FEDERAL COURT OF AUSTRALIA

Fair Work Ombudsman v Eastern Colour Pty Ltd (No 3) [2016] FCA 186

File number:	QUD 376 of 2010
Judge:	**COLLIER J**
Date of judgment:	3 March 2016
Catchwords:	**INDUSTRIAL LAW** – assessment of penalty – imposition of penalties on the respondents following contraventions of *Workplace Relations Act 1996* (Cth) – factors relevant to determining penalty – where first, second and third respondents constitute one entity – failure to pay overtime – failure to pay penalty rates – whether multiple contraventions treated as single contravention – whether conventions arose out of one scheme – not penalising respondents more than once for same conduct – family companies – vulnerable employees – need for general and specific deterrence – totality principle
Legislation:	*Workplace Relations Act 1996* (Cth) ss 182, 182(1), 182(2), 719, 719(1), 719(2), 728, 841
Cases cited:	*Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 326 ALR 476; [2015] HCA 46 *Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 2)* [2010] FCA 1156 *Fair Work Ombudsman v Eastern Colour Pty Ltd* [2011] FCA 803 *Fair Work Ombudsman v Eastern Colour Pty Ltd (No 2)* [2014] FCA 55 *Pearce v The Queen* (1998) 194 CLR 610 *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550
Date of hearing:	13 May 2014
Date of last submissions:	29 January 2016
Registry:	Queensland
Division:	Fair Work Division

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Category:	Catchwords
Number of paragraphs:	26
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ORDERS

QUD 376 of 2010

BETWEEN:	**FAIR WORK OMBUDSMAN** Applicant
AND:	**EASTERN COLOUR PTY LTD (ACN 001 852 071)** First Respondent
	SB EMPLOYMENTS PTY LTD (ACN 117 006 596) Second Respondent
	NB EMPLOYMENTS PTY LTD (ACN 117 059 319) Third Respondent
	LOUISA BARONIO Fourth Respondent

JUDGE: **COLLIER J**

DATE OF ORDER: **3 MARCH 2016**

THE COURT ORDERS THAT:

1. The first, second and third respondents pay a total penalty of $50,000 pursuant to s 719(1) of the *Workplace Relations Act 1996* (Cth) within thirty days of the date of this order to the Commonwealth Consolidated Revenue Fund.
2. The fourth respondent pay a penalty of $10,000 pursuant to s 719(1) of the *Workplace Relations Act 1996* (Cth) within thirty days of the date of this order to the Commonwealth Consolidated Revenue Fund.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

COLLIER J:

1 In *Fair Work Ombudsman v Eastern Colour Pty Ltd (No 2)* [2014] FCA 55 I found that the Fair Work Ombudsman (the **FWO**) had substantiated its claim that the first respondent was the employer of relevant workers (**employees**) at a farm at 244 Aerodrome Road, Applethorpe in Queensland. Accordingly, I found that the first respondent had contravened the *Workplace Relations Act 1996* (Cth) (the **WR Act**), in particular:

1. Section 182 of the WR Act by failing to pay the employees a basic periodic rate of pay for each of the employee's guaranteed hours that is at least equal to the basic periodic rate of pay that is payable to the employees under the Australian Pay and Classification Scale (**APCS**) derived from the Notional Agreement Preserving State Awards (**NAPSA**).
2. Clause 6.4.2 of the NAPSA by failing to pay the employees overtime for all time worked in excess of 40 hours in any seven days.
3. Clause 7.6.1 of the NAPSA by failing to pay the employees overtime for all work done by the employees on a public holiday.
4. Clause 7.6.2 of the NAPSA by failing to pay the employees a full day's wages for Labour Day.
5. Clause 7.6.3 of the NAPSA by failing to pay the employees overtime for all work done by the employees on the Annual Show Day.

2 I further declared that the second, third and fourth respondents were involved in the contraventions of the first respondent within the meaning of s 728 of the WR Act.

3 The FWO seeks the following relief against the first respondent:

1. Orders pursuant to subs 719(1) of the WR Act that the first respondent pay a penalty within the range of $82,500 to $95,700 comprising:
   (a) $23,100 to $26,400 (70% to 80% of the maximum penalty) in respect of its involvement in the contraventions of s 182(1) of the WR Act;
   (b) $23,100 to $26,400 (70% to 80% of the maximum penalty) in respect of its involvement in the contraventions of cl 6.4.2 of the NAPSA;

(c) $19,800 to $23,100 (60% to 70% of the maximum penalty) in respect of its involvement in the grouped contraventions of cl 7.6.1 and cl 7.6.3 of the NAPSA; and

(d) $16,500 to $19,800 (50% to 60% of the maximum penalty) in respect of its involvement in the contraventions of cl 7.6.2 of the NAPSA.

2. An order pursuant to subs 841 of the WR Act that penalties imposed on the first respondent be paid to the Commonwealth Consolidated Revenue Fund.

3. An order that any penalties imposed by the Court be paid within 30 days of the date of the order.

4 Against the second respondent, the FWO seeks the following relief:

1. Orders pursuant to subs 719(1) of the WR Act that the second respondent pay a penalty within the range of $82,500 to $95,700 comprising:

(a) $23,100 to $26,400 (70% to 80% of the maximum penalty) in respect of its involvement in the contraventions of s 182(1) of the WR Act;

(b) $23,100 to $26,400 (70% to 80% of the maximum penalty) in respect of its involvement in the contraventions of cl 6.4.2 of the NAPSA;

(c) $19,800 to $23,100 (60% to 70% of the maximum penalty) in respect of its involvement in the grouped contraventions of cl 7.6.1 and cl 7.6.3 of the NAPSA; and

(d) $16,500 to $19,800 (50% to 60% of the maximum penalty) in respect of its involvement in the contraventions of cl 7.6.2 of the NAPSA.

2. An order pursuant to subs 841 of the WR Act that penalties imposed on the first respondent be paid to the Commonwealth Consolidated Revenue Fund.

3. An order that any penalties imposed by the Court be paid within 30 days of the date of the order.

5 Against the third respondent the FWO seeks the following relief:

1. Orders pursuant to subs 719(1) of the WR Act that the third respondent pay a penalty within the range of $82,500 to $95,700 comprising:

(a) $23,100 to $26,400 (70% to 80% of the maximum penalty) in respect of its involvement in the contraventions of s 182(1) of the WR Act;

(b) $23,100 to $26,400 (70% to 80% of the maximum penalty) in respect of its involvement in the contraventions of cl 6.4.2 of the NAPSA;

(c) $19,800 to $23,100 (60% to 70% of the maximum penalty) in respect of its involvement in the grouped contraventions of cl 7.6.1 and cl 7.6.3 of the NAPSA; and

(d) $16,500 to $19,800 (50% to 60% of the maximum penalty) in respect of its involvement in the contraventions of cl 7.6.2 of the NAPSA.

2. An order pursuant to subs 841 of the WR Act that penalties imposed on the first respondent be paid to the Commonwealth Consolidated Revenue Fund.

3. An order that any penalties imposed by the Court be paid within 30 days of the date of the order.

6 Against the fourth respondent the FWO seeks the following relief:

1. Orders pursuant to s 719 of the WR Act that the fourth respondent pay a penalty within the range of $16,500 to $19,140, comprising:

(a) $4,620 to $5,280 (70% to 80% of the maximum penalty) in respect of her involvement in the contraventions of s 182(1) of the WR Act;

(b) $4,620 to $5,280 (70% to 80% of the maximum penalty) in respect of her involvement in the contraventions of cl 6.4.2 of the NAPSA;

(c) $3,960 to $4,620 (60% to 70% of the maximum penalty) in respect of her involvement in the grouped contraventions of cl 7.6.1 and cl 7.6.3 of the NAPSA; and

(d) $3,300 to $3,960 (50% to 60% of the maximum penalty) in respect of her involvement in the contraventions of cl 7.6.2 of the NAPSA.

2. An order pursuant to subs 841 of the WR Act that penalties imposed on the first respondent be paid to the Commonwealth Consolidated Revenue Fund.

3. An order that any penalties imposed by the Court be paid within 30 days of the date of the order.

7 The parties in this case have not reached agreement on appropriate penalties, and have filed separate submissions in respect of this issue. I note that this course is unobjectionable in light of the recent decision of the High Court in *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 326 ALR 476; [2015] HCA 46.

Submissions of the parties

8 The case of the FWO in support of the penalties it seeks is, in summary, as follows:

- Relevant events took place in the context of a deliberate, blatant scheme of the respondents designed to avoid the minimum legislative rate of pay and NAPSA entitlements.
- One of the affected employees was eighteen years of age at the time of his engagement with the respondents, and was a vulnerable employee given his age and reliance on the respondents to comply with their minimum legislative requirements.
- The fourth respondent implemented the scheme. She was a director, manager and agent of the first respondent, and was solely responsible for determining and settling wage rates and conditions.
- The detriment suffered by the four employees was not insignificant, totalling $19,034.11. The total underpayments were rectified by the respondents in or about August 2010 after an investigation had been initiated by the FWO.
- The breaches arose from four separate courses of conduct on the part of each respondent. In particular, the applicant alleges a single breach of four distinct provisions by each respondent, being s 182(1) of the WR Act, and cl 6.4.2, cll 7.6.1 and 7.6.3, and cl 7.6.2 of the NAPSA.
- There is no evidence before the Court as to the financial circumstances of the respondents, or the relevance of those circumstances (if any) to the failure of the first respondent to pay its employees their minimum entitlements.
- The contraventions of the WR Act and the NAPSA were deliberate.
- The respondents have not accepted any responsibility for their conduct, nor expressed any sincere contrition.
- The respondents did not enter into an agreed statement of facts, but elected to defend the proceedings, thus causing the FWO to incur significant costs.
- Penalties in this case should be imposed on a meaningful level to generally deter other employers in the fruit picking and packing industry from committing similar contraventions in respect of the casual workforce in that industry.

- Specific deterrence is warranted because the contraventions resulted from a calculated and deliberate bid by the respondents to avoid the minimum legislative obligations under the WR Act and NAPSA.
- The total maximum penalties the Court could impose on the respondents are $132,000 (in respect of each of the first, second and third respondents) and $26,400 (in respect of the fourth respondent). The penalties recommended by the FWO represent an appropriate response to the contravening conduct.

9 Relevantly, the respondents submit, in summary:

- The arrangement put in place to allow the employees to work in excess of 40 hours should they so wish was unremarkable in the circumstances of this case. This is relevant to the assessment of the gravity of the conduct of the respondents.
- The respondents sought advice as to the best approach to comply with their obligations under the WR Act and the NAPSA, and to still make additional work available to persons who wanted it. While the advice they received was wrong, it is clear that the conduct of the respondents did not constitute a blatant contravention.
- The respondents have paid the employees all outstanding entitlements.
- No prior conduct consistent with the contraventions has been alleged.
- Each of the contraventions constitutes a single course of conduct for the purpose of s 719(2). It follows that there are five primary contraventions by the first respondent in respect of which the second, third and fourth respondents were involved.
- The Court should consider whether the five contraventions should be regarded as one because they arose from one scheme.
- Although the fourth respondent was a senior manager, the first respondent was a family owned business without discernible tiers of management.
- There is no requirement for specific deterrence in the circumstances of this case.
- This is not a case that calls for a penalty that will promote general deterrence.
- The Court should be cautious to ensure that the respondents are not punished multiple times, and should take into account the considerations of cumulation and concurrence as well as totality. Accordingly, a separate penalty for the contravention by the second and third respondents would be disproportionate.

- In the circumstances the conduct of the respondents is at the low end of the range, warranting orders to the following effect: 10% of the maximum penalty in relation to the first respondent, no penalty or no more than 5% of the maximum penalty in relation to the second and third respondents, and 5-10% of the maximum penalty in relation to the fourth respondent.

Consideration

10 Relevant factors to consider in the imposition of a penalty under the WR Act have been substantially settled for some time. An overriding principle is that there is no prescribed checklist to which the Court should adhere in the exercise of its discretion: *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550 at [11]; *Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 2)* [2010] FCA 1156 at [231]. As McKerracher J observed in *Kentwood Industries* at [231]:

> The task of the Court is to fix penalties which pay appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations.

11 In *Kentwood Industries* at [230] however, McKerracher J helpfully reprised the following non-exhaustive list of factors potentially relevant to the imposition of a penalty under the WR Act:

> (a) the nature and extent of the conduct which led to the contraventions;
>
> (b) the circumstances in which that conduct took place;
>
> (c) the nature and extent of any loss or damage sustained as a result of the contraventions;
>
> (d) whether there has been similar previous conduct by the respondent;
>
> (e) whether the contraventions were properly distinct or arose out of the one course of conduct;
>
> (f) the size of the business enterprise involved;
>
> (g) whether or not the contraventions were deliberate;
>
> (h) whether senior management was involved in the contraventions;
>
> (i) whether the party committing the contraventions has exhibited contrition;
>
> (j) whether the party committing the contraventions has taken corrective action;
>
> (k) whether the party committing the contraventions has co-operated with the enforcement authorities;
>
> (l) the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements;

and

(m) the need for specific and general deterrence (see *Kelly v Fitzpatrick* (2007) 166 IR 14 at [14] applying *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 at [26]-[29]; *Stuart-Mahoney v CFMEU* (2008) 177 IR 61 and *John Holland Pty Ltd v Maritime Union of Australia (No 2)* (2010) 192 IR 431 per Graham J at [27]).

12 The submissions of the parties have addressed these, and other, factors. The above summary is of assistance in determining the appropriateness of the penalty, if any, to be applied in the circumstances of this case.

13 Not surprisingly given their lack of agreement in respect of the substantive issues in this case, the parties are somewhat polarised as to their views concerning the appropriateness of penalty (and, indeed, whether penalties should be imposed on a number of the respondents at all). Having considered the submissions, I am satisfied that the correct position is an intermediate one. In my view:

- it should be recognised that the corporate respondents, in effect, constitute one entity;
- liability should be assessed at lower mid-range; and
- the contraventions on the part of the four respondents in respect of overtime payments should be treated as arising from one scheme. The position in relation to the non-payment of penalty rates raises a separate issue although generally related to the issue of underpayment of the employees.

14 In forming this view I make the following observations.

15 First, as I observed in the primary judgment, the scheme giving rise to the contraventions concerning overtime takes place in an industry where profit margins are thin and, realistically, prices paid for produce are determined by buyers (including large supermarket chains) rather than producers. It is not controversial that work is seasonal and unskilled, and that workers are commonly – but not universally – young backpackers or local people who simply want as many hours of work as possible. These circumstances provide an explanation for the respondents seeking advice to devise an approach whereby labour costs could be kept to a minimum, and the use of the existing workforce maximised.

16 Second, however, the unfortunate fact that the respondents themselves may feel somewhat exploited by purchasers of their produce does not mean that the respondents are excused from compliance with the WR Act and the terms of the NAPSA, including paying overtime and

penalty rates to their workers where applicable. Indeed, in this respect it can be observed that the respondents in turn exploited the lack of knowledge of the employees as to their wages entitlements. The evidence of Mrs Baronio that no farms paid overtime rates to their harvesting and packing staff does not mean that the employees (or, indeed, farm workers generally) were not entitled to receive overtime and penalty rates. As I found in the primary judgment, the employees were unaware of the arrangements put in place by the respondents. Even in circumstances where the employees may have been primarily interested in simply having more hours of work, there was no evidence that they knowingly cooperated in the scheme arrangements devised by the respondents.

17 Third, I note that the respondents have fully paid the employees amounts in respect of which they were out of pocket as a result of the respondents' actions. I note further however that the amount involved was $19,034.11, which is not an insignificant sum, and that the employees' losses were rectified only following the commencement of investigation by the FWO.

18 Fourth, it is clear that the conduct of the respondents followed advice given to them by Mr Catanzaro and Livingstones. To that extent, I am satisfied that the respondents were not aware that they were contravening the terms of the WR Act and the NAPSA, although I am also satisfied that the respondents sought to avoid the effects of the WR Act and the NAPSA.

19 Fifth, I previously declared that the respondents either contravened (in the case of the first respondent) or were involved in five contraventions of the WR Act and the NAPSA (although the FWO conceded at the hearing that the contraventions could be grouped into four or, "at a pinch", three contraventions). The FWO further submits that the contravention of the respondents in respect of the failure to pay the employees overtime was the most serious contravention. In my view this is an accurate submission.

20 It is a recognised principle of sentencing – extending to penalties imposed for contraventions of civil penalty provisions – that a respondent should not be penalised more than once for the same conduct (McHugh, Hayne and Callinan JJ in *Pearce v The Queen* (1998) 194 CLR 610 at [40]; *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at [46]). In these proceedings obvious common elements of the contraventions were the identity of the respondents (being interrelated entities), the identity of the employees, the scheme to "transfer" employees from employment by one corporate entity to another once 40 hours of work had been performed by the employees, and the overall intent on the part of the respondents to avoid the payment of any amounts to employees in excess of base rates. In my

view even though contraventions of numerous provisions have occurred, the contraventions by the respondents arose from two courses of conduct, involving the creation of the scheme to avoid payment of overtime, and the underpayment of the employees in respect of penalty rates.

21 Sixth, the first, second and third respondents are, in effect, family companies of the Baronio family, of which the fourth respondent is a member. Indeed while Mrs Baronio was at all material times a director of the first respondent and responsible for farming operations in the packing shed (and to that extent "senior management", at least in respect of the first respondent), the use of the term "senior management" in the context of family-operated enterprises is somewhat artificial. Further, it is clear that the sole purpose of existence of the second and third respondents was to provide employment services to the first respondent. The second and third respondents had no function or meaning other than in relation to the existence of the overtime scheme. The respondents submit that it can be safely assumed that any penalty imposed on the second and third respondents would have to be met by the first respondent. While there is no evidence before me to this effect, in my view this is a reasonable inference to draw.

22 Seventh, the FWO submits, in effect, that the respondents failed to cooperate with it, thus forcing a trial at the expense of the public purse. While it is clearly desirable for respondents to work with and, if possible, reach a settlement with the regulator, the weight the Court should attribute to such conduct must always depend on the facts of the particular case. In this case, the respondents acted on the basis of professional advice they had received. It has transpired that the tenor of that advice was wrong. However I am not prepared to say that the position adopted by the respondents was hopeless or frivolous, or that they were unjustified in requiring the FWO to take the matter to trial. Further, as the respondents have quite correctly submitted, the statement of claim of the FWO required amendment on multiple occasions, such that the statement of claim finally considered by me represented the fourth version of that pleading (*Fair Work Ombudsman v Eastern Colour Pty Ltd* [2011] FCA 803 at [94]). It appears that the FWO had difficulty over some time framing a proper case for the respondents to meet, and in such circumstances the resistance of the respondents to the FWO's broad claims was not unreasonable.

23 Eighth, I accept the submission of the FWO that any penalty imposed should take into account the need for both general and specific deterrence. In respect of the need for general

deterrence, I consider that any penalty imposed should be at a meaningful level to deter other employers in the industry who have a fluctuating casual workforce from committing similar contraventions. I make this observation particularly in light of comments of Mrs Baronio that, so far as she was aware, overtime payments are not available to casual workers in the industry, and the uncontroverted evidence of Mrs Baronio that the workforce in the fruit picking and packing industry is traditionally comprised of young, itinerant and overseas workers. As I have already noted, such workers are, invariably, vulnerable to exploitation.

24 In respect of the need for specific deterrence, while I am satisfied that the contraventions arose substantially from a scheme created on the basis of professional advice given to the respondents, it is also clear that the purpose of the scheme was to circumvent the minimum legislative obligations in respect of payment of entitlements to the employees. Any future conduct of this nature by the respondents should be deterred.

Conclusion

25 The total penalty the FWO submits should be imposed by the Court on the respondents in this case is in the range of $264,000 to $306,240, with the first, second and third respondents bearing equal penalties and the fourth respondent a comparatively minor penalty. Grouped, these penalties represent 50-80% of the maximum penalties which could be imposed for the contraventions, on the basis that penalties be imposed on each respondent for each contravention (noting, of course, the submission of the respondents that the contraventions of the respondents in respect of cl 7.6.1 and cl 7.6.3 of the NAPSA should be considered together).

26 I have taken into consideration the factors to which I have referred but in particular the totality factor, the substantial coincidence of identity between the first, second and third respondents, the fact that the second and third respondents are, in effect, empty corporate vessels, the need for deterrence, and the fact that the contraventions arose from two separate forms of contravening conduct by the respondents in respect of overtime and penalty rates (such that it is not unreasonable to treat the respondents' conduct as referable to two or three, rather than five, separate contraventions). The appropriate total penalty in the circumstances is $60,000, being a total of $50,000 payable by the first, second and third respondents, and $10,000 payable by the fourth respondent. These penalties should be paid within thirty days to the Commonwealth Consolidated Revenue Fund pursuant to s 841 of the WR Act.

I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Collier.

Associate:

Dated: 2 March 2016