FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v TSURC PTY LTD & ANOR (No.2) *[2015] FCCA 2148*

Catchwords:
INDUSTRIAL LAW – Application for pecuniary penalties pursuant to s.546(1) of the *Fair Work Act 2009* (Cth) – contravention of *Fair Work Act 2009* (Cth) – consideration of matters relevant to penalty.

Legislation:
Corporations Act 2001 (Cth), s.471B
Fair Work Act 2009 (Cth), ss.3, 539, 545, 546, 550, 559, 716
Fast Food Industry Award 2010
Federal Circuit Court Rules 2001 (Cth), rr.13.03B, 13.03C
Crimes Act 1914 (Cth), s.4AA

Cases cited:
Fair Work Ombudsman v Tsurc Pty Ltd (ACN 130 749 969) & Anor [2014] FCCA 2472
Sharpe v Dogma Enterprises [2007] FCA 1550
Australian Ophthalmic Supplies Ply Ltd v McAlary-Smith [2008] FCAFC 8; (2008) 165 FCR 560
Kelly v Fitpatrick [2007] FCA 1080; (2007) 166 IR 14
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Williams v Construction, Forestry, Mining and Energy Union (No.2) [2009] FCA 548; (2009) 182 IR 327
Cotis v McPherson [2007] FMCA 2060; (2007) 169 IR 30
Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union [2008] FCAFC 170; (2008) 171 FCR 357
Fair Work Ombudsman v Shafi Investments Pty Ltd (No.2) [2013] FMCA 168

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	TSURC PTY LTD (ACN 130 749 969)
Second Respondent:	SOTIRIOS THEOCHARIDIS
File Number:	SYG 3193 of 2013
Judgment of:	Judge Nicholls

Hearing date: 25 June 2015

Date of Last Submission: 25 June 2015

Delivered at: Sydney

Delivered on: 12 August 2015

REPRESENTATION

Appearing for the Applicant: Mr J Robertson

Respondents: No appearance

THE COURT ORDERS THAT:

(1) The second respondent is to pay a penalty of $3825.00 pursuant to s.546(1) of the *Fair Work Act 2009* (Cth) in respect of his involvement in Tsurc Pty Ltd's contravention of s.716(5) of the *Fair Work Act 2009* (Cth).

(2) The pecuniary penalty set out in Order 1 above is to be paid, pursuant to s.546(3)(c) of the *Fair Work Act 2009* (Cth), to the eight Employees listed in the table below, in the following amounts proportionate to the underpayments owed to each of the Employees:

Employee	Underpayment Amount	Percentage of total underpayment	Total payable (based on percentage amount of total underpayment)
David Butterworth	$437.25	1.68%	$64.26
Giulia Valeria Cerminara	$5,483.20	21.06%	$805.55
Yu-Jung (Erin) Chen	$1,565.86	6.01%	$229.88

Employee	Underpayment Amount	Percentage of total underpayment	Total payable (based on percentage amount of total underpayment)
Labiba Lia Choudhury	$823.45	3.16%	$120.87
Fernando Freire de Freitas	$3,290.20	12.64%	$483.48
Billie K Hobbs-Wypych	$844.75	3.24%	$123.93
Camilo Roldan Madrinan	$5,120.19	19.67%	$752.38
Willyam Willyam	$8,740.42	32.53%	$1,244.27

(3) The second respondent is to pay the penalty at Order 1 above, within twenty-eight days of order for payment.

(4) If the second respondent is unable to pay any amount set out in the table at Order 2 above to any Employee, because the Fair Work Ombudsman does not know the Employee's whereabouts, the second respondent is to pay this remaining amount to the Consolidated Revenue Fund of the Commonwealth pursuant to s.559 of the *Fair Work Act 2009* (Cth).

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

(6) The proceedings are otherwise dismissed.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY

SYG 3193 of 2013

FAIR WORK OMBUDSMAN
Applicant

And

TSURC PTY LTD (ACN 130 749 969)
First Respondent

SOTIRIOS THEOCHARIDIS
Second Respondent

REASONS FOR JUDGMENT

1. This is an application made by the Fair Work Ombudsman ("the FWO"), for penalties against Mr Sotirios Theocharidis ("the second respondent") following the judgment given by this Court on 29 October 2014 (*Fair Work Ombudsman v Tsurc Pty Ltd (ACN 130 749 969) & Anor* [2014] FCCA 2472 ("*Tsurc (No 1)*"). That judgment was entered for the FWO pursuant to r.13.03B(2)(c) of the *Federal Circuit Court Rules 2001* (Cth) ("the FCC Rules"), given the default of the second respondent.

Before the Court

2. At the relevant times, the second respondent was a director of the first respondent, Tsurc Pty Ltd ("the first respondent"), which operated a pizza outlet and pizza delivery service. The proceedings involve the failure of the first respondent to comply with a Compliance Notice issued by the FWO pursuant to s.716 of the *Fair Work Act 2009* (Cth) ("the FWA").

3. The issue currently before the Court involves an application by the FWO for a penalty to be imposed in relation to the second respondent. The second respondent did not appear, nor was there any appearance for him, at the penalty hearing before the Court. I was satisfied on the evidence that he had reasonable notice of that Court event with reference to the affidavit of Ms Hannah Schutz made on 24 June 2015. The hearing proceeded in the absence of the second respondent pursuant to r.13.03C(1)(e) of the FCC Rules.

Evidence Before the Court

4. The evidence before the Court was as follows:

    1) Affidavit of Stephen Marriott affirmed on 4 February 2014 (first Marriott affidavit).

    2) Affidavit of Paula Cunneen sworn on 4 February 2014 (Cunneen affidavit).

    3) Affidavit of Joseph Khoury sworn on 4 February 2014 (Khoury Affidavit).

    4) Affidavit of Morrie Fahd sworn on 4 February 2014 (Fahd affidavit).

    5) Affidavit of Andrew Ng sworn on 4 February 2014 (Ng Affidavit).

    6) Affidavit of Stephen Marriott affirmed on 4 April 2014 (second Marriott affidavit).

    7) Affidavit of Emma Travers affirmed on 26 February 2015 (Travers affidavit).

Consideration

5. The application against the first respondent was permanently stayed (see [6] of *Tsurc (No.1)*). Subsequently, the first respondent was deregistered by the Australian Securities and Investment Commission on 24 August 2014 (Travers affidavit at annexure "ET-20"). The application against the first respondent should, therefore be dismissed. I will make an order accordingly.

6. The current judgment, therefore, concerns the issue of whether the second respondent should be ordered to pay a penalty under the FWA.

7. Section 546 of the FWA provides for, upon application, the imposition of a penalty upon a person who has contravened a civil remedy provision under the FWA. In the current matter, I found that the second respondent had been involved in one contravention of a civil remedy provision as set out at s.716(5) of the FWA (see *Tsurc (No.1)* at [19]).

8. The FWO has made such an application for a penalty to be imposed. As is clear, the imposition of a penalty is at the discretion of the Court. In this light, there is no restriction on the matters that the Court may take into account (*Sharpe v Dogma Enterprises* [2007] FCA 1550 and *Australian Ophthalmic Supplies Ply Ltd v McAlary-Smith* [2008] FCAFC 8; (2008) 165 FCR 560 at [91] per Buchanan J).

9. Noting the above, in *Kelly v Fitpatrick* [2007] FCA 1080; (2007) 166 IR 14 ("*Kelly*") at [14], Justice Tracey adopted a non-exhaustive list of relevant factors referred to in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7. These are (*Kelly* at [14]):

> *"...• The nature and extent of the conduct which led to the breaches.*
>
> *• The circumstances in which that conduct took place.*
>
> *• The nature and extent of any loss or damage sustained as a result of the breaches.*
>
> *• Whether there had 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 breach had exhibited contrition.*

> • *Whether the party committing the breach had taken corrective action.*
>
> • *Whether the party committing the breach had cooperated with the enforcement authorities.*
>
> • *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…"*

10. In light of the findings in *Tsurc (No 1)*, the following factors are relevant to the consideration of penalties against the second respondent.

The Nature of the Second Respondent's Conduct Which Led to the Contraventions

11. The evidence of Fair Work Inspector Paula Cunneen ("Inspector Cunneen") shows that she formed a reasonable belief that the second respondent had underpaid eight employees in contravention of the relevant *Fast Food Industry Award 2010* in the period 21 January 2013 to 3 February 2013 and 18 February 2013 to 2 June 2013.

12. A Compliance Notice was issued to the first respondent on 12 September 2013, which required payments totalling $25,995.13 to be made to the eight employees. Further, the Compliance Notice required that evidence be produced to the FWO and that this had been done within the time specified in the Compliance Notice (see Travers affidavit at annexure "ET-1").

13. Ms Travers gave evidence that the first respondent failed to make the payments, let alone within the specified time (Travers affidavit at [13]).

14. Ms Travers also gave evidence that the FWO gave the second respondent the opportunity to provide any reasonable excuse for the failure to comply (Travers affidavit at [12] and annexure "ET-16"). No excuse was provided and no payments were made.

15. The second respondent's conduct must be seen in light of the relevant statutory scheme. Relevantly, that the ability for a Fair Work Inspector to issue a Compliance Notice was introduced into the FWA as an

alternative mechanism to commencing Court proceedings for dealing with the non-compliance of obligations under the Act.

16. Section 716 of the FWA provides the opportunity for a person, in respect of whom a Compliance Notice has been issued, to address and rectify the contravention and, thereby, avoid civil remedy proceedings. In the current case no response from the second respondent was received by the Fair Work Inspector. I find that the second respondent did not seek to address the contraventions or the call on him made by the Compliance Notice.

Circumstances in Which the Breaches Took Place

17. The evidence before the Court reveals that the respondents were on notice, following an audit by the FWO in January and February 2013, of the obligation to pay employees, at least, the minimum entitlements due under the FWA. Further, on the evidence, the second respondent would have been on notice of this obligation following an earlier complaint by another employee. Further, that the second respondent was on notice of the possible consequences of failing to do so (see generally Travers affidavit, and in particular at [8](a) and [14] – [16]).

18. I find that once having been put on relevant notice, the second respondent made no attempt to comply with the obligations. This was in circumstances where, on the evidence, reasonable efforts were made to engage with him (see Travers affidavit at [8] – [12] and Cunneen affidavit at [4] – [31]).

Nature of the Loss Sustained as a Result of the Breach

19. It is important to note that the eight employees owed outstanding wages are young persons. The failure to comply with the Compliance Notice means that these young employees have been denied the full payment of minimum wages between January and June 2013 (see [11] above).

20. The total amount outstanding is $25,995.13. When relevantly distributed amongst the eight employees some of the individual amounts may be seen as small. However, I agree with the FWO, that this should not be understood as being, in context, of lesser significance simply for that reason. In my view, the repeated failure of

the second respondent to engage with the FWO in this matter, highlights the vulnerability of these young employees.

21. Further, given the concentration in a relatively short period of time during which the underpaid amounts relate, they achieve a proportionate significance for that reason.

22. The FWO is correct to note that the specific issue before the Court now is the failure to comply with the Compliance Notice. However, also relevant to the current consideration, is that the failure to pay sufficient wages to young employees, must been seen in light of the nature of the entitlements under the Award, which were the failure to pay minimum wages for work on weekends, and public holidays, and the number of instances of such failures.

23. In all, therefore, what cannot be ignored here is that the second respondent's failure to comply with the Compliance Notice, having regard to the relevant statutory scheme, involves a failure that runs counter to the purpose of the statutory scheme empowering Fair Work Inspectors to enforce compliance with the minimum entitlements of employees. By his lack of response, the second respondent has caused significant cost to the public purse by requiring the matter to come before this Court.

Similar Previous Conduct by the Respondent

24. The FWO submitted that it was not aware as to whether the first respondent, or the second respondent, had been the subject of proceedings for contraventions of workplace laws.

25. However, on the evidence, the respondents have had previous dealings with the FWO. While this may be a matter of lesser weight (see *Williams v Construction, Forestry, Mining and Energy Union (No.2)* [2009] FCA 548; (2009) 182 IR 327), nonetheless, the previous interventions by the FWO would have left the second respondent in no doubt as to his relevant obligations (see Travers affidavit at [14] – [16] and at annexure "ET-17"). In my view, this argues for a penalty to be imposed as a deterrent (see further below).

Size of the Business Enterprise Involved

26. As stated above, the first respondent has been deregistered and the application against it has, therefore, been dismissed. The second respondent is no longer its director. On the evidence available to the Court, the size of the first respondent or financial circumstances of either respondent, cannot be discerned.

27. However, the obligations to comply with relevant workplace laws apply equally to all business enterprises. I note, further, and as relevant to this case, the applicant's submission, that an employer's financial position at the time the contraventions took place, is not relevant to the question of penalty and, therefore, the absence of such information is not a factor to weigh against the application of a penalty to the second respondent (*Cotis v McPherson* [2007] FMCA 2060; (2007) 169 IR 30 and *Kelly*).

Whether or not the Breaches Were Deliberate

28. On the evidence before the Court, the second respondent's accountant provided, to the second respondent, the Compliance Notice issued to him. That Compliance Notice made clear that a failure to comply with it may result in a contravention of a civil remedy provision under the FWA. Further, a failure to comply may result in legal proceedings (see Travers affidavit at annexure "ET-1").

29. In evidence before the Court is an email communication from the second respondent to Inspector Cunneen dated 11 November 2013 (Cunneen affidavit at annexure "PC-6"). On a fair reading of the second respondent's email, and when seen in light of Inspector Cunneen's response, what can be said, is that the second respondent understood the need to comply with the Compliance Notice. Despite this, there is no evidence that any steps were taken to rectify the breaches set out in the Compliance Notice.

30. Ms Travers sent a letter dated 26 November 2013 to the first respondent, and the second respondent, inviting comment on whether there was any difficulty in understanding the requirements of the Compliance Notice (Travers affidavit at annexure "ET-15"). No response was received.

31. In my view, a reasonable inference may be drawn that the contravention was deliberate, given the opportunities provided to the respondents to address the underpayments and the second respondent's failure to effect compliance with the Compliance Notice.

Whether the Parties Committing the Breach Exhibited Contrition

32. The evidence before the Court gives rise to the inference that the second respondent has not accepted responsibility for the contravention. No payment has been made to the employees, thus leading to the view, in the circumstances, that the second respondent has continued to avoid the consequences of the failure to make the underpayments, and in circumstances where a Compliance Notice was issued.

33. Further, it is of note that the second respondent has failed to attend hearings before the Court, file any documents, or comply with Court orders in these proceedings. This conduct, in the circumstances, can be reasonably characterised as uncooperative.

34. In all the circumstances, the second respondent's lack of cooperation leads to the position where no discount to the penalty is to be contemplated.

The Need to Comply with Minimum Standards

35. As is made clear in s.3 of the FWA, the maintenance of an effective "safety net" of minimum terms and conditions of employment is part of the objects of the FWA (see in particular at s.3(b) of the FWA).

36. Enforcing compliance with minimum standards falls, under the FWA, to the FWO. The issuing of a Compliance Notice is a formal method of ensuring compliance with the relevant employment law.

37. Given that such compliance by employers is not discretionary, or elective, the need in this case to impose a penalty, in circumstances where there has been disregard of the minimum standards in the FWA and the Compliance Notice, is clear.

The Need for Specific and General Deterrence

38. As is clear, specific deterrence is focussed on the party on whom the penalty is to be imposed (see *Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union* [2008] FCAFC 170; (2008) 171 FCR 357 ("*Plancor*") at [37] per Gray J). As set out above, the first respondent has been wound up and deregistered. Given that circumstance, specific deterrence in relation to the first respondent would lack utility.

39. However, the second respondent, who was operating the business of the first respondent, may still operate a similar business in the future. This would argue for a deterrent action, specifically in relation to him, to deter him from future non-compliant conduct. The argument gains additional weight in circumstances where he has not cooperated in these proceedings.

40. As to general deterrence, setting a penalty as against the second respondent will mark disapproval of his conduct. Further, I agree with the applicant that the imposition of such a penalty would serve as a general deterrent to others in the fast food industry, which is said to be "notorious" for non-compliance with the standards required by the FWA (see the referable industry of "hospitality" in *Plancor* and see Travers affidavit at [18] – [20] and annexure "ET-20").

41. I also note what was relevantly said in *Fair Work Ombudsman v Shafi Investments Pty Ltd (No.2)* [2013] FMCA 168 per Judge Whelan at [66]:

> *"…The need for general deterrence in this case springs from two considerations. First, employees in the fast food industry often work irregular hours and may be regarded as low paid. They are frequently dependent on the safety net provision of the Award and they may be employed in franchised businesses where the employer does not have sophisticated human resources support. Employers in such businesses need to be reminded of their obligations to be acquainted with their legal responsibilities and to act accordingly."*

42. I accept that weight should be given in the current consideration to the need to deter employers in the fast food industry from contravening minimum standards set by the FWA.

Appropriate Penalty

43. As set out above, in *Tsurc (No.1)*, the Court found that the second respondent had been involved in one contravention by the first respondent of a civil remedy provision (s.716 of the FWA). Given Item 33, at s.539(2), of the FWA, the FWO has applied for a penalty which, in the circumstances, involves a maximum penalty of 30 penalty units. This equates to a maximum penalty of $5,100 (see s.4AA of the *Crimes Act 1914* (Cth)).

44. In my view, the failure by the second respondent to ensure the payment of the correct minimum entitlements under the FWA, that is, to procure the payment by the first respondent, would of itself warrant a penalty in the mid-range.

45. However, the circumstances set out above, particularly given the uncooperative conduct by the second respondent, and the disregard of the need to comply with the Compliance Notice, warrant a penalty above the mid-range. In my view that penalty should be, in all the circumstances, set at 75% of the maximum penalty. That is, at the sum of $3,825.

46. Section 546(3) of the FWA provides for the penalty to be paid to the Commonwealth, a particular organisation, or a particular person. In the current circumstances, where the first respondent has been wound up, an order that the penalty, in proportion to each underpayment, be paid to each of the eight employees, recognises that these young people would be unable to recover the underpayments from it. If anyone, or all, of the eight employees cannot be located within a reasonable period, that part of the penalty should be paid to the FWO as "unclaimed money" pursuant to s.559 of the FWA, particularly given s.559(3) of the FWA.

47. The payment of the penalty therefore, proportionate to the underpayments found in *Tsurc (No.1)*, should be as follows:

Employee	Underpayment Amount	Percentage of total underpayment	Total payable (based on percentage amount of total underpayment)
David Butterworth	$437.25	1.68%	$64.26
Giulia Valeria Cerminara	$5,483.20	21.06%	$805.55
Yu-Jung (Erin) Chen	$1,565.86	6.01%	$229.88
Labiba Lia Choudhury	$823.45	3.16%	$120.87
Fernando Freire de Freitas	$3,290.20	12.64%	$483.48
Billie K Hobbs-Wypych	$844.75	3.24%	$123.93
Camilo Roldan Madrinan	$5,120.19	19.67%	$752.38
Willyam Willyam	$8,740.42	32.53%	$1,244.27

[I note that this amount is $0.38 below the total penalty amount due to the necessity of "rounding out".]

48. As set out above, there has been one contravention in relation to eight employees. As the relevant authorities make clear, it is appropriate to consider the "aggregation" of the penalty for the contravention, to determine whether it is appropriate as a response to the second

respondent's conduct which lead to the breach, and "is not oppressive or crushing" (see *Kelly* at [30]).

Conclusion

49. In my view, in all the circumstances, the penalty set out above is an appropriate response to the contravention found in *Tsurc (No.1)*, in this case. I will make the orders sought by the FWO in light of my decision.

I certify that the preceding forty-nine (49) paragraphs are a true copy of the reasons for judgment of Judge Nicholls

Associate:

Date: 12 August 2015