FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v DALADONTICS (VIC) PTY LTD *[2014] FCCA 2571*

Catchwords:
INDUSTRIAL LAW – Determination of penalty – undefended – default judgment – established contraventions of Respondent of s.716(5) of the *Fair Work Act 2009* (Cth) - pecuniary penalties imposed pursuant to s.546(1) of the Fair Work Act.

Legislation:
Fair Work Act 2009, ss.546(1), 546(3), 687, 701

Cases cited:
Kelly & Fitzpatrick (2007) 166 IR 14
Mason v Harrington Corporation Proprietary Limited, trading as Pangaea Restaurant & Bar [2007] FMCA 7

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	DALADONTICS (VIC) PTY LTD
File Number:	MLG 2299 of 2013
Judgment of:	Judge Hartnett
Hearing date:	31 October 2014
Delivered at:	Melbourne
Delivered on:	7 November 2014

REPRESENTATION

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

ORDERS

(1) Pursuant to s.546(1) of the *Fair Work Act 2009* (Cth) a pecuniary penalty of $38,250 is to be paid by the Respondent in respect of the contraventions declared in order 1 of the Orders made 30 April 2014.

(2) Pursuant to s.546(3)(a) of the *Fair Work Act 2009* (Cth) the pecuniary penalty ordered by the Court in order 1 herein be paid into the Consolidated Revenue Fund of the Commonwealth within 28 days of the date of these Orders.

(3) The Applicant has liberty to apply on seven days' notice in the event that order 2 herein is not complied with.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE

MLG 2299 of 2013

FAIR WORK OMBUDSMAN
Applicant

And

DALADONTICS (VIC) PTY LTD
Respondent

REASONS FOR JUDGMENT

As Corrected

1. Before the Court is a hearing as to penalty consequent upon orders made by the Court on 30 April 2014.

2. The declarations and Orders made by the Court on 30 April 2014 were as follows:-

> ***"THE COURT DECLARES THAT:***
>
> *1. Upon the admissions which the Respondent is taken to have made, consequent upon default by the Respondent pursuant to rule 13.03A(2) of the Federal Circuit Court Rules 2001 (Cth) ('the FCC Rules'), the Court declares that:-*
>
> > *a. the Respondent contravened s.716(5) of the Fair Work Act 2009 (Cth) ('the FW Act') by:-*
> >
> > > *i. failing to comply with a Compliance Notice dated 15 October 2013 and requiring the Respondent to pay Ms Huynh Xuan Thao Tran ('Ms Tran') the amount of $5,405.09 (gross) within 14 days; and*

ii. failing to comply with a Compliance Notice dated 15 October 2013 and requiring the Respondent to pay Mr John Iepema ('Mr Iepema') the amount of $3,940.80 (gross) within 14 days.

THE COURT ORDERS ON AN UNDEFENDED BASIS THAT:

2. Pursuant to s.545(2) of the FW Act, the Respondent pay:-

a. Ms Tran the amount of $5,405.09 (gross); and

b. Mr Iepema the amount of $3,940.80 (gross);

within 28 days of the date of this Order.

3. Pursuant to s.547 of the FW Act, the Respondent pay interest on the sums referred to in order 2 above.

4. Pursuant to s.559(1) of the FW Act that, in the event the Respondent is unable to locate Ms Tran or Mr Iepema, the Respondent pay the amounts due to Ms Tran or Mr Iepema under these Orders into the Consolidated Revenue of the Commonwealth, within a further seven days.

5. The Applicant is to file and serve any evidence and submissions on which it seeks to rely in respect of penalty on or before 30 September 2014.

6. The Respondent is to file and serve any evidence and submissions on which it seeks to rely in respect of penalty on or before 17 October 2014.

7. The Applicant is to file and serve any evidence and submissions in reply on or before 24 October 2014.

8. The matter be adjourned to 31 October 2014 at 10am with respect to the Applicant's claim for penalties to be imposed upon the Respondent.

9. The parties have liberty to apply.

10. There is leave to the Applicant to amend paragraphs 14 and 23(b) of the Statement of Claim filed 20 December 2013 such that instead of reading "$3,940.90" they will read "$3,940.80".

3. The Fair Work Ombudsman ('FWO') sought a total penalty of $38,250 to be imposed against the Respondent company for its failure to

comply with two compliance notices. The calculation of the proposed penalties is as set out in "annexure A" of the FWO's penalty submissions filed 2 October 2014 and served upon the Respondent company. Those penalties set out the provisions contravened, the maximum penalty applicable, the percentage of penalty sought by the Applicant and the range of penalty sought.

4. In a minute of proposed orders put before the Court this day, the Applicant did not presume to insert a pecuniary penalty in the amount sought by it of $38,250, but rather sought that, pursuant to s.546(1) of the *Fair Work Act 2009* (Cth) ('FW Act') pecuniary penalties be imposed on the Respondent company in respect of the contraventions declared in paragraph 1 of the Court's Orders on 30 April 2014.

5. The penalty sought by the Applicant in respect of the Respondent company's failure to comply with a Compliance Notice with respect to Mr Iepema is 80 per cent of the maximum and thus an amount of $20,400. The penalty sought by the Applicant in respect of the Respondent company's failure to comply with a Compliance Notice with respect to Ms Tran is 70 per cent of the maximum and thus an amount of $17,850, making a total penalty sought of $38, 250.

6. The Applicant relies upon the following documents and evidence contained therein in the proceedings:-

   a) Application filed 20 December 2013;

   b) Statement of Claim filed 20 December 2013;

   c) Affidavit of Stephen Marriott affirmed 11 April 2014;

   d) Affidavit of Caitlin Baillie affirmed 29 April 2014; and

   e) Affidavit of Kerryn Shacklock affirmed 30 September 2014.

7. The Respondent company failed to answer the call on the hearing of the matter and failed to appear. The Respondent company has not communicated with the Applicant in respect of this litigation with the Applicant throughout the entirety of the litigation. The Respondent company has put no material before the Court. The penalty hearing

proceeded without any input by way of submissions or evidence from the Respondent company.

History

8. The Respondent company carried on and continues to carry on a business specialising in orthodontic services in Collins Street in Melbourne. This business first commenced operations in 1987. Mr John Ivan Parra and Ms Pauline Parra are the directors of the Respondent company. At all relevant times, Mr Parra was also the secretary of the Respondent company. Mr and Mrs Parra were and are responsible for ensuring that the Respondent company complied with its obligations under the FW Act.

9. The underlying contraventions are the Manufacturing and Associated Industries and Occupations Award 2010 and the National Employment Standards under the FW Act

10. Ms Tran made a complaint to the FWO on or about 10 May 2013 alleging non-payment of wages. Mr Iepema made a complaint to the FWO on 16 July 2013 alleging irregular payment of wages and no payment between 9 May 2013 and 3 July 2013.

11. The FWO conducted an investigation into the complaints of Ms Tran and Mr Iepema. That investigation involved extensive contacts with the Respondent company, including numerous phone calls to Mr and Mrs Parra to discuss the matter, attempted phone calls and some emails, prior to an attendance (on 23 July 2013) by Fair Work Investigator ('FWI') Shields and FWI Shacklock upon the Respondent company's business address to speak with Mr Parra. They sought also to meet with Mrs Parra.

12. Further phone calls and correspondence from the Applicant followed, together with a further visit to the business premises of the Respondent company and the residential address of Mr and Mrs Parra on 24 July 2013. A Notice to Produce issued on 24 July 2013 and thereafter correspondence to Mr and Mrs Parra as to the failure of the Respondent company to comply with the Notice to Produce, and the offer of an interview with Mr and Mrs Parra to discuss their alleged contravention of Commonwealth workplace laws. No response was

received by Mr and Mrs Parra concerning the Notice to Produce or the offers of interview by FWI Shacklock. The Applicant then conducted an analysis of records as provided by the employees and as set out in paragraphs 26 to 30 of the Affidavit of FWI Shacklock affirmed 30 September 2014.

13. As a result of the FWO investigation, FWI Shacklock formed a belief that the Respondent company had contravened the Manufacturing and Associated Industries and Occupations Award 2010 and the National Employment Standards under the FW Act, in respect of the complaints made by Ms Tran and Mr Iepema, by failing to pay them (a) minimum wages and (b) annual leave and annual leave loading.

14. On 15 October 2013, FWI Shacklock attended the business premises of the Respondent company and issued two compliance notices; one in respect of Ms Tran, and one in respect of Mr Iepema. The Compliance Notice in respect of Ms Tran required rectification of unpaid wages and annual leave entitlements in the amount of $5,405.09 gross. The Compliance Notice in respect of Mr Iepema required rectification of unpaid wages in the amount of $3,940.90 gross.

15. The Respondent company did not comply with the compliance notices by the time specified in those notices. On 28 April 2014, Ms Tran informed FWI Sanders that she had been paid all of her monies. The monies received by Ms Tran were in the sum of $3,200. No rectification has been made to Mr Iepema of any amount and nor has he received any communication from the Respondent company or anyone on its behalf.

16. The issuing of compliance notices to the Respondent company by a FWI sought rectification of underpayments by the Respondent company without it being further subjected to, in addition, civil remedy proceedings. Unfortunately, the Respondent company chose not to comply with the notices and court proceedings became inevitable. On 13 December 2013, a pre-litigation letter was sent by the Applicant to the Respondent company at its registered address of Unit 41, Level 4, 15 Collins Street Melbourne. That letter advised the Respondent company that the Applicant intended to commence legal proceedings against the Respondent company in respect of failure to comply with two compliance notices. On 20 December 2013, these proceedings

were commenced. As set out in the Affidavit of Mr Stephen Marriott affirmed 11 April 2014, following the institution of proceedings, the Applicant made many attempts to contact and communicate with the Respondent company through its directors, Mr and Mrs Parra, but to no avail.

17. The letters from the Applicant went unanswered; emails were not replied to by either Mr or Mrs Parra; and Mr Parra was not available to take any phone calls or return any phone calls from the Applicant's lawyers. At the time of the affirmation of Mr Marriott's Affidavit in April 2014, the Applicant had not had any contact at all from the Respondent company or anyone on its behalf, including Mr Parra. The Respondent company had not filed a response, or notice of appearance, and had otherwise not participated in these proceedings. The Affidavit of Ms Caitlin Baillie affirmed 29 April 2014 further sets out the numerous attempts made by the Applicant to contact and communicate with the Respondent company and discuss these proceedings.

18. That lack of response continued and included the penalty hearing conducted on 31 October 2014.

Consideration

19. The FWO is appointed by the Governor-General in written instrument under s.687 of the FW Act and is a FWI under s.701 of the FW Act. In respect of the contraventions declared by the Court on 30 April 2014 and pursuant to s.716(5) of the FW Act, the Court has power to impose a penalty under s.546 of the FW Act. The maximum penalty for a corporation such as the Respondent company is 150 penalty units. Section 12 of the FW Act provides that: -

> *"penalty unit" has the meaning given by section 4AA of the Crimes Act 1914."*

20. At the time the Respondent company failed to comply with the compliance notices, being 29 October 2013, s.12 of the FW Act defined "penalty unit" to be $170. The maximum penalty that can be imposed in respect of each contravention in this proceeding is $25,500 (a total of $51,000). The Respondent company failed to comply with two separate compliance notices related to two different employees and to different entitlements due to be paid to each of those two employees.

21. In *Kelly & Fitzpatrick*[1] at paragraph 14, Tracey J adopted the summary of factors relevant to the imposition of a penalty as stated by Mowbray FM in *Mason v Harrington Corporation Proprietary Limited, trading as Pangaea Restaurant & Bar*[2] as follows:-

> *"…*
>
> *• The nature and extent of the conduct which led to the breaches.*
>
> *• The circumstances in which that conduct took place.*
>
> *• The nature and extent of any loss or damage sustained as a result of the breaches.*
>
> *• Whether there had been similar previous conduct by the respondent.*
>
> *• Whether the breaches were properly distinct or arose out of the one course of conduct.*
>
> *• The size of the business enterprise involved.*
>
> *• Whether or not the breaches were deliberate.*
>
> *• Whether senior management was involved in the breaches.*
>
> *• Whether the party committing the breach had exhibited contrition.*
>
> *• Whether the party committing the breach had taken corrective action.*
>
> *• Whether the party committing the breach had cooperated with the enforcement authorities.*
>
> *• The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and*
>
> *• The need for specific and general deterrence.*
>
> *…"*

22. There is no doubt that the contraventions in this matter represent a systematic unwillingness and failure by the Respondent company to

[1] (2007) 166 IR 14.
[2] [2007] FMCA 7.

comply with notices and correspondence issued by the Applicant, as submitted by counsel for the Applicant. It is particularly concerning to the Court that despite the orders made by the Court on 30 April 2014, Mr Iepema remains unpaid by the Respondent company and Ms Tran remains unpaid as to an interest sum. The Court acknowledges that there has been some rectification in the payment made to Ms Tran.

23. The failure by the Respondent company to comply with the compliance notices is seen by the Court in the context of the numerous efforts made by the Applicant to assist the Respondent company with the investigation into the two complaints, and specifically, to avoid the need for litigation. In the period between 13 June 2013 and 15 October 2013, as deposed to by FWI Shacklock in her Affidavit affirmed 30 September 2014, paragraphs 10 to 33, the FWO made no less than five site visits and 15 phone calls to the Respondent company.

24. The Respondent company had ample opportunity to work with the Applicant prior to the issuing of these proceedings, post the issuing of the proceedings and up to and including the penalty hearing. It has failed to do so.

25. The contravention of these important provisions for a minimum rate of pay and annual leave accrued and annual leave loading to be paid on termination, in particular, to those who are vulnerable and in low income roles, undermines the workplace relations regime as a whole and demonstrates, on the part of the Respondent company, a disregard for its legal obligations as submitted by the Applicant.

26. The total underpayment to Ms Tran of $5,405.09 is a significant underpayment, given that she was employed for a period of some 11 weeks. Mr Iepema remains unpaid.

27. The Respondent company has not put before the Court any evidence as to its size and financial circumstances. The Court notes that it is a company with two directors but otherwise, cannot take into account in mitigation, that the Respondent company is of a size and/or has financial circumstances such that the penalty sought by the Applicant would be oppressive to it, nor does any financial difficulty that the Respondent company may have been experiencing at the relevant time

assist the Respondent company, were that to be argued, in the circumstances of this case.

28. The Respondent company however puts no argument before the Court. The Applicant submits that regardless of whether the Respondent company is a small business or not, it is required to comply with the requirements of the FW Act. The Applicant submits that the law should mark its disapproval of the conduct in question and set an appropriate penalty which serves as a warning to others. The FWO submits, and the Court accepts, that the failure to comply with the compliance notices were, at best, done by the Respondent company with reckless disregard for its obligations.

29. The Respondent company has not accepted responsibility for its conduct or expressed any contrition in respect of the contraventions to either of its former employees. Whilst it has rectified the underpayment to Ms Tran following the institution of proceedings, it has failed to do so in respect of Mr Iepema and there is no evidence before the Court that Mr Iepema will ever receive his outstanding entitlements. The Respondent company has not complied with orders of this Court made on 30 April 2014, requiring it to pay Mr Iepema the amount of his underpayment with interest, and its attitude to the proceedings has been one of non-involvement and non-cooperation with the Applicant.

30. There is clearly a need for both general and specific deterrence in the circumstances of this case. The need for specific deterrence is high as the Respondent company continues to operate. There is no evidence that it has taken any steps to prevent further contraventions by it and its non-compliance with the earlier Court orders continues to this day. The need for general deterrence is also an important factor in these proceedings. The penalties imposed by the Court should be imposed at a meaningful level.

31. The Court is required to fix an appropriate penalty for each course of conduct and then look to the aggregate penalty to determine whether it is an appropriate response to the conduct which led to the

contraventions, and is not an oppressive or crushing response. At paragraph 30 of *Kelly & Fitzpatrick*[3] Tracey J said as follows:-

> *"Another factor which must be taken into account in the fixing of pecuniary penalties for multiple breaches of statutory stipulations is the totality principle. This principle is designed to ensure that the aggregate of the penalties imposed is not such as to be oppressive or crushing. Different views have been expressed as to the manner in which the principle ought properly to be applied. On one view the starting point should be the determination of an appropriate total penalty. That figure would then be divided by the number of breaches to produce a penalty for each breach: see* CPSU v Telstra Corporation Ltd *(2001) 108 IR 228 at 230[7]. The orthodox position, however, which I consider should be adopted, is that the starting point is the determination of appropriate penalties for each contravention of the statutory norm. The aggregate figure is then considered with a view to ensuring that it is an appropriate response to the conduct which led to the breaches: see* Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd *(1997) 145 ALR 36 at 53. See also* Ponzio v B & P Caelli Constructions Pty Ltd *[2007] FCAFC 65 at [145] per Jessup J. This approach was recently described, in the criminal context from which the totality principle is derived, as "the orthodox, but not necessarily immutable, practice" adopted by sentencing courts: see* Johnson v R *(2004) 205 ALR 346 at 356[26] per Gummow, Callinan & Heydon JJ."*

32. In light of the totality of the above, the Applicant submits to the Court that it should impose a penalty of 80 per cent for the failure of the Respondent company to comply with the Compliance Notice issued in respect of Mr Iepema and 70 per cent in respect of the failure to comply with the Compliance Notice issued in respect of Ms Tran. The lesser percentage amount in respect of Ms Tran takes into account the rectification made to her.

[3] (2007) 166 IR 14.

33. The Court shall accede to the submissions of the Applicant in respect of penalty and finds that a penalty amount in the total sum of $38,250 is appropriate in the circumstances of this contravening by the Respondent company.

I certify that the preceding thirty-three (33) paragraphs are a true copy of the reasons for judgment of Judge Hartnett

Associate:

Date: 7 November 2014

Corrections

1. Paragraph 26 has been amended by deleting the amount "$9,345.99" and inserting the amount "$5,405.09".

2. References to "Mr Ipema" have been amended to read "Mr Iepema" at paragraphs 5, 10, 11, 13-15, 22, 29 and 32.