# FEDERAL CIRCUIT COURT OF AUSTRALIA

*FAIR WORK OMBUDSMAN v SONA PEAKS PTY LTD & ANOR (No.2)* [2015] FCCA 2030

Catchwords:
INDUSTRIAL LAW – Penalty hearing – contraventions of FW Act and FW Regulations – contraventions admitted – statement of agreed facts – consideration of matters relevant to penalty.

Legislation:
*Fair Work Act 2009*, ss.701, 589(2), 546, 546(2), 535(1), 557(1), 550
*Crimes Act 1914* (Cth), s.4
*Federal Circuit Court Rules 2001* (Cth), rr.13.03A(2), 13.03B(2), 13.03C(1)
*Evidence Act 1995* (Cth), s.191

Cases cited:
*Fair Work Ombudsman v Sona Peaks Pty Ltd & Anor* [2015] FCCA 437
*Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 59
*Director, Fair Work Building Industry Inspectorate v Foxville Projects Group Pty Ltd* [2015] FCA 492
*Comcare v Transpacific Industries Pty Ltd* [2015] FCA 500
*Murrihy v Betezy.com.au Pty Ltd (No.2)* [2013] FCA 1146
*Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7
*Kelly v Fitzpatrick* (2007) 166 IR 14
*Australian Ophthalmic Supplies Pty Ltd v Mc Alary-Smith* [2008] FCAFC 8
*Fair Work Ombudsman v Roselands Fruit Market Pty Ltd & Anor* [2010] FMCA 599
*Fair Work Ombudsman v Sona Peaks Pty Ltd (ACN 141 459 789) & Anor* [2015] FCCA 137
*Hartnett Legal Services Pty Ltd v Ballantyne* [2015] FCA 744

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|---|---|
| Applicant: | FAIR WORK OMBUDSMAN |
| First Respondent: | SONA PEAKS PTY LTD (ACN 141 459 789) |
| Second Respondent: | DAVID PETER ANDERSON |
| File Number: | MLG 2301 of 2014 |
| Judgment of: | Judge O'Sullivan |

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|---|---|
| Hearing date: | 24 July 2015 |
| Date of Last Submission: | 24 July 2015 |
| Delivered at: | Melbourne |
| Delivered on: | 24 July 2015 |

**REPRESENTATION**

| | |
|---|---|
| Counsel for the Applicant: | Ms Nicholas |
| Solicitors for the Applicant: | Office of the Fair Work Ombudsman |
| Counsel for the Respondents: | No appearance |
| Solicitors for the Respondents: | No appearance |

**ORDERS**

(1) The applicant have leave to proceed this day upon the default of the respondents pursuant to Rule 13.03A(2)(a)(b)(vii) and 13.03C(1)(c) of the *Federal Circuit Court Rules 2001* (the Rules).

**THE COURT DECLARES THAT:**

(2) Pursuant to 13.03B(2)(c) of the Rules and having regard to the admissions made in the Statement of Agreed Facts filed on 19 March 2015 (Statement of Agreed Facts) the Court declares that the First Respondent contravened:

(a) section 45 of the *Fair Work Act 2009* (FW Act) by:

(i) failing to pay Rajwinder Kaur (Kaur), Rebecca White (White), Shermeka Wood (Wood), Joshua Eglite (Eglite), Gemma Maillard (Maillard) and Kuldeep Singh (Singh) minimum adult wage rates in accordance with clause 20.1 of the *Restaurant Industry Award 2010* (Award) during the period from 1 October 2012 to 30 September 2013 (Audit Period);

(ii) failing to pay Sarah Graham (Graham), Aidan Lloyd (Lloyd) and Katie Gordon (Gordon) minimum junior wage rates in

accordance with clause 20.3 of the Award during the Audit Period;

(iii) failing to pay Graham, Lloyd, Gordon, Wood and Eglite a casual loading in accordance with clause 13.1 of the Award during the Audit Period;

(iv) failing to pay the Employees penalty rates for work performed on a Saturday, Sunday or Public Holiday, in accordance with clause 34.1 of the Award and clause A.7.3 of Schedule A of the Award during the Audit Period;

(v) failing to pay Eglite, Wood, Maillard and Graham an additional amount for work performed between the hours of 10 p.m. to midnight, Monday to Friday, in accordance with clause 34.2(a)(i) of the Award and clause A.7.3 of Schedule A of the Award, during the Audit Period; and

(b) section 535(1) of the FW Act by failing to make and keep records including the content prescribed by the *Fair Work Regulations 2009* (FW Regulations).

(3) Pursuant to Rule 13.03B(2)(c) and the admissions made in the Statement of Agreed Facts that the Second Respondent was involved in each of the First Respondent's contraventions identified in paragraph 2 above pursuant to section 550(1) of the FW Act.

**THE COURT ORDERS THAT:**

(4) Pursuant to section 545(2)(b) of the FW Act, the First Respondent pay within 14 days of service of this order, compensation to the employees in the following amounts:

(i) to Josh Eglite the sum of $3,479.41;

(ii) to Katie Gordon the sum of $2,642.44;

(iii) to Shermeka Wood the sum of $1,187.77;

(iv) to Rebecca White the sum of $37.34;

(v) to Kuldeep Singh the sum of $1,984.92;

(vi) to Gemma Millard the sum of $486.28;

(vii) to Rajwinder Kaur the sum of $43.59;

(viii) to Sarah Graham the sum of $830.67; and

(ix) to Aidan Lloyd the sum of $509.35.

(5) Pursuant to section 547(2) of the FW Act the First Respondent pay interest on the amounts set out in order 4 within 14 days of service of this order.

(6) Pursuant to section 545(1) of the FW Act the First Respondent make superannuation contributions on behalf of the Employees to their respective superannuation funds in respect of the payments made pursuant to order 4 at the superannuation guarantee charge rate prescribed by applicable superannuation legislation in the following amounts within 14 days of service of this order:

(i) to Sarah Graham the sum of $78.91;

(ii) to Katie Gordon the sum of $251.03;

(iii) to Josh Eglite the sum of $330.54;

(iv) to Gemma Maillard the sum of $46.20; and

(v) to Kuldeep Singh the sum of $188.57.

(7) In the event that any amounts are unable to be paid to the employees set out in paragraphs 4, 5 & 6, the amounts be paid to the Consolidated Revenue Fund of the Commonwealth.

(8) Pursuant to section 546(1) of the FW Act, the First Respondent pay $118,650 in respect of the contraventions declared in paragraph 2 above.

(9) Pursuant to section 546(1) of the FW Act, the Second Respondent pay $23,715 in respect of his involvement in the contraventions declared in paragraph 2 above.

(10) Pursuant to section 546(3)(a) of the FW Act all penalties be paid to the Consolidated Revenue Fund of the Commonwealth within 28 days of service of this order.

(11) The applicant serve the respondents within 14 days with a copy of these orders.

(12) The Applicant have liberty to apply on seven days' notice.

**AND THE COURT NOTES:**

(13) Rule 16.05 of the Rules.

# FEDERAL CIRCUIT COURT
# OF AUSTRALIA
# AT MELBOURNE

## MLG 2301 of 2014

**FAIR WORK OMBUDSMAN**
Applicant

And

**SONA PEAKS PTY LTD**
First Respondent

**DAVID PETER ANDERSON**
Second Respondent

## REASONS FOR JUDGMENT
## (Revised from transcript)

## Introduction

1. These proceedings were commenced by the Fair Work Ombudsman ("the applicant") by application and statement of claim filed on 14 November 2014. The respondents to that application are Sona Peaks Pty Ltd ("the first respondent") a company which operated the 'Curry Garden Indian Restaurant', located at 12 Pall Mall in Bendigo, Victoria and David Anderson, ("the second respondent") the sole director of the first respondent.

2. The matter came before the Court on 19 February 2015. Ms Nicholas appeared on behalf of the applicant. There was no appearance on behalf of the first respondent. The second respondent appeared via telephone link.

3. For the reasons set out in *Fair Work Ombudsman v Sona Peaks Pty Ltd & Anor* [2015] FCCA 437 the second respondent was granted leave to

represent the first respondent. There were orders made by consent for the parties to file a statement of agreed facts, evidence, submissions and the matter was fixed for a penalty hearing today 24 July 2015. In those orders it was noted that the respondents made admissions in relation to all matters alleged in the statement of claim filed 14 November 2014 and the parties subsequently filed a Statement of Agreed Facts (S.O.A.F.) on 19 March 2015.

4. On 1 May 2015 the applicant filed an affidavit of Lyndal Ablett and on 22 May 2015 the respondents filed an affidavit of David Anderson. On 12 June 2015 the applicant filed a further affidavit of Kylie Lyn Murtagh and an outline of submissions. The respondents filed an outline of submissions on 3 July 2015.

## Background

5. The following background is drawn from the S.O.A.F. filed by the parties on 19 March 2015:[1]

6. The first respondent used to operate the Curry Garden Indian Restaurant in Bendigo Victoria. Between October 2012 and September 2013 nine different employees of the first respondent were underpaid in breach of the *Fair Work Act 2009* (Cth) ("the FW Act").

7. During that period the employees of the first respondent were covered by the *Restaurant Industry Award 2010* and did not receive the correct minimum adult or junior rates, casual loadings, penalty rates and proper records were not kept all in contravention of the FW Act and *Fair Work Regulations 2009*. The second respondent who was responsible for engaging those employees, admits he was involved in those contraventions.

8. In this case four of the employees affected by the admitted contraventions commenced before 28 December 2012. They are Joshua Eglite, Katie Gordon, Shermeka Wood and Rebecca White. The others, Gemma Maillard, Kuldeep Singh, Sarah Graham, Aidan Lloyd and Rajwinder Kaur all commenced after 28 December 2012.

[1] see s.191 of the *Evidence Act* 1995 (Cth).

9. The nine employees affected by the admitted contraventions include three junior and six adult workers who were employed as waiting staff and a cook. As a result of those contraventions the employees were underpaid over $11,000. These amounts remain outstanding. It appears it is uncontroversial that since that time the Curry Gardens Indian Restaurant has been sold.

10. Finally, this is not the first time these respondents have been dealt with for contraventions of the FW Act. In 2013 proceedings were brought against them by the applicant (for separate contraventions against other employees) which resulted in orders being made against them for the reasons set out in *Fair Work Ombudsman v Sona Peaks Pty Ltd* (ACN 141 459 789) *& Anor* [2015] FCCA 137.

## The penalty hearing

11. At the penalty hearing today 24 July 2015 the applicant, was represented by Ms Nicholas. There was no appearance by or on behalf of the respondents.

12. In *Hartnett Legal Services Pty Ltd v Ballantyne* [2015] FCA 744 Rangiah J considered the correct test that should be applied in granting default judgment under the *Federal Circuit Court Rules 2001* (Cth) ("the Rules").[2] Given the respondents' absence this day the applicant applied to proceed in their absence. There has been no explanation for their failure to appear or application for an adjournment.

13. The Rules provide the Court with authority to give judgment or to make any other order against the respondents. I am satisfied the respondents have not satisfied the applicant's claim. The respondents have not complied with an order of this Court and having regard to Rules 13.03A(2)(a), 13.03A(2)(b)(vii) the respondent is in default for the purposes of Rules 13.03B(2). In the face of the respondent's failure to appear this day and the defaults referred to above, a combination of Rules 13.03B(2), 13.03B(6) and/or 13.03C(1) provides the Court with ample authority to give judgment or make any other order against the respondents. Accordingly leave was granted to the applicant to proceed.

[2] See paragraphs [28] to [76].

14. These proceedings had been listed for penalty hearing before the decision of the Full Court in *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 59. The impact of that decision on civil penalty cases has itself been considered in subsequent decisions of judges of the Federal Court at first instance in *Director, Fair Work Building Industry Inspectorate v Foxville Projects Group Pty Ltd* [2015] FCA 492 per Flick J at paragraphs [19] to [24] and [30] to [31] and also *Comcare v Transpacific Industries Pty Ltd* [2015] FCA 500 per Barker J at [225] to [234]. In light of the decision of the Full Court the applicant has conducted itself consistent with the requirements set out therein.

15. Today and for the purpose of the penalty hearing the applicant relied on:

    a) The application filed 14 November 2014;

    b) the Statement of Claim filed 14 November 2014;

    c) Statement of Agreed Facts filed 19 March 2015;

    d) affidavits of L. Ablett filed 1 May 2015 and 21 July 2015;

    e) affidavit of K. L. Murtagh filed 12 June 2015;

    f) outline of submissions filed 12 June 2015; and

    g) exhibits A1 and A2.

16. Before turning to the legal framework governing any penalty to be imposed on the respondents it is timely to set out the submissions that were filed by the respondents. Save for an affidavit from the second respondent which was not relevant for present purposes, this was the only material filed by the respondents. The applicant's submissions will be addressed in due course. However the respondent's submissions were both short and revealing and they are verbatim incorporated as follows:

> *"We acknowledge receipt of your letter dated 26 June 2015. Once again you address me as Mr David Anderson. Government entity, agent, assign of corporation we are not. I am David of the family Anderson. We ask you once again to refrain from addressing me as Mr David Anderson: David or David Anderson will suffice, otherwise. Please supply me with an affidavit or statutory*

*declaration that states we are a corporation or government entity, employee agent of assign.*

*In our past phone conversations, on at least two occasions, we agreed to give you certain information you were seeking. We have mulled this over for some time now and we decided now, not to give you this information… all monies received from the sale of the restaurant must go back to the bank as the banks are the first creditors… back in June 2014 we asked that David and Maria Anderson be paid as employees of Sona Peaks. You refuse to answer our question. Your silence on this question means and is taken as acquiescence "the labourer is worthy of his hire." …we further bring to your attention in the past when we supplied the requisite information as requested we were informed we were not to be trusted. That we were liars seemed implied…please note, not all indians are untrust worthy and not all indian restaurant owners are dishonest charlatans and thieves.*

*We have stated repeatedly that we will pay through or by 'set off' ….. Till*(sic) *date it is claimed the judgment debt as it is called has not been paid. Yet such claim has not made under affidavit. Your claim is counter to my understanding and knowledge…we reserve our right to produce this in any court in this land and at any time."*

## The legal framework

17. These proceedings concern admitted contraventions of the FW Act and FW Regulations.

18. The applicant (the Fair Work Ombudsman) is a "Fair Work Inspector" pursuant to s.701 of the FW Act who can bring proceedings under s.589(2) of the FW Act for conduct after 1 July 2009. Section 546 of the FW Act enables a Court to impose a penalty upon a person who has contravened a civil remedy provision.

19. Section 546(2) of the FW Act provide that the maximum penalty that may be imposed by the Court for each contravention committed by a body corporate is 300 penalty units and by a natural person is 60 penalty units. For contraventions of section 535(1) of the FW Act the maximum penalty that can be imposed is 150 penalty units for a body corporate and 30 penalty units for a natural person.

20. Section 4 of the FW Act provides that "penalty unit" has the same meaning as in the *Crimes Act 1914* (Cth). As of 28 December 2012 and by virtue of the *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012* increased from $110 to $170.

21. Therefore the maximum penalty that can be imposed for each of the contraventions prior to 28 December 2012 on the first respondent is $33,000 and the second respondent is $6,600. For the contraventions of s.535 the maximums are $16,500 and $3,300 respectively. For each of the contraventions after 28 December 2012 the maximum penalty that may be imposed on the first respondent is $51,000 and $10,200 on the second respondent.

22. In *Murrihy v Betezy.com.au Pty Ltd* (No 2) [2013] FCA 1146 Jessup J determined that the relevant value of the penalty unit was the value at the time of the contravention. The applicant today approached the quantification of the relevant penalties in light of that decision and I accept that approach.

23. Section 557(1) of the FW Act provides that where two or more breaches are committed by the same person, the Court should consider whether the breaches arose out of a course of conduct by the person, such as to be taken to constitute a single breach of the term.

24. Section 550 of the FW Act provide that a person who is involved in a contravention of a civil remedy provision is treated as having contravened the civil remedy provision.

## Approach to penalty proceedings

25. The factors which may be taken into account is the assessment of penalty are well established. The factors relevant to the imposition of a penalty were summarised by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7, [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 respondent;*

*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;*

*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."*

26. This summary was adopted by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14. In *Australian Ophthalmic Supplies Pty Ltd v Mc Alary-Smith* [2008] FCAFC 8 Buchanan J after referring to the decision in *Kelly v Fitzpatrick* (supra) said at [9]:

> *"9. Checklists of this kind can be useful providing they do not become transformed into a rigid catalogue of matters for attention. At the end of the day the task of the Court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations…"*

27. In *Fair Work Ombudsman v Roselands Fruit Market Pty Ltd & Anor* [2010] FMCA 599 Driver FM as His Honour was then, summarised the approach the Court should follow in these sorts of proceedings at paragraphs 22 to 26 as follows:

> *"22. The first step for the Court is to identify the separate contraventions involved. Each breach of each separate*

*obligation found in the AFPCS, the NAPSA is a separate contravention of a term of an applicable provision for the purposes of s.719.*[3]

*23. However, s.719(2) provides for treating multiple breaches, involved in a course of conduct, as a single breach.*

*24. Secondly, 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 respondent did.*[4] *This task is distinct from and in addition to the final application of the "totality principle".*[5]

*25. Thirdly, the Court will then consider an appropriate penalty to impose in respect of each course of conduct, having regard to all of the circumstances of the case.*

*26. Fourthly and finally, having fixed an appropriate penalty for each group of contraventions or course of conduct, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to the conduct which led to the breaches.*[6] *The Court should apply an "instinctive synthesis" in making this assessment.*[7] *This is what is known as an application of the 'totality principle'."*

## Admitted contraventions

28. The S.O.A.F set out a summary of the admitted contraventions. These were:

> "3. *The First Respondent admits to contravening the following provisions of the Fair Work Act 2009 (FW Act) with respect*

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3 *Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216 at 223; *McIver v Healey* [2008] FCA 425 at [16] (unreported, Federal Court of Australia, 7 April 2008, Marshall J).

4 *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 at [46] (Graham J) (unreported, Full Court of the Federal Court of Australia, 20 February 2008, Gray, Graham and Buchanan JJ) (*Merringtons*).

5 *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 at [41]-[46] (Stone and Buchanan JJ) (unreported, Full Court of the Federal Court of Australia, 7 May 2008, Gyles, Stone and Buchanan JJ) (*Mornington Inn*).

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

7 *Merringtons*, supra at [27] (Gray J) and [55] and [78] (Graham J).

*to the employment of the Employees during the period from 1 October 2012 to 30 September 2013 (Audit Period):*

*(a) section 45 of the FW Act by:*

*(i) failing to pay Kaur, White, Wood, Eglite, Maillard and Singh minimum adult wage rates in accordance with clause 20.1 of the Restaurant Industry Award 2010 (Award) during the Audit Period;*

*(ii) failing to pay Graham, Lloyd and Gordon minimum junior wage rates in accordance with clause 20.3 of the Award during the Audit Period;*

*(iii) failing to pay Graham, Lloyd, Gordon, Wood and Eglite a casual loading in accordance with clause 13.1 of the Award during the Audit Period;*

*(iv) failing to pay the Employees penalty rates for work performed on a Saturday, Sunday or Public Holiday, in accordance with clause 34.1 of the Award and clause A.7.3 of Schedule A of the Award during the Audit Period;*

*(v) failing to pay Eglite, Wood, Maillard and Graham an additional amount for work performed between the hours of 10 p.m. to midnight, Monday to Friday, in accordance with clause 34.2(a)(i) of the Award and clause A.7.3 of Schedule A of the Award, during the Audit Period; and*

*(b) section 535(1) of the FW Act by failing to make and keep records including the content prescribed by the Fair Work Regulations 2009 (FW Regulations).*

*4. The Second Respondent admits:*

*(a) he was involved (within the meaning of section 550(2) of the FW Act) in the First Respondent's contraventions of the FW Act as set out in paragraph 3 above; and*

*(b) by reason of section 550(1) of the FW Act, is taken to have committed the contraventions."*

## Consideration

29. It was acknowledged that the respondents were entitled to the benefit of the course of conduct provisions of the FW Act and common elements of the contraventions could and should be grouped.

30. In submissions, which I accept, it was contended that having regard to the separate and distinct entitlements or obligations the admitted contraventions referred to in the S.O.A.F. should be grouped along with the relevant maximum penalties (given the decision referred to earlier) as follows:

a) failure to pay basic rate of pay;

b) failure to pay casual loading;

c) failure to pay correct Saturday rate;

d) failure to pay correct Sunday rate;

e) failure to pay correct night rate;

f) failure to pay correct public holiday rate; and

g) failure to keep records.

| GROUP | Admitted Contraventions | Nature of Contraventions | Grouping | Maximum Penalty (with grouping) First Respondent | Maximum Penalty (with grouping) Second Respondent |
|---|---|---|---|---|---|
| **1** | s.45 Fair Work Act by reason of Clause 20.1 of the Award | Basic Rate of Pay | Basic minimum rate of pay | $33,000 | $6,600 |
| **2** | s.45 of the Fair Work Act by reason of Clause 13.1 of the Award | Casual Loading | Casual loading | $33,000 | $6,600 |
| **3** | s.45 of the Fair Work Act by reason of Clause 34.1 & A.7.3 of the Award | Saturday Rate | Saturday Rate | $33,000 | $6,600 |
| **4** | s.45 of the Fair Work Act by reason of Clause 34.1 & A.7.3 of the Award | Sunday Rate | Sunday Rate | $33,000 | $6,600 |
| **5** | s.45 of the Fair Work Act by reason of Clause 34.2(i) & A.7.3 of the Award | Night Work Rate | Night Work Rate | $33,000 | $6,600 |
| **6** | s.45 of the Fair Work Act by reason of Clause 34.1 & A.7.3 of the Award | Public holiday Rate | Public holiday Rate | $51,000 | $10,200 |
| **7** | s.535(1) of the Fair Work Act by reason of regulation 3.32 & 3.33 *Fair Work Regulations* | Records keeping | Record keeping | $16,500 | $3,300 |

## The nature and extent of the conduct

31. The applicant submitted:

> *"35. The contraventions in these proceedings relate to a failure by the First Respondent to provide a number of basic, minimum entitlements prescribed under the FW Act and the Award identified during the Audit Period by the Applicant. The admitted contraventions include the failure of the First Respondent to ensure payment of a number of different and discrete entitlements, including minimum adult wage rates, minimum junior wage rates, penalty rates, and casual loadings.*
>
> *36. The calculations of underpayments provided demonstrate that the underpayment of these key entitlements occurred throughout the entirety of the Audit Period, rather than being confined to a discrete interval or incident.*[8] *These contraventions demonstrate an ongoing and systemic failure by the First and Second Respondents to comply with minimum standards and workplace law.*
>
> *37. The provision for payment of minimum wage rates, penalty rates and casual loadings are intended to provide a basic safety net for employees. The Admitted Contraventions in this case involved a significant underpayment of base level entitlements to a number of low paid workers, who were reliant on the protection afforded by minimum wages under the Award. It is submitted that, in addition to their status as low paid workers, a number of the Employees disadvantaged by the conduct of the Respondents were additionally vulnerable due to the casual nature of their employment (Graham, Lloyd, Gordon, Wood and Eglite),*[9] *their youth at the time of the contraventions (Graham, Lloyd, and Gordon),*[10] *and their status as migrant workers on 485 visas (Kaur and Singh).*[11]
>
> *38. Central to the enforcement of workplace laws is the ability of the regulator to ascertain and verify employees' entitlements through the maintenance of accurate records as*

[8] SOAF Annexure A.
[9] SOAF at paragraph [10].
[10] SOAF at paragraph [3].
[11] See Ablett Affidavit, Annexure 1.

*acknowledged by this Court in Fair Work Ombudsman v Orwill Pty Ltd & Ors*[12] *at [21]:*

"Manifestly, failure to make and maintain records in relation to employee entitlements, undermines the utility and effectiveness of workplace inspectors, and their ability to determine whether or not there has been compliance with minimum standards and industrial instruments, and the provision of effective means for investigation and enforcement of employee entitlements."

*39. The Respondents' failure to keep proper employment records in accordance with the FW Regulations, specifying the required content such as classification and commencement dates hindered the Applicant's ability to properly determine the entitlements of the Employees. Failing to keep employment records in accordance with the FW Regulations undermines in the efficacy of the safety net provided by minimum employment standards by compromising the regulator's role in monitoring compliance with relevant industrial instruments."*

32. I accept the applicant's submissions in relation to this factor and will take into account the nature and extent of the admitted contraventions in arriving at an appropriate penalty.

## The circumstances in which the conduct took place

33. The applicant submitted:

*"40. The conduct of both the Respondents in respect of the contraventions in this matter should be considered in the context of the broader actions and knowledge of the Respondents throughout the Audit Period.*

*41. The Applicant submits that during the Audit Period, the Respondents were aware of their obligations under the FW Act and the Award. The Second Respondent was, at all relevant times, responsible for the day-to-day operations of the First Respondent and aware that the Award applied to the First Respondent's employment of the Employees.*

*42. The Respondents had been put on notice of the potential consequences for breaching their obligations under the Award in similar factual circumstances. As of late 2012, the*

[12] [2011] FMCA 730.

*Respondents had already had, and were continuing to have, dealings with the Applicant in respect of an investigation into the alleged underpayment of another employee (Ms Raphael) relating to failure to comply with minimum wage rates and a failure to pay appropriate penalty rates (the Prior Underpayment). On 13 May 2013, the First Respondent was issued with a compliance notice in respect of the Prior Underpayment.*

*43. Despite the fact that the Applicant made the Respondents aware that the First Respondent was contravening the FW Act during the earlier investigation of underpayments to Ms Raphael and in the compliance notice dated 13 May 2013, the First Respondent continued to engage in similar conduct. The First Respondent continued to underpay the Employees throughout the balance of the Audit Period (until 30 September 2013). There is no evidence that the First or Second Respondent took any steps to rectify the manner in which the other Employees were paid, following these issues being brought to their attention as a result of the Prior Underpayment. To the contrary, from the date of the earlier compliance notice until the balance of the audit period (13 May 2015 – 30 September 2013) the First and Second Respondents continued their failure to act in accordance with their obligations under the FW Act.*

*44. The Applicant submits that these circumstances demonstrate a disregard for the minimum protections set down by the FW Act and a failure of the First and Second Respondent to take any steps to implement corrective action. This is particularly blatant in circumstances where the Respondents' obligations under the FW Act and the Award had been brought to their attention and where the Applicant had made several offers to assist the Respondents to understand their obligations.*

*45. On 12 January 2014, the Respondent stated, in a letter to the Applicant, "[a]t no stage were they [the employees] chained to the front desk and forced to work". The Applicant submits that the Court is able to infer that in spite of being made aware of their legal obligations on multiple occasions the Respondents' believed that they should be able to avoid statutory requirements by "contracting" with the Employees."*

34. I accept the applicant's submissions in relation to this factor. In arriving at an appropriate penalty I will place weight on the fact that by virtue

of their involvement in previous proceedings the respondents were aware of the consequences of breaches of the FW Act.

## The nature and extent of any loss or damage

35. The applicant submitted:

> *"46. The contraventions in respect of section 45 of the FW resulted in underpayments to the Employees totalling $11,201.77. Each of these Employees suffered loss and damage as a result of the First Respondent's failure to pay proper entitlements for hours worked. Given the number of employees affected by the contraventions, it is submitted that the loss or damage sustained can be described as significant.*
>
> *47. Further, it is submitted that the loss resulting from the underpayment of entitlements in this case is especially significant when considered in the light of the overall weekly earnings of the Employees affected and the percentage of their entitlements which have remained unpaid.*
>
> *48. When assessed in light of these factors, the effect of the underpayment on each individual employee represents a significant loss. For example, one employee (Eglite) has not received $3,479.41 of a total entitlement of $8,801.28 over a 16 week period (1 October 2012 – 21 January 2013). This means that as a result of the contraventions, he has not received 40% of the amount his was entitled to be paid for this period. Similarly, Gordon has not received payment of $2,642.44 out of an entitlement of $8,139.32. This equates to a failure to pay 32% of what Gordon was entitled to be paid under the provisions of the Award.*
>
> *49. In respect of the other affected Employees, the proportion of their total entitlements for the relevant period which is unpaid is as follows:*
>
> *i. Wood – 46.0%*
>
> *ii. White – 0.05%*
>
> *iii. Singh – 34.0%*
>
> *iv. Maillard – 27.0%*
>
> *v. Graham – 32.0%*

*vi.Lloyd – 29.0%*

*vii.Kaur - 0.04%*

*With the exception of the underpayments to White and Kaur, the underpayments to each individual employee represented a significant portion of their overall entitlement. It is also notable that three particularly vulnerable young employees, Graham, Lloyd and Gordon, were each not paid approximately one third of their entitlements under the Award.*

*50. As at the date of these submissions, no payment of the $11,201.77 in outstanding entitlements has been made to the Employees despite urging by the Applicant.*

*51. The provision of minimum wage entitlements is also intended to ensure a level playing field among employers in respect of labour costs. In failing to comply with minimum wage provisions for a large number of employees over at least the Audit Period, the First Respondent has obtained a significant benefit in the form of the cost of labour being at a significantly discounted rate. Given that the underpayments have yet to be rectified, the First Respondent continues to receive the benefit of the Employees' unpaid entitlements. In contrast, it is approximately 18 – 30 months since each of the Employees employment with the First Respondent ceased and they have been, and continue to be, deprived of the financial benefits that would flow from the timely payment of their correct entitlements."*

36. I accept the applicants submissions in relation to this factor and in arriving at an appropriate factor will place weight on the fact the entitlements remain outstanding.

## Any similar previous conduct

37. The applicant submitted:

*"52. The Respondents had previously been involved in similar conduct, which have left them in no doubt as to their obligations.*

*53. In previous proceedings before this Court,[13] (the **First Proceeding**) the First Respondent was found to have*

[13] *Fair Work Ombudsman v Sona Peaks Pty Ltd & Anor* [2015] FCCA 137.

*contravened section 716(5) of the FW Act for failing to comply with a Compliance Notice. The Second Respondent was held to be involved in the contravention within the meaning of section 550(1) of the FW Act. The Applicant concedes that outcome of the First Proceeding has not been decided at the time of the filing of the current matter. The Applicant submits that the First Proceeding is a relevant factor in relation to penalty as it demonstrates that in spite of being put on notice of potential non-compliance throughout the investigation by the Applicant in relation to the First Proceedings no corrective action was taken at any stage by the First or Second Respondent. The non-compliant conduct of the Respondents continued in the face of the investigation of the current proceedings.*

54. *The subject of the Compliance Notice in the First Proceeding related to similar conduct on the part of the First and Second Respondent as admitted in this proceeding, namely a failure to pay minimum employee entitlements, including base minimum wage and penalty rates, to an employee in accordance with the Award.*[14] *The conduct in the First Proceeding related to one employee and had occurred over in the period between May 2012 and December 2012. Similarly to the present contraventions, the underpayment to Ms Raphael represented approximately 36% of her total entitlements during the employment period.*[15] *In his penalty decision, Judge Riethmuller noted that it was "clear that the breaches by the respondents were deliberate" as was the decision not to comply with 'the penalty notice'.*[16]

55. *The underpayments to the employee were rectified through a payment plan following the commencement of court proceedings. This Court also imposed penalties on both the First and Second Respondent by Order dated 23 January 2015.*[17] *Payment of these penalties was to be paid on 20 March 2015. As at the date of these submissions, no payment has been received from the First or Second Respondents.*[18]

56. *The history of this previous contravention, combined with the lack of meaningful cooperation with the regulator*

[14] SOAF at paragraph [48].
[15] *Fair Work Ombudsman v Sona Peaks Pty Ltd & Anor* [2015] FCCA 137, [11].
[16] *Fair Work Ombudsman v Sona Peaks Pty Ltd & Anor* [2015] FCCA 137, [18].
[17] *Fair Work Ombudsman v Sona Peaks Pty Ltd & Anor* [2015] FCCA 137, [26].
[18] Ablett Affidavit at paragraphs [15]-[18].

*throughout both investigations until court proceedings were issued,*[19] *suggests on the part of the respondents "a continuing attitude of disobedience of the law",*[20] *which makes this prior contravention significant in assessing an appropriate penalty.*[21] *This continuing attitude is further evidenced by the failure of the First and Second Respondent to comply with the Orders of this Court made on 23 January 2015.*

*57. The First and Second Respondents were allowed 56 days to comply with the Orders but still failed to pay the penalties ordered by the relevant date. The penalties still remain unpaid."*

38. I accept the applicant's submissions and will place significant weight on this factor, as the similar previous conduct with no valid or extenuating circumstances warrants a meaningful penalty.

**Whether the breaches were properly distinct or arose out of one course of conduct**

39. The applicants' submissions on this factor have already been referred to earlier as has the Court's findings on the appropriate number and grouping of the admitted contravention.

## The size of the respondents business

40. The applicant submitted:

*"59. The First Respondent has provided no evidence in this proceeding relating to the financial circumstances of the business. As at the date of these submissions the First Respondent remains a registered company, although the Applicant is aware that the Business has been recently sold by the Respondents.*

*60. Should the First or Second Respondent seek to put evidence before the Court regarding their respective financial positions, the Applicant submits that material must be weighed against the objective seriousness and deliberateness of the contravening conduct and the need to*

[19] Ablett Affidavit, paragraphs [4]-[19] and annexures; SOAF at paragraphs [50]-[67].
[20] *Veen v R [No 2]* [1988] HCA 14 [14]; (1988) 164 CLR 465, 478.
[21] *Williams v Construction, Forestry, Mining and Energy Union (No 2)* [2009] FCA 548.

*impose a sufficiently meaningful and deterrent penalty, particularly in light of the repeated nature of the conduct.*

*61. In* Workplace Ombudsman v Saya Cleaning Pty Ltd *Federal Magistrate Simpson (as he then was) provided a summary of the case law in this respect:*

'the First respondent is a small company and, I infer, has very few assets. However as Justice Tracey said in *Kelly v Fitzpatrick* (supra):

*'No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees. Rightly, have an expectation that this will occur. When it does not it will, normally, be necessary to mark the failure by imposing a monetary sanction. Such a sanction must be imposed at a meaningful level.'*

In *Rajogopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 at paragraphs 27 to 29 it was said:

*'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 relevant to a Court's consideration of penalty.'"*

41. I accept the applicants' submissions on this factor and note the respondents did have an opportunity to put evidence (in proper form) capable of demonstrating financial difficulties but haven't.

**The deliberateness of the breach**

42. The applicant submitted:

*"62. The Applicant submits the evidence demonstrates that the contraventions were clearly deliberate and as a result penalties should be awarded at a level which matches the seriousness of the conduct.*

*63. As set out earlier in these submissions, the First and Second Respondents were notified by way of the Prior Underpayment and the issuing of a Compliance Notice of the relevant Award that applied to the Employees. In spite of the Respondents being made aware of their failure to comply with the relevant industrial obligations, the First*

*Respondent continued to engage in the same practices and therefore continued to contravene the FW Act.*

*64. In addition to the First Respondent failing to amend its practices to become compliant with Commonwealth workplace laws, the Second Respondent engaged in correspondence with the Applicant outlining his belief that the Employees were employed "on a contract basis. An offer of employment and wade were made. As individuals they were free to accept or refuse". This continued notwithstanding the regulators advice that this position was wrong and his subsequent acceptance of liability in the First Proceedings.*

*65. The Applicant submits that the Respondents deliberately refused to pay the Employees in accordance with the Award. As submitted at paragraph 45 above, the Second Respondent believed that entering into a contract should dispose of the Employees entitlements under the Award. This was in spite of his previous admissions of liability in the First Proceedings and being made aware of the First Respondent's legal obligations on multiple occasions by the Applicant.*

*66. In spite of the Respondents admitting liability in the First Proceedings and rectifying the amount owed, the Respondents have failed to pay the penalty amount ordered by the Court and has not rectified the Underpayment Amounts in the current proceedings. The Applicant submits that it is open to the Court to draw an inference that the First and Second Respondent do not fully accept their wrongdoing, and that in the circumstances the contraventions were deliberate."*

43. I accept the applicant's submissions in relation to this factor and will place weight on what appears to be in the circumstances deliberate conduct by the respondents.

## The involvement of senior management

44. The applicant submitted:

*"67. The Second Respondent is one of two directors of Newtonomics Pty Ltd, the sole shareholder of the First Respondent. The Second Respondent was also the sole director and secretary of the First Respondent. In the SOAF the Second Respondent admits that he was, during at least the Audit Period:*

*(a) responsible for ensuring that the Employer complied with its legal obligations to its employees under the relevant legislation and instruments;*

*(b) had actual knowledge of the factual matters which comprise the Admitted Contraventions; and*

*(c) was an intentional participant in the factual matters which comprise the Admitted Contraventions.*

*68. The Applicant submits that the Second Respondent was aware that the pay rates paid to the Employees were not in accordance with the Award but did nothing to address the issue. There is no suggestion that anybody other than the Second Respondent had any responsibility for the contraventions that took place, or the authority to redress those contraventions as they were occurring."*

45. I accept the applicant's submissions on this factor and in arriving at an appropriate penalty will address the need to sanction the involvement of the director of the first respondent in the admitted contraventions.

## The respondents contrition, corrective action and cooperation with the enforcement authorities

46. The applicant submitted:

*"Contrition*

*70. Notwithstanding the Respondents admissions as to liability, the Respondents have not, at the date of these submissions, rectified the Underpayment Amounts or paid the penalties as ordered by the Court in the First Proceedings. No apology or expression of remorse has been provided to the Employees by the Respondents with respect to the Admitted Contraventions.*

*71. Further as outlined below, The Second Respondent provided completely unsatisfactory responses to the Applicant during the investigation and the current proceedings. The Second Respondent's constant requests to know who his "accusers" were and his statements that the Employees were not "chained to the front desk and forced to work" [22] demonstrates a fundamental lack of contrition or acceptance of wrongdoing.*

[22] Ablett Affidavit annexure 7, page 34.

*Corrective Action*

*72. As previously stated above at paragraph 0, at the date of these submissions the First Respondent has not made any payments to the Employees rectifying the underpayments in spite of accepting that the underpayments occurred. The Applicant submits that there is no evidence that the Respondents' took any steps to remedy non-compliance with the Award, in respect of the business generally. For example by conducting an audit in respect of other employees.*

*Cooperation with authorities*

*73. Where Respondents have co-operated and have made admissions early in the course of an investigation, or soon after the commencement of proceedings, it is appropriate to allow a discount of penalty. In considering the application of penalty discount for cooperation, the statements of Stone and Buchanan JJ in Mornington Inn are apposite:*

> *"…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 credible expression of regret; and/or (b) has indicated a willingness to facilitate the course of justice."*[23]

*74. The Applicant submits that, despite ultimately admitting to the contraventions, the Respondents have not cooperated with the Applicant in relation to the investigation.*

*75. The First Respondent was given a Notice to Produce Record or Documents (**NTP**) on 15 October 2013 by Fair Work Inspector Kyle Murtagh. The NTP required the production of employment records and documents with respect to all of the Employees during the Audit Period.*[24] *The Respondent failed to comply with the NTP within the timeframe and made repeated requests for extensions to the stated deadline.*[25] *The First Respondent did not provide the Applicant with the requested information until 11 June 2014, approximately 8 months after the original request.*[26]

*76. When the Second Respondent ultimately agreed to provide information to the Applicant's investigation in relation to the*

[23] *Mornington Inn* at [74]-[76] per Stone and Buchanan JJ.
[24] SOAF paragraph [51].
[25] SOAF paragraphs [52]-[61].
[26] SOAF paragraph [64].

*current proceedings, he continually alleged that any information provided was "under duress and threat of pillage and rape, not to mention bodily harm",[27] or "under threat of financial penalty, legal assault kidnap or imprisonment".[28]*

77. *The Second Respondent has repeatedly requested that the Applicant provide further details of the basis of its authority, proof that it is a legitimate federal operation and has stated that the Applicant's actions are illegal and will force him into slavery.[29] Mr Anderson has accused the Applicant of forcing him to enter into a contract with the Applicant and demanded that the applicant pay him in accordance with a "Schedule of Fees".[30]*

78. *On 22 May 2015 the Respondent served the Applicant with an Affidavit. The Second Respondent stated as follows:*

    "I did attempt in the past to get some advice and help in regard to the processes associated with this matter. This is and was not available".

79. *This allegation is without basis. The Applicant refers to the following paragraphs of the SOAF where the First and Second Respondent agree that the Applicant attempted to provide support and assistance to the Respondents:*

    *(a) paragraph 50;*

    *(b) paragraph 53;*

    *(c) paragraph 55; and*

    *(d) paragraph 63.*

80. *The Applicant acknowledges that in making admissions and entering into the SOAF the Respondents have saved the Court and the public the resources and costs associated with a fully contested liability hearing in this matter. The Applicant submits that it is open to the Court to find his conduct was designed to distract from the key issue – his ongoing refusal to comply with statutory minimums, which were made clear to the Respondents. The Applicant submits that the admissions made by the Respondents occurred as an acceptance of the*

[27] Ablett Affidavit Annexure 6, page 30.
[28] Ablett Affidavit Annexure 7, page 39.
[29] Ablett Affidavit Annexure 4, page 21.
[30] Ablett Affidavit Annexure 4, page 21.

*inevitable rather than a desire to facilitate justice. In the event that the Court considers a discount for cooperation is appropriate, any discount should be minimal."*

47. I accept the applicant's submissions and will place appropriate weight on these factors in arriving at a proper penalty for the admitted conduct.

## Ensuring compliance with minimum standards

48. The applicant submitted:

> *"81. Compliance with minimum standards is an important consideration in the present case for the following reasons:*
>
> *(a) one of the stated principal objects of the FW Act has been the preservation of an effective safety net for employees entitlements and effective enforcement mechanisms;*[31]
>
> *(b) it is vital to ensure compliance with the safety net of awards to create an even playing field for employers in an industry and to ensure all employees in an industry are appropriately remunerated for the work they perform; and*
>
> *(c) the substantial penalties set by the legislature for contraventions of the FW Act reinforce the importance placed on compliance with minimum standards.*[32]
>
> *82. The prolonged and fundamental nature of the contraventions in the present proceedings demonstrates the Respondents' disregard for statutory obligations.*
>
> *83. Regarding the failure to pay minimum entitlements, the Applicant submits that the Court should have regard to* Fair Work Ombudsman v Kentwood Industries Pty Ltd *(No 3)*[33]*, where McKerracher J said:*
>
> "In imposing a penalty against the respondents, it is necessary for the court to set the penalty in a range that reinforces the fundamental importance of compliance with the employment standards enshrined in Commonwealth workplace laws".[34]"

[31] FW Act s3.
[32] FW Act s3.
[33] [2011] FCA 579.
[34] [2011] FCA 579, [36] (McKerracher J).

49. I accept the submission that weight should be placed on the importance of compliance with minimum standards in arriving at an appropriate penalty in this case.

## Deterrence

50. In regards to specific deterrence, the applicant submitted:

> *"84. The Applicant submits that there is a clear need for specific deterrence due to the repeated contraventions; the lack of remorse or contrition; and what appears to be an ongoing belief that the Respondents should be able to pay employees below their minimum entitlements as long as the Employees agree to it.*[35] *In* Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union[36] *Gray J observed:*
>
> "Specific deterrence focusses on the party on whom the penalty is to be imposed and the likelihood of that party being involved in a similar breach in the future. Much will depend on the attitude expressed by that party as to things like remorse and steps taken to ensure that no future breach will occur."
>
> *85. The Applicant relies on the following principles to support the submission that the penalty imposed on the Respondents to ensure the deterrence effect is high:*
>
> *Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor*:[37]
>
> "As there has been no demonstration of contrition or remorse on behalf of either respondent the need for specific deterrence is high."
>
> *Ponzio v B & P Caelli Constructions Pty Ltd:*[38]
>
> "…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."

[35] Ablett Affidavit, Annexure 7.
[36] [2008] FCAFC 170, [37].
[37] [2009] FMCA 38, [41] citing *Merringtons* [17]; *Fryer v Yoga Tandoori House Pty Limited* [2008] FMCA 288 [35].
[38] [2007] FCAFC 65, [93].

86. *The Applicant submits that although it appears the Respondents are no longer operating the Business*[39]*, the need for specific deterrence in these proceedings is high given the First and Second Respondents' non-compliance with the previous orders of the Court. Although the non-compliance with the orders of the First Proceedings occurred after the issuing of the current proceedings, the conduct indicates a basis for concern. The ongoing interactions with the Respondents also provide little confidence to the Applicant that this conduct will not occur in the future – even in a different business. If the Respondents were truly remorseful and accepting of wrongdoing, the Respondents would not have continued to conduct themselves in such a way. The Applicant submits that the Court should ensure that both Respondents are aware of the seriousness of the contraventions and the penalty should reflect that."*

51. In regards to general deterrence, the applicant submitted:

*"87. The importance of the role of general deterrence in determining the appropriate penalty was outlined by Lander J in* Ponzio v B & P Caelli Constructions Pty Ltd *(2007) and Finkelstein J in* CPSU v Telstra Corporation.

*88. Employers should be in no doubt that they have a positive obligation to ensure compliance with the obligations they owe to their employees under the law. In* Fair Work Ombudsman v Bento King Meadows Pty Ltd*, O'Sullivan J commented:*

"I accept there is also a need for general deterrence and to ensure employers understand they must take steps to ensure correct employee entitlement are paid and statutory requirements are observed (see Tracey J in *Kelly v Fitzpatrick* [2007] FCA 1080 at paragraph [28]). Recently, Marshall J said in *Fair Work Ombudsman v Maclean Bay Pty Ltd* (No.2) [2012] FCA 557 at [29]: "It is important to ensure that the protections provided by the Act to employees are real and effective and properly enforced. The need for general deterrence cannot be understated. Rights are a mere shell unless they are respected."

*89. General deterrence is an important factor in these proceedings. As observed by the Court in the First Proceedings, the hospitality industry is one "where rates of non-compliance with the minimum obligations to employees*

[39] Murtagh affidavit at paragraph [6].

*are high". Compliance in the hospitality industry has been notoriously difficult. The Applicant submits that there is a need to send a message to employers in the community in the hospitality industry that they must comply with their obligations under the Award and under the FW Act, especially in the context of repeated unlawful conduct.*

*90. The Applicant submits that the Court should place weight on the need to deter employers operating in similar circumstances to those of the First Respondent and to impose penalties at a level which will make such conduct undesirable and commercially unviable."*

52. Finally I also accept there is the need for specific and general deterrence in this matter.

## Appropriate penalties

53. In this matter seven contraventions have been identified for the first respondent and the second respondent leading to a total potential liability of $232,500 for the first respondent and $46,500 for the second respondent in light of the approach set out above.

54. The task of the Court in this case is to arrive at an appropriate penalty for the particular circumstances of this matter in light of the relevant considerations set out above. Specifically, the factors that are most relevant in the proceedings relate to the following:

a) previous conduct of the first and second respondents, meaning they were abundantly aware of their obligations and the consequences of a breach;

b) non-cooperation with the applicant ;

c) vulnerable profile of employees;

d) the deliberateness of the first and second respondents conduct;

e) the need for specific and general deterrence; and

f) the importance of minimum standards.

55. Therefore the appropriate penalties in this case are:

| Group | Admitted Contraventions | Nature of Contraventions | Penalty for First Respondent | Penalty for Second Respondent |
|---|---|---|---|---|
| **1** | s.45 Fair Work Act by reason of Clause 20.1 of the Award | Basic Rate of Pay | $18,000 | $3,597 |
| **2** | s.45 of the Fair Work Act by reason of Clause 13.1 of the Award | Casual Loading | $18,000 | $3,597 |
| **3** | s.45 of the Fair Work Act by reason of Clause 34.1 & A.7.3 of the Award | Saturday Rate | $18,000 | $3,597 |
| **4** | s.45 of the Fair Work Act by reason of Clause 34.1 & A.7.3 of the Award | Sunday Rate | $18,000 | $3,597 |
| **5** | s.45 of the Fair Work Act by reason of Clause 34.2(i) & A.7.3 of the Award | Night Work Rate | $18,000 | $3,597 |
| **6** | s.45 of the Fair Work Act by reason of Clause 34.1 & A.7.3 of the Award | Public holiday Rate | $20,400 | $4,080 |
| **7** | s.535(1) of the Fair Work Act by reason of regulation 3.32 & 3.33 *Fair Work Regulations* | Pay Records | $8,250 | $1,650 |

56. This results in a total penalty for the first and second respondents of 51% of the maximum.

## Totality principle

57. Having fixed an appropriate penalty for each group of contraventions, consistent with the authorities as set out above, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to the conduct which led to the breaches and is not oppressive or crushing.[40] The application of the totality principle does not mean that the penalties arrived at before its application must be reduced and there was no submission I should do so. Therefore in

[40] *Kelly v Fitzpatrick* [2007] FCA 1080, [30]; *Merringtons* at [23] per Gray J, [71] per Graham J, [102] per Buchanan J.

this case I am satisfied the penalties individually and in the aggregate are an appropriate response to the whole of the conduct.

## Conclusion

58. Therefore, as the Court:

- is directed by the relevant authorities to consider what is appropriate in all the circumstances of this case;[41] and
- in its discretion in relation to penalty is not fettered by a checklist of mandatory criteria;[42] and
- notes the parties have file S.O.A.F; and
- is satisfied the individual and aggregate penalty for the whole of the contravening conduct is not crushing nor oppressive and is appropriate in the circumstances;

I make the declarations and orders as set out at the beginning of these reasons.

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**I certify that the preceding fifty-eight (58) paragraphs are a true copy of the reasons for judgment of Judge O'Sullivan**

Associate:

Date: 27 July 2015

[41] See *Construction Forestry Mining & Energy Union v Coal & Allied Operations Pty Ltd (No.2)* (1999) 94 IR 231.

[42] See *Australian Ophthalmic Supplies Pty Limited v McAlary-Smith* [2008] FCAFC 8.