FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v OPENICA LOGISTICS PTY LTD & ANOR *[2016] FCCA 159*

Catchwords:
INDUSTRIAL LAW – Application under Fair Work Act – Failure to pay living away from home allowances and casual loading – failure to pay wages – failure to provide payslips – medium sized business – penalties – whether two penalties should apply.

Legislation:
Fair Work Act 2009 (Cth), s.45
Fair Work Regulations 2009 (Cth), r.3.42

Cases cited:
Fair Work Ombudsman v WKO Pty Ltd (2012) FCA 1129
Fair Work Ombudsman v AJR Nominees Pty Ltd (No 2) (2014) FCA 128
Access Embroidery (Australia) Pty Ltd & Anor (2012) FMCA 835

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	OPENICA LOGISTICS PTY LTD
Second Respondent:	VLADMIR TASEKI
File Number:	MLG 946 of 2013
Judgment of:	Judge Riethmuller
Hearing date:	18 May 2015
Date of Last Submission:	18 May 2015
Delivered at:	Melbourne
Delivered on:	11 February 2016

REPRESENTATION

Counsel for the Applicant:	Ms Dowsett
Solicitors for the Applicant:	Fair Work Ombudsman
Counsel for the Respondents:	Ms Sweet
Solicitors for the Respondents:	Sparke Helmore

THE COURT DECLARES

(1) The First Respondent contravened:

(a) section 45 of the *Fair Work Act* 2009 by failing to pay Giddings, Nelson and Tomkins the Living Away from Home Allowance **(LAHA)** in contravention of clause 14.2(c) of the Modern Award;

(b) section 45 of the *Fair Work Act* 2009 by failing to pay Nelson and Tommkins a 15% casual loading in contravention of clause 10.3(b) of the Modern Award;

(c) section 45 of the *Fair Work Act* 2009 by failing to pay Nelson for all driving time in contravention of clause 13.3(a) of the Modern Award; and

(d) regulation 3.42(1) of the *Fair Work Regulations* 2009 by failing to make available to Nelson a copy of his employee records on request of Nelson.

(2) The Second Respondent was involved in each of the contraventions by the First Respondent set out in paragraph (1)(a) to (d) above pursuant to section 550(1) of the *Fair Work Act* 2009.

ORDERS

(1) The First Respondent and Second Respondent each pay penalties pursuant to section 546(1) of the *Fair Work Act* 2009 for the contraventions set out (1)(a) to (d) above as follows:

(a) The First Respondent pay the amount of $34,500.00;

(b) The Second Respondent pay the amount of $7,100.00.

(2) Pursuant to section 546(3)(a) of the *Fair Work Act* 2009 the First Respondent and Second Respondent pay the penalties imposed pursuant to Order 1 herein to the Commonwealth.

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

(4) The proceedings are otherwise dismissed.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE

MLG 946 of 2013

FAIR WORK OMBUDSMAN
Applicant

And

OPENICA LOGISTICS PTY LTD
First Respondent

VLADMIR TASEKI
Second Respondent

REASONS FOR JUDGMENT

1. The applicant brings proceedings for a number of contraventions of the *Fair Work Act* 2009 (Cth) ('the Act') and *Fair Work Regulations* 2009 (Cth) ('the Regulations') as set out in the Statement of Agreed Facts filed by the parties on 26 May 2014.

2. The First Respondent is a medium-size trucking business transporting cars, caravans, boats, motor homes and machinery interstate on trucks and carriers. The Second Respondent is the Director and Secretary of the First Respondent.

3. The breaches concern s.45 of the Act (failing to pay certain entitlements to truck drivers) and a breach of regulation 3.42(1) of the Regulations by failing to make available an employee's payslips when requested to do so.

4. The underpayments were as follows:

    a) Employee G: $16,422.06

b) Employee N: $45,291.40 and;

c) Employee T: $7461.84.

5. The total of the underpayments is $69,175.30. Importantly, full rectification has already been made by the First Respondent. Thus, the primary objective of the legislation (that employees receive their proper entitlements) has been achieved, and will not require the Fair Work Ombudsman to pursue enforcement action against the First or the Second Respondents. However, the amounts involved are significant, particularly in the context of wages for truck drivers.

6. The maximum penalties for each breach under s.45 of the Act, are $33,000.00 for the First Respondent and $6660.00 for the Second Respondent. With respect to breach of the Regulations, the maximum penalty for a body corporate is $11,000, and for an individual $2200.00.

7. The contraventions in this case can be conveniently grouped into four categories:

a) breaches of the Act as a result of failing to pay the living away from home allowance with respect to three employees (G, N, and T);

b) a failure to pay casual loading to employees N and T

c) failure to pay employee N the amounts owing under clause 13.3(a) of the modern award with respect to driving on 9 and 10 May 2012; and

d) failing to make payslips available to employee N for inspection and copying upon request of the employee.

8. Whilst the First Respondent is a medium-size business and employed internal accounts and payroll support staff, it had no dedicated Human Resources Manager, leaving those duties to fall upon the Director. Since 2012, when an employee was responsible for human resources duties, new pay rates remained the responsibility of the Second Respondent.

Living away from home allowances and casual loading

9. A living away from home allowance has been a feature of the relevant award since 1963, and is intended to compensate drivers for the cost of

being away from home on a regular basis and for extended periods and not being provided with suitable accommodation.

10. The Respondents point out that the sleeper cabs in the trucks were assessed by Work Safe as sufficient for fatigue management, although, clearly, requiring a driver to sleep in a cabin is an imposition beyond normal arrangements one would expect for an employee, for example a motel room. It is clear that the living away from home allowance is intended to compensate a driver for these conditions.

11. I accept the submissions of the Respondents that the breach was failing to pay the allowance, not the requirement to remain with the truck. However, it demonstrates a failure to pay appropriate allowances for an employee who is expected to work in conditions that are more onerous than those experienced by an average person.

12. The failure to pay the casual loading was a straight forward breach of the award.

Failure to pay wages

13. The contravention with respect to failure to pay wages was not a simple non-payment. Rather, the employer had offset against the wages (a relatively small sum of $593.87) as repayment of a loan that had previously been made by the respondents to the applicant for $2000.00 in March 2012.

14. A deduction cannot be made from an employee's pay unless agreed to by the employee. Whilst it was open to the employer to obtain a Judgment and a garnishee order from the Court, such a process does not amount to the equivalent of allowing the employer to simply make deductions from the employee's wages without an appropriate authorising order of a Court, or the consent of the employee.

Failure to Provide Pay Slips

15. The failure to provide the payslips was constituted by a request for a payment by the employer as the payslips sought were quite old. The evidence is that the payment was required by the business' accountants to retrieve records from archives. In this case the payslips had previously been provided to the applicant by the employer from pay

period to period, however it appears that the Act requires pay slips to be provided upon request even if they were provided with the pays.

Considerations

16. The Respondents have cooperated, in addition to engaging in corrective action. As a result of these two factors I am of the view that a discount in the vicinity of 25 per cent should be applicable in this case.

17. The nature and extent of the losses involved for the employees are set out above.

18. There is no evidence that the First Respondent has previously engaged in any similar conduct.

19. The business is described as a medium-size one. I note that it employs 36 employees. It is not put that the financial position of the First Respondent is such as to affect penalties.

20. There is no evidence that the Respondents took any particular steps to ensure compliance with their obligations under the award. It is apparent that they were aware that there were awards. Given the overall number of employees involved in this business, the importance of compliance with the award was a significant issue warranting careful attention by the employer.

21. The Respondents have now engaged the services of a company expert in these matters to provide advice and guidance on employment matters, including compliance issues. The accounts clerk who made the demand for the fee is now aware that retrieval of the payslips from archives must be at the expense of the company.

22. Contrition had been expressed, with the company writing to each of the employees apologising. I accept that the need for specific deterrence is low in these proceedings, as evidenced by the level of cooperation, rectification, early admissions and corrective action.

23. I take into account, however, that general deterrence is also a relevant factor that must be borne in mind.

24. With respect to the failure to pay the living away from home allowance, it appears to me that an appropriate penalty for the First Respondent is $15,000.00, and the Second Respondent $3,000.00.

25. With respect to the failure to pay casual loading, the same penalties are appropriate.

26. With respect to the deduction from the last pay of the employee, given the nature of the contravention, I am persuaded that a quite modest penalty is appropriate. I do however bear in mind the very limited period during which the contravention took place. Ultimately, I find that a penalty of $3000.00 for the First Respondent and $600.00 for the Second Respondent is appropriate.

27. With respect to the failure to provide replacement copies of pay slips, it seems to me that this is really a technical contravention, given that substantive records were generated and provided to the employee at the relevant times. In these circumstances, a penalty of $1,500.00 for the First Respondent and $500.00 on the Second Respondent is appropriate.

28. The total penalties come to $34,500.00 for the First Respondent and $7,100.00 for the Second Respondent. Given the period of the offences and the nature of the conduct involved, it appears to me that these penalties reasonably represent the penalties appropriate for the overall course of conduct.

29. The final matter is whether or not the penalty against the Second Respondent should be suspended. The Second Respondent seeks that the penalty imposed upon them be suspended such that it is not payable unless the First Respondent fails to pay the penalty imposed upon it, a course of action adopted by Barker J in *Fair Work Ombudsman v WKO Pty Ltd* [2012] FCA 1129. at paragraph 106 to 107, Barker J, said:

> *106. The parties, however, suggest that it is only necessary to impose a civil penalty on the company and not on the moving mind of the company, its director Ms O'Leary. In my view, this is an inappropriate penalty outcome. The fact of the matter is that there would have been no contravention by the company if Ms O'Leary had not acted as she did. Indeed, the evidence shows that Ms O'Leary at one point sought guidance from the Fair Work Ombudsman hotline, which advised her to obtain legal advice, but she failed or neglected to do so. It seems to me in all the circumstances that it would be quite inappropriate not to impose a penalty on the individual.*

> *107. The Fair Work Ombudsman suggests that there is authority to support the view that where the individual, by being a shareholder in the offending corporation, will in effect be financially "punished" by the civil penalty imposed on the corporation, then there is a case for not additionally imposing a civil penalty on the individual. I agree that principle can be relevant and should be regarded here as Ms O'Leary has a stake in the company as a shareholder. Nonetheless, I am also concerned that should, for some reason, the company not pay or be unable to pay the civil penalty imposed on it, the penalty should not go unpaid and Ms O'Leary escape the sanction of the Court for her part in the contraventions.*

30. This course has not often been taken up in other cases. In *Fair Work Ombudsman v AJR Nominees Pty Ltd* (No 2) [2014] FCA 128, Gilmour J declined to adopt such an approach when sentencing a company and its controlling director. Gilmour J said:

> *74. The applicant submits that the courts have rarely exercised their discretion to suspend penalties in cases involving contraventions of the FW Act and that where this has occurred, the facts are far removed from the current proceedings: the limited cases have generally involved unlawful industrial action, some admission of liability, and a negotiated agreement as to penalty.*

31. Gilmour J ultimately declined to exercise the discretion, not accepting that the second respondent in that case had demonstrated relevant contrition, referring to the fact that there was no evidence that the Second Respondent in that case was "unaware of his actions as a result of his physical and mental condition".

32. In *Access Embroidery (Australia) Pty Ltd & Anor* [2012] FMCA 835, FM Turner accepted the submissions concerning the limited range of cases that appropriately involved suspended penalties, saying:

> *102 Ms Richards concedes that there is nothing in s.545 of the FW Act to exclude a power to suspend a pecuniary penalty. She submits that this is not an appropriate case in which to suspend penalties because:*
>
> - *All cases the applicant had located on suspension of penalties resulted from an agreement between the parties to do so;*

- *Suspension should not be granted unless a future breach or further contravention will be readily apparent; and*

- *If a suspension is granted here, the FWO will have to scrutinise the ongoing compliance of the respondents with their obligations, which will involve public expense; and there is to be no ongoing relationship between the parties by which a further contravention may be readily identified.*

103. The Court finds force in the submission by Ms Richards. The penalties or part thereof, to be imposed on the respondents will not be suspended.

33. Agreements as to penalties are no longer acceptable nor is there any agreement in this case. Ultimately, I am not persuaded that the category of cases in which a suspended penalty may be imposed is as narrow as referred to by FM Turner. However, nor am I persuaded that simply because the shares are owned by the company and the company controlled by the Second Respondent that this is a basis for suspending the Second Respondent's penalty.

34. At law the Company is a separate legal personality, and responsible for its actions and liabilities separately from the Second Respondent. This brings benefits such as limited liability. The legislature has legislated to impose penalties on companies and those personally involved in the breach by the Company. The mere fact that the profits of the Company ultimately flow to the Second Respondent does not show, on its face, that the Company should not receive a penalty separate from that of the Second Respondent, nor that the Second Respondent's penalty should be suspended.

35. In almost all of the cases of breaches of the Act the relevant manager will be the agent of the company and the penalties apply to the company and its agent. If one accepted that only one penalty should be imposed simply because the Second Respondent holds all of the shares and is the only Director how does one answer the argument that would arise where the company had agreed to indemnify the agent for the agent's penalty under the Act? The argument is the same - one legal person is bearing the cost of all penalties.

36. A better reading of the Act recognises that firstly the company is a separate legal person and that the company's duties are such that the

Act imposes liability regardless of the fact that its agent or ultimate owner carries out the relevant acts. Secondly, the law imposes a separate personal liability upon the relevant real person.

37. Similarly, one can imagine the argument where a Husband and Wife have a business that the Wife owns, and the Husband manages, where all of the profits are used by them as joint matrimonial property: should the penalties for one be suspended? The answer is clearly no.

38. I conclude that as a matter of principle there should be two penalties. Ordinarily neither should be suspended as they are an incidence (albeit negative) of the separate legal identity of the company. Avoidance of this negative incidence of corporate identity is simple: one can operate as a sole trader with the disadvantages that may bring. The Second Respondent has chosen to establish a Company, a second legal entity, and this entity's conduct is the subject of sanction, just as the real person involved in the conduct.

39. The practical reality is that the company, as a separate legal entity has independent obligations regardless of its ownership. Simply because profits ultimately come back to one person doesn't alter the fact the two 'legal persons' have breached the Act.

40. Whilst, as a matter of general principle there ought be two penalties in cases involving companies, even where the individual is both the sole director and shareholder, it is not the entire answer. The fact that as a matter of principle there will ordinarily be two penalties imposed does not foreclose the sentencing discretion which must necessarily be grounded on the particular facts and circumstances of individual cases.

41. I am not persuaded that in this case the circumstances (particularly the size of the company) as a whole warrant a suspension of the Second Respondent's penalties.

42. I therefore make orders to reflect the findings set out above.

I certify that the preceding forty-two (42) paragraphs are a true copy of the reasons for judgment of Judge Riethmuller

Date: 11 February 2016