FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v DEBORAH RUTH SOURIS *[2016] FCCA 345*

Catchwords:
INDUSTRIAL LAW – Penalty hearing – failure to comply with compliance notices under *Fair Work Act 2009* (Cth) – involvement of respondent in contraventions – accessorial liability – appropriate penalty.

Legislation:
Fair Work Act 2009, ss. 545, 546(1), 546(3)(a), 550(1), 550(2), 557(1), 716, 716(2), 716(4A), 716(5), 716(6), 717

Cases cited:
Milardovic v Vemco Services Pty Ltd [2016] FCA 19
Fair Work Ombudsman v South Jin Pty Ltd [2015] FCA 1456
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Gibbs v The Mayor, Councillors and Citizens of City of Altona [1992] FCA 374
McIver v Healey [2008] FCA
Kelly v Fitzpatrick (2007) 166 IR 14
Australian Ophthalmic Supplies Pty Ltd v Mc Alary-Smith [2008] FCAFC 8
AMIEU v Meneling Station (1987) 16 IR 245
Pearce v R (1998) 194 CLR 610
Fair Work Ombudsman v Daladontics (Vic) Pty Ltd [2014] FCCA 2571

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	DEBORAH RUTH SOURIS
File Number:	MLG 1094 of 2015
Judgment of:	Judge O'Sullivan
Hearing date:	18 February 2016
Date of Last Submission:	18 February 2016
Delivered at:	Melbourne
Delivered on:	18 February 2016

REPRESENTATION

Counsel for the Applicant:	Ms Dowsett
Solicitors for the Applicant:	Fair Work Ombudsman
The Respondent:	In person

THE COURT DECLARES:

1. The respondent was involved, within the meaning of subsection 550(1) of the *Fair Work Act 2009* (Cth) (FW Act), in the failure by TIS Logistics Pty Ltd (in liquidation) ACN 113 264 547 (TIS) to comply with three compliance notices dated 20 February 2015, in contravention of subsection 716(5) of the FW Act.

THE COURT ORDERS:

2. Pursuant to subsection 546(1) of the FW Act the respondent pay pecuniary $9,000 for the contraventions referred to in Order 1.
3. Pursuant to subsection 546(3)(c) of the FW Act the respondent to pay the penalties in order 2 to the Commonwealth in full within six months of the date of this order.
4. The applicant have liberty to apply on seven days' notice in the event that any of the proceeding orders are not complied with.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE

MLG 1094 of 2015

FAIR WORK OMBUDSMAN
Applicant

And

DEBORAH RUTH SOURIS
Respondent

REASONS FOR JUDGMENT

(Revised from transcript)

1. By application filed 15 May 2015 the Fair Work Ombudsman ("the applicant") commenced proceedings against Deborah Ruth Souris ("the respondent").

2. The applicant alleged that a business TIS Logistics Pty Ltd (in liquidation) (ACN 113 264 547) ("TIS") has, prior to going into liquidation, breached provisions of the *Fair Work Act 2009* (Cth) (the FW Act) and as the director of TIS the respondent was involved in those breaches and should also be liable for the breaches of the FW Act.

3. TIS operated a retail business selling cards and gifts at sites in Victoria and Queensland. In mid 2014 the applicant received complaints from 5 former employees of TIS whose terms and conditions of employment with TIS were governed by the *General Retail Industry Award 2010* and the FW Act.

4. The applicant's investigation into those complaints led to the issue of notices under s.716 of the FW Act to TIS on 20 February 2015 requiring it to make payments to the employees concerned by 16 March 2015 and provide proof of same by 23 March 2015.

5. The applicant alleged TIS did not comply with the compliance notices properly served upon it (the notices) within the time provided for. The respondent was the sole director and shareholder of TIS. The respondent was the contact person for TIS during the applicant's investigation and the applicant alleged the respondent knew what TIS had to do to comply with the notices. The applicant alleged the respondent was involved in and separately liable for the breaches of the FW Act by TIS by reason of the failure to comply with the notices.

6. TIS did not comply with the notices and on 1 May 2015 a liquidator was appointed to TIS.

7. In the application filed 15 May 2015 the applicant sought, *inter alia*, the following orders:

> *"23. A declaration that the Respondent was involved, within the meaning of subsection 550(1) of the FW Act, in the failure by TIS to comply with three compliance notices dated 20 February 2015, in contravention of subsection 716(5).*
>
> *...*
>
> *26. An Order pursuant to subsection 546(1) of the FW Act imposing pecuniary penalties on the Respondent for her Contraventions of the FW Act."*

8. The application was given a first court date of 23 July 2015. On 17 July 2015 the respondent filed a notice of address for service and a response that it appears she prepared herself. On 23 July 2015 the applicant was represented by Ms Ablett, solicitor, and the respondent appeared in person.

9. There was no issue that the application and accompanying statement of claim had been properly served and the respondent could not provide evidence of any response to the notices. The respondent told the Court she wished to defend the allegations made in the application and accompanying statement of claim. Accordingly the following orders were made.

> *"1. The respondent to file and serve a defence to the statement of claim filed on 15 May 2015 by 31 August 2015.*
>
> *2. The proceedings shall be subject to mediation to be held by the end of November 2015 though not before September 2015 with the mediation to be conducted by a Registrar of the Court as mediator appointed by the Registrar of the Court.*

…

4. The trial shall proceed on affidavit evidence with the affidavits of each witness if adopted to stand as the evidence in chief of the witness.

5. The Applicant file and serve any affidavit material and any documents upon which it intends to rely at the liability hearing on or before the 14 December 2016.

…"

10. On 31 August 2015 solicitors for the respondent filed a notice of address for service, a defence to the application and statement of claim. The parties then attended mediation. Following this the applicant filed a notice to admit facts on 27 November 2015 and an affidavit of Inspector Allen on 16 December 2015.

11. However before the respondent filed her affidavit material (as provided for in the abovementioned orders) the parties compromised the issue of liability for failure to respond to the notices. As a result on 14 January 2016 the parties asked the Court to make the following further orders:

"1. Orders 3 and 6 to 12 of the Orders made by Judge O'Sullivan on 23 July 2015 be vacated.

2. The proceedings be listed for a hearing on the issue of penalty with an estimated duration of half a day on 18 or 19 February 2016.

3. The parties file a Statement of Agreed Facts on or before 15 January 2016.

4. The Respondent file and serve any affidavit material upon which she intends to rely at the penalty hearing on or before 22 January 2016.

5. The Applicant file and serve any affidavit material upon which it intends to rely at the penalty hearing on or before 29 January 2016.

6. The Respondent shall file and serve her submissions on the issue of penalty by 5 February 2016.

7. The Applicant shall file and serve its submissions on the issue of penalty by 12 February 2016.

8. The parties have liberty to apply.

9. *Such further or other orders at the Court considers appropriate."*

12. At the request of the parties the matter was relisted to 18 February 2016 for a penalty hearing and each of the parties had an opportunity to file affidavit material and written submissions.

Agreed Facts

13. Relevantly for present purposes the parties filed a Statement of Agreed Facts on 15 January 2016 (S.O.A.F.) that provided *inter alia*:

> *"3. The Employer contravened subsection 716(5) of the FW Act by failing to comply with three compliance notices issued by Senior Fair Work Inspector Sarah Allen (**Inspector Allen**) pursuant to subsection 716(2) of the FW Act (collectively, the **Compliance Notices**).*
>
> *4. The Respondent admits:*
>
> *(a) she was involved (within the meaning of subsection 550(2) of the FW Act) in the Employer's contraventions of subsection 716(5) of the FW Act as set out in paragraph 3 above; and*
>
> *(b) by reason of subsection 550(1) of the FW Act, is taken to have committed those contraventions.*
>
> *5. The Respondent also admits to the contraventions set out in the Compliance Notices (attached to this SOAF and marked **Attachment A**) and that those contraventions resulted in the Employees being underpaid a total aggregate amount of $11,187.03 (**Underpayments**).*
>
> *6. The Respondent has made payment of the Underpayments.*
>
> …
>
> *14. After conducting an investigation into complaints made by the Employees, Inspector Allen formed the reasonable belief, within the meaning of subsection 716(1) of the FW Act that, during the Employment Period, the Employer contravened:*
>
> *(a) terms of the Award in relation to each of the Employees; and*
>
> *(b) terms of the National Employment Standards in respect of each of the Employees excluding Ms Pisera.*

15. *On 20 February 2015, at a meeting between the Inspector Allen, Fair Work Inspector Patricia Campbell, the Respondent and her husband Mr Brenton White, Inspector Allen issued to the Employer, by personally handing to the Respondent:*

    (a) *a compliance notice pursuant to subsection 716(2) of the FW Act requiring the Employer to pay:*

        (i) *Courtney Reddy a total of $1,621.57 (gross) in respect of minimum rates of pay, penalty and overtime rates and accrued untaken annual leave entitlements; and*

        (ii) *Megan Reddy a total of $506.67 (gross) in respect of minimum rates of pay, penalty and overtime rates and accrued untaken annual leave entitlements;*

    (b) *a compliance notice pursuant to subsection 716(2) of the FW Act requiring the Employer to pay:*

        (i) *Ms Jovanovski a total of $1,008.73 (gross) in respect of penalty rates of pay and accrued untaken annual leave entitlements; and*

        (ii) *Ms Pisera a total of $859.58 (gross) in respect of minimum rates of pay, casual loading and penalty rates of pay; and*

    (c) *a compliance notice pursuant to subsection 716(2) of the FW Act requiring the Employer to pay Ms Howard a total of $7,190.48 (gross) in respect of annual leave loading during periods of annual leave, accrued untaken annual leave entitlements, payment in lieu of notice of termination and redundancy pay.*

16. *The Compliance Notices each required the Employer to:*

    (a) *make the specified payments to each of the Employees by 16 March 2015; and*

    (b) *provide evidence of its compliance with the requirements of the Compliance Notices to the Office of the Applicant by 23 March 2015.*

17. *Pursuant to subsection 716(3) of the FW Act, each of the Compliance Notices also:*

(a) set out the name of the Employer as the person to whom the compliance notice was given and the name of the Respondent as the contact person for the Employer;

(b) set out the name of Inspector Allen, being the inspector who gave the compliance notice;

(c) set out brief details of the contraventions for each of the Employees;

(d) explained that a failure to comply with the compliance notice may contravene a civil remedy provision; and

(e) explained that the Employer may apply to the Federal Court, Federal Circuit Court or eligible State or Territory Court for a review of the compliance notice on the grounds that:

(i) the Employer has not committed the contraventions; or

(ii) the compliance notice did not comply with subsection 716(2) or 716(3) of the FW Act.

18. The Employer failed to comply with the Compliance Notices in that it:

(a) did not pay the Employees, the required amounts or any amounts, by 16 March 2015; and

(b) did not produce any evidence of its compliance with the Compliance Notices to the office of the Applicant by 23 March 2015.

19. The Employer has not made an application to the Federal Court, the Federal Circuit Court or an eligible State or Territory Court for a review of any of the Compliance Notices pursuant to section 717 of the FW Act.

20. By reason of the matters set out in paragraphs 14 to 19 above, the Employer contravened section 716(5) of the FW Act.

ACCESSORIAL LIABILITY OF THE RESPONDENT

21. By reason of the matters set out in paragraphs 10, 15 and 16 above, the Respondent:

(a) had actual knowledge of the Compliance Notices, including knowledge of the Employer's requirements to comply with them;

(b) had authority, as sole director of the Employer, to cause the Employer to comply with the Compliance Notices; and

(c) was the person with whom the Applicant dealt during the course of the investigation into the Employees' complaints, including with respect to the Employer's failure to comply with the Compliance Notices.

22. The Respondent:

(a) had actual knowledge of the Employer's failure to comply with the Compliance Notices; and

23. By reason of the matters set out at paragraphs 10 and 21 above, the Respondent:

(a) was involved in, within the meaning of subsection 550(2) of the FW Act, the contraventions by the Employer of subsection 716(5) of the FW Act; and

(b) by reason of subsection 550(1) of the FW Act, is taken to have contravened subsection 716(5) of the FW Act."

Penalty Hearing

14. At the penalty hearing on 18 February 2016 the applicant was represented by Ms Dowsett of Counsel. Mr Jewell, Solicitor, sought leave pursuant to r.9.03 of the *Federal Circuit Court Rules* 2001 to withdraw from representing the respondent. As there was no objection and the respondent wanted to represent herself, leave was granted.

15. The applicant told the Court it relied on:

a) application and statement of claim filed on 15 May 2015;

b) S.O.A.F;

c) affidavits of Inspector Allen filed on 16 December 2015, 29 January 2016 and 18 February 2016; and

d) submissions filed on 12 February 2016

16. The respondent told the Court she relied on:

a) S.O.A.F.;

b) her affidavits filed on 22 January 2016 and 11 February 2016; and

c) submissions filed on 5 February 2016.

17. Each of the parties had an opportunity to make oral submissions supporting the written material on which they relied. At the conclusion of the hearing the Court reserved its decision.

Relevant provisions of FW Act

18. The notices were issued under s.716 of the FW Act which provides:

> ***"716 Compliance notices***
>
> *Application of this section*
>
> *(1) This section applies if an inspector reasonably believes that a person has contravened one or more of the following:*
>
> *(a) a provision of the National Employment Standards;*
>
> *(b) a term of a modern award;*
>
> *...*
>
> *Giving a notice*
>
> *(2) The inspector may, except as provided by subsection (4), give the person a notice requiring the person to do either or both of the following within such reasonable time as is specified in the notice:*
>
> *(a) take specified action to remedy the direct effects of the contravention referred to in subsection (1);*
>
> *(b) produce reasonable evidence of the person's compliance with the notice.*
>
> *(3) The notice must also:*
>
> *(a) set out the name of the person to whom the notice is given; and*
>
> *(b) set out the name of the inspector who gave the notice; and*
>
> *(c) set out brief details of the contravention; and*

(d) explain that a failure to comply with the notice may contravene a civil remedy provision; and

(e) explain that the person may apply to the Federal Court, the Federal Circuit Court or an eligible State or Territory Court for a review of the notice on either or both of the following grounds:

(i) the person has not committed a contravention set out in the notice;

(ii) the notice does not comply with subsection (2) or this subsection; and

(f) set out any other matters prescribed by the regulations.

…

Relationship with civil remedy provisions

(4A) An inspector must not apply for an order under Division 2 of Part 4-1 in relation to a contravention of a civil remedy provision by a person if:

(a) the inspector has given the person a notice in relation to the contravention; and

(b) either of the following subparagraphs applies:

(i) the notice has not been withdrawn, and the person has complied with the notice;

(ii) the person has made an application under section 717 in relation to the notice that has not been completely dealt with.

Note: A person other than an inspector who is otherwise entitled to apply for an order in relation to the contravention may do so.

(4B) A person who complies with a notice in relation to a contravention of a civil remedy provision is not taken:

(a) to have admitted to contravening the provision; or

(b) to have been found to have contravened the provision.

Person must not fail to comply with notice

(5) A person must not fail to comply with a notice given under this section.

Note: This subsection is a civil remedy provision (see Part 4-1).

(6) Subsection (5) does not apply if the person has a reasonable excuse."

19. Section 545 of the FW Act sets out orders that can be made by this Court:

"(1) The Federal Court or the Federal Circuit Court may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision.

Note 1: For the court's power to make pecuniary penalty orders, see section 546.

Note 2: For limitations on orders in relation to costs, see section 570.

Note 3: The Federal Court and the Federal Circuit Court may grant injunctions in relation to industrial action under subsections 417(3) and 421(3).

Note 4: There are limitations on orders that can be made in relation to contraventions of subsection 65(5), 76(4), 463(1) or 463(2) (which deal with reasonable business grounds and protected action ballot orders) (see subsections 44(2), 463(3) and 745(2)).

(2) Without limiting subsection (1), orders the Federal Court or Federal Circuit Court may make include the following:

(a) an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention;

(b) an order awarding compensation for loss that a person has suffered because of the contravention;

(c) an order for reinstatement of a person."

20. The issuing of the notices is a power given to Fair Work Inspectors which is designed to be a method by which non-compliance with obligations imposed by the FW Act can be enforced as an alternative to court proceedings (see *Fair Work Bill 2008*, Explanatory Memorandum at [2673]). As is clear from the above failure to comply with a notice given under s716 of the FW Act is a civil remedy provision.

21. In so far as the respondent's liability as an accessory to the failure of TIS to comply with the notices is concerned, in *Milardovic v Vemco Services Pty Ltd* [2016] FCA 19 at 74 to 75, Mortimer J said:

> *"74.The Full Court considered the nature of accessorial liability under the similar terms of the predecessor* Workplace relations Act 1996 (Cth) *in* Construction, Forestry, Mining and Energy Union v Clarke *[2007] FCAFC 87; 164 IR 299. At [26], Tamberlin, Gyles and Gilmour JJ stated:*
>
> Regardless of the precise words of the accessorial provision, such liability depends upon the accessory associating himself or herself with the contravening conduct – the accessory should be linked in purpose with the perpetrators (per Gibbs CJ in *Giorgianni v The Queen* [1985] HCA 29; (1985) 156 CLR 473 at 479-480; see also Mason J at 493 and Wilson, Deane and Dawson JJ at 500). The words "party to, or concerned in" reflect that concept. The accessory must be implicated or involved in the contravention (*Ashbury v Reid* [1961] WAR 49 at 51; *R v Tannous* (1987) 10 NSWLR 303 per Lee J at 307E-308D (agreed with by Street CJ at 304 and Finlay J at 310)) or, as put by Kenny J in *Emwest Products Pty Ltd v Automative, Food, Metals, Engineering, Printing and Kindred Industries Union* [2002] FCA 61; (2002) 117 FCR 588; 112 IR 388 at [34], must participate in, or assent to the contravention.
>
> 75.The terms of s 550(2) of the *Fair Work Act* are identical to those found in s 75B of the then *Trade Practises Act 1974* (Cth), considered by the High Court in *Yorke v Lucas* [1985] HCA 65; 158 CLR 661. Mason ACJ, Wilson, Deane and Dawson JJ held at 669 that not withstanding that s 75B operated as an adjunct to the imposition of civil liability, it has its derivation in the criminal law and there was nothing to support the view the concepts it introduced should be given a new or special meaning (see also Brennan J at 673). Accessorial liability thus requires intent or knowledge of the essential elements of the contravention to be established: at 670.*"*

22. In *Fair Work Ombudsman v South Jin Pty Ltd [2015] FCA 1456* White J at paragraphs [227] to [235] set out "***Accessory liability – principles***" as follows:

> *"227. In order to be knowingly concerned in, or party to, a contravention, a person must have engaged in some conduct which "implicates or involves" him or her in the contravention, so that there is a "practical connection" between the person and the contravention:* Qantas Airways

Ltd v Transports Workers' Union of Australia [*2011] FCA 470*; *(2011) 280 ALR 503 at [324][325]*. *See also* Construction, Forestry, Mining and Energy Union v Clarke *[2007] FCAFC 87; (2007) 164 IR 299 at [26]*. *In* Trade Practice Commission v Australian Meat Holdings Pty Ltd *[1988] FCA 244; (1988) 83 ALR 299, Wilcox J at 357 quoted with approval the following passage from the judgment of the* Full Court of the Supreme Court of Western Australia in Ashbury v Reid *(1961) WAR 49*:

> The question which a Court should ask itself in determining whether an act or omission on the part of an individual comes within the terms of section 54 is whether on the facts it can reasonably be said that the act or omission shown to have been done or neglected to be done by the defendant does in truth implicate or involve him in the offence, whether it does show a practical connection between him and the offence.

The statement in Ashbury v Reid *was also approved in* R v Nifadopoulos *(1988) 36 A Crim R 137 at 140 with the Court (Kirby ACJ, Maxwell and Carruthers JJ agreeing) saying that "a person cannot become criminally involved in an act made unlawful by mere knowledge or inaction on his part – some act or conduct on his part is necessary".*

228. In Yorke v Lucas *(1983) 49 ALR 672 at 681, the Full Court of this Court approved the following statement of Pennycuick VC in* Re Maidstone Buildings Provisions Ltd *[1971] 1 WLR 1085 at 10923:*

> [T]he expression "party to" must on its natural meaning indicate no more than "participates in" or "concurs in". And that, it seems to me, involves some positive steps of some nature.

See also Sent v Jet Corporation of Australia [1984] FCA 178; (1984) 2 FCR 201 at 2089.

229. In order for a person to have been knowingly concerned in a statutory contravention, that person must have been an intentional participant, with knowledge of the essential elements constituting the contravention: Yorke v Lucas *[1985] HCA 65; (1985) 158 CLR 661 at 670. However, it is not necessary that a person with knowledge of the essential elements making up the contravention also know that those elements do amount to a contravention:* Yorke v Lucas *at 667;* Rural Press Ltd v Australian Competition and Consumer Commission *[2003] HCA 75; (2003) 216 CLR 53*

at [48]. An accessory does not have to appreciate that the conduct involved is unlawful: Australian Competition and Consumer Commissioner v Giraffe World Australia Pty Ltd (No 2) *[1999] FCA 1161; (1999) 95 FCR 302 at [186]*.

230. Actual knowledge of the essential elements constituting the contravention is required. Imputed or constructive knowledge is insufficient: Young Investments Group Pty Ltd v Mann *[2012] FCAFC 107 at [11]; [2012] FCAFC 107; (2012) 293 ALR 537 at 541.*

231. Proof that a person had actual knowledge of each of the essential elements making up a contravention may be derived from direct evidence but more commonly will be a matter of inference from all the circumstances found to be proved. In some cases, actual knowledge can be inferred from the combination of a respondent's knowledge of suspicious circumstances and the decision by the respondent not to make enquiries to remove those suspicions. Nevertheless it is actual knowledge which is required. In this respect, Wilson, Deane and Dawson JJ in Giorgianni v The Queen *[1985] HCA 29; (1985) 156 CLR 473 at 505 said:*

> [A]lthough it may be a proper inference from the fact that a person has deliberately abstained from making an inquiry about some matter that he knew of it and, perhaps, that he refrained from inquiry so that he could deny knowledge, it is nevertheless actual knowledge which must be proved and not knowledge which is imputed or presumed.
>
> *And later (at 5078):*
>
> The fact of exposure to the obvious may warrant the inference of knowledge. The shutting of one's eyes to the obvious is not, however, an alternative to the actual knowledge which is required as the basis of intent to aid, abet, counsel or procure.

232. The conclusion that a person has actual knowledge of the elements of a contravention by reason of that person's knowledge of suspicious circumstances coupled with a deliberate failure to make enquiries which may have confirmed those suspicions requires consideration of the person's knowledge of the matters giving rise to the suspicion, the circumstances in which the person did not make the obvious enquiry and the person's reasons, to the extent that they are known, for not having made the enquiry. It is not every deliberate failure to make enquiry which will support the inference of actual knowledge. In several cases,

including Official Trustee in Bankruptcy v Mitchell *[1992] FCA 521, (1992) 38 FCR 364 at 371 and* Richardson & Wrench (Holdings) Pty Ltd v Ligon No 174 Pty Ltd *[1994] FCA 1222, (1994) 123 ALR 681 at 6934, this Court has referred with approval to a passage from the advice of Lord Sumner in* Zamora (No 2) *[1921] 1 AC 891 at 8123 in which his Lordship noted two senses in which a person may be said not to know something because they do not wish to know it:*

> A thing may be troublesome to learn, and knowledge of it, when acquired, may be uninteresting or distasteful. To refuse to know any more about the subject or anything at all is then a wilful but a real ignorance. On the other hand, a person is said not to know because he does not want to know, where the substance of a thing is borne in upon his mind with a conviction the full details or precise proofs may be dangerous, because they may embarrass his denials or compromise his protests. In such a case he flatters himself that whereas ignorance is safe, 'tiz folly to be wise, but there he is wrong, for he has been put upon notice and his further ignorance, even though actual and complete, is a mere affectation and disguise.

233. In the former circumstance described by Lord Sumner, the person will not have actual knowledge of the matter. In the latter circumstance, the person does have that knowledge but deliberately refrains from asking questions or seeking further information in order to maintain a state of apparent ignorance. That is not a circumstance of constructive or imputed knowledge, but of actual knowledge reduced to minimum by the person's wilful conduct: Richardson & Wrench *at 694 (Burchett J).*

234. The requisite actual knowledge must be present at the time of the contravention. A later acquisition of knowledge of the essential matters is not sufficient.

235. A company may be knowingly concerned in a statutory contravention. The knowledge of an officer of a corporation is imputed to the corporation: s 826 of the WR Act and s 793 of the FW Act."

Approach to penalty proceedings

23. The applicant's standing to commence these proceedings was not in dispute. The power for the Court to order the imposition of a penalty for contraventions of the FW Act arises under s.546 FW Act.

24. Section 12 of the FW Act provides that "*penalty unit*" has the same meaning as in the *Crimes Act 1914* (Cth). At all relevant times, section 4AA of the *Crimes Act* defined "*penalty unit*" to be $170.[1]

25. By virtue of s.539(2) of the FW Act the maximum penalty that may be imposed in respect of a contravention of s716(5) of the FW Act is :

    (a) 150 penalty units for a corporation; and

    (b) 30 penalty units for an individual.

26. The maximum penalty that may be imposed for a failure to comply with the compliance notices (the notices) is in respect of the respondent $15,300.

27. The appropriate penalty for the contravening conduct by the respondent should be determined as follows. The first step for the Court is to identify the separate contraventions. Each contravention of each separate obligation of the FW Act is a separate contravention of a civil remedy provision for the purposes of section 539(2) of the FW Act[2]. At this stage the Court would consider in appropriate cases whether a number of contraventions constitute a single course of conduct, such that multiple contraventions should be treated as a single contravention.

28. Second, to the extent that two or more contraventions have common elements, this should be taken into account in considering an appropriate penalty. 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.[3]

29. Third, the Court will consider an appropriate penalty to impose in respect of each contravention, whether a single contravention, a course of conduct or group of contraventions, having regard to all the circumstances of the case.

30. Finally, having fixed an appropriate penalty for each contravention, the Court should take a final look at the aggregate penalty, to determine

[1] This increased to $170 on and from 28 December 2012, and $180 from 31 July 2015.
[2] *Gibbs v The Mayor, Councillors and Citizens of City of Altona* [1992] FCA 374 at [24]; *McIver v Healey* [2008] FCA 425 at [16].
[3] *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at 571 [46] (Graham J) (*Merringtons*).

whether it is an appropriate response to the contravening conduct.[4] The Court should apply an "*instinctive synthesis*" in making this assessment.[5] This is known as the "*totality principle*".

31. The factors which may be taken into account in the assessment of penalty are well established and weren't controversial. The factors relevant to the imposition of a penalty were summarised by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 [26]-[59], as follows:

> *"a. the nature and extent of the conduct which led to the breaches;*
>
> *b. the circumstances in which that 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."*

32. This summary was adopted by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14. In *Australian Ophthalmic Supplies Pty Ltd v Mc Alary-*

[4] 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)
[5] *Merringtons*, supra at [27] (Gray J) and [55] and [78] (Graham J)

Smith [2008] FCAFC 8 Buchanan J after referring to the decision in *Kelly v Fitzpatrick* (supra) said at [9]:

> *"9. Checklists of this kind can be useful providing they do not become transformed into a rigid catalogue of matters for attention. At the end of the day the task of the Court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations…"*

Consideration

33. I have considered the parties written and oral submissions in relation to each of the relevant factors for determining the appropriate penalty in this case.

34. I accept the applicant's submission that the failure by TIS to comply with the notices should be seen in the context of the efforts made by the applicant to assist TIS (and the respondent as the responsible officer of TIS) to meet its obligations under the FW Act and to avoid the need for litigation. It is clearly the case that TIS had ample opportunity to work towards a resolution of the issues dealt with in the notices with the applicant prior to these proceedings being issued, but failed to do so.

35. There is no evidence that the respondent raised with the applicant any difficulties with understanding the nature and extent of the actions required of TIS to comply with the notices given by the Fair Work Inspector. Indeed, the evidence makes it clear that the respondent understood what was required by the notices, and accepted that employees had been underpaid as alleged.

36. The compliance notices served upon TIS set out what was required of TIS. It made clear that there were steps that TIS could take to address the contraventions that were alleged against it. This did not happen.

37. Section 717 of the FW Act sets out what TIS might have done if it determined not to pay the amount specified in the notices. It provides as follows:

> ***"717 Review of compliance notices***
>
> *(1) A person who has been given a notice under section 716 may apply to the Federal Court, the Federal Circuit Court or an*

eligible State or Territory Court for a review of the notice on either or both of the following grounds:

(a) the person has not committed a contravention set out in the notice;

(b) the notice does not comply with subsection 716(2) or (3).

(2) At any time after the application has been made, the court may stay the operation of the notice on the terms and conditions that the court considers appropriate.

(3) The court may confirm, cancel or vary the notice after reviewing it."

38. The contraventions before the Court involves, the failure to comply with the notices which is conduct that undermines the effectiveness and objects of the FW Act. I bear in mind the context in which the notices were issued and the respondent's failure to comply occurred despite extensive efforts by and on behalf of the applicant to assist in resolving the matter without resorting to litigation.

39. The material before the Court makes clear a number of employees were affected by the underpayments referred to in the notices and despite the fact those have now been remedied there was a measure of lack of contrition, corrective action and willingness to cooperate with the applicant.

40. That said the respondent, albeit only after these proceedings were commenced, has co-operated with the applicant, prepared the S.O.A.F. and made full admissions in relation to the contraventions.

41. Given the conduct the subject of the contraventions undermines the statutory objective of the FW Act and is a challenge to the compliance powers of the applicant there is a need for a measure of both specific and general deterrence.

42. Contraventions of s 716(5) do not attract the operation of the course of conduct provisions in s 557(1) of the FW Act, because this is not a civil remedy provision specified in s 557(2) of the FW Act.

43. The Court has discretion to group separate contraventions together where the contraventions may have said to overlap with each other, or involve the potential punishment of the respondent for the same or substantially similar conduct. However, there is no evidence before the Court that the

respondent's failure to comply with the compliance notices arose from the one transaction or decision and should be grouped.[6]

44. The applicant submits, and I accept, that the compliance notices do not have common elements which would warrant the 'grouping' of the contraventions[7] because they related to different employees who:

a) each made separate complaints to the applicant;

b) were employed in different employment at different stores; and

c) whose entitlements were due to be paid over separate periods of time.

45. Further, the respondent was aware that separate notices were served, each requiring steps to be taken, and each involving penalties for non-compliance. This is consistent with the approach adopted by this Court recently in *Fair Work Ombudsman v Daladontics (Vic) Pty Ltd* (Daladontics) [2014] FCCA 2571 (at [20] per (Hartnett J)).

46. Sadly had the respondent as the director of TIS chosen to comply with the notices before these proceedings were issued, she would have avoided the imposition of any penalty at all: s.716(4A) of the Act.

47. Finally it appears TIS did not take up the opportunity presented by s.717 of the FW Act to challenge the allegations of contravention made against it and the notices and the respondent was on notice it could have.

Conclusion

48. The failure to comply with the notices 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.

49. In relation to the admitted contraventions, each one is objectively serious, and in light of the submissions on the above mentioned factors, there should only be a discount of 5% for the respondent's co-operation at the door of the Court. However, in the circumstances of this case, it

[6] *AMIEU v Meneling Station* (1987) 16 IR 245 notes that the burden is on the party relying on it to establish the course of conduct.
[7] *Pearce v R* [1998] HCA 57; (1998) 194 CLR 610 at [40].

is inappropriate in arriving at a total penalty that is an appropriate response to the whole of the contravening conduct to impose a penalty in respect of each of the contraventions as if it was the only contravention. I will give effect to this by imposing lower penalties in the case of the second and third than in the case of the first.

50. The applicant had sought what was referred to in submissions as a "*training order*" and (separately) an injunction restraining the respondent from further contravening conduct or involvement in same. Both orders expressed to be pursuant to s.545(1) of the FW Act. However as the applicant was unable to point to any authority for such orders in proceedings of this nature (i.e. by way of penalty) I am not persuaded either are appropriate orders.

51. In the circumstances the appropriate penalty for the first contravention is $4,845 and then $3,000 and $1,155 for the second and third contraventions respectively. This results in a total penalty for the whole of the respondent's conduct in light of the factors relevant to penalty of $9,000 payable within 6 months (which period was agreed). This is around 58% of the maximum.

52. For the reasons set out above I will make the orders set out in the being of these reasons for decision.

I certify that the preceding fifty two (52) paragraphs are a true copy of the reasons for judgment of Judge O'Sullivan

Associate:

Date: 19 February 2016