FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v PRIMEAGE PTY LTD & ORS *[2015] FCCA 139*

Catchwords:
INDUSTRIAL LAW – Fair Work – Awarding penalties under the Fair Work Act 2009 – Consideration of factors relevant to the amount of penalty.

Legislation:
*Fair Work Act 200, ss.*535, 536, s.550(2)

Cases cited:
Mason v Harrington Corporation Pty Ltd (trading as Pangaea Restaurant and Bar) [2007] FMCA 7
Fair Work Ombudsman v Hongyun Chinese Restaurant Pty Ltd (In liquidation) [2013] FCCA 52
Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor [2012] FMCA 258
Fair Work Ombudsman v Orwill Pty Ltd and Ors [2011] FMCA 730
*Foure Mile Pty Ltd and Ano*r [2013] FCCA 682
Fair Work Ombudsman v Australian Shooting Academy Pty Ltd [2011] FCA 1064
Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union [2008] 171 FCR 357
Fair Work Ombudsman v Bento Kings Meadows [2013] FCCA 977

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	PRIMEAGE PTY LTD
Second Respondent:	TSINMAN FU
Third Respondent:	PING OSTROVSKIH
File Number:	MLG 385 of 2014
Judgment of:	Judge Riethmuller
Hearing date:	17 October 2014

Date of Last Submission:	17 October 2014
Delivered at:	Melbourne
Delivered on:	23 January 2015

REPRESENTATION

Counsel for the Applicant:	Ms Nicholas
Solicitors for the Applicant:	Office of the Fair Work Ombudsman
Counsel for the Respondents:	Mr Galbraith of Counsel
Solicitors for the Respondents:	Canaan Lawyers

THE COURT DECLARES THAT:

(1) The First Respondent breached:

(a) Section 45 of *Fair Work Act 2009*:

(i) by failing to pay 17 of the Employees his or her hourly base rate of pay for work performed on Mondays to Fridays, as prescribed by clause 17 and schedule A.3 of the Modern Award;

(ii) by failing to pay 7 of the Employees his or her junior hourly base rate of pay for work performed on Mondays to Fridays, as prescribed by clause 18 and schedule A.3 of the Modern Award;

(iii) by failing to pay 21 of the Employees his or her casual loading for work performed Monday to Fridays, as prescribed by clause 13.2 of the Modern Award;

(iv) by failing to pay 18 of the Employees his or her penalty rates for work performed on Saturdays, as prescribed by clause 25.5(b) and schedule A.7 of the Modern Award;

(v) by failing to pay 17 of the Employees his or her penalty rates for work performed on Sundays, as prescribed by clause 25.5(c) and schedule A.7 of the Modern Award;

(vi) by failing to pay 10 of the Employees his or her penalty rates for work performed on public holidays, as prescribed by clause 30.3 and schedule A.7 of the Modern Award;

(vii) by failing to provide minimum shifts to seven of the employees, as prescribed by clause 13.4 of the Modern Award;

(viii) by failing to pay a special clothing allowance to 22 of the Employees, as prescribed by clause 19.2 of the Modern Award;

(ix) by failing to provide meal breaks to the Employees, as prescribed by clause 27.1 of the Modern Award;

(b) Section 535(1) of *Fair Work Act 2009* by failing to keep records for each of the Employees, as prescribed by Fair Work Regulations 3.31, 3.32 and 3.33; and

(c) Section 536(1) of *Fair Work Act 2009* by failing to give each of the Employees a pay slip within one working day of payment.

(2) The Second Respondent and Third Respondent were involved in the breaches by the First Respondent in Order 1 herein, pursuant to section 550(1) of *Fair Work Act 2009*.

THE COURT ORDERS THAT:

(1) Pursuant to section 546(1) of the *Fair Work Act 2009*, the First Respondent pay into the Consolidated Revenue Fund of the Commonwealth an aggregate penalty of $80,000 for breaching the *Fair Work Act 2009.*

(2) Pursuant to section 546(1) of the *Fair Work Act 2009*, the Second Respondent pay into the Consolidated Revenue Fund of the Commonwealth an aggregate penalty of $17,500 for breaching the *Fair Work Act 2009.*

(3) Pursuant to section 546(1) of the *Fair Work Act 2009*, the Third Respondent pay into the Consolidated Revenue Fund of the

Commonwealth an aggregate penalty of $13,000 for breaching the *Fair Work Act 2009.*

(4) The First Respondent pay any superannuation entitlements not yet paid to its employees within 3 months of the date of these Orders.

(5) Payment of the pecuniary penalties referred in Orders 1 to 3 herein be made within sixth months of the date of these Orders.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE

MLG 385 of 2014

FAIR WORK OMBUDSMAN
Applicant

And

PRIMEAGE PTY LTD
First Respondent

TSINMAN FU
Second Respondent

PING OSTROVSKIH
Third Respondent

REASONS FOR JUDGMENT

1. The First Respondent in this matter carried on a café business trading as Gloria Jean's, Caulfield in Caulfield East in the State of Victoria. The Second and Third Respondents were the relevant directors and shareholders responsible for the day-to-day management, direction and control of the First Respondent.

2. The First Respondent admits that it had contravened the *Fair Work Act 2009* in a number of respects:

    a) Failing to pay 17 of the employees of the café the minimum rate for work performed Monday to Friday in accordance with cl.17, sch.8.3 of the modern award;

b) Failing to pay seven of the employees of the café their hourly base rate of pay in accordance with cl.18 of sch.8.3 of the modern award;

c) Failing to pay 21 of the employees of the café casual loading under the award;

d) Failing to pay 18 of the employees of the café penalty rates for work on Saturdays;

e) Failing to pay 18 of the employees of the café penalty rates for work on Sundays;

f) Failing to pay 10 of the employees of the café penalty rates for work performed on public holidays;

g) Failing to provide minimum shifts for seven of the employees of the café;

h) Failing to pay a special clothing allowance to 22 of the employees of the café;

i) Failing to provide meal breaks to the employees of the café as required by the award;

j) A breach of s.535(1) of the *Fair Work Act 2009* by failing to keep records for each of the employees of the café, as prescribed by the regulations; and

k) A breach of s.536 of the *Fair Work Act 2009* in that it had failed to give each of the employees of the café a payslip within one working day of payment during the relevant period.

3. Both Tsinman Fu and Ping Ostrovskih (the Second and Third Respondents) admit that they were involved in the company's contraventions within the meaning of s.550(2) of the *Fair Work Act 2009*.

4. The total underpayment to the employees during the relevant period (25 July 2011 to 28 April 2013) was $83,566.46. The amount of the underpayments varied from as little as $219.92 for one employee to as much as $17,103.76 for another employee. Significantly, the total

amount of the underpayments was $83,566.46, yet the total amount of actual payments to the relevant employees was only $82,297.24 for the period. On average the employees received less than half of their entitlements.

5. The totality of the underpayments has been rectified prior to the penalty hearing. Whilst not all superannuation contributions had been rectified, it was expected that they would have been rectified by October 2014. No application has been made to make further submissions with respect to this issue and it is therefore appropriate for me to proceed on the basis that superannuation payments have also been rectified.

6. The maximum penalties with respect to the underpayment contraventions are $33,000 for the First Respondent and $6,600 for each of the Second and Third Respondents. The maximum penalties with respect to the record keeping and payslip breaches are $16,500 for the First Respondent and $3,300 for each of the Second and Third Respondents.

7. Having regard to the principles with respect to grouping multiple contraventions that arise out of a single course of conduct, I accept the submissions that the contraventions relating to hourly base rates with respect to cls.17 and 18 of the award should be grouped as one group of contraventions and that the penalty rate contraventions relating to Saturday and Sunday should similarly be grouped. This reduces the groups of contraventions to a total of nine.

8. Thus, the maximum penalty applicable for the nine groups of admitted contraventions is $264,000 with respect to the First Respondent and $52,800 with respect to each of the Second and Third Respondents.

9. Whilst the factors that are relevant to the imposition of a penalty will vary from case to case, the list of relevant factors identified by Mowbray FM in *Mason v Harrington Corporation Pty Ltd (trading as Pangaea Restaurant and Bar)* [2007] FMCA 7 at 26 to 59 is a useful checklist. I note that it does not prescribe or restrict the matters to be taken into account in the exercise of the Court's discretion. In this case both parties have presented their submissions under the headings contained within that checklist. Neither suggested that there are further

factors which are not within the ambit of the headings identified by Mowbray FM.

The Nature and Extent of the Conduct which led to the Breaches

10. In this case the total underpayment at $83,566.46 is not an insignificant sum, nor is it at the higher levels that are often seen in cases of this type before the Courts. However, I accept that the fact that as the underpayment represents around half of the entitlements of the employees during the relevant period, coupled with the fact that the employees' minimum rates of income under the relevant award are modest rates of pay and entitlements, and that none of the employees had full-time work at the café, that the impact upon the employees of the underpayments must be seen as significant.

11. It is submitted that most of the employees were friends or acquaintances of the two company directors as a result of the fact that most of their time was spent doing similar tasks as the employees and that therefore the employees were treated as co-workers and colleagues. Both directors state that the employees did not express any dissatisfaction in relation to the salaries or entitlements that they had been paid prior to Fair Work's intervention.

12. Notably, however, there is no suggestion that any of the employees have chosen to forego their proper entitlements, nor any evidence from any of the employees on behalf of the directors. It is common for employees, particularly in industries where pay rates are low and workforces are largely casual to be wary of expressing any dissatisfaction for fear that their employment will not continue. It would be the most unusual case where the absence of complaint by the employee could be considered a mitigating factor.

13. The submissions that the employees were friends or acquaintances of the Second and Third Respondents does not appear to me to be a mitigating factor: should a penalty be a larger or lesser where someone has exploited a person with whom they have developed a friendship compared to a person that they have not. Indeed, it may be that in cases where the employee has been encouraged to accept breaches of the award as appropriate based upon a relationship of trust and

confidence with the employee that this would be an aggravating factor. However, there is no evidence to this effect in this case, and therefore I do not treat this as an aggravating or mitigating factor.

The Circumstances in which the Conduct Took Place

14. There are a number of circumstances that are significant in this case. First, this is not the first occasion on which the workplace regulator has been involved in a business operated by the Second and Third Respondents. In the previous investigations by the Workplace Ombudsman's Office the Second and Third Respondents' company, Noval Enterprise Proprietary Limited was involved. In that investigation it was discovered that an employee was entitled to a casual loading and other employee entitlements. It is clear that the Respondents had previously failed to comply with the award and would have been well aware of the necessity to ensure compliance, and that it was incumbent upon them to make all necessary inquiries to ascertain their employees' proper entitlements (as discussed in *Fair Work Ombudsman v Hongyun Chinese Restaurant Pty Ltd (In liquidation)*) [2013] FCCA 52 at 46. In these circumstances I do not accept the submission that the payment of employees as part-time employees rather than casual is a matter that occurred simply as the result of a mistake.

15. The Respondents' attempted to explain the failure to keep proper records and provide proper pay slips on the basis that there was only one desktop computer on the business premises that was old and contained viruses, and that this discouraged or had the effect of discouraging the proper record keeping. The fact that the Respondents did not implement a proper pay system (which could have been as simple as purchasing appropriate printed books from office suppliers for the purpose of preparing pays and maintaining those records in paper form, or obtaining an up-to-date accounting package or computer system) shows, at best, a reckless disregard of the obligations raised by the Act. This is a serious failure because it prevents employees from making their own independent inquiries with respect to pay entitlements, and also hinders the regulator from determining and enforcing entitlements (see *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor* [2012] FMCA 258 at 67

and *Fair Work Ombudsman v Orwill Pty Ltd and Ors* [2011] FMCA 730 at 21).

16. When the Noval investigation occurred the Second Respondent wrote to the investigator by email stating that $16.91 per hour was "our pay rate", that "is accorded to our system that we use", asking if he should pay the employee in that investigation the rate that the workplace inspector had given him or "is it possible to follow our rate?"

17. An email was sent back advising the correct rate under the award and advising that a casual loading had to be paid unless the Second Respondent could provide evidence that the employee's conditions were covered by a collective agreement or an Australian Workplace Agreement. In a subsequent email it was made clear that determinations had been made as to whether or not the employee worked on a casual basis or a part time basis in order to determine the proper rate of pay. There is no question, once one reads the emails, that Mr Fu would have been well aware of the importance of complying with the award and the importance of carefully determining whether an employee was employed on a casual or part time basis. I also note that the investigations into Noval Enterprises Pty Ltd were at a time when that was the corporate entity being used to carry on business as Gloria Jeans, and thus in substance the same business enterprise at Caulfield.

18. Submissions were made that at the time of the underpayments the business was having difficulties financially. I previously addressed this argument in *Fair Work Ombudsman and Foure Mile Pty Ltd and Another* [2013] FCCA 682 at 22, where I said:

> *22. … The Second Respondent was concerned that the business was not very profitable, and operated at a marginal level. He appeared to hold the view that he was providing a benefit by way of a job to the employee and that this should be borne in mind. It appears to me that this wholly misconceives the nature of the difference between employment and joint venture. Many persons choose to undertake work for a level of reward less than would be set as the minimum in the various awards, on conditions set out under the legislative scheme for employees in the hope of achieving business growth or the establishment of a business that*

> *will be significantly more profitable, or valuable, to them in the long term. It remains every person's right to operate their own business or trading venture and live off the profits that they can generate as they see fit. In this regard, it is common for persons to join together in partnerships or form companies or joint ventures. Significantly, when a person is not a joint venturer or partner, but working simply as an employee, they have no prospects of sharing in the wealth of the business venture in the future (if this comes to pass). It is for those operating a new or marginal business to make an election as to whether or not to seek partners or joint venturers who may be prepared to work for less than the award in a business operation in the hope of making a significant gain in the future. Alternatively, if workers are to be employed, regardless of the state of the business, the minimum terms and conditions must be remunerated on at least the minimum terms and conditions provided for in the legislation and the awards. For the law to be otherwise would simply create a category of underpaid workers who were being exploited to subsidise inefficient or otherwise unprofitable business operations, or business start-up periods.*

19. Nothing has changed since I gave judgment in *Foure Mile* to lead me to any alternative view on this issue. There will always be potential businesses that are not sufficiently profitable to pay workers their minimum entitlements. To allow this to become a mitigating factor or an excuse for failing to pay minimum entitlements would mean there is no purpose in setting minimum entitlements for employees. It is an argument that can only lead to a justification of the exploitation of workers. In this case the argument is further weakened by the fact that the Second and Third Respondents had purchased real property during the relevant periods, and appear to have had no other source of income than that of the coffee shop. In the circumstances I am not satisfied that this is a mitigating factor.

20. I have identified the nature and extent of the loss above. I take careful account of the fact that the underpayment has been rectified, which is a significant mitigating factor in this case.

21. This is a case where there has been previous conduct of a similar type that has received an intervention by the regulators. Whilst there has not been a previous imposition of a penalty, that intervention by the regulator would have ensured that the Second and Third Respondents were well aware of their obligations and the seriousness of those obligations.

22. Turning to consider the size and financial circumstances of the business enterprise involved in this case, there are a number of features that are important to consider.

23. It was submitted that the Respondents, being a small business, did not have the benefit of dedicated human resources personnel expertise. I accept that this is the case, however there are two other factors of significance in this case. Firstly, the business operates a Gloria Jean's franchise. It is submitted on behalf of the Applicant that the Respondents would have had access to information, advice and assistance in relation to the operation of the franchise from the franchisor. In response to this submission the Respondents did not submit that they did not have access to such information or advice from the franchisee but simply that there is no evidence on the point, and that in the absence of evidence it is not open to the Court to draw an inference that such advice or assistance would be available from the franchisor. I have reflected upon this for some time and concluded that on the bare evidence of a franchise, even with a well-known franchise brand, it is not open to me to draw an inference that the franchisor would provide support with respect to industrial issues by the franchisee, in the absence of any evidence.

24. It was also submitted that I should take into account that the Second and Third Respondents had limited language skills. The Second Respondent holds a Bachelor of Business degree from Deakin University. I do not accept that the Second Respondent could obtain a Bachelor of Business degree from Deakin University without a high level of English language skills. It is remarkable to suggest that a respected Australian university would award a Bachelor of Business degree to a person who had only limited English language skills.

25. It appears to me that it is reasonable to draw an inference that a person who holds a Bachelor of Business degree would, either through

training in the degree, or general knowledge given their obvious interest in the operation of businesses, be aware that there are minimum standards for employees, and of the necessity to ensure that those standards were identified and complied with. In any event the Noval investigation made this clear.

26. Ms Ostrovskih is not in the same position in that she was not involved in the Noval investigation, nor does she hold such a qualification. The Third Respondent similarly claims difficulties with the English language, however she has lived in Australia for over 10 years and is operating a business in Australia. I am not persuaded that her language skills would be such as to be a real impediment to ensuring compliance with workplace laws, had she desired to take any active steps with respect to employee entitlements.

Whether or not the breaches were deliberate

27. In this case the breaches by the First and Second respondent must be, in my view, considered to be deliberate. The Second Respondent was aware of the award prior to these breaches as a result of the Noval investigation. He is tertiary educated, holding a Bachelor of Business degree. A conscious decision was made to reduce wages when the business was not producing sufficient income. The Third Respondent is in the fortunate position that there is no evidence as to the state of her knowledge of the industrial obligations of the company.

Corrective action and cooperation

28. The Respondents have made written apologies to employees and cooperated with the Fair Work Ombudsman in the investigation, and made payments to rectify the underpayments. The Applicant submits that a discount of around 20 % on the penalty is appropriate taking into account the co-operation of the Respondents, their admissions, the rectifications of overpayments and the savings in public resources by not contesting liability at the hearing.

29. The rectification of the underpayments must be considered the most significant factor as it is a restoration of the position of the employees to what they were entitled to under the law. I also take into account the

benefits that can be said to flow from the letters of apology as discussed by the *Federal Court in Fair Work Ombudsman v Australian Shooting Academy Pty Ltd* [2011] FCA 1064.

30. Having regard to these factors and, particularly, the payments having been made in full, I am persuaded that a 25% discount is appropriate for the cooperation and corrective action.

Deterrence

31. In this case specific deterrence is more significant with respect to the First and Second Respondents, given the knowledge of the Second Respondent based upon the previous interactions in the Noval investigation, and that his knowledge should be taken into account as a controlling mind of the First Respondent.

The restaurant industry

32. The restaurant and hospitality industry have been recognised as notorious for non-compliance with workplace laws as long ago as 2008 (see the comments of Gray J in *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* [2008] 171 FCR 357 at 367, and repeated on many occasions, such as the comments in *Fair Work Ombudsman v Bento Kings Meadows* [2013] FCCA 977 at 1). In this case there is evidence before me that:

    a) The industry has attracted the highest volume of complaints (compared with other industries) to the Fair Work Ombudsman in the last four years;

    b) High volumes of contraventions of workplace laws have been identified by the Fair Work Ombudsman in this industry area;

    c) A high level of complaints come from young workers and visa holders; and

    d) The industry employs large numbers of low-skilled workers.

33. I accept that general deterrence is important in this case.

Considering penalties as a whole

34. With respect to the penalty range, I find that the penalty range that is appropriate for Primeage is between $75,000 to $95,000 and between 15,000 and $19,000 with respect to Mr Fu. With respect to the Third Respondent, I accept the penalty range submitted by the Respondents, having regard to her different state of knowledge, as being between $12,300 and $15,500.

35. Having regard to the totality of the circumstances in the particular case, I find that the appropriate penalty in this case is $80,000 with respect to Primeage, $17,500 with respect to Mr Fu, and $13,000 with respect to Ms Ostrovskih.

36. I will also make formal orders with respect to superannuation to ensure that if it is not yet paid it is enforceable without the need to further approach the court.

I certify that the preceding thirty-six (36) paragraphs are a true copy of the reasons for judgment of Judge Riethmuller

Associate:

Date: 23 January 2015