FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v JAVA SPICE AUSTRALIA PTY LTD & ORS *[2015] FCCA 2930*

Catchwords:
INDUSTRIAL LAW – Breach of terms of modern award – breach of notice requiring production of wage and employment records – failure to provide appropriate wage slips and pay wage allowances in respect of weekend and out of hours work – proceedings undefended – question of penalties to be imposed – one respondent undischarged bankrupt – matters to be taken into account in assessing appropriate penalties – employees concerned considered to be vulnerable to exploitation – consideration of general and specific deterrence.

Legislation:
Fair Work Act 2009, s: 3(b) & (c), 687(1); 701; 712(1); 712(3); 536, 539(2), 700,
Corporations Act 2001 (Cth) s: 109X(1)(b)
Federal Circuit Court Rules 2001: r: 13.03A(2); 13.03B(2)(c); 13.03B(c)

Cases cited:
Fair Work Ombudsman v Kentwood Industries Pty Ltd (No3) [2011] FCA 579
Fair Work Ombudsman v Lifestyle SA Pty Ltd [2014] FCA 1151
Australian Opthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560
Attorney-General (SA) v Tichy (1982) 30 SASR 84
Johnson v R (2004) 78 ALJR 616
Mornington Inn Pty Ltd v Jordan (2008) 168 FCR 383
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Kelly v Fitzpatrick [2007] 166 IR 14
Veen v R (No 2) (1988) 164 CLR 465
Gibbs v City of Altona (1992) 37 FCR 216
FWO v Ramsey Food Processing Pty Ltd (No 2) [2012] FCA 408
Cotis v Macpherson (2007) 169 IR 30
FWO v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor [2012] FMCA 258
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412
Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543
Plancor Pty Ltd v Liquor Hospitality & Miscellaneous Union (2008) 171 FCR 357
Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining & Energy Union [2015] FCAFC 59

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	JAVA SPICE AUSTRALIA PTY LTD
Second Respondent:	MOYA BUCKLEY
Third Respondent:	PETER BUCKLEY
File Number:	DNG55 of 2014
Judgment of:	Judge Brown
Hearing date:	3 September 2015
Date of Last Submission:	3 September 2015
Delivered at:	Adelaide
Delivered on:	5 November 2015

REPRESENTATION

Counsel for the Applicant:	Ms Walker
Solicitors for the Applicant:	Fair Work Ombudsman
Counsel for the Respondents:	No appearance

ORDERS

(1) Order 7 of the Orders of Judge Brown dated 25 May 2015 is varied by deleting the words "Ms Fu and Ms Tseng" in paragraph 7(a) and inserting in their place the words "to the Applicant".

(2) Pursuant to subsection 546(1) of the FW Act, the First Respondent pay a total pecuniary penalty fixed in the amount of $60,000.00.

(3) Pursuant to subsection 546(1) of the FW Act, the Second Respondent pay a total pecuniary penalty fixed in the amount of $12,000.00.

(4) Pursuant to subsection 546(1) of the FW Act, the Third Respondent pay a total pecuniary penalty in an amount fixed in the amount of $1,000.00.

(5) Pursuant to subsection 546(3)(a) of the FW Act, the pecuniary penalties specified in orders 2 – 4 above are to be paid into the Consolidated Revenue Fund of the Commonwealth within 28 days of the service of this order on the Respondents.

(6) The Applicant is to serve these orders on the Respondents as follows:

(a) In respect of the First Respondent, by delivery to each of its Registered Office and 6 Garden Hill Crescent, The Gardens NT 0820 and by email to javaspicedarwin@gmail.com;

(b) In respect of the Second Respondent, by delivery to each of GPO Box 10, Darwin NT 1801 and care of her Trustee in Bankruptcy Mr Hugh Thomas Level 11, 60 Castlereagh St Sydney NSW 2000, and by email to moya@escapeforabreak.com; and

(c) In response of the Third Respondent, by delivery to each of 6 Gardens Hill Crescent, the Gardens NT 0820 and GPO Box 10, Darwin NT 1801, and by email to javaspicedarwin@gmail.com.

(7) The Applicant has liberty to apply on seven days' notice in the event that any of the preceding orders are not complied with.

(8) The application is otherwise dismissed.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT ADELAIDE

DNG55 of 2014

FAIR WORK OMBUDSMAN
Applicant

And

JAVA SPICE AUSTRALIA PTY LTD
First Respondent

And

MOYA BUCKLEY
Second Respondent

And

PETER BUCKLEY
Third Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant in these proceedings is the Fair Work Ombudsman "the FWO". The FWO seeks the imposition of monetary penalties against each of the respondents in the case – Java Spice Australia Pty Ltd "Java Spice"; Moya Buckley "Ms Buckley"; and Peter Buckley "Mr Buckley" pursuant to the provisions of the *Fair Work Act 2009* (Cth) "the FWA" or "the Act".

2. Mr Buckley and Ms Buckley are both directors of Java Spice. Ms Buckley is also the company secretary. Java Spice operated a café, called Java Spice Emporium and Café, in Mitchell Street, Darwin. The company employed individuals, from time to time, in a variety of capacities, including as waiting staff and kitchen hands. Mitchell Street is part of *"the tourist strip"* of Darwin.

3. One of the objects of the FWA is to ensure that employees in Australia receive regulated minimum awards of pay and are fairly and transparently treated in their workplaces, without exploitation.[1] The FWO is a statutory appointment under the Act,[2] who is mandated to monitor compliance with the FWA.

4. In addition, the FWO has responsibility to educate, advise and assist, both employers and employees, in respect of obligations arising under the Act and, if necessary, commence proceedings, in appropriate courts, to enforce the FWA.

5. Pursuant to section 701 of the Act, the FWO is also a fair work inspector. The Act confers upon such inspectors a number of powers in order to ensure compliance with provisions of the Act. Amongst other things, inspectors can enter working premises and require the production of employee records.[3]

6. In addition, the FWO, as a consequence of its status as a fair work inspector, has statutory authority to bring proceedings under the Act and seek the imposition of penalties, if breaches of the FWA are established.[4]

7. On 4 March 2014, Tseng Wan-Ting "Ms Tseng" approached the FWO, in Darwin, to complain about the conduct of Java Spice and Ms Buckley. In her complaint form, Ms Tseng indicated that she had been employed by Java Spice, as a waitress and kitchen hand between 15 July 2013 and 2 March 2014. She indicated that her employment was casual and her employment was subject to a section 417 working visa, issued pursuant to the provisions of the *Migration Act 1958.*

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[1] See FWA at section 3(b) & (c)
[2] See FWA at section 687(1)
[3] See FWA at section 712(1)
[4] See FWA at section 539(2)

8. Ms Tseng's complaint read as follows:

> *"Employee didn't pay on time, already 4 weeks I haven't gotten pay.*
>
> *I feel no courtesy in here.*
>
> *Employer doesn't offer superannuation.*
>
> *Employer promise me worked for them on weekend and trained new staff, after busy weekend then they will have money to pay … but nothing … employer said now the business is slow, so I have to wait when other staff already got their payment.*
>
> *I try to contact employer and text her asking payment, but never reply … ignore my right.*
>
> *I hope fair work can help me get all payment before I leaving Australia and at least I can tell other backpackers that fair work protect us right, it does work."*[5]

9. In particular, Ms Tseng indicated that she had received no payment, in respect of the performance of waitressing, food preparation and operating the cash register, at the Java Spice Café between 3 February and 2 March 2014. She indicated that the person who had been her manager was Ms Buckley.

10. From the FWO's perspective, it is important to note that Ms Tseng, in her complaint to it, identified herself as a *"backpacker"* by which I take it she is to be characterised as an itinerant tourist in Australia. Necessarily, she is not a permanent resident in this country and her stay here is limited in duration.

11. On 4 March 2014 also, Fu Man Wah "Ms Fu" made a similar complaint to the FWO about her treatment at Java Spice Café. She too identified herself as having been a kitchen hand and member of the waiting staff at the café. She complained that she had commenced work, at the café, on 22 January 2014 but had received no wages between 3 February and 16 February 2014, when she had ceased her employment.

[5] See affidavit of Jodi Gribben filed 6 August 2015 at page 20

12. Ms Jodi Gribben was appointed a fair work inspector by the FWO.[6] She is attached to the FWO's office in Darwin. She received both Ms Tseng and Ms Fu's complaints and was charged with their investigation. It was this investigation, which led to the FWO commencing proceedings, in this court, on 12 December 2014. It is also Ms Gribben's evidence that she has previously been involved with Java Spice in her capacity as a fair work inspector.

13. The FWO alleges that each of the respondents concerned has breached provisions of the FWA both in respect of how Ms Tseng and Ms Fu were treated in their employment and later in how Mr Buckley and Ms Buckley have responded to Ms Gribben's investigation into Java Spice, particularly in respect of their failure to respond to directions to produce relevant employment documents to Ms Gribben, relating to the two employees concerned.

14. On 25 May 2015 the court was satisfied that each of the respondents had contravened various provisions of the FWA. As a consequence, the proceedings were adjourned to 3 September 2015 to determine what are the appropriate penalties, to be applied to each of the respondents, for the various breaches of the Act. These reasons for judgment are directed to the resolution of this issue.

The material relied upon

15. The FWO relies on the following documents:

    i) Affidavit of Megan Anne Louise Carter filed 11 May 2015;

    ii) Affidavit of Jodi Gribben filed 6 August 2015;

    iii) Affidavit of Ellen Laurie McInerney, a solicitor employed by the FWO, filed 6 August 2015;

    iv) Affidavit of Sharnie Banes, a specialist support officer, employed by the FWO, filed 6 August 2015;

    v) A further affidavit of Ms McInerney filed 1 September 2015.

[6] See FWA at section 700

16. None of the respondents in these proceedings have filed any substantive document, other than addresses for service, which were filed on 10 February 2015. For reasons which will be outlined shortly, the proceedings have been dealt with on an undefended basis.

The history of the proceedings to date

17. The FWO has provided proof that its application for penalties under the FWA and an associated statement of claim were served on each of the respondents. In the case of Mr Buckley and Ms Buckley, affidavits of service have been filed, which indicate that they were each personally served, with the relevant documents, on 16 December 2014, at an address in suburban Darwin.[7]

18. At the time of the institution of the proceedings, Ms Carter, a senior lawyer employed at the office of the FWO in Adelaide had conduct of the matter. She deposed that she had made inquiries with the Australian Securities & Investment Commissions company database in respect of the directors of Java Spice at relevant times.

19. This search revealed that Mr Buckley and Ms Buckley were each a director and shareholder of Java Spice and there were no other directors or shareholders of the company. Pursuant to the provisions of section 109X (1)(b) of the *Corporations Act 2001* (Cth) service on either director constitutes service on the company concerned.

20. In all these circumstances, I am satisfied that each of the respondents has been served with the application and supporting statement of claim in these proceedings. In any event, on the first return date of the application, both Mr Buckley and Ms Buckley appeared before the court via a telephone link to Darwin.

21. As a consequence, each party was directed to file a notice of address for service with responses to follow within thirty-five days of the directions hearing. The first direction met with compliance, the direction for the filing of answering material did not.

[7] See affidavits of Grant Eric Jonsson filed 22 January 2015

22. On 3 February 2015 Ms Buckley orally indicated to the court that she was desirous of resolving all issues arising between her and Ms Tseng, Ms Fu and the FWO as amicably as possible. She said words to the effect of that *"she wanted to do the right thing by her workers"*. On this basis, the parties were referred to mediation, with a registrar of the court, in Darwin, on a date convenient to all, in either April or May of 2015.

23. Mr Buckley and Ms Buckley are married. As they both reside in Darwin and the relevant business was conducted there, it was obvious that it would be convenient for them, if the appointed mediation took place in Darwin. However, at the time, the FWO did not have suitably qualified officers to participate in the mediation, who were based permanently in Darwin.

24. Accordingly, from the FWO's perspective, it was potentially an expensive exercise to dispatch staff to Darwin in the event that the mediation was not likely to be productive or there was the probability it might have to be aborted at the last minute.

25. On 16 April 2015, Ms Carter sought that the matter be re-listed before the court for further mention. In her affidavit, she deposed to frequent attempts to contact both Mr Buckley and Ms Buckley, by both telephone and email, to obtain information as to when the respondents would be able to comply with the court's order to file responses and any answering material in respect of the FWO's statement of claim.

26. It was Ms Carter's position that it was logistically impracticable for the FWO to attend in Darwin, for the proposed mediation, in the event that no responding documents had been filed. In addition, Ms Carter deposed that she had formally advised the Buckleys that, if they did not file the necessary documents, she would apply to the court for the matter to be listed for further directions.

27. On 17 March 2015, Mr Buckley telephoned Ms Carter's office and left a message that Ms Buckley was in hospital having chemotherapy. Mr Buckley further advised that Ms Buckley was not ignoring the matter but would be available the following week.[8]

[8] See affidavit of Megan Anne Louise Carter filed 11 May 2015 at annexure MC12

28. In these circumstances, Ms Carter forbore from taking further action. However, when Ms Buckley did not formally respond to her, as had been indicated she would, Ms Carter further wrote to Mr Buckley and Ms Buckley, on 30 March 2015, indicating that their responses were overdue. In addition, in the light of Mr Buckley's message, Ms Carter requested medical information outlining any incapacity suffered by Ms Buckley and when such incapacity was likely to be resolved.

29. In addition, Ms Carter's letter requested that a response be received no later than 7 April 2015 and advised that, if no such response was forthcoming, she would apply to the court to vacate the mediation in Darwin. Ms Carter also formally advised Mr Buckley and Ms Buckley of the court's power to enter judgment against a respondent in default of a defence being filed or in the event that the proceedings concerned were not being conducted with due diligence.[9]

30. It is Ms Carter's evidence that she received no response to this letter. As a consequence of this, she unsuccessfully tried to contact Ms Buckley, by telephoned and left a message on her voicemail, inviting Ms Buckley to contact her. Ms Carter received no response to this overture either.[10]

31. On this basis, Ms Carter applied to have the matter re-listed before the court on 16 April 2015. Ms Carter advised the respondents of this date by email. Neither Mr Buckley nor Ms Buckley appeared before the court on 16 April 2015.

32. Accordingly, on Ms Carter's application, the mediation of the matter, which had been arranged for 30 April 2015, was vacated and each respondent was directed to file a response no later than 24 April 2015. At this stage, I was persuaded that the mediation would serve no purpose, given the lack of cooperation demonstrated by the respondents, up to that stage.

33. The matter was then adjourned until 20 May 2015 in Darwin, as I was scheduled to be on circuit, in Darwin, on that date. This had been the previously adjourned date, provided to the respondents, when the matter had originally been listed before the court, for its first directions

[9] See *Federal Circuit Court Rules 2001* at rule 13.03A(2)
[10] See affidavit of Megan Anne Louise Carter at paragraph 35-36

hearing, which both Mr Buckley and Ms Buckley had attended by telephone. Accordingly, I am satisfied that both of them were aware of this date, which was confirmed in the court's order, later forwarded to them at their nominated address for service.

34. Neither Mr Buckley nor Ms Buckley complied with the order requiring them to file answering affidavit material. In addition, there was no appearance by them, in Darwin, on 20 May 2015. In order to assist counsel for the FWO, the proceedings were adjourned to Adelaide for further hearing on 25 May 2015 and in particular for the hearing of the FWO's application that the court should proceed to default judgment, given the non-appearance of both Mr Buckley and Ms Buckley.

35. The application for default judgment was filed on 11 May 2015 and was supported by Ms Carter's affidavit. The application was served on the respondents on 13 May 2015 by means of express post to the postal addresses nominated by Mr Buckley and Ms Buckley in their respective notices of address for service, filed with the court on 10 February 2015.[11] Ms Carter has also deposed that the application for default judgment was sent to Ms Buckley's via her email. In all these circumstances, I was satisfied that the application for default judgment had been properly served upon each of the respondents.

36. The court's authority to enter judgment against a respondent, who is found to be in default, is set out in rule 13.03A(2) of the court's rules. It specifies that a respondent is in default if, amongst other things, there is a failure to file a response in proceedings; comply with an order of the court; or the proceedings are not defended with due diligence.

37. In this particular case, I was satisfied that each of the respondent's concerned had been properly served with the FWO's application. I was also satisfied that each had been given an ample opportunity to take part in the proceedings and had been informed of the potential for the matter to be finalised in their absence.

38. I was also satisfied, after hearing the submissions of Ms Carter and reading her affidavit, which outlined her dealings with both Mr Buckley and Ms Buckley, that the respondents were not properly

[11] See affidavit of Jodi Lee Gribben filed 18 May 2015 at paragraph 4

engaged with the proceedings, notwithstanding Ms Buckley's earlier protestation that she wished to resolve the matters raised by Ms Tseng and Ms Fu expeditiously and amicably.

39. As a consequence of these findings, on 25 May 2015, orders for default judgment were made pursuant to rule 13.03B(2)(c) of the court's rules against each of the respondents concerned.

40. In brief, it was found that there had been breaches of section 712(3) of the FWA in respect of a failure to comply with a notice to produce records or documents to Ms Gribben, in her capacity as a Fair Work Inspector on 19 June 2014.

41. In addition that there had been various breaches of section 536 of the FWA in respect of the failure to issue payslips to Ms Tseng and Ms Fu; and in respect of payslips which had been provided to them, these payslips had not complied with the Act because they did not include regulated details relating to the date on which the payment was made and superannuation contributions which had been calculated.

42. It was also determined that the respondents had breached section 45 of the FWA by contravening the terms of the applicable *Modern Award - The Restaurant Industry Award 2010* – in respect of Ms Fu in the period from 10-16 February 2014 and in respect of Ms Tseng in the period from 3-9 February 2014 and 17-23 February 2014 in that each had not been paid the required minimum rate of pay; had not been paid a casual loading; had not been paid either a Saturday or Sunday penalty rate; or paid a penalty rate for working between midnight and 7:00am.

43. The amount of wages due to Ms Fu was $1,261.18 and in respect of Ms Tseng was $2,406.36. In addition, it was found that neither Ms Tseng nor Ms Fu had been paid the appropriate level of superannuation on their wages due. In these circumstances, the FWO seeks payment of the following monies:

Employee	**Gross underpayment figure**	**Interest**	**Superannuation contributions**
Ms Fu	$1,261.18	$37.06	$344.32
Ms Tseng	$2,406.36	$70.71	$3,398.35

44. As a consequence of these orders, the respondents were ordered to pay Ms Fu and Ms Tseng's outstanding wages together with the appropriate superannuation contributions within 28 days of the date of judgment. It is the FWO's position that these sums remain outstanding, as at the date of hearing on 3 September 2015.

45. On 26 February 2015 the comprehensive default orders were served on both Mr Buckley and Ms Buckley by both email and express post.[12] The order also specified that the hearing in respect of penalty would be fixed on 3 September 2015 with the FWO to file and serve its submissions 28 days beforehand with each respondent being able to file any submissions or evidence, relating to the appropriate penalty no later than 14 days before the hearing date.

46. On 8 July 2015, following a search of the *Insolvency & Trustee Service Australia National Personal Insolvency Index*, it became known to Ms Gribben that Ms Buckley had been declared bankrupt, on 19 May 2015, on the petition of Citigroup Pty Ltd. Mr Hugh Thomas had been appointed trustee of her estate. Mr Thomas had also been provided with a copy of the orders of 25 May 2015.

47. In all these circumstances, I am satisfied that all of the respondents concerned, including the trustee in bankruptcy for Ms Buckley, have been properly notified of the penalty hearing and the requirement that Ms Tseng and Ms Fu be reimbursed the wages and superannuation payments to which they are entitled. None of the respondents has elected to appear at the penalty hearing or to provide any written submissions or other evidence.

48. In addition, I am satisfied that no moneys have been paid to either Ms Tseng or Ms Fu. In these circumstances, I have elected to proceed with the penalty hearing in the absence of each of the respondents. I am satisfied that I am authorised to do so pursuant to rule 13.03B(c) of the Federal Circuit Court Rules.

The applicable legal provisions

49. Section 712(3) of the FWA provides as follows:

[12] See affidavit of Ms McInerny filed 6 August 2015 at paragraphs 9-10

> *"A person who is served with a notice to produce must not fail to comply with the notice."*

50. Ms Gribben has deposed that she served a notice to produce, by registered post, at the registered office of Java Spice, in Footscray, Victoria. The notice to produce required the company to provide payslips, time records and details of payments made to Ms Tseng and Ms Fu at the times relevant to their complaints.

51. Ms Gribben personally served a similar notice to produce on Ms Buckley personally on 8 May 2014. Mr Buckley was also personally served with the same notice to produce on 19 June 2014.

52. Section 536(1) of the Fair Work Act provides as follows:

> *"An employer must give a pay slip to each of its employees within one working day of paying an amount to the employee in relation to the performance of work."*

53. Ms Gribben has deposed that Ms Fu was not provided with any payslip for the work she provided to Java Spice, whilst Ms Tseng was not provided with payslips on two occasions.

54. Section 536(2) of the FWA requires payslips to include information prescribed by the regulations made under the Act. Pursuant to regulation 3.46(1)(d) payslips are required to specify the date on which the payment to which the payslip relates was made. Further, pursuant to regulation 3.46(5) payslips must also include the amounts of any superannuation contributions, which an employer is liable to make.

55. Section 45 of the FWA provides as follows:

> *"A person must not contravene a term of a modern award."*

As previously indicated, the award applicable to Ms Tseng and Ms Fu is the *Restaurant Industry Award 2010*, which is designated as a modern award. The two individuals concerned were food and beverage attendants grade 2 and, as such, were entitled to be paid minimum entitlements, such as the base rate of pay for ordinary hours, casual loading, and Saturday and Sunday penalties under the applicable award.

56. The FWO seeks the following orders:

a) Orders pursuant to subsection 546(1) of the FWA imposing pecuniary penalties, on each of the respondents, in respect of each of the declared contraventions, as a consequence of the undefended proceedings of 25 May 2015;

b) An order pursuant to subsection 546(3)(a) of the FWA that all pecuniary penalties imposed be paid into the Consolidated Revenue Fund of the Commonwealth;

c) An order that any penalties imposed by the Court and the payment of any paid monies and interest to the employees concerned be paid to the FWO within 28 days of the Court's order for payment;

d) An order that the Applicant have liberty to apply on seven days' notice in the event that any of the proceeding's orders are not complied with; and

e) Such further orders, as the Court deems appropriate.

57. Section 546(1) of the FWA provides as follows:

> *"(1) The Federal Court, the Federal Circuit Court or an eligible State or Territory court may, on application, order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision."*

58. Section 539(2) provides the maximum penalties applicable to each of the relevant contraventions. In respect of both the breach of modern award provision and the failure to comply with a notice to produce, the maximum penalty is 60 penalty units. In respect of both the payslip offences, the maximum penalty is 30 penalty units.

59. However, pursuant to section 546(2) of the Act, if the person who has committed the offence in question is a body corporate, the maximum penalty is to be multiplied by five. At relevant times, a penalty unit amounted to $170.

Considerations relevant to penalty

60. The legislative provisions relating to how contraventions arising under the FWA are to be grouped for the purposes of calculation of penalty are contained in section 557(1) of the FWA, which reads as follows:

> *"(1) For the purposes of this Part, 2 or more contraventions of a civil remedy provision referred to in subsection (2) are, subject to subsection (3), taken to constitute a single contravention if:*
>
> *(a) the contraventions are committed by the same person; and*
>
> *(b) the contraventions arose out of a course of conduct by the person."*

61. In this case, there have been multiple contraventions of the FWA by the respondents concerned. The next issue for the court is how these offences are to be grouped, so that each respondent receives an appropriate penalty, given the nature of the offending in question.

62. The approach, which the court is required to take in respect of these contravention proceedings, is not controversial. It has been delineated in a number of decisions of the Federal Court[13] and described as a four step process, which I will summarise as follows:

- Firstly, the court should identify each separate contravention arising from a breach of either the applicable award or the FWA and determine whether any of these arise in a single *course of conduct* within the terms envisaged by section 557(1);
- Secondly, determine what is the appropriate penalty to be imposed (whether in terms of a single episode of contravention or as part of a course of conduct), having regard to all the circumstances of the case;

[13] See *Fair Work Ombudsman v Kentwood Industries Pty Ltd (No3)* [2011] FCA 579 per McKerracher J applied in *Fair Work Ombudsman v Lifestyle SA Pty Ltd* [2014] FCA 1151 at [42] per Mansfield J

- Thirdly, give consideration to whether any of these contraventions contain common elements and factor this into considering what is an appropriate penalty, in all the circumstance, for each contravention;

- Fourthly, apply the totality principle. This final step constitutes a review of the aggregate penalty thus far calculated and a consideration of whether such a penalty is an appropriate response to the conduct which led to the various contraventions. This step has been categorised as a process of *instinctive synthesis.*[14]

63. The third and fourth steps are to be distinguished from one another. In the context of the former, the following comments, approved by Gleeson CJ in *Johnson v R*, are apposite, although arising in the context of actual criminal proceedings:

> *"Where there are truly two or more incursions into criminal conduct, consecutive sentences will generally be appropriate. Where, whatever the number of technically identifiable offences committed, the prisoner was truly engaged upon one multi-faceted course of criminal conduct, the judge is likely to find concurrent sentences just and convenient."* [15]

64. The totality principle arises when a court is called upon to sentence an individual, as here, in respect of a number of identifiable offences. It is directed to a review of the penalties imposed, in total, in respect of individual offences to determine whether those penalties, in aggregate, constitute a just and appropriate penalty, in all the circumstances arising. As indicated earlier, it has been characterised as a process of intuitive synthesis best summarised in the well-known line from *The Mikado* that it be the case that *"the punishment fit the crime."*

65. Gray J in *Australian Opthalmic Supplies Pty Ltd* said as follows:

> *"What is required is to determine an appropriate level of penalty for each contravention, as if it were a separate offence, and then look at the aggregate of those penalties in the light of the overall*

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[14] *Australian Opthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at [55] per Graham J

[15] See *Attorney-General (SA) v Tichy* (1982) 30 SASR 84 at 92-93 per Wells J; cited with approval by Gleeson CJ in *Johnson v R* (2004) 78 ALJR 616; and followed by Stone and Buchan JJ in *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383 at 397

conduct of the [offender], to form a view as to whether that aggregate [is] out of proportion to that overall conduct."[16]

66. Regardless of these considerations, the fundamental task, for the court, is to determine, from all the factual circumstances arising, the gravity or seriousness of the offending, which it is called upon to penalise. Again there is little legal controversy as to the considerations relevant to this task, which have been delineated in a number of decisions of both this court and the Federal Court.[17]

67. The considerations are as follows:

- The nature and extent of the conduct which led to the breaches;
- The circumstances in which the conduct took place;
- The nature and extent of any loss or damage sustained as a result of the breaches;
- Whether there has been similar previous conduct by the respondent;
- Whether the breaches were properly distinct or arose out of the one course of conduct;
- The size of the business enterprise involved;
- Whether or not the breaches were deliberate;
- Whether senior management was involved in the breaches;
- Whether the party committing the breaches has exhibited contrition;
- Whether the party committing the breaches has taken corrective action;
- Whether the party committing the breaches has cooperated with the enforcement authorities;

[16] *Australian Opthalmic Supplies Pty Ltd v McAlary-Smith* (supra) at [23]
[17] See *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7; *Kelly v Fitzpatrick* [2007] 166 IR 14 at [14]; *Blandy v Coverdale NT Pty Ltd* [2008] FCA 1533 at [23]

- The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and

- The need for specific and general deterrence.

68. However the court needs to be careful not to apply a formulaic approach to the imposition of penalties or attempt to extrapolate the penalties imposed in one case to the circumstances of another. Each case involving the imposition of a civil penalty warrants an idiosyncratic approach and a careful analysis of all relevant circumstances. As was stated in *Australian Opthalmic Supplies:*

> *"Penalties are not a matter of precedent. The choice of penalty must be dictated by the individual circumstances of a case, not by a line by line comparison with another case."*[18]

69. Clearly the check-list, as enumerated above, is useful. It is not, however, to be regarded as an exhaustive list of factors to be considered. The *ultimate control* on any sentence is that it must be proportionate to the offence committed. A court is not permitted to impose a sentence greater than is warranted by the objective circumstances of the offending.[19]

70. The FWO acknowledges that each respondent is entitled to the benefit of section 557 of the Act, in relation to repeated contraventions, of each term of the modern award arising in respect of Ms Tseng and Ms Fu.

How should the offences be grouped, and what are they

(a) Failure to comply with notice to produce (section 712 FWA)

71. Ms Gribben's investigation into Ms Tseng and Ms Fu's complaints began on 4 March 2014. In the weeks that followed, Ms Gribben sent numerous emails to Ms Buckley and personally attended at the business premises of Java Spice.

72. A first Notice to Produce was sent to the registered office of Java Spice on 21 March 2014. On 23 April 2014, during a telephone conversation instigated by Ms Gribben, Ms Buckley indicated as follows:

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[18] *Australian Opthalmic Supplies Pty Ltd v McAlary-Smith* (supra) at [12]
[19] See *Veen v R (No 2)* (1988) 164 CLR 465 at 472

> *"There was no drama with the girls as they had been paid in full."*

In these circumstances, Ms Buckley indicated that she was "*happy*" to provide the documents requested by Ms Gribben.

73. Notwithstanding this indication, it is Ms Gribben's evidence that Ms Buckley did not provide any of the documents requested. Thereafter, between 30 April and 19 June 2014, Ms Gribben personally served a letter on Ms Buckley, in respect of the Notice to Produce and in subsequent correspondence informed her that penalties attached to a person, who failed to comply with such a notice.

74. In this context, I accept Ms Gribben's evidence that she had a number of conversations, with both Ms Buckley and Mr Buckley, in respect of the Notice to Produce, at the business premises of Java Spice and was met by a mixture of obfuscation and promises to comply, with the notice, in due course.

75. On 19 June 2014, Ms Gribben issued a further Notice to Produce directed to the First Respondent. It required Java Spice to produce employment records, in respect of both Ms Tseng and Ms Fu, to the FWO premises in Darwin at close of business on 4 July 2014. This Notice to Produce was personally served on Mr Buckley at the business premises of Java Spice on 19 June 2014. Java Spice failed to comply with this Notice to Produce.

76. The FWO seeks a penalty from both Java Spice and Mr Buckley. The maximum penalty for the company is $51,000 and for Mr Buckley, it is $10,200. This represents a discrete contravention. The FWO is not seeking a penalty against Ms Buckley in respect of the Notice to Produce offence.

(b) Failure to provide payslips (section 536(1) FWA)

77. Java Spice failed to provide Ms Tseng with payslips on 34 occasions between 21 July 2013 and 8 March 2014. Ms Fu was not provided with payslips on four occasions between 7 February and 17 March 2014.

78. In addition, Ms Tseng was not provided with payslips, on other occasions, within one day of the receipt of the payment concerned. There are six such occasions in this respect, which occurred between 21 July 2013 and 31 August 2013.

79. The FWO seeks that these three sets of contraventions be grouped as one. The maximum penalty in respect of Java Spice is $25,500, and in respect of Ms Buckley, who is held to have aided and abetted the failure of the company, the maximum penalty is $5,100.

(c) Failure to include information in payslips (section 536(2)(b) FWA)

80. The evidence also indicates that Java Spice did not include regulated information in payslips provided to Ms Tseng, on four occasions. In particular, she was not provided with the required information as to the periods in respect of which the payment related and information in respect of the payment of superannuation.

81. I propose to adopt the submission of the FWO and group these two contraventions together. Again, the maximum penalty so far as Java Spice is concerned, is $25,500 and Ms Buckley it is $5,100.

(d) Failure to comply with the applicable modern award (section 45 FWA)

82. The FWO has established that Java Spice has failed to comply with the applicable modern award – the *Restaurant Industry Award 2010* – by failing to pay Ms Tseng and Ms Fu the minimum rate of pay on three occasions; failure to pay them a casual loading on three occasions; failure to pay a Saturday penalty rate on three occasions; failure to pay a Sunday penalty rate on three occasions; failure to pay a penalty for work between midnight and 7.00am on three occasions; and a failure to make superannuation contributions on three occasions.

83. The maximum penalty for each of these offences is $51,000 for Java Spice and $10,200 for Ms Buckley, who was taken to have aided and abetted the company in the commission of these offences.

84. Accordingly, this case concerns numerous breaches of a modern award in respect of a variety of obligations to pay the employees concerned a number of difference entitlements. In each breach, the actors concerned are the same. However, each breach of the award is distinct,

in the sense that it relates to a different obligation arising under the award in question.

85. In *Gibbs v City of Altona*[20] Gray J, in respect of the legislative predecessor of the current provisions under consideration, said as follows in respect of how the court was to approach repeated omissions of an award, which related to the same course of conduct. His Honour said as follows:

> *"… The ascertainment of what is a term should depend not on matters of form, such as how the award maker has chosen to designate by numbers or letters the various provisions of an award, but on matters of substance, namely the different obligations which can be spelt out. For these reasons, I incline to the view that each separate obligation imposed by an award is to be regarded as a "term", for the purposes of s 178 of the Act. If the different terms impose cumulative obligations or obligations that substantially overlap, it is possible to take into account the substance of the matter by imposing no penalty, or a nominal penalty, in respect of breaches of some terms, but a substantial penalty in respect of others."*

86. The court is required to give recognition to the distinct legal nature of each breach arising under section 45 of the Act. Section 557 operates to allow groupings of contraventions of the same obligation or term of an industrial instrument, not the entire range of terms breached under that one instrument.

87. In *FWO v Ramsey food Processing Pty Ltd (No 2)* Buchanan J considered the application of section 719(2) of the *Workplace Relations Act*, the legislative predecessor of section 557. He said as follows:

> *"On one view, the failure to make any of the required payments arose from a single course of conduct. They all arose from a determination by the respondents that no payment would be made upon the termination of employment of any of the employees, or the employees as a group. However, this approach gives insufficient attention to the separate legal character of the three forms of obligation earlier identified. I am satisfied that each of those forms of obligation requires separate recognition. I am not, however, satisfied that each individual example of defiance of an obligation is permitted separate recognition. In my view the*

[20] *Gibbs v City of Altona* (1992) 37 FCR 216 at 223.

individual examples, constituted by the failure to make payments to particular individual employees, arise out of a course of conduct in each of the three instances. Any penalty must be assessed taking that into account."[21]

88. The various breaches of the relevant modern award must be given sufficient recognition. Each such failure is a distinct breach of a term of the award, which is different in nature, although each require the payment of monies. In these circumstances, I propose to group the various contraventions of specific incidence of the award together, creating six groups.

(e) Conclusions on groups

89. For these reasons, I have determined that there are nine distinct offences, which require consideration, so far as penalty is concerned, which are to be grouped as follows:

ANNEXURE A – PROPOSED GROUPING AND MAXIMUM PENALTIES					
1 Declared Contraventions	**2 Nature of Contraventions**	**3 Maximum Penalty – without grouping (Company)**	**4 Proposed Grouping**	**5 Maximum Penalty (Company)**	**6 Maximum Penalty (Individual)**
Subsection 712(3) of the Fair Work Act 2009	Failure to comply with Notice to Produce Records or Documents	1 contravention - $51,000.00	No grouping	300 penalty units - $51,000.00	60 penalty units - $10,200.00
Section 536(1) FW Act	Failure to provide any payslips to Ms Fu	1 contravention - $25,500.00	1 group (failure to provide payslips)	150 penalty units - $25,500.00	30 penalty units - $5,100.00
Subsection 536(1) FW Act	Failure to provide payslips to Ms Tseng	1 contravention - $25,500.00			
Section 536(1) FW Act	Failure to issue payslips to Ms Tseng without one day of making payment	1 contravention - $25,500.00			
Section 536(2)(b) FW Act	Failure to include in payslips issued to Ms Tseng info required by Regulation 3.45(1)(d) (day of payment)	1 contravention - $25,500.00	1 group (failure to issue payslips which comply with Regulations)	150 penalty units $25,500.00	30 penalty units - $5,100.00
Section 536(2)(b) FW Act	Failure to include in payslips to Ms Tseng information	1 contravention - $25,500.00			

[21] *FWO v Ramsey Food Processing Pty Ltd (No 2)* [2012] FCA 408 at [2] The passage was approved by the Full Court in *Rocky Holdings* (supra) at [18]

	required by Regulation 3.46(5) (superannuation details)				
Section 45 FW Act by reason of Clause A.2.5 of Schedule A to the Modern Award	Failure to pay required minimum rate of pay	3 contraventions:[22] 3 x $51,000 = $153,000	1 group (base rate of pay)	300 penalty units $51,000.00	60 penalty units $10,200.00
Section 45 FW Act by reason of Clause 31.1 of the Modern Award	Failure to pay a casual loading	3 contraventions:[23] 3 x $51,000 = $153,000	1 group (casual loading)	300 penalty units $51,000.00	60 penalty units $10,200.00
Section 45 FW Act by reason of Clause A.7.3 of Schedule A to the Modern Award	Failure to pay a Saturday penalty rate	3 contraventions: 3 x $51,000 = $153,000	1 group (Saturday penalty rate)	300 penalty units $51,000.00	60 penalty units $10,200.00
Section 45 FW Act by reason of Clause A.7.3 of Schedule A to the Modern Award	Failure to pay a Sunday penalty rate	3 contraventions: 3 x $51,000 = $153,000	1 group (Sunday penalty rate)	300 penalty units $51,000.00	60 penalty units $10,200.00
Section 45 FW Act by reason of Clause A.7.3 of Schedule A to the Modern Award	Failure to pay a penalty for work between midnight and 7am	3 contraventions: 3 x $51,000 = $153,000	1 group (early work penalty)	300 penalty units $51,000.00	60 penalty units $10,200.00
Section 45 of the FW Act by contravening clause 30.29a) of the Modern Award	Failure to make superannuation contributions	3 contraventions: 3 x $51,000 = $153,000	1 group (superannuation): $51,000	300 penalty units $51,000.00	60 penalty units $10,200.00
TOTAL				**$408,000.00**	**$81,600.00**

Effect of Ms Buckley's bankruptcy on these proceedings

90. Section 82(3) of the *Bankruptcy Act 1966* (Cth) provides:

> ***"82 Debts provable in bankruptcy***
>
> …
>
> *(3) Penalties or fines imposed by a court in respect of an offence against a law, whether a law of the Commonwealth or not, are not provable in bankruptcy."*

[22] Contravention 1 – Ms Fu for the week 10-16 February; Contravention 2 – Ms Tseng for the week 3-9 February; Contravention 3 – Ms Tseng for week 17-23 February.

[23] Contravention 1 – Ms Fu for the week 10-16 February; Contravention 2 – Ms Tseng for the week 3-9 February; Contravention 3 – Ms Tseng for week 17-23 February.

91. Given this section, I am satisfied that any penalties that may be imposed upon Ms Buckley, pursuant to section 546 of the FWA, fall within the exception provided by section 82(3) and hence are not debts provable in bankruptcy.[24]

92. Mr Thomas, Ms Buckley's bankruptcy trustee, has informed the solicitor for the FWO that he accepts that any penalties or fines imposed by this court, on Ms Buckley, are not provable in her bankruptcy.[25]

Discussion of factors relevant to penalty

93. Ms Gribben deposed as to her previous involvement, with Java Spice, in her role as a Workplace Inspector investigating other complaints made by former employees of Java Spice. In the context of those investigations, it is Ms Gribben's evidence that she had issued other Notices to Produce to Java Spice and has provided education to Ms Buckley in respect of the obligation of the business to provide payslips and what information is to be detailed on such payslips.

94. Neither Java Spice nor Mr and Ms Buckley are to be punished for these earlier matters, which are not before the court. However, it is the submission of the FWO that it cannot be said that any of the respondents concerned has not been previously provided with education and information about their various workplace obligations, arising under the FWA.

95. I accept this submission. In addition, I accept Ms Gribben's evidence that she attempted to discuss matters with Ms Buckley but met with obfuscation and delaying tactics from her. As such, I do not accept that the various breaches of the FWA, which have been established against each of the Respondents, can be considered to be the product of inadvertence or arising from ignorance of the employer's obligations. I now turn to consider other relevant considerations, relevant to penalty, more specifically.

[24] See *Cotis v Macpherson* (2007) 169 IR 30 at 39.
[25] See Affidavit of Ms McInerney filed 6 August 2015 at paragraph 12.

(a) Nature and extent of the conduct in question

96. Both Ms Tseng and Ms Fu are of Taiwanese extraction and each was on a working holiday visa, when the contraventions against them occurred. Both Ms Tseng and Ms Fu are of a non-English speaking background. In these circumstances, I accept that both of them are to be characterised as vulnerable employees, who are thus more susceptible, than English speaking resident employees, within the Australian community, to exploitation within the workplace.

97. Both Ms Tseng and Ms Fu are to be regarded as transitory employees, who are on holiday. As such, if subject to the exploitation of an employer, they are likely to put it down to a bad employment experience and overlook it, before moving on to the next destination on their holiday itinerary. In addition, such individuals are likely to be ignorant of how they can complain to the Australian authorities in order to seek redress for the poor employment behaviour to which they have been subject.

98. In addition, both Ms Tseng and Ms Fu were employed, on a casual basis, in the hospitality industry. This industry relies on itinerant workers, particularly in tourist locations such as Darwin. In my view, backpackers and the like are particularly susceptible to being exploited by unscrupulous operators in the hospitality industry. In this context, it is telling that, in her complaint to the FWO, Ms Tseng said that, "*before leaving Australia"* she wanted to be in a position to tell other backpackers that their rights would be protected in this country.

99. As previously indicated, one of the objects of the FWA is to ensure that employees have the benefit of a *safety net*, which ensures they receive their minimum entitlements and the terms of any relevant award are followed. In this particular case, Ms Tseng and Ms Fu did not receive their proper entitlements, particularly in terms of receiving applicable loadings for working outside of conventional hours and in respect of superannuation entitlements. In my view, these terms are significant, given the nature of the industry in which each employee was engaged.

100. The issue of a Notice to Produce, in my view, is an essential weapon in the armoury of a workplace inspector to ascertain whether there have been any breaches of the Fair Work Act and in particular, whether any particular employee has not been provided with the protection of the *industrial safety net*.

101. In this particular case, in my view, there has been a systematic failure of the Respondents concerned to comply with the Notices to Produce issued by Ms Gribbens. This failure arose in the context of Ms Gribben reminding the Respondents of their obligations in a patient and forbearing manner.

102. In addition, if the Respondent had promptly complied with the relevant Notices to Produce and made appropriate recompense to the employees concerned, it is entirely possible that these proceedings may not have been implemented. In these circumstances, the Respondents are entirely responsible for the predicament in which they find themselves.

103. The provision of appropriate and correct payslips is also an essential component of a fair system of wage regulation. Employees, particularly vulnerable ones, are entitled to know what they have been paid and how specifically their wages are broken down.

104. Such employees need to know this information promptly so that they can query any areas of uncertainty and sort out any misunderstandings. On a basic level, they need to be able to budget and make properly informed decisions about whether they will elect to continue to work in a particular manner, such as on weekends and at night time.

105. In this context, I respectfully adopt what was said by Judge Reithmuller in *FWO v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor*[26] as follows:

> *"Without proper payslips, employees are significantly disempowered, creating a structure within which breaches of the industrial laws can easily be perpetrated."*

[26] *FWO v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor* [2012] FMCA 258 at [67]

106. In her affidavit, Ms Griffen has deposed that she has investigated other complaints, made by *backpackers* employed by Java Spice, in the past. In these complaints, issues were raised in respect of irregularities regarding payslips.

107. As a consequence, in October 2012, Ms Buckley was provided with a resource pack, compiled by the Fair Work Commission, entitled *Employer Obligations in Relation to Employee Records and Payslips*. Ms Griffen further deposes that she has investigated five complaints regarding Java Spice.

108. This case does not concern isolated failures in respect of payslips. Payslips were not provided to the employees concerned on multiple occasions. Given that the employees are to be regarded as vulnerable in nature, the breaches must be regarded as significant. Ms Tseng and Ms Fu were disadvantaged in being able to query their entitlements by the absence of payslips.

(b) The nature and the extent of the loss

109. It is the submission of the FWO that the amounts due to both Ms Tseng and Ms Fu must be considered significant, given that both employees were modestly renumerated and the shortfall in wages due occurred over a comparatively short period of time, particularly so far as Ms Fu is concerned. I accept these submissions. Ms Fu was not paid at all in respect of the period concerned.

(c) Similar previous conduct

110. Each of the Respondents is to be regarded as a first offender. However, they are not to be regarded as being good corporate citizens or employers of good standing, given the previous involvement of the workplace inspectorate in their business and their failure to take advantage of education and information offered to them.

(d) Size and financial circumstances of the respondents

111. Given the lack of involvement of Java Spice and its directors in these proceedings, it is not possible for me to gauge the size of the business concerned. It seems more probable than not that the business is to be regarded as a small one, with a modest turnover. With the bankruptcy of Ms Buckley, it also seems likely that the business is now closed.

112. Small business, in Australia, is a significant employer in terms of the number of persons which it employs. In these circumstances, I adopt the comments of Driver FM (as his Honour then was) in *Rajagopalan v BM Sydney Building Materials Pty Ltd*[27] as follows:

> *"Employers must not be left under the impression that because of their size or financial difficulty that they are able to breach an award. Obligations by employers for adherence to industrial instruments arise regardless of their size. Such a factor should be of limited relevance to the Court's consideration of penalty."*

(e) Contrition

113. Given the failure of the Respondents to appear, there is no evidence of contrition. What evidence is available indicates that the Respondents have attempted to evade responsibility for their conduct. As such, there is no evidence that any of the Respondents have co-operated with Ms Gribben.

114. Most significantly, the evidence indicates that the Respondents have failed to take any corrective action, so far as either Ms Tseng or Ms Fu are concerned. Their entitlements remain outstanding. As at the date of these orders, neither Ms Tseng nor Ms Fu has received any apology regarding their treatment.

(f) Deliberateness of the breaches

115. Again, in the absence of evidence from either Mr Buckley or Ms Buckley, it is difficult to assess whether the breaches were deliberately committed. However, in my view, it is relevant that the Workplace Inspectorate had worked with Java Spice in the past, and in particular had provided information regarding the employer's obligations under the applicable modern award and so far as record keeping obligations were concerned.

116. As such, none of these breaches can be regarded as being trivial or having arisen as a consequence of inadvertence or in ignorance of the legislative framework concerned. Java Spice had been the subject of complaint in the past. In my view, it is also telling the Ms Fu was not paid at all.

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[27] *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 at [27].

117. This underlies the gravity of the offending. In global terms, the amount of wages outstanding may be regarded as being modest but, on the other hand, there has been a total failure of Java Spice to honour its employment obligations. This underlines the exploitative nature of the conduct and is indicative of its seriousness.

g) Involvement of senior management

118. Mr and Mrs Buckley were the only directors of Java Spice. Both worked in the business. Ms Buckley seems to have had the greater managerial role, overseeing staff. As such, Ms Buckley in particular was fully cognisant of all that occurred in the business.

h) Contrition, corrective action and cooperation with authorities

119. There is no evidence of any cooperation, by the respondents, with Ms Gribben, when the complaints of Ms Tseng and Ms Fu were being investigated or subsequently after these proceedings were instituted. In particular, no documents have been provided and both Mr Buckley and Ms Buckley have failed to cooperate with the court. They have filed no documents.

120. More significantly, the respondents have taken no steps to reimburse Ms Tseng or Ms Fu in respect of the moneys due to them. I do not know if either remains in Australia. If they have left this country, they are likely to have departed with a poor view of Australian employers or at least of employers in Darwin.

121. In all these circumstances, there is no evidence of any contrition on the part of the respondents. As such, it is not proper that the appropriate penalty, for the offending in this matter, be discounted in any way by dint of cooperation or contrition demonstrated by the respondents.

i) General deterrence

122. One of the central purposes of imposing a civil penalty, in proceedings such as these, is to deter other employers from embarking on a similar course of conduct to that engaged upon by the transgressing employer. The role of general deterrence in fixing appropriate penalty is

demonstrated by what Lander J said in *Ponzio v B & P Caelli Constructions Pty Ltd*[28] namely:

> *"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…. 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...* "(citations removed)

123. In my view, in this particular case, issues of general deterrence loom large. This is a case concerning compliance with minimum employment standards applicable to two highly vulnerable employees. In my view, iterant backpackers are likely to be extremely vulnerable to exploitation by unscrupulous employers, particularly in the hospitality industry.

124. Backpackers are often keen to augment their savings through casual employment. The turnover of workers, in the hospitality industry, particularly in tourist areas such as Darwin, is likely to be high. Such potential workers are likely to be informally recruited and be unaware of their workplace rights because of their unfamiliarity with the Australian employment context.

125. In all these circumstances, in my view, the court needs to send a strong message to the general employer community that such conduct will be subject to significant penalty.

126. In my view, similar considerations relate to the notice to produce offenses. It needs to be underlined to employers that they have an obligation to cooperate with the industrial watchdog and, if they do not do so, such transgressions are liable to penalty. In my view, it is in the general public interest that Fair Work inspectors be able to have confidence that the court will support their investigative role.

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[28] *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 at [93] approved by Mansfield J in *Lifestyle SA* (supra) at [154]

127. I agree with the submission of counsel for the FWO that a sufficient penalty needs to be imposed in this case:

> *"To reinforce that such disregard for legal obligation and enforcement processes is unacceptable and encourage employers to engage in more robust cooperation with the regulator, particularly when they have been specifically put on notice of their obligations."*[29]

j) specific deterrence

128. Considerations relevant to specific deterrence focus on the individual circumstances of the offender concerned and require some degree of prognostication as to the likelihood of re-offending. The most reliable tool for such prognostication is usually the attitude expressed by the party in question.[30]

129. In this case the FWO contends that there is a significant need for specific deterrence, as none of the respondents concerned have accepted any degree of responsibility for the various contraventions in questions nor taken any steps to rectify the consequences of their behaviour. In this context, the FWO points to the fact that the wages outstanding to Ms Tseng and Ms Fu remain unpaid.

130. It is also the position of the FWO that there has been a consistent level of complaint, from employees sharing a similar background to Ms Tseng and Ms Fu, regarding irregularity in the provision of wages by the various respondents concerned in this case. These complaints have led to a situation in which the Fair Work Inspector has endeavoured to educate each of the respondents as to the significance of their obligations arising under the FWA.

131. It is the FWO's submission that these educative interventions have been singularly unsuccessful so far as the respondents in this case are concerned. As such, it is submitted that the need to impose a level of specific deterrence is heightened in the present case.

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[29] See applicant's submissions on penalty at paragraph 109

[30] See *Plancor Pty Ltd v Liquor Hospitality & Miscellaneous Union* (2008) 171 FCR 357 at [37] per Gray J

132. I accept Ms Walker's submission that these circumstances do indicate that there is a high risk of ongoing non-compliance with workplace obligation imposed on each of the respondents. These concerns are heightened when consideration is given to the nature of the workplace concerned, which has the characteristic of having a high turnover of itinerant employees.

Conclusions

133. As previously indicated, the maximum penalty for the breach, in respect of Mr Buckley is $10,200.00. So far as Java Spice is concerned, the maximum penalty for the various offences, as they have been grouped, is $408,000.00. So far as Ms Buckley is concerned, the maximum penalty is $71,400.00.

134. On any view, these are significant sums of money. The major difficulty with the sentencing task is that the court has scant knowledge of the financial circumstances of any of the parties, other than that Ms Buckley is now an undischarged bankrupt. It is known, in general terms, that the enterprise which each of the parties carried out can be characterised as a small business. In these circumstances, the court must be careful not to impose a crushing sentence or one which is manifestly excessive.

135. On the other hand, the court must bear in mind the extent of penalty imposed by the legislature and examine the conduct of the respondent's concerned. In this regard, I bear in mind that Java Spice and Ms Buckley have contravened a number of provisions of the applicable Modern Award in respect of vulnerable employees, who were casual, low paid employees, from overseas. The employees were engaged in a high turnover workplace and were thus vulnerable to exploitation.

136. For these reasons, the various breaches of the applicable Modern Award must be regarded as serious. The appropriate penalty cannot be mitigated by any contrition or evidence of cooperation between the parties. In addition, the workplace regulator has, in the past, attempted to educate of the respondents, particularly Ms Buckley, the managerial alter ego of Java Spice, in respect of her responsibilities as an employer.

137. It has been said that the task of sentencing is one of the hardest judicial tasks, as it requires the synthesis of competing consideration to arrive at a penalty, which is just and appropriate. Necessarily it is a process of intuitive synthesis. It is useful to think in terms of percentages, but sentencing is not a purely arithmetical process.

138. As a consequence of the decision in *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining & Energy Union*[31] the FWO did not feel it appropriate to make any submissions identifying a range of penalties, in the case or to nominate any specific penalties in respect of any particular contraventions.

139. In respect of the single offence, in respect of Mr Buckley, relating to his failure to comply with the notice to produce, I propose to impose a penalty of $1,000.00. I will impose a $5,000.00 penalty for this contravention in respect of Java Spice. In so doing, I bear in mind that these breaches are serious and the court needs to underline the importance of employers complying with directions, from the Industrial Regulator, to supply employment records to it.

140. In respect of the two payslip offences, I propose to impose a penalty of $5,100.00, in respect of each count, on Java Spice and a penalty of $1,000.00, in respect of each count on Ms Buckley.

141. In respect of each of the breaches of Modern Award, I consider a penalty of $2,020.00 is appropriate in respect of each of the six counts concerning Ms Buckley; and a penalty of $10,200.00, in respect of each count concerning Java Spice. This amounts to a penalty of $12,120.00, so far as Ms Buckley is concerned; and to one of $61,200.00, so far as Java Spice is concerned.

142. Having fixed these penalties, the final task for the court is to step back and consider whether, an aggregate term, the penalties imposed represent, in total, an appropriate response to the conduct, which led to the various breaches in question.

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[31] See *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining & Energy Union* [2015] FCAFC 59

143. In *Kelly v Fitzpatrick*[32] Tracey J indicated that the purpose of the totality principle, that is reviewing the aggregate penalties imposed – was to ensure that such aggregate was not *oppressive or crushing*. In a more colloquial sense, the totality principle requires the court to take *"a last look at the total just to see whether it looks wrong"*.[33] In this context, as previously indicated, it is said that this is a process of *instinctive synthesis*.

144. The total penalty, so far as Java Spice is concerned is one of $76,400.00. The total penalty, so far as Ms Buckley is concerned is one of $14,120.00. These are significant sums of money. However, in my view, this is a case which calls for a significant component of general deterrence and so to a condign penalty.

145. The company, of which Ms Buckley was the guiding force, was involved in providing food and beverage, in the hospitality industry. It operated a café in a tourist area. It breached aspect of the Modern Award designed to protect employees in this industry. It is well known that café and restaurant employees are very often casual workers, who work irregular hours. Their employers are again, very often, small concerns.

146. As such, these types of employee are liable to being exploited. This is particularly so in respect of the two employees concerned in this case, who were itinerant visitors to Australia and so particularly vulnerable to such exploitation. Individuals such as Ms Tseng and Ms Fu, passing through a town such as Darwin, whilst on holiday, may not challenge or even know that they can challenge their employment circumstances.

147. In my view, employers in the hospitality industry need to know that they cannot exploit backpackers or other itinerant employees and expect that their behaviour, if detected by the authorities, will not attract a significant penalty.

148. The court has a responsibility to set penalties, which will deter others from engaging in conduct, which may tarnish Australia's reputation as a satisfactory place for visitors and tourists to undertake a working holiday.

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[32] See *Kelly v Fitzpatrick* (2007) 166IR 14 at [30]
[33] See *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383

149. In this case, in addition, the conduct of Java Spice was exacerbated by its lack of cooperation with the investigative process manifest by its disregard for the notices to produce documents, which were served upon it. It is also significant that the company has taken no heed of directions and advice provided to it, by the industrial regulator, in respect of its obligations under the applicable legislation.

150. These same considerations apply to Ms Buckley, who must be regarded as the controlling force of the company. The penalties relating to her conduct amount to $14,120.00. Again, I accept that this is a significant penalty, for an individual.

151. Stepping back, I have come to the conclusion that a penalty of $76,400.00 for Java Spice and that calculated for Ms Buckley are crushing ones and in total disproportionate. In lieu thereof, I have determined that a total penalty of $60,000.00 is an appropriate one for Java Spice. So far as the penalty calculated in respect of Ms Buckley is concerned, I have come to the conclusion that a penalty of $12,000.00 is as an appropriate one. I do not propose to alter the penalty imposed in respect of Mr Buckley.

152. In all the circumstances of this case, I believe that it is appropriate that the various pecuniary penalties specified be paid into the consolidated revenue fund of the Commonwealth within twenty-eight days of the service of these orders on each of the respondents concerned.

153. I will also vary the earlier order relating to the conviction so that the moneys due to Ms Tseng and Ms Fu are to be made to the FWO, rather than to the employees concerned.

154. For all these reasons, the orders of the court will be as set out at the commencement of these reasons for judgment.

I certify that the preceding one hundred and fifty four (154) paragraphs are a true copy of the reasons for judgment of Judge Brown

Associate:

Date: 5 November 2015