FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v NAOMI-JAYNE ALDRED *[2016] FCCA 220*

Catchwords:
INDUSTRIAL LAW – Fair Work – awarding penalties under the *Fair Work Act* 2009 – consideration of factors relevant to the amount of penalty.

Legislation:
Fair Work Act 2009, ss.44, 45, 357, 358, 535, 712

Cases cited:
Fair Work Ombudsman v Croc Media Pty Ltd [2015] FCCA 140
Kelly v Fitzpatrick [2007] FCA 1080
Fair Work Ombudsman v Foure Mile Pty Ltd [2013] FCCA 682

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	NAOMI-JAYNE ALDRED
File Number:	MLG 1303 of 2014
Judgment of:	Judge Riethmuller
Hearing date:	25 August 2015
Date of Last Submission:	25 August 2015
Delivered at:	Melbourne
Delivered on:	10 February 2016

REPRESENTATION

Counsel for the Applicant:	Ms Hall
Solicitors for the Applicant:	Office of the Fair Work Ombudsman
The Respondent:	In Person

DECLARATION:

(1) The Respondent contravened the following provisions of the *Fair Work Act* 2009 by virtue of her involvement, within the meaning of section 550 of the *Fair Work Act* 2009, in each of the following contraventions:

(i) section 45 of the *Fair Work Act* 2009 by the Employer failing to pay minimum rates in accordance with clause 17.1 of the Graphic Arts Award to Ms A and Ms C during Ms A's Internship and Ms C's Internship;

(ii) section 45 of the *Fair Work Act* 2009 by the Employer failing to pay minimum rates in accordance with clause 17.1 of the Graphic Arts Award to Ms A and Ms C during Ms A's Paid Employment and Ms *C's* Paid Employment;

(iii) section 45 of the *Fair Work Act* 2009 by the Employer failing to pay minimum rates in accordance with clause 17.1 of the Graphic Arts Award to Ms C during the Casual Employment Period;

(iv) section 45 of the *Fair Work Act* 2009 by the Employer failing to pay minimum rates in accordance with clause 15.1 of the Clerks Award to Ms R;

(v) section 45 of the *Fair Work Act* 2009 by the Employer failing to pay casual loading in accordance with clause 12.4 of the Graphic Arts Award to Ms C;

(vi) section 45 of the *Fair Work Act* 2009 by the Employer failing to pay overtime in accordance with clause 12.3(c) of the Graphic Arts Award to Ms A;

(vii) section 45 of the *Fair Work Act* 2009 by the Employer failing to pay overtime in accordance with clause 11 .6 of the Clerks Award to Ms R;

(viii) section 45 of the *Fair Work Act* 2009 by the Employer failing to pay the applicable rate for ordinary hours during periods of paid annual leave in accordance with clause 37.5 of the Graphic Arts Award to Ms A;

(ix) section 45 of the *Fair Work Act* 2009 by the Employer failing to pay annual leave loading in accordance with clause 37.6 of the Graphic Arts Award to Ms A;

(x) section 45 of the *Fair Work Act* 2009 by the Employer failing to pay annual leave loading in accordance with clause 29.3 of the Clerks Award to Ms R;

(xi) section 44 of the *Fair Work Act* 2009 by the Employer failing to pay Ms Agar her base rate of pay for absence on a public holiday in accordance with s.116 of the *Fair Work Act* 2009;

(xii) section 44 of the *Fair Work Act* 2009 by the Employer failing to pay personal/carer's leave in accordance with section 99 of the FW Act to the Employees;

(xiii) section 357 of the *Fair Work Act* 2009 by the Employer representing to the Employees that the contract under which they would be employed was a contract for services under which they would perform work as independent contractors;

(xiv) section 358 of the *Fair Work Act* 2009 by the Employer dismissing the Employees in order to engage them as independent contractors to perform, the same, or substantially the same, work under a contract for services;

(xv) section 44 of the *Fair Work Act* 2009 by the Employer failing to pay the Employees their accrued but untaken annual leave on termination of employment in accordance with section 90(2) of the *Fair Work Act* 2009;

(xvi) section 712(3) of the *Fair Work Act* 2009 by the Employer failing to comply with a Notice to Produce Records or Documents;

(xvii) section 535 of the *Fair Work Act* 2009 by the Employer failing to comply with sub regulation 3.44(4) of the *Fair Work Regulations* by altering a record that it was required to keep.

ORDERS

(1) The Respondent pay penalties pursuant to subsection 546(1) of the *Fair Work Act* 2009 in respect of her involvement in the contraventions by the Employer in the amount of $17,500.00.

(2) Pursuant to sub-s.546(3)(a) of the *Fair Work Act* 2009 that all pecuniary penalties imposed be paid into the Consolidated Revenue Fund of the Commonwealth within 28 days.

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

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE

MLG 1303 of 2014

FAIR WORK OMBUDSMAN
Applicant

And

NAOMI-JAYNE ALDRED
Respondent

REASONS FOR JUDGMENT

1. The applicant brings proceedings against the respondent with respect to various breaches of the *Fair Work Act,* 2009 which are now admitted by the respondent.

2. The Respondent operated a company, Nexus Coaching Group Pty Ltd which was placed in to liquidation by its creditors on 3 December 2013. The Respondent was the director and chief executive officer and responsible for the day-to-day management, direction and control of the company's business. She was also responsible for setting and adjusting pay rates and conditions for the employees.

3. In July 2012 the company advertised unpaid traineeship positions for which Ms A and Ms C, applied. The applicant's company offered the two women positions in July 2012. Ms A was offered the position as "Graphic Design Intern" in late July 2012, and Ms C was offered a position as a "Multi Media Intern" in early August 2012. The respondent signed a letter from the company to Ms A which included as the final paragraph:

> *Your contract start date is 27 July 2012 and will finish on 25 October 2012. At which point we will assess your work over the*

three-month period to ascertain if you are suitable for a permanent part-time position.

4. In the second paragraph the letter sets out:

> *Please find enclosed a contract of employment which sets out the standard terms and conditions whilst in employment with Nexus, see G, all terms are as per the NES (National Employment Standards) as of today's date, 27 July 2012, however should any legislation change after the issue of your contract Nexus CG will uphold any changes reasonably expected by Fair Work Australia without issuing you with a new contract of employment.*

5. The letter also says that in addition to the National Employment Standards the intern would "Also be protected by the modern award applicable to" her role.

6. In October, Ms A was offered a part-time position as a Junior Graphic Designer, and Ms C as a part-time Junior Multi Media Specialist. In late August 2012 a third employee, Ms R, was offered a position as a receptionist, which, at the commencement of 2013, was changed to a position as a Receptionist/Marketing Assistant.

7. In April 2013 the three employees were told that the employer was moving to a "freelance model" where they would be engaged as independent contractors rather than employees and were required to obtain their own Australian Business Name, and establish their invoicing systems so as to build the business and pay their tax and superannuation. As a result, their permanent employment was terminated in mid-April 2013. All three continued to do substantially the same, if not the same work, as they were undertaking when they were employees. Ms C rejected the offer, and was offered as position as a casual employee which she accepted.

8. The nature of the duties carried out by the employees is set out in the agreed facts as follows:

> *27. During Ms A's Employment Period, her duties and conditions were:*
>
> > *(a) to produce designs and marketing concepts, including for clients' websites, using computer software;*

(b) to produce work that was ultimately sold to clients of the Employer;

(c) to occasionally communicate directly with clients of the Employer;

(d) to do all work that was given to her;

(e) to meet deadlines associated with work tasks;

(f) to attend the Employer's business premises and perform work between 9am and 5.30pm with a one hour lunch break;

(g) to work under the guidance of the Head Designer; and

(h) to have her work reviewed by the Respondent and the Head Designer.

28. During Ms C's Employment Period, her duties and conditions were:

(a) to produce designs and marketing concepts, mainly involving cartoon animation;

(b) to produce work that was ultimately sold to clients of the Employer;

(c) to do all work that was given to her;

(d) to perform work at the Employer's business premises;

(e) to attend the Employer's business premises and perform work between 9am and 5.30pm with a one hour lunch break;

(f) to work under the guidance of the Head Designer; and

(g) to have her work reviewed by the Respondent and the Head Designer.

29. During the period from 27 August 2012 to approximately 1 January 2013 when Ms R was employed as a Receptionist, Ms R performed clerical and administrative duties.

30. During the period from approximately 1 January 2013 to 12 April 2013 when Ms R worked as a Receptionist/Marketing Assistant, Ms R's duties included clerical and administrative work and supporting the marketing team in the Business.

9. The employer engaged in a number of contraventions as follows:

a) Section 45 of the *Fair Work Act* 2009 – a failure to pay minimum rates under the Graphics Sales Award during the internship period resulting in underpayments to Ms A of $1672.52 and Ms C of $1532.96; and

b) Section 45 of the *Fair Work Act* 2009 – failure to pay minimum rates under the Graphics Arts Award during the employment after the internship resulting in underpayments to Ms A of $275.15 and Ms C of $1322.23;

c) Section 45 of the *Fair Work Act* 2009 – failure to pay minimum rates for Ms Cs casual employment resulting in an underpayment to Ms C of $139.36;

d) Section 45 of the *Fair Work Act* 2009 – a failure to pay the minimum rate under the Clerks Award to Ms R resulting an underpayment of $143.70;

e) Section 45 of the *Fair Work Act* 2009 – a failure to payment casual loading to Ms C under the Graphics Arts Award resulting in underpayment of $34.84;

f) Section 45 of the *Fair Work Act* 2009 – a failure to pay overtime under the Graphic Arts Award which resulted in an underpayment to Ms A of $2284.29;

g) Section 45 of the *Fair Work Act* 2009 – a failure to pay overtime under the Clerks Award to Ms R resulting in an underpayment of $444.40;

h) Section 45 of the *Fair Work Act* 2009 – a failure to pay annual leave under the Graphics Arts Award resulting in an underpayment to Ms A of $13.09;

i) Section 45 of the *Fair Work Act* 2009 – a failure to pay annual leave loading to Ms A resulting in an underpayment of $73.16;

j) Section 45 of the *Fair Work Act* 2009 – a failure to pay leave loading under the Clerks Award to Ms R resulting in an underpayment of $182.34;

k) Section 45 of the *Fair Work Act* 2009 – a failure to public holiday pay resulting in an underpayment to Ms A of $148.09;

l) A failure to pay personal/carer's leave resulting in underpayments to Ms C of $79.09, Ms A of $112.05 and Ms R of $21.46;

m) Section 357 of the *Fair Work Act* 2009 misrepresenting employment as an independent contracting arrangement;

n) Section 358 of the *Fair Work Act* 2009 – dismissing employees to engage them as independent contractors;

o) Section 44 of the *Fair Work Act* 2009 – failure to pay accrued annual leave on termination resulting in underpayments to Ms A of $536.01, Ms C in the sum of $842.99 and Ms R in the sum of $326.39;

p) Section 712 of the *Fair Work Act* 2009 – being a failure to produce records of documents in accordance with a notice under the Act, being the payslips and timesheets for various periods for Ms C and Ms R;

q) Section 535 of the *Fair Work Act* 2009 – altering payslips with respect to Ms C.

10. The totals of the underpayments come to the following:

a) Ms A $5114.12;

b) Ms C $3952.28;

c) Ms R $1118.29.

11. As the respondent was effectively the operating force of the company she was knowingly involved in all of the breaches.

12. The parties are agreed as to the form of declarations with respect to the various breaches and I will make orders in those terms.

13. The most significant factor in the respondent's favour is that the employees have now been paid, and therefore it can be said that the respondent has remedied the breaches of the company that she operated with respect to the underpayments of the employees.

14. When considering the nature and extent of the conduct which led to the breaches, the terms of the employment letters signed by the Respondent stand out for their brazen claims to be in accord with the National Employment Standards, which were simply false. To provide letters in these terms would, quite naturally, lead the ordinary person to assume that the arrangements were completely in accordance with the minimum standards, and dissuade most people from checking. This stands in stark contrast to many cases where there are no such representations made by the employer. The effect of these letters, at best was misleading and deceptive if one accepts that the respondent was unaware that she was breaching the laws, if not completely reckless, and at worse formed part of a calculated and carefully executed fraud upon these three young women.

15. The respondent said that she had obtained advice from her aunt who is from the United Kingdom and unfamiliar with Australia's workplace laws. This is contrast to her affidavit material where she stated:

> *I did not obtain legal or human resources advice from any person in relation to the proposed intern program prior to the program commencing. (See paragraph 9)*

16. And further, that she did not:

> *Obtain any legal or professional advice in relation to my decision to offer positions to the employees as contractors. (See paragraph 12)*

17. The combined effect of the conduct was to take advantage of young graduates in an industry where employment is difficult to obtain, utilising the rouse of formal claims to comply with the *Fair Work Act* and the National Standards.

18. I have careful regard to the amount of the underpayment and that it has since been paid to the employees. Whilst the amount is relatively modest, it must be seen in light of the very low earnings of the persons involved (entitled to pay rates of around $24 per hour).

19. It is not suggested that there has been any previous or similar breach by the respondent.

20. The size of the business enterprise was clearly small.

21. The respondent says she has suffered considerably as a result of the breaches. She submits that the publicity caused by the proceedings has significantly impacted upon her career options, but stated in court that she takes responsibility for the actions that occurred. She submits that in substance, she is no longer in a position to pursue a career in marketing as a result of the incident.

22. It is said that the alterations she made to the payslips of one employee were not to perpetrate a workplace fraud, but rather as a result of a request by the employee who wished to have the employment status changed to one that better suited her for her visa applications. This is a mitigating factor to the extent that it relates solely to the question of breaches of the industrial laws, although remains a poor reflection upon the respondent, as her explanation is, in effect, that she was participating in a fraud upon the Department of Immigration, albeit in a minor way.

23. As I set out in *Fair Work Ombudsman v Croc Media Pty Ltd* [2015] FCCA 140 ("Crocmedia"):

> *[8] The authors make two important structural arguments with respect to the underlying purpose of the industrial relations and regulatory scheme within Australia saying:*
>
> > *9.21 The first is that it seems to us that the situation of most concern ought to be where an organisation appears to be systematically using unpaid interns or job applicants to perform work that would or could otherwise be performed by paid employees. It is this practice, we believe, that most obviously threatens the integrity of the standards and protections established by the Fair Work legislation. We should add that an organisation should be considered to fall into this category even if it has not actively sought to recruit such labour, but has merely been prepared to respond on a regular basis to requests to provide productive but unpaid labour; although the fact that an organisation advertises for unpaid interns may perhaps make it easier to conclude that it is systematically using 'work experience' as a cheap substitute for employment.*
> >
> > *9.22 The second point relates to the question of vulnerability, a matter on which the FWO typically places some emphasis in deciding whether to investigate or pursue complaints.*[8] *We have already made the point in Chapter 1*

that unpaid work experience arrangements tend of their nature to involve the likes of younger workers or visa holders, who may as a class be considered 'vulnerable' in the labour market. In practice, of course, not every person agreeing to undertake unpaid work experience may in fact appear (or even be) vulnerable, even if they are young or in Australia on a temporary visa. Our experience in conducting research for this report leads us to conclude that a significant number of those who agree to work unpaid in order to improve their chances of paid employment, or of a career in their chosen field, or of permanent residence, do so with their eyes open to what is involved. They may understand and accept the risks and consequences of such an arrangement. Indeed they may have initiated it. At an individual level, it may be hard to conclude that they have in any sense been 'exploited'.

2.23 However, there is an important point of principle here, which goes back to the reasons for being concerned about the growth of work experience arrangements that are functionally similar to employment, and that cannot be justified by their connection to an authorised course of education or training. Such arrangements do not just undermine the integrity of labour standards. As noted in Chapter 2, they potentially erect barriers to entry to the labour market, or selected portions of it, for those who do not have the means to spend lengthy periods of time in unpaid work. An intelligent and articulate graduate from a wealthy family who opts to do months of unpaid work in order to break into their chosen profession may not seem very vulnerable. They may not seem to be a 'victim' of exploitation. But the point of investigating their situation and (if appropriate) taking action is not necessarily to protect them as an individual. It is to assert a principle – a fair day's pay for a fair day's work – that underpins our system of minimum labour standards. And it is to promote the goal of 'social inclusion' that is expressly made part of the objects of the Fair Work Act, in the opening words to section 3.

[9] The concerns expressed by the report authors are well-founded when one has regard to the prevalence of the arrangements (as discussed in ch.3 of the report), and the review of advertisements for such positions, about which the authors state:

> *3.56 …What is notable about many of them is how similar they are to what might be expected from an advertisement for a paid entry-level position. They give every impression of involving employment without the pay, sometimes (thought not always) to be offset by vague promises of 'training' or of consideration for a paid job.*

[10] Remarkably, given the important role of the media in protecting the rights of citizens through publishing articles and reports, Stewart and Owens conclude:

> *3.58 Of all the industries or sectors that we have had occasion during this study to read or hear about, in terms of unpaid work experience, the one that came up most often by far was the media.*

[11] Indeed, in some sectors there are now agencies carrying on the business of brokering internships or work experience placements. Stewart and Owens say:

> *3.68 It is apparent that a number of agencies are now operating in Australia to 'broker' unpaid internships or job placements. Besides the agencies that are responsible for delivering the kind of assistance to unemployed or injured workers discussed earlier in the chapter, these include firms that are in business to 'sell' work experience. As Fenella Souter notes:*
>
> > *Commercial intern agencies, like Borch Leeman and Punk Jobs in Melbourne, are cashing in on the trend, targeting graduate jobseekers, mostly former overseas students. These companies charge fees running into the thousands to 'place' graduates into unpaid work with Australian companies. Just to be clear, it's the intern who pays. In the case of Borch Leeman, for instance, a three-month placement costs the applicant at least $2850 (a $550 non-refundable application fee plus a $2300 placement and insurance fee) – money that has to be paid upfront before the placement goes ahead.*
>
> *3.71 According to the AIIA, which represents a number of such agencies, intermediaries of this type have an important role to play:*
>
> > *[B]y mediating between hosts and interns, providers offer a level of control, in terms of quality, safety and standards of practice, that individual interns*

> *negotiating their own placement direct with a host may not receive. Although both providers and hosts are businesses, and as such need to operate as profitable enterprises (charity organisations who host being the exception) the provision of internships is driven by much more than profit. Internships are an important contribution to an individual's learning (as recognised by the increasing emphasis Universities are placing on experiential learning as part of a qualification). International internships are an important contribution to global awareness at both an individual and corporate level.*

24. I take into account that the business was a small one and has failed, although bear in mind the comments in *Kelly v Fitzpatrick* [2007] FCA 1080 at 28, that small businesses also have obligations to meet minimum employment standards just as large businesses do. It is unfortunate that there is no information as to the profitability of the business prior to going into liquidation. In many circumstances, this would lead to the court being unable to be satisfied that the business was actually a loss making enterprise or a marginal business.

25. In the circumstances of this particular case, however, I accept that the business was marginal when it was operating. The business has gone into liquidation, and the respondent has taken up full time employment. These are not events that will ordinarily follow a profitable business venture, particularly in light of what may be seen as relatively modest amounts outstanding to the employees.

26. I repeat what I said before with respect to profitability as a mitigating factor for underpayments, in the *Fair Work Ombudsman v Foure Mile Pty Ltd* [2013] FCCA 682, that:

> *[22] The Second Respondent was concerned that the business was not very profitable, and operated at a marginal level. He appeared to hold the view that he was providing a benefit by way of a job to the employee and that this should be borne in mind. It appears to me that this wholly misconceives the nature of the difference between employment and joint venture. Many persons choose to undertake work for a level of reward less than would be set as the minimum in the various awards, on conditions set out under the legislative scheme for employees in the hope of achieving business growth or the establishment of a business that*

will be significantly more profitable, or valuable, to them in the long term. It remains every person's right to operate their own business or trading venture and live off the profits that they can generate as they see fit. In this regard, it is common for persons to join together in partnerships or form companies or joint ventures. Significantly, when a person is not a joint venturer or partner, but working simply as an employee, they have no prospects of sharing in the wealth of the business venture in the future (if this comes to pass). It is for those operating a new or marginal business to make an election as to whether or not to seek partners or joint venturers who may be prepared to work for less than the award in a business operation in the hope of making a significant gain in the future. Alternatively, if workers are to be employed, regardless of the state of the business, the minimum terms and conditions must be remunerated on at least the minimum terms and conditions provided for in the legislation and the awards. For the law to be otherwise would simply create a category of underpaid workers who were being exploited to subsidise inefficient or otherwise unprofitable business operations, or business start-up periods.

[23] For this reason, it is no answer to these breaches to say that a job was being provided which could not be provided if award wages were paid.

27. I accept the groupings submissions by the Fair Work Ombudsman, which brings the total maximum penalties to $112,500. The total penalty amount is similar in magnitude to that which appears in Crocmedia, however in Crocmedia the total underpayment was more than double the underpayment in this case (although in Crocmedia, gratuities had been paid to the employees representing more than half of the underpayment amount, which were not recovered from the employees). The circumstances in Crocmedia were in many respects different, it being a larger employer and an ongoing profitable business. The number of breaches were far fewer, and the case involved only two, not three, people. It did not have the level of sophistication with respect to representations of compliance with the Act that are present in this case. The overall penalty in that case came to $24,000, as imposed upon a corporate respondent rather than an individual.

28. As has often been pointed out by the courts, the differences in factual scenarios between example cases makes it difficult to rely upon them as a guide for determining penalties. Whilst I have regard to the

penalties that I proposed in Crocmedia, there are many differences with this case. I do not rely upon it as a yardstick for what penalty should be imposed here.

29. Whilst there are numerous penalties to be imposed in this case, all bar five represents penalties for underpayments of less than $500, and indeed, in some instances, the underpayments are under $150. However, I note that four of the breaches could not result in underpayments, but are breaches that insidiously undermine the system of industrial laws being sham contracting, failure to maintain accurate records, and failure to produce records.

30. In the circumstances, I impose the following penalties:

a) For the offences set out in paragraphs (a) and (b) above, $3000;

b) For the penalties set out in (c) and (d) above, $3000;

c) For the contraventions set out in (e) above, $3000;

d) For the contraventions set out in (f) and (g) above, $500;

e) For the contraventions in (g) and (h), being the overtime underpayments, $1000;

f) For the contraventions relating to leave loading, $500;

g) For the contraventions relating to annual leave, $500;

h) For the contravention relating to public holiday pay, $500;

i) For the contravention relating to personal carer's leave, $500;

j) For the contravention related to accrued annual leave, $1000;

k) For the contraventions related to sham contracting, and dismissing to engage as a sham contractor, $1500 each;

l) For the contravention in failing to produce records, $500; and

m) For the contravention related to record keeping, $500.

Total $17,500.

31. Stepping back and looking at the matter as a whole, it appears to be that this is an appropriate penalty, as it represents around a little over 15 per cent of the total permissible penalty. I bear in mind that proportionality is important, as is regard to the circumstances of those involved. In this case, the amounts of money involved in many of the contraventions was particularly small. The context of significant contravention penalties being imposed with respect to the significant aspects of the underpayments, it's appropriate that, in this case, modest penalties be imposed with respect to the balance.

32. The penalties with respect to the notices to produce records and record keeping are small in this case, having particular regard to the fact that the breaches in this regard had no impact of significance in the circumstances of this case, upon the rights of the employees, nor, in substance, any significant impact upon the investigation.

I certify that the preceding Thirty Two (32) paragraphs are a true copy of the reasons for judgment of Judge Riethmuller

Date: 9 Feb 2016