FEDERAL COURT OF AUSTRALIA

Fair Work Ombudsman v Devine Marine Group Pty Ltd [2015] FCA 370

Citation:	Fair Work Ombudsman v Devine Marine Group Pty Ltd [2015] FCA 370
Parties:	**FAIR WORK OMBUDSMAN v DEVINE MARINE GROUP PTY LTD, BRETT BARRY DEVINE and ARTHUR BOUCAUT-JONES**
File number:	SAD 209 of 2013
Judge:	**WHITE J**
Date of judgment:	22 April 2015
Catchwords:	**INDUSTRIAL LAW** – Penalty – involvement in contraventions of modern award – effect of s 557 of *Fair Work Act 2009* (Cth) in relation to multiple contraventions of multiple provisions in award – assessment of penalty – contraventions part of deliberate strategy – contraventions occurred throughout period of employment – no cooperation with investigation or expression of contrition from self-represented respondent – respondent now bankrupt – whether particular vulnerability of foreign employees was exploited – application of totality principle **PRACTICE AND PROCEDURE** – Costs – application for costs of proceeding under the *Fair Work Act 2009* (Cth) – whether proceedings instituted without reasonable cause – legal position having been clarified by decisions delivered after commencement of proceedings
Legislation:	*Fair Work Act 2009* (Cth) ss 45, 539, 546, 550, 557, 570
Cases cited:	*Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; (2008) 165 FCR 560 *Australian Workers' Union v Leighton Contractors Pty Ltd (No 2)* [2013] FCAFC 23 *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU) v John Holland Pty Limited ACN 004 282 268* [2009] FCA 274; (2008) 180 IR 350 *Baker v Patrick Projects Pty Ltd (No 2)* [2014] FCAFC 166 *Cahill v Construction, Forestry, Mining and Energy Union (No 4)* [2009] FCA 1040, (2009) 189 IR 304 *Fair Work Ombudsman v Access Embroidery (Australia) Pty Ltd* [2012] FMCA 835

	Fair Work Ombudsman v Al Hilfi [2012] FCA 1166 *Fair Work Ombudsman v Devine Marine Group Pty Ltd* [2013] FCA 1135 *Fair Work Ombudsman v Devine Marine Group Pty Ltd* [2014] FCA 1365 *Fair Work Ombudsman v Kingsford Carwash Pty Ltd* [2012] FMCA 464 *Fair Work Ombudsman v Kingsford Carwash Pty Ltd (No 2)* [2012] FMCA 1210 *Hanssen Pty Ltd v Jones* [2009] FCA 192; (2009) 179 IR 87 *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357 *Modern Awards Review 2012-Penalty Rates* [2013] FWCFB 1635 *Potter v Fair Work Ombudsman* [2014] FCA 187 *R v Moore; Ex parte Federated Miscellaneous Workers' Union of Australia* (1978) 140 CLR 470 *Rafferty v Madgwicks* [2012] FCAFC 37; (2012) 203 FCR 1 *Restaurant and Catering Association Victoria* [2014] FWCFB 1996 *Rocky Holdings Pty Ltd v Fair Work Ombudsman* [2014] FCAFC 62; (2014) 221 FCR 153 *Stuart-Mahoney v Construction, Forestry, Mining and Energy Union* [2008] FCA 1426; (2008) 177 IR 61 *Temple v Powell* [2008] FCA 714; (2008) 169 FCR 169 *Weeks v Commissioner of Taxation (No 2)* [2013] FCAFC 22 *Yorke v Lucas* (1984) 158 CLR 661
Date of hearing:	29 January 2015 and 4 March 2015
Place:	Adelaide
Division:	FAIR WORK DIVISION
Category:	Catchwords
Number of paragraphs:	63
Counsel for the Applicant:	Mr E Stratton-Smith
Solicitors for the Applicant:	Fair Work Ombudsman
Counsel for the First Respondent:	The First Respondent did not appear
Counsel for the Second Respondent:	The Second Respondent appeared in person

Counsel for the Third Respondent:	Mr S Mitchell
Solicitors for the Third Respondent:	Murray Legal

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY
FAIR WORK DIVISION **SAD 209 of 2013**

BETWEEN:	**FAIR WORK OMBUDSMAN** **Applicant**
AND:	**DEVINE MARINE GROUP PTY LTD** **First Respondent**
	BRETT BARRY DEVINE **Second Respondent**
	ARTHUR BOUCAUT-JONES **Third Respondent**

JUDGE: **WHITE J**
DATE OF ORDER: **22 APRIL 2015**
WHERE MADE: **ADELAIDE**

THE COURT DECLARES THAT:

1. The Second Respondent, Brett Barry Devine, contravened s 45 of the *Fair Work Act 2009* (Cth) (FW Act) by reason of his involvement, within the meaning of s 550(2)(c) of the FW Act, in each of the following contraventions by the First Respondent, Devine Marine Group Pty Ltd, of the Manufacturing and Associated Industries and Occupations Award 2010 (the Award):
   (a) the failure to pay Mr Alopisia Kouka and Mr Andrew James (the Employees) the applicable minimum hourly rates required by cl 24.1 of the Award;
   (b) the failure to pay Saturday penalty rates to each of the Employees as required by cl 40.7 of the Award; and
   (c) the failure to pay Sunday penalty rates to each of the Employees, as required by cl 40.8 of the Award.

THE COURT ORDERS THAT:

2. A penalty of $4,000 be imposed on the Second Respondent in respect of the contravention of cl 24.1(a) of the Award.

3. Penalties of $2,000 be imposed on the Second Respondent in respect of each of the contraventions of cll 40.7 and 40.8 of the Award.

4. Pursuant to s 546(3) of the FW Act, the pecuniary penalties imposed under the above orders be paid by payments to Mr Alopisia Kouka and Mr Andrew James of $4,000 each.

5. The claim against the Third Respondent, Arthur Boucaut-Jones be dismissed.

6. The proceedings otherwise be dismissed.

7. There be no order as to the costs of the proceedings.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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AND:	**DEVINE MARINE GROUP PTY LTD** **First Respondent**
	BRETT BARRY DEVINE **Second Respondent**
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JUDGE:	**WHITE J**
DATE:	**22 APRIL 2015**
PLACE:	**ADELAIDE**

REASONS FOR JUDGMENT

1 On 12 December 2014, I delivered judgment in which I found that the second respondent, Capt Devine, had been involved as an accessory in contraventions by the first respondent, Devine Marine Group Pty Ltd (DMG), of s 45 of the *Fair Work Act 2009* (Cth) (the FW Act): *Fair Work Ombudsman v Devine Marine Group Pty Ltd* [2014] FCA 1365. Those contraventions arose from the failure by DMG to pay two employees (Mr James and Mr Kouka) the minimum hourly rate required by cl 24.1(a) of the Manufacturing and Associated Industries and Occupations Award 2010 (the Award) and the penalty rates for Saturday and Sunday work required by cll 40.7 and 40.8 of the Award

2 The applicant (the FWO) did not seek orders against DMG as it is now in liquidation and I found that its claims against the third respondent, Capt Boucaut-Jones, were not established. This meant that orders were to be made only against Capt Devine in respect of his accessorial liability. Captain Boucaut-Jones foreshadowed an application for costs. I required the FWO to bring in minutes of the orders to give effect to my conclusions and adjourned the matter for submissions with respect to those minutes, the issue of penalty and costs.

3 Unfortunately, submissions could not be made on Capt Boucaut-Jones' costs application at the adjourned hearing because he had only recently obtained legal representation. A second hearing was held to permit him to make those submissions.

4 These are my reasons on the remaining issues, namely, the penalty to be imposed on Capt Devine and the claim of Capt Boucaut-Jones for costs. They are to be read in conjunction with the reasons contained in the primary judgment.

Penalty

5 The substance of the FWO's case was that DMG, by Capt Devine, had arranged for Mr James and Mr Kouka to come to Australia from Fiji as apparent participants in a training program when, in reality, they were employees carrying out productive work to which the Award applied, and that it had not paid them the entitlements for which the Award provided. The claim of the FWO which I upheld related to Mr James' work in Australia between 22 August and 19 November 2011 and to Mr Kouka's work between 20 September and 16 December 2011.

6 Both men had been engaged in Fiji and flown to Australia at the expense of DMG. Capt Devine had assisted them to obtain a Business (Short Stay) visa which allowed them to remain in Australia for a period of three months. Amongst other things, DMG provided documents indicating that the men were to undergo forms of training and familiarisation with salvage work as well as training in the operation of marine vessels. In reality the men received minimal training and worked as employees. Both men were involved in the repair, maintenance and refurbishment of a large seagoing barge known as the Bradley.

7 The FWO claimed that DMG had contravened a number of terms in the Award. I found that some of those claims were not proved but, as indicated, found, in relation to each of Mr James and Mr Kouka, that DMG had contravened cl 24.1(a) of the Award by failing to pay the required minimum hourly rate and had contravened cll 40.7 and 40.8 of the Award by failing to pay the required weekend penalty rates. They were entitled to payment at the rate of time and a half the applicable hourly rate for the first three hours' work on each Saturday and double time thereafter, and double time for all work carried out on Sundays. Instead of receiving payment in accordance with the Award, the men were paid in respect of each day a flat rate of $100 per day for a full day's work and $50 for a half day's work. I accepted that there were days when the men commenced work at about 6:00am and continued to 6:00pm but there was evidence that, on at least some days, they commenced at 7:00am. It was plain,

even on the assumptions most favourable to DMG and Capt Devine, that the flat daily rate of $100 was well less than their Award entitlement. The men worked many Saturdays and Sundays and it was even more obvious that the flat daily rates were well less than their Award entitlements for those days, having regard to the applicability of penalty rates.

8 The extent of the underpayments cannot be calculated accurately but I accept that in Mr James' case, it was at least $7,826, and in Mr Kouka's case at least $7,526.

9 The effect of s 550(1) of the FW Act is that a person involved in a contravention of a civil remedy provision (of which s 45 is one) is also taken to have contravened that provision. The Court is authorised to impose the pecuniary penalty which it considers appropriate on contravenors: s 546(1).

The relevant maximum penalties

10 The maximum number of penalty units for a contravention of s 45 of the FW Act is 60 (s 539(2)). As at the date of the contraventions in 2011, a penalty unit was $110: FW Act, s 12; *Crimes Act 1914* (Cth), s 4AA. Accordingly, the maximum penalty for each contravention is $6,600.

11 Strictly speaking, cl 24.1(a) of the Award was breached in respect of each day worked by Mr James and Mr Kouka or, at least, in respect of each Award pay period, and cll 40.7 and 40.8 were breached in respect of each Saturday and Sunday which the men worked. Despite these multiple contraventions of each of cll 24.1(a), 40.7 and 40.8 of the Award in relation to Mr James and Mr Kouka, s 557 of the FW Act has the effect of deeming there to be only a single contravention of each provision. Section 557 provides (relevantly):

> **Course of conduct**
>
> (1) For the purposes of this Part, 2 or more contraventions of a civil remedy provision referred to in subsection (2) are, subject to subsection (3), taken to constitute a single contravention if:
>
> (a) the contraventions are committed by the same person; and
>
> (b) the contraventions arose out of a course of conduct by the person.
>
> (2) The civil remedy provisions are the following:
>
> …
>
> (b) section 45 (which deals with contraventions of modern awards);
>
> …

12 The proper application of s 557 was considered by the Full Court in *Rocky Holdings Pty Ltd v Fair Work Ombudsman* [2014] FCAFC 62; (2014) 221 FCR 153. The Court held that the term "two or more contraventions of a single penalty provision" in subs (1) is a reference to the contraventions which occur when a *term* of a modern award or, as the case may be, a *provision* of a national employment standard, is contravened, and that that is so even when the contraventions relate to two or more persons. This means that, in the circumstances referred to in subparas (a) and (b) of s 557(1), the multiple contraventions by DMG of cl 24.1(a) of the Award in relation to Mr James and Mr Kouka are to be taken to constitute a single contravention of that clause. Likewise, in the same circumstances, the multiple contraventions of cl 40.7 in relation to both Mr James and Mr Kouka are to be taken to constitute a single contravention of that provision, and the multiple contraventions of cl 40.8 in relation to both Mr James and Mr Kouka are to be taken to constitute a single contravention of that provision.

13 The FWO accepted, quite properly, that each of the contraventions of cll 24.1(a), 40.7 and 40.8 of the Award had been committed by the same person and that they arose out of a course of conduct of DMG, in which Capt Devine was involved. That means that a penalty is to be imposed on Capt Devine in respect of three contraventions only and, in turn, that the maximum of the aggregate penalties which may be imposed on him is $19,800.00.

Penalty principles

14 The matters relevant to the imposition of penalty in circumstances like the present are well established, and it is not necessary to refer to the authorities in any detail. Prominent among the matters to be considered are the nature, circumstance and significance of the contraventions, the effect on the employees of the contraventions, the involvement or otherwise of senior management in the contraventions, any previous like conduct by the respondent, the extent to which the respondent has taken corrective action or has exhibited contrition, and the need for general and specific deterrence: *Stuart-Mahoney v CFMEU* [2008] FCA 1426, (2008) 177 IR 61 at [40]; *Temple v Powell* [2008] FCA 714, (2008) 169 FCR 169 at [56]-[78]; *Cahill v CFMEU (No 4)* [2009] FCA 1040, (2009) 189 IR 304 at [9]-[10].

15 The Court is to determine an appropriate penalty in each case by a process of instinctive synthesis after taking into account all relevant factors: *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8, (2008) 165 FCR 560 at [27], [55];

Markarian v The Queen [2005] HCA 25, (2005) 228 CLR 357 at [37]-[39]. The need for deterrence, both personal and general, is usually a prominent consideration in the determination of penalty.

Consideration of penalty

16 It can be said that each contravention was a form of underpayment so that to that extent they have a commonality.

17 However, I accept the submission of the FWO that the minimum hourly rates and weekend penalty rates are separate parts of the safety net established by the FW Act and the Award. A guaranteed minimum rate of pay for all hours of work is central to the Australian workplace relations system. It is the base entitlement of employees.

18 Weekend penalty rates compensate employees for the disadvantages of working on weekends. The Full Bench of the Fair Work Commission has recently affirmed the appropriateness of penalty rates for weekend work. In *Modern Awards Review 2012-Penalty Rates* [2013] FWCFB 1635 at [218] the Full Bench held that the continuation of penalty rates for weekend work was appropriate as "there are disabilities associated with work at unsociable times". The higher rate for Sunday work reflects the greater disadvantages in working on Sundays. Thus, in *Restaurant and Catering Association Victoria* [2014] FWCFB 1996, the Full Bench referred to the "contemporary general assessment of the disabilities associated with working on Sundays as compared to other days of the week" as supporting the continuation of penalty rates for Sunday work. Although that conclusion was expressed in relation to an industry quite different from that in which DMG operated, it is reasonable to suppose that the same considerations underpin the prescription in the Award for all work performed on Sundays.

19 Thus, as the FWO submitted, cll 24.1(a), 40.7 and 40.8 serve separate and distinct purposes. This understanding should underpin the assessment of the culpability of Capt Devine for the contraventions.

20 It is evident that DMG, at the instigation of Capt Devine, engaged in a deliberate strategy by which to obtain labour at less cost. I repeat in this respect part of my finding at [195] in the principal reasons:

> … DMG, controlled by Capt Devine, had arranged to bring the Fijians, and in particular Mr James and Mr Kouka, to Australia as apparent participants in a training program when, in reality, it intended that they should carry out productive work. The

> evident purpose of the strategy was to avoid DMG having to pay the rates which would otherwise be applicable to the performance of that work by local employees.

21 The FWO also referred to the evidence of Capt Devine that DMG could not afford to engage workers as employees and, instead, preferred to engage them as contractors "because of WorkCover, Fair Work and over regulation of this country … in the Marine Industry in particular."

22 I proceed on the basis that DMG, by Capt Devine, was aware that Mr James and Mr Kouka were employees to whom the Award applied but sought to disguise their employment as participation in a training program as a means of saving costs. Captain Devine's participation was accordingly deliberate. He sought to achieve DMG's purpose by arranging for the men to be provided with "certificates of training" from the Adelaide Nautical College, by providing letters to support the visa applications of the men which referred to "training courses" and, on occasion, by instructing Mr James and Mr Kouka to describe themselves as trainees if anyone asked about their status.

23 The conduct comprising the course of contraventions occurred throughout the three month period of the men's employment. It cannot be regarded as conduct of an isolated kind.

24 The FWO submitted that the conduct of DMG and Capt Devine was aggravated because it involved an exploitation of the vulnerability of Mr James and Mr Kouka. It was said that they were induced to come to Australia by the prospect of enhancing their chances of obtaining employment with DMG in Fiji if it established operations there. Their remuneration here, although less than that required by the Award, was higher than that which they would receive if employed in Fiji. Accordingly, Mr James and Mr Kouka had an economic incentive to work in the manner directed by DMG. The FWO referred in addition to an occasion on which Capt Devine told Mr Kouka that, if he did not work harder, he would terminate the arrangement and inform the Department of Immigration and Citizenship that he had done so, with the effect that Mr Kouka's visa would then be cancelled.

25 The FWO submitted that DMG and Capt Devine had, by reason of these circumstances, exploited the circumstance that Mr James and Mr Kouka were foreign nationals whose first language is not English and who had little or no knowledge of Australian workplace laws. I agree that there was a form of exploitation in a general sense, that is, of an employer taking the benefit of an employee's ignorance of his or her lawful

entitlements and of the employee's willingness to accept the proffered remuneration because doing so was more advantageous to the employee than the alternative.

26 However, I do not accept that exploitation of this kind should be regarded as an aggravating factor. It seems to be similar to the kinds of exploitation which the workplace laws are intended to prevent and which is present in the case of many contraventions of the present kind. It is necessary to exercise care before treating a commonplace circumstance, or a usual incident of a contravention, as an aggravating circumstance. The impact on affected workers may in some circumstances be an aggravating factor but that will usually be when that impact is greater by reason of a particular vulnerability of an employee or some other particular circumstance, so that the conduct of the contravening employer can be seen to be more egregious: *Hanssen Pty Ltd v Jones* [2009] FCA 192; (2009) 179 IR 87 at [61].

27 That is not this case. Further, it is apparent that Mr James and Mr Kouka regarded the arrangements under which they worked for DMG as quite advantageous and, considered from the perspective of what was available to them in Fiji, that was objectively so.

28 Deterrence, both personal and general, is particularly important in this case. It is appropriate that the penalties be sufficient to indicate to employers generally that workplace obligations cannot be avoided simply by disguising an employment relationship as something else.

29 The FWO drew attention to the absence of any expression of contrition or remorse by Capt Devine, let alone recognition of the wrongfulness of his conduct as found by the Court. The penalty to be imposed cannot be mitigated on this account. However, it is appropriate to take into account that Capt Devine was unrepresented at the penalty hearing, as he was at the trial, and may not have been alert to the significance of an expression of contrition. I also take into account Capt Devine's apparent conviction that he was, in effect, doing the Fijians a favour, and there is a sense in which that was so.

30 It is not possible to determine the extent to which DMG, and in turn Capt Devine, benefited from the contraventions. This makes it difficult to fix penalties at a level which would make it apparent that it is not to the economic advantage of an employer to contravene an award.

31 Captain Devine has no record of previous contraventions of industrial instruments. He provided a number of written character and proficiency references. They indicate that he

and DMG have had a good reputation in the marine salvage industry. I take these into account in Capt Devine's favour but indicate that the weight which can be given to them is reduced by the fact that none of them indicate awareness of the findings in the principal judgment. Indeed, many of the references were written well before the events giving rise to this litigation.

32 It is not possible to give Capt Devine credit for his cooperation with the FWO's investigation. He declined to be interviewed by the FWO. Although on my findings, DMG was not in contravention of the obligation to produce records to the FWO, it is pertinent that DMG, which was controlled by Capt Devine, did not produce any records voluntarily.

33 As well as DMG now being in liquidation, Capt Devine is now bankrupt. He said that he has lost everything and has little by way of assets, so much so that he had to rely on funds from his children in order to travel to Adelaide for the penalty hearing. Although I do not have Capt Devine's date of birth, it is apparent that he is nearing retirement age. Given his bankruptcy, it may be difficult for him to re-establish himself in the marine salvage industry. I accept that, by reason of his impecuniosity, Capt Devine is likely to have difficulty in paying the penalties which the Court will impose. That impecuniosity bears in particular on the penalties necessary to achieve a deterrent effect in this case.

34 The FWO submitted that the Court should impose separate penalties for each of the three separate contraventions. I will proceed on that basis.

35 In doing so, it is appropriate to have regard to the totality principle, namely, ensuring that the overall penalty imposed is proportionate to Capt Devine's culpability and avoiding the imposition of penalties having a crushing effect. Those considerations make it inappropriate to impose in respect of each contravention the penalty which would be imposed if it was the only contravention before the Court. I will give effect to this by imposing lower penalties in respect of each contravention than would otherwise be the case, and by imposing lower penalties in the case of the second and third than in the case of the first.

36 Balancing out these considerations, I impose a penalty in respect of the contravention of cl 24.1(a) of the Award of $4,000 and penalties of $2,000 in respect of each of the contraventions of cll 40.7 and 40.8 of the Award. The total of the penalties is therefore $8,000.

37 I accept the submission of the FWO that it is appropriate to order that the penalties be paid to Mr James and Mr Kouka. I will direct that $4,000 be paid to each.

The application for costs

38 Capt Boucaut-Jones sought an order that the FWO pay his costs of the proceedings. This was the only order for costs sought by any party. No party sought an order that the matter be remitted to the Federal Circuit Court for it to determine those costs which it had reserved while the proceedings were in that Court, as was contemplated by my decision in *Fair Work Ombudsman v Devine Marine Group Pty Ltd* [2013] FCA 1135.

39 The exercise of Court's discretion with respect to costs pursuant to s 43 of the *Federal Court Act 1976* (Cth) is governed, in the circumstances of this case, by s 570 of the FW Act. Section 570 provides:

> **570 Costs only if proceedings instituted vexatiously etc.**
>
> (1) A party to proceedings (including an appeal) in a court (including a court of a State or Territory) in relation to a matter arising under this Act may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2) or section 569 or 569A.
>
> (2) The party may be ordered to pay the costs only if:
>
> (a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or
>
> (b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or
>
> (c) the court is satisfied of both of the following:
>
> (i) the party unreasonably refused to participate in a matter before the FWC;
>
> (ii) the matter arose from the same facts as the proceedings.

40 As can be seen, s 570(2)(a) has the effect that an order for costs may be made against a party only if the Court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause.

41 Captain Boucaut-Jones submitted that the FWO had instituted the proceedings against him "without reasonable cause", so that subs (2)(a) enlivened the discretion in the Court. This was so, he submitted, because it should have been clear to the FWO that the claim of accessorial liability made against him would fail even if all the findings of facts sought by the FWO were made in the FWO's favour. Even on that basis, the FWO could not establish that

Capt Boucaut-Jones had knowledge that an award applied, and the FWO should have known that proof of such knowledge was necessary for a finding of accessorial liability.

42 The principles relating to the assessment of whether a proceeding was commenced without reasonable cause were not in issue. The mere fact that the claim against Capt Boucaut-Jones failed does not mean, by itself, that the proceedings were commenced without reasonable cause. In this respect, Gibbs J said in *R v Moore; Ex parte Federated Miscellaneous Workers' Union of Australia* (1978) 140 CLR 470 at 473, when considering s 197A of the *Conciliation and Arbitration Act 1904* (Cth):

> In my opinion, a party cannot be said to have commenced a proceeding "without reasonable cause", within the meaning of that section, simply because his argument proves unsuccessful. In the present case the argument presented on behalf of the prosecutor was not unworthy of consideration and it found some support in the two decisions of this Court to which I have referred. The fact that those decisions have been distinguished, and that the argument has failed, is no justification for ordering costs in the face of the prohibition contained in s. 197A.

43 In *Baker v Patrick Projects Pty Ltd (No 2)* [2014] FCAFC 166, the Full Court said:

> [9] The meaning and application of the phrase "without reasonable cause" in s 570 and its predecessors has been considered in many cases. The effect of these authorities was recently summarised by Pagone J in *Construction, Forestry, Mining and Energy Union v Corinthian Industries (Australia) Pty Ltd (No 2)*; [2014] FCA 351. His Honour said (at [8]) that:
>
> > "To exercise the discretion conferred by [s 570(2)(a) of the FW Act] the Court must be satisfied that the claims were, relevantly, instituted without reasonable cause. That is not established merely because a party fails in the claims: *R v Moore; ex parte Federated Miscellaneous Workers Union of Australia* [1978] HCA 51; (1978) 140 CLR 470, 473. The relevant provisions reflect 'a policy of protecting a party instituting proceedings from liability for costs' and costs will rarely be awarded unless justified by exceptional circumstances: see *Kangan Batman Institute of Technology and Further Education v Australian Industrial Relations Commission* (2006) 156 FCR 275 at [60]. In *Kangan Batman Institute* it was said by the Full Court at [60] that "a proceeding will be instituted without reasonable cause if it has no real prospects of success, or was doomed to failure". In *Kanan v Australian Postal and Telecommunications Union* (1992) 43 IR 257 Wilcox J indicated at 264 that one way of testing whether a proceeding was instituted 'without reasonable cause' was to ask whether, upon the facts apparent to the applicant at the time of instituting the proceeding, there was no "substantial prospect of success". His Honour went on to say that a proceeding lacks a reasonable cause where it is clear that it must fail on the applicant's own version of the facts."

Counsel for Capt Boucaut-Jones emphasised the last sentence in this passage.

44 Some assistance in determining whether a proceeding has been commenced without reasonable cause can be obtained by enquiring whether the proceeding could have been dismissed summarily. Care must be taken in this respect however, so as not to substitute a different test for that created by the words of the statute. The Full Court in *Weeks v Commissioner of Taxation (No 2)* [2013] FCAFC 22 made this point:

> [6] As the Full Court said in *Thompson v Hodder* (1989) 21 FCR 467 at 471, the words of the Act must be allowed to speak for themselves, in the sense, we would add, that it may be a distraction to substitute different words for those of s 824. Nevertheless the expression, "without reasonable cause", may describe a proceeding that is capable of being disposed of summarily. It is therefore appropriate to ask whether the present appeal had no substance in fact and law.

45 As is apparent from the principal reasons at [204], I found that, even on the inferences most favourable to the FWO, the evidence did not establish that Capt Boucaut-Jones "had knowledge of an applicable industrial award, let alone an award containing stipulations with respect to minimum rates of pay and weekend penalty rates".

46 Earlier, I had reviewed several of the authorities bearing upon the requisite intention and knowledge for a finding of accessorial liability. In particular, I referred to the decisions in *Potter v Fair Work Ombudsman* [2014] FCA 187, *Fair Work Ombudsman v Al Hilfi* [2012] FCA 1166, and *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU) v John Holland Pty Limited ACN 004 282 268* [2009] FCA 274; (2008) 180 IR 350. In *Potter*, Cowdroy J had held, in analogous circumstances, that knowledge that a particular award applied was necessary for a finding of accessory liability. In *Al Hilfi*, Besanko J had held, without deciding the point, that there was a good deal of force in the contention of the respondent to like effect and, in *John Holland*, Greenwood J in a different but analogous context seemed to take a similar view.

47 I concluded at [187]-[188]:

> [187] In my opinion, *Potter* cannot be distinguished on this basis. The FWO submission does not give effect to the requirement that the accessory's involvement be intentional. That is the real issue to which Cowdroy J's reasoning was directed. Without knowledge that an Award is applicable, it is difficult to see how a finding could be made that the accessory had intentionally participated in the contravention: see *Yorke v Lucas* at 670.
>
> [188] As the respondents were not represented, the Court did not have the benefit of full argument on these issues. Nevertheless, I consider that the claims of accessorial liability in this case should be determined in accordance with the principles stated in *Potter* and *Al Hilfi*. That is because knowledge that there

> is an award which is applicable which prescribes minimum rates or entitlements is a factual element necessary for the establishment of the accessory's intention.

48 Counsel for Capt Boucaut-Jones noted that the original Statement of Claim filed in these proceedings on 31 May 2012 contained no allegation at all concerning his (Capt Boucaut-Jones) knowledge of any applicable award, let alone an allegation concerning his knowledge of an application of the kind relied upon by the FWO for his accessory liability. Further, the Amended Statement of Claim filed on 19 September 2013 alleged only that Capt Boucaut-Jones was "aware of the obligation to pay minimum wages to employees for time worked" but made no further allegation.

49 Counsel also referred to the terms of s 45 of the FWA and, in particular, to Note 2 which makes it plain that a person does not contravene the terms of a modern award unless the award applies to the person. This should have made it plain to the FWO, he submitted, that knowledge that an award applied had to be established as part of the claim of accessory liability.

50 In short, counsel's submission was that, in the light of *Yorke v Lucas* (1984) 158 CLR 661 and the cases which followed it, the FWO should have known that Capt Boucaut-Jones could be knowingly concerned in the alleged contraventions of DMG only if he had knowledge of the essential facts constituting the contravention and in particular, knowledge of the application of an award.

51 Despite the force of those submission, I am not satisfied, as required by s 570(2)(a), that the FWO instituted the proceedings without reasonable cause.

52 First, as already noted, the mere fact that the FWO failed in her claim against Capt Boucaut-Jones is not sufficient for a finding in terms of s 570(2)(a). The relevant question is whether the proceeding had some reasonable prospect of success at the time it was instituted, and not whether it ultimately failed: *Australian Workers' Union v Leighton Contractors Pty Ltd (No 2)* [2013] FCAFC 23 at [7].

53 Secondly, the decisions in both *Potter* and *Al Hilfi* were handed down after the commencement of the present proceedings on 31 May 2012. The judgment in *Al Hilfi* was delivered on 26 October 2012 and the judgment in *Potter* on 7 March 2014, only five days before the commencement of the trial in this action on 12 March 2014. Accordingly, the FWO cannot be taken to have known of these judicial views as at 31 May 2012.

54 Thirdly, the state of the law at 31 May 2012 as to the requisite knowledge in circumstances like the present was not clear. In particular, there was no clear authority as to the essential facts of which an accessory must have knowledge for a contravention of s 45 of the FWA. It is pertinent to note in this respect that, after 31 May 2012, there were some judicial decisions to the effect that knowledge of the applicability of an award, in a context like the present, was not necessary for accessory liability. The FWO referred in this respect to decisions of the then Federal Magistrates Court in *Fair Work Ombudsman v Kingsford Carwash Pty Ltd* [2012] FMCA 464; *Fair Work Ombudsman v Kingsford Carwash Pty Ltd (No 2)* [2012] FMCA 1210; and *Fair Work Ombudsman v Access Embroidery (Australia) Pty Ltd* [2012] FMCA 835. Although these decisions were handed down after the commencement of the present proceedings, they do provide support for the FWO's contention that, as at 31 May 2012, there was more than one view reasonably open as to the essential elements to be established for a finding of accessorial liability in circumstances like the present.

55 Fourthly, there are cases outside the context of the FW Act which provide some support for the FWO's position. I referred to one such authority in the principal reasons at [176], namely, *Rafferty v Madgwicks* [2012] FCAFC 37; (2012) 203 FCR 1 at [254].

56 Fifthly, Capt Boucaut-Jones did bring an application for summary dismissal of the proceedings against him, and failed: *Fair Work Ombudsman v Devine Marine Group Pty Ltd* [2013] FCA 1135. In that decision, I gave a number of reasons for declining to dismiss the FWO's claim against Capt Boucaut-Jones summarily, including:

> [42] However, I am not satisfied that this indicates that these particular claims of the FWO have no reasonable prospects of success. First, the manner in which *Giorgianni* and *Yorke v Lucas* are to be applied in a context such as the present is not settled. At the heart of the FWO's claim is an allegation that DMG sought to avoid the payment to Mr Kouka and Mr James of employment entitlements of a kind commonly found in an industrial award. In that context, there is a question as to whether it is sufficient for the FWO to establish knowledge on Capt Boucaut-Jones' part that work was being carried out to which minimum legislative protections would apply or to which the Award would apply if it were performed by employees. Alternatively, must the FWO go further and establish knowledge of the particular circumstances giving rise to the individual contraventions arising under the applicable award? These are not easy questions and, in my opinion, should be addressed in the context of a trial.

57 It should also be kept in mind that the FWO commenced the proceedings against three respondents: DMG and Capt Devine as well as Capt Boucaut-Jones. There was accordingly

the prospect that there may be evidence in the trial in addition to that which the FWO proposed to lead. I referred to this consideration in [13]-[19] of the summary judgment decision.

58 These circumstances in combination make it inappropriate to conclude that it should have been obvious to the FWO as at 31 May 2012 that, on any reasonable view of the facts, the claim against Capt Boucaut-Jones could not succeed. For these reasons I am not satisfied that the proceedings were commenced without reasonable cause.

59 The means that Capt Boucaut-Jones does not establish a matter enlivening this Court's discretion with respect to costs under s 570.

60 Given these views, it is not necessary to consider the submissions of the FWO made by reference to *Fair Work Ombudsman v Pocomwell Ltd (No 2)* [2013] FCA 1139; (2013) 218 FCR 94.

61 Further, it is not necessary to address the submissions of the parties with respect to the exercise of the discretion vested in the Court once it is satisfied that proceedings have been commenced without reasonable cause.

62 The appropriate order in the case is that there be no order as to costs.

Summary

63 For the reasons in the principal judgement and those given above, I will issue declarations with respect to the contraventions by Capt Devine of the Award and make the following orders:

(1) In respect of the contravention of cl 24.1(a) of the Manufacturing and Associated Industries and Occupations Award 2010, a penalty of $4,000 is imposed.

(2) In respect of each of the contraventions of cll 40.7 and 40.8 of the Award, penalties of $2,000 are imposed.

(3) Captain Devine is to pay those penalties by payments of Mr James and Mr Kouka of $4,000 each.

(4) The claim against the third respondent, Capt Boucaut-Jones is dismissed.

(5) The remaining claims of the FWO are dismissed.

(6) There be no order as to the costs of the proceedings.

I certify that the preceding sixty-three (63) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice White.

Associate:

Dated: 22 April 2015