FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v HAIDER PTY LTD & ANOR *[2015] FCCA 2113*

Catchwords:
INDUSTRIAL LAW – Penalty – agreed statement of facts – factors going to penalty – deterrence – quantum of penalty –contravention of the *Fair Work Act 2009* (Cth).

Legislation:
Corporations Act 2001 (Cth): s.459A
Fair Work Act 2009 (Cth): ss.550, 712(3), 716(5)

Cases cited:
Mason & Harrington Corporation Proprietary Limited (trading as Pangaea Restaurant and Bar) [2007] FMCA 7

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	HAIDER PTY LTD ACN 124 624 871
Second Respondent:	MUBIN Al HAIDER
File Number:	BRG 1099 of 2014
Judgment of:	Judge Vasta
Hearing date:	30 July 2015
Date of Last Submission:	30 July 2015
Delivered at:	Brisbane
Delivered on:	30 July 2015

REPRESENTATION

Counsel for the Applicant:	Ms Nicholas
Solicitors for the Applicant:	Fair Work Ombudsman
Solicitors for the Respondent:	Tonio Lawyers

ORDERS

THE COURT DECLARES:

(1) That the Second Respondent was involved in each of the following contraventions by the First Respondent, and is therefore taken to have himself contravened these provisions, pursuant to s.550 of the *Fair Work Act 2009* (Cth).

(a) Section 712(3) of the *Fair Work Act 2009* (Cth) by failing to comply with a notice to produce issued by the Applicant on 29 May 2014; and

(b) Section 716(5) of the *Fair Work Act 2009* (Cth) by failing to comply with compliance notice issued by the Applicant on 16 September 2014.

THE COURT ORDERS ON A FINAL BASIS:

(2) That the Second Respondent pay penalties pursuant to ss.546(1) of the *Fair Work Act 2009* (Cth) in respect of each of the contraventions in the Declarations in 1(a) and 1(b) above totalling $6,970.

(3) That pursuant to ss.546(3) of the *Fair Work Act 2009* (Cth), the Second Respondent pays the penalty amount imposed pursuant to Order 2 above to the Commonwealth of Australia for transmission to Mr Prakesh Bajagai within sixty (60) days of this Order.

(4) That the Applicant have liberty to apply on seven (7) days' notice in the event that any of the preceding Orders are not complied with.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT BRISBANE

BRG 1099 of 2014

FAIR WORK OMBUDSMAN
Applicant

And

HAIDER PTY LTD ACN 124 624 871
First Respondent

MUBIN AL HAIDER
Second Respondent

REASONS FOR JUDGMENT

(Ex Tempore)

1. In March 2014 Mr Prekas Kumar Bajagai complained of various breaches as to underpayment and overworking by the First and Second Respondents to the Fair Work Ombudsman (the Applicant to these proceedings) who then investigated the complaint.

2. On 29 May 2014, the Applicant served upon both the First Respondent and the Second Respondent, a notice to produce records or documents. Those records or documents were needed to match up and to check the veracity of the claims made and to ensure that the First Respondent was complying with the obligations that they have generally under the National Employment Standards.

3. Those documents were not produced. On 8 July 2014, there was a letter sent to the Second Respondent which spoke of excuses that had been made so far and gave the Second Respondent an opportunity to participate in an interview regarding the allegations but also again spoke of the consequences of non-compliance with this matter.

4. There was no real answer to that letter. There was an email, I should say, that was sent but when one has a look at it, there really was nothing further done to in anyway bring forward the matter to any conclusion.

5. The Fair Work Ombudsman continued the investigations without the aid of these documents that ought to have been produced. The Applicant had reference to text messages, photographs, other log books or record books that they were able to find and records with the 7-Eleven head office. From these matters, certain inferences could be made as to the hours worked by, and the amounts paid to, Mr Bajagai. In September 2014, the Applicant issued the Second Respondent and the First Respondent with a notice to comply by paying a sum of $21,298.86 to Mr Bajagai. That notice was not complied with and there was correspondence entered into.

6. The Applicant then took this action in this Court. On 28 May 2015, a statement of agreed facts was filed in this Court. The statement of agreed facts noted that the first respondent was a company that was wound up pursuant to s.459A of the *Corporations Act 2001* (Cth) and a liquidator was appointed to the First Respondent as a result of a Supreme Court of Queensland order on 17 December 2014. Therefore, the action against the First Respondent was stayed.

7. With regard to the Second Respondent, he admitted to contravening the provisions set out and those provisions are in a minute of proposed order, which I will sign at the end of these proceedings.

8. The contraventions pursuant to s.550 of the *Fair Work Act 2009* (Cth) ("FW Act")were these:-

    a) The first contravention was against s.712(3) of the FW Act, by failing to comply with the notice to produce issued by the applicant on 29 May 2014;

    b) The second contravention was against s.716(5) of the FW Act by failing to comply with a compliance notice issued by the applicant on 16 September 2014.

9. As I have said, during the course of this hearing, I take the failure to comply with the notice to produce extremely seriously.

10. These are matters where the allegations fair and squarely note that there had been a chronic underpayment and a changing of records or a falsifying of records. The notice to produce asked for the records of the Applicant. As a person who was a franchisee, the Second Respondent ought to have had the records completed and easily attainable. There does not seem to be any real reason why these records were not attainable.

11. Excuses were given that the Second Respondent was sick during a period from 16 June to 12 July, inclusive, though that seemed to be a retrospective medical certificate and it did not really talk about how he was ill, other than he could not continue his usual occupation. His usual occupation was not such that that would stop him from being able to simply either get records that should have been available or to click a key on a computer to attain records.

12. There were other excuses that some of the records were in a particular building for which he could not gain access. I do not accept any of these excuses in any way justifies, explains or mitigates the non-compliance with the notice.

13. The fact is that the documents were not produced, and a reasonable inference is that either:-

    - The non-compliance is an acknowledgement that the documents don't exist, thereby illustrating that the Second Respondent has not completed the sorts of duties that he is, by law, obliged to do in keeping records; or

    - The non-compliance is an acknowledgement that the documents do exist and that they verify that Mr Bajagai's complaint was justified.

14. To fail to produce documents in accordance with the notice in the manner in which this Respondent has done, to my mind, is an extremely serious breach and I will deal with that accordingly.

15. With regard to the second breach, that is he comply with the compliance notice to pay the $21,000 to Mr Bajagai, the money was owed by the First Respondent. The evidence before me is that the First Respondent, within a month to six weeks of the issuing of the notice

and the serving of the notice, faced a creditor's petition in the Supreme Court for winding up. It is obvious, at that stage, that there were some very serious financial problems with regard to the First Respondent. Again, some six to seven weeks after that petition was lodged in the Supreme Court, the First Respondent was, indeed, wound up.

16. The Second Respondent says that he did not have the capacity to comply with the notice given the dire financial circumstances of the First Respondent. Having said that, it is still a breach, though it would be a much more serious breach for the First Respondent than for the Second Respondent. I do take note of the submission by the Applicant that the Second Respondent could have complied or offered to pay at least some of that money if he had so wanted. But I do see that this breach is not in the same category of seriousness as the first breach.

17. The maximum penalty for the first breach is 60 penalty units which, at the time in question, amounted to $10,200.00. The maximum penalty for the second breach was 30 penalty units which, at that time, equated to $5,100.00.

18. In looking at the proper quantum of pecuniary penalties that I ought make, there are a number of factors that I have to take into consideration. They were helpfully set out and summarised in the authority of *Mason & Harrington Corporation Proprietary Limited (trading as Pangaea Restaurant and Bar)* [2007] FMCA 7.

19. In that case, there were a number of factors that were seen to be relevant. I have had a look at all of those particular matters. I do take particular notice that Mr Bajagai, because of the involuntary liquidation of the First Respondent, looks very unlikely to ever have the $21,000 paid to him.

20. In this case, I do not see that there is much contrition other than the fact that there has been a consent order made, and there have been agreed statements of fact. This means that this Court has not been inconvenienced by having to have had extensive litigation to prove these matters, though whether that is contrition or more an acceptance of the inevitable, is really a fine line. However, it is something that I do take into account because there has been a saving of considerable time, money and Court resources.

21. I do take into account that there has not been, still, a full disclosure of the documents. Even though this action was taken, which would have meant that the need to disclose was somewhat gone, it is still of note that as at January of this year, the documents had not been disclosed. It was submitted to me that the Second Respondent did bring along documents in January. That, to me, considering that notice to produce was given in May, is almost showing contempt for the Office of the Fair Work Ombudsman and what it is that that Office is trying to achieve.

22. The need for specific and general deterrence to my mind is an extremely important factor in this case. The fact is that, in a society such as ours, the balance between the interests of employers and the interests of employees has been achieved by the implementation of the Fair Work Act. When persons do not comply with the provisions of that Act, then the industrial system is in danger. It is incumbent upon the Courts to make sure that all employers and employees understand that if there has been a wilful defiance of what the law requires, then there will be condign punishment.

23. In this case I do also take into account, to a limited extent, what is contained in exhibit 1, which talks of the financial position of the Second Respondent, and there has been a tapering of the penalties that I would otherwise impose because of that and because of the cooperation.

24. In the end, it is my view, in respect of the first breach, that the appropriate penalty, taking into account all those factors I have spoken of, is one of 60% of the maximum, which is 36 penalty units; that is a total of $6,120.

25. With regard to the second breach, as I have said, I do not see that that is in the same category. I think that a penalty of 13.334% of the maximum, or four penalty units, is appropriate; that is a total of $850.

26. I would normally order that those amounts be paid to the Commonwealth and that they be applied to consolidated revenue.

27. The reason for this is that these breaches are offences against Commonwealth law. The "victims" of such breaches may be seen by

most to be the individuals affected but, in truth, the real "victim" is the community who has dictated, through the Parliament, what is the acceptable industrial regime of this nation.

28. Therefore, because there is a breach against the laws of the community, the pecuniary penalty ought be paid to the community. To do otherwise may be inviting consequences that would not be in the best interests of the continued health of the industrial regime. However, there may be exceptions to this and the legislation acknowledges this fact. I stress that this is my reasoning and is not reflective of the actual legislation.

29. In this case, as I have noted previously, there is little to no chance of Mr Bajagai ever being paid the money owed to him. To my mind, this qualifies as an exceptional circumstance that would militate my making an order contrary to my usual practice.

30. I order that the Second Respondent pay the sum of $6,790.00 to the Commonwealth of Australia for transmission by them to Mr Bajagai.

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

Date:10 August 2015