FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v TREK NORTH TOURS & ANOR (No.2) *[2015] FCCA 1801*

Catchwords:
INDUSTRIAL LAW – Contraventions of the *Fair Work Act 2009* – failure to comply with notice to produce documents – failure to comply with compliance notices – application for the imposition of pecuniary penalties – penalties applied.

Legislation:
Fair Work Act 2009, ss.530(1), 557(1), 557(2), 712, 712(3), 716, 716(5), 717
Federal Circuit Court Rules 2001, r.13.03B(2)(c)

Cases cited:
McIver v Healey [2008] FCA 425

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	ACN 156 455 828 PTY LTD TRADING AS TREK NORTH TOURS
Second Respondent:	LEIGH ALAN JORGENSEN
File Number:	BRG 1009 of 2014
Judgment of:	Judge Jarrett
Hearing date:	19 June 2015
Date of Last Submission:	19 June 2015
Delivered at:	Brisbane
Delivered on:	19 June 2015

REPRESENTATION

Counsel for the Applicant: Ms Clayden

Solicitors for the Applicant: Office of the Fair Work Ombudsman

No appearance for the Respondents

ORDERS

THE COURT DECLARES THAT

(1) The first respondent contravened the following civil remedy provisions:

(a) s.712(3) of the *Fair Work Act 2009* by failing to comply with a Notice to Produce Documents and Records served upon it on 24 March, 2014;

(b) s.716(5) of the *Fair Work Act 2009* by failing to comply with a Compliance Notice with respect to Kuai Chong Ho, Wing Yan Mak and Jing-Yi Wang served upon it on 29 August, 2014;

(c) s.716(5) of the *Fair Work Act 2009* by failing to comply with a Compliance Notice with respect to Tania Raineri served upon it on 29 August, 2014; and

(d) s.716(5) of the *Fair Work Act 2009* by failing to comply with a Compliance Notice with respect to Thryze Van Zelm served upon it on 29 August, 2014.

(2) The second respondent was involved in (for the purposes of s.550(1) of the *Fair Work Act 2009*) the first respondent's contraventions set out in declaration 1 above.

THE COURT ORDERS THAT:

(3) Pursuant to s.545(1) of the *Fair Work Act 2009*, the First Respondent comply with the Compliance Notices the subject of declaration 1 hereof.

(4) The monies pursuant to the Compliance Notices by the First Respondent be paid in the first instance to the employees named in the Compliance Notices and in the event that the applicant is unable to locate those employees, those amounts be paid to the Consolidated Revenue pursuant to s.559(1) of the *Fair Work Act 2009*.

(5) The first respondent pay a penalty for the contraventions set out in declaration 1 hereof fixed in the sum of $55,000.

(6) The second respondent pay a pecuniary penalty for his contraventions of the *Fair Work Act* 2009 in which he was involved by reason of s.550(1) of the *Fair Work Act 2009* fixed in the sum of $12,000.

(7) Any penalties be paid within twenty-eight (28) days of the date of this order.

(8) The pecuniary penalties imposed by these orders be paid to the Commonwealth of Australia.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT BRISBANE

BRG 1009 of 2014

FAIR WORK OMBUDSMAN
Applicant

And

ACN 156 455 828 PTY LTD TRADING AS TREK NORTH TOURS
First Respondent

LEIGH ALAN JORGENSEN
Second Respondent

REASONS FOR JUDGMENT

ex tempore

1. This is an application for certain relief arising out of the *Fair Work Act 2009*.

2. The procedural history of the matter I have already recounted in some reasons for judgment that I delivered earlier today when I determined to proceed in default against the respondents.

3. The relief sought in the proceedings against the respondents is, *first*, declarations with respect to the contravening conduct alleged against them, *second*, the imposition of pecuniary penalties in respect of the contraventions, and *third*, order rectifying certain underpayments to particular people.

4. The application was commenced by an application and a statement of claim. That has a consequence because rule 13.03B(2)(c) of the Federal Circuit Court Rules provides that the Court, when it proceeds

on default, can give judgment against the respondent for the relief that the applicant appears entitled to on the statement of claim and the Court is satisfied it has power to grant.

5. It is unnecessary, according to the authorities, for the applicant to prove its case by way of evidence. There is a qualification to that, and the qualification arises where the applicant is seeking relief of a discretionary nature. That is the case here, the making of declarations and the imposition of pecuniary penalty orders is discretionary relief. In those circumstances, it is generally necessary for the applicant to provide some evidence which provides some basis for the Court to make the necessary discretionary judgments. That evidence is present in this case.

6. The evidence and the allegations in the statement of claim reveal that the first respondent operates a business in the tourism industry selling tour services in Cairns, Far North Queensland. The second respondent is, and was at all material times, the sole shareholder and director of the first respondent.

7. Commencing in February, 2014 the applicant received five complaints from people who were purportedly employees engaged to perform work for the first respondent. The people from whom the complaints were received were working, they said, for the first respondent as sales assistants. They alleged that they were either underpaid, or failed to receive payment of any wages at all.

8. In the course of investigating the allegations, the applicant, as it was entitled to do, issued a notice to produce documents to the first respondent pursuant to s.712 of the Fair Work Act. That notice was issued on 24 March, 2014 and it required the production of documents relating to the purported employees by 8 April, 2014. The allegation is, and I accept it is the case, that there was no compliance with that notice to produce.

9. The applicant, through its officers, attempted to engage with the respondents about these issues, but their attempts have, on all fronts, been unsuccessful. That resulted in the applicant issuing to the first respondent notices pursuant to s.716 of the Fair Work Act. They are referred to in the statement of claim as compliance notices. There were

three of them, each issued on 29 August, 2014. One was issued in respect of an employee Tania Ranieri, another was issued in respect of Thyrze Van Zelm. Another was issued collectively in respect of three employees, Kuai Ching Ho, Wing Yan Mak and Jing-Yi Wang.

10. The notice in respect of Ms Ranieri required the first respondent to pay to Ms Ranieri the sum of $4,080.73 by 19 September, 2014 and to produce to the applicant reasonable evidence of compliance with the notice.

11. The notice in respect of Ms Van Zelm required the first respondent to pay to her the sum of $2,397.20 by 19 September, 2014 and to produce to the applicant reasonable evidence of compliance with the notice.

12. The notice in respect of Ms Ho, Ms Mak and Ms Wang required the first respondent to pay to them $9,690.24, $8,993.55 and $4,805.03 respectively by 19 September, 2014 and to produce to the applicant reasonable evidence of compliance with the notice.

13. The compliance notices required the first respondent to remedy what the applicant alleged were non-compliances by the first respondent with its obligations arising under the *General Retail Industry Award 2010* and the National Employment Standards under the Fair Work Act.

14. The first respondent failed to respond to the notices at all. It certainly did not remedy the non-compliance and so these proceedings were commenced.

15. The failure to comply with the notice to produce was a contravention of s.712(3) of the Fair Work Act. The failure to comply with the compliance notices was a contravention of section 716(5) of the Fair Work Act.

16. There are four contraventions with which I have to deal. Despite the submissions for the applicant, in my view, s.557(1) of the Fair Work Act has no place to play in identifying the contraventions that need to be dealt with in this matter. Each failure by the first respondent to comply with a notice served upon is a separate contravention of the Act. Those separate contraventions, and the three contraventions of s.716(5) in particular, cannot be treated as one contravention pursuant to s.557(1) because s.557(1) only applies to the civil remedy provisions referred to

in s.557(2) of the Act. Neither ss.712(3) nor 716(5) are included in the list of civil remedy provisions in s.557(2) of the Act.

17. Where contraventions separately identified arise out of the same course of conduct, however, they might be dealt with collectively so that the same contravening conduct is not punished more than once. That might be achieved in a number of ways. Ordinarily, it might be achieved by imposing a penalty for one of the contraventions, and a lesser or no penalty for the others. See, for example, the approach of Marshall J in *McIver v Healey* [2008] FCA 425. But there are other ways of dealing with multiple contraventions that arise out of the same course of conduct, but which cannot be treated as a single contravention under s.557(1) of the Act.

18. Whether multiple contraventions ought to be treated in such a way is dependent upon evidence, the Court being satisfied that the multiple contraventions arose out of what might be described as a course of conduct, and that can be, although always, proved by way of evidence which demonstrates that the contravenor has made a single decision that has led to the multiple contraventions.

19. The authorities make it clear, however, that if that principle is to be invoked there needs to be evidence upon which the Court can draw the necessary conclusions of fact, and the onus is, generally speaking, upon the respondent, the person alleged to have committed the contraventions, to prove the necessary facts to engage the principle. Here there is no evidence about those things. I intend to impose a penalty for each of the contraventions.

20. The matters to be taken into account when determining what pecuniary penalty might be imposed for breaches of the Fair Work Act are the subject of many authorities. They are set out in the applicant's written submissions. I do not intend to enumerate the authorities.

21. The contravening conduct in this case is, I accept, a serious failure by the first respondent to understand its obligations under the Fair Work Act. The arming of the applicant with the power to issue notices with which an employer must comply is a practical and effective way in which the applicant might go about discharging its responsibilities under the Fair Work Act to ensure compliance with the Act.

22. The provision of notices to employers serves a number of purposes, not the least of which is to give the employer an opportunity to deal with the contravention that is being alleged, or, in the case of notices to produce, to provide information which would demonstrate that no contravention of the Act has occurred. The regime set out under s.716 and s.717 of the Act relating to compliance notices represents a regime which would avoid proceedings coming to a court at all if an employer took the steps set out in those sections.

23. Here the first respondent did nothing of any substance to respond to the notices, except prevaricate and obfuscate, such that they are now in default in these proceedings. The first respondent, directed by the second respondent, I am satisfied, has been entirely uncooperative.

24. The employees, the subject of the allegations in the statement of claim, were underpaid a total of $29,956.75. I accept the applicant's submissions that that is not an insignificant underpayment. It is equally significant that the employees are generally low-skilled workers reliant on minimum wages. There is no evidence to suggest that the underpayment has been rectified, and I am satisfied that it remains outstanding. The first respondent has, consequently, obtained an ongoing benefit from the use of those funds at the employees' expense. There is, of course, in addition to the monetary loss to the employees, the fact that the obligations cast upon the first respondent by the Fair Work Act have not been complied with, and that undermines the objectives of the Act.

25. I am satisfied that the non-compliance by the first respondent was entirely deliberate and intentional. It could hardly be said to be the case that the failure to comply was reckless, or inadvertent. The compliance notices, having regard to the evidence from the Fair Work inspector, were clear on their face. They directed the first respondent to what it was that it could do to comply with the notices.

26. I have already indicated that the underpayments have not been rectified. As the applicant points out, there is evidence from the second respondent that he does not intend to rectify the underpayments. He set out in an email the following:

> *I do not believe they did any work that attracted penalty rates, as I cannot afford to have people working with these crazy loadings. My business has no money and I will not be paying (even I were able to) the ridiculous "compliance notices" that Ying has given me.*

27. The reference to Ying in that quotation is a reference to the relevant Fair Work inspector who was dealing with the matter.

28. Far from being contrite about the non-compliance, the first respondent via the second respondent has expressed nothing, and has done nothing, which would indicate contrition. In fact, they have done the opposite. On 29 August the second respondent, in a telephone conversation with a Fair Work inspector, said to her words to the effect:

> *The compliance notices are rubbish. I have no intention of paying the money. I will have thousands of complaints against me before I do. The Fair Work Act reeks of fascism and I will never pay any of the money.*

29. The applicant submits that that conduct should be seen as an aggravating factor in the determination of penalty. I decline to treat it in that way, but rather, as an express statement by the second respondent – both on his own part and on the part of the first respondent – which demonstrates no regret, no contrition and something which goes to the need in this case for specific deterrence.

30. On that point, there is plainly a case made on the evidence contained in Inspector Zheng's affidavit for the penalties to be imposed in this case to carry a significant deterrent effect. In my view, in this case specific deterrence is of particular importance, although general deterrence has a place to play as well. The Court should mark its disapproval of such deliberate refusal to meet obligations cast upon all employers by the Fair Work Act.

31. There is no evidence before me about the size of the first respondent's business and its capacity to meet any pecuniary penalty placed upon it by the Court. The respondents have had an opportunity, it seems to me, to place their evidence before the Court but have not taken up that opportunity.

32. I accept the applicant's submission that in this case it is appropriate to record that the contraventions here are contraventions of provisions of the Act that are specifically designed to assist the enforcement of the Act by the applicant and to assist employers to meet their obligations under the Act. The giving of notices such as the notice to produce and the compliance notices are designed to avoid the very thing that is now facing these respondents. Had they acted reasonably, these proceedings would never have been implemented, I expect. That they are here at all and that the first respondent and second respondent now find themselves in the position that they are is something for which they are themselves entirely responsible.

33. It is appropriate in the circumstances of this case, I am satisfied, to make the declarations sought by the applicant.

ORDERS DELIVERED

34. It is appropriate in the circumstances of this case that the first respondent pay a penalty in respect of each of its contraventions. Taking into account the matters to which I have referred, it seems to me that these contraventions are serious.

RECORDED: NOT TRANSCRIBED

35. The maximum penalty for an individual respondent for a breach of s.712(3) is 60 penalty units. A penalty unit is $170. In respect of the corporate respondent, the maximum is 300 penalty units.

36. In respect of the contraventions of s.716(5), the maximum for the individual respondent, the second respondent, is 30 penalty units; and the maximum for the corporate respondent is 150 penalty units.

37. In respect, then, of the contravention of s.712(3) of the Fair Work Act by the first respondent, it is appropriate, in my view, to impose a penalty which is 75 per cent of the maximum. That would be a pecuniary penalty of $38,250.

38. In respect of the contraventions of s.716(5), there are three of them, and again, in my view, it is appropriate to impose a penalty which is 75 per cent of the maximum available for each of those contraventions. That would be a penalty for each contravention of $19,125. For each

then of the three contraventions of s.716(5), the total penalty would be $57,375. That would then be a total penalty for all four contraventions of $95,625.

39. I have to apply the totality principle. I have to look at each of the contraventions and the penalty imposed on each of them and apply an instinctive synthesis so as to ensure that the penalties that have been imposed answer the contravening conduct. I have said a number of times now in these reasons that these contraventions are serious, and I do not resile from that. But it seems to me that in respect of all four of the contraventions, one total penalty is appropriate, and I fix that total penalty at $55,000 for the first respondent.

40. For the reasons that I have indicated in respect of the first respondent, there will be similarly calculated penalties imposed on the second respondent. The second respondent was at all times the controlling mind of the first respondent and, as I have found, involved in the contraventions for the purposes of s.550(1) of the Fair Work Act.

41. The penalty for the second respondent's contravention of s.712(3) I fix at $7,650. In respect of the contraventions of s.716(5), for each contravention I fix the penalty at 75 per cent of the maximum or $3,825. The total penalty for those three would be $11,475, and thereafter the total penalty for all four contraventions is $19,125.00.

42. In those circumstances, it seems to me that, having regard to the totality principle, it is appropriate that there be one total penalty for each of the contraventions on the second respondent of $12,000. In those circumstances, I order that the first respondent pay a penalty for the contraventions set out in the declarations, fixed in the sum of $55,000. I order that the second respondent pay a pecuniary penalty for the contraventions in which he was involved, by reason of s.550(1) of the Fair Work Act, fixed in the sum of $12,000.

43. I order that any penalties that might be paid by the respondents be paid within 28 days of this order.

ORDERS DELIVERED

I certify that the preceding forty-three (43) paragraphs are a true copy of the reasons for judgment of Judge Jarrett delivered on 19 June, 2015.

Associate:

Date: 6 July 2015