

**IN THE MAGISTRATES' COURT
OF VICTORIA
AT MELBOURNE
INDUSTRIAL DIVISION**

COURT NUMBER: Y01997613

BETWEEN

FAIR WORK OMBUDSMAN

Plaintiff

and

S & J ROOFING PTY LTD (ACN 064 290 188)

First Defendant

and

STEPHEN WALTERS

Second Defendant

TRANSCRIPT OF HEARING: 9 OCTOBER 2009

Magistrate Holzer
For the Plaintiff: Ben Vallence
For the Defendant: No appearance

**DISCLAIMER: THIS IS AN EDITED EXCERPT OF THE ABOVE HEARING.
NUMBERING HAS BEEN ADDED FOR EASE OF REFERENCE ONLY.**

- HIS HONOUR:
1. This is a matter in which the Fair Work Ombudsman has brought proceedings against a company, S & J Roofing Pty Ltd and Stephen Walters who is the Director and Secretary of the company and alleged to be a person involved in the contraventions before me today and I accept that he is a person so involved. The reasons which will become apparent shortly.
 2. The proceeding was brought on 30 June 2009 and orders have been previously made on 28 August 2009 which there was an amount awarded on the claimant of \$15,013.83 together with interest of \$238.58.
 3. The matter comes before me by way of a penalty hearing only and Mr Vallence appears on behalf of the plaintiff. The proceeding concerns the employment of one Steven Svirn who was a full time apprentice roof tiler employed by the first defendant under the direct authority and instruction of the second defendant. The period of employment was between the 30 November 2005 and the 25 July 2008 and the relevant award for the purposes of this proceeding is the Roof Slaters and Tilers Victoria Award of 2002.
 4. There are a number of breaches of each there are said to be seven contraventions as against the first named defendant company and five as against the second named defendant individual. I accept each of those breaches are proven and are made out on the evidence before me.
 5. I have had regard in particular in coming to my decision today to the affidavits of both Mr Svirn which is filed and sworn in this proceeding on 6 October 2009 and the affidavit of Ms Jeanette Nicholson sworn and filed on the 2 November, 2 October I should say, 2009. In particular the affidavit of Ms Nicholson is constructive because it deposes to a number of recent communications between herself, her office and the second defendant. Relevantly, paragraph 5 exhibits a letter of 19 November 2008 and then on the 17th, I beg your pardon on the 11 December 2008 deposes to a telephone conversation between Ms Nicholson and Mr Svirn. The relevant part of that in my view, is in particular, that Mr Svirn outlined that he had been signed up as an apprentice roof tiler however only attended trade school for a total of two weeks the second defendant that is told him he could not afford to go to trade school as well as pay him and that seems to me to underpin much of the course of conduct which is alleged in this proceeding before me. Oddly what has happened is that there was a breach notice served on about the 18 February 2009 and there was a response to that which is the letter of 2 March 2009 which is exhibited to Ms Nicholson's affidavit as exhibit JN9 and materially that advises that it was financially impossible for the company or the second defendant to pay the breach notice. That lead to the service of a final notice on or about 31 March and as I indicated the proceeding was commenced on 30 June this year.

6. Mr Valence has helpfully provided to me both submissions on penalty and proposed draft orders. I won't recite the content of all those submissions but materially they set out the evidence in respect of penalty on the part of the plaintiff and they provide the framework and also the legal analysis on which I should found my decision. And I have seen similar kind of submissions previously I accept that the approach that is suggested by Mr Valence and his instructor is an appropriate one and I propose for that today.
7. Mr Valence has helpfully provided to me both submissions on penalty and proposed draft orders. I won't recite the content of all those submissions but materially they set out the evidence in respect of penalty on the part of the plaintiff and they provide the framework and also the legal analysis on which I should found my decision. And I have seen similar kind of submissions previously I accept that the approach that is suggested by Mr Valence and his instructor is an appropriate one and I propose for that today.
8. I note and I accept that there is a maximum penalty that might be imposed today by me in respect of the first defendants contraventions of \$231,000 I note and also accept that there is a maximum penalty of \$33,000 that may be imposed by me as against the second defendant. The real question for me is taking into account the relevant factors which are set out in the authority of **P.....** case I'll use the shorthand description the citation of which is 2007 Federal Magistrates Court of Australia page 7, His Honour, Federal Magistrate **Marbray** and later followed by other courts, principles of which are well established and don't need me to make further comment upon whether they suggest that I should take a robust approach in terms of penalty, take into account all the factors or whether I should accept the position that the plaintiff ?? on me that this is a case that in all the circumstances justifies a penalty in low to mid range.
9. It is significant I think, I had this discussion with Mr Valence in making the submission that he did that the timing of the strike off application I have been handed the printout from the Australian Securities and Investment Commission which suggests that there was a voluntary deregistration of the company before proceedings were commenced. Some three months before and as I indicated to Mr Valence fairly I think, one can only speculate upon that given the reason proffered to Ms Nicholson and given the timing of that application voluntarily made it seems to me that there is a reasoning that might be drawn that there is some attempt to minimise or to avoid liability as both as against the company and also as against the individual Mr Walters in this case and I take that into account in particular in coming to the decision that I do.
10. In my view an appropriate percentage, I will work on percentage in coming to my conclusion and based my penalty on is one fixed at 40% of the maximum. I know there are a range of approach by my

brothers and sisters and that's a variable approach and its reflective of discretion with which ?? vested in coming to conclusions on penalty proceedings such as this that I think in the circumstances 40% adequately and fairly reflects the degree of culpability and also importantly imposes a degree of deterrent particularly specific deterrents as well as general deterrents in the contexts of this particular proceeding and mathematically when one does the calculation applying my multiplying 40% based on the maximum penalty I come to figures of \$92,400 being the amount of the penalty as against the first defendant and \$13,200 being the amount of the penalty as against the second defendant in respect of the seven and five respectively contraventions that are proven in this proceeding.

11. Given the submissions that Mr Vallence made it is appropriate that I order that in respect of the \$92,400 that that be paid to the consolidated revenue of the Commonwealth consistently with paragraph 75 of Mr Vallence's submissions to me dated 2 October and in respect of the \$13,200 that that be paid to Mr Svirn under section 841(b) of the Workplace Relations Act and I make those orders.
12. I also have to formalise my decision and my reasons today I make the declaration sought by Mr Vallence and his proposed draft orders that were handed to me today I won't recite each of those simply to indicate that I am prepared to and I do make the declaration sought in paragraphs 1A through to 1G inclusive of the minute in respect of the first defendant and make the orders in terms of the contravention against the second defendant in paragraphs 2A through to 2E inclusive of the minutes. I think having indicated as I have the way in which my reasoning has been arrived at I don't need to, or perhaps I should recite paragraphs 3 and 4 in the formal sense that Mr Vallence has asked me to do in his minute.
13. I order that, this is order number three. Pursuant to section 841 of the Workplace Relations Act and section 356(a) of the Pre Reform Workplace Relation Act that the first defendant pay to the consolidated revenue fund of the commonwealth a pecuniary penalty of figure to be inserted there is \$92,400. I order pursuant to paragraph 4 of the draft proposed minute that pursuant to section 841 (b) of the Workplace Relations Act that the second defendant pay to Steven Svirn a pecuniary penalty \$13,200 and I further order that the payment of pecuniary penalty referred to in orders 3 and 4 be made within 60 days of the date of this order. I will therefore date the minute, I will sign it, and Mr Vallence if you need to have that engrossed or copied for your purposes that can act as the orders and penalties that I have ordered today.

Mr Vallence: 14. Yes I would be grateful Your Honour.

HIS HONOUR: 15. Are there any other issues I need to attend to?

- Mr Vallence: 16. Your Honour, the only issue is that obviously we would like a copy of the transcript of your decision.
- HIS HONOUR: 17. That can be arranged. I am sure my clerk can put those steps into train. Alright is there any further that needs to be attended to?
- Mr Vallence: 18. No Your Honour.
- HIS HONOUR: 19. Alright, I'll hand back to you the correspondence, the recent correspondence and also the ASIC extract, If you don't mind I will retain the submissions that you kindly presented to me but I will make available to you the draft orders, and I have deleted the word draft and I have initialled that and I have put a date next to that so as to reflect properly the orders of the court made this day.
- Mr Vallence: 20. Thank you
- HIS HONOUR: 21. I am indebted to your assistance Mr Vallence thank you very much indeed unless there is anything else you wish to say or have me do in respect of this proceeding I will excuse you. Thank you very much. You are excused.