

FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v OHMEDIA MELBOURNE PTY LTD & ANOR [2015] FCCA 50

Catchwords:

INDUSTRIAL LAW – Application for imposition of pecuniary penalties – grouping of contraventions.

Legislation:

Fair Work Act 2009, ss.45, 535(1), 545(2)(b), 546(1), 546(3)(a), 547(2), 557, 557(1), 557(2), 559(1)

Fair Work Regulations 2009, regs.3.32, 3.33

General Retail Industry Award 2010

Cases cited:

Fair Work Ombudsman v Kensington Management Services Pty Ltd (No.2) [2012] FMCA 586

Fair Work Ombudsman v Orwill Pty Ltd [2011] FMCA 730

Fair Work Ombudsman v Praglowski [2010] FMCA 621

Fair Work Ombudsman v Promoting U Pty Ltd [2012] FMCA 58

Fair Work Ombudsman v Sanada Investments Pty Ltd [2010] FMCA 401

Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd (2012) FMCA 258

Fair Work Ombudsman v VS Investment Group Pty Ltd (in Liq) [2013] FCCA 208

Kelly v Fitzpatrick (2007) 166 IR 14 [2007] FCA 1080

McIver v Healey [2008] FCA 425

Workplace Ombudsman v Saya Cleaning Pty Ltd [2009] FMCA 38

Yardley v Betts (1979) 22 SASR 108

Applicant:

FAIR WORK OMBUDSMAN

First Respondent:

OHMEDIA MELBOURNE PTY LTD

Second respondent:

WEN ZHOU

File Number:

BRG 40 of 2013

Judgment of:

Judge Jarrett

Hearing date:

17 November 2014

Date of Last Submission: 17 November 2014

Delivered at: Brisbane

Delivered on: 23 January 2015

REPRESENTATION

Solicitor for the Applicant: Mr Fraser

Solicitors for the Applicant: Fair Work Ombudsman

The second respondent appeared for himself and for the first respondent

ORDERS

THE COURT DECLARES THAT:

- (1) The First Respondent contravened s.45 of the *Fair Work Act 2009* by virtue of failing to pay each of the employees identified in Schedule A to these orders:
 - (a) their ordinary base rate as prescribed by the *General Retail Industry Award 2010*;
 - (b) their casual loading prescribed for the hours worked on Mondays to Fridays, as prescribed by the *General Retail Industry Award 2010*;
 - (c) the applicable rate for all hours worked on a Saturday, as prescribed by the *General Retail Industry Award 2010*;
 - (d) the applicable rate for all hours worked on a Sunday, as prescribed by the *General Retail Industry Award 2010*;
- (2) The First Respondent contravened s.45 of the *Fair Work Act 2009* by failing to provide Rosario Carrasco, Xuan Trang Dang and Zoreh Zarezadehmehrizi, with a minimum shift of three hours, as prescribed by the *General Retail Industry Award 2010*; and

- (3) The First Respondent contravened s.535(1) of the *Fair Work Act 2009* by failing to keep records for each of the forty-five employees identified in Schedule A, as prescribed by regulations 3.32 and 3.33 of the *Fair Work Regulations 2009*.

THE COURT ORDERS THAT:

- (4) Pursuant to s.545(2)(b) of the *Fair Work Act 2009*, within thirty days of the date of these orders, the First Respondent pay:
- (a) Franziska Albrecht \$1,502.84;
 - (b) Alaa Al-fatlawee \$2,491.38;
 - (c) Georgina Arrowsmith \$1,432.46;
 - (d) Carissa Bakker \$1,159.91;
 - (e) Ramprasad Baskaran \$1,793.76;
 - (f) Katrin Becher \$1,729.60;
 - (g) Lisa Berry \$1,245.05;
 - (h) Maria Canaveral \$1,137.77;
 - (i) Chun (Ambrosia) Chen \$1,323.16;
 - (j) Tsang Yuet (Leo) Chun \$1,770.11;
 - (k) Evelyn Dalgliesh \$2,392.27;
 - (l) Maria Roger Fernando \$1,465.58;
 - (m) Laurent Fisson \$1,717.25;
 - (n) Shona Gleeson \$335.34;
 - (o) Helene Herbert \$1,631.17;
 - (p) Hsin-I (Jill) Hsieh \$945.99;
 - (q) Jing Huang \$934.53;
 - (r) Abdulkhader Khajipeta \$1,462.95;

- (s) Xiaonan (Roger) Li \$1,447.92;
- (t) Wei (May) Liao \$123.02;
- (u) Miriam Loeffler \$2,747.47;
- (v) Matthew Magnus \$1,462.95;
- (w) Jordi Martinez \$1,097.12;
- (x) Julia Mende \$753.89;
- (y) Sandra Ottenberg \$1,453.03;
- (z) Sung Nak Park \$774.94;
- (aa) Neha Patel \$1,662.24;
- (bb) Audrey Quere \$1,137.77;
- (cc) Ken Tan \$815.58;
- (dd) David Tsatsa \$1,160.21;
- (ee) Man Wie (Irene) Tu \$763.08;
- (ff) Kakin (Sprewell) Wong \$2,028.60;
- (gg) Zoreh Zarezadehmehrizi \$2,280.51;
- (hh) Qian (Coco) Zhang \$2,646.31;
- (ii) Fang Fang \$1,595.18;
- (jj) Ya Li (Isabella) Han \$788.53;
- (kk) Mingxuan (Susie) Sui \$1,232.30;
- (ll) Ha Hong (Harmony) Vuong \$189.99;
- (mm) Yunifei (Fergie) Yang \$1,553.09;
- (nn) Zhen Liu \$204.55;
- (oo) Yiwei (Lesley) Sun \$311.29;

(pp) Xiaowei Zhao \$31.50;

(qq) Qiong Ying (Annabelle) Zhou \$867.38;

(rr) Rosario Carrasco \$1,261.46; and

(ss) Xuan Trang Dang \$2,284.39.

- (5) Pursuant to s.547(2) of the *Fair Work Act 2009* the First Respondent pay interest on the amounts ordered to be paid in order 4 hereof.
- (6) Pursuant to s.546(1) of the *Fair Work Act 2009* the First Respondent pay a pecuniary penalty of \$85,000 in respect of the contraventions the subject of the declarations above.
- (7) Pursuant to s.546(1) of the *Fair Work Act 2009* the Second Respondent pay a pecuniary penalty of \$15,000 in respect of his involvement in the First Respondent's contraventions the subject of the declarations set out above.
- (8) Pursuant to s.546(3)(a) of the *Fair Work Act 2009* all pecuniary penalties imposed be paid to the Commonwealth within 30 days of the date of these orders;
- (9) Pursuant to s.559(1) of the *Fair Work Act 2009* any unpaid monies and interest owing to any person specified in order 4 hereof who cannot be located, or who has not been paid within thirty days of the date of this order be paid into the Consolidated Revenue Fund of the Commonwealth.

**FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT BRISBANE**

BRG 40 of 2013

FAIR WORK OMBUDSMAN
Applicant

And

OHMEDIA MELBOURNE PTY LTD
First Respondent

WEN ZHOU
Second Respondent

REASONS FOR JUDGMENT

1. By this application, the Fair Work Ombudsman alleges that the first respondent has breached certain obligations cast upon it by the *Fair Work Act 2009* (Cth) and is thereby liable to the imposition of pecuniary penalties for those breaches. The applicant alleges that the second respondent was involved in the first respondent's contraventions and is also liable to the imposition of pecuniary penalties for those breaches.
2. The respondents admit the allegations against them. The Court's task is to determine the penalties that ought to be imposed upon each respondent for those breaches.
3. I have been assisted in this matter by the extensive written submissions filed on behalf of the applicant. The second respondent presented a short written submission on the day of the hearing on behalf of both the first and second respondents.

Background

4. The parties have filed a statement of agreed facts. What follows by way of background is drawn largely from that statement. None of what follows is controversial.
5. The first respondent carried on an advertising, exhibition and cultural exchange business in Melbourne, Victoria. Part of its business involved an arrangement with a third party, Lycamobile Pty Ltd, to recruit and provide staff to Lycamobile to promote the products of Lycamobile.
6. The second respondent is, and was at all material times, one of three directors of the first respondent. He was one of three secretaries and a shareholder of the first respondent. The parties agree that he was actively in control of the day-to-day management, direction and control of the first respondent's operations. He was principally responsible for:
 - a) establishing the arrangement with Lycamobile by which the first respondent recruited and provided staff to Lycamobile;
 - b) invoicing Lycamobile for the work performed by the first respondent under the arrangement;
 - c) engaging employees of the first respondent that were then provided to Lycamobile pursuant to the first respondent's arrangements with Lycamobile;
 - d) determining the terms and conditions of, and the wage rates payable to, those employees;
 - e) organising the payment of wages to the first respondent's employees.
7. The second respondent supervised the day to day operations of the first respondent's employees that were engaged to provide labour and services to Lycamobile in Melbourne. The first respondent also employed people to perform work in Adelaide, Sydney and Brisbane under the arrangements with Lycamobile and the second respondent was responsible for engaging others who recruited and supervised, on behalf of the first respondent, those employees. For that purpose the

second respondent specified the terms and conditions under which those others were to engage employees, on behalf of the first respondent, to perform work in Adelaide, Sydney and Brisbane under the arrangements with Lycamobile.

8. The second respondent was responsible for ensuring that the first respondent complied with its obligations to employees under the Fair Work Act.
9. Between 14 March, 2011 and 7 April, 2011 the first respondent employed 45 employees on a casual basis to perform work for Lycamobile pursuant to the first respondent's arrangements with Lycamobile. Most of the employees worked in Queensland. Some worked in South Australia, some in Victoria and two worked in New South Wales.
10. The employees duties, when performing work for Lycamobile, included:
 - a) setting up stalls outside of supermarkets and promoting the sale of Lycamobile prepaid SIM cards and top up vouchers;
 - b) distributing pamphlet material;
 - c) providing information and advice to potential customers; and
 - d) directing any interested customers to the service desk inside the supermarket to purchase Lycamobile products.
11. The parties agree that the *General Retail Industry Award 2010* applied to the employment of each of the employees. Each of the employees was classified as 'Retail Employee Level 1' for the purposes of the Award. Thirty-six of the employees were adult employees for the purposes of the Award in that they were over 21 years of age. The remaining nine employees were under 21 years of age and so were junior employees for the purpose of the Award.
12. The first respondent was required to pay the employees in accordance with the Award. The pay rates applicable to each employee were derived from the Award and the industrial instruments drawn upon by the Award. Different rates applied to adult and junior employees.

Different rates also applied to employees who worked in different States. The relevant pay rates for the employees in each of the States in which they worked were ultimately derived from:

- a) for each of the Queensland based employees, the *Retail Industry Award – State 2004*;
 - b) for each of the Victorian based employees, the *Shop, Distributive and Allied Employee’s Association – Victoria Shops Interim Award 2000*;
 - c) for each of the South Australian based employees, the *Retail Industry (South Australia) Award*; and
 - d) for each of the New South Wales based employees, the *Shop employees (State Award)*.
13. Particulars of each employee, the rates of pay to which they were entitled, the amounts they were in fact paid and some other matters are set out in Schedule A to these reasons.

The contraventions

14. The contraventions to which the first and second respondents each admit fall into three broad categories. The first category is contraventions of s.45 of the Fair Work Act by failing to pay prescribed remuneration and in particular:
- a) the prescribed hourly base rate of pay;
 - b) the prescribed casual leave loading;
 - c) the prescribed hourly rate of pay for work performed on Saturdays; and
 - d) the prescribed hourly rate of pay for work performed on Sundays.
15. The second category is contraventions of s.45 of the Fair Work Act by failing to provide a minimum shift of three hours to three of the employees.
16. Particulars of the amounts that the first respondent was required to pay the employees and the amounts that it did in fact pay to them are set

out in Schedule A to these reasons. The parties agree that, in total, the first respondent underpaid the employees the amount of \$59,145.43. The underpayment has not been rectified by the first or second respondents.

17. The third category is contraventions of s.535(1) of the Fair Work Act in that the first respondent failed to keep employee records as prescribed by regs. 3.32 and 3.33 of the *Fair Work Regulations 2009*, namely:

- a) for the purposes of reg. 3.32, records of:
 - i) the name of the employer and the names of the employees;
 - ii) the Australian Business Number of the employer;
 - iii) the date on which the employees' employment began;
 - iv) whether the employee's employment was full-time or part-time; and
 - v) whether the employee's employment was permanent, temporary or casual.
- b) for the purposes of reg. 3.33, records of:
 - i) the rate of remuneration paid to the employees;
 - ii) the gross and net amounts paid to the employees;
 - iii) any deductions made from the gross amount paid to the employees;
 - iv) the hours worked by the employees; and
 - v) the details of the employee's entitlements to loadings and penalty rates.

18. Having broadly described the contraventions, it is necessary to identify each of the separate contraventions involved. Each breach of an obligation is a separate contravention. The breaches in the present application are numerous and have not been quantified. They span across 45 employees but the time over which the breaches occurred was short – only a period of 3 weeks or so. However, each time an

employee was not paid the correct rate of pay or loading, there was a separate contravention. In addition, there were at least 90 contraventions of the record keeping regulations.

19. However, it is necessary to consider whether a number of the contraventions might be dealt with as one pursuant to s.557 of the Fair Work Act. That section provides:

557 Course of conduct

(1) For the purposes of this Part, 2 or more contraventions of a civil remedy provision referred to in subsection (2) are, subject to subsection (3), taken to constitute a single contravention if:

(a) the contraventions are committed by the same person; and

(b) the contraventions arose out of a course of conduct by the person.

20. Sections 45 and 535(1) of the Fair Work Act are referred to in s.557(2) of the Fair Work Act and so, s.557(1) has application.
21. The applicant submits that the first respondent is entitled to the benefit of s.557(1) in relation to the repeated breaches of the same provision in respect of each employee. For instance, the multiple contraventions of the base rate provision arising from the failure to pay an employee's base rate of pay should be treated as a single contravention in respect of that employee. I accept that submission. Section s.557(1) of the Act permits the aggregation of multiple contraventions of s.45 of the Act where those contraventions arise from a breach of the same term of a relevant award. Thus, the contraventions in this case that arise from the failure to pay the correct base rate of pay in respect of a particular employee, for example, might be aggregated. But they should not be aggregated with contraventions of s.45 of the Act that arise from the failure to observe another term of the award, such as that providing for casual loading.
22. The applicant contends that "it is appropriate to apply the statutory course of conduct principle to the multiple breaches of each provision in respect of the employees." I am not sure what that means. If it means that I should treat as one, multiple breaches of the same award

provision committed in respect of the same employee, I accept that submission as I have set out above. If it means that I should treat as one, multiple breaches of the same award provision committed in respect of more than one employee, I reject that submission. In *Fair Work Ombudsman v VS Investment Group Pty Ltd (in Liq)* [2013] FCCA 208, at [19], I reasoned:

Moreover, in my view s.557(1) does not require the Court to treat the alleged contraventions of s.45 of the Fair Work Act (by failure to pay basic rates of pay for example) in respect of multiple employees, as one contravention. The failure to pay a basic rate of pay to one employee over time might properly be seen as a course of conduct. However, the failure to pay a basic rate of pay to a number of employees should not, in my view, be seen as a “course of conduct” for the purposes of s.557(1) unless it is the result of a single decision made by the employer. The failures to pay basic rates of pay to a number of different employees are several and separate courses of conduct in respect of each employee which is dependent upon the decision made in respect of that employee. So much seems to be accepted by the approach of Marshall J in McIver v Healey (above).

23. Here there is no evidence before me as to whether the contraventions in respect of all of the employees were the result of a single decision by the first respondent which applied across the employment of all the relevant employees (unlike for example, *Fair Work Ombudsman v Pragowski* [2010] FMCA 621). In that respect, in the absence of an agreement between the parties about the matter, there must be an evidential onus upon the respondents to place before the Court evidence which would permit the Court to find that the multiple contraventions were the result of a single decision which was implemented in respect of the employment of each employee. In the absence of evidence to that effect, it is difficult to infer that the relevant contraventions arose out of a course of conduct by the first respondent.
24. There is no such evidence in this case and the issue is not answered by the facts that have been agreed between the parties.
25. The record keeping contraventions might be conveniently grouped into two groups pursuant to s.557(1) of the Act. In respect of each of the regulations that has been contravened, it is easily inferred that the multiple contraventions are the result of a course of conduct on the part

of the first respondent – a single decision taken about how it would conduct its business. The multiple contraventions of each of the relevant regulations should be taken to constitute a single contravention of each regulation.

26. On my reckoning there are 278 separate contraventions having applied s.577(1) of the Act. The particulars are set out in Schedule B to these reasons.
27. However, aside from the operation of s.557(1) of the Act, the Court may, as a matter of discretion, further group together contraventions (not otherwise to be treated as one pursuant to s.557(1) of the Act) to the extent that two or more contraventions have common elements or overlap in some material way. Where that is so, those common elements might be taken into account when considering an appropriate penalty in all the circumstances for each contravention or course of conduct. It is open to the Court to group separate contraventions together where those various contraventions may be said to overlap with each other and involve potential punishment of the respondents for the same or similar conduct: *Fair Work Ombudsman v Kensington Management Services Pty Ltd (No.2)* [2012] FMCA 586 at [16] – [19].
28. Where contraventions are grouped together in such a way, the multiple contraventions remain (unlike a grouping under s.557(1) where the contraventions are treated as one contravention alone), but different penalties might be fixed for different contraventions within the group so that any overlap or commonality is taken into account. Accordingly, a penalty might be imposed for one contravention and no penalty or different penalties (usually lesser in amount) imposed for the others. The approach of Marshall J in *McIver v Healey* [2008] FCA 425 is an illustration of the application of this principle.
29. The applicant submits that based on the particular circumstances of this case, the following contraventions have sufficient similarity or overlap in the factual circumstances to be appropriately grouped together and accordingly, the Court should consider imposing penalties for the following seven contraventions:

- a) contraventions of s.45 of the Fair Work Act by virtue of failing to pay adult employees their ordinary base rate as prescribed by clause 17 of the Award;
- b) contraventions of s.45 of the Fair Work Act by virtue of failing to pay junior employees their ordinary base rate as prescribed by clause 18 of the Award;
- c) contraventions of s.45 of the Fair Work Act by virtue of failing to pay casual loading for week day work as prescribed by clause 13.2 of the Award;
- d) contraventions of s.45 of the Fair Work Act by virtue of failing to pay Saturday rates (both base rate and casual loading) as prescribed by clause 13.2 of the Award;
- e) contraventions of s.45 of the Fair Work Act by virtue of failing to pay Sunday rates (both base rate and casual loading) as prescribed by 13.2 and 29.4(c) of the Award;
- f) contraventions of s.45 by virtue of failing to provide Rosario Carrasco, Xuan Trang Dang and Zoreh Zarezadehmehrizi with a minimum shift of three hours as prescribed by clause 13.4 of the Award; and
- g) contraventions of s.535(1) of the Fair Work Act by failing to keep records for each of the employees as prescribed by regs. 3.32 and 3.33 of the Regulations.

30. In my view, however, it is inappropriate to group the wage-related contraventions in that way because:

- a) the obligations to pay basic rates of pay, casual loading and weekend rates are all separate and distinct obligations arising under separate and distinction statutory or legislative provisions which relate to each individual employee;
- b) there is no evidence that establishes that the terms and conditions of the employment of each of the employees was the same and was the result of a single decision by the first respondent to

employ all of the employees on the same terms and conditions;
and

- c) whilst the contraventions might be further aggregated into groups, that further grouping is for the purpose of fixing an appropriate penalty in respect of each of the contraventions. The further aggregation is not undertaken for the purpose of defining each contravention with which the Court has to deal.

31. There is no evidence from either respondent explaining the basis upon which each of the employees were paid or the way in which they were paid. There is no explanation as to why the correct rates and loadings were not paid. The evidence is simply silent on those issues. It is difficult, therefore, to say whether there is any commonality or overlap in respect of the wage-related contraventions, both in relation to each individual employee (base rates, casual loadings and penalty rates) and as between multiple employees. It is difficult to conclude that there is some overlap in culpability when it is difficult to define the nature and the extent of the culpable behaviour.

Consideration of Penalties

32. The maximum penalties that may be imposed by the Court upon the first respondent (as a body corporate) and the second respondent (as an individual) for each contravention of an applicable provision or civil remedy provision are as follows:

- a) s.45 of the Fair Work Act:
 - i) 300 penalty units (or \$33,000) for each contravention by the first respondent;
 - ii) 60 penalty units (or \$6,600) for each contravention by the second respondent; and
- b) s.535 of the Fair Work Act:
 - i) 150 penalty units (or \$16,500) for each contravention by the first respondent;
 - ii) 30 penalty units (or \$3,300) for each contravention by the second respondent.

33. The admitted contraventions represent a serious failure to afford the relevant 45 employees their minimum entitlements provided for in the Award. Thirty-seven of the employees were not, and have not been, paid at all. I accept that the purpose of the legislation is to provide a safety net which ensures adequate minimum entitlements to employees. The legislation is also designed to provide an even playing field for all employers with regard to employment costs. Contraventions of these fundamental entitlements undermine the workplace relations regime as a whole and demonstrate a disregard for the respondents' statutory obligations.
34. As the applicant points out, in a competitive service industry such as retail, where labour costs are a significant portion of a business's operating expenses, those businesses that do not comply with workplace laws gain a competitive advantage over those employers who do meet their lawful obligations.
35. Whilst the first respondent's conduct in contravention of the Act spanned a period of just under 3.5 weeks, the conduct was nonetheless significant because:
- a) it represented the entire period of each of the employees' employment with the first respondent;
 - b) it concerned 45 employees and was plainly not a one-off episode that involved only one or a small number of employees;
 - c) the conduct has resulted in a significant, combined underpayment across the employees concerned.
36. The applicant submits that the employees "were vulnerable by reason of their age and background". The majority of the employees were foreign citizens working in Australia pursuant to a variety of visas. Nine of the employees were under the age of 21 at the time of the contraventions. The work was lowly paid and largely unskilled.
37. I accept that young age and ethnic or cultural background may go towards establishing that an employee is potentially vulnerable to improper practices by their employer. I accept that the cases demonstrate that those characteristics mean that a particular employee concerned might be of a vulnerable class: see, for example, *Fair Work*

Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd (2012) FMCA 258, *Fair Work Ombudsman v Orwill Pty Ltd* (2011) FMCA 730; *Fair Work Ombudsman v Sanada Investments Pty Ltd* [2010] FMCA 401 at [60].

38. It is important that potentially vulnerable employees have their entitlements met. But no more or less so than employees who might not be similarly categorised. Employers should understand very clearly that employees, whether within a “vulnerable” class or otherwise, are not available for exploitation and are entitled to all of the protections offered by the Fair Work Act.
39. Whether an employee or group of employees is within a “vulnerable class” is not to the point. What is to the point is whether an employer has in fact exploited a particular employee’s vulnerability. That enquiry will be answered by any direct evidence that bears upon that issue and any inferences reasonably available from the evidence otherwise before the Court. The nature and extent of the contraventions admitted, or found proved, will be relevant. For example, a minor contravention or one that is technical in nature in respect of a “vulnerable employee” that occurs by oversight or the conscientious implementation of qualified advice might not lead to the conclusion that the employer has exploited the vulnerabilities of a particular employee or group of employees. Membership of a class of “vulnerable employees” is not particularly relevant in those circumstances.
40. On the other hand, the facts may show that the employer has treated an employee, or a particular group of employees, in such a way that it is easy to conclude that the employer’s conduct was designed to exploit real or perceived vulnerabilities of those employees. The conclusion on this issue, however, must depend upon the evidence and the inferences that might be drawn from the evidence, and not upon the mere categorisation of an employee as within a “vulnerable” class.
41. Here there is no direct evidence that would support the submission that the first respondent has exploited the vulnerabilities of the junior employees, or those who were present in this country on a visa. Indeed, the inference to be drawn from what little evidence there is, is that such vulnerabilities were not exploited because it seems that even

employees who were not on visas and who were not junior employees suffered in the same way as those employees who did fall into those categories.

42. The underpayments in this case total \$59,145.43. I accept the applicant's submission that the underpayment to the 45 employees is significant. Thirty-seven of the employees have not been paid at all for the work they have performed. Of the employees who were paid, the underpayments represent a significant proportion of the wages to which they were entitled. In that respect, the examples highlighted by the applicant are instructive:

- a) Fang Fang was underpaid \$1,595.18 representing 72.37% of his entitlement;
- b) Ha Hong (Harmony) Wong was underpaid \$189.99 representing 68.34% of her entitlement;
- c) Yunifei Yan was underpaid \$1,553.09 representing 65.78% of her entitlement; and
- d) Mingxuan Sui was underpaid \$1,232.30 representing 65.02% of her entitlement.

43. All of the employees were deprived and remain deprived of the amounts to which they were legitimately entitled. I accept that they are significant amounts to forgo over such short periods of time. The underpayments have remained outstanding for over 3 and half years. The first respondent has received a benefit from the underpayments. The first respondent has not rectified the underpayments despite being issued with a contravention letter by the applicant on 7 December, 2011.

44. The applicant also submits that the failure to keep records is significant. I agree. The failure to keep adequate records undermines the applicant's ability to investigate and ensure compliance with minimum standards. As the applicant points out, in *Fair Work Ombudsman v Orwill Pty Ltd* [2011] FMCA 730 at [21] the Court found:

[21] The consequences of contravening conduct may include loss of, or damage to, the relevant statutory objective. That is, "conduct ... [which] undermines the utility and effectiveness of a fundamental object" of, in this case, the WR Act and WR

Regulations. In this case, the failure to make and maintain various records and to issue payslips undermines the utility and effectiveness of the purpose of Part 19 of the WR Regulations which provides for “the inspection of records by workplace inspectors”. The statutory purpose of the WR Regulations ties in with the purposes for which the powers of workplace inspectors can be exercised under s.169 of the WR Act, those purposes including determination of whether various industrial instruments and minimum standards and entitlements, and the requirements of the WR Act and WR Regulations themselves, are being observed. Manifestly, failure to make and maintain records in relation to employee entitlements, undermines the utility and effectiveness of workplace inspectors, and their ability to determine whether or not there has been compliance with minimum standards and industrial instruments, and the provision of effective means for investigation and enforcement of employee entitlements.

45. The first respondent has not previously been the subject of proceedings brought by the applicant or its predecessors for contraventions of workplace laws.
46. The second respondent presented a short written submission on behalf of the first respondent and himself. It seems to suggest that the first respondent’s business is, or was, of relatively modest size. Even if that is so, it is of little moment. In *Kelly v Fitzpatrick* (2007) 166 IR 14 [2007] FCA 1080 at [28] Tracy J stated:

No less than large corporate employees, 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 make 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].

47. Further, in *Workplace Ombudsman v Saya Cleaning Pty Ltd* [2009] FMCA 38 at [27] to [28] Simpson FM (as his Honour then was) said:

27. In Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412 at paras 27 to 29 it was said:

“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 a Court's consideration of penalty."

28. *Notwithstanding financial hardship that an employer may be experiencing, in Lynch v Buckley Sawmills Pty Ltd [1984] FCA 306; (1984) 3 FCR 503, 508, Keely J said:*

"In this connection it is important that the respondent – and other employers bound by the award or by other awards under the Act – understand the importance of complying with an award and it follows that any decision taken by them which is regarded as affecting their obligation to comply with particular provisions of the award or the award generally should only be taken after careful consideration. They must not be left under the impression that in times of financial difficulty they can breach an award made under the Act either with impunity or in the belief that no substantial penalty will be imposed in respect of a breach found by a court to have been committed."

48. Moreover, the second respondent's submissions suggest that his financial position and that of the first respondent is not very good. Regardless, the Court should mark its disapproval of the first respondent's conduct and set a significant penalty which serves as a warning to others. As the applicant points out, in *Fair Work Ombudsman v Promoting U Pty Ltd* [2012] FMCA 58, the Court said:

... the Respondents cannot hope to have their conduct in effect exonerated by the Court merely because they are impecunious. Parliament has set significant penalties for the sort of contraventions that the Respondents engaged in and I do not think it is appropriate for the totality principle to operate simply to ensure that penalties are imposed in suitably insignificant amounts to meet the Respondents' capacity to pay.

Should the respondents file evidence regarding their financial position the Applicant will have regard to such material and reserves its rights, where appropriate, to make a brief further submission as to this issue. It is noted that the impact of financial position, where proved by evidence, to the extent that it has bearing on the reason for the contraventions or the respondents' present capacity to meet a particular penalty, must be appropriately balanced with the other factors relevant to the determination of penalty.

49. The contraventions here were deliberate in the sense that the second respondent's submission lead to the conclusion that he was at least

reckless in relation to the responsibilities of the first respondent as an employer. He submitted that he arrived in Australia in early 2008. At that time, because of his age (he does not say what it was) and “lacking knowledge of relevant laws and regulations” he was “lacking of awareness in regards to business operations and legal risks for the company”. He claims that he and the first respondent were “manipulated and deceived by LYCA MOBILE such a mature and large companies, which led to all sorts of errors committed after.”

50. Three things can be said about these submissions namely:
- a) a lack of knowledge of the relevant workplace laws is no excuse;
 - b) given the admitted lack of knowledge on the part of the second respondent, it behoved him to seek out and obtain relevant advice about the first respondent’s obligations – there is no evidence that he did so; and
 - c) there is no evidence at all upon which the Court might form the conclusion that the first or second respondents were manipulated or deceived by Lycamobile.
51. I do not think that the respondents’ actions were deliberate in the sense that the second respondent set out to intentionally breach the Act. But employing others in the circumstances described by the second respondent in his written submissions without even a cursory understanding of the relevant “laws and regulations” was fraught and demanded that the respondents take some steps to inform themselves about their obligations. There is no evidence that they sought out that advice. That was clearly reckless.
52. There is no evidence to suggest that the failure to pay the employees their correct entitlements was a mistake or was inadvertent. The failure to remedy the underpayments is consistent with the proposition that the contraventions were at the very least reckless.
53. The first and second respondents have expressed no genuine remorse or contrition. There has been no suggestion from either about how the underpayments might be addressed.

54. The second respondent was at the relevant times a director and secretary of the first respondent and made the decisions regarding the day to day running of the first respondent's business. The second respondent was involved in each of the contraventions by the first respondent. There is no evidence that the contraventions were attributable to any other person or agent.
55. The applicant acknowledges that the first respondent and second respondent have demonstrated co-operation to enable this matter to proceed by way of a statement of agreed facts. The respondents admitted the contraventions after the proceedings were commenced.
56. The applicant submits that ensuring compliance with minimum standards is a very important consideration in this case. I accept that submission. One of the objects of the Fair Work Act is the maintenance of an effective safety net of minimum terms and conditions, and effective enforcement mechanisms. It is imperative for the Court to impose a penalty that reinforces the fundamental importance of compliance with the safety net of entitlements specified by the National Employment Standards and the general protection provisions of the Fair Work Act.
57. It is well-established that the need for specific and general deterrence is a factor that is relevant to the imposition of a penalty under the Fair Work Act. In cases such as the present, general deterrence is of particular importance. An appropriate penalty will act as a deterrent to others who might be likely to offend: *Yardley v Betts* (1979) 22 SASR 108.
58. The applicant submits that the conduct in this matter is objectively serious and has not been mitigated through rectification, contrition or other ameliorating circumstances. The penalties in this case should be imposed on a meaningful level so as to deter other employers from committing similar contraventions. The first and second respondent, and employers more generally, should be left in no doubt that failing to comply with minimum obligations will not be tolerated by the Court. I accept those submissions.

Penalty

59. There is considerable overlap amongst the nature and extent of the contraventions between the employees. Each of the employees have been denied them basic rates of pay and casual loading. Those rates vary depending upon when the relevant work was performed (weekend work attracts different rates and loadings). But the offending conduct across the employees bears the same character and culpability.
60. In those circumstances, I intend to impose penalties upon the first and second respondents for each of the contraventions of the wage-related conditions (save for the minimum shift hours contraventions) for a representative employee and to impose no further penalty in respect of all other employees. The representative I have chosen is Franziska Albrecht, an employee based in Queensland. There are five separate contraventions in respect of Ms Albrecht:
- a) failure to pay her the base rate to which she was entitled for weekday work;
 - b) failure to pay her casual loading upon the base rate to which she was entitled for weekday work;
 - c) failure to pay her the base rate to which she was entitled for Saturday work;
 - d) failure to pay her the penalty rate to which she was entitled for Saturday work;
 - e) failure to pay her casual loading upon the base rate to which she was entitled for Saturday work;
 - f) failure to pay her the base rate to which she was entitled for Sunday work; and
 - g) failure to pay her the penalty rate to which she was entitled for Sunday work.
61. In my view, a penalty fixed at half of the maximum penalty is appropriate to take into account:
- a) The seriousness of the first respondent's conduct;

- b) The first respondent's lack of contrition and remorse;
 - c) The first respondent's failure to remedy the underpayments;
 - d) The failure of the first respondent to adequately explain the contraventions; and
 - e) The cooperation afforded by the first respondent with the applicant and the investigation.
62. The total penalty for these contraventions is \$115,000.
63. Similarly, a penalty needs to be imposed for the contraventions of the provision relating to minimum shift requirements. Adopting a similar approach, I assess a penalty of half of the maximum available penalty for a further contravention of s.45 of the Act that relates to the failure of the first respondent to meet the minimum shift requirements for Zoreh Zarezadehmehrizi, an employee based in Queensland. That is an additional penalty of \$16,500. In respect of the other two employees in respect of whom similar contraventions were committed, I impose no further penalty.
64. In respect of the first respondent's contraventions of s.535(1) of the Act, I assess a further penalty of \$11,550 (or 35% of the maximum penalty that could be imposed). I have imposed a lesser percentage of penalty to take into account the fact that the first respondent did keep some records that related to the employees, although they did not sufficiently record all of the matters required by the Regulations. I assess one penalty in respect of the two contraventions.
65. The aggregate penalty is \$143,550.
66. There is no evidence before me about the financial position of either the first or second respondents. As I have said above, the second respondent's submissions tended to suggest that neither the first nor the second respondents are in a particularly sound financial position. In the absence of evidence, however, it is impossible to know.
67. It is important to avoid the imposition of a penalty at a level that would be likely to be crushing. That needs to be balanced, however, with the purposes discussed above for the imposition of a penalty.

68. In my view, and having regard to the above assessments, an aggregate penalty of \$85,000 for the first respondent is an appropriate response to the contraventions.
69. The second respondent was involved in the contraventions. In my view an adequate response to his involvement is to impose a penalty assessed in the same way as the penalties for the first respondent was assessed. That is to say, a penalty of 50% of the maximum in respect of eight contraventions (\$3,300), and a penalty 35% of the maximum in respect of the final contravention (\$2,310).
70. That is an aggregate penalty of \$25,410.00. Adopting the same approach to the penalty imposed upon the first respondent, the aggregate penalty should be reduced to \$15,000.
71. Accordingly, I make the orders set out at the commencement of these reasons.

I certify that the preceding seventy-one (71) paragraphs are a true copy of the reasons for judgment of Judge Jarrett

Associate:

Date: 23 January 2015

Schedule A

Employee	State	Age	Ordinary Base Rate	Ordinary Casual Loading	Min shift ordinary base rate	Min shift casual loading	Saturday Base Rate	Saturday Casual Loading	Saturday Penalty	Sunday Base Rate	Sunday Penalty	Total Entitlement	Total Paid	Total Under payment
Queensland based employees														
Albrecht, Franziska	QLD	19	\$705.25	\$165.03			\$295.95	\$69.25	\$5.92	\$188.91	\$72.54	\$1,502.84		\$1,502.84
Al-fatlawe, Alaa	QLD	Adult	\$1,468.90	\$343.33			\$387.13	\$90.48	\$7.74	\$140.03	\$53.77	\$2,491.38		\$2,491.38
Arrowsmith, Georgina	QLD	Adult	\$897.82	\$209.83			\$131.79	\$30.80	\$2.64	\$115.32	\$44.28	\$1,432.46		\$1,432.46
Bakker, Carlissa	QLD	18/19	\$646.78	\$151.35			\$177.31	\$41.49	\$3.55	\$100.75	\$38.69	\$1,159.91		\$1,159.91
Baskaram, Ramprasad	QLD	Adult	\$1,186.11	\$277.20			\$263.58	\$61.60	\$5.27			\$1,793.76		\$1,793.76
Becher, Katrin	QLD	19	\$882.61	\$206.53			\$302.25	\$70.73	\$6.04	\$188.91	\$72.54	\$1,729.60		\$1,729.60
Berry, Lisa	QLD	Adult	\$741.32	\$173.28			\$263.58	\$61.60	\$5.27			\$1,245.05		\$1,245.05
Canaveral, Maria	QLD	Adult	\$658.95	\$154.00			\$131.79	\$30.80	\$2.64	\$115.32	\$44.28	\$1,137.77		\$1,137.77
Chen, Chun (Ambrosia)	QLD	Adult	\$790.74	\$184.80			\$131.79	\$30.80	\$2.64	\$131.79	\$50.61	\$1,323.16		\$1,323.16
Chun, Tsang Yuet (Leo)	QLD	Adult	\$1,054.32	\$246.40			\$247.11	\$57.75	\$4.94	\$115.32	\$44.28	\$1,770.11		\$1,770.11
Dalglish, Evelyn	QLD	Adult	\$1,268.47	\$296.45			\$387.13	\$90.48	\$7.74	\$247.11	\$94.89	\$2,392.27		\$2,392.27
Fernando ,Maria Roger	QLD	Adult	\$790.74	\$184.80			\$263.58	\$61.60	\$5.27	\$115.32	\$44.28	\$1,465.58		\$1,465.58
Fisson, Laurent	QLD	Adult	\$1,140.80	\$266.65			\$247.11	\$57.75	\$4.94			\$1,717.25		\$1,717.25
Gleeson, Shona	QLD	Adult	\$271.82	\$63.53								\$335.34		\$335.34
Herbert, Helene	QLD	Adult	\$1,054.32	\$246.40			\$263.58	\$61.60	\$5.27			\$1,631.17		\$1,631.17
Hsieh, Hsin-I (Jill)	QLD	Adult	\$632.86	\$147.90			\$131.79	\$30.80	\$2.64			\$945.99		\$945.99

Employee	State	Age	Ordinary Base Rate	Ordinary Casual Loading	Min shift ordinary base rate	Min shift casual loading	Saturday Base Rate	Saturday Casual Loading	Saturday Penalty	Sunday Base Rate	Sunday Penalty	Total Entitlement	Total Paid	Total Under payment
Huang, Jing	QLD	Adult	\$494.21	\$115.50			\$131.79	\$30.80	\$2.64	\$115.32	\$44.28	\$934.53		\$934.53
Khajipeta, Abdulkhader	QLD	Adult	\$922.53	\$215.60			\$131.79	\$30.80	\$2.64	\$115.32	\$44.28	\$1,462.95		\$1,462.95
Li, Xiaonan (Roger)	QLD	Adult	\$922.53	\$215.60			\$247.11	\$57.75	\$4.94			\$1,447.92		\$1,447.92
Liao, Wei (May)	QLD	20	\$99.69	\$23.33								\$123.02		\$123.02
Loeffler, Miriam	QLD	Adult	\$1,581.47	\$369.63			\$362.42	\$84.70	\$7.25	\$247.11	\$94.89	\$2,747.47		\$2,747.47
Magnus, Matthew	QLD	Adult	\$922.53	\$215.60			\$131.79	\$30.80	\$2.64	\$115.32	\$44.28	\$1,462.95		\$1,462.95
Martínez, Jordi	QLD	Adult	\$626.00	\$146.30			\$131.79	\$30.80	\$2.64	\$115.32	\$44.28	\$1,097.12		\$1,097.12
Mende, Julia	QLD	19	\$406.15	\$95.04			\$100.75	\$23.58	\$2.01	\$91.30	\$35.06	\$753.89		\$753.89
Ottenburg, Sandra	QLD	20	\$1,018.30	\$238.28			\$156.66	\$36.66	\$3.13			\$1,453.03		\$1,453.03
Park, Sung Nak	QLD	Adult	\$494.21	\$115.50			\$131.79	\$30.80	\$2.64			\$774.94		\$774.94
Patel, Neha	QLD	20	\$875.88	\$204.96			\$227.87	\$53.32	\$4.56	\$213.63	\$82.03	\$1,662.24		\$1,662.24
Quere, Audrey	QLD	Adult	\$658.95	\$154.00			\$131.79	\$30.80	\$2.64	\$115.32	\$44.28	\$1,137.77		\$1,137.77
Tan, Ken	QLD	Adult	\$527.16	\$123.20			\$131.79	\$30.80	\$2.64			\$815.58		\$815.58
Tsatsa, David	QLD	Adult	\$395.37	\$92.40			\$263.58	\$61.60	\$5.27	\$247.11	\$94.89	\$1,160.21		\$1,160.21
Tu, Man Wie	QLD	Adult	\$484.60	\$113.25			\$131.79	\$30.80	\$2.64			\$763.08		\$763.08
Wong, Kakin	QLD	Adult	\$1,142.18	\$266.93			\$247.11	\$57.75	\$4.94	\$223.77	\$85.93	\$2,028.60		\$2,028.60
Zarezahehmehrzi Zoreh	QLD	Adult	\$1,322.02	\$308.96	\$28.82	\$6.74	\$362.42	\$84.70	\$7.25	\$115.32	\$44.28	\$2,280.51		\$2,280.51
Zhang, Qian	QLD	Adult	\$1,474.39	\$344.58			\$387.13	\$90.48	\$7.74	\$247.11	\$94.89	\$2,646.31		\$2,646.31
Victorian based employees														
Fang, Fang	VIC	Adult	\$1,235.53	\$308.88			\$247.11	\$61.78	\$4.94	\$247.11	\$98.84	\$2,204.18	\$609.00	\$1,595.18

Employee	State	Age	Ordinary Base Rate	Ordinary Casual Loading	Min shift ordinary base rate	Min shift casual loading	Saturday Base Rate	Saturday Casual Loading	Saturday Penalty	Sunday Base Rate	Sunday Penalty	Total Entitlement	Total Paid	Total Under payment
South Australian based employees														
Han, Ya Li (Isabella)	VIC	Adult	\$988.42	\$247.11								\$1,235.53	\$447.00	\$788.53
Sui, Mingxuan (Susie)	VIC	Adult	\$988.42	\$247.11			\$247.11	\$61.78	\$4.94	\$247.11	\$98.84	\$1,895.30	\$663.00	\$1,232.30
Vuong, Ha Hong (Harmony)	VIC	20	\$222.39	\$55.60								\$277.99	\$88.00	\$189.99
Yang, Yunifei	VIC	Adult	\$1,235.53	\$308.88			\$370.66	\$92.66	\$7.41	\$247.11	\$98.84	\$2,361.09	\$808.00	\$1,553.09
New South Wales based employees														
Liu, Zhen	SA	Adult	\$460.78	\$96.76								\$557.55	\$353.00	\$204.55
Sun, Yi Wei (Lesley)	SA	Adult	\$179.19	\$37.63			\$76.80	\$16.13	\$1.54			\$311.29		\$311.29
Zhao, Xiaowei	SA	Adult	\$221.86	\$46.59						\$85.33	\$30.72	\$384.50	\$353.00	\$31.50
Zhou, Qiong Ying (Annabelle)	SA	Adult	\$494.92	\$103.93			\$76.80	\$16.13	\$1.54	\$128.00	\$46.08	\$867.38		\$867.38
New South Wales based employees														
Carrasco, Rosario	NSW	Adult	\$1,499.11	\$254.85	\$32.94	\$5.60	\$96.10	\$16.34	\$1.92	\$74.13	\$23.72	\$2,004.71	\$743.25	\$1,261.46
Dang, Xuan Trang	NSW	20	\$1,282.47	\$218.02	\$29.66	\$5.04	\$308.88	\$52.51	\$6.18	\$289.11	\$92.52	\$2,284.39		\$2,284.39
			\$37,368.56	\$8,601.49	\$91.42	\$17.38	\$8,458.26	\$1,961.77	\$169.17	\$4,738.54	\$1,803.09	\$63,209.68	\$4,064.25	\$59,145.43

Schedule B – The Contraventions

Employee	Base rate	Casual Loading	Saturday Base Rate	Saturday Casual Loading	Saturday Penalty Rate	Sunday Base Rate	Sunday Penalty Rate	Minimum Hours	Total Contraventions per employee
Franziska Albrecht	✓	✓	✓	✓	✓	✓	✓		7
Alaa Al-fatlawee	✓	✓	✓	✓	✓	✓	✓		7
Georgina Arrowsmith	✓	✓	✓	✓	✓	✓	✓		7
Carissa Bakker	✓	✓	✓	✓	✓	✓	✓		7
Ramprasad Baskaran	✓	✓	✓	✓	✓				5
Katrin Becher	✓	✓	✓	✓	✓	✓	✓		7
Lisa Berry	✓	✓	✓	✓	✓				5
Maria Canaveral	✓	✓	✓	✓	✓	✓	✓		7
Chun (Ambrosia) Chen	✓	✓	✓	✓	✓	✓	✓		7
Tsang Yuet (Leo) Chun	✓	✓	✓	✓	✓	✓	✓		7
Evelyn Dalglish	✓	✓	✓	✓	✓	✓	✓		7
Maria Roger Fernando	✓	✓	✓	✓	✓	✓	✓		7
Laurent Fisson	✓	✓	✓	✓	✓				5
Shona Gleeson	✓	✓							2
Helene Herbert	✓	✓	✓	✓	✓				5
Hsin-I (Jill) Hsieh	✓	✓	✓	✓	✓				5
Jing Huang	✓	✓	✓	✓	✓	✓	✓		7
Abdulkhader Khajipeta	✓	✓	✓	✓	✓	✓	✓		7
Xiaonan (Roger) Li	✓	✓	✓	✓	✓				5
Wei (May) Liao	✓	✓							2
Miriam Loeffler	✓	✓	✓	✓	✓	✓	✓		7
Matthew Magnus	✓	✓	✓	✓	✓	✓	✓		7
Jordi Martinez	✓	✓	✓	✓	✓	✓	✓		7
Julia Mende	✓	✓	✓	✓	✓	✓	✓		7
Sandra Ottenberg	✓	✓	✓	✓	✓				5
Sung Nak Park	✓	✓	✓	✓	✓				5
Neha Patel	✓	✓	✓	✓	✓	✓	✓		7
Audrey Quere	✓	✓	✓	✓	✓	✓	✓		7
Ken Tan	✓	✓	✓	✓	✓				5
David Tsatsa	✓	✓	✓	✓	✓	✓	✓		7
Man Wie (Irene) Tu	✓	✓	✓	✓	✓				5
Kakin (Sprewell)	✓	✓	✓	✓	✓	✓	✓		7

Wong									
Zoreh Zarezadehmehrizi	√	√	√	√	√	√	√	√	8
Qian (Coco) Zhang	√	√	√	√	√	√	√		7
Fang Fang	√	√	√	√	√	√	√		7
Ya Li (Isabella) Han	√	√							2
Mingxuan (Susie) Sui	√	√	√	√	√	√	√		7
Ha Hong (Harmony) Vuong	√	√							2
Yunifei (Fergie) Yang	√	√	√	√	√	√	√		7
Zhen Liu	√	√	√	√	√	√	√		7
Yi Wei (Lesley) Sun	√	√	√	√	√				5
Xiaowei Zhao	√	√				√	√		4
Qiong Ying (Annabelle) Zhou	√	√	√	√	√	√	√		7
Rosario Carrasco	√	√	√	√	√	√	√	√	8
Xuan Trang Dang	√	√	√	√	√	√	√	√	8
Record Keeping Contraventions									2
Total Contraventions									275