FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v EVER AUSTRALIA PTY LTD & ANOR *[2015] FCCA 1999*

Catchwords:
INDUSTRIAL LAW – Determination of penalty – statement of agreed facts – admitted contraventions of ss.45 and 536(1) of the *Fair Work Act 2009* (Cth) by first respondent – second respondent's involvement in the first respondent's contraventions pursuant to s.550 of the *Fair Work Act 2009* (Cth) – pecuniary penalties imposed on first and second respondent.

Legislation:
Fair Work Act 2009 (Cth), ss.45, 536, 539, 550, 557

Cases cited:
Gibbs v Mayor, Councillors and Citizens of City of Altona (1992) 37 FCR 216
McIver v Healey [2008] FCA 425
Blandy v Coverdale NT Pty Ltd ACN 102 611 423 [2008] FCA 1533
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8
Mornington Inn Pty Ltd v Jordan [2008] FCAFC 70
Kelly v Fitzpatrick (2007) 166 IR 14
Seymour v Stawell Timber Industries Pty Ltd (1985) 9 FCR 241
Workplace Ombudsman v Securit-E Holdings Pty Ltd (In Liquidation) & Ors [2009] FMCA 700
Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar [2007] FMCA 7
Fair Work Ombudsman v Rocky Holdings Pty Ltd [2013] FCCA 1549
Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550
Fair Work Ombudsman v Australia China Trading Investment Consultancy Group Pty Ltd and Anor [2014] FCCA 407
Hamilton v Whitehead (1988) 166 CLR 121
Fair Work Ombudsman v Jooine (Investment) Pty Ltd [2013] FCCA 2144
Workplace Ombudsman v Saya Cleaning Pty ltd and Anor [2009] FMCA 38
Hanssen Pty Limited v Jones (2009) 179 IR 57
Fair Work Ombudsman v Bosen Pty Ltd and Others (Industrial) [2011] VMC 81
David Armstrong v VK Holdings Pty Limited - (Unreported, 28 November 2007) Chief Industrial Magistrate Hart, Chief Industrial Magistrates Court Sydney
Australian Workers Union v Johnson Matthey (Aust) Ltd [2000] FCA 728
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412
Jordan v Mornington Inn Pty Ltd (2007) 166 IR 33

ACCC v Leahy Petroleum Pty Ltd (No.2) (2005) 215 ALR 281
FWO v Promoting U Pty Ltd [2012] FMCA 58
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8
Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543
Yardley v Betts (1979) 22 SASR 108
R v Thompson (1975) 11 SASR 217
Yoga Tandoori House Pty Limited [2008] FMCA 288
R v Hunter (1984) 36 SARC 101
Fair Work Ombudsman v Ramsay Food Processing Pty Ltd (No.2) [2012] FCA 408
Australian Prudential Regulation Authority v Holloway [2000] FCA 1245
Carr v CEPU & Anor [2007] FMCA 1526
McDonald v The Queen [1994] FCA 956
Australian Competition & Consumer Commission v Australian Safeway Stores Pty Ltd & Ors (1997) 145 ALR 36

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	EVER AUSTRALIA PTY LTD (ACN 134 213 817)
Second Respondent:	YUE HUA LIU
File Number:	SYG 3447 of 2014
Judgment of:	Judge Emmett
Directions date:	17 March 2015
Date of Last Submission:	19 June 2015
Delivered at:	Sydney
Delivered on:	9 October 2015

REPRESENTATION

Solicitor for the Applicant:	Ms Cara Seymour (Fair Work Ombudsman)
Solicitor for the Respondents:	Mr Wang Fang (Wang Fang & Co Legal Pty Ltd)

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY

SYG 3447 of 2014

FAIR WORK OMBUDSMAN
Applicant

And

EVER AUSTRALIA PTY LTD
(ACN 134 213 817)
First Respondent

YUE HUA LIU
Second Respondent

Contents

REASONS FOR JUDGMENT

A. Background

1. Pursuant to s.539(2) of the *Fair Work Act 2009* (Cth) ("**the Act**"), the applicant is and was, at all material times in the present proceeding, a person with standing to apply to this Court for orders in relation to contraventions of civil remedy provisions of the Act.

2. The first respondent was at all relevant times a company incorporated under the *Corporations Act 2001* (Cth) as 'Ever Australia Pty Ltd'. The second respondent was at all relevant times a director of the first respondent responsible for the day-to-day operations of the first respondent.

3. On 12 December 2014, the applicant commenced proceedings against the respondents by way of an Application and Statement of Claim. The Statement of Claim alleged contravention by the first respondent of ss.45 and 536(1) of the Act in respect of one of the employees of the first respondent, Ms Hiu Lum (Helen) Leung ("**the Employee**"), who was employed for the period 2 April 2014 to 2 June 2014 as a casual salesperson. The Statement of Claim also pleaded accessorial liability of the second respondent pursuant to s.550 of the Act in relation to the second respondent's involvement in the alleged contraventions of s.45 of the Act by the first respondent.

B. Introduction

4. An introduction to this matter together with a summary of the agreed contraventions, the maximum penalties and documents relied upon are contained in the applicant's submissions as follows:

> ***"Introduction***
>
> *1. By way of application and statement of claim filed in the Court on 12 December 2014, the applicant alleged that the first respondent breached various provisions of the* General Retail Industry Award 2010 ***(Award)*** *in respect of one of its employees, Ms Hiu Lum (Helen) Leung* ***(Employee)****, thereby contravening the* Fair Work Act 2009 *(Cth)* ***(FW Act)****. It was also alleged that the first respondent had contravened sub−section 536(1) of the FW Act by not giving the Employee proper pay slips.*

2. More specifically, it was alleged that the first respondent contravened:

> *(a) section 45 of the FW Act by failing to pay the Employee the minimum wage rate for ordinary hours worked in accordance with clause A.3.6 of Schedule A of the Award (by reference to clause 13.2 of the Award);*
>
> *(b) section 45 of the FW Act by failing to pay the Employee the relevant casual loading in accordance with:*
>
> > *(i) clause A.5.4 of Schedule A of the Award (by reference to clause 13.2 of the Award) for ordinary hours of work performed on a Monday to Saturday;*
> >
> > *(ii) clause A.6.4 of Schedule A of the Award (by reference to clause 29.4(c) of the Award) for ordinary hours of work performed on a Sunday;*
>
> *(c) section 45 of the FW Act by failing to pay the Employee penalty rates for work performed on a Saturday in accordance with clause A.7.3 of Schedule A of the Award (by reference to clause 29.4(b) of the Award);*
>
> *(d) section 45 of the FW Act by failing to pay the Employee penalty rates for work performed on a Sunday in accordance with clause A.7.3 of Schedule A of the Award (by reference to clause 29.4(c) of the Award);*
>
> *(e) section 45 of the FW Act by failing to pay the Employee penalty rates for work performed on a public holiday in accordance with clause A.7.3 of Schedule A of the Award (by reference to clause 29.4(d) of the Award); and*
>
> *(f) sub−section 536(1) of the FW Act by failing to give pay slips to the Employee* ***(Contraventions)***.

3. The applicant further alleged that the second respondent, who was a director of the first respondent at all material times, was involved, within the meaning of section 550 of the FW Act, in each of the contraventions listed at paragraph 2(a) to 2(e) above ***(Underpayment Contraventions)***.

4. By way of a Statement of Agreed Facts filed on 18 February 2015 ***(SOAF)*** *the respondents have admitted both the Contraventions and the second respondent's involvement in the Contraventions.*

*5. The first respondent is, and at all material times was, in the business of manufacturing and selling sheepskin and sheepskin products, particularly including footwear sold under the brand name 'Ever UGG', including sales to members of the general public. In about April 2013, the first respondent — in what the second respondent has described as an effort to "*prop up*" sales, started to operate "*pop up*" retail stores in shopping centres whereby it sold its products to the public. The first respondent employed a number of persons, including the Employee, to work as casual salespersons in the stores.*

6. The first respondent paid the employees a base rate of pay of between $8−10 per hour plus a commission of 10% of the sales made on a day, with the commission rate increasing to 15% where sales exceeded $1500 in a day and to 20% where sales exceeded $2000 in a day.

7. In respect of the Employee, the Underpayment Contraventions (i.e. those in paragraphs 2(a) to 2(e) above) arose as a consequence of the first respondent adopting the pay practice referred to in paragraph 6. In the case of the Employee, she was paid a flat hourly rate of pay of $8 in respect of the hours she worked. This included time worked on Saturdays, Sundays and public holidays. There is no evidence that the first respondent did a reconciliation between the amounts which the Employee was paid as a consequence of adopting the pay practice and her entitlements as a casual employee under the Award for those hours. Because of the matters identified in paragraph 28 below, the Court can infer that no such process was undertaken. Consequently, the first respondent did not pay the Employee the minimum hourly rate of pay under the Award, which at the material time was $17.98. The first respondent also did not pay the Employee casual loadings and penalty rates for the work done on Saturdays, Sundays and public holidays.

8. As a result of the Underpayment Contraventions, the Employee was underpaid a total of $4,222.73.

9. On 3 November 2014, the first respondent rectified the underpayment to the Employee.

10. The matter is now before the Court for the making of declarations and the imposition of civil penalties on the respondents for the Contraventions.

Maximum penalties

11. The FW Act provides that the maximum penalty that may be imposed against the first respondent by this Court is:

> *(a) 300 penalty units for a contravention of section 45; and*
>
> *(b) 150 penalty units for a contravention of sub−section 536(1).*

12. Similarly, the FW Act provides that the maximum penalty that may be imposed against the second respondent is:

> *(a) 60 penalty units for a contravention of section 45; and*
>
> *(b) 30 penalty units for contraventions of sub−section 536(1).*

13. A "Penalty Unit" has the same meaning as in the Crimes Act 1914 *(Cth)* ***(Crimes Act).*** *The current value of a penalty unit is, and was at all relevant times, $170. Accordingly, the maximum penalties, in monetary terms, which could be imposed by the Court are as follows:*

> *(a) as against the first respondent, $51,000 for each contravention of section 45 of the FW Act and $25,500 for a contravention of sub−section 536(1) of the FW Act; and*
>
> *(b) as against the second respondent, $10,200 for each contravention of section 45 of the FW Act. The applicant does not allege that the second respondent was involved in the first respondent's contravention of sub−section 536(1) of the FW Act.*

Documents relied upon by the Applicant

14. The applicant relies upon the following documents:

> *(a) application and statement of claim filed 12 December 2014;*
>
> *(b) SOAF filed 18 February 2015;*
>
> *(c) affidavit of Inspector Emma Travers affirmed 17 April 2015* ***(Travers Affidavit);*** *and*
>
> *(d) affidavit of Inspector Maria Loutsopoulos affirmed 17 April 2015* ***(Loutsopoulos Affidavit)***."

C. Findings in respect of the Statement of Agreed Facts

5. On 18 Feb 2015, by way of a Statement of Agreed Facts, the respondents admitted the alleged contraventions in respect of the first respondent and the involvement of the second respondent in those contraventions.

6. Both parties relied on that Statement of Agreed Facts and I make findings in accordance with those agreed facts as follows:

> *"**ADMITTED CONTRAVENTIONS***
>
> *4. On the basis of the facts set out below, the first respondent admits to contravening the following provisions:*
>
> *(a) section 45 of the FW Act by failing to pay the Employee the minimum wage rate in accordance with clause A.3.6 of Schedule A of the Award (by reference to clause 13.2 of the Award);*
>
> *(b) section 45 of the FW Act by failing to pay the Employee the relevant casual loading in accordance with:*
>
> *(i) clause A.5.4 of Schedule A of the Award (by reference to clause 13.2 of the Award) for ordinary hours of work performed on a Monday to Saturday;*
>
> *(ii) clause A.6.4 of Schedule A of the Award (by reference to clause 29.4(c) of the Award) for ordinary hours of work performed on a Sunday;*
>
> *(c) section 45 of the FW Act by failing to pay the Employee penalty rates for work performed on a Saturday in accordance with clause A.7.3 of Schedule A of the Award (by reference to clause 29.4(b) of the Award);*
>
> *(d) section 45 of the FW Act by failing to pay the Employee penalty rates for work performed on a Sunday in accordance with clause A.7.3 of Schedule A of the Award (by reference to clause 29.4(c) of the Award);*
>
> *(e) section 45 of the FW Act by failing to pay the Employee penalty rates for work performed on a public holiday in accordance with clause A.7.3 of Schedule A of the Award (by reference to clause 29.4(d) of the Award);*

(f) section 536(1) of the FW Act by failing to give payslips to the Employee.

5. The second respondent admits to his involvement, within the meaning of section 550 of the FW Act in each of the first respondent's contraventions set out at paragraph 4 above.

ADMITTED FACTS

The applicant

*6. The Fair Work Ombudsman (**FWO**) has standing and authority to bring these proceedings and to pursue declarations and orders in relation to the first and second respondent's contraventions.*

The first respondent

7. The first respondent is and was at all relevant times:

(a) a company incorporated pursuant to the provisions of the Corporations Act 2001 *(Cth);*

(b) capable of being sued in its corporate name;

(c) a constitutional corporation within the meaning of section 12 of the FW Act;

(d) a national system employer within the meaning of section 14(1)(a) of the FW Act;

(e) in the business of manufacturing and selling sheepskin and sheepskin products, particularly including footwear sold under the brand name 'Ever UGG', including sales to members of the general public; and

*(f) the employer of Ms Hiu Lum (Helen) Leung (the **Employee**).*

The second respondent

8. The second respondent is and was at all relevant times:

(a) a natural person capable of being sued;

(b) a director of the first respondent;

(c) responsible for the day-to-day operation of the first respondent;

(d) aware of the duties performed by the Employee for the first respondent; and

(e) responsible for determining the Employee's rates of pay.

The employee

*9. For the period from 2 April 2014 to 2 June 2014 (**Employment Period**), the Employee was employed by the first respondent on a casual basis in the position of a 'casual salesperson'.*

10. At all relevant times, the Employee performed the duties including the following for the first respondent:

(a) customer assistance, including:

(i) assisting customers with product sizing; and

(ii) processing, including taking receipt of payment, and recording the sale of goods.

(b) store maintenance, including:

(i) the display of goods for sale; and

(ii) organising stock.

Industrial instruments

11. The first respondent was at all relevant times bound, in relation to the Employee's employment by the General Retail Industry Award 2010 *(MA000004) (**Award**), by way of the following:*

(a) pursuant to subsection 49(2) of the FW Act and clause 2.1 of the Award, the Award commenced operation on 1 January 2010;

(b) pursuant to subsection 47(1) and subsection 48(1) of the FW Act a modern award applies to an employer if the award is expressed to cover the employer, the modern award is in operation and no other provision of the FW Act applies so that the modern award does not apply to the employer;

(c) clause 4.1 of the Award provides that it covers employers throughout Australia in the general retail industries and their employees in the classifications listed in clause 16 of the Award to the exclusion of any other modern award;

(d) the general retail industry is defined in clause 3.1 of the Award to mean the sale or hire of goods or services to final consumers for personal, household or business consumption; and

(e) by reason of the matters set out at paragraphs 9 and 10 above, the first respondent employed the Employee in the general retail industry.

12. By reason of the duties set out in paragraph 10 above, the Employee was at all relevant times properly classified as a Retail Employee Level 1 in accordance with clause B.1 of Schedule B of the Award and clause 16 of the Award.

*13. For the purposes of calculating transitional wage rates in accordance with Schedule A of the Award, the Australian Pay and Classification Scale (**APCS**) derived from the* Shop Employees (State) Award *(AN120499) (**Shop Employees Award**) applies to the first respondent, by way of the following:*

(a) pursuant to clause 3.1 of the Award and item 5(3) of Schedule 9 of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 *(**Transitional Act**), an APCS is a transitional minimum wage instrument;*

(b) pursuant to sub-item 6(1) of Part 3 of Schedule 9 of the Transitional Act, on and from 1 July 2009 an APCS covers an employee if the APCS covers the employment of the employees under (amongst other provisions) section 204 and 205 of the Workplace Relations Act 1996 *(**WR Act**);*

(c) pursuant to section 204 of the WR Act, the question of whether the employment of a particular employee is covered by a particular APCS is determined by reference to the coverage provisions of the APCS;

(d) clause 37 of the Shop Employees Award provides that it applies to the whole of New South Wales to "all classes of employees employed under classifications in this award who work in or in connection with a retail shop,"

(e) by reason of the matters set out at paragraph 70 above, at all relevant times the first respondent's business fell within the scope of the coverage clause in clause 37 of the Shop Employees Award.

ALLEGED CONTRAVENTIONS

Minimum wage rate

14. By reason of the matters set out in paragraphs 11 to 13 above, the first respondent was at all relevant times required under clause A.3.6 of Schedule A of the Award (by reference to clause 13.2 of the Award) to pay the Employee the minimum wage rate for a Retail Employee Level 1 for ordinary hours worked.

15. At all relevant times, the minimum wage rate for the Employee was $17.98.

*16. The Employee worked the hours of work which are set out in Annexure A of the statement of claim (**Hours Worked**).*

*17. The first respondent paid the Employee a flat rate of pay in respect of the Hours Worked, being an amount of $8.00 per hour (the **Payments**).*

18. By acting as set out in paragraph 17, the first respondent contravened clause A3.6 of Schedule A of the Award and, as a result, contravened section 45 of the FW Act.

*19. By reason of the matters set out in paragraphs 14 to 18 above, the first respondent underpaid the Employee a total of **$843.88** in respect of the minimum wage rate in clause A3.6 of Schedule A of the Award.*

Casual loading

20. By reason of the matters set out in paragraphs 9 and 11 to 13 above, the first respondent was at all relevant times required to pay the Employee a casual loading amount of:

> *(a) 23 per cent of the minimum wage rate for ordinary hours worked on Monday to Saturday pursuant to clause A.5 of Schedule A of the Award (by reference to clause 13.2 of the Award), by way of the following:*
>
> > *(i) pursuant to clause 13.2 of the Award, the Employee was entitled to be paid a casual loading of 25 per cent on top of the minimum wage rate;*
> >
> > *(ii) pursuant to clause 5 of the APCS derived from the Shop Employees Award, the Employee was entitled to a*

15 per cent casual loading for hours worked on a Monday to Saturday;

(iii) clause A.5 of Schedule A of the Award provides for transitional arrangements where the existing loading in a transitional minimum wage instrument is lower than the loading in the modern award; and

(iv) as the Employee was entitled to a lower casual loading prior to the commencement of the Award, pursuant to clause A.5.4 of Schedule A of the Award, the first respondent was required to pay the Employee 80 per cent of the casual loading percentage for hours work worked on Monday to Saturday.

(b) 3 per cent of the minimum wage rate for ordinary hours worked on a Sunday pursuant to clause A.6 of Schedule A of the Award (by reference to clause 29.4(c) of the Award), by way of the following:

(i) pursuant to clause 29.4(c) of the Award, when working on a Sunday the Employee was entitled to a Sunday penalty rate for all hours worked in replacement of the casual loading in clause 13.2 of the Award;

(ii) pursuant to clause 5 of the APCS derived from the Shop Employees Award, the Employee was entitled to a 15 per cent casual loading for hours worked on a Sunday;

(iii) clause A.6 of Schedule A of the Award provides for transitional arrangements where the existing loading in a transitional minimum wage instrument is higher than the loading in the modern award; and

(iv) as the Employee was entitled to be paid a casual loading in respect of hours worked on a Sunday prior to the commencement of the Award, pursuant to clause A.6.4 of Schedule A of the Award, the first respondent was required to pay the Employee 20 per cent of the casual loading required under the APCS derived from the Shop Employees Award for hours worked on a Sunday.

21. In making the Payments, the first respondent failed to pay the Employee any casual loadings in respect of the Hours Worked.

22. By acting as set out in paragraph 21, the first respondent contravened clause A.6.4 of Schedule A of the Award and, as a result, contravened section 45 of the FW Act.

23. By reason of the matters set out in paragraphs 20 to 22 above, the first respondent underpaid the Employee a total of $694.08 in respect of unpaid casual loading

Saturday Penalty Rate

24. By reason of the matters set out in paragraphs 9 and 11 to 13 above, the first respondent was at all relevant times required under clause A.7.3 of Schedule A of the Award (by reference to clause 29.4(b) of the Award) to pay the Employee a penalty rate of 8 per cent on top of the minimum wage rate for work performed on a Saturday, by way of the following:

> *(a) pursuant to clause 29.4(b) of the Award, the Employee was entitled to a penalty rate of 10 per cent on top of the minimum wage rate for work performed on a Saturday;*
>
> *(b) the Employee was not entitled to a Saturday penalty rate under the APCS derived from the Shop Employees Award prior to the commencement of the Award;*
>
> *(c) clause A.7 of Schedule A of the Award provides for transitional arrangements where there were no existing penalty rates in a transitional minimum wage instrument; and*
>
> *(d) as the Employee was not entitled to a Saturday penalty rate prior to the commencement of the Award, pursuant to clause A.7.3 of Schedule A of the Award, the first respondent was required to pay the Employee 80 per cent of the Saturday penalty rate.*

*25. The Hours Worked by the Employee included hours worked on a Saturday as set out in **Annexure A** of the statement of claim.*

26. In making the Payments, the first respondent failed to pay the Employee any Saturday penalty rate in respect of the Hours Worked on a Saturday.

27. By acting as set out in paragraph 26, the first respondent contravened clause A.7.3 of Schedule A of the Award and, as a result, contravened section 45 of the FW Act.

28. By reason of the matters set out in paragraphs 24 to 27 above, the first respondent underpaid the Employee a total of ***$746.05*** *in respect of the unpaid Saturday penalty rate.*

Sunday Penalty Rate

29. By reason of the matters set out in paragraphs 9 and 11 to 13 above, the first respondent was at all relevant times required under clause A.7.3 of Schedule A of the Award (by reference to clause 29.4(c) of the Award) to pay the Employee a Sunday penalty rate of 80 per cent on top of the minimum wage rate, by way of the following:

> *(a) pursuant to clause 29.4(c) of the Award, the Employee was entitled to a 100 per cent penalty rate for work performed on a Sunday;*
>
> *(b) the Employee was not entitled to a Sunday penalty rate under the APCS derived from the Shop Employees Award prior to the commencement of the Award;*
>
> *(c) clause A.7 of Schedule A of the Award provides for transitional arrangements where there were no existing penalty rates in a transitional minimum wage instrument; and*
>
> *(d) as the Employee was not entitled to a Sunday penalty rate prior to the commencement of the Award, pursuant to clause A.7.3 of Schedule A of the Award, the first respondent was required to pay the Employee 80 per cent of the Sunday penalty rate.*

30. The Hours Worked by the Employee included hours worked on a Sunday as set out in ***Annexure A*** *of the statement of claim.*

31. In making the Payments, the first respondent failed to pay the Employee any Sunday penalty rate in respect of the Hours Worked on a Sunday.

32. By acting as set out in paragraph 31, the first respondent contravened clause A.7.3 of Schedule A of the Award and, as a result, contravened section 45 of the FW Act.

33. By reason of the matters set out in paragraphs 29 to 32 above, the first respondent underpaid the Employee a total of ***$1217.67*** *in respect of the unpaid Sunday penalty rate.*

Public Holiday Penalty Rate

34. By reason of the matters set out in paragraphs 9 and 11 to 13 above, the first respondent was at all relevant times required under clause A.7.3 of Schedule A of the Award (by reference to clause 29.4(d) of the Award) to pay the Employee a public holiday penalty rate of 120 per cent on top of the minimum wage rate, by way of the following:

> *(a) pursuant to clause 29.4(d) of the Award, the Employee was entitled to a 150 per cent penalty rate for work performed on a Public Holiday;*
>
> *(b) the Employee was not entitled to a Public Holiday penalty rate under the APCS derived from the Shop Employees Award prior to the commencement of the Award;*
>
> *(c) clause A.7 of Schedule A of the Award provides for transitional arrangements where there were no existing penalty rates in a transitional minimum wage instrument; and*
>
> *(d) as the Employee was not entitled to a public holiday penalty rate prior to the commencement of the Award, pursuant to clause A.7.3 of Schedule A of the Award, the first respondent was required to pay the Employee 80 per cent of the public holiday penalty rate.*

*35. The Hours Worked by the Employee included hours worked on a Public Holiday as set out in **Annexure A** of the statement of claim.*

36. In making the Payments, the first respondent failed to pay the Employee any public holiday penalty rates in respect of the Hours Worked on a public holiday.

37. By acting as set out in paragraph 36, the first respondent contravened clause A.7.3 of Schedule A of the Award and, as a result, contravened section 45 of the FW Act.

*38. By reason of the matters set out in paragraphs 34 to 37 above, the first respondent underpaid the Employee a total of **$721.05** in respect of the unpaid public holiday penalty rate.*

Failure to issue payslips

39. The first respondent was at all relevant times required under subsection 536(1) of the FW Act to give the Employee a payslip within one working day of paying an amount to the Employee in relation to the performance of work.

40. The first respondent did not give the Employee payslips during her Employment Period.

41. By acting as set out in paragraph 40 above, the first respondent contravened subsection 536(1) of the FW Act.

UNDERPAYMENTS

42. The respondents admit that the contraventions set out at paragraphs 18, 22, 27, 32 and 37 above resulted in an underpayment to the Employee totalling $4,222.73.

RECTIFICATION

43. On 3 November 2014, the first respondent rectified the underpayment amount by paying $4,222.73 to the Employee.

ACCESSORIAL LIABILITY

44. The second respondent admits that from at least 22 July 2013, he knew that:

> *(a) the Award applied to the first respondent's employment of staff working in the general retail industry;*
>
> *(b) a flat hourly rate of $8.00 per hour was not sufficient to satisfy the first respondent's minimum obligations under the Award; and*
>
> *(c) an employee employed as a Retail Employee Level 1 was entitled to be paid in excess of $17.00 per hour plus casual loading (where relevant).*

45. In relation to the matters set out at paragraph 44 above, the second respondent admits that:

> *(a) during the period from 4 July 2013 to 15 July 2013, three employees engaged by the first respondent to work in the general retail industry made workplace complaints to the applicant (**Prior Complaints**); and*

(b) on 22 July 2013:

(i) the second respondent stated to the applicant that he would conduct research into applicable minimum award entitlements;

(ii) the second respondent prepared underpayment calculations in relation to the three Prior Complaints. The underpayment calculations prepared by the second respondent calculated the difference between the amount paid to the relevant employees (being $8.00 per hour) and a casually loaded rate of $21.25; and

(iii) the three Prior Complaints were resolved by the first respondent making payments to the relevant employees in accordance with the second respondent's calculations.

46. By reason of the matters set out in paragraph 8, 44 and 45 above, the second respondent admits he:

(a) had actual knowledge of, or was wilfully blind as to, the factual matters which comprise each of the contraventions set out in paragraphs 18, 22, 27, 32 and 37 above against the first respondent; and

(b) was an intentional participant in the factual matters which comprise those contraventions set out against the first respondent.

47. By reason of the matters set out in paragraphs 8, 44 and 45 above, the second respondent:

(a) aided, abetted, counselled or procured; and/or

(b) was, by his acts or omissions, directly or indirectly, knowingly concerned in or a party to the contraventions set out against the first respondent.

48. By reason of the matters set out in paragraphs 46 and 47 above, and pursuant to section 550(1) of the FW Act, the second respondent was involved in the contraventions set out in paragraphs 18, 22, 27, 32 and 37 above against the first respondent."

D. The respondents' submissions on penalty

7. The first respondent filed submissions on penalty on 19 June 2015 and referred to reliance on the affidavit of the second respondent sworn/affirmed on 14 May 2015.

8. The respondents submitted that the decision to set up 'pop up shops' was a desperate measure to salvage the first respondent from its financial difficulties, and that the period of the alleged contraventions was the lean season for the sales of products of the first respondent, which mainly target the wholesale market. The respondents submitted that it was important for the first respondent to maintain cash flow in order to prevent it from laying-off permanent staff. The respondents submitted that they developed a payments structure for casual staff employed by the first respondent that was not intended to gain an advantage over the first respondent's competitors, "*except that of a desperate measure for survival*". The respondents submitted that there was no intention by the respondents to disregard the statutory obligations of the respondents or to target backpackers for their vulnerability.

9. The respondents also submitted that they had made admissions of liability at the first instance and cooperated with the applicant in its investigation, which they said reflected remorse and an acceptance of responsibility.

10. The respondents also submitted that the first respondent has stopped the practice of setting up 'pop up shops' employing casual workers and that, therefore, the chances of recurrence of similar contraventions in the future would be remote.

11. In submissions filed by their solicitor, the respondents expressed regret for what had happened and noted that they had already been '*named and shamed*' by the applicant in news briefings to the public media, including local Chinese media.

12. Lastly, the respondents submitted that the first respondent was a "*young, small enterprise*" and that a significant civil penalty would have a devastating impact on its future.

E. The applicant's submissions on penalty

13. The applicant filed submissions identifying the penalties that it says should be imposed on each of the first and second respondents. Those submissions accurately outline the relevant general principles to be considered when imposing a penalty; identify the contraventions of the respondents; group the contraventions appropriately; and outline factors relevant for determining the quantum of penalty and the totality principle:

> *"**Penalty principles***
>
> *15. The applicant submits that the following principles are well settled and should be taken into account in determining the question of appropriate penalty:*
>
> *(a) the first step for the Court is to identify the separate contraventions involved. Each breach of each separate obligation found in the FW Act in relation to an employee is a separate contravention;*[1]
>
> *(b) secondly, the Court should consider whether the breaches arising in the first step constitute a single course of conduct;*[2]
>
> *(c) thirdly, to the extent that two or more contraventions have common elements, this should be taken into account in considering what is an appropriate penalty in all the circumstances for each contravention. The respondents should not be penalised more than once for the same conduct. The penalties imposed by the Court should be an appropriate response to what the respondents did.*[3] *This task is distinct from and in addition to the final application of the "totality principle";*[4]
>
> *(d) fourthly, consider the appropriate penalty for the single breaches and, if relevant, each group of contraventions, taking into account all of the relevant circumstances; and*

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[1] *Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216 at 223; *McIver v Healey* [2008] FCA 425 at [16]; *Blandy v Coverdale NT Pty Ltd ACN 102 611 423* [2008] FCA 1533 at [56].

[2] Subsection 557(1) of the FW Act.

[3] *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 (***Merringtons***) at [46] (Graham J).

[4] *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 (***Mornington Inn***) at [41]-[46] (Stone and Buchanan JJ).

(e) finally, consider whether it is an appropriate response to the conduct which led to the breaches[5]. The Court should apply an "instinctive synthesis" in making this assessment.[6] This is known as an application of the "totality principle".

16. Set out below is the application of each of the above principles to the current proceedings.

Identified contraventions

17. The parties have identified and agreed that there are 6 contraventions for the purposes of the penalty hearing.

Grouping of Contraventions – Course of conduct and common element

Course of conduct

18. The FW Act contains statutory course of conduct provisions.

19. Section 557 of the FW Act sets out that multiple breaches of particular provisions may attract the operation of the course of conduct provisions. Particularly relevant is whether the breaches arose out of separate acts or decisions of the employer, or out of a single act or decision. The latter case will constitute a course of conduct but the former will not.[7] The onus of establishing the benefit of section 557 of the FW Act is on the respondents.[8]

*20. The Contraventions occurred on multiple occasions and days during the relevant period being 2 April 2014 to 2 June 2014 (**Employment Period**).[9] As identified in paragraph 150 above, each and every occasion was a breach of the Award and FW Act.*

21. The applicant has applied the course of conduct provisions of the FW Act and treated multiple contraventions of the same provision as one contravention. For example, the first respondent failed to pay the Employee the applicable minimum wage rate for each shift that she worked during the Employment period (as required under clause A.3.6 of Schedule A of the Award (by reference to clause 13.2 of the Award)). The applicant has treated each separate minimum wage contravention as one.

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[5] See *Kelly v Fitzpatrick* (2007) 166 IR 14 at [30] (Tracey J) (***Kelly***); *Merringtons* at [23] (Gray J), [71] (Graham J) and [102] (Buchanan J).

[6] *Merringtons* at [27] (Gray J) and [55] and [78] (Graham J).

[7] *Seymour v Stawell Timber Industries Pty Ltd* (1985) 9 FCR 241 at 266-267 per Gray J (with whom Northrop J agreed at 245).

[8] *Workplace Ombudsman v Securit-E Holdings Pty Ltd (In Liquidation) & Ors* [2009] FMCA 700 at [5].

[9] Statement of Claim at paragraph 4.

22. As this case involves contraventions of multiple Award terms, the applicant draws the Court's attention to a number of authorities which outline that each separate obligation imposed by an award is to be regarded a separate contravention: Gibbs v Mayor, Councillors and Citizens of City of Altona *(1992) 37 FCR 216 at 223;* McIver v Healey *[2008] FCA 425 at [16];* Blandy v Coverdale NT Pty Ltd ACN 102 611 423 *[2008] FCA 1533 at [56]. Accordingly, the applicant submits that each of the 6 underpayment contraventions attract separate civil penalties and should not be further grouped.*

Common element

23. The applicant submits that as each of the six Contraventions relates to separate and distinct terms of the FW Act and Award, apart from the grouping set out at paragraph 21 above, no further grouping is required[10].

Factors relevant to determining penalties

24. Factors relevant to the imposition of a penalty under the FW Act[11] *have been summarised by Mowbray FM in* Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar *[2007] FMCA 7 (**Pangaea**), [26]-[59], as follows:*

> *(a) the nature and extent of the conduct which led to the breaches;*
>
> *(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 breaches;*
>
> *(d) whether there had been similar previous conduct by the defendant;*
>
> *(e) whether the breaches 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 breaches were deliberate;*

[10] Refer to *Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216 at 223; *McIver v Healey* [2008] FCA 425 at [16]; *Blandy v Coverdale NT Pty Ltd ACN 102 611 423* [2008] FCA 1533 at [56].

[11] Whilst applied in that case in respect of contraventions of the *Workplace Relations Act 2006*, they have been applied in relation to contraventions of the FW Act including in *Fair Work Ombudsman v Rocky Holdings Pty Ltd* [2013] FCCA 1549 at [50] per Emmett J.

(h) whether senior management was involved in the breaches;

(i) whether the party committing the breach had exhibited contrition;

(j) whether the party committing the breach had taken corrective action;

(k) whether the party committing the breach had cooperated 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.

25. This summary was adopted by Tracey J in Kelly *at [14] and Emmett J in* Fair Work Ombudsman v Rocky Holdings Pty Ltd *[2013] FCCA 1549 at [50] – [51]. The summary is a convenient checklist, but it does not prescribe or restrict the matters which may be taken into account in the exercise of the Court's discretion*: Sharpe v Dogma Enterprises Pty Ltd *[2007] FCA 1550 at [11];* Merringtons *at [91] per Buchanan J.*

26. As will be addressed further below, the circumstances of this case demonstrate that there has been a flagrant disregard for the system of workplace regulation in Australia whereby, among other things, the laws provide minimum entitlements for employees. The applicant also submits that there is sufficient evidence from which the Court can infer that the respondents have exploited a vulnerable employee by reason of their conduct. These are matters which the applicant submits should figure prominently in the imposition of penalties upon the respondents in this case. The Court should fix appropriate penalties so that the public's confidence in workplace regulation is maintained.

Nature and extent of conduct / The circumstances in which the conduct took place/ Deliberateness of the breaches

27. As set out in paragraph 5 above, in April 2013, the first respondent made a decision to commence selling its products via pop up shops. The first respondent also made the decision to pay its casual sales employees a basic hourly rate of pay plus commission in order to "encourage" them to sell more

products.[12] *It was noted in paragraph 7 that there is no evidence from the first respondent as to whether it undertook an, in effect, reconciliation to determine whether or not the Employee was being paid properly, and in accordance with their minimum entitlements under the Award.*

28. Moreover, and one of the points which the applicant places particular emphasis on in these proceedings, it is open for the Court to find, and the applicant submits that it should so find, that the first respondent's conduct was deliberate or, at the very least, wilfully blind to its obligations to the Employee. That being the case, that is an aggravating factor: Fair Work Ombudsman v Australia China Trading Investment Consultancy Group Pty Ltd and Anor *[2014] FCCA 407 at [72] per O'Sullivan J*

*29. The applicant says that the above finding arises from the evidence of the second respondent's belief (and therefore that of the first respondent as the second respondent was the "*hands and brains*" of the first respondent:* Hamilton v Whitehead *(1988) 166 CLR 121; and the application of section 793 of the FW Act) that the first respondent "*could not afford*" to pay the minimum entitlements under the Award because if it did it "*wouldn't make any profit*".*[13]

30. The other inference which arises from that evidence, and that which the applicant asks the Court to draw, is that the first respondent's decision not to comply with the Award was because the first respondent preferred its interests to that of the Employee. That is another matter that should be given some particular weight in the imposition of civil penalties and which the applicant says is an aggravating factor.

31. The egregious nature of that conduct in this case is further highlighted by the following matters which all arose before the Employment Period:

> *(a) firstly, in July 2013 three other employees of the first respondent lodged complaints with the applicant regarding conduct similar to that which involved the Employee in this case.*[14]
>
> *(b) secondly, in July 2013, the applicant (through an Inspector employed by the applicant) sent information to the first respondent to assist it to understand its obligations to*

[12] Loutsopoulos Affidavit at [8(a)].
[13] Loutsopoulos Affidavit at [8(h)]
[14] Travers Affidavit at [11].

its employees, including attaching a link to the Award, information regarding pay slips and also to online tools to calculate wages.[15]

(c) thirdly, the second respondent acknowledged that the three employees had been underpaid.[16]

(d) fourthly, the second respondent received and read the information which the applicant had sent the first respondent, referred to in subparagraph 0 above.[17]

(e) fifthly, the first respondent also received advice from a solicitor that it had to pay according to the Award.[18]

32. Those circumstances support a submission that the first respondent acted with a flagrant disregard for the Employee's rights. That is a serious and aggravating factor in the applicant's submission.

33. A purpose of the Australian workplace laws is to provide a safety net to ensure that employees are paid adequate minimum entitlements, particularly those who are vulnerable or in low income roles. The laws also ensure that there is an even playing field in the industry for all employers in respect of their employment costs. Contraventions of these entitlements undermine the workplace relations regime as a whole and demonstrate a disregard for an employer's legal obligations: Fair Work Ombudsman v Jooine (Investment) Pty Ltd *[2013] FCCA 2144 at [26] per Lloyd-Jones J. The respondents' reasons for not paying in accordance with the Award because they would "not make any profit" permits the Court to, if not positively find, at least infer that the respondents were seeking to obtain an advantage over the first respondent's competitors which were complying with their legal obligations. That is a matter the Court should take into account when imposing penalties upon the respondents.*

34. Finally, the applicant draws to the Court's attention to the fact that the Employee was working in Australia pursuant to a working holiday subclass 417 visa[19] *and a fair inference can be drawn from the facts in this case that she was from a non-English speaking background and had a limited understanding of her legal rights in Australia. The Employee was therefore a*

[15] Travers Affidavit at [12].
[16] Travers Affidavit at [12(b)(ii)].
[17] Annexure ML2 to the Loutsopoulos Affidavit at page 14, Lines 9-15.
[18] Annexure ML2 to the Loutsopoulos Affidavit at page 12, Line 23 to page 13, Line 5.
[19] Exhibit ET-1 to the Travers Affidavit at Tab 9, page 36.

vulnerable employee: Workplace Ombudsman v Saya Cleaning Pty ltd and Anor *[2009] FMCA 38 at [20];* Jooine (Investment) *at [82]*.

35. The applicant acknowledges however that mere vulnerability is not sufficient to constitute an aggravating factor for the purposes of determining penalty; the Court needs to be satisfied that that vulnerability was exploited: Hanssen Pty Limited v Jones *(2009) 179 IR 57 at [55]:* Jooine *at [90]*.

36. The applicant submits that the Court can, at least, infer from the circumstances of this case that the Employee's vulnerability was exploited. The applicant relies upon the following matters in support of that submission. Firstly, the first respondent appears to have consciously targeted "backpackers" by advertising the jobs on the website www.backpackers.com.[20] *That demonstrates that a particular type of person was being sought out. A fair description of those persons in the applicant's submission are foreign nationals, here in Australia for relatively short periods of time, seeking to earn some money to sustain their living and travel expenses. It is not too much of a stretch to appreciate that it might be thought that those persons would not necessarily know their full legal rights and/or not complain about them.*

37. Secondly, in paragraph 15 of his affidavit, the second respondent says that before the incidents of the prior complaints – as to which see paragraphs 45 and 46 below – there was no sign of the first respondent's employees complaining. If they had complained, then he would have resolved the issues with them amicably. The second respondent then goes on to say that he caused the first respondent to remedy the underpayments once the complaint had been made to the applicant.

38. Despite the earlier instances, the first respondent appears to have adopted the exact same position with respect of the Employee. The first respondent continued to breach its legal obligations and underpay the Employee and has simply waited until the Employee complained to the applicant before the first respondent rectified the underpayment.

39. The position taken by the first respondent (as outlined in paragraphs 37 to 38 above) effectively attempts to shift responsibility for compliance with minimum employment entitlements from the employer to the employee (with minimum wages to be determined and paid only upon complaint). This

[20]Exhibit ET-1 to the Travers Affidavit at Tab 9, page 44.

system is inconsistent with the first respondent's responsibility as an employer as recognised in the below cases:

> *(a)* FWO v Bosen Pty Ltd *[2011] VMC 81 at [51]*
>
> *"*There is a need to send a message to the community at large, and small employers particularly, that the correct entitlements for employees must be paid and that steps must be taken by employers (of all sizes) to ascertain and comply with minimum entitlements (as opposed to ignoring those obligations). Compliance should not be seen as the bastion of the large employer, with human resources staff and advisory consultants (accountants, consultants, lawyers) behind them*."*
>
> *(b)* David Armstrong v VK Holdings Pty Limited - *(Unreported, 28 November 2007) Chief Industrial Magistrate Hart, Chief Industrial Magistrates Court Sydney) - at page 19*
>
> *"*However, negligence in this area is far from excusable. An employer has an obligation to find out and provide the minimum lawful entitlements prescribed for its employees. When the employee is a young, vulnerable employee, such as a trainee, the obligation upon the employer is even greater*."*

40. As a result of the first respondent's practice of only considering Award entitlements after receipt of a complaint, the Employee did not receive her lawful minimum entitlements for a period of up to eight months after those entitlements were accrued.[21]

41. There is no evidence that the Employee knew what her legal rights were. As a newcomer to Australia on a 417 working visa, she is unlikely to have been aware of what her rights were until she complained to the applicant. In the applicant's submission, the Court can infer that the respondents exploited the Employee's vulnerability and that but for the intervention of the applicant it is likely that the Employee would have remained unpaid in respect of her minimum entitlements. The applicant submits that this should be taken into account as an aggravating factor when imposing penalties upon the respondents.

[21] The Employment Period commenced on 2 April 2014 (SOAF at 9) and the rectification payment was made in 3 November 2014 (SOAF at 43).

42. To the extent that the first respondent may seek to rely on its prompt payment upon receipt of the complaint as a factor in mitigation, the applicant submits that any such submission should be considered in the context that the respondents were already on notice as to existence and application of the Award (as a result of the three prior complaints) but chose to utilise a system of payment (i.e. a flat rate of $8 per hour when the minimum award rate was $17.98 per hour) which would inevitably lead to underpayments.

43. The relatively quick payment of the underpaid amount on receipt of the Employee's complaint represents no more than the first respondent meeting its outstanding minimum obligations. The relevant time for payment was not upon receipt of complaint but rather when the Employee performed work (up to eight months prior to the eventual payment date). The applicant further draws the Court's attention to the decision of Australian Workers Union v Johnson Matthey (Aust) Ltd *[2000] FCA 728 in which Marshall J states at [5]: "*A transgressor should not unduly benefit from the stoicism of the injured party*."*

The nature and extent of any loss or damage sustained as a result of the breaches

44. The monetary consequence of the Underpayment Contraventions was that the Employee was underpaid the sum of $4,222.73.[22] *Although this may not sound like a large sum, to give that some context, that is the underpayment in a period of only two months. Over the same period, the Employee was paid $3,346.93 for the work that she did. That is, the underpayment represents about 126% of what she was paid over the same period. On any consideration of the facts, an underpayment of that extent is extremely significant. It is to also be remembered that the Employee was in Australia working under a working holiday visa. A proper inference open to be drawn is that any amount of an underpayment is likely to have particularly adverse consequences for an employee away from home and needing to work in order to sustain not only their living expenses but to enjoy the purpose of their trip.*

Similar previous conduct

45. The respondents engaged in the same conduct with respect to other of its employees before the Employee's complaint. In July 2013, the applicant received three complaints from

[22] SOAF at [43].

employees of the first respondent. All three complaints were essentially identical in nature to that of the Employee's complaint. Two of the complainants indicated that they were working in Australia pursuant to subclass 417 working holiday visas. All three of the complainants said that they were being paid $8 per hour and that they worked significant hours. All three also complained that they were not provided with pay slips and/or that the content of those pay slips were inaccurate.[23]

46. The applicant investigated the complaints made in July 2013 and the second respondent caused the first respondent to remedy the underpayments at that time by paying the three complainants their proper entitlements. The applicant closed its file on that basis.[24] *It is proper to infer that the applicant did not take any action at that time because the respondents remedied the underpayments when it was brought to their attention. They were, in effect, given a chance to rectify their behaviour.*

47. In addition to the Employee's complaint in July 2014, the applicant received another request for assistance from another employee in July 2014 complaining of the same conduct. That complainant, Miss Jiu Yi Cheng, indicated that she had been paid $8 per hour. Miss Cheng was also working in Australia on a subclass 417 working holiday visa. Miss Cheng's complaint was closed on 28 August 2014 because Miss Cheng had not supplied sufficient information for the applicant to carry out an investigation.[25]

Size and financial circumstances of the respondents

48. The second respondent purports to give some evidence of the financial position of the first respondent in paragraphs 16, 17 and 20 of his affidavit. The applicant objects to that evidence in that form. If the Court receives that evidence, the applicant urges the Court to give it very little, if any, weight. The respondents have not sought to place proper evidence of the first respondent's financial position before the Court. There is no meaningful way in which the Court can make an assessment of the financial position of either of the respondents.

49. In any event, the applicant submits that an employer's financial position at the time of the contraventions is not relevant to the question of penalty.[26] *Employers, be they small, medium or*

[23] Travers Affidavit at [10] – [11].
[24] Travers Affidavit at [12].
[25] Travers Affidavit at [13] and [14(a)].
[26] See *Cotis v McPherson* (2007) 169 IR 30 at [16] and *Kelly* at [28]

large, have an obligation to meet minimum standards in relation to their employees; they cannot overcome financial difficulties by underpaying their employees.[27]

50. To the extent that the issue of capacity to pay may be raised, the FWO refers to a relevant line of authority regarding the primacy of general deterrence. In Jordan v Mornington Inn Pty Ltd,[28] *Heerey J was required to determine the appropriate penalties to be imposed on an employer for admitted contraventions ss 400(5) and 792 of the WR Act. His Honour stated:*[29]

> *"*As to the respondent's own financial position, however, in considering the size of a penalty, capacity to pay is of less relevance than the objective of general deterrence: Leahy (No 2) at [9]. In any event, to the extent that financial hardship might mitigate what would otherwise be an appropriate penalty, such an argument would need to be based on evidence. Apart from the income figures mentioned above, which were advanced from the Bar table, no such evidence was forthcoming*."*

51. On appeal,[30] *Stone and Buchanan JJ described the statement of principle highlighted in the above extract from the judgment of Heerey J as being "unimpeachable".*[31]

52. In support of the principle he identified in Jordan, Heerey J cited a paragraph from the judgment of Merkel J in ACCC v Leahy Petroleum Pty Ltd (No 2)[32] *which concerned the determination of appropriate penalties for price-fixing behaviour in breach of s 45 of the* Trade Practices Act 1974 *(the TPA). In the paragraph of the judgment of Merkel J referred to by Heerey J, his Honour stated:*[33]

> *"*The size of the contravening companies and their respective capacities to pay a penalty were relied upon as factors in mitigation in the present case. Plainly, such factors can be relevant to the penalty that is necessary to deter the company from contravening the Act in the future. … However, a contravening company's capacity to pay a penalty is of less relevance to the objective of general

[27] Kelly at [27]; *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 at [27].
[28] (2007) 166 IR 33
[29] At [99] (emphasis added).
[30] (2008) 168 FCR 383.
[31] At [69].
[32] (2005) 215 ALR 281
[33] At [9].

> deterrence because that objective is not concerned with whether the penalties imposed have been paid. Rather, it involves a penalty being fixed that will deter others from engaging in similar contravening conduct in the future. Thus, general deterrence will depend more on the expected quantum of the penalty for the offending conduct, rather than on a past offender's capacity to pay a previous penalty. I therefore respectfully agree with the observation of Smithers J, referred to by Burchett and Kiefel JJ in NW Frozen Foods, to the effect that, a penalty that is no greater than is necessary to achieve the object of general deterrence, will not be oppressive. ...*"*

53. More recently in FWO v Promoting U Pty Ltd,[34] *Burchardt FM observed:*

> *"...* 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*".*[35]

Involvement of senior management

54. It is clear that senior management of the first respondent was involved in the conduct giving rise to the Contraventions. The second respondent was a director of the first respondent. He has admitted that he was the person responsible for the day to day operation of the first respondent. The second respondent has also admitted that he was aware of the duties which the Employee performed and was responsible for setting her rates of pay.[36]

55. The second respondent has admitted that he was involved in the first respondent's contraventions within the meaning of section 550 of the FW Act[37].

Ensuring compliance with minimum standards

56. Ensuring compliance with minimum standards is an important consideration in this case. One of the principal objects of the FW Act is the maintenance of an effective safety net of

[34] [2012] FMCA 58
[35] [2012] FMCA 58 at [57]
[36] SOAF at [8].
[37] SOAF at [48].

employer obligations (and employee entitlements) and effective enforcement mechanisms. The substantial penalties set by the legislature for contravention of such obligations reinforce the importance placed on compliance with minimum standards.

57. As set out in paragraph 32 above, it is open for the Court to find that the respondents committed the Contraventions in flagrant disregard for their statutory obligations. The applicant submits that this requires the need for penalties to be imposed on a meaningful level.

58. In addition, the first respondent failed to issue pay slips to the Employee. Under sub-section 536(1) of the FW Act, the first respondent was required to provide the Employees with a pay slip within one working day of paying an amount to her in relation to the performance of work. The provision of pay slips enables employees to understand the basis of payments made and check the accuracy of the amounts paid. This is particularly important in a matter such as this where an employer has adopted a remuneration regime where an employee receives an hourly rate for each hour of work and a commission payment based on sales. Without receipt of a payslip setting out what an employee has been paid, the hours they worked and the basis for their payment, it becomes very difficult for an employee to understand whether or not they are receiving their full legal entitlements.

<u>Cooperation with the applicant</u>

59. The applicant acknowledges that the respondents have demonstrated a co-operative attitude throughout the FWO's investigation and these proceedings in that:

> *(a) the second respondent participated in a recorded interview with the applicant on 5 September 2014.[38] The applicant submits, and accepts, that the second respondent was candid in the interview; and*
>
> *(b) the matter has ultimately proceeded by way of the SOAF, with the respondents admitting to all of the contraventions after these proceedings were commenced.*

60. The admissions made by the respondents have saved a considerable cost to the public purse by avoiding the need for a fully contested hearing and providing a more efficient use of Court resources.

[38] Travers Affidavit at [14(c)]; Loutsopoulos Affidavit at [5].

61. The applicant accepts that the Court may wish to afford the respondents a discount on penalty for their early admissions and co-operation with the applicant. The applicant submits that when considering whether to afford such a discount, or when setting the amount of any such discount the Court should have regard to the decision of Stone and Buchanan JJ in the matter of Mornington Inn v Jordan *[2008] FCAFC 70 which stated:*

> *[74] "*It is important to note that it is not a sufficient basis for a discount that the plea has saved the cost of a contested hearing – that would discriminate against a person who exercised a right to contest the allegations. A discount may be justified, however, if the plea is properly to be seen as willingness to facilitate the course of justice. Remorse and an acceptance of responsibility also merit consideration where they are shown*."*
>
> *[76] "...* it should be accepted, for the same reasons as given in Cameron, that a discount should not be available simply because a respondent has spared the community the cost of a contested trial. Rather, the benefit of such a discount should be reserved for cases where it can be fairly said that an admission of liability: (a) has indicated an acceptance of wrongdoing and a suitable and credible expression of regret; and/or (b) has indicated a willingness to facilitate the course of justice*."*

62. The applicant submits that in the circumstances of this matter (in which the Employee was paid $8 per hour instead of the Award minimum of $17.98 and was not paid at all in regards to other Award entitlements such as her casual loading and penalty rates) the admission of liability by the respondents assisted with the efficient disposition of this matter but could arguably be regarded as an acceptance of the inevitable rather than a credible expression of regret.

<u>Whether the party committing the breach had exhibited contrition or has taken corrective action</u>

63. The applicant accepts that the first respondent remedied the underpayment to the Employee by making a payment on 3 November 2014.[39] *The applicant submits that the making of the overdue wage payment does not in and of itself demonstrate contrition as outlined by Gray J in the matter of* Australian

[39] SOAF at [43].

Ophthalmic Supplies Pty Ltd v McAlary-Smith *[2008] FCAFC 8 at [15]:*

> *"*One argument on which counsel for the appellant relied was that the magistrate had failed to take into account, or to give any weight to, the fact that the appellant had demonstrated contrition. The only fact relied on to demonstrate contrition was that the appellant had paid the amounts owing to the employees whose underpayments were the subject of the contraventions prior to the magistrate's consideration of penalties. This fact involved no demonstration of contrition on the part of the appellant at all. ... It did no more than to comply with its legal obligation to obey the order*."*

64. The applicant acknowledges that the second respondent has expressed a commitment to complying with Award obligations in future[40]. However, the applicant submits that this evidence should be given little weight as this commitment goes no further than stating that the first respondent (through the actions of the second respondent) has informed itself of its minimum legal obligations and will comply with those obligations in future dealings.

*65. The applicant submits that it is notable that the respondents have sought that no penalties be imposed in this matter (based on an un-evidenced assertion of incapacity to pay "*a hefty fine*"[41]). The applicant submits that the position taken by the respondents indicates a failure to accept culpability for the Contraventions and therefore a lack of genuine contrition.*

<u>The need for specific and general deterrence</u>

*66. The applicant submits that there is a need in this case to consider both specific and general deterrence. 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 FW Act.[42] The setting of a penalty in respect of contravening conduct deliberately marks the seriousness with which the public regards such non-compliance, and naturally is designed to act as a deterrent, both by encouraging compliance in the first instance and also by imposing serious financial consequences for non-compliance.*

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[40] Affidavit of Second Respondent dated 14 May 2015 at [19].
[41] Affidavit of Second Respondent dated 14 May 2015 at [20].
[42] See for example, Mowbray FM in *Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar* [2007] FMCA 7 [26]-[59].

67. The role of general deterrence in determining the appropriate penalty is illustrated by the comments of Lander J in Ponzio v B & P Caelli Constructions Pty Ltd *(2007) 158 FCR 543, [93]:*

> *"*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*."*

68. As has been noted in these submissions, the Contraventions involve deliberate conduct resulting in underpayments to a vulnerable employee. The Employee was in Australia working pursuant to a subclass 417 working holiday visa. Employees engaged on working holiday visas are entitled to the full benefit of the Australian workplace laws. They are entitled to expect that they will be properly treated by Australian employers and not be exploited. The penalties in this case should be imposed on a meaningful level so as to deter other employers from committing similar contraventions.

69. There is also a need to consider specific deterrence. The first respondent is still in business and operating. There is a risk that it will commit further breaches of workplace laws. The second respondent remains a director of the first respondent and of a number of other entities.[43] *Despite the second respondent's statements to the contrary, there is still a risk that he might commit further contraventions in the future.*

70. The applicant relies on the following principles to support the submission that the penalty imposed on respondents should be significant to ensure that the specific deterrence effect is high:

> *(a)* Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor *[2009] FMCA 38*

[43] Travers Affidavit at [16].

> *"[41]* As there has been no demonstration of contrition or remorse on behalf of either respondent the need for specific deterrence is high: *Australian Ophthalmic Supplies Pty Ltd* [17]; *Fryer v Yoga Tandoori House Pty Limited* [2008] FMCA 288 [35]*."*
>
> *(b) Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543*
>
> *"*[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 SARC 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*."*

Penalty considerations for the second respondent

71. The applicant submits that by reason of the matters set out at paragraphs 8 of the SOAF, the second respondent was the human agent through whom the first respondent committed the Underpayment Contraventions; he was the "hands and brain" of the first respondent.

72. The applicant submits that the same considerations should apply in determining the penalty to be imposed in respect of the conduct of both the first respondent and the second respondent. Additionally, the applicant submits that the connection between the first and second respondents should not reduce the amount of penalty. The applicant relies upon the decision of Buchanan J in Fair Work Ombudsman v Ramsay Food Processing Pty Ltd (No. 2) *[2012] FCA 408 at [8]:*

> *"*A submission was made by the respondents that some consideration should be given to reducing the amount of the penalty imposed on one or other of the respondents to account for the intimate connection between the actions of the first respondent and the conduct of the second respondent. As I understood the submission, it was that there was a risk of punishing twice for the same conduct – i.e. punishing both the first and second respondents for the conduct of the second respondent. The submission appeared to rely on the judgment of Mansfield J in *Australian*

> *Prudential Regulation Authority v Holloway* (2000) 45 ATR 278; [2000] FCA 1245, although I do not understand how it could do so … in the legislative scheme which his Honour was applying, no distinction was made between the maximum penalty that could be applied to corporations and the maximum penalty that could be applied to individuals. That is not the case here. The present legislative scheme fixes quite different (and much lower) penalties for individuals than for corporations. The culpability of each respondent must be assessed individually and in the context set by the maximum penalty prescribed in each case. I reject the suggestion, if that was what was intended, that either or both respondents might have the benefit of any reduction in penalty because they were jointly, as well as individually, culpable*."*

73. To the extent that the second respondent seeks to advance a submission of ignorance or inexperience in mitigation of his involvement in the Underpayment Contraventions the applicant submits that:

> *(a) ignorance is no excuse for non-compliance: as stated in the matter of* FWO v Bosen Pty Ltd *[2011] VMC 81 at [37]*
>
> *"*The breaches may have occurred through ignorance to a degree, however the Defendants are engaged in multiple business operations in an English speaking jurisdiction. They are not vulnerable workers. Ignorance is no excuse for non compliance with legal obligations. There is no evidence they sought clarification of this advice in their native language to ensure they understood and complied with their legal obligations*."*
>
> *(b) the second respondent had personal knowledge of the existence and application of the Award through his involvement in the resolution of three prior complaints approximately 12 months prior to the Employee's complaint*[44] *but made a deliberate decision not to amend the first respondent's payment practices following the resolution of those complaints*[45]*;*

[44] Travers Affidavit at [10] – [11].
[45] Loutsopoulos Affidavit at [8(h)]

(c) the second respondent is an experienced company director having been a director of the first respondent since 2008 and also holding directorships of four other entities;[46]

(d) the second respondent has experience in Australian regulatory requirements having completed a Bachelor of Finance from Macquarie University in Australia in 2005;

(e) the second respondent had access to, and did access, legal advice concerning the first respondent's Award obligations[47] *prior to the Employee's complaint*

Totality

74. The applicant accepts that the Court may find that the totality principle is relevant when determining the appropriate level of penalties to be set in this case.[48]*"*

F. Findings in support of penalty

14. In relation to the **nature and extent of the conduct**, I accept that on the evidence before me, the first respondent's conduct was deliberate or at the very least, wilfully blind to its obligations to the Employee. I further accept that, as such, that conduct is an aggravating factor.

15. I also have regard to the fact that the first respondent was the subject of **previous complaints by employees**, resulting in information being given by the applicant to the first respondent to assist it to understand its obligations to its employees and assist in implementing procedures to meet its obligations. Further, the second respondent acknowledged that the employees the subject of the earlier complaints had been underpaid and that the second respondent had received and read the information provided to it by the applicant and that the first respondent had received advice from a solicitor.

16. Whilst I accept that the first respondent did act with a **deliberate disregard for the Employee's rights**, I do not accept that the first respondent exploited the Employee. I accept the submission of the first respondent that the Employee spoke English and was able to pursue her

[46] Travers Affidavit at [16].
[47] Annexure ML2 to the Loutsopoulos Affidavit at page 12, Line 23 to page 13, Line 5
[48] *Carr v CEPU & Anor* [2007] FMCA 1526 at [34], *McDonald v The Queen* (supra, 563) per Burchett and Higgins JJ,

complaint about the breaches of the first respondent of its obligations to her.

17. In the circumstances, the first respondent's prompt payment following the complaint to the applicant by the Employee should be seen in the context of the fact that the respondents were already on notice as to the existence and the application of the relevant Award. However, I do still have regard to the fact that rectification of the underpayments was made promptly.

18. The applicant submits that the underpayment of $4,222.73 was an underpayment in a period of only 2 months, during which the employee was paid $3,346.93 for the work that she did. In the circumstances, I accept the applicant's submission that the underpayment is relatively significant.

19. In relation to the **size and financial circumstances** of the first respondent, there is some evidence before me provided by the second respondent. The applicant objects to the evidence in that form and submits that the Court should give it little, if any, weight. In the circumstances, I accept there is little evidence before this Court to make a reliable finding as to the size and financial circumstances of the respondents. However, there is some evidence from the second respondent that the first respondent was struggling to pay its employees and that was part of the reason why the first respondent decided to employ the Employee on the terms and conditions that it did and I accept that evidence.

20. In any event, as submitted by the applicant, an employer's financial position at the time of any contravention is not relevant to the question of penalty. All employers have an obligation to meet minimum standards in relation to their employees and it is not acceptable for employers to seek to overcome their financial difficulties by underpaying their employees.

21. The second respondent, being a director of the first respondent, admitted that he was the person responsible for the day-to-day operation of the first respondent. The second respondent further admitted that he was aware of the duties that the first respondent had, that is, to pay the Employee according to law. Plainly, such an

admission makes it clear that the second respondent was intricately and intimately involved in the senior management of the first respondent. Indeed the second respondent has admitted that he was involved in the first respondent's contraventions within the meaning of s.550 of the Act.

22. The **failure by the first respondent to issue payslips** to the Employee is a serious breach of its obligations as it is the provision of payslips that enables employees to understand the basis of payments made to them and check the accuracy of the amounts paid. I accept the submissions of the applicant that this is particularly important in instances such as this, where an employer has adopted a remuneration regime where an employee receives an hourly rate for each hour of work and a commission payment based on sales.

23. The applicant acknowledged the **cooperative attitude** of the respondents throughout the applicant's investigation and acknowledged that the admissions made by the respondents have saved considerable cost to the public purse by avoiding the need for a fully contested hearing, thereby facilitating more efficient use of court resources.

24. The applicant accepted that a discount on penalty for **early admissions** and cooperation with the applicant could be afforded to the respondents, particularly where the early admission is properly to be seen as a willingness to facilitate the course of justice. The applicant submits that such discount should take into account the fact that the Employee was paid $8.00 an hour instead of the award rate of $17.98 and was not paid at all in regards to other work award entitlements, such as the casual loading and penalty rates. However, in my view, early admissions and cooperation throughout the applicant's investigation, including in the filing of a Statement of Agreed Facts, are certainly matters that should reflect as mitigating circumstances in the imposition of a penalty.

25. Further, I accept that the early remedy of the underpayments, the early admissions and cooperation throughout; expression of commitment to comply with award obligations in future; and expression of contrition through the respondents' submissions, are all evidence of contrition and remorse on the part of the respondents that should be taken into account in mitigating any penalty to be imposed.

26. In relation to **deterrence**, I accept the applicant's submissions that the contraventions involved deliberate conduct on the part of the respondents. I also accept that all employees, including those, such as the applicant, working in Australia pursuant to a sub-class 417 working holiday visas, are entitled to the full benefit of the Australian workplace laws and are entitled to expect that they will be properly treated by Australian employers. I further accept the applicant's submission that the penalty in this case should be imposed at a meaningful level so as to deter other employers from committing similar contraventions.

27. In relation to **specific deterrence**, again in light of the deliberate nature of the respondents' contraventions in the face of full information from the applicant as to the first respondent's workplace obligations, coupled with the fact that the first respondent continues its business, with the second respondent remaining as a director, some degree of specific deterrence is appropriate.

28. In considering the appropriate penalty in respect of the second respondent, the same comments as above apply. In particular, the second respondent's personal knowledge of the existence and application of the awards through his involvement in the resolution of three prior complaints approximately twelve months prior to the Employee's complaint; the second respondent's deliberate decision not to amend the first respondent's payment practices following the resolution of those complaints; and, the information and assistance provided by the applicant.

29. I also have regard to the fact that:

    a) the second respondent is an experienced company director, having been a director of the first respondent since 2008 and also holding directorships of four other entities;

    b) the second respondent's experience in Australian regulatory requirements, having completed a Bachelor of Finance from Macquarie University in Australia in 2005; and,

    c) the second respondent accessed legal advice prior to the Employee's complaint.

G. Penalties

30. In respect of the first respondent, the maximum for each contravention is $51,000.00 in respect of breaches of s.45 of the Act and $25,500.00 for contravention of s.536(1) of the Act.

31. The Employee was employed by the first respondent on a casual basis, in the position of a casual sales person, from 2 April 2014 to 2 June 2014. During that period, the first respondent failed to:

    a) pay the Employee the minimum wage rate in breach of s.45 of the Act;

    b) pay the Employee the relevant casual loading in breach of s.45 of the Act;

    c) pay the Employee penalty rates for work performed on a Saturday in breach of s.45 of the Act;

    d) pay the Employee penalty rates for work performed on a Sunday in breach of s.45 of the Act;

    e) pay the Employee for work performed on a public holiday in breach of s.45 of the Act; and

    f) provide to the Employee pay slips in breach of s.536(1) of the Act.

32. In considering an appropriate penalty, I have regard to the applicant's submission that each of the six underpayment contraventions should attract separate civil penalties and should not be further grouped beyond treating each separate minimum wage contravention as one.

33. I accept the applicant's submission that each of the six underpayment contraventions should be regarded as separate contraventions of the Act which attract separate civil penalties to which the totality principle should be applied.

34. Having determined an appropriate penalty for each contravention, one should consider the aggregate figure with a view to ensuring that it is an appropriate response to the conduct that engendered the breaches. The relevant principles are as set out by Goldberg J in *Australian*

Competition & Consumer Commission v Australian Safeway Stores Pty Ltd & Ors (1997) 145 ALR 36, 53:

> "*The totality principle is designed to ensure that overall an appropriate sentence or penalty is appropriate and that the sum of the penalties imposed for several contraventions does not result in the total of the penalties exceeding what is proper having regard to the totality of the contravening conduct involved:* McDonald v R *[1994] FCA 956; (1994) 48 FCR 555; 120 ALR 629. But that does not mean that a court should commence by determining an overall penalty and then dividing it among the various contraventions. Rather the totality principle involves a final overall consideration of the sum of the penalties determined. In* Mill v R *[1988] HCA 70; (1988) 166 CLR 59; 83 ALR 1 the High Court accepted the following statement as correctly describing the totality principle:*
>
> > The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is "just and appropriate". The principle has been stated many times in various forms: "when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong"; "when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences".
>
> *As Spender J pointed out in* McDonald v R *at FCR 556; ALR 631:*
>
> > Implicit in that statement is that the sentence for each offence should be "properly calculated in relation to the offence for which it is imposed*".*
>
> *It is explicit in this statement that a sentencer or penalty fixer must, as an initial step, impose a penalty appropriate for each contravention and then as a check, at the end of the process, consider whether the aggregate is appropriate for the total*

contravening conduct involved: McDonald v R *at FCR 563, per Burchett and Higgins JJ.*"

35. Accordingly, I make the following determination in respect of each of the contraventions in respect of each of the respondents as follows:

Penalty Imposed upon the First Respondent			
Provision	**Description of Contravention**	**Maximum Penalty**	**Penalty Imposed**
s.45 of the Act by contravening clause A.3.6 of Schedule A of the Award	Failure to pay the minimum wage for ordinary hours of work	$51,000.00	$2,550
s.45 of the Act by contravening clauses A.5.4 and A.6.4 of Schedule A of the Award	Failure to pay the relevant casual loading for ordinary hours of work performed on a Monday to Saturday, and Sunday	$51,000.00	$2,550
s.45 of the Act by contravening clause A.7.3 of Schedule A of the Award	Failure to pay penalty rates for work performed on a Saturday	$51,000.00	$2,550
s.45 of the Act by contravening clause A.7.3 of Schedule A of the Award	Failure to pay penalty rates for work performed on a Sunday	$51,000.00	$2,550
s.45 of the Act by contravening clause A.7.3 of Schedule A of the Award	Failure to pay penalty rates for work performed on a public holiday	$51,000.00	$2,550
s.536(1) of the Act	Failure to issue pay slips	$25,500.00	$1,025
Sub Total		$280,500.00	$13,775

Penalty Imposed upon the Second Respondent			
Provision	**Description of Contravention**	**Maximum Penalty**	**Penalty Imposed**
s.45 of the Act by contravening clause A.3.6 of Schedule A of the Award	Failure to pay the minimum wage for ordinary hours of work	$10,200.00	$1,020
s.45 of the Act by contravening clauses A.5.4 and A.6.4 of Schedule A of the Award	Failure to pay the relevant casual loading for ordinary hours of work performed on a Monday to Saturday, and Sunday	$10,200.00	$1,020
s.45 of the Act by contravening clause A.7.3 of Schedule A of the Award	Failure to pay penalty rates for work performed on a Saturday	$10,200.00	$1,020
s.45 of the Act by contravening clause A.7.3 of Schedule A of the Award	Failure to pay penalty rates for work performed on a Sunday	$10,200.00	$1,020

s.45 of the Act by contravening clause A.7.3 of Schedule A of the Award	Failure to pay penalty rates for work performed on a public holiday	$10,200.00	$1,020
Sub Total		$51,000.00	$5,100

36. In applying the totality principle, I accept that each separate course of conduct in respect of each obligation imposed may be regarded as a separate contravention. However, I also have regard to the fact that the Employee was employed for only two months; that the underpayments were remedied immediately upon identification; and, the early and continued cooperation of the first respondent in the applicant's investigation and this proceeding.

37. Further, I am satisfied that the first respondent was not a large corporate entity and was a small employer operating in lean times and attempting to continue to operate for the benefit of all its employees.

H. Conclusion

38. In the circumstances, in my view, and in the absence of any guidance as to an appropriate penalty, five percent of the maximum penalty, being $12,750.00 in respect of the first respondent's breaches of s.45 of the Act and $1,025.00 in respect of the first respondent's breach of s.536 of the Act, making a total of $13,775.00 is appropriate. However, in applying the totality principle, and having regard to the limited time of employment of the Employee and the matters to which I have referred above in mitigating any penalty, and in seeking not to prevent the opportunity of the first respondent to continue its business, in my view the penalty should be no more than twice the underpayment. The underpayment was $4,222.73. Having regard to all matters relevant to considering an appropriate penalty, including totality, I am satisfied that the total penalty in respect of the contraventions of the first respondent should be **$8,500.00**.

39. In relation to an appropriate penalty for the second respondent, applying the same formula, I am satisfied that the aggregate penalty should be $5,100. However, in applying the totality principle, I am satisfied that the aggregate penalty should be further reduced and that the total penalty in respect of the contraventions of the second respondent should be $2,550.

40. Accordingly, the penalty in respect of the contraventions of the second respondent should be a total of **$2,550.00**.

41. The penalties should be paid to consolidated revenue.

I certify that the preceding forty-one (41) paragraphs are a true copy of the reasons for judgment of Judge Emmett

Associate:

Date: 9 October 2015