

FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v MAHOMET

[2014] FCCA 1872

Catchwords:

INDUSTRIAL LAW – Penalty hearing – agreed contraventions of Fair Work Act – underpayment of wages – penalty rates – casual loading – failure to keep employee records and provide pay slips – statement of agreed facts – appropriate penalty.

Legislation:

Fair Work Act 2009 (Cth) ss.45, 323, 536, 539, 545, 546, 547, 557

Evidence Act 1995 (Cth) s.191

Crimes Act 1914 (Cth) ss.4AA, 12

Fair Work Regulations 2009 (Cth)

Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012 (Cth)

Cases cited:

Murrihy v Betezy.com.au Pty Ltd (No.2) [2013] FCA 1146

Gibbs v The Mayor, Councillors and Citizens of City of Altona (1992) 37 FRC 216

McIver v Healey [2008] FCA 425

Kelly v Fitzpatrick (2007) 166 IR 14

Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560

Mornington Inn Pty Ltd v Jordan (2008) 168 FCR 838

Fair Work Ombudsman v Australian Shooting Academy Pty Ltd [2011] FCA 1064

Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550

Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412

Fair Work Ombudsman v Promoting U Pty Ltd & Anor [2012] FMCA 58

Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543

Community and Public Sector Union v Telstra Corporation Ltd (2001) 108 IR 228

Construction Forestry Mining & Energy Union v Coal & Allied Operations Pty Ltd (No.2) (1999) 94 IR 231

Australian Competition and Consumer Commission v Energy Australia Pty Ltd [2014] FCA 336

Applicant:

FAIR WORK OMBUDSMAN

Respondent:

VIVIEN MAHOMET
(TRADING AS ACADEMY FOR KIDS)

File Number:

MLG 936 of 2013

Judgment of: Judge O'Sullivan
Hearing date: 15 September 2014
Date of Last Submission: 15 September 2014
Delivered at: Melbourne
Delivered on: 15 September 2014

REPRESENTATION

Counsel for the Applicant: Mr Crick
Solicitors for the Applicant: Fair Work Ombudsman
The Respondent: In Person

THE COURT DECLARES THAT:

(1) Having regard to the admissions made in the Statement of Agreed Facts filed 17 April 2014 the Respondent contravened:

(a) section 45 of the *Fair Work Act 2009* (Cth) (FW Act) by:

- (i) failing to pay Priti Pandya (Pandya) the casually loaded rate of pay required by clause 10.5(a) of the Children's Services Award 2010 (Modern Award) in the course of five fortnightly pay periods (Pay Periods) between 13 August 2012 and 9 November 2012;
- (ii) failing to pay Ankita Mithsagar (Mithsagar) the casually loaded rate of pay required by clause 10.5(a) of the Modern Award in the course of the Pay Periods between 23 July 2012 and 31 August 2012;

(b) section 45 of the FW Act by:

- (i) failing to pay Kamalpreet Riyat (Riyat) an allowance required by clause 15.1 of the Modern Award of 1.91% of the standard rate of pay (as defined by the Modern Award) (broken shift allowance) for each day on which Riyat was required to work two shifts in one day (broken shift), on 53 occasions during the period between 10 September 2012 and 14 December 2012;
- (ii) failing to pay Mithsagar a broken shift allowance required by clause 15.1 of the Modern Award for each day on which Mithsagar was required to work a broken shift, on 117 occasions during the period between 14 May 2012 and 7 December 2012;
- (iii) failing to pay Nisha Rani (Rani) a broken shift allowance required by clause 15.1 of the Modern Award for each day on which Rani was required to work a broken shift, on 46 occasions during the period between 17 September 2012 and 21 December 2012;
- (iv) failing to pay Kirti Khare (Khare) a broken shift allowance required by clause 15.1 of the Modern Award for each day on which Khare was required to work a broken shift, for the

Pay Period ending on 27 July 2012, in respect of 3 broken shifts;

- (c) section 323(1) of the FW Act by:
- (i) failing to pay Pandya any wages or casual loading in respect of work performed during the Pay Periods ending 26 August 2012 and 23 November 2012;
 - (ii) failing to pay Riyat any wages or casual loading in respect of work performed during the Pay Periods ending 5 October 2012; 2 November 2012; 30 November 2012 and 14 December 2012;
 - (iii) failing to pay Mithsagar any wages or casual loading in respect of work performed during the Pay Periods ending 14 September 2012; 26 October 2012; 23 November 2012 and 7 December 2012, and the week ending 31 August 2012;
 - (iv) failing to pay Rani any wages in respect of work performed during the Pay Periods ending 28 September 2012; 26 October 2012; 23 November 2012; 7 December 2012 and 21 December 2012;
 - (v) failing to pay Khare any wages in respect of work performed during the Pay Periods ending 13 July 2012 and 10 August 2012;
- (d) Section 536(1) of the FW Act, by failing to issue pay slips to Pandya, Mithsagar, Khare, Riyat and Rani in respect of all wages paid;
- (e) Section 536(2)(b) of the FW Act, by failing to specify in the pay slips, where she did issue pay slips, the date on which the payment to which the pay slip relates was made as prescribed by regulation 3.46(1)(d) of the *Fair Work Regulations 2009* (Cth); and
- (f) Section 712(3) of the FW Act, by failing to comply with a notice to produce records or documents issued under section 712(1) of the FW Act by Fair Work Inspector Ashley Hurrell on 31 January 2013.

THE COURT ORDERS THAT:

- (2) Pursuant to section 546(1) of the FW Act the Respondent pay an aggregate pecuniary penalty in the amount of \$19,980 for the contraventions identified in paragraph 1(a) to 1(f) above.
- (3) Pursuant to section 546(3)(a) of the FW Act that the pecuniary penalties ordered by the Court be paid into the Consolidated Revenue Fund of the Commonwealth, within three months of the date of the order.
- (4) The Applicant have 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**

(P)MLG936 of 2013

FAIR WORK OMBUDSMAN
Applicant

And

VIVIEN MAHOMET
(TRADING AS ACADEMY FOR KIDS)
Respondent

REASONS FOR JUDGMENT

(Revised from transcript)

(As corrected)

Introduction

1. By an application filed on 28 June 2013 the Fair Work Ombudsman (“the applicant”) sought declarations and other orders against Vivien Mahomet trading as Academy for Kids (“the respondent”) for contraventions of the *Fair Work Act 2009* (Cth) (“the FW Act”) and the *Fair Work Regulations 2009* (“the FW Regulations”).
2. The respondent has now made full admissions, set out in the Statement of Agreed Facts filed on 17 April 2014 (“S.O.A.F.”), that she contravened the FW Act. The respondent admits to underpayments of \$16,369.27 for 5 casual child care workers between May 2012 until 21 December 2012 and to failing to issue payslips and comply with notices to produce.

3. As a result of those admissions the applicant and the respondent asked the Court to determine the appropriate penalties that should be imposed on the respondent for the admitted contraventions.

Procedural history

4. These proceedings were commenced by application and statement of claim filed on 27 June 2013.
5. The proceedings had a first Court date on 18 September 2013. On that date the applicant was represented and there was no appearance on behalf of the respondent. The Court made orders that *inter alia* provided for substituted service of the initiating application on the respondent, the filing of a response and the matter was adjourned to 15 November 2013.
6. On 11 November 2013 the applicant filed an application in a case for default judgment. However on 15 November 2013 the respondent appeared in person and the applicant did not press that application. Orders were made adjourning the application in a case to 17 February 2014.
7. On 17 February 2014 both parties appeared and the following orders were made:

“BY CONSENT IT IS ORDERED THAT:

1. *The application in a case filed 11 November 2013 be discontinued pursuant to Rule 13.01(2)(b) of the Federal Circuit Court Rules 2001 (“the Rules”).*
2. *The parties file and serve a statement of agreed facts by 17 April 2014.*
3. *The respondent file and serve any evidence in support of her position in relation to penalties by 9 May 2014.*
4. *The applicant file and serve any evidence in support of its position in relation to penalties by 30 May 2014.*
5. *The respondent file and serve any submissions by 20 June 2014.*
6. *The applicant file and serve any submissions by 11 July 2014.*

7. *The respondent file and serve any submissions in reply by 25 July 2014.*
 8. *The matter be listed for a penalty hearing on 15 September 2014 at the Federal Circuit Court of Australia in Melbourne commencing at 10.00 am.*
 9. *There be general liberty to apply for both parties.”*
8. The respondent has not, despite being given the opportunity, filed any evidence or submissions. However the respondent has signed the S.O.A.F which was filed on 17 April 2014.

Background

9. A helpful summary of the factual background to the agreed contraventions is set out in the S.O.A.F and with some adaption for the sake of brevity is as follows.
10. The respondent operated a child care business trading as Academy for Kids. The applicant has in the past received complaints of alleged breaches of the FW Act by the respondent. Between 2009 and 2012 there were 10 separate complaints of underpayments by different former employees of the respondent. Those complaints were different to those the subject of the admitted contraventions in the S.O.A.F. Relevantly for the purposes of these proceedings the respondent employed 5 employees in the childcare business between May 2012 and February 2013 all of whom subsequently made complaints to the applicant regarding their employment with the respondent.
11. The *Children’s Services Award 2010* (“the Award”) and the FW Act and the FW Regulations applied to those employees engaged by the respondent and there is evidence the respondent knew this.
12. As a result of further complaints made to the applicant an investigation into the respondent’s business began in January 2013. The respondent was served with a notice to produce, failed to comply and having concluded its investigation the applicant commenced these proceedings.
13. Importantly the respondent who still operates childcare services for before and after school care in Glen Waverley, Coburg, Reservoir and

Preston has only rectified the underpayments to the affected employees in the last two weeks.

The hearing

14. At the penalty hearing on 15 September 2014 the applicant, was represented by Mr Crick. The respondent appeared in person.

Material relied upon

15. At the penalty hearing the applicant relied on:
- a) minute of proposed orders (“A1”);
 - b) amended statement of claim filed 17 April 2014 (“A2”);
 - c) statement of agreed facts filed 17 April 2014 (S.O.A.F);
 - d) affidavit of Ms Verity Okno filed 30 May 2014 (“A4”); and
 - e) submissions filed 10 July 2014 (“A3”).
16. As noted earlier the respondent has not filed any affidavit material in these proceedings but has agreed to and signed the S.O.A.F.

Agreed Contraventions

17. In the S.O.A.F the respondent acknowledged:

“ADMITTED CONTRAVENTIONS

4. The Respondent admits to contravening:

(a) section 45 of the Fair Work Act 2009 (Cth) (FW Act) as a result of contravening:

(i) clause 10.5(a) of the Children’s Services Award 2010 (Modern Award), in that she failed to pay a casual loading to employees Priti Pandya (Pandya) and Ankita Mithsagar (Mithsagar) at least equal to 25% of the base rate of pay for all ordinary hours performed; and

(ii) clause 15.1 of the Modern Award, in that she failed to pay employees Kamalpreet Riyat (Riyat), Mithsagar, Nisha Rani (Rani) and Kirti Khare

(Khare) an amount at least equal to the broken shift allowance of 1.91% of the standard rate (as defined) for each day on which those employees were required to work two shifts in one day;

- (b) section 323(1) of the FW Act, in that the Respondent failed to pay employees Pandya, Riyat, Mithsagar, Rani and Khare their wages in full at least monthly;*
- (c) section 536(1) of the FW Act, in that the Respondent failed to issue payslips to the Employees within one working day of paying the Employees an amount in relation to the performance of work;*
- (d) section 536(2)(b) of the FW Act as a result of contravening regulation 3.46(1)(d) of the Fair Work Regulations 2009 (Cth) (FW Regulations), in that the Respondent failed to include on the payslips issued the date on which the payment to which the payslip related was made; and*
- (e) section 712(3) of the FW Act, in that the Respondent failed to comply with a notice to produce records or documents issued pursuant to section 712(1) of the FW Act by a Fair Work Inspector, by failing to produce records specified in the notice to produce,*

(collectively, the Admitted Contraventions).

UNDERPAYMENT

- 5. The Respondent admits that the Admitted Contraventions resulted in underpayments to the Employees in the aggregate amount of \$16,369.27.”*

The legal framework

- 18. These proceedings concern admitted contraventions of *inter alia* the FW Act and the FW Regulations (between May and December 2012). Those admitted contraventions are contraventions of civil remedy provisions of the FW Act.
- 19. The applicant is a Fair Work Inspector by reason of section 701 of the FW Act and a person with standing under section 539 of the FW Act to commence these proceedings.

20. Section 546 of the FW Act enables a Court to impose a penalty upon a person who has contravened a civil remedy provision.
21. The admitted contraventions include contraventions of ss.45, 323(1), 536(1), 536(2)(b) and 712(3) of the FW Act which are civil remedy provisions. In this case as the respondent is a natural person ss.539(2) and 546(2) of the FW Act prescribe the maximum penalties that may be imposed by reference to a particular number of penalty units.
22. Section 12 of the FW Act provides that “*penalty unit*” has the same meaning as in the *Crimes Act 1914* (Cth). Section 4AA of the *Crimes Act 1914* defined “*penalty unit*” to be \$110 at the time most of the admitted contraventions occurred.¹
23. However the admitted contraventions also include the failure to comply with the notice to produce. Those contraventions occurred in 2013 and after the value of a penalty unit was increased to \$170.² Accordingly, the maximum penalty that may be imposed upon the respondent for the admitted contraventions of ss.45 and 323(1) of the FW Act is 60 penalty units or \$6,600, s.536(1) and (2) of the FW Act is 30 penalty units or \$3,300 and s.712(3) of the FW Act is 60 penalty units or \$10,200.
24. Section 557(1) of the FW Act provides that where two or more breaches are committed by the same person, the Court should consider whether the breaches arose out of a course of conduct by the person, such as to be taken to constitute a single breach of the term.

Approach to penalty proceedings

25. The authorities establish that the appropriate penalties for the admitted contraventions are to be determined as follows.
26. The first step for the Court is to identify the separate contraventions involved. Each contravention of each separate obligation found in the FW Act is a separate contravention of a civil remedy provision for the purposes of s.539(2) of the FW Act.³ Section 557(1) of the FW Act

¹ see *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012* (Cth) which amended the value of a penalty unit for offences after 28 December 2012.

² see *Murrihy v Betezy.com.au Pty Ltd (No.2)* [2013] FCA 1146 at [6] and [28]

³ *Gibbs v The Mayor, Councillors and Citizens of City of Altona* (1992) 37 FRC 216 at 223 (*Gibbs*);

provides for treating multiple contraventions of the same provision, involved in a course of conduct, as a single contravention.

27. Second, to the extent that two or more contraventions have common elements, this should be taken into account in considering what an appropriate penalty is in all the circumstances for each contravention. The respondent should not be penalised more than once for the same conduct. The penalties imposed by the Court should be an appropriate response to what the respondent did.⁴ This task is distinct from and in addition to the final application of the “*totality principle*”.⁵
28. Third, the Court will consider an appropriate penalty to impose in respect of each contraventions, whether a single contravention, a course of conduct or group of contraventions, having regard to all the circumstances of the case.
29. Finally, having fixed an appropriate penalty for each contravention, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to the contravening conduct.⁶ The Court should apply an “*instinctive synthesis*” in making this assessment.⁷ This is known as the “*totality principle*”.
30. The factors relevant to a penalty for a contravention of the FW Act have been set out in a number of decisions of the Federal Court such that the factors which are to be considered in relation to penalty for the agreed contraventions in this matter are now well established. Those factors have been referred to in the submissions filed by the applicant.
31. The following factors identified by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14 have been described as a helpful list of considerations that are relevant to the determination of penalty in matters such as those presently before the Court:⁸

McIver v Healey [2008] FCA 425 at [16] (unreported, Federal Court of Australia, 7 April 2008, Marshall J) (McIver)

⁴ *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at 571 [46] (Graham J) (*Merringtons*)

⁵ *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 838 at [41]-[46] (Stone and Buchanan JJ) (*Mornington Inn*)

⁶ See *Kelly v Fitzpatrick* (2007) 166 IR 14 at [30] (Tracey J) (*Kelly*); *Merringtons*, supra at [23] (Gray J), [71] (Graham J) and [102] (Buchanan J)

⁷ *Merringtons*, supra at [27] (Gray J) and [55] and [78] (Graham J)

⁸ *Fair Work Ombudsman v Australian Shooting Academy Pty Ltd* [2011] FCA 1064 Logan J at [34]

- a) the nature and extent of the conduct which led to the breaches;
- b) the circumstances in which that relevant conduct took place;
- c) the nature and extent of any loss or damage sustained as a result of the breaches;
- d) whether there had been similar previous conduct by the respondent;
- e) whether the breaches were properly distinct or arose out of the one course of conduct;
- f) the size of the business enterprise involved;
- g) whether or not the breaches were deliberate;
- h) whether senior management was involved in the breaches;
- i) whether the party committing the breach had exhibited contrition;
- j) whether the party committing the breach had taken corrective action;
- k) whether the party committing the breach had cooperated with the enforcement authorities;
- l) the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and
- m) the need for specific and general deterrence.⁹

32. While the above factors are a “*convenient checklist*”, they do not restrict the matters which may be taken into account in the exercise of the Court’s discretion.¹⁰

⁹ *Kelly* at [14] per Tracey J

¹⁰ *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550, [11] per Gyles J; *Merringtons* at [91] per Buchanan J

Contraventions

33. I accept the applicant's submissions¹¹ and find that the identified contraventions arrived at after the application of the statutory course of conduct provisions and allowing for common elements are:

No.	Provision contravened	Description of contravention
1.	Section 45 of the FW Act (clause 10.5(a) of the Modern Award)	Failing to pay casual loading
2.	Section 45 of the FW Act (clause 15.1 of the Modern Award)	Failing to pay broken shift allowance
3.	Section 323(1) of the FW Act	Failing to pay wages in full
4.	Section 536(1) of the FW Act	Failure to issue payslip within 1 working day of paying employees
5.	Section 536(2)(b) of the FW Act	Failure to include specified information on payslips
6.	Section 712(3) of the FW Act	Failure to comply with Notice to Produce Records or Documents

Considerations

The nature and extent of the conduct; the circumstances in which the conduct took place; and the nature and extent of the loss

34. In written submissions the applicant contended:

“Circumstances in which the conduct took place and nature and extent of the conduct

53. The Applicant submits that the admitted contraventions represent a serious failure by the Respondent to afford five casual employees important minimum entitlements provided for in the Modern Award. In respect of more than a dozen pay periods collectively, Employees received no payment at all.¹² The purpose of the FW Act includes providing a safety net which ensures adequate minimum entitlements to

¹¹ see paras [32] to [42]

¹² Annexures A to E of the SOAF.

employees.¹³ These contraventions represent a failure by the Respondent to provide five award-reliant employees basic and important entitlements under the FW Act and Modern Award.

54. The five Employees were underpaid a total amount of \$16,369.27.¹⁴ The consequence of the conduct was that the Respondent had the benefit of the underpayment amounts.¹⁵

55. Further, the Respondent failed to comply with the NTP, issued on 31 January 2013, in the specified time frame (by 15 February 2013). It was not until 26 June 2013, the day foreshadowed by the Applicant as the day on which it intended to commence proceedings, that the Respondent provided some documents pertaining to the NTP.¹⁶ On 15 November 2013, the morning of the Applicant's default judgment hearing, the Respondent provided further pay and timesheet documents pertaining to the NTP. Further information was subsequently provided by the Respondent on 11 December 2013, some 10 months after the NTP was first issued.¹⁷

56. The Respondent's conduct in failing to comply with the NTP issued by the Applicant hindered the Applicant's ability to conduct a proper investigation of the complaints by each of the Employees in this matter. The non-provision of documents, including payslips, made it difficult for the Fair Work Inspector to determine the amounts owed to and paid to the Employees. A further result of the late provision of the information sought in the NTP was to cause the Applicant the need to seek leave to and subsequently amend its statement of claim, although it is noted that this took place with the consent of the Respondent. The Respondent's conduct undermines the statutory objectives and the principal object of the FW Act.

57. It is also submitted that the failure to provide payslips and to include the specified information on the payslips effectively further disempowers employees. In regard to the failure to provide payslips to the Employees, the Applicant refers to the comments of Judge Reithmuller in this Court in

¹³ Section 3 of the FW Act.

¹⁴ SOAF at [48].

¹⁵ Okno Affidavit at [9] and [10] and Annexure "VO-3".

¹⁶ SOAF at [115] and [117].

¹⁷ SOAF [126] to [129].

“Whilst the record keeping obligation with respect to pay slips only appears in Regulations, its central importance in industrial matters cannot be underestimated. Proper pay slips allow employees to understand how their pay is calculated and therefore easily obtain advice. Pay slips provide the most practical check on false record keeping and underpayments, and allow for genuine mistakes or misunderstandings to be quickly identified. Without proper pay slips employees are significantly disempowered, creating a structure in within which breaches of the industrial laws can easily be perpetrated.”

58. *The contraventions in this matter are serious as they represent the failure to pay employees their basic entitlements; an unwillingness and failure by the Respondent to comply with an NTP issued by the Applicant and a failure to provide employees with payslips in accordance with the requirements of the FW Act.*

Nature and extent of the loss

59. *This matter involves a total underpayment to five employees of \$16,369.27. This is a significant amount to the Employees, considering their relatively short periods of employment and the fact the underpayments represented a high proportion of the Employees' total entitlements:*

- (a) *Pandya worked for the Business for approximately 16 weeks and was underpaid \$735.30, representing 24% of her entitlement;*
- (b) *Riyat worked for the Business for approximately 14 weeks and was underpaid \$4,986.31, representing 56% of her entitlement;*
- (c) *Mithsagar worked for the Business for approximately 29 weeks and was underpaid \$5,485.72, representing 38% of her entitlement;*
- (d) *Rani worked for the Business for approximately 23 weeks and was underpaid \$4,609.25, representing 73% of her entitlement; and*

¹⁸ [2012] FMCA 258 at [67].

(e) *Khare worked for the Business for approximately 10 weeks and was underpaid \$552.69, representing 39% of her entitlement.*¹⁹

60. *These employees, reliant on the minimum wage as provided in the Modern Award were deprived and remain deprived of the above amounts, which are significant amounts to forgo over such short periods of time. The earliest underpayments were outstanding for a period of slightly greater than 2 years, notwithstanding that the Respondent formally admitted in the SOAF almost three months ago that the underpayments are owing.*

61. *The Applicant submits that the nature and extent of the loss suffered by the Employees is significant and warrants the imposition of a significant penalty because:*

(a) *it involves contravention of minimum standards of the most fundamental kind, which is the payment of wages and entitlements;*

(b) *the underpayment of \$16,369.27 is a significant sum, particularly when it is considered in the context of the affected Employees' short employment periods;*

(c) *the Respondent took an unreliable approach to the payment of employees' wages, with Riyat providing evidence of having to follow up the Respondent, sometimes on multiple occasions, regarding the payment of her wages;*²⁰

(d) *the Respondent has had the benefit of the underpayment; and*

(f) *the Respondent did not admit the extent of the underpayment without the initiation of proceedings and an application in a case for default judgment in this matter.*

62. *It is noted that as a result of the Underpayments:*²¹

(a) *Pandya has stopped applying for jobs, because she is scared of not getting paid;*

¹⁹ SOAF [Annexure A to E], SOAF at [2(f)] and [36] to [38].

²⁰ Okno Affidavit, [9] and Annexure "VO-3", page 19.

²¹ Okno Affidavit at [9], Annexure "VO-3" pages 18 to 20.

(b) *Riyat and her husband were obliged to use their savings to meet household expenses such as groceries and rent; and*

(c) *Mithsagar has been unable to find subsequent employment.*

63. *In addition to the monetary loss arising from the failure to rectify the underpayments, the Applicant contends that the Court should also consider loss and damage in view of the relevant statutory objective. The Respondent's conduct is "conduct...[which] undermines the utility and effectiveness of a fundamental object".²²*

64. *One of the principal objects of the FW Act is to provide a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions for all employees.²³ In order to enforce these terms, Fair Work Inspectors must be able to exercise their compliance powers effectively. The purposes of the powers conferred on Fair Work Inspectors (which include the power to issue notices to produce under section 712 of the FW Act) is to provide the Applicant with an effective means for investigating and enforcing compliance with minimum standards and industrial instruments. Where those mechanisms are ignored, the effective operation of the Fair Work regime is undermined. It is submitted that the Respondent should be penalised accordingly."*

Whether the breaches were deliberate; and whether senior management was involved in the breaches

35. In written submissions the applicant contended:

"Deliberateness of the breaches

76. *The Applicant submits that the payment practices of the Respondent were inconsistent, with Employees unable to predict when they would be paid. On occasion, payments appear to have been made to employees as a result of their request to be paid, or following intervention by the Applicant, rather than when their entitlement arose.²⁴*

²² *Secretary, Department of Health and Ageing v Pagasa Australia Pty Ltd* [2008] FCA 1545 at [56]; *Olsen v Sterling Crown Pty Ltd* [2008] FMCA 1392 at [51].

²³ FW Act, subsection 3(b).

²⁴ Okno Affidavit at page 19, Annexure "VO-3", SOAF [54] and [60].

77. *It was incumbent upon the Respondent to ensure it paid its employees in accordance with the law. In FWO v EA Fuller & Sons Pty Ltd²⁵, Driver J cited with approval the following extract from the decision of Chief Industrial Magistrate Hart in David Armstrong v VK Holdings Pty Ltd:*

“...An employer has an obligation to find out and provide the minimum lawful entitlements prescribed for its employees. When the employee is a young, vulnerable employee, such as a trainee, the obligation upon the employer is even greater”²⁶.

78. *In this regard, the Applicant notes that it has a record of the Respondent contacting the predecessor to the Fair Work Infoline on 2 August 2007, to ascertain which industrial instrument covered her in respect of her childcare business at that time which traded as “Schools Out”. The advisor provided the Respondent information regarding the applicable award and minimum rates of pay and conditions then provided by the relevant Australian Pay and Classification Scale and Australian Fair Pay and Conditions Standard. However, the Applicant has no record of the Respondent contacting it or its predecessor agencies at any time since that occasion to seek advice to ensure that she was acting lawfully and in compliance with Commonwealth workplace laws, or to determine the minimum entitlements she was required to pay her employees.²⁷*

79. *The Applicant also notes that the Respondent does not appear to have put into place processes or systems to address her non-compliance with relevant workplace obligations, in particular making full and regular payment of minimum rates of pay and providing payslips to employees, notwithstanding the significant number of complaints investigated by the Applicant.*

80. *In all of the circumstances, the Applicant seeks that the Court draw an inference from the conduct of the Respondent that the Respondent took deliberate action to avoid her responsibilities to her employees, or in the alternative that she was reckless as to those responsibilities. There is no evidence to suggest that the Respondent would have ceased*

²⁵ [2013] FCCA 5.

²⁶ Unreported, Chief Industrial Magistrates Court, Sydney, 28 November 1997.

²⁷ Okno Affidavit at [11] to [14].

underpaying the Employees or future employees were it not for these proceedings.

81. *In regard to the NTP, the Applicant notes that it was served personally on the Respondent.²⁸ The Respondent was provided with ample opportunity to provide the records sought by the FWO, and agreed with Inspector Hurrell that she would provide the documents required by 15 February 2013 in accordance with the NTP.²⁹ The Respondent was also provided with opportunities to explain her non-compliance with the NTP, and to rectify the underpayments to the Employees, prior to the proceedings being issued.³⁰ The Respondent was warned of the consequences of non-compliance.³¹ Despite her knowledge of the NTP, the Employees' complaints, the investigation and the underpayments, and the opportunities and warnings given, the Respondent did not comply with the NTP or rectify the underpayments.*

82. *The Applicant submits that the failure to comply with the NTP was deliberate or, at best, done by the Respondent with reckless disregard for her obligations.*

83. *The Applicant further submits that the Respondent was acting deliberately, or at best recklessly, by failing to provide employees with pay slips in respect of every pay period despite the Prior Complaints from employees.*

Involvement of senior management

84. *The Respondent was at the relevant times operating the Business as a sole trader, made the decisions regarding the day to day running of the Business, and was the sole point of contact with the staff at the four schools from which the Business operates.³²*

²⁸ SOAF [37] and [104].

²⁹ SOAF [105].

³⁰ SOAF [106], [111] to [115].

³¹ The NTPs issued on 15 January and 31 January 2013 (SOAF [101] and [104]) contained a notice, highlighted in bold, stating that “*Failure to comply with this Notice, without reasonable excuse, is a contravention of subsection 712(3) of the Act and may attract a maximum penalty of \$51,000 in respect of a body corporate or \$10,200 in respect of an individual*”. A warning relating to possible penalty proceedings were also contained in the determination of contravention letter dated 9 May 2013 (SOAF [113]), and the Applicant’s intention to commence proceedings was explicitly stated in correspondence dated 20 June 2013 and 26 June 2013 (SOAF [115] and [117]).

³² SOAF [58], Okno Affidavit [8] and Annexure “VO-2” at pages 12 to 16.

Whether the party committing the breach has exhibited contrition; and whether they have taken corrective action

36. In written submissions the applicant contended:

“Contrition, corrective action, cooperation with authorities

Cooperation with authorities

85. *The Respondent provided limited co-operation to the Office of the Applicant during the investigation period, being the period between 7 January 2013 and 26 June 2013. She did not participate in a recorded interview regarding the allegations and did not comply with the NTP. The Applicant attempted to contact the Respondent on at least 15 occasions during that time, including by sending not less than four emails and six letters, making six telephone calls (leaving detailed voicemail messages on five occasions and speaking to the Respondent once) and conducting a site visit. The majority of attempts were met with no response or reply from the Respondent.*³³

86. *Once proceedings were commenced, it was necessary for the Applicant to:*

- (a) obtain an order for substituted service, as service was difficult to effect on the Respondent;*³⁴
- (b) make an application for default judgment (notwithstanding that application was subsequently discontinued as a result of the Respondent’s admissions);*³⁵ *and*
- (c) file an amended statement of claim, to account for fresh information contained in pay records provided by the Respondent in November and December 2013 which ought properly to have been produced in compliance with the NTP (although it is noted that the amended statement of claim was filed by consent of the Respondent).*³⁶

³³ SOAF [100] to [118].

³⁴ Refer to the Application in a Case and supporting materials filed by the Applicant on 17 September 2013, and the Orders of Judge O’Sullivan, made in this proceeding on 18 September 2013.

³⁵ SOAF [126] and [134].

³⁶ SOAF [135].

87. *The Applicant acknowledges that the Respondent has demonstrated co-operation to enable this matter to proceed by statement of agreed facts, with the Respondent admitting to the alleged contraventions after these proceedings were commenced. The Respondent's admissions, and her consent to the filing of an amended statement of claim, have saved considerable costs to the public purse by avoiding the need for a fully contested hearing and providing a more efficient use of Court resources.*

Corrective action

88. *There is no evidence before the Court of any steps taken by the Respondent to prevent further contraventions.*

Contrition

89. *There is no evidence that the Respondent has made any apology to the Employees, or has expressed any regret or genuine remorse.*³⁷

Discounts for Contrition, Corrective Action and Co-operation

90. *Where respondents co-operate and make admissions early in the course of an investigation or soon after the commencement of proceedings, it is appropriate to allow a discount of penalty (in the criminal jurisdiction, the maximum discount for this factor is "sometimes thought to be 25%").*³⁸ *In considering the application of a penalty discount for co-operation and contrition, the statements of Stone and Buchanan JJ in Mornington Inn are apposite:*

"...a discount should not be available simply because a respondent has spared the community the cost of a contested trial. Rather, the benefit of such a discount should be reserved for cases where it can be fairly said that an admission of liability:

- (a) has indicated an acceptance of wrongdoing and a suitable and credible expression of regret; and/or*
- (b) has indicated a willingness to facilitate the course of justice."*

³⁷ See *Fair Work Ombudsman v Bound for Glory Enterprises & Anor* [2014] FCCA 432 per O'Sullivan J, where the Court noted at [99] the respondent's general lack of co-operation, which hamstrung the Applicant's ability to confirm the affected employees' entitlements, and prevented the Court finding that the respondents were genuinely remorseful.

³⁸ *Mornington Inn* at [75] per Stone and Buchanan JJ.

91. *Whilst the Respondent has made admissions and co-operated with the Applicant in the proceeding to a point, the Applicant holds concern about the extent to which the Respondent's co-operation answers the description of Stone and Buchanan JJ extracted above.*³⁹ *Specifically, and in addition to the matters already set out in paragraphs 0 and 0 above:*

(a) *the co-operation was not offered at the earliest opportunity, and came only after the Applicant was put to the expense of making an application for default judgment;*⁴⁰

92. *The Applicant submits that a discount of 10% on penalty is appropriate in this case.*⁴¹ *The Applicant has incorporated that discount into the proposed penalty ranges set out in Attachment A."*

The size of the business enterprise involved

37. In written submissions the applicant contended:

*"70. The Respondent has not provided any evidence relating to the size and financial circumstances of the Respondent. However, the Applicant accepts that the Respondent is a sole trader, operating as an individual with registered business names.*⁴²

71. Should the Respondent seek to put submissions before the Court regarding her financial position, we submit that the material must be weighed against the objective seriousness and deliberateness of the contravening conduct, and the need to impose a sufficiently meaningful and deterrent penalty.

*72. The Courts have previously found that sanctions should be imposed on a meaningful level regardless of the employer's size or financial position. The Applicant relies on Kelly v Fitzpatrick*⁴³, where Tracey J stated:

³⁹Noting the observations of Judge Jarrett in *Fair Work Ombudsman v VS Investment Group Pty Ltd & Anor* [2013] FCCA 208 at [38] to [45].

⁴⁰SOAF [121] to [126].

⁴¹ Cf. *Fair Work Ombudsman v Australia China Trading Investment Consultancy Group Pty Ltd & Anor* [2014] FCCA 407 at [76] to [78]; [93].

⁴² Okno Affidavit at [6] and Annexure "VO-1"

⁴³ [2007] FCA 1080 at [28].

“No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees, rightly, have an expectation that this will occur. When it does not it will, normally, be necessary to mark the failure by imposing an appropriate monetary sanction. Such a sanction “*must be imposed at a meaningful level*”: see *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd* [2001] ATPR 41-815 at [13].”

73. *Further, the Applicant refers to Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor*⁴⁴ and the authorities referred to in those paragraphs, where Simpson FM (as he then was) stated:

“In *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 at paras 27 to 29 it was said:

“Employers must not be left under the impression that because of their size or financial difficulty that they are able to breach an award. Obligations by employers for adherence to industrial arise regardless of their size. Such a factor should be limited relevance to a Court’s consideration of penalty.”

Notwithstanding financial hardship that an employer may be experiencing, in *Lynch v Buckley Sawmills Pty Ltd* [1984] FCA 306; (1984) 3 FCR 503, 508, Keely J said:

“In this connection it is important that the respondent – and other employers bound by the award or by other awards under the Act – understand the importance of complying with an award and it follows that any decision taken by them which is regarded as affecting their obligation to comply with particular provisions of the award or the award generally should only be taken after careful consideration. They must not be let under the impression that in times of financial difficulty they can breach an award made under the Act either with impunity or in the belief that no substantial penalty will be imposed in respect of a breach found by a court to have been committed.”

⁴⁴ [2009] FMCA at [27] to [28].

74. *The Applicant also relies on the decision in FWO v Bosen Pty Ltd⁴⁵ where the Court stated:*

“There is a need to send a message to the community at large, and small employers particularly, that the correct entitlements for employees must be paid and that steps must be taken by employers (of all sizes) to ascertain and comply with minimum entitlements (as opposed to ignoring those obligations). Compliance should be seen as the bastion of the large employer, with human resources staff and advisory consultants (accountants, consultants, lawyers) behind them.”

75. *On that basis, the Applicant submits that regardless of the Respondent’s financial circumstances and size, of which there is limited or no evidence before the Court, the Court should mark its disapproval of the conduct in question and set a significant penalty which serves as a warning to others.⁴⁶”*

Whether the breaches were properly distinct or arose over the one course of conduct

38. The issues relevant to this factor have already been addressed.

The need to ensure compliance with minimum standards; and the need for general and specific deterrence

39. The applicant submitted:

“Ensuring compliance with minimum standards

93. *The Applicant submits that ensuring compliance with minimum standards is a very important consideration in this case. As set out above, one of the objects of the FW Act has been the maintenance of an effective safety net of minimum terms and conditions, and effective enforcement mechanisms. Contravention of these fundamental entitlements and mechanisms undermines the workplace relations regime as a whole and displays a disregard for statutory obligations.*

94. *One purpose of Australian workplace laws is to provide a safety net which ensures that employees are paid adequate minimum entitlements particularly to those who are in*

⁴⁵ [2011] VMC 81 at[51].

⁴⁶ *Kelly* at [28].

vulnerable or in low income roles. The laws also ensure that there is an even playing field for employers regarding employment costs.

95. *Regarding the failure to pay minimum entitlements, the Applicant submits that the Court should have regard to the Fair Work Ombudsman v A Dalley Holdings Pty Ltd [2013] FCA 509 where the Federal Court stated at [19]:*

“In imposing a penalty, it is imperative for the Court to impose a penalty that reinforces the fundamental importance of compliance with the safety net of entitlements specified by the National Employment Standards and the general protection provisions of the FW Act.”

96. *It is further submitted that the Court should take the failure to comply with the NTP seriously. In the Fair Work Ombudsman v VS Investment Group Pty Ltd⁴⁷, Judge Jarrett held (in ordering a penalty of 50% of the applicable maximum):*

“The failure to comply with a notice properly issued by the applicant in the course of its investigations and the discharge of its statutory functions is serious. Recipients of such notices should be left under no misapprehension about their obligations to comply with those notices.”

97. *The FWO submits that penalties should be imposed at a meaningful level to ensure compliance with these minimum standards. Particular regard should be had to the number of occasions that the Respondent has admitted to contravening NTPs issued by the Applicant in whole or in part in the course of the Prior Complaints.⁴⁸*

General Deterrence

98. *It is well-established that “the need for specific and general deterrence” is a factor that is relevant to the imposition of a penalty under the FW Act. See for example, Mowbray FM in Pangaea⁴⁹.*

99. *The role of general deterrence in determining the appropriate penalty is illustrated by the comments of Lander*

⁴⁷ [2013] FCCA 208 at [51].

⁴⁸ SOAF at [58], [65], [66], [70], [72] and [85].

⁴⁹ *Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar* [2007] FMCA 7 at [26]-[59].

J in Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543, [93]:

“In regard to general deterrence, it is assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend: *Yardley v Betts* (1979) 22 SASR 108. The penalty therefore should be of a kind that it would be likely to act as a deterrent in preventing similar contraventions by like minded persons or organisations. If the penalty does not demonstrate an appropriate assessment of the seriousness of the offending, the penalty will not operate to deter others from contravening the section. However, the penalty should not be such as to crush the person upon whom the penalty is imposed or used to make that person a scapegoat. In some cases, general deterrence will be the paramount factor in fixing the penalty: *R v Thompson* (1975) 11 SASR 217.”

100. *Employers should be in no doubt that they have a positive obligation to ensure compliance with the obligations they owe to their employees under the law. Recently, in Fair Work Ombudsman v Maclean Bay Pty Ltd (No 2),⁵⁰ Marshall J observed:*

“It is important to ensure that the protections provided by the [FW Act] to employees are real and effective and properly enforced. The need for general deterrence cannot be understated. Rights are a mere shell unless they are respected.”

101. *It is submitted that when imposing penalties, the Court should have regard to the “message sent” in the imposition of penalties, to employers and the community generally, to make it clear that employers must provide employees with the correct entitlements; take steps to respond to correspondence and notices issued by Government regulators such as the Applicant and provide each employee with a payslip every pay. The penalties in this case should be imposed on a meaningful level so as to deter other employers from committing similar contraventions.*

Specific deterrence

⁵⁰ [2012] FCA 557 at [29].

102. *The need for specific deterrence is significant in this case as the Respondent continues to operate the Business.*⁵¹

103. *The Applicant relies on the following principles to support the submission that the penalty imposed on the Respondent should be significant to ensure the specific deterrence effect is high:*

*Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor:*⁵²

“As there has been no demonstration of contrition or remorse on behalf of either respondent the need for specific deterrence is high.”

*Ponzio v B & P Caelli Constructions Pty Ltd:*⁵³

“There are three purposes at least for imposing a penalty: punishment; deterrence; and rehabilitation. The punishment must be proportionate to the offence and in accordance with the prevailing standards of punishment: R v Hunter (1984) 36 SARC 101 at 103. Therefore the circumstances of the offence or contravention are especially important. The penalty must recognise the need for deterrence, both personal and general. In regard to personal deterrence, an assessment must be made of the risk of re-offending.”

104. *The Respondent should be left in no doubt that failing to comply with minimum obligations will not be tolerated by the Court. The Applicant submits that the penalties in this case need to be imposed at a sufficient quantum to make the contravening conduct unprofitable and to make the prospect of future contraventions commercially undesirable.”*

40. The FW Act represents a safety net of employment conditions. The Court has a responsibility to ensure that those conditions are observed and industrial instruments are enforced.
41. In *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543, Lander J said the following with respect to the role of general deterrence:

⁵¹ Okno Affidavit [6] to [8], Annexure “VO-1” at pages 5 to 11.

⁵² [2009] FMCA 38 at [41]; citing *Australian Ophthalmic Supplies Pty Ltd* [17]; *Fryer v Yoga Tandoori House Pty Limited* [2008] FMCA 288 [35].

⁵³ [2007] FCAFC 65 at [93]

“In regard to general deterrence, it is assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend: Yardley v Betts (1979) 22 SASR 108. The penalty therefore should be of a kind that would be likely to act as a deterrent in preventing similar contraventions by like minded persons or organisations. If the penalty does not demonstrate an appropriate assessment of this seriousness of the offending, the penalty will not operate to deter others from contravening the section. However, the penalty should not be such as to crush the person upon whom the penalty is imposed or used to make that person a scapegoat. In some cases, general deterrence will be the paramount factor in fixing the penalty: R v Thompson (1975) 11 SASR 217.”⁵⁴

42. Similarly, in *Community and Public Sector Union v Telstra Corporation Ltd* (2001) 108 IR 228, Finkelstein J said:

“even if there be no need for specific deterrence, there will be occasions when general deterrence must take priority, and in that case a penalty should be imposed to mark the law’s disapproval of the conduct in question, and to act as a warning to others not to engage in similar conduct: R v Thompson (1975) 11 SASR 217.”⁵⁵

Conclusion

43. Given the decision in *Australian Competition and Consumer Commissioner v Energy Australia Pty Ltd* [2014] FCA 336. I have taken into account the submissions made on behalf of the applicant both as to penalty and the appropriate orders. In the circumstances I accept the applicant’s submissions⁵⁶. There is no evidence before the Court from the respondent as to her financial position and no evidence as to whether any penalty would affect the viability of the business. I will however allow up to three months for the payment of the penalty as the applicant didn’t oppose this request made by the respondent today.
44. There is no evidence that the respondent is remorseful or contrite nor is there any evidence the respondent has taken steps to mitigate the seriousness of the conduct. The underpayments have only very recently

⁵⁴ (2007) 158 FCR 543 at pp.559-560

⁵⁵ (2001) 108 IR 228 at pp.231-232

⁵⁶ In particular para 108 – 111 of applicant’s submissions.

been rectified and the respondent, despite being given the opportunity has not filed any material for this hearing. The contraventions were committed by the person (the respondent) directly responsible for compliance with the FW Act and someone who has previously come to the applicant's attention. The only factor which mitigates in favour of a discount to the respondent is co-operation (in the sense that the respondent has made full admissions, signed the S.O.A.F and rectified the underpayments albeit at the door of the Court).

45. The general approach of the Court in determining an appropriate penalty is to consider what might be appropriate with respect to each of the contraventions and then to apply what is referred to as the '*totality principle*'. The Court needs to consider all of the circumstances of the matter and the issue of proportionality in determining what is an appropriate penalty.
46. Therefore, and allowing for a discount of 10% for co-operation, the appropriate penalties for the contraventions identified at paragraph 33 are:
 - a) the casual loading contravention a penalty of \$594;
 - b) the broken shift loading contravention a penalty of \$3,564;
 - c) the failure to pay wages in full contravention a penalty of 5,049;
 - d) the contravention concerning timing of pay slips a penalty of \$1,188;
 - e) the contravention concerning content of pay slips a penalty of \$1,782; and
 - f) the contravention concerning the notice to produce a penalty of \$7,803.
47. The maximum possible penalty applicable to the admitted contraventions is \$36,600. A total penalty of \$19,980 is a proper reflection of the totality of the wrong doing.
48. Therefore, as the Court:

- a) is directed by the relevant authorities to consider what is appropriate in all the circumstances of this case;⁵⁷
- b) in its discretion in relation to penalty is not fettered by a checklist of mandatory criteria;⁵⁸
- c) notes the parties have filed the S.O.A.F;
- d) is satisfied the individual and aggregate penalties for the whole of the contravening conduct are appropriate;⁵⁹ and
- e) accepts there is both public interest and utility in making declarations in relation to the admitted contraventions to mark the Court's disapproval of the contravening conduct.

there will be orders as set out at the beginning of these reasons for decision.

I certify that the preceding forty eight (48) paragraphs are a true copy of the reasons for judgment of Judge O'Sullivan

Associate:

Date: 15 September 2014

⁵⁷ see *Construction Forestry Mining & Energy Union v Coal & Allied Operations Pty Ltd* (No.2) (1999) 94 IR 231

⁵⁸ see *Australian Ophthalmic Supplies Pty Limited v McAlary-Smith* (2008) 165 FCR 560

⁵⁹ *Ibid*

Corrections

1. In paragraph 44 the word not was omitted.

IN THE FEDERAL CIRCUIT COURT
OF AUSTRALIA
REGISTRY: MELBOURNE
FAIR WORK DIVISION

File number: MLG936/2013

FAIR WORK OMBUDSMAN

Applicant

VIVIEN MAHOMET
(T/AS ACADEMY FOR KIDS)

Respondent

STATEMENT OF AGREED FACTS

1. This Statement of Agreed Facts is made by the Applicant and the Respondent in these proceedings for the purposes of section 191 of the *Evidence Act 1995* (Cth).

THE APPLICATION

2. On 27 June 2013, the Applicant filed an Application and Statement of Claim in this Court against the Respondent, in respect of a total underpayment of **\$15,450.62** by her to the following employees:
 - (a) Priti Pandya (**Pandya**);
 - (b) Kamalpreet Riyat (**Riyat**);
 - (c) Ankita Mithsagar (**Mithsagar**);
 - (d) Nisha Rani (**Rani**); and
 - (e) Kirti Khare (**Khare**),(collectively, the **Employees**).

Filed on behalf of	The Applicant & the Respondent		
Prepared by	Daniel Crick	Lawyer's code	
Name of law firm	Fair Work Ombudsman		
Address for service in Australia	Level 5, 414 La Trobe Street, Melbourne		
	State	Victoria	Postcode 3000
Email	daniel.crick@fwo.gov.au		
Tel	03 9954 2942	Fax	03 6216 0321
		Attention	Daniel Crick

3. On 15 April 2014, the Applicant filed an Amended Statement of Claim in this Court against the Respondent (**Amended Statement of Claim**), alleging that the total underpayment by the Respondent to the Employees was **\$16,369.27**.

ADMITTED CONTRAVENTIONS

4. The Respondent admits to contravening:
- (a) section 45 of the *Fair Work Act 2009* (Cth) (**FW Act**) as a result of contravening:
 - (i) clause 10.5(a) of the *Children's Services Award 2010* (**Modern Award**), in that she failed to pay a casual loading to employees Priti Pandya (**Pandya**) and Ankita Mithsagar (**Mithsagar**) at least equal to 25% of the base rate of pay for all ordinary hours performed; and
 - (ii) clause 15.1 of the Modern Award, in that she failed to pay employees Kamalpreet Riyat (**Riyat**), Mithsagar, Nisha Rani (**Rani**) and Kirti Khare (**Khare**) an amount at least equal to the broken shift allowance of 1.91% of the standard rate (as defined) for each day on which those employees were required to work two shifts in one day;
 - (b) section 323(1) of the FW Act, in that the Respondent failed to pay employees Pandya, Riyat, Mithsagar, Rani and Khare their wages in full at least monthly;
 - (c) section 536(1) of the FW Act, in that the Respondent failed to issue payslips to the Employees within one working day of paying the Employees an amount in relation to the performance of work;
 - (d) section 536(2)(b) of the FW Act as a result of contravening regulation 3.46(1)(d) of the *Fair Work Regulations 2009* (Cth) (**FW Regulations**), in that the Respondent failed to include on the payslips issued the date on which the payment to which the payslip related was made; and
 - (e) section 712(3) of the FW Act, in that the Respondent failed to comply with a notice to produce records or documents issued pursuant to section 712(1) of the FW Act by a Fair Work Inspector, by failing to produce records specified in the notice to produce,
- (collectively, the **Admitted Contraventions**).

UNDERPAYMENT

5. The Respondent admits that the Admitted Contraventions resulted in underpayments to the Employees in the aggregate amount of **\$16,369.27**.

PARTIES AND EMPLOYEES

The Applicant

6. The Applicant is and was at all material times:
- (a) a statutory appointee of the Commonwealth appointed by the Governor General by written instrument pursuant to Division 2 of Part 5-2 of the *Fair Work Act 2009* (Cth) (**FW Act**);
 - (b) a Fair Work Inspector pursuant to section 701 of the FW Act; and
 - (c) a person with standing to bring these proceedings in accordance with section 539(2) of the FW Act.

The Respondent

7. The Respondent at all material times:
- (a) was a natural person;
 - (b) operated as a sole trader in the State of Victoria;
 - (c) carried on a business involving the provision of before and after school and holiday care for children (**Business**);
 - (d) traded since 24 September 2007 under the name "Academy for Kids" (ABN 58 730 261 989);
 - (e) was a national system employer within the meaning of section 30D of the FW Act;
 - (f) was the employer of:
 - (i) Pandya from about 31 July 2012 until about 23 November 2012;
 - (ii) Riyat from about 10 September 2012 until about 14 December 2012;
 - (iii) Mithsagar from about 18 May 2012 until about 7 December 2012;
 - (iv) Rani from about 16 July 2012 until about 21 December 2012; and
 - (v) Khare from about 1 June 2012 until about 10 August 2012.

The Employees

8. At all material times the Employees:
- (a) were employed by the Respondent;
 - (b) were employed on a casual basis;
 - (c) held a Certificate Level III in Children's Services (**Qualifications**);

- (d) were employed wholly or principally to perform, *inter alia*, and did so perform unsupervised by the Respondent, the following duties:
 - (i) supervising children in the care of the Business;
 - (ii) implementing activities for children in the care of the Business;
 - (iii) preparing and providing food to children in the care of the Business; and
 - (iv) general cleaning duties,(collectively, **Duties**).
- 9. The Respondent and Riyat agreed that the Respondent would pay Riyat \$25.00 per hour for all work performed.
- 10. The Respondent and Rani agreed that the Respondent would pay Rani \$23.23 per hour for all work performed.
- 11. The parties agree to the information contained in Annexures A to E of the Amended Statement of Claim, which describes (among other things):
 - (a) the total hours worked by the Employees, including the number of broken shifts;
 - (b) the base rate, casual loading, broken shift allowance and total amounts payable to the Employees;
 - (c) the amounts paid and the date of payments made by the Respondent; and
 - (d) the amount of underpayments by the Respondent to the Employees.

THE APPLICABLE INDUSTRIAL INSTRUMENTS AND LEGISLATIVE PROVISIONS

National Employment Standards

- 12. At all material times the Respondent was bound in relation to the employment of the Employees by the National Employment Standards (**NES**), and was prohibited from contravening a provision of the NES.

Transitional Award

- 13. The *Children's Services (Victoria) Award 2005* was the appropriate instrument for the purposes of calculating the Employees' rates of pay pursuant to the transitional arrangements set out in Schedule A of the Modern Award.

Modern Award

- 14. At all material times the Respondent was bound in relation to the Employees' employment by the Modern Award, and was prohibited from contravening a term of the Modern Award.
- 15. By reason of the:

(a) Qualifications held by the Employees; and

(b) Duties performed by the Employees,

the Employees were properly classified as level 2 Children's Services Employees under the Modern Award.

CONTRAVENTIONS BY THE RESPONDENT

Wages contraventions

Entitlements

16. At all material times the Respondent was required by section 323(1) of the FW Act to pay the Employees their wages in full at least monthly.
17. At all material times the Respondent was required to pay the Employees no less than the base rates of pay provided for by clause A.2.5 of Schedule A of the Modern Award.
18. In addition to their base rates of pay, the Respondent was required by clause 10.5(a) of the Modern Award to pay the Employees, as casual employees, a casual loading of 25% of their base rates of pay for all ordinary hours performed.
19. The Respondent was required to pay Pandya, Mithsagar and Khare the following rates of pay for all work performed:

Period	Base rate	Casual loading	Total rate
1 January 2012 until 13 July 2012 (being immediately before the first full pay period on or after 1 July 2012)	\$15.53	\$3.89	\$19.41
14 July 2012 (being the first full pay period on or after 1 July 2012) until 31 December 2012	\$16.32	\$4.08	\$20.41

20. The Respondent was required by section 542 of the FW Act to pay Riyat \$25.00 per hour for all work performed, which was an agreed rate of pay enforceable as a safety net contractual entitlement.
21. The Respondent was required by section 542 of the FW Act to pay Rani \$23.23 per hour for all work performed, which was an agreed rate of pay enforceable as a safety net contractual entitlement.
22. The Respondent was required by clause 10.5(c) of the Modern Award to pay the Employees a minimum of two hours pay for each engagement at the applicable rate of pay.

Non-payment contraventions

23. The Employees were required to, and did, complete timesheets on a fortnightly basis. Each fortnight represented a "pay period".
24. The Respondent failed to pay the following Employees any wages in respect of work performed during the following periods:
 - (a) Pandya – pay periods ending 26 October 2012 and 23 November 2012;
 - (b) Riyat – pay periods ending 5 October 2012, 2 November 2012, 30 November 2012 and 14 December 2012;
 - (c) Mithsagar – pay periods ending 14 September 2012, 26 October 2012, 23 November 2012 and 7 December 2012, and the week ending 31 August 2012;
 - (d) Rani – pay periods ending 28 September 2012, 26 October 2012, 23 November 2012, 7 December 2012 and 21 December 2012;
 - (e) Khare – pay periods ending 13 July 2012 and 10 August 2012.
25. By failing to pay the Employees any wages in respect of work performed during the specified periods, the Respondent contravened section 323(1) of the FW Act.
26. The Respondent's failure to pay the Employees any wages in accordance with section 323(1) of the FW Act resulted in the Employees not being paid an aggregate amount of \$13,966.40 as follows:
 - (a) Pandya – \$775.43;
 - (b) Riyat – \$4,423.50;
 - (c) Mithsagar – \$4,154.23;
 - (d) Rani – \$4,077.12; and
 - (e) Khare – \$536.12.

Underpayment contraventions

27. When the Respondent paid Pandya and Mithsagar wages in respect of work performed, the Respondent paid a rate of pay which was:
 - (a) more than the base rate of pay required by clause 14.1 of the Modern Award and clause A.2.5 of Schedule A of the Modern Award; and
 - (b) less than the casually loaded rate of pay required by clause 10.5(a) of the Modern Award.
28. By failing to pay Pandya and Mithsagar rates of pay which satisfied their entitlement to casual loading under the Modern Award, the Respondent contravened clause 10.5(a) of the Modern Award and therefore section 45 of the FW Act.

29. The Respondent's failure to pay casual loading in accordance with clause 10.5(a) of the Modern Award resulted in underpayments to Pandya and Mithsagar in the aggregate amount of \$40.87 as follows:
- (a) Pandya – \$0.56; and
 - (b) Mithsagar – \$40.31.

Broken shift allowance contraventions

30. At all material times the Respondent was required by clause 15.1 of the Modern Award to pay the Employees an allowance of 1.91% of the standard rate (as defined) for each day on which the Employees were required to work two shifts in one day (**Broken Shifts**).
31. Between 14 July 2012 and 31 December 2012 Riyat, Mithsagar, Rani and Khare were required to and did work Broken Shifts.
32. The Respondent was required to pay Riyat, Mithsagar, Rani and Khare the following amounts in respect of each day they worked Broken Shifts:
- (a) \$13.11 in the period between 18 May 2012 and 13 July 2012; and
 - (b) \$13.49 in the period between 14 July 2012 and 31 December 2012.
33. The Respondent failed to pay Riyat, Mithsagar, Rani and Khare an amount at least equal to the broken shift allowance required by clause 15.1 of the Modern Award.
34. By failing to pay a broken shift allowance the Respondent contravened clause 15.1 of the Modern Award.
35. The Respondent's failure to pay a broken shift allowance resulted in underpayments to Riyat, Mithsagar, Rani and Khare in the aggregate amount of \$2,942.57 as follows:
- (a) Riyat - \$714.81;
 - (b) Mithsagar - \$1,566.92;
 - (c) Rani - \$620.38; and
 - (d) Khare - \$40.46.

Notice to produce

36. At all material times the Respondent was required by section 712(3) of the FW Act to comply with a notice to produce issued pursuant to section 712(1) of the FW Act by a Fair Work Inspector.
37. On 31 January 2013 at approximately 8.00 am, Fair Work Inspector Ashley Hurrell (**FWI Hurrell**) personally served a written notice to produce on the Respondent

(Notice) by giving it to her during a site visit to the premises of St Paul's Primary School in Coburg in the State of Victoria.

38. FWI Hurrell is a Fair Work Inspector appointed in accordance with section 700 of the FW Act.
39. The Notice required the Respondent to produce the records requested by the Notice to the Melbourne offices of the Applicant by 15 February 2013.
40. The Respondent did not produce records requested by the Notice to the Applicant by 15 February 2013.
41. By failing to comply with the Notice the Respondent has contravened section 712(3) of the FW Act.

Payslips

42. At all material times the Respondent was required:
 - (a) by section 536(1) of the FW Act to issue a payslip to the Employees within one working day of paying to the Employees an amount in relation to the performance of work; and
 - (b) by section 536(2)(b) of the FW Act, to include in the pay slip the date on which the payment to which the payslip relates was made as prescribed by regulation 3.46(1)(d) of the FW Regulations.
43. The Respondent:
 - (a) failed to issue payslips to all Employees in respect of all wages paid; and
 - (b) where she issued payslips, failed to include on the payslips issued the date on which the payment to which the payslip relates was made.
44. By failing to issue payslips to Employees within one working day of paying to the Employees an amount in relation to the performance of work, the Respondent contravened section 536(1) of the FW Act.
45. By failing to include on the payslips which were issued the date on which the payment to which the payslip relates was made, the Respondent contravened section 536(2)(b) of the FW Act by reason of contravening regulation 3.46(1)(d) of the FW Regulations.

TOTAL UNDERPAYMENTS

46. The Respondent was required to pay:
 - (a) Pandya, in respect of work performed between 28 July 2012 and 23 November 2012 (**Pandya Claim Period**) – \$3,081.29 in respect of ordinary hours worked;
 - (b) Riyat, in respect of work performed between 8 September 2012 and 14 December 2012 (**Riyat Claim Period**) – \$8,888.31, being comprised of:

- (i) \$8,173.50 in respect of ordinary hours worked;
 - (ii) \$714.81 in respect of broken shift allowances;
- (c) Mithsagar, in respect of work performed between 12 May 2012 and 7 December 2012 (**Mithsagar Claim Period**) – \$14,352.73, being comprised of:
- (i) \$12,785.81 in respect of ordinary hours worked;
 - (ii) \$1,566.92 in respect of broken shift allowances;
- (d) Rani, in respect of work performed between 15 September 2012 and 21 December 2012 (**Rani Claim Period**) – \$6,300.38, being comprised of:
- (i) \$5,680.00 in respect of ordinary hours worked;
 - (ii) \$620.38 in respect of broken shift allowances;
- (e) Khare, in respect of work performed between 9 June 2012 and 10 August 2012 (**Khare Claim Period**) – \$1,428.99, being comprised of:
- (i) \$1,388.53 in respect of ordinary hours worked;
 - (ii) \$40.46 in respect of broken shift allowances.
47. The Respondent paid:
- (a) Pandya in respect of work performed during the Pandya Claim Period – \$2,346.00;
 - (b) Riyat in respect of work performed during the Riyat Claim Period – \$3,902.00;
 - (c) Mithsagar in respect of work performed during the Mithsagar Claim Period – \$8,867.01;
 - (d) Rani in respect of work performed during the Rani Claim Period – \$1,691.13; and
 - (e) Khare in respect of work performed during the Khare Claim Period – \$876.30.
48. The Respondent underpaid the Employees a total of **\$16,369.27** (gross) between 9 June 2012 and 21 December 2012 (**Total Underpayment**).
49. The Total Underpayment is comprised of the following underpayments to each of the Employees:
- (a) Pandya – \$735.30;
 - (b) Riyat – \$4,986.31;
 - (c) Mithsagar – \$5,485.72;
 - (d) Rani – \$4,609.25; and
 - (e) Khare – \$552.69.

RECTIFICATION OF THE UNDERPAYMENT AMOUNTS

50. There has been no rectification of any of the Total Underpayment amount as at the date of filing this Statement of Agreed Facts.

PRIOR COMPLIANCE HISTORY

51. The Applicant has received multiple complaints from former employees of the Respondent.

Camilleri Complaint

52. On 20 October 2009, the Applicant received a complaint from Joanne Camilleri, a former employee of the Respondent (**Camilleri Complaint**).
53. The Camilleri Complaint related to alleged failures by the Respondent to pay wages for time worked, issue payslips, pay accrued annual leave and make compulsory superannuation contributions.
54. The matter was finalised by the Applicant on 12 January 2010, after the Respondent agreed to pay, and did pay, Ms Camilleri the amount of \$216.67 in unpaid wages for hours worked.

A Monello, R Monello, Dowsey and Siracusa Complaints

55. On 23 December 2009, the Applicant received complaints from:
- (a) Anna Monello (**A Monello Complaint**);
 - (b) Rosa Monello (**R Monello Complaint**);
 - (c) Wendy Siracusa (**Siracusa Complaint**); and
 - (d) Karina Dowsey (**Dowsey Complaint**),
- each a former employee of the Respondent (**the December 2009 Complaints**).
56. The December 2009 Complaints related to alleged failures by the Respondent to pay wages for time worked, for public holidays not worked, for accrued but unpaid annual leave, and for failing to issue payslips.
57. On 7 January 2010, Ms Siracusa wrote to the Applicant advising that she wished to withdraw her complaint. Accordingly, the Applicant took no further action in relation to the Siracusa Complaint.
58. On 5 May 2010, the Applicant issued a Notice to Produce Documents in accordance with section 712 of the FW Act (**Notice To Produce Documents**) to the Respondent in respect of Ms A Monello, Ms R Monello and Ms Dowsey. The Respondent did not comply with the Notice to Produce Documents in accordance with the timeframe specified, but did subsequently produce documents to the Applicant.

59. The Applicant wrote to the Respondent on 27 July 2010 to inform her of its determination that the Respondent failed to pay to Ms A Monello, Ms R Monello and Ms Dowsey accrued but untaken annual leave upon termination of employment and wages in respect of a public holiday in contravention of Commonwealth workplace laws.
60. The December 2009 Complaints (other than the Siracusa Complaint) were finalised by the Applicant on 19 August 2010, after the Respondent agreed to pay, and did pay:
- (a) Ms A Monello the amount of \$271.10;
 - (b) Ms R Monello the amount of \$253.94; and
 - (c) Ms Dowsey the amount of \$271.10,
- in respect of public holiday work and accrued but untaken annual leave upon termination of their employment.

Pati, Colombage and Wilkinson Complaints

61. On 18 October 2010, the Applicant received a complaint from Santo Pati, a former employee of the Respondent (**Pati Complaint**).
62. The Pati Complaint related to alleged failures by the Respondent to pay wages for time worked and to issue payslips.
63. From 18 October 2010 to 6 December 2010, the Applicant attempted to resolve the Pati Complaint by assisted voluntary resolution. The Pati Complaint could not be resolved, and was referred to investigation.
64. From 6 December 2010 until 8 December 2011, the Applicant undertook an investigation into the Pati complaint.
65. On 18 February 2011, the Applicant issued a Notice to Produce Documents in respect of the Pati Complaint. The Respondent did not comply.
66. On 24 March 2011, the Applicant issued a further Notice to Produce Documents in respect of the Pati Complaint. The Respondent did not comply.
67. On 2 June 2011, during its investigation of the Pati Complaint, the Applicant received a complaint from Ranisha Colombage, a former employee of the Respondent (**Colombage Complaint**).
68. On 3 June 2011, the Applicant received a complaint from Elisa Wilkinson, a former employee of the Respondent (**Wilkinson Complaint**).
69. The Colombage Complaint and Wilkinson Complaint also related to alleged failures by the Respondent to pay wages for time worked and to issue payslips. The Applicant's

investigation of the Pati Complaint was expanded to include an investigation of the Colombage and Wilkinson Complaints (**Consolidated Complaint**).

70. On 6 July 2011, the Applicant issued a further Notice to Produce Documents in respect of the Consolidated Complaint. The Respondent did not comply.
71. On 3 August 2011, the Applicant issued a failure to comply with a Notice to Produce Documents letter, requiring that the Respondent advise the Applicant within 7 days of any reasonable excuse for her non-compliance. The Respondent did not reply.
72. On 8 September 2011, the Applicant issued a Notice to Produce Documents in relation to the Consolidated Complaint and another complaint as described in paragraph 85 below. The Respondent did not comply within the timeframe stipulated by the Notice to Produce, but did subsequently produce the following documentation in respect of the Consolidated Complaint:
 - (a) regarding Mr Pati, the Respondent provided one payslip for the period between 4 August 2009 and December 2010;
 - (b) regarding Ms Colombage, the Respondent provided one payslip for the period between 6 December 2010 and 21 February 2011; and
 - (c) regarding Ms Wilkinson, the Respondent provided two payslips for the period between 1 July 2009 to 4 February 2011.
73. On 29 September 2011 and 5 October 2011, the Applicant requested in writing that the Respondent provide further records.
74. On 21 October 2011, the Respondent emailed the Applicant stating that she had sent the documents that were required to the Applicant by post.
75. The Applicant has never received the records referred to by the Respondent in the email described in paragraph 74 above.
76. On 25 and 28 October 2011, the Applicant wrote to the Respondent informing her that the records had not been received by the Applicant.
77. On 10 November 2011, the Applicant and Respondent met in person so that the Applicant could obtain the records required from the Respondent directly. The Respondent produced the following documentation in respect of the Consolidated Complaint:
 - (a) regarding Mr Pati, no records;
 - (b) regarding Ms Colombage, one time sheet and pay slip; and
 - (c) regarding Ms Wilkinson, time sheets and payslips for three fortnights of work.

78. On 24 November 2011, the Applicant requested that the Respondent provide further records in respect of the Consolidated Complaint.
79. On 29 November 2011, the Respondent emailed the Applicant agreeing to “follow up the details” of the Applicant’s request for further records.
80. On 8 December 2011, the Applicant wrote to the Respondent to advise her that:
 - (a) it had been unable to identify any contravention of Australian workplace laws in relation to the Consolidated Complaint, due to insufficient records being provided by the Respondent; and
 - (b) she should ensure that the terms and conditions of all relevant employees are being provided in accordance with the *Children’s Services Award 2010*, the *Children’s Services (Victoria) Award 2005* and the *Fair Work Act 2009* (Cth).
81. The Consolidated Complaint was finalised by the Applicant on 8 December 2011.

Scollo Complaint

82. On 22 August 2011, the Applicant received a complaint from Maria Scollo, a former employee of the Respondent (**Scollo Complaint**).
83. The Scollo Complaint related to alleged failures by the Respondent to pay wages for time worked.
84. From 22 August 2011 to 13 December 2011, the Applicant undertook an investigation into the Scollo Complaint.
85. On 8 September 2011, the Applicant issued a Notice to Produce Documents in relation to the Scollo Complaint and the Consolidated Complaint as described in paragraph 72 above. The Applicant did not comply within the timeframe stipulated by the Notice to Produce, but did subsequently produce documentation in respect of the Scollo Complaint.
86. On 13 December 2011, the Applicant wrote to the Respondent to advise that it had determined that Ms Scollo was underpaid in the amount of \$1,575.95 (gross).
87. On 4 January 2012, the Respondent advised the Applicant that she disputed the amount outstanding, and undertook to provide further records for consideration by the Applicant by 13 January 2012.
88. On 16 January 2012, the Applicant telephoned the Respondent to enquire after the further documentation described in paragraph 87 above. The Respondent informed the Applicant that she had sent the documentation by post on 13 January 2012. The Applicant did not receive that documentation.

89. On 6 February 2012, the Applicant wrote to the Respondent offering the opportunity to participate in an electronically recorded interview regarding the Scollo Complaint. The Respondent did not accept the offer for interview.
90. On 22 February 2012, the Applicant finalised the Scollo Complaint by issuing the Respondent a "Letter of Caution", which:
- (a) amended the amount outstanding to \$1,711.65 (gross) to reflect further assessment carried out by the Applicant;
 - (b) stated that the Applicant did not consider it to be in the public interest to commence civil proceedings in the current case; and
 - (c) stated that the Applicant had issued the letter of caution as an alternative way to bring about voluntary compliance in the future.
91. The Respondent did not rectify the underpayment amount determined by the Applicant.

Tran Complaint

92. On 4 July 2012, the Applicant received a complaint from Kim Tran, a former employee of the Respondent (**Tran Complaint**).
93. The Tran Complaint related to alleged failures by the Respondent to pay wages for time worked and to issue pay slips.
94. The Tran Complaint was finalised by the Applicant when resolution was reached by Ms Tran and the Respondent in the course of mediation.

Lyngcoln Complaint

95. On 11 October 2012, the Applicant received a complaint from Ilana Lyngcoln, a former employee of the Respondent (**Lyngcoln Complaint**).
96. The Lyngcoln Complaint related to alleged failures by the Respondent to pay wages for time worked and to issue pay slips.
97. From 17 October 2012 to 23 November 2012, the Applicant undertook an investigation into the Lyngcoln Complaint. During the investigation, the Respondent provided the Applicant with payslips.
98. On 23 November 2012, the Applicant wrote to the Respondent to advise that it had determined that Ms Lyngcoln was underpaid for five hours of work and recommended the Respondent take immediate action to rectify the monies outstanding.
99. No further action was taken by the Applicant and the Lyngcoln Complaint was finalised.

INVESTIGATION AND INSTITUTION OF PROCEEDINGS

100. On 7 January 2013, the Applicant wrote to the Respondent by email advising that it had received complaints from employees Mithsagar, Riyat, Rani and Khare.
The complaints related to non-payment or late payment of wages for work performed.
The Respondent did not respond to or acknowledge the email dated 7 January 2013.
101. On 15 January 2013, the Applicant wrote a letter to the Respondent notifying her that it had commenced an investigation of the allegations raised by the complainants. The letter enclosed a Notice to Produce Records or Documents issued pursuant to section 712 of the FW Act, which was also dated 15 January 2013.
102. On 23 January 2013, the Applicant left a voicemail message on the Respondent's mobile telephone in terms to the effect that Applicant requested the Respondent to urgently call the Applicant to discuss the complaints under investigation, which were being treated most seriously due to a previous letter of caution issued by the Applicant. The Applicant received no contact from the Respondent in response.
103. On 25 January 2013, the Applicant left a further voicemail message on the Respondent's mobile telephone requesting a return call. The Applicant received no contact from the Respondent in response.
104. On 31 January 2013, the Applicant attended the Respondent's business premises and spoke with the Respondent about the investigation. The Applicant issued a further Notice to Produce Documents, dated 31 January 2013. The Respondent agreed that she would provide the Applicant with documents by 15 February 2013, in accordance with the Notice to Produce Documents.
105. The Respondent did not produce any documents to the Applicant by 15 February 2013, contrary to the requirements of the Notice to Produce Documents.
106. On 19 February 2013, the Applicant wrote to the Respondent by email noting the Respondent's non-compliance with the Notice to Produce Documents in contravention of the FW Act, and requesting that the Respondent provide any reasonable excuse by no later than 26 February 2013.
107. On 20 February 2013, the Respondent sent an email to the Applicant in reply in the following terms: "Will contact you shortly".
108. On 26 February 2013 and 27 February 2013 the Applicant left further voicemail messages on the Respondent's mobile telephone requesting a return call. The Applicant received no contact from the Respondent in response.

109. On 28 February 2013, the Applicant emailed the Respondent in terms that:
- (a) noted its attempts to contact the Respondent;
 - (b) requested that the Respondent attend a meeting with the Applicant in order for her to present any documentation and other information relevant to the complaints; and
 - (c) noted that the Applicant would need to assess the complaints on the basis of the evidence available to it, should no further evidence or information be provided by the Respondent.
110. The Applicant received no contact from the Respondent in response to the email described in paragraph 109 above.
111. On 9 April 2013, the Applicant telephoned the Respondent and spoke to her regarding the investigation. The Applicant advised that no records had been received from the Respondent in compliance with the Notice to Produce Documents or Records. The Respondent advised that she had sent them some time ago, and wasn't sure if she had copies. The Applicant sought to collect further copies from the Respondent at any address at a convenient time, although the Respondent stated that she would instead provide the records by registered post.
112. On 26 April 2013, the Applicant wrote to the Respondent confirming that the records required by the Notice to Produce Documents had still not been received. The Applicant again requested that the records be produced, and offered various methods of production. The Applicant also offered the Respondent an opportunity to participate in a recorded interview regarding the allegations identified for investigation. The Applicant requested a response within 7 days. The Applicant received no contact from the Respondent in response.
113. On 9 May 2013, the Applicant issued the Respondent a Determination of Contravention letter, which:
- (a) determined that the Respondent had underpaid the employees Pandya, Riyat, Mithsagar, Rani and Khare a total of \$17,086.76;
 - (b) required the Respondent to either rectify the underpayments or dispute the findings within 14 days; and
 - (c) indicated that the Applicant may commence litigation to recover the outstanding amounts and/or seek penalties for non-compliance with Commonwealth workplace laws.
114. The Applicant received no contact from the Respondent in response to the letter described in paragraph 113 above.

115. On 20 June 2013, the Applicant wrote to the Respondent notifying her that litigation would commence on 26 June 2013, and enclosing a draft statement of claim.
116. On 21 June 2013, the Respondent telephoned the Applicant regarding its letter of 20 June 2013.
117. On 26 June 2013, the Respondent separately emailed and wrote to the Applicant, enclosing pay records for the Applicant's consideration. The Respondent's correspondence:
 - (a) queried discrepancies between the amounts alleged to be outstanding and the details that the Respondent says were sent to the Applicant in April 2013;
 - (b) requested that the Applicant provide the Respondent with copies of documentation obtained by the Applicant from the complainants;
 - (c) requested that the Applicant provide proof of "award wage documentation"; and
 - (d) stated that the timesheets relied upon by the Applicant were completed in a fraudulent and misleading manner by the complainants.
118. Also on 26 June 2013, the Applicant wrote to the Respondent indicating that:
 - (a) it had considered the new information provided by the Respondent, and adjusted the alleged underpayment amount accordingly;
 - (b) further proof was required in respect of certain of the Respondent's claims that payments had already been made; and
 - (c) that the Applicant was satisfied that, notwithstanding the matters raised, there remained sufficient evidence and public interest to commence civil penalty proceedings and that the Applicant intended to do so.
119. On 27 June 2013, the Respondent wrote to the Applicant to indicate she would provide further "time sheets etc" to resolve the issues.
120. Also on 27 June 2013, the Applicant commenced proceedings in this Court against the Respondent seeking declarations and penalties in respect of the Admitted Contraventions.
121. During the period from 27 June 2013 until 12 November 2013, the Applicant made numerous attempts to contact the Respondent by telephone, email and letter, initially to serve court documents and subsequently to discuss aspects of the proceeding. The Respondent did not make any contact with the Applicant until 12 November 2013.

122. On 18 September 2013, the Respondent did not attend the first directions hearing in this proceeding. Orders were made which included that:
 - (a) the Respondent file any notice of address for service and response by 11 October 2013; and
 - (b) that the matter be adjourned until 15 November 2013.
123. On 19 September 2013, the Applicant wrote to the Respondent enclosing the orders of the Court, urging her compliance with the orders of the Court and foreshadowing that it may make an application for default judgment.
124. By 11 October 2013, the Respondent had not filed a notice of address for service or response.
125. On 17 October 2013, the Applicant wrote to the Respondent:
 - (a) noting her non-compliance with the orders of the Court;
 - (b) urging her to rectify her non-compliance; and
 - (c) foreshadowing that the Applicant may make an application for default judgment.
126. On 11 November 2013, having received no responses to any of its correspondence, the Applicant filed and served an application in a case and supporting affidavit materials, seeking default judgment.
127. On 12 November 2013, the Respondent telephoned the Applicant and agreed to participate in the Court proceeding.
128. On 15 November 2013, the Respondent attended Court and provided the Applicant with some further timesheet and pay record evidence. The Court made orders by consent which:
 - (a) required the Respondent to file a response by 17 January 2014; and
 - (b) adjourned the Applicant's default judgment application for further hearing on 17 February 2014.
129. On 11 December 2013, the Applicant received further pay and timesheet records from the Respondent.
130. During the period from 12 December 2013 until 16 January 2014, the Applicant made numerous attempts to contact the Respondent by telephone, email and letter to discuss aspects of the proceeding. The Respondent did not make any contact with the Applicant until 17 January 2014.
131. On 17 January 2014, the Respondent served the Applicant an unsealed copy of a response.
132. On 20 January 2014, the Respondent filed her response with the Court.

133. Between 20 January 2014 and 16 February 2014, the Applicant made numerous attempts to contact the Respondent by telephone, email and letter to discuss aspects of the proceeding, including a request that the Respondent provide further and better particulars of her response. The Respondent did not reply to the Applicant's attempts to contact her.
134. On 17 February 2014, the Respondent attended Court and agreed to admit liability and enter into a statement of agreed facts. The Court by consent dismissed the Applicant's application for default judgment.
135. On 15 April 2014, the Applicant filed an amended statement of claim with the consent of the Respondent.

RELIEF SOUGHT

136. The parties agree to the making of the declarations and orders in the terms set out in the Proposed Declarations and Orders, which is attached to this Statement of Agreed Facts (**Attachment A**).

Filed by the Applicant and the Respondent

Dated:

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Office of the Fair Work Ombudsman

For the Applicant

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Vivien Mahomet

The Respondent