

FEDERAL MAGISTRATES COURT OF AUSTRALIA

JORDAN v SWITCHED ON SECURITY PTY LTD

[2008] FMCA 394

INDUSTRIAL LAW – Alleged contravention of s.342(1) of the *Workplace Relations Act 1996* (Cth) – agreed statement of facts – failure to lodge AWAs – workers underpaid – consideration of matters relevant to imposition of penalty.

Workplace Relations Act 1996 (Cth), ss.342(1), 407(1)

Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8

Mason v Harrington Corporation Pty Ltd [2007] FMCA 7

Kelly v Fitzpatrick [2007] FCA 1080

Trade Practices Commission v TNT Australia Ltd (1995) ATPR 40

Lawlor v Dartbridge Welding Pty Ltd & Anor [2007] FMCA 2119

Applicant:	JORDAN (OFFICE OF WORKPLACE OMBUDSMAN)
Respondent:	SWITCHED ON SECURITY PTY LTD (ACN 093 863 257) TRADING AS PLATINUM SECURITY
File Number:	LNG 42 of 2007
Judgment of:	Burchardt FM
Hearing date:	6 March 2008
Date of Last Submission:	6 March 2008
Delivered at:	Melbourne
Delivered on:	3 April 2008

REPRESENTATION

Counsel for the Applicant: Mr Connolly
Solicitors for the Applicant: Clayton Utz
Counsel for the Respondent: Mr Collinson
Solicitors for the Respondent: Page Seager

THE COURT DECLARES AND ORDERS:

DECLARES:

- (1) That the Respondent has contravened s.342(1) of the *Workplace Relations Act 1996* (Cth) by failing to lodge Australian Workplace Agreements with respect to the eleven employees named in paragraph 1 of the application in this proceeding.

ORDERS:

- (2) That a penalty of \$5,500.00 be imposed upon the Respondent in accordance with s.407(1) of the *Workplace Relations Act 1996* (Cth).
- (3) That the penalty in Order 2 be paid into the Consolidated Revenue Fund within 60 days of 3 April 2008.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
MELBOURNE**

LNG 42 of 2007

JORDAN (OFFICE OF WORKPLACE OMBUDSMAN)
Applicant

And

SWITCHED ON SECURITY PTY LTD (ACN 093 863 257)
TRADING AS PLATINUM SECURITY
Respondent

REASONS FOR JUDGMENT

1. This is an application by an inspector of the Office of Workplace Ombudsman for the imposition of penalties on the Respondent for failing to lodge Australian Workplace Agreements with respect to eleven employees.
2. Inspector Jordan's application asserts that that failure contravened s.342(1) of the *Workplace Relations Act 1996* (Cth) ("the Act") and he accordingly seeks the imposition of penalties in accordance with s.407(1) of the Act.
3. The facts in the proceeding are not controversial and can be shortly stated.
4. There is no issue as to Inspector Jordan's appointment or as to his entitlement to bring these proceedings, nor as to the incorporation of the Respondent and its capacity to be sued under the legislation.
5. The agreed statement of facts with which the Court has been provided also records that the Respondent operates a business trading as

Platinum Security providing security and transport services in the Launceston area, Tasmania. At the relevant times it employed twenty staff, and was bound by the Security Industry Award, a Notional Agreement Preserving a State Award ("the NAPSA") and the relevant pay scales contained in that award.

6. From late 2000 onwards the Respondent began offering AWAs as a condition of employment and engaged the services of an industrial consultant to assist with the implementation and administration of AWAs with its workforce.
7. The consultant ceased providing his services in 2005 and from that time onwards the Respondent has neglected to see that the AWAs were implemented and administered properly in accordance with law, most particularly including the requirements of lodgment with what is now the Office of Workplace Ombudsman.
8. In or about January 2007 Mr Jordan commenced an investigation into the conduct of the Respondent and that led to these proceedings.
9. It is now common cause that the employer failed to lodge AWAs in respect of eleven named employees, whose names are set out at paragraph 6 of the agreed statement of facts.
10. Although each AWA was approved, the Respondent failed to lodge them, as required by s.342(1) of the Act, and this meant that the AWA was non-operational. That in turn meant that the employees continued to be entitled to the benefits of the NAPSA. Because the AWAs terms were less generous than certain terms of the NAPSA, each of the eleven employees was underpaid and suffered loss.
11. In total, about \$18,500.00 was underpaid, approximately \$1,680.00 per employee. The Respondent fully cooperated with the investigation, including being interviewed, providing documents and promptly rectifying the underpayments owing after receiving the breach notice from Mr Jordan. There are no outstanding underpayments with respect to employees arising from the failure to lodge the AWAs or any other matters arising out of the investigation.
12. It is common cause that the Respondent has committed no prior breaches of the Act.

13. The above is in part a paraphrase and in part a direct quotation of the matters set out in the agreed statement of facts.
14. Before me, counsel for the Respondent advanced a number of factual assertions from the bar table which were not the subject of objection or challenge and which I will therefore accept as being factually accurate. From an interview between an officer of the Office of Workplace Services, as it was then known, and Mr Douglas Knowles in March 2007 (exhibit GMJ-5 to the affidavit of Mr Jordan sworn on 19 November 2007) it is apparent that Mr Knowles is the managing director of the Respondent.
15. Most of the other matters contained in the interview are subsumed within the agreed statement of facts. It is apparent that all or almost all of the work that the company has done is to provide additional staff to assist the Ashley Youth Detention Centre (“the Ashley Centre”) in the transport of young offenders.
16. At page 6 of the record of transcript Mr Knowles said, relevantly:

I admit negligence in filing AWA receipts with the OEA. However, I have tried to live by the spirit of the agreement and have provided wage increases in line with the wage increase annually. Since this matter has been brought to my attention I have engaged an officer from AI Workplace Agreements (Thane Brady) to assist me in putting together an updated agreement in line with the changes of workplace relations in 2006. The reason I didn't lodge filing receipts is because my agent was no longer available and due to heavy work pressures and high turnover of staff I overlooked filing receipts and failed to replace him. In every other respect my company pays wages on time and other entitlements such as workers comp, it seems the problem here is a paperwork issue.
17. Before me, counsel asserted that Mr Knowles was in fact a person who had worked for many years as a security officer at the Ashley Centre and that he had decided to set up this additional business in about 2000. It appears that Mr Knowles performs his work as a security officer and runs his company additionally.
18. Mr Knowles has now entered into a certified agreement, so he will not re-offend, whatever the future of AWAs may be under Australian law.

19. Mr Jordan seeks, as I have said, a declaration that the Respondent has breached s.342(1) of the Act, and that is an agreed matter.
20. The real dispute between the parties is the measure of penalty I should impose.
21. Mr Jordan submits that the Court should, in fixing a penalty, have regard to the objective seriousness of the offence, to deterrence and to the totality principle.
22. It is common cause that the maximum total penalty available is \$181,500.00, being \$16,500.00 times eleven breaches.
23. Although there were differences of emphasis in the submissions made, both parties submitted that the application of the relevant factors in considering the circumstances of the case meant that the matter fell within the lower penalty range. What they disagreed about was the conclusion to which I should arrive as to the precise figure.
24. At this point it is appropriate to say something of the principles that govern the assessment of penalty in these circumstances. This Court now has the very considerable benefit of the decision of the Full Court of the Federal Court of Australia in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 (“*Ophthalmic Supplies*”), a decision of Gray, Graham and Buchanan JJ.
25. From that decision, which addresses a number of prior decisions both of this Court and the Federal Court, I would, respectfully, adopt the following propositions:
 - a) The non-exhaustive list of relevant factors identified by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7, and adopted by Tracey J in *Kelly v Fitzpatrick* [2007] FCA 1080, is a helpful check list, providing it does not become transformed into a rigid catalogue of matters for attention (per Graham J at [60] and per Buchanan J at [88]-[91]).
 - b) Penalties are not a matter of precedent. The choice of penalty must be dictated by the individual circumstances of the case, not by a line by line comparison with another case (per Gray J at [12] and Buchanan J at [91]). These observations mirror the remarks

of Burchett J in *Trade Practices Commission v TNT Australia Ltd* (1995) ATPR 40, 161 at 40,165 where Burchett J said:

“It cannot be denied that the fixing of the quantum of penalty is not an exact science. It is not done by the application of a formula, and within a certain range, courts have always recognised that one precise figure cannot be incontestably said to be preferable to another.”

- c) 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 (per Buchanan J at [91]).
 - d) The Court must apply the totality principle, which means determining an appropriate level of penalty for each contravention and then to look at the aggregate of the penalties in light of the overall conduct of the appellant to form a view as to whether that aggregate was out of proportion to the overall conduct (per Gray J at [23], per Graham J at [71], per Buchanan J at [102]).
26. There was some disagreement in emphasis between the parties as to whether the conduct of Mr Knowles (and through him, the Respondent) was merely negligent or reckless. There was also some conflict as to the need for general deterrence.
27. In my view, it is appropriate to note that:
- the Respondent had been made aware, or at the very least ought to have been aware, from the conduct of its industrial adviser that AWAs needed to be filed;
 - Mr Knowles made no effort to replace his industrial agent, Mr Brown, when he ceased work in 2005;
 - the conduct of the Respondent led to employees being underpaid their proper entitlements in amounts that were not insubstantial, and over a period of some months;

- there is no indication that absent the intervention of the Workplace Ombudsman the conduct would not have continued for a very considerable period of time;
- it is acknowledged between the parties that this is not a case in which specific deterrence has any significant role to play;
- the Respondent has no prior conduct of infringing this or any other relevant legislation;
- the Respondent has shown contrition, corrective action and cooperation;
- the company is, to all intents and purposes, a very small one consisting of Mr Knowles and those people he engages from time to time;
- we are concerned with one course of conduct rather than multiple sorts of actions; and
- the failure to lodge AWAs does not of itself enhance the profitability of a company as the filing fee is nominal.

28. The parties spent some time discussing the decision of Jarrett FM in *Lawlor v Dartbridge Welding Pty Ltd & Anor* [2007] FMCA 2119.

29. While I note that in that decision his Honour imposed a penalty of \$200.00 per offence, I am required to and do bear in mind the remarks of the Full Court in *Ophthalmic Supplies*. Each case must be approached on its own facts and circumstances, and, per Gray J at [14], "There is no established tariff, or appropriate range of penalties."

30. Ultimately an exercise of this sort must necessarily involve matters of impression and judgment. Bearing in mind all the materials before the court and paying particular regard to the matters that I have itemised above, an appropriate penalty for each of the eleven contraventions is the sum of \$500.00.

31. This would provide a total penalty of \$5,500.00. Applying the approach to the totality principle set out in *Ophthalmic Supplies*, I have considered whether this aggregate total offends against the totality principle. It is not out of proportion to the overall conduct of the

appellant (per Gray J at [23]). It is just and appropriate (per Graham J at [73]). It is not, in all the circumstances, excessive (per Buchanan J at [102]).

32. Accordingly, there will be a declaration that the Respondent has contravened s.342(1) of the Act by failing to lodge AWAs with respect to the eleven employees named in paragraph 1 of the application in this proceeding. I will impose a penalty of \$5,500.00 upon the Respondent in accordance with s.407(1) of the Act for that failure. I will further Order that the said sum be paid into consolidated revenue, as sought by Mr Jordan.

I certify that the preceding thirty-two (32) paragraphs are a true copy of the reasons for judgment of Burchardt FM

Associate: Brooke Evans

Date: 3 April 2008