FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v AAA AUSSIE EMERGENCY GLASS PTY LTD *[2016] FCCA 280*

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 2009, s.546

Cases cited:
Fair Work Ombudsman v Extrados [2014] FCCA 815
Meadley v Sort Worx Pty Ltd [2013] FCA 1012
Ponzio v B & P Caelli Constructions Pty Ltd [2007] FCAFC 65
Alogaidi v Agad Property Consulting Pty Ltd [2014] FCCA 1883

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	AAA AUSSIE EMERGENCY GLASS PTY LTD
File Number:	MLG 2419 of 2014
Judgment of:	Judge Riethmuller
Hearing date:	12 November 2015
Date of Last Submission:	12 November 2015
Delivered at:	Melbourne
Delivered on:	15 February 2016

REPRESENTATION

Counsel for the Applicant:	Ms Hartigan
Solicitors for the Applicant:	Office of the Fair Work Ombudsman
Counsel for the Respondent:	n/a
Solicitors for the Respondent:	n/a

ORDERS

(1) That pursuant to s.546(1) of the *Fair Work Act* 2009 (Cth) (FW Act) a pecuniary penalty be imposed on the Respondent in respect of contravention of s.405 of the FW Act in the sum of $35,500.

(2) That pursuant to s.546(3)(a) of the FW Act the Respondent pay the penalty amount under Order 1 above to Consolidated Revenue Fund of the Commonwealth within 60 days of these orders.

(3) The Applicant have liberty to apply on seven days' notice in the event that any of the orders made in this matter are not complied with.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE

MLG 2419 of 2014

FAIR WORK OMBUDSMAN
Applicant

And

AAA AUSSIE EMERGENCY GLASS PTY LTD
Respondent

REASONS FOR JUDGMENT

1. On 27 January 2015, I ordered that the respondent file and serve notice of address for service by 3 February and a response by 17 February. I notice an address for service was filed on 2 February, however no response was forthcoming. A further directions hearing was held on 20 April 2015, however the respondent did not appear. On that occasion, the matter was adjourned to 18 May noting that the applicant would proceed to obtain a default judgment on the next occasion should the respondent not file and serve a response and a defence in the proceedings. Default judgment was entered on 18 May 2015 resulting in the following orders:

> *THE COURT ORDERS THAT:*
>
> *1. The Respondent pay compensation to Ms Hussey in the sum of $8,000.00 less taxation as required by law, together with interest in sum of $370.41.*
>
> *2. All amounts due to Ms Hussey pursuant to these orders be paid within 14 days of the date of this Order.*
>
> *3. The matter be adjourned to 26 June 2015 at 10.00 a.m. for further hearing in respect of the Applicant's claim for penalties to be imposed on the Respondent.*

4. The Applicant file and serve any further evidence they seek to rely upon at the penalty hearing no later than 7 days prior to the hearing.

5. The Applicant file and serve any written submissions they seek to rely upon at the penalty hearing no later than 3 days prior to the hearing.

6. The Applicant serve a sealed copy of these Orders on the Respondent by ordinary prepaid post at the Respondent's address within 7 days of the date of this Order.

THE COURT DECLARES THAT:

7. Upon admissions which the Respondent is taken to have made, consequent upon default by the Respondent pursuant to subrule 13.03A(2) of the Federal Circuit Court Rules 2001 (Cth), the Court declares that the Respondent contravened section 405 of the Fair Work Act 2009 (Cth), a civil remedy provision, by falling to comply with the Order.

2. The matter was relisted for submissions with respect to penalty on 12 November 2015. The respondent failed to appear on that date, however since a letter to the court dated 10 November 2015 setting out a number of submissions, the substance of which was that the applicant and his company were experiencing financial hardship. He said that the Victorian branch of the business only employs two people, and that the period during which four people were employed was less than three months. He also claims that the business had not been given the opportunity to "go to any sort of conciliation."

3. In the letter, the submission was made:

> *We would like this case to be either dismissed on these grounds or for us to be given a fair chance to show our case which unfortunately the fair work ombudsman has denied us the chance or if this cannot be done I ask you please as we are just a small struggling business that cannot afford legal representation or to pay the $8000 for the 8 weeks' pay that was awarded less weekly taxes of $195.00 per week would be a nett amount of $6440.00 to be paid over a period of 12 Months in weekly instalments, by allowing us to do this we will be able to stay in business but unfortunately if we were to be disadvantaged because we do not have enough money for legal representation for a clear mistake that was the fault of the Fair Work department for not sending us*

the notifications to us at the correct address listed on the unfair dismissal application 28 Hinde. St Ashmore Qld 4214 to be able to defend ourselves on this matter that would have clearly been dismissed because of the evidence that we have on this matter.

…

Once again I ask you to please consider my requests of either getting a fair hearing or secondly a payment plan to pay the amount of money that was set out in the order in the event that this can't happen I will have no option as to close my business after 20 years as I have been struggling financially and with my health ·' .., issues after my open heart surgery as I have complied with everything you have asked of me since the correct paperwork was sent to the right address at 28 Hinde street Ashmore.

4. The Respondent has had adequate notice of the proceedings and a lengthy period has passed during which the Respondent could have made submissions or paid the amounts due. I am not persuaded that any adjournment is appropriate.

5. The applicant seeks the imposition of a penalty pursuant to s.546 of the *Fair Work Act*.

Circumstances of the contravention.

6. Between December 2012 and November 2013, Ms H was employed on a full-time basis in a sales and marketing position. This employment was transferred to the respondent pursuant to section 311 of the Fair Work Act on or about 21 November 2013. The respondent employed Ms H on a full-time basis from then until 20 February 2014. During this time, the respondent operated an emergency glass replacement business. On 20 February 2014, the respondent terminated Ms H's employment and she then applied to the Fair Work Commission for a remedy for unfair dismissal.

7. In March 2014, the Commission found that Ms H had been unfairly dismissed, that reinstatement of Ms H was inappropriate and ordered a payment of compensation that was appropriate in the circumstances, being the sum of $8000.

8. The respondent did not comply with the order of the Commission within the 21 days as required. Unfortunately, the respondent does not

appear to have complied with the Commission's order at any time, not even partially. It has now been over a year.

9. In light of the fact that there has been no attempt of compliance (even partial compliance, in that period) I find that the submission made by the respondent, as set out above, is disingenuous.

10. The maximum penalty that may be imposed in this case is $51,000.

11. Not surprisingly, the applicant says that the contravention represents a serious failure by the respondent to comply with an order of the Commission.

12. The proceedings have proceeded at a pace slow enough to enable the respondent more than adequate time to make the payment, or at least demonstrate some commitment to making the payment prior to the penalty hearing.

Nature and extent of the loss

13. In this case, the amount of the loss is relatively small, being $8000, however such a sum is significant for an employee in the position of Ms H who was unable to obtain secure permanent employment until April of 2015. This caused her to fall behind in her own obligations with respect to phone bills, and credit bills and a personal loan.

14. The conduct also undermines the utility and effectiveness of the Fair Work Commission which is established as an informal body to hear and determine such matters and provide cost effective remedies.

Circumstances surrounding the conduct

15. The respondent has not previously been the subject of proceedings by the applicant for contraventions of workplace law, however has previously received warnings from the Workplace Ombudsman with respect to breaches of workplace laws. It is also alleged that, on a previous occasion, the respondent failed to engage with the applicant in the resolution of a complaint and failed to pay the outstanding amount owing to the complainant. On that occasion, a penalty infringement notice was issued.

16. In the context of this case, the history demonstrates an awareness of the role of the regulator. In the context of this awareness, the failure to comply with the determination of the Commission is a serious challenge to its authority.

17. The respondent has not provided detailed financial statements from which to form a meaningful determination as to the financial circumstances of the respondent, or indeed the size of the business. In these circumstances, it is difficult to accept the effectively bare allegation that the business is impecunious. If the business is impecunious and unable to pay its debts as and when they fall due, the appropriate course is to wind up the company under the corporations law. Such a course has not been pursued.

18. Mr Michael Boehm, is the sole director of the respondent and the author of correspondence to the court. It appears that he was the guiding mind of the company throughout.

Contrition

19. There is nothing in the material to indicate any contrition on the part of the respondent. Payment has not been made. At best, the submissions appear to be a desire to engage in processes that would either result in delay or minimisation of the process.

20. The bulk of the letter by Mr Boehm focuses on complaints about postal addresses and email addresses, and the like. There is no question that the applicant is well aware of these proceedings.

21. I accept the submissions that the respondent appears to have continued to avoid the consequences of the conduct and has taken no steps to make any of the payments. As Jarrett J said in *Fair Work Ombudsman v Extrados* [2014] FCCA 815 at 12, one would expect that at least something would have been paid if there were any contrition.

22. The case concerns non-compliance with minimum standards of fairness in employment. As was noted in *Meadley v Sort Worx Pty Ltd* [2013] FCA 1012 at 45:

> *An employer is not entitled unilaterally to determine to ignore an order made by the Commission.*

23. I note that Commission orders can be the subject of stay applications and appeal if there is a genuine issue as to the appropriateness. Such a course was not taken in this case.

24. As set out above, there has been nothing done to take corrective action in this case, nor even a partial payment made.

25. The Fair Work Ombudsman submits that there has not been any real cooperation with the authorities, which I accept.

Deterrence

26. I accept that it is well-established that there is a need for specific and general deterrence in these types of proceedings. As Lander J said in *Ponzio v B & P Caelli Constructions Pty Ltd* [2007] FCAFC 65:

> ***[93]*** *There are three purposes at least for imposing a penalty: punishment; deterrence; and rehabilitation. The punishment must be proportionate to the offence and in accordance with the prevailing standards of punishment:* R v Hunter *(1984) 36 SASR 101 at 103. Therefore the circumstances of the offence or contravention are especially important. The penalty must recognise the need for deterrence, both personal and general. In regard to personal deterrence, an assessment must be made of the risk of re-offending. In regard to general deterrence, it is assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend:* Yardley v Betts *(1979) 22 SASR 108. The penalty therefore should be of a kind that it would be likely to act as a deterrent in preventing similar contraventions by like minded persons or organisations. If the penalty does not demonstrate an appropriate assessment of the seriousness of the offending, the penalty will not operate to deter others from contravening the section. However, the penalty should not be such as to crush the person upon whom the penalty is imposed or used to make that person a scapegoat. In some cases, general deterrence will be the paramount factor in fixing the penalty:* R v Thompson *(1975) 11 SASR 217. In some cases, although hardly in this type of contravention, rehabilitation is an important factor.*

27. In this case, there is also the need for specific deterrence given that the respondent continues to trade and has made no attempt to comply with the order. I am referred to a decision of *Alogaidi v Agad Property Consulting Pty Ltd* [2014] FCCA 1883 where Hartnett J took into

account the size of the business and the lack of prior contraventions to conclude that a 20 per cent reduction was warranted in the penalty.

28. As the applicant submits, the penalty in a case such as this need to be at a level to make the contravening conduct unprofitable and future contraventions commercially undesirable.

29. When considering the matter as a whole, it appears to me that a penalty of $35,500 is appropriate in the circumstances of this case.

30. As orders were made for the payment of the $8,000 and declarations as to the contraventions were made on a previous date there is no need to re-make the orders. They can be enforced in their current form.

I certify that the preceding thirty (30) paragraphs are a true copy of the reasons for judgment of Judge Riethmuller

Date: 12 February 2016