FEDERAL CIRCUIT COURT OF AUSTRALIA
FAIR WORK OMBUDSMAN v ANAHATA NATURALS PTY LTD & ANOR *[2014] FCCA 2954*

Catchwords:
INDUSTRIAL LAW – Penalty hearing with respect to breaches of s.716(5) of the *Fair Work Act 2009* (Cth) – Second Respondent found to be involved in contraventions – penalties ordered against both the First and Second Respondents.

Legislation:
Fair Work Act 2009 (Cth), ss.545, 546(1), 550(2), 716(5)
Fair Work Bill 2009 Explanatory Memorandum
Restaurant Industry Award 2010 [MA000119]

Cases cited:
Fair Work Ombudsman v Extrados Solutions Pty Ltd [2014] FCCA 815
Fair Work Ombudsman v Jaycee Trading Pty Ltd & Anor (No.2) [2013] FCCA 2128
Fair Work Ombudsman v Ramsey Food Processing Proprietary Limited (No.2) [2012] FCA 408
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Ponzio v B & P Caelli Constructions Pty Ltd & Ors (2007) 158 FCR 543
Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor [2009] FMCA 38

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	ANAHATA NATURALS PTY LTD
Second Respondent:	MEGHA SOOD
File Number:	MLG 2301 of 2013
Judgment of:	Judge Whelan
Hearing date:	12 November 2014
Date of Last Submission:	12 November 2014
Delivered at:	Melbourne
Delivered on:	12 November 2014

REPRESENTATION

Counsel for the Applicant:	Ms Dwight
Solicitors for the Applicant:	Fair Work Ombudsman
Counsel for the First Respondent:	No appearance
Counsel for the Second Respondent:	No appearance

THE COURT DECLARES THAT:

(1) The Second Respondent was involved in (within the meaning of subsection 550(2) of the *Fair Work Act 2009* (Cth) ("the Act")) the First Respondent's contraventions set out in paragraph 2 of the declarations of this Court made on 12 May 2014.

THE COURT ORDERS THAT:

(2) Pursuant to s.545 of the Act and paragraph 4(b) of the Orders of this Court made on 12 May 2014, the First Respondent is to comply with the Compliance Notice dated 9 October 2013 within fourteen (14) days of this order.

(3) The First Respondent is to pay a penalty of $15,300.00 pursuant to subsection 546(1) of the Act in respect of the contravention of s.716(5) of the Act.

(4) The Second Respondent is to pay a penalty of $3,542.00 pursuant to subsection 546(1) of the Act in respect of her involvement in the First Respondent's contravention of s.716(5) of the Act.

(5) All pecuniary penalties imposed are to be paid within twenty eight days of these orders.

(6) In the event that Order 2 of these Orders is not complied with by the First Respondent, the pecuniary penalties are to be paid as follows:

    (a) Any penalty to be paid by the Second Respondent, to Mr Edirisinghe in his nominated bank account;

(b) Any penalty to be paid by the First Respondent:

(i) Up to the amount of $8,707.05 less any penalty to be paid by the Second Respondent, to Mr Edirisinghe in his nominated bank account; and

(ii) Any remaining monies, into the Consolidated Revenue Fund of the Commonwealth (care of the Office of the Fair Work Ombudsman).

(7) In the event that Order 2 of these Orders is not complied with by the First Respondent, any pecuniary penalty to be paid into the Consolidated Revenue Fund of the Commonwealth (care of the Office of the Fair Work Ombudsman).

(8) 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 2301 of 2013

FAIR WORK OMBUDSMAN
Applicant

And

ANAHATA NATURALS PTY LTD
First Respondent

MEGHA SOOD
Second Respondent

REASONS FOR JUDGMENT
(As revised from transcript)

Introduction

1. This is an application by the Fair Work Ombudsman ("the Applicant") for penalties to be imposed on the First and Second Respondents, ANAHATA NATURALS PTY LTD ("the First Respondent") and MEGHA SOOD ("the Second Respondent") (collectively "the Respondents"). On 12 May 2014, the Court declared that the First Respondent contravened ss.716(5) of the *Fair Work Act 2009* (Cth) ("the Act") by failing to comply with a compliance notice that had been issued by the Applicant on 9 October 2013. On 10 July 2014, the Court entered judgment for the Applicant against the Second Respondent by consent. The Applicant is now seeking pecuniary penalties against the Respondents with respect to those contraventions, and against the Second Respondent for her involvement in that contravention pursuant to s.550 of Act.

2. It is significant, in my view, that the Applicant submits that the penalties it is seeking are appropriate because of the following factors:

- First, the nature of the underlying contraventions in that there were contraventions by the Respondents of both the National Employment Standards ("NES") and the *Restaurant Industry Award 2010* [MA000119] ("the Award"); and

- Second, the Respondents consistently refused to cooperate with the Applicant after the issue of the compliance notice ("the notice") and to comply with that notice.

3. There is, I accept, a need for general deterrence in this industry and I also accept the submission of the Applicant that, had the Respondents complied with the notice and met the underpayments prior to the commencement of these proceedings, these proceedings would never have occurred. The failure by the Respondents to comply with the notice has incurred time and expense for both the Applicant and this Court, which is a very busy Court with many demands on its time and resources.

4. The Applicant indicates that it relies on the following documents in support of the penalty application:

    - Application – Fair Work Division filed on 20 December 2013 ("the application");

    - Statement of Claim filed 20 December 2013;

    - Statement of Agreed Facts filed 7 July 2014; and

    - Affidavit of Fair Work Inspector KEZ MA ("Fair Work Inspector Ma") filed 6 August 2013.

Background

5. The Applicant's submissions [1] set out the history of the matter. The First Respondent carried out a restaurant business. The Second Respondent was a director, shareholder and company secretary of the First Respondent and was responsible for ensuring that the First Respondent complied with its obligations under the Act. In April 2013, the Applicant received a complaint from an employee of the First Respondent, Mr DUMINDU EDIRISINGHE

[1] Applicant's Penalty Submissions filed 6 August 2014.

("Mr Edirisinghe"), who alleged that the First Respondent had failed to pay wages owing to him.

6. The Applicant then conducted an investigation into the complaint and determined that Mr Edirisinghe:

- Was a temporary resident;
- Was a trade-qualified chef with a certificate in commercial cooking; and
- Should have been classified as a Level 4 under the terms of the Award.

Under those terms, Mr Edirisinghe was entitled to a minimum rate of pay of $18.58 per hour for ordinary hours and additional amounts for Saturdays, Sundays and public holidays.

7. The evidence from the affidavit of Fair Work Inspector Ma is that, from October 2012 until 2 December 2012, Mr Edirisinghe was paid a flat rate of $18.00 for all hours worked and, during that time, he worked on Saturdays and Sundays. The restaurant itself was closed from 3 December 2012 until 23 December 2012 for renovations. Mr Edirisinghe recommenced employment on 29 December 2012 after it reopened and usually worked Fridays, Saturdays and Sundays. He kept a record of the hours on his computer and he was not paid at all between 29 December 2012 and 20 April 2013.

8. Fair Work Inspector Ma considered, on the basis of the material before him, that the First Respondent had contravened the NES and the Award by failing to pay Mr Edirisinghe:

- Minimum wages;
- The entitlements Mr Edirisinghe was entitled to for work on Saturdays, Sundays and public holidays; and
- Annual leave owing at the time that his employment terminated.

9. There was a compliance notice served on the First Respondent by being given to the Second Respondent personally at her residential address on 9 October 2013. The First Respondent did not comply with

the notice within the time specified and, in fact, Mr Edirisinghe has never received the amount of the underpayment.

10. The Applicant referred the Court to previous decisions dealing with failure to comply with compliance notices, and in particular to the decisions of *Fair Work Ombudsman v Extrados Solutions Pty Ltd* [2014] FCCA 815 (*"Extrados"*) and *Fair Work Ombudsman v Jaycee Trading Pty Ltd & Anor (No.2)* [2013] FCCA 2128. The Applicant also referred the Court to the following:

- The Explanatory Memorandum to the Act, which states that compliance notices were designed to be an option to deal with non-compliance instead of pursuing court proceedings; and

- Section 716 of the Act, which allows a person who has been issued with such a notice the opportunity to comply with the notice and, in such circumstances:

    - No civil remedy proceedings could be brought against them; and

    - They were not taken to have contravened the civil remedy provisions with respect to the underpayment,

  however, if they fail to comply with the notice, a Fair Work Inspector could bring civil remedy proceedings against the person and seek appropriate orders from the Court, which is what has occurred in the circumstances of this case

11. The Applicant made submissions with respect to the principles relevant to the determination of penalty, and I accept that those are the principles that should be taken into account by the Court. The Court must first identify the separate contraventions involved. Each contravention of each separate obligation in the Act in relation to each employee is regarded as a separate contravention. However, in this case, the Applicant has submitted, and the Court accepts, that the contraventions relate to a single course of conduct on the part of the Respondents. It is, therefore, not necessary to deal with the second step which is to consider whether the contraventions constitute a single course of conduct or should be grouped in such a way as to deal with

them as such. It is accepted that an employer should not be penalised more than once for the same contravention.

12. The penalties imposed by the Court should be appropriate and the penalty for the contravention or each group of contraventions should be taken into account considering all the relevant circumstances. The Court should, finally, assess whether it is an appropriate response to the conduct which led to the contraventions to impose the penalties that have come out of the process undertaken by the Court.

13. The Applicant submits that the Court should find that the Respondents engaged in one contravention, respectively, for which penalties should be imposed and I accept that that is the appropriate course of action. The Applicant also referred the Court to the factors relevant to imposing a penalty which were summarised by Federal Magistrate Mowbray in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 ("*Mason*").

14. The case of *Mason* has subsequently been followed in this Court in other penalty matters and I accept that the factors suggested by Federal Magistrate Mowbray are relevant to the consideration of this matter. The first of those is the nature and extent of the conduct.

15. From the unchallenged evidence of Fair Work Inspector Ma, the following findings can be made. On 9 October 2013, the First Respondent was served with the notice when Fair Work Inspector Ma gave the notice to the Second Respondent. The notice required payment of a total of $8,707.57 to Mr Edirisinghe and the production of evidence to the Applicant that the amount had been paid by 31 October 2013.

16. On 28 October 2013, Fair Work Inspector Ma telephoned the solicitors for the Second Respondent who told Fair Work Inspector Ma that the First Respondent would not be compliant with the notice and that they intended to liquidate the First Respondent. Fair Work Inspector Ma then sent the Second Respondent a letter explaining that the First Respondent was still required to comply with the notice and

indicated that the Applicant would commence litigation for non-compliance if the First Respondent failed to do so.[2]

17. Despite that opportunity to comply, the Respondents did not comply with the notice nor did they seek to have the notice reviewed. Instead, there was a response from the Second Respondent on 31 October 2013 repeating that it was the intention of the First Respondent not to comply.[3] A further opportunity was given to the Respondents to comply on 1 November 2013 when Fair Work Inspector Ma sent the Second Respondent a letter explaining the potential consequences of non-compliance. [4] Again, Fair Work Inspector Ma received correspondence on 13 November 2013 which indicated that the Respondents would not comply with the notice. [5]

18. On 20 November 2013, Fair Work Inspector Ma sent an email setting out the evidence upon which the Fair Work Ombudsman relied during the investigation into the complaint.[6] On 27 November 2013, a letter was sent giving the Respondents the opportunity to provide evidence of the alleged financial difficulties of the First Respondent and the details of the Second Respondent's personal bankruptcy. [7] On 20 December 2013, the Second Respondent advised that she declared herself to be a bankrupt on 3 December 2013. However, no material was produced with respect to the alleged financial difficulties of the First Respondent. The Trustee in Bankruptcy did confirm that the Second Respondent was made bankrupt on 3 December 2013 and remains an undischarged bankrupt.

19. The Applicant submits that the conduct of the Respondents after the notice was issued amounted to a *"persistent unwillingness and failure"*[8] by the Second Respondent to facilitate the First Respondent's compliance with the notice. I accept that submission.

20. The second consideration for the Court is the circumstances in which the conduct took place. The Applicant submits that the failure to

[2] Affidavit of Kez Ma filed 6 August 2014, at Annexure "KM-8".
[3] Ibid, at Annexure "KM-9".
[4] Ibid, at Annexure "KM-10".
[5] Ibid, at Annexure "KM-11".
[6] Ibid, at Annexure "KM-12".
[7] Ibid, at Annexure "KM-13".
[8] Applicant's Penalty Submission filed 6 August 2014, p.9 at para.55.

comply with the notice should be seen in the context of the extensive efforts made by the Applicant to assist the Respondents to avoid the need for litigation. As previously set out with respect to the factors going to the nature and extent of the conduct, Fair Work Inspector Ma gave the Respondents ample opportunity to work with the Applicant prior to these proceedings being issued. Had there been cooperation at that stage, it is unlikely that litigation would have been commenced.

21. The Applicant gave emphasis to the importance of Australian workplace laws in providing a safety net that ensures that employees are paid adequate minimum entitlements, particularly those employees who are vulnerable or in low income roles. The Applicant referred the Court to the case of the *Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor* [2009] FMCA 38 (*"Saya"*) in which the Court found:

> *The vulnerability of these employees and the way they were exploited by the respondents is a significant factor when assessing the quantum of penalty* (footnotes omitted).[9]

22. The complainant, Mr Edirisinghe, was the holder of a temporary resident visa and worked as a part-time employee. He was a vulnerable employee because of his reliance on the First Respondent as a foreign worker and I accept that this is a significant factor in determining penalty.

23. With respect to the nature and extent of the loss, the Applicant has submitted that:

- The total underpayment was significant, given Mr Edirisinghe's situation as a part-time employee on a temporary resident visa;
- Mr Edirisinghe was underpaid between October and December 2012; and
- Mr Edirisinghe was not paid at all for a period of approximately four months.

Those amounts remain outstanding. Mr Edirisinghe has been without the benefit of those amounts for a considerable period of time and the Respondents had the benefit of not paying those amounts to the Mr Edirisinghe.

[9] [2009] FMCA 38, p.13 at para.20.

24. The Applicant also considers that, in addition to the monetary loss arising to Mr Edirisinghe, the Court should also consider the loss and damage in view of the relevant statutory objectives.

25. One of the principal objectives of the Act is to provide a guaranteed safety net and the purpose of the powers conferred on the Fair Work Inspectors, which includes the power to issue compliance notices, is to provide the Fair Work Ombudsman with an effective means of investigating and enforcing compliance with minimum standards and industrial instruments. The failure of the Respondents to pay Mr Edirisinghe and to cooperate positively with the Applicant was a significant loss to Mr Edirisinghe and caused costs to the Commonwealth as a whole by virtue of the Applicant's expenditure on this case and the Court's time and resources taken up with this matter. These are matters which I take into account.

26. The Court must also consider the size and financial circumstances of the business. It is conceded that the First Respondent operated a small restaurant and that it is no longer operating. Regardless, the fact that the business is small does not negate its obligations under the Act. The Applicant referred the Court to the judgment of Judge Jarrett in *Extrados*, where his Honour made the following comments:

> *The obligation to comply with the Fair Work Act and, in particular, s.716 falls just as heavily on small corporations and small businesses – and individuals, for that matter – as it does on large employers or businesses. Put shortly, one cannot shirk one's responsibilities imposed by law simply because one might be described as a "small business" or because the business has a particular size. It is incumbent on all employers to comply with the requirements of the Fair Work Act.*[10]

27. The Applicant referred to the fact that the Second Respondent had been declared a bankrupt in 2013 and that she was removed as a director of the First Respondent by the Trustee in Bankruptcy. However, to the extent that either of the Respondents rely on their financial circumstances as an excuse for non-compliance, the Applicant referred to the case of *Saya* which, in itself, referred to a number of authorities going to the fact that financial

[10] [2014] FCCA 815, pp.4-5 at para.10.

difficulties are not, in themselves, an excuse to breach award and obligations and the obligations under the NES.

28. With respect to the deliberateness of the contraventions, the material in the affidavit of Fair Work Inspector Ma indicates that, despite her knowledge of the notice and the opportunities and warnings given, neither the Second Respondent nor the First Respondent complied with the notice and ignored the request by the Fair Work Inspector to do so. On the submissions of the Applicant, a failure to comply with a notice was done, at best, with *"reckless disregard"* for their obligations.[11] I accept that submission also.

29. With respect to the involvement of senior management, it is clear that the Second Respondent, up until she was declared a bankrupt, was the sole director, the company secretary and the sole shareholder of the First Respondent. At all relevant times during Mr Edirisinghe's employment, she was responsible for ensuring that the First Respondent complied with its legal obligations under the Act and was responsible for the day-to-day management, direction and control of the operations of the First Respondent. The Second Respondent was the person who was personally served with the notice. She was repeatedly informed of the consequences of failing to comply and yet she failed to ensure that the First Respondent did so. I am satisfied that the Second Respondent was involved in the contravention by the First Respondent of s.716(5) of the Act within the meaning of s.550 of the Act.

30. With respect to contrition, corrective action and cooperation, it is clear that the Respondents have not accepted responsibility for their conduct. They have shown no contrition and they have made no effort to pay to Mr Edirisinghe the amount owing to him and it now appears likely, given the bankruptcy of the Second Respondent, that he is unlikely to receive that.

31. Although the First Respondent is no longer trading, the Applicant does put on the part of the Second Respondent that she was able to enter into the Statement of Agreed Facts and had been cooperative with the Applicant since the commencement of the proceedings and that is a matter that should be taken into account. I accept that submission as well.

[11] Applicant's Penalty Submission filed 6 August 2014, p.13 at para.71.

32. On the question of ensuring compliance with the minimum standards, the Applicant submits that the substantial penalties set by Parliament and awarded by the Courts for a failure to comply with compliance notices reinforces the importance placed on compliance with minimum standards. It is important that penalties are ordered at a meaningful level for the Court to show there are consequences for failing to comply in circumstances where compliance, in the first instance, would have allowed both of the Respondents to escape any penalty or any finding of a breach of the Act.[12] The effect of an insubstantial penalty being awarded would provide little or no incentive for the employer and other employers to change their practices.

33. The Applicant also cited examples of recent authority on penalties with respect to failure to comply with notices to produce that have shown that the Court takes these failures seriously.

34. With respect to general deterrence, the Applicant submits that the need for specific and general deterrence is a factor that is relevant to the imposition of a penalty and the role of general deterrence in determining the appropriate penalty is illustrated by the oft quoted comments of Justice Lander in *Ponzio v B & P Caelli Constructions Pty Ltd & Ors* (2007) 158 FCR 543 at paragraph 93 of that decision.

35. The Applicant submits that general deterrence is an important factor in these proceedings because there is a need to send a strong message to the community, and particularly employers in the restaurant industry, that employers must provide their employees with the correct entitlements and also to take steps to respond to notices issued by Government regulators, such as the Applicant. The Applicant also submits that the Court should place weight on the need to deter employers operating in similar circumstances from contravening minimum obligations.

36. With respect to specific deterrence, the Applicant submits that:

- Mr Edirisinghe was not paid his entitlements at all for a period of four months;
- No rectification has been made by the Respondents; and

[12] Applicant's Penalty Submission filed 6 August 2014, pp.13-14 at paras.78-79.

- Non-compliance with the notice was compounded by their attitude after the notice was issued.

Both of the Respondents should be left in no doubt that failing to comply with notices issued by the Applicant will not be tolerated by the Courts and that employees should be provided with their minimum entitlements.

37. I am satisfied that, while the Second Respondent is an undischarged bankrupt and the First Respondent has ceased to trade, the Second Respondent should be under no misapprehension that a failure to pay employees and to comply with Fair Work Ombudsman compliance notices will be treated seriously by this Court.

38. On the totality of the penalty, the Applicant submitted that, having considered appropriate penalties for each course of conduct, the Court should take a final look at the aggregate penalty to determine what is appropriate and that, in looking at that penalty, the Court might have regard to mitigating factors such as the following:

- The First Respondent's non-participation in the proceedings came about as a consequence of the Trustee in Bankruptcy's decision not to appoint a director to the First Respondent after the Second Respondent was declared a bankrupt

- The Second Respondent did engage in the proceedings, albeit not until after the proceedings were instituted, but was able to enter into a Statement of Agreed Facts; and

- It is likely that the First Respondent may be wound up as the Second Respondent is already a bankrupt.

39. The First Respondent also submits that the connection between the Respondents should not reduce the amount of the penalty in relation to the Second Respondent. In support of that submission, the Applicant relied on the decision of Justice Buchanan in *Fair Work Ombudsmen v Ramsey Food Processing Proprietary Limited (No.2)* [2012] FCA 408 at paragraph 8.

Conclusions

40. In its submissions, the Applicant has dealt with the:

- Factual background to the proceedings;
- Legislative provisions applying to penalties; and
- Factors to which the Court should have regard to in making such orders.

The matters set out in the affidavit of Fair Work Inspector Ma were not contested and a Statement of Agreed Facts was provided to the Court. The Respondents provided no written submissions.

41. As the Applicant correctly points out, the capacity of the Fair Work Ombudsman to issue compliance notices was specifically designed to provide an option for employers, such as the First Respondent, to avoid court proceedings by complying with the notice. Further, it:

- Avoids the costs to all parties of Court proceedings;
- Allows the respondent the opportunity to rectify the non-compliance with the relevant award or the Act; and
- To therefore avoid the penalties associated with that.

In this case, the Respondents specifically rejected that opportunity.

42. The Respondents have not provided any reason for their failure to pay Mr Edirisinghe for wages owed to him or to comply with the notice, save for some unspecified claims of financial difficulties. The Second Respondent voluntarily entered into bankruptcy but did not do so until two months after the notice was issued and some eight months after Mr Edirisinghe had ceased working for the First Respondent due to a failure to pay him for a period of almost four months. There was no effort made during that time to pay Mr Edirisinghe or to comply with the notice. Essentially, the Respondents had the benefit of his free labour and the underpayment is still outstanding.

43. The financial position of the Respondents – and no evidence was produced with respect to that – is no excuse for a failure to comply with the Act. It is an incident of taking on the role of an employer that a business complies with the Act in the same manner as it is obliged to comply with taxation legislation and any relevant occupational health and safety legislation. The Court has pointed out on other occasions that the responsibility is not

diminished by the size of the business, nor is it excused by a claim that the business is experiencing financial difficulties.

44. I agree with the submissions of the Applicant that both specific and general deterrence are relevant in this case. The hospitality industry is a low-pay industry where many employees are young, a number of workers are on temporary residence or working holiday visas and the work is frequently casual or part-time. Restaurants open and close with regularity. Employers should not be allowed to base the viability of their business on a failure to afford the minimum safety conditions to their employees, nor should employers who comply with the law be forced to compete with those who do not.

45. The future of the First Respondent is not clear, nor does the Court have any information on what the Second Respondent is now currently engaged in. She could, in the future, engage in another business venture. A clear understanding of the Second Respondent's obligations in such a case is essential. The Applicant has asked the Court to consider a penalty in the range of 50 to 60 per cent of the maximum with some discounting for the Second Respondent due to her cooperation in the Statement of Agreed Facts. I am satisfied that penalties within the range suggested are neither excessive nor derisory and further they are not oppressive or crushing.

46. In my view, a penalty towards the upper level of that suggested is consistent with the emphasis in the Act on the maintenance of a safety net of conditions and the opportunity given to employers who are in default to remedy that situation without risk of penalty by complying with a compliance notice issued by the Fair Work Ombudsman. On that basis, I am satisfied that the draft orders that have been proposed by the Applicant in these proceedings should be made by the Court.

I certify that the preceding forty-six (46) paragraphs are a true copy of the reasons for judgment of Judge Whelan

Associate:

Date: 17 December 2014