of the *Fair Work Act 2009* (by reference to s.90(2) of the *Fair Work Act 2009*) in that it failed to pay the employee, at the time that her employment ended, the amount that would have been payable to the employee had the employee taken the balance of her accrued annual leave.

(2) Pursuant to s.550 of the *Fair Work Act 2009*, the second respondent was involved in each of the first respondent's contraventions identified in declaration 1.

(3) Pursuant to s.550 of the *Fair Work Act 2009*, the third respondent was involved in each of the first respondent's contraventions identified in declaration 1.

THE COURT ORDERS BY CONSENT THAT:

(4) The first respondent pay penalties pursuant to s.546(1) of the *Fair Work Act 2009* for the contraventions identified in declaration 1.

(5) The second respondent pay penalties pursuant to s.546(1) of the *Fair Work Act 2009* for the contraventions identified in declarations 1 and 2.

(6) The third respondent pay penalties pursuant to s.546(1) of the *Fair Work Act 2009* for the contraventions identified in declarations 1 and 3.

(7) Under s.546(3)(a) of the *Fair Work Act 2009*:

(a) all penalties imposed on the first respondent, be paid to the Commonwealth within six months of the date of this order; and

(b) all penalties imposed on the second and third respondents, be paid to the Commonwealth within three months of the date of this order.

THE COURT ORDERS THAT:

(8) Pursuant to order 4, the first respondent pay penalties in the sum of $50,160.

(9) Pursuant to order 5, the second respondent pay penalties in the sum of $10,032.

(10) Pursuant to order 6, the third respondent pay penalties in the sum of $10,032.

(11) The applicant have 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

MLG 935 of 2013

FAIR WORK OMBUDSMAN
Applicant

And

CUTS ONLY THE ORIGINAL BARBER PTY LTD
(ACN 067 416 835)
First respondent

PAUL MARK SALTER
Second respondent

GEORGE DIMARIS
Third respondent

REASONS FOR JUDGMENT

Introduction

1. This matter concerns the penalties to be imposed for certain contraventions of the *Fair Work Act 2009* ("FW Act"). The parties filed a statement of agreed facts.

2. In essence, the respondents admitted that Ms Sarah Bejjani, an employee of the first respondent (**the employee**), was underpaid $8,625.71. The underpayments concerned the underpayment of minimum wages, overtime rates and Saturday, Sunday and public holiday penalties and the non-payment of accrued annual leave on termination and annual leave loading.

3. The parties agreed on the range of penalties that would be appropriate in this case, namely, for the first respondent, $36,960 to $50,160, and for each of the second and third respondents, $7,392 to $10,032. The applicant submitted that the respondents should each receive penalties at the top of those ranges. The respondents submitted that they should each receive penalties at the lower end of those ranges.

Agreed orders and declarations

4. The statement of agreed facts included certain declarations and orders to which the parties consented. Those declarations and orders were as follows:

(a) Declarations that the First Respondent contravened:

*(i) section 45 of the Fair Work Act 2009 (**FW Act**) in that it failed to pay the Employee the required minimum rate of pay pursuant to clause 19 of the* Hair and Beauty Industry Award 2010 *(**Modern Award**) between 26 January 2012 and 9 August 2012;*

(ii) section 45 of the FW Act in that it failed to pay the Employee the required minimum rate of pay pursuant to Clause A.2.5 of the Modern Award between 10 August 2012 and 11 November 2012;

*(iii) section 45 of the FW Act in that it failed to pay the Employee the appropriate overtime rates in accordance with clause 31.2(a) of the Modern Award during the period between 26 January 2012 and 11 November 2012 (the **Relevant Period**);*

(iv) section 45 of the FW Act in that it failed to pay the Employee the correct penalty rate for time worked between 7:00 a.m. and 6:00 p.m. on a Saturday in accordance with clause A.6.4 of the Modern Award in the Relevant Period;

(v) section 45 of the FW Act in that it failed to pay the Employee the correct penalty rate for time worked between 7:00 a.m. and 6:00 p.m. on a Saturday in accordance with clause A.7 of the Modern Award in the Relevant Period;

(vi) *section 45 of the FW Act in that it failed to pay the Employee the correct penalty rate of 100% of the ordinary rate of pay for all time worked on a Sunday in accordance with clause 31.2(c) of the Modern Award in the Relevant Period;*

(vii) *section 45 of the FW Act in that it failed to pay the Employee at the correct rate of double time and a half for all work performed on a public holiday in accordance with clause 35.3 of the Modern Award in the Relevant Period;*

(viii) *section 45 of the FW Act in that it failed to pay the Employee, in addition to her ordinary minimum wage, a loading of 17.5% during her periods of annual leave taken in the Relevant Period, in accordance with clause 33.3 of the Modern Award; and*

(ix) *section 44 of the FW Act (by reference to subsection 90(2) of the FW Act) in that it failed to pay the Employee, at the time that her employment ended, the amount that would have been payable to the Employee had the Employee taken the balance of her accrued annual leave.*

*(collectively, **the Admitted Contraventions**)*

(b) *A declaration that the Second Respondent was involved in each of the Admitted Contraventions pursuant to section 550 of the FW Act.*

(c) *A declaration that the Third Respondent was involved in each of the Admitted Contraventions pursuant to section 550 of the FW Act.*

(d) *An order that the First Respondent pay penalties pursuant to subsection 546(1) of the FW Act for the Admitted Contraventions of the FW Act.*

(e) *An order that the Second Respondent pay penalties pursuant to subsection 546(1) of the FW Act for the Admitted Contraventions of the FW Act.*

(f) *An order that the Third Respondent pay penalties pursuant to subsection 546(1) of the FW Act for the Admitted Contraventions of the FW Act.*

(g) Orders under section 546(3)(a) of the FW Act that all penalties imposed on the First, Second and Third Respondents be paid to the Commonwealth.

(h) An order that the Applicant have liberty to apply on seven days' notice in the event that any of the preceding orders are not complied with.

(i) Such further or other orders as the Court thinks fit.

Agreed facts

5. The agreed facts set out below in paragraphs 6 to 123 are taken verbatim from the statement of agreed facts filed by the parties.

The applicant

6. The applicant is and was at all times material to this proceeding:

a) a statutory appointee of the Commonwealth appointed by the Governor-General by written instrument pursuant to Div.2 of Pt.5-2 of the FW Act;

b) a Fair Work Inspector by force of s.701 of the FW Act; and

c) a person with standing under sub-s.539(2) of the FW Act to apply for orders in respect of contraventions of civil remedy provisions under the FW Act that occurred on or after 1 July 2009.

The first respondent

7. The first respondent is and was at all relevant times:

a) a corporation since 5 December 1994, and is registered in accordance with the *Corporations Act 2001* (Cth);

b) the trustee of the Cuts Only Unit Trust (ABN 81 702 104 376);

c) capable of being sued in its corporate name;

d) a constitutional corporation within the meaning of s.12 of the FW Act;

e) a national system employer within the meaning of s.14(1)(a) of the FW Act;

f) under the trading name of "GP Studio", in the business of providing hairdressing services to customers at Shop 313 in the Chadstone Westfield retail shopping centre, located at 1341 Dandenong Road, Chadstone, Victoria (the **Business**);

g) the employer of the employee from around April 2009 until 11 November 2012; and

h) one of a number of hairdressing salons operated by the second and third respondents, including hairdressing salons trading under the Cuts Only and Cuts and Colour business names (collectively the **Cuts Only Group**).

The second respondent

8. The second respondent, Paul Mark Salter, is and was at all relevant times:

a) one of two shareholders of the first respondent;

b) a director and company secretary of the first respondent;

c) jointly responsible for the day to day management, direction and control of the first respondent's operations and the Business;

d) a person who knew that the Modern Award applied to the first respondent and the employee;

e) jointly responsible for setting and adjusting the wage rates for the employee;

f) aware of the requirement to pay the employee minimum wages, having been involved in an assisted voluntary resolution process conducted by the applicant as the result of a prior underpayment complaint lodged by the employee in June 2011; and

g) a person with whom the applicant primarily dealt during the course of the investigation into the employee's entitlements.

9. The second respondent is and was at all relevant times:

   a) a director and company secretary of Cuts and Colours Pty Ltd (**Cuts and Colour**); and

   b) one of two shareholders of Cuts and Colours.

10. The second respondent admits that at all material times he was involved in the Admitted Contraventions, because he was, by his acts or omissions, directly or indirectly, knowingly concerned in or a party to each of the Admitted Contraventions, and is therefore to be treated as having himself contravened each of the provisions set out in paragraph 4.(a) above and detailed in paragraphs 29 to 57 below, in accordance with s.550(1) of the FW Act.

The third respondent

11. The third respondent, George Dimaris, is and was at all relevant times:

   a) one of two shareholders of the first respondent;

   b) a director of the first respondent;

   c) jointly responsible for the day to day management, direction and control of the first respondent's operations and the Business;

   d) a person who knew that the Modern Award applied to the first respondent and the employee;

   e) jointly responsible for setting and adjusting wage rates for the employee;

   f) aware of the requirement to pay the employee minimum wages, having been involved in an assisted voluntary resolution process conducted by the applicant as the result of a prior underpayment complaint lodged by the employee in June 2011; and

   g) a person with whom the applicant dealt during the course of the investigation into the employee's entitlements.

12. The third respondent, is and was at all relevant times:

a) a director and company secretary of Cuts and Colours; and

b) one of two shareholders of Cuts and Colours.

13. The third respondent admits that at all material times he was involved in the Admitted Contraventions, because he was, by his acts or omissions, directly or indirectly, knowingly concerned in or a party to each of the Admitted Contraventions, and is therefore to be treated as having himself contravened each of the provisions set out in paragraph 4.(a) above and detailed in paragraphs 29 to 57 below, in accordance with s.550(1) of the FW Act.

The employee

14. During the relevant period, the employee was an adult employee, having been born on 13 October 1991.

15. At all relevant times between around April 2009 and approximately 9 August 2009, the employee was employed by the first respondent on a full-time basis as a salon assistant to perform duties that included:

a) shampooing, conditioning, rinsing and blow-drying hair;

b) cleaning hairdressing instruments;

c) general reception duties, including answering telephones, making bookings and maintaining client records;

d) sweeping floors; and

e) stocking and re-stocking shelves within the salon.

16. The employee:

a) commenced a hairdressing apprenticeship with the first respondent on or about 10 August 2009, the terms of her apprenticeship being set out in an Apprenticeship/Traineeship Training Contract (the **Contract**) entered into between the first respondent and the employee on 10 August 2009;

b) commenced studying a certificate III in hairdressing at the Chisholm Institute of TAFE (the **TAFE**) on 2 February 2010;

c) had not completed the requirements of the Contract by its nominal expiry date of 10 August 2012;

d) continued to be enrolled at TAFE after 10 August 2012; and

e) on and from 10 August 2012, continued to work for the first respondent until her employment was terminated by the first respondent on or about 11 November 2012.

17. The employee was, during her apprenticeship, entitled to progress to a higher wage rate on each anniversary of the commencement of her apprenticeship in accordance with cl.19 of the Modern Award.

18. During the relevant period, the employee's correct classification under the Modern Award was:

a) at all relevant times from 26 January 2012 to 9 August 2012, as a third year hairdressing apprentice; and

b) from 10 August 2012 to 11 November 2012, as a salon assistant within the classification of Hair and Beauty Employee – Level 1 in Sch.B of the Modern Award.

19. During the relevant period, the employee regularly worked between 35 and 38 hours per week and frequently undertook the following shifts:

a) 9:00 am to 9:00 pm Thursday and Friday;

b) 9:00 a.m. to 5:00 p.m. Saturday; and

c) 10:00 a.m. to 5:00 p.m. Sunday.

20. During her apprenticeship, the employee was required to attend TAFE classes every Tuesday.

21. During the relevant period, the employee received regular weekly payments from the first respondent for the hours she worked, which included:

a) for each ordinary hour she worked:

i) from 26 January 2012 to on or about 26 October 2012, payments at the rate of $9.60 per hour; and

ii) from on or about 27 October 2012 to 11 November 2012, payments at the rate of $14.31 per hour;

b) payments in relation to overtime hours worked at the rates of:

i) $14.40 per hour for the first three hours, and

ii) $19.20 per hour thereafter;

c) payments in relation to time worked:

i) on Saturday and public holidays, at the rate of $14.40 per hour (excluding (iii) below);

ii) on Sunday, at the rate of $19.20 per hour; and

iii) on a public holiday (Melbourne Cup Day 2012) at the rate of $28.62 per hour.

Relevant legislation

22. At all relevant times prior to 1 July 2009, the first respondent was bound in respect of the employment of the employee by the *Workplace Relations Act 1996* (**WR Act**).

23. At all relevant times from 1 July 2009 to 31 December 2009 inclusive, the first respondent was bound in respect of the employment of the employee by the WR Act as it continued to apply by reason of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (**Transitional Act**).

24. At all relevant times on and from 1 July 2009, the first respondent was bound in respect of the employment of the employee by the FW Act.

25. At all relevant times on and from 1 January 2010:

a) the National Employment Standards (**NES)** in Pt.2-2 of the FW Act applied to the first respondent in relation to its employment of the employee; and

b) the first respondent was required by s.44(1) of the FW Act not to contravene a term of the NES.

Hairdressing and Beauty Services – Victoria – Award 2001

26. At all relevant times prior to 1 January 2010:

    a) the first respondent was bound, in respect of the employment of the employee by:

        i) the *Hairdressing and Beauty Services - Victoria - Award 2001 [AP806816]* (**Pre-Modern Award**); and

        ii) a preserved Australian Pay and Classification Scale derived from the Pre-Modern Award (the **Hairdressing Pay Scale**);

    b) the work performed by the employee was of a kind covered by:

        i) the Pre-Modern Award; and

        ii) the Hairdressing Pay Scale; and

    c) the employee was properly classified, initially as a 'salon assistant' and from 10 August 2009 as a hairdressing apprentice. Both classifications fell within the ambit of the Pre-Modern Award and the Hairdressing Pay Scale.

Hair and Beauty Industry Award 2010

27. At all relevant times on and from 1 January 2010:

    a) the first respondent was bound, in respect of the employment of the employee by the Modern Award because;

        i) the first respondent was an employer in the hair and beauty industry; and

        ii) the Business fell within the industry, incidence and application of the Modern Award;

    b) the work performed by the employee was of a kind covered by the Modern Award; and

        i) in relation to the period before 10 August 2012, fell within the classification of hairdressing apprentice as provided for in cl.19 of the Modern Award; and

ii) in relation to the period after 10 August 2012, fell within the classification of Hair and Beauty Employee Level 1 as defined in Sch.B of the Modern Award; and

c) the first respondent was required by s.45 of the FW Act not to contravene a term of a modern award.

28. At all relevant times, the Modern Award has prescribed apprentice rates of pay on the basis of the year of the apprenticeship.

Failure to pay minimum hourly rate of pay: contravention of s.45 of the *Fair Work Act 2009* (cls. 19 and A.2.5 of the *Modern Award)*

29. At all times during the relevant period, the first respondent was required to pay the employee a minimum hourly rate of pay in respect of all ordinary hours worked in accordance with cls. 19 and A.2.5 of Sch.A of the Modern Award.

30. During the relevant period, the minimum hourly rate of pay prescribed by the Modern Award in respect of the employee was:

a) from 26 January 2012 to 30 June 2012 - $13.90 per hour;

b) from 1 July 2012 to 9 August 2012 - $14.31 per hour; and

c) from 10 August 2012 to 11 November 2012 - $17.33 per hour,

(the minimum hourly rates of pay).

31. The first respondent admits that it contravened s.45 of the FW Act by failing to pay the employee the minimum hourly rates of pay for each hour she worked during the relevant period in contravention of cls. 19 and A.2.5 of the Modern Award.

32. By failing to pay the employee the applicable minimum hourly rates of pay, the first respondent underpaid the employee in the amount of **$4,418.71.**

Failure to pay overtime rates: contravention of s.45 of the *Fair Work Act 2009* (cl.31.2(a) of the *Modern Award)*

33. At all times during the relevant period, the first respondent was required to pay the employee for all ordinary hours worked in excess of 38 hours per week:

    a) at the rate of 150% of the minimum hourly rate for the first three hours; and

    b) at the rate of 200% of the minimum hourly rate thereafter,

in accordance with cl.31.2(a) of the Modern Award.

34. During the relevant period, the minimum hourly rate of pay prescribed by the Modern Award in respect of hours worked by the employee in excess of 38 hours per week was:

    a) from 26 January 2012 to 30 June 2012 - $20.86 per hour for the first three hours and $27.81 per hour thereafter;

    b) from 1 July 2012 to 9 August 2012 - $21.46 per hour for the first three hours and $28.62 per hour thereafter; and

    c) from 10 August 2012 to 11 November 2012 - $25.99 per hour for the first three hours and $34.66 per hour thereafter,

    (the overtime rates of pay).

35. The first respondent admits it contravened s.45 of the FW Act by failing to pay the employee the overtime rates of pay for each hour she worked in excess of 38 hours per week during the relevant period in contravention of cl.31.2(a) of the Modern Award.

36. By failing to pay the employee the overtime rates of pay, the first respondent underpaid the employee in the amount of **$690.85.**

Failure to pay Saturday penalty rates: contravention of s.45 of the *Fair Work Act 2009* (cls. A.6.4 and A.7 of the *Modern Award)*

37. At all times during the relevant period, the first respondent was required to pay the employee an amount in addition to the minimum

hourly rate of pay in respect of work performed from 7:00 a.m. to 6:00 p.m. on a Saturday (**Saturday Work**) in accordance with cl.A.6.4 of Sch.A of the Modern Award.

38. At all times during the relevant period, the first respondent was also required to pay the employee a loading of 33% (refer cl.31.2(b)) of the applicable minimum hourly rate of pay in respect of Saturday work in accordance with cl.A.7 of the Modern Award.

39. During the relevant period, the penalty rate of pay prescribed by the Modern Award in respect of Saturday work performed by the employee was:

    a) from 26 January 2012 to 30 June 2012 - $18.37 per hour;

    b) from 1 July 2012 to 9 August 2012 - $18.90 per hour; and

    c) from 10 August 2012 to 11 November 2012 - $22.76 per hour,

(the Saturday rates of pay).

40. The first respondent admits it contravened s.45 of the FW Act by failing to pay the employee the correct Saturday rates of pay for all work performed on a Saturday during the relevant period in contravention of cls. A.6.4 and A.7 of the Modern Award.

41. By failing to pay the employee the correct Saturday rates of pay, the first respondent underpaid the employee in the amount of **$879.93**.

Failure to pay Sunday penalty rates: contravention of s.45 of the *Fair Work Act 2009* (cl.31.2(c) of the *Modern Award)*

42. At all times during the relevant period, the first respondent was required to pay the employee the minimum hourly rate of pay plus a loading of 100% for all work performed on a Sunday, in accordance with cl.31.2(c) of the Modern Award.

43. During the relevant period, the penalty rate of pay prescribed by the Modern Award in respect of all work performed on a Sunday by the employee was:

    a) from 26 January 2012 to 30 June 2012 - $27.81 per hour;

b) from 1 July 2012 to 9 August 2012 - $28.62 per hour; and

c) from 10 August 2012 to 11 November 2012 - $34.66 per hour,

(the Sunday rates of pay).

44. The first respondent admits it contravened s.45 of the FW Act by failing to pay the employee the correct Sunday rates of pay for all work performed on a Sunday during the relevant period in contravention of cl.31.2(c) of the Modern Award.

45. By failing to pay the employee the correct Sunday rates of pay, the first respondent underpaid the employee in the amount of **$1,564.35**.

Failure to pay public holiday penalty rates: contravention of s.45 of the *Fair Work Act 2009* (cl.35.3 of the *Modern Award)*

46. At all times during the relevant period, the first respondent was required to pay the employee at the rate of double time and a half for all work performed on a public holiday in accordance with cl.35.3 of the Modern Award.

47. During the relevant period, the penalty rate of pay prescribed by the Modern Award in respect of all work performed on a public holiday by the employee was:

a) from 26 January 2012 to 30 June 2012 - $34.76 per hour;

b) from 1 July 2012 to 9 August 2012 - $35.77 per hour; and

c) from 10 August 2012 to 11 November 2012 - $43.42 per hour;

(public holiday rates of pay).

48. The first respondent admits it contravened s.45 of the FW Act by failing to pay the employee the correct public holiday rates of pay for each hour she worked on the public holidays of Good Friday, Easter Saturday and Melbourne Cup Day during the relevant period in contravention of cl.35.3 of the Modern Award.

49. By failing to pay the employee the correct public holiday rates of pay, the first respondent underpaid the employee in the amount of **$659.95**.

Failure to pay annual leave loading during periods of annual leave: contravention of s.45 of the *Fair Work Act 2009* (cl.33.3 of the *Modern Award)*

50. At all times during the relevant period, the first respondent was required to pay the employee a loading of 17.5% during periods when the employee took annual leave (**annual leave loading**) in accordance with cl.33.3 of the Modern Award.

51. During the relevant period, the employee took the following periods of annual leave:

    a) 9 July 2012 to 21 July 2012; and

    b) 8 October 2012 to 20 October 2012.

52. The first respondent admits it contravened s.45 of the FW Act by failing to pay the employee annual leave loading for annual leave taken by the employee during the relevant period in contravention of cl.33.3 of the Modern Award.

53. By failing to pay the employee annual leave loading, the first respondent underpaid the employee in the amount of **$276.72**.

Failure to pay annual leave on termination of employment: contravention of s.44 of the *Fair Work Act 2009* (s.90(2) of the *Fair Work Act 2009)*

54. On termination of the employee's employment on 11 November 2012, the first respondent was required to pay the employee the amount that would have been payable to the employee had the employee taken her accrued annual leave in accordance with sub-s.90(2) of the FW Act.

55. As at 11 November 2012, the employee had an accrued but untaken paid annual leave balance of 6.64 hours.

56. The first respondent admits it contravened s.44 of the FW Act by failing to pay the employee accrued but untaken annual leave on termination of her employment.

57. By failing to pay the employee accrued but untaken annual leave on termination, the first respondent underpaid the employee in the amount of **$135.20**.

Total underpayment

58. During the relevant period, the employer underpaid the employee a gross amount of **$8,625.71** (**total underpayment**).

59. The total underpayment was rectified by the first respondent by the issuance of a cheque on 5 July 2013.

Prior compliance history

Earlier complaint by the employee

60. On 17 June 2011, the office of the applicant (**FWO**) wrote to the first respondent advising that it had received an underpayment complaint from the employee (**first complaint**).

61. At the time of the first complaint, the employee was in the second year of her hairdressing apprenticeship. The first complaint concerned the alleged failure of the first respondent to progress the employee's minimum hourly rate to that of a second year hairdressing apprentice.

62. In seeking to resolve the first complaint, Fair Work Inspector Luke Thomas spoke with the third respondent who advised that:

    a) the first respondent had agreed to pay the employee an amount of approximately $2000 (**settlement amount**) to resolve the first complaint; and

    b) the second respondent had negotiated the payment of the settlement amount with the employee.

63. On 23 July 2011, the first respondent paid the settlement amount to the employee.

Other complaints

64. The FWO and its predecessor agency have received multiple complaints from former employees of the first respondent and the Cuts Only Group.

Williams complaint

65. On 29 May 2006, the Workplace Ombudsman (**WO**) (a predecessor entity to the applicant) received a complaint from Mark Williams, a former employee of the first respondent (**Williams complaint**).

66. The Williams complaint related to alleged underpayment of the minimum hourly rate, Saturday penalty rates and payment in lieu of notice.

67. From May to October 2006, the WO undertook an investigation into the Williams complaint, during which it primarily had contact with the second respondent.

68. On 13 October 2006, the WO wrote to the first and second respondents to advise that it had determined that Mr Williams was underpaid in the amount of $1,175 (net).

69. Following discussions between Mr Williams and the second respondent, Mr Williams agreed to settle his claim for $725 and a cheque for this amount was sent by the second respondent to the WO. The Williams complaint was finalised by the WO on 7 December 2006.

Dickson complaint

70. On 14 December 2006, the WO received a complaint from Janine Dickson, a former employee of the first respondent (**Dickson complaint**).

71. The WO determined that the first respondent had contravened applicable workplace laws by:

    a) failing to pay Ms Dickson for pro rata annual leave on termination; and

b) failing to record annual leave for work performed on Saturdays.

72. This determination was communicated to the first respondent by way of a Breach Notice letter addressed to the second respondent. In that letter, the first respondent was advised to take immediate action to ensure that the requirements of the Award and the *Australian Fair Pay and Conditions Standard*, particularly relating to the accrual of annual leave on Saturdays, were being met for all existing and former employees.

73. Fair Work Inspector, Josh Iser, spoke with the second respondent in relation to the Dickson complaint and met with the second respondent on 18 May 2007.

74. The second respondent agreed that the first respondent would make a payment to Ms Dickson to resolve her complaint. On 19 June 2007, the WO wrote to the first respondent advising that a cheque totalling $341.10 net ($390.10 gross) was received by the WO. This amount represented Ms Dickson's total outstanding entitlements and as such, the Dickson complaint was finalised by the WO.

Park complaint

75. On 29 April 2007, Cheon Park lodged a complaint with the WO with respect to her employment with the first respondent **(Park complaint).**

76. On 17 October 2007, the third respondent spoke to Fair Work Inspector Josh Iser and confirmed that Ms Park was employed by the first respondent.

77. The WO determined that the first respondent had underpaid Ms Park $618.68 (gross) and contravened applicable workplace laws by:

a) failing to pay the correct minimum rate of pay for work performed on Saturday and Sunday shifts; and

b) failing to accrue annual leave for work performed on Saturday and Sunday shifts.

78. This determination was communicated to the first respondent by way of a Breach Notice letter dated 12 November 2007 addressed to the

first and third respondents. In that letter, the first respondent was advised to take immediate action to ensure it complied with applicable workplace laws, particularly in relation to accrual of annual leave on weekend shift.

79. The Breach Notice also put the first respondent on notice that any future breaches of the Act and/or the Award by the first respondent would be viewed most seriously by the WO and could result in the initiation of legal action by the WO against the first respondent.

80. The first respondent agreed to rectify the underpayment and provided a cheque to the WO on 23 November 2007.

Larizza complaint

81. On 29 November 2007, the WO received a complaint from Maria Larizza in relation to her employment with the first respondent (**Larizza complaint**).

82. The WO determined that the first respondent had underpaid Ms Larizza $423.65 (gross) and contravened applicable workplace laws by:

    a) failing to pay applicable minimum hourly rates of pay;

    b) failing to pay the correct Saturday penalty rates;

    c) failing to pay the correct Sunday penalty rates;

    d) failing to pay the correct public holiday penalty rates; and

    e) failing to pay the tool allowance.

83. This determination was communicated to the first respondent by way of a Breach Notice letter dated 21 April 2008 addressed to the second respondent.

84. On 8 May 2008 a Final Notice issued. The Final Notice stated that failure to rectify the underpayment may result in the matter being recommended for legal action to recover outstanding amounts.

85. The first respondent sent a cheque to the WO for the underpayment amount, and on 6 June 2008 the WO wrote to the first respondent to confirm that the Larizza complaint had been finalised.

Ruffin complaint

86. On 13 May 2008, the WO wrote to the second and third respondents to advise that the WO had received a complaint from a former employee of Cuts and Colour, Lara Ruffin (**Ruffin complaint**).

87. The WO determined that:

a) Ms Ruffin's employment entitlements were contained in the *Australian Fair Pay and Conditions Standard* and the *Hairdressing and Beauty Services - Victoria - Award*;

b) Cuts and Colour had failed to pay Ms Ruffin one week's pay in lieu of notice of termination.

88. This determination was communicated to the second respondent by letter and Workplace Inspector Kerry Free discussed the determination with the second respondent by telephone.

89. The second respondent agreed to pay Ms Ruffin the amount of $692.35 (less tax) in settlement of the Ruffin complaint. On 26 September 2008, the Ruffin complaint was finalised by the WO.

Garthwaite complaint

90. In May 2008, the WO received a complaint from Julie Garthwaite, a former employee of the first respondent (**Garthwaite complaint**).

91. In correspondence dated 1 May 2008, the WO explained the role of the WO as a government agency, including that it encourages voluntary rectification of breaches of workplace laws, but will litigate where appropriate.

92. From May to November 2008, the WO undertook an investigation into the Garthwaite complaint, during which it primarily had contact with the second respondent.

93. By letter dated 4 November 2008 to the first and second respondents, the WO advised that:

a) it had determined that the first respondent failed to pay Ms Garthwaite pay in lieu of notice of termination, meal allowances, equipment allowances, late night trading penalties, Saturday penalties and an amount for annual leave on termination. The WO also determined that the first respondent had made an unauthorised deduction from Ms Garthwaite's wages; and

b) as a result of the contraventions by the first respondent, Ms Garthwaite was entitled to be paid $1605.35 (gross).

94. On 13 November 2008, the second respondent agreed that the first respondent would pay Ms Garthwaite $1605.35 (less tax). A cheque for this amount was provided to the WO on 18 November 2008 and the Garthwaite complaint was finalised on 2 December 2008.

Del Prete complaint

95. On 6 April 2009 Katrina Del Prete lodged a complaint with the applicant with respect to her former employment with the first respondent **(Del Prete complaint).**

96. On 12 October 2009 the applicant issued a Determination of Contravention letter which identified the following contraventions:

a) failure to pay the correct minimum rate;

b) failure to pay the correct Saturday rate;

c) failure to pay the correct Sunday rate;

d) failure to pay the annual leave loading of 17.5% on the ordinary rate of pay;

e) failure to pay overtime;

f) failure to provide 1 weeks' pay in lieu of notice;

g) failure to pay the correct pro rata annual leave amount on termination;

h) failure to pay personal leave; and

i) failure to pay the public holiday penalty rate.

97. The Determination of Contravention letter stated the possible consequences of the contravention, namely that the FWO may commence enforcement action in relation to the contraventions identified above, which may include commencing litigation.

98. On 3 August 2009, Fair Work Inspector Diane Roberts spoke with the third respondent who confirmed that the first respondent was the employing entity.

99. Fair Work Inspector, Roz Brear, spoke with the third respondent on several occasions in relation to the Del Prete complaint.

100. On 30 October 2009 FWO received a cheque from the first respondent made payable to the employee in the amount of $864.47 net ($1,089.47 gross). This amount represented Ms Del Prete's total outstanding entitlements and as such, the Del Prete complaint was finalised by the FWO.

101. In the Finalisation of Investigation letter, dated 30 October 2009, the first respondent was requested to ensure that the terms and conditions of all relevant employees are being provided in accordance with the requirements of the Act and the Award and that the first respondent should rectify any underpayments that have occurred.

Zolfaghari complaint

102. On 30 August 2011, the FWO received an underpayment complaint from a former employee of Deller Pty Ltd trading as Cuts and Colour, Ms Jessie Zolfaghari (**Zolfaghari complaint**).

103. In the course of investigating the Zolfaghari complaint:

a) Fair Work Inspector Kate Lawrence spoke to the second respondent who identified himself as the joint business owner, together with the third respondent, of Cuts and Colour; and

b) correspondence was addressed to the second respondent, as an officer of Deller Pty Ltd.

104. On 20 January 2012, Fair Work Inspector Emma Travers sent a 'Determination of Contravention' letter to Deller Pty Ltd, addressed to the second respondent. The 'Determination of Contravention' letter determined that Deller Pty Ltd had contravened provisions of the Modern Award and FW Act in respect of Ms Zolfaghari's employment, resulting in an underpayment. Ms Zolfaghari subsequently requested a review of the FWO's determination.

105. On review of the Zolfaghari complaint the FWO determined that Ms Zolfaghari had in fact been employed by the first respondent for the whole of her employment period.

106. On 4 June 2012 the FWO issued an amended 'Determination of Contravention' letter to the first respondent, determining that the first respondent had contravened provisions of the Pre-Modern Award and the FW Act in respect of Ms Zolfaghari's employment, resulting in an underpayment to Ms Zolfaghari of $940.74 (gross).

107. On 9 July 2012, the first respondent rectified in full the underpayment owing to Ms Zolfaghari.

Aisha Williams complaint

108. On 23 May 2012, the FWO received a complaint from a former employee of Dimasalt Pty Ltd trading as Cuts Only, Ms Aisha Williams (**Aisha Williams complaint**).

109. The Aisha Williams complaint related to alleged failure to pay annual leave loading, tool allowance, paid personal leave and penalty rates for evening work. Ms Williams worked as a hairdresser at the Cuts Colour Northland store and was covered by the Modern Award.

110. On 29 June 2012, Fair Work Inspector Margaret Shields telephoned the second respondent who identified himself as a representative of Ms Williams' employer.

111. On 4 July 2012, Fair Work Inspector Margaret Shields wrote to the second respondent, requesting that the second respondent, on behalf of

Dimasalt Pty Ltd, undertake a self-assessment to determine whether it had met its minimum legislative obligations in relation to Ms Williams.

112. The letter dated 4 July 2012 set out the applicable Modern Award clauses relevant to Ms Williams' complaint, including the applicable minimum weekly wage and the obligation to pay annual leave loading.

113. On 9 July 2012, the second respondent advised that the third respondent would undertake the self-assessment.

Investigation and institution of proceedings

114. On 10 December 2012, the FWO wrote to the respondents advising that it had received an underpayment complaint from the employee (**second complaint**). The second complaint concerned the alleged failure of the first respondent to progress the employee's minimum hourly rate to that of a third year hairdressing apprentice.

115. The applicant sought to mediate the second complaint. The first respondent did not respond to the FWO's communications regarding the referral of the second complaint to mediation, although it has no record of having received said correspondence, and the second complaint was therefore referred for further investigation by the FWO.

116. In the period from 19 December 2012 to 8 May 2013, the FWO conducted a full investigation into the second complaint.

117. During the course of the FWO's investigation:

a) in response to a Notice to Produce issued by the FWO on the first respondent on 23 January 2013, the first respondent produced to the FWO copies of documents relating to the employee's employment, including time and pay records and TAFE attendance records;

b) the FWO advised the second respondent that the employee was not enrolled in a competency based apprenticeship and was entitled to progress to a higher wage rate at each anniversary of the commencement of the apprenticeship; and

c) the second and third respondents were given the opportunity to participate in a formal record of interview with the applicant. The second and third respondents did not participate in formal records of interview.

118. On 9 May 2013, the FWO sent a Contravention Letter to the first, second and third respondents, which advised that:

a) the FWO had determined that the first respondent had contravened the Modern Award and the FW Act in respect of the employee, resulting in an underpayment to the employee;

b) it was required to rectify the identified underpayments within 14 days or otherwise provide details within that time of any dispute as to the FWO's findings; and

c) the FWO may initiate litigation in respect of the contraventions identified in the Contravention Letter.

119. In the period from 10 May 2013 to 18 June 2013:

a) the FWO advised the second respondent that if he disagreed with the underpayments identified in the Contravention Letter then the first respondent could raise its concerns and provide evidence and information to support its position;

b) the FWO entered into further discussions with the second respondent regarding the basis of the underpayment calculations and the correct classification of the employee, and on 4 June 2013 notified the second respondent of a revised underpayment amount;

c) the FWO again advised the second respondent that the employee was not enrolled in a competency based apprenticeship and was entitled to progress to a higher wage rate at each anniversary of the commencement of the apprenticeship; and

d) the FWO advised the second respondent that if the underpayment was not rectified then the FWO may take legal action to seek penalties for the contraventions identified.

120. On 19 June 2013, the applicant wrote to the first, second and third respondents to notify them of a further revision to the underpayment amount and that the applicant intended to commence legal proceedings against the first, second and third respondents in respect of the employee's employment with the first respondent.

121. On 27 June 2013, the applicant commenced proceedings in this court against the first, second and third respondents seeking declarations and penalties in respect of the Admitted Contraventions.

122. On 5 July 2013, the first respondent issued a cheque in rectification of the total underpayment.

123. On 6 February 2014, the respondents agreed to admit liability and enter into a Statement of Agreed Facts.

Declarations

124. There has been authority in the past to the effect that it is not appropriate for a court to make declarations based on admissions. However, there is more recent authority that in certain cases it is appropriate for the court to make declarations in such circumstances.

125. In particular, in *Australian Competition and Consumer Commission v Dataline.net.au Pty Ltd* (2006) 236 ALR 665; (2008) ASAL 55-176; (2007) ATPR 42-138; [2006] FCA 1427, Kiefel J, at paragraphs 52 to 59, considered the rationale for the previous approach taken by the courts. Her Honour came to the view that the previous approach may no longer be warranted, particularly in public interest cases such as this, and particularly if the declarations are preceded by a statement that they are made upon admissions.

126. In all the circumstances of this case, I am satisfied that it is appropriate to make the declarations sought by the parties on the basis of the admissions made by the respondents, provided that the declarations are preceded by an appropriate preamble. Also, it is proper to make the orders proposed by the parties by consent. Those declarations and orders will be made accordingly.

When the parties have agreed on penalty

127. The parties in the present case were not entirely in agreement on the amount of penalties to be imposed. However, as they were in partial agreement, it is appropriate to note the approach of the courts when parties are in agreement.

128. When the parties have agreed on penalties, the court is by no means bound to impose the agreed penalties. The court should itself consider the permissible range of penalties in all of the circumstances of the case. If the agreed penalties fit within the permissible range, it would be appropriate for the court to make orders imposing those penalties.

129. This was explained in *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* (2004) ATPR 41-993; [2004] FCAFC 72 at [53] to [60], albeit in the context of a trade practices case. Those paragraphs are as follows:

> *53 The following propositions emerge from the reasoning in* NW Frozen Foods *(footnote omitted):*
>
> *(i) It is the responsibility of the Court to determine the appropriate penalty to be imposed under s 76 of the* TP Act *in respect of a contravention of the* TP Act.
>
> *(ii) Determining the* quantum *of a penalty is not an exact science. Within a permissible range, the courts have acknowledged that a particular figure cannot necessarily be said to be more appropriate than another.*
>
> *(iii) There is a public interest in promoting settlement of litigation, particularly where it is likely to be lengthy. Accordingly, when the regulator and contravenor have reached agreement, they may present to the Court a statement of facts and opinions as to the effect of those facts, together with joint submissions as to the appropriate penalty to be imposed.*
>
> *(iv) The view of the regulator, as a specialist body, is a relevant, but not determinative consideration on the question of penalty. In particular, the views of the regulator on matters within its expertise (such as the ACCC's views as to the deterrent effect of a proposed*

penalty in a given market) will usually be given greater weight than its views on more "subjective" matters.

(v) In determining whether the proposed penalty is appropriate, the Court examines all the circumstances of the case. Where the parties have put forward an agreed statement of facts, the Court may act on that statement if it is appropriate to do so.

(vi) Where the parties have jointly proposed a penalty, it will not be useful to investigate whether the Court would have arrived at that precise figure in the absence of agreement. The question is whether that figure is, in the Court's view, appropriate in the circumstances of the case. In answering that question, the Court will not reject the agreed figure simply because it would have been disposed to select some other figure. It will be appropriate if within the permissible range.

54 Five further points should be made.

55 First, the rationale for giving weight to a joint submission on penalty is said by the Court to be the savings in resources for the regulator and the Court, as well as the likelihood that a negotiated resolution will include measures designed to promote competition. As Jeremy Thorpe points out, a related advantage is that the savings in resources can be used by the regulator to increase the likelihood that other contraveners will be detected and brought before the courts. This has the effect of increasing deterrence which is one of the principal justifications, if not the only justification for imposing civil penalties under the TP Act *or the* Sites Act*: J Thorpe, "Determining the Appropriate Role for Charge Bargaining in Part IV of the Trade Practices Act" (1996) 4 Comp & Cons LJ 69, at 72-74. Of course the arguments in favour of negotiated settlements have to take account of the fact that it is the Court that bears the ultimate responsibility for determining the appropriate penalty.*

56 Secondly, the sixth proposition drawn from the reasoning in NW Frozen Foods *does not mean, in our opinion, that the Court must commence its reasoning with the proposed penalty and limit itself to considering whether that penalty is within the permissible range. A Court may wish to take that approach. However, it is open to a Court, consistently with the reasoning in* NW Frozen Foods*, first to address the appropriate range of penalties independently of the parties'*

proposed figure and then, having made that judgment, determine whether the prepared penalty falls within the range.

57 *Thirdly, as has been noted, the appellant in* NW Frozen Foods *admitted contravening the* TP Act *and had reached agreement with the ACCC upon the facts to be put before the Court. There was no suggestion that the admissions or statement had been tailored or modified to reflect the difficulties faced by the ACCC in proving its case. The Full Court therefore acted on the basis of clear admissions and a detailed statement of agreed facts setting out how the contraventions had occurred. Accordingly, the decision is consistent with the views expressed by the New Zealand High Court in* Milk Corporation*. Those views are, with respect, correct in principle.*

58 *Fourthly, as the Full Court in* Australian Competition and Consumer Commission v Ithaca Ice Works Pty Ltd *[2001] FCA 1716; [2002] ATPR 41-851, has pointed out, the regulator should always explain to the Court the process of reasoning that justifies a discounted penalty. In that case, the ACCC and two contravenors produced an agreed statement of facts, supplemented by affidavit evidence, but they disagreed as to the appropriate penalty. The trial Judge had previously imposed agreed penalties on other offenders, which the Full Court apparently thought were somewhat low (at 44,543 [51]), and had taken these penalties into account in determining the appropriate penalties to be imposed on the two remaining contravenors. The Full Court made the following observations (at 44,549 [56]):*

> "[w]here the Commission proposes to the Court an agreed penalty which is calculated taking into account a substantial discount from what would otherwise be considered the appropriate penalty so as to reflect a degree of co-operation, it would be desirable that the Commission disclose the process by which the discounted penalty has been arrived at. In particular, it would be of assistance to the Court, particularly where there are other proceedings pending, to hear submissions on the range of appropriate penalties and the discount which it is proposed should be allowed to take into account the level of co-operation afforded by the offender. Had that been done in the present case, the learned primary judge would have been able to form a view as to the appropriate range of penalty

absent co-operation and have then been in the position to calculate an appropriate discount to take into account the exceptional level of co-operation afforded by QIS *[one of the offenders]*. It is only in this way that a comparison could properly be made between the penalty payable where the offender had offered a high level of co-operation and the penalty payable where the level of co-operation was of a lesser magnitude."

59 *These observations are consistent with the approach in* NW Frozen Foods*. The Full Court in* Ithaca Ice *was plainly aware of the reasoning in* NW Frozen Foods*, since it considered the factors discussed in that case as relevant to the quantum of penalty. It follows that a court considering an "agreed" penalty is entitled to expect the regulator to explain the basis on which a discount from the otherwise appropriate penalty has been calculated having regard to the contravenor's co-operation and, for that matter, other relevant factors. (For endorsement of this approach, see Australian Law Reform Commission*, Principled Regulation: Federal Civil and Administrative Remedies in Australia *(ALRC 95, 2002), pars 30.81 ff.)*

60 *Fifthly, there is nothing in* NW Frozen Foods *that is inconsistent with any of the following propositions:*

(i) The Court, if it considers that the evidence or information before it is inadequate to form a view as to whether the proposed penalty is appropriate, may request the parties to provide additional evidence or information or verify the information provided. If they do not provide the information or verification requested, the Court may well not be satisfied that the proposed penalty is within the range.

(ii) If the absence of a contradictor inhibits the Court in the performance of its duties under s 76 of the TP Act*, s 13 of the* Sites Act*, or similar legislation, it may seek the assistance of an* amicus curiae *or of an individual or body prepared to act as an intervenor under* FCR*, O 6 r 17.*

(iii) If the Court is disposed not to impose the penalty proposed by the parties, it may be appropriate, depending on the circumstances, for each of them to be given the opportunity to withdraw consent to the

proposed orders and for the matter to proceed as a contested hearing.

Approach to determining penalty

130. The proper approach to determining penalty in cases such as this is as follows. The first step for the court is to identify each separate contravention involved.

131. Where there are multiple contraventions, the second step is to consider whether any of the various contraventions constituted a single course of conduct, such that multiple breaches should be treated as a single breach.

132. The third step is for the court to consider the extent, if any, to which two or more contraventions have common elements. A person should not be penalised more than once for the same conduct. The penalty imposed by the court should be an appropriate response to the contravenor's conduct.[1] This is a separate process from the application of the totality principle.[2]

133. The fourth step is for the court to consider the appropriate penalty for each breach, treating multiple breaches arising from a course of conduct as a single breach, and taking into account any common elements shared by the various breaches.

134. The fifth step is for the court to apply the totality principle. This requires the court to consider the aggregate penalty overall, and determine whether it is an appropriate response to the conduct which resulted in the breaches.[3] The court in this step makes an "instinctive synthesis".[4]

135. A convenient checklist of the factors that the court might consider in determining penalty include the matters that were identified by Mowbray FM

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[1] *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).
[2] *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)
[3] See *Kelly v Fitzpatrick* (2007) 166 IR 14 at [30] (Tracey J) (Kelly); *Ophthalmic*, supra at [23] (Gray J), [71] (Graham J) and [102] (Buchanan J).
[4] *Ophthalmic*, supra at [27] (Gray J) and [55] and [78] (Graham J).

in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 at [26]-[59] and adopted by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14; [2007] FCA 1080 at [14]. That list is as follows, (with paragraph letters inserted):

> *(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.*
>
> *(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.*
>
> *(m) The need for specific and general deterrence.*

136. The court must of course be mindful of the caution expressed by Buchanan J in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560; (2008) 246 ALR 35; [2008] FCAFC 8 at [91] as follows:

> *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. There is no suggestion in the present case that the learned magistrate made any relevant error in her identification of the matters which she should consider in fixing penalties.

137. The court will consider the circumstances of the case under the various headings suggested by Mowbray FM, and then consider whether any other matters are relevant.

138. There was no cross examination of any witness, so I accept all of the affidavit evidence. Where there is a conflict, I accept the more recent evidence.

Step 1: identifying the breaches

139. As stated above, the first respondent breached:

a) s.45 of the *Fair Work Act 2009* in that it failed to pay the employee the required minimum rate of pay pursuant to cl.19 of the Modern Award between 26 January 2012 and 9 August 2012;

b) s.45 of the *Fair Work Act 2009* in that it failed to pay the employee the required minimum rate of pay pursuant to cl.A.2.5 of the Modern Award between 10 August 2012 and 11 November 2012;

c) s.45 of the *Fair Work Act 2009* in that it failed to pay the employee the appropriate overtime rates in accordance with cl.31.2(a) of the Modern Award during the period between 26 January 2012 and 11 November 2012 (the relevant period);

d) s.45 of the *Fair Work Act 2009* in that it failed to pay the employee the correct penalty rate for time worked between 7:00 a.m. and 6:00 p.m. on a Saturday in accordance with cl.A.6.4 of the Modern Award in the relevant period;

e) s.45 of the *Fair Work Act 2009* in that it failed to pay the employee the correct penalty rate for time worked between 7:00 a.m. and 6:00 p.m. on a Saturday in accordance with cl.A.7 of the Modern Award in the relevant period;

f) s.45 of the *Fair Work Act 2009* in that it failed to pay the employee the correct penalty rate of 100% of the ordinary rate of pay for all time worked on a Sunday in accordance with cl.31.2(c) of the Modern Award in the relevant period;

g) s.45 of the *Fair Work Act 2009* in that it failed to pay the employee at the correct rate of double time and a half for all work performed on a public holiday in accordance with cl.35.3 of the Modern Award in the relevant period;

h) s.45 of the *Fair Work Act 2009* in that it failed to pay the employee, in addition to her ordinary minimum wage, a loading of 17.5% during her periods of annual leave taken in the relevant period, in accordance with cl.33.3 of the Modern Award; and

i) s.44 of the *Fair Work Act 2009* (by reference to s.90(2) of the *Fair Work Act 2009*) in that it failed to pay the employee, at the time that her employment ended, the amount that would have been payable to the employee had the employee taken the balance of her accrued annual leave,

and the second and third respondents were involved in those breaches.

Step 2: single course of conduct

140. On one view, each time that the first respondent underpaid the employee, it committed a separate breach. However, subject to the paragraph below, the parties have agreed, and I accept, that each type of breach as listed above was a single course of conduct and should be treated as a single breach.

Step 3: grouped breaches

141. In addition, the parties have agreed, and I accept, that breaches d, e and f should be treated as a single grouped breach, because they all arose from the same mistake, being the use of the incorrect base rate of pay to calculate weekend penalty rates.

Step 4: the appropriate penalty for the breaches

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

142. In its submissions on penalty, the applicant said that the contraventions arose because:

> *a. the First Respondent did not progress the Employee from a second year apprentice to a third year apprentice as at 26 January 2012; and*
>
> *b. the First Respondent did not correctly classify the Employee as a Hair and Beauty employee – Level 1 in Schedule B of the Modern Award as at 10 August 2012.*

143. The parties agreed in oral submissions that the employee's rate of pay had to increase every 12 months regardless of whether she had progressed in her TAFE course (transcript pages 12 to 13). The second respondent said in his affidavit sworn on 6 May 2014 that the employee had been paid in accordance with her competence rather than her year level. The respondents acknowledged that was wrong, but maintained that the employee had not met her TAFE requirements and had not reached the appropriate level of competence. She was eventually dismissed.

144. There were multiple breaches during the period 26 January 2012 until 11 November 2012, a period of over nine months. The breaches involved failing to pay the employee the stipulated minimum wages. Minimum wages are designed to be a safety net for employees and establish a level playing field for employers.

The circumstances in which that conduct took place

145. The parties disputed whether the employee was a vulnerable employee. She was 21 years old at the time of the breaches. There is no indication that she had any disability, impediment or language difficulties.

She was an apprentice who was dependent on her employer for the completion of her apprenticeship.

146. The Fair Work Ombudsman submitted that the employee was vulnerable purely because she was an apprentice. The authority cited for that proposition was *Fair Work Ombudsman v Humidifresh Industries Pty Ltd* [2012] FMCA 954 at [17] and *Fair Work Ombudsman v Fed Up Deli & Catering Pty Ltd (in liquidation) (ACN 118 143 972)* [2012] FMCA 738 at [46]. Neither of those cases indicates that a person is a vulnerable employee solely by reason of being an apprentice.

147. In my view, the combination of the applicant being an apprentice and being 21 years of age is sufficient to make her a vulnerable employee. Although technically she was an adult, she was a young adult and in a vulnerable position because of her need to finish her apprenticeship. Apprenticeships are qualitatively different from other jobs.

148. The respondents submitted that the breaches arose because they misunderstood the pay structure for apprentices, and believed progression in pay rates was based on progression through the TAFE course that the employee was undertaking. They submitted that they did pay penalty rates, but calculated them incorrectly by using the wrong base rate.

149. The employee had previously complained to the Fair Work Ombudsman and the respondents about her pay not being progressed from the level applicable to first year apprentices to the level applicable to second year apprentices. The present issue relates to the first respondent not progressing the employee's pay from the level applicable to second year apprentices to the level applicable to third year apprentices.

150. The Fair Work Ombudsman submitted that, because of the earlier complaint, the respondents should have known of the requirement to increase the employee's rate of pay even if she had not progressed adequately through her TAFE course.

151. The second and third respondents said in their affidavits that they were aware of the employee's previous complaint. The second respondent said that he did not recall speaking directly to anyone from the office of the Fair Work Ombudsman about the previous complaint. He said that the employee's father had telephoned him and said that the employee

had been underpaid because she was a second year apprentice. The second respondent said he agreed to a settlement amount and the complaint was not taken any further. The third respondent said he was not involved in the employee's first complaint or in the resolution of that complaint.

152. The respondents submitted that, in these circumstances, the fact of the first complaint does not suggest that the respondents should have known of the employee's entitlements as a second, and subsequently, as a third year apprentice.

153. I do not accept that submission. On the second respondent's own evidence, the employee's father had told him that she had been underpaid because she was by then a second year apprentice. There is no reasonable explanation for the first respondent giving the employee a monetary settlement, apart from a recognition that she was entitled to be paid as a second year apprentice even if she had not progressed adequately through her TAFE course.

154. In any event, as this court said in *Fair Work Ombudsman v Hongyun Chinese Restaurant Pty Ltd (in liquidation)* [2013] FCCA 52 at [46]:

> *... it is incumbent upon employers to make all necessary enquiries to ascertain their employees' proper entitlements and pay their employees at the proper rates.*

155. Moreover, not all of the breaches concerned penalty rates or base rates. Two of the breaches concerned failure to pay leave loading and accrued annual leave payable on termination.

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

156. The respondents submitted that there was no loss or damage, because the employee was paid everything that was owing to her on 5 July 2013. The applicant submitted that the respondents' submission did not take account of the fact that the employee was out of pocket for about 10 months of the period that she was working for the first respondent and for about eight months afterwards. I accept that submission.

157. The applicant also claimed that the underpayment represented 60% of the employee's total entitlements during the relevant period. However, on closer examination, it was ascertained that the underpayment represented about 30% of the employee's total entitlement during the relevant period.

Whether there had been similar previous conduct by the respondent

158. The first respondent or associated companies had previously been the subject of 10 complaints to the Fair Work Ombudsman or its predecessor, as listed in the statement of agreed facts. The complaints were made in the six years between May 2006 and July 2012. They concerned various types of underpayments, including failure to pay correct penalties and overtime, failure to pay minimum wage entitlements and failure to pay accrued annual leave on termination. None of the complaints were brought to the court. All of the complaints were settled by agreement between the first respondent or associated company and the relevant employee. In all cases, the first respondent or associated company paid a sum of money that the complainant was prepared to accept. In six cases, (namely, Dickson, Park, Larizza, Garthwaite, Del Prete and Zolfaghari) the first respondent or associated company paid the total amount claimed.

Whether the breaches were properly distinct or arose out of the one course of conduct

159. This point has already been addressed.

The size of the business enterprise involved

160. The first respondent operates 17 salons and has about 100 employees. As such, it is not a small business, as that term is understood in the industrial context. At the time of the breaches, the second or third respondents processed pays. However, the first respondent has now engaged a book keeper.

161. The respondents submitted, but did not provide evidence, that at the time of the breaches, the first respondent did not have a dedicated human resources section. Even if that is true, there is ample authority

that such circumstances, which frequently occur in the case of small businesses, are no excuse for contraventions of laws providing for workplace entitlements. Tracey J said in *Kelly v Fitzpatrick* (2007) 166 IR 14; [2007] FCA 1080 at [28]:

> *No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees, rightly, have an expectation that this will occur. When it does not it will, normally, be necessary to mark the failure by imposing an appropriate monetary sanction. Such a sanction "must be imposed at a meaningful level": see* Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd *[2001] ATPR 41-815 at [13].*

162. Similarly, in *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412, the court said at [27]:

> *Employers must not be left under the impression that because of their size or financial difficulty that they are able to breach an award. Obligations by employers for adherence to industrial instruments arise regardless of their size. Such a factor should be of limited relevance to the Court's consideration of penalty. ...*

Whether or not the breaches were deliberate

163. The Fair Work Ombudsman accepts that the respondents did not deliberately break the law, but submitted that the decision to pay the employee based on competency rather than years of service was deliberate.

164. The respondents submit that the underpayments were the result of misinformation received from TAFE via Mr Camera, the manager of the Chadstone store where the employee worked. However, Mr Camera did not say in his affidavit that he was advised by TAFE that the employee could be paid based on her competency and he did not say that he relayed any such information to the second and third respondents. Nor do they claim in their affidavits that he did so.

165. I consider that the breaches were deliberate, as opposed to accidental or the result of a clerical error. As mentioned above, it is incumbent upon employers to accurately ascertain their employees' entitlements. Moreover, the respondents' submissions about misinformation do not

have any impact on the failure to pay the employee her leave loading and accrued annual leave on termination.

Whether senior management was involved in the breach

166. The second and third respondents were the two directors and shareholders of the first respondent. They were closely involved in the breaches.

Whether the party committing the breach has exhibited contrition, corrective action and co-operation with the authorities

167. The respondents have cooperated with the authorities by entering into a statement of agreed facts. The first respondent has paid the employee the total of the underpayments. The Fair Work Ombudsman acknowledged that the respondents had taken corrective action by engaging a qualified book keeper.

168. The second and third respondents said in their affidavits in reply that they regretted that the employee had been underpaid due to their error. That does not amount to a significant level of contrition. There is no evidence of any apology to the employee. The respondents persist in saying that they were misled. They have not acknowledged that it was incumbent upon them to ascertain the correct information.

169. The Fair Work Ombudsman conceded that the respondents should be given a 20% discount for their cooperation, corrective action and contrition, such as it is. That figure seems to me to be reasonable in the circumstances.

The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements

170. The first respondent in this case breached the employee's minimum entitlements. Amounts are set as minimums for good policy reasons. Employers must not breach those minimums.

The need for specific and general deterrence

171. 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. ...*

172. In relation to general deterrence, Lander J noted in *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543; (2007) 162 IR 444; [2007] FCAFC 65 at [93]:

> *... 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 like minded 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. ...*

173. Similarly, in *Community and Public Sector Union v Telstra Corporation Limited* (2001) 108 IR 228; [2001] FCA 1364 at 230-231, Finkelstein J said:

> *... even if there be no need for specific deterrence, there will be occasions when general deterrence must take priority, and in that case a penalty should be imposed to mark the law's disapproval of the conduct in question, and to act as a warning to others not to engage in similar conduct ....*

174. The large number of previous complaints against the first respondent and associated companies indicates that there is a need in this case for considerable specific deterrence. Clearly, there is a difference between a complaint and a finding of a court, and the prior history in this case

does not rise above the level of complaint. However, the manner in which those complaints were resolved is reasonably indicative of a practical acceptance by the respondents of wrongdoing.

175. The respondents submit that their engagement of a book keeper means there is little likelihood of similar breaches in the future. However, that is perhaps an overly optimistic assessment of the capacity for independent enquiry of a book keeper. There was certainly no evidence before the court of who this book keeper is, or what he or she will be doing to ensure compliance by the first respondent with its employment law obligations.

176. In relation to general deterrence, the affidavit of Kim Nhu Chum affirmed on 2 June 2014 states that the Fair Work Infoline received 456 complaints in the nine months between 1 July 2013 and 31 March 2014 relating to the hair and beauty industry. Of those complaints, 57% were from people under 25 years of age and 33% were from apprentices or trainees.

177. The respondents submitted, correctly, that in the absence of evidence about how many people are employed in the hair and beauty industry, it is not possible to gauge how prevalent complaints are in that industry. However, on any view, 456 complaints in nine months is a lot. It is probably also fair to say, in accordance with common human experience, that there were probably a great many more people who experienced underpayments or other difficulties at work than actually went to the trouble of lodging a complaint.

178. The respondents submitted that they should not be a scapegoat for non-compliance in the hair and beauty industry. However, rightly or wrongly, general deterrence is a well-established corner stone of both civil and criminal penalties. It seems to me that there is a considerable need in this case for general deterrence.

179. It is important that a message be sent, both to the respondents and the industry generally, that failure to pay workers their correct entitlements is not economic. The penalties should be set at a level that means that it does not pay to underpay workers. Employers should be discouraged from calculating that they will be able to get away with underpayments often enough for it to be worth their while financially.

Other issues

180. I do not consider that there are any other relevant issues in this case.

Step 4: the appropriate penalty

181. The parties agreed that the appropriate penalty range was as set out in the Fair Work Ombudsman's submissions as follows:

FIRST RESPONDENT							
	Contravention	**Nature of contravention**	**Amount of underpayment**	**Maximum penalty**	**Maximum Penalty Less 20% discount**	**Proposed penalty range (%)**	**Proposed penalty range ($) with 20% discount**
1.	**Clause 19 of Modern Award and section 45 of FW Act**	Minimum hourly rate	$4,418.71	$33,000	$26,400	65% - 80%	$17,160 - $21,120
2.	**Clause 31.2(a) of Modern Award**	Overtime Rates	$690.85	$33,000	$26,400	10% - 15%	$2,640 - $3,960
3.	**Clause A.6.4 and A.7 of Modern Award**	Saturday penalty rates	$879.93	$33,000	$26,400	10% - 15%	Grouped with Sunday contravention
4.	**Clause 31.2(c) of Modern Award**	Sunday penalty rates	$1,564.35	$33,000	$26,400	10% - 15%	$2,640 - $3,960
5.	**Clause 35.3 of Modern Award**	Public holiday penalty rates	$659.95	$33,000	$26,400	20% - 25%	$5,280 - $6,600
6.	**Section 90(2) and section 44 of FW Act**	Annual leave on termination	$135.20	$33,000	$26,400	25% - 40%	$6,600 - $10,560
7.	**Clause 33.3 of Modern Award**	Annual leave loading	$276.72	$33,000	$26,400	10% - 15%	$2,640 - $3,960
Sub-total				**$231,000**	**$184,800**		**$36,960 - $50,160**

SECOND AND THIRD RESPONDENTS							
	Contravention	**Nature of contravention**	**Amount of underpayment**	**Maximum penalty**	**Maximum Penalty Less 20% discount**	**Proposed penalty range (%)**	**Proposed penalty range ($) with 20% discount**
1.	**Clause 19 of Modern Award and section 45 of FW Act**	Minimum hourly rate	$4,418.71	$6,600	$5,280	65% - 80%	$3,432 - $4,224
2.	**Clause 31.2(a) of Modern Award**	Overtime Rates	$690.85	$6,600	$5,280	10% - 15%	$528 - $792
3.	**Clause A.6.4 and A.7 of Modern Award**	Saturday penalty rates	$879.93	$6,600	$5,280	10% - 15%	Grouped with Sunday contravention
4.	**Clause 31.2(c) of Modern Award**	Sunday penalty rates	$1,564.35	$6,600	$5,280	10% - 15%	$528 - $792
5.	**Clause 35.3 of Modern Award**	Public holiday penalty rates	$659.95	$6,600	$5,280	20% - 25%	$1,056 - $1,320
6.	**Section 90(2) and section 44 of FW Act**	Annual leave on termination	$135.20	$6,600	$5,280	25% - 40%	$1,320 - $2,112
7.	**Clause 33.3 of Modern Award**	Annual leave loading	$276.72	$6,600	$5,280	10% - 15%	$528 - $792
Sub-total				**$46,200**	**$36.960**		**$7,392 - $10,032**

182. The Fair Work Ombudsman submitted that penalties at the upper end of those ranges were appropriate. The respondents submitted that penalties at the lower end of those ranges were appropriate.

183. I accept that the range agreed to by the parties is appropriate in all the circumstances of this case. The Fair Work Ombudsman has suggested a 20% discount for cooperation and so on, and has then suggested penalties at certain percentages of what is left after the 20% discount.

184. I consider that the appropriate penalties are at the top of those ranges. For the reasons discussed above, it seems to me that there is a real need in this case for both specific and general deterrence. The breaches were not accidental. Senior management were closely involved in the breaches. The respondents persisted in seeking to excuse their behaviour with weak evidence about being misinformed. They do not appear to have accepted that it was their responsibility to ascertain the correct information. The employee concerned was vulnerable. She may not have been a good worker. However, while she remained employed, the first respondent was obliged to pay her the correct entitlements.

Step 5: the totality principle

185. In relation to the check that is required by the totality principle, I consider that the aggregate penalties indicated above are appropriate for the whole of the contravening conduct engaged in by the respondents.

186. There will be orders accordingly.

I certify that the preceding one hundred and eighty-six (186) paragraphs are a true copy of the reasons for judgment of Judge Riley

Associate:

Date: 22 October 2014