



Australian Government
Office of Workplace Services

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

Court Number U02597024

BETWEEN

**ZELJKO KOVACEVIC (A WORKPLACE INSPECTOR APPOINTED PURSUANT TO
SECTION 167(2) OF THE WORKPLACE RELATIONS ACT 1996)**

Plaintiff

and

A.C.N. 000 254 057 PTY LTD

Defendant

TRANSCRIPT OF HEARING 3 APRIL 2007

Magistrate Kate Hawkins
For the plaintiff: Melinda Richards
For the defendant: Robert Hendrey

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

- HER HONOUR:
1. Thank you. I'll now give my decision in this matter.
 2. These proceedings were commenced on 31 October last year. In the complaint that was lodged on that day Mr Kovacevic, who is a workplace inspector appointed pursuant to section 167(2) of the pre-reform *Workplace Relations Act*, alleged that the *Property and Business Services Industry Sector Minimum Wages Order of Victoria 1997* and the *Clerical and Administrative Employees Victorian Common Rule Award 2005* had been breached by the defendant company in a number of regards. Those breaches related to the underpayment of wages to one employee, Janet Langshaw, and the failure to pay pro rata annual leave entitlements upon the termination of her employment.
 3. That claim was defended by Mr Robert Hendrey, the sole director of the defendant, and by a defence dated 5 December 2006 in which I note that he admitted a partial underpayment of wages in the sum of \$574.20, but otherwise disputed or denied the claim, in that he submitted that the employee was incorrectly classified in the claim made by or on behalf of the Office of Workplace Services. He also attached to that, correspondence submitting that his company had paid her under a legally binding contract.
 4. This matter was subsequently listed for hearing, or came before the court, on 7 February of this year and listed for hearing for a contested hearing on today's date as to merits, and, ultimately, penalty.
 5. I'm told by the plaintiff that Mr Hendrey has made good the total amount of the underpayments and paid those sums of money out of his own pocket last week, and, accordingly, this matter proceeds before me today on an agreed statement of facts on the question of penalty only. On the basis of that agreed statement of facts, I find the breaches that are alleged proven. For the purposes of this decision I will refer to the matters which are raised in the agreed statement of facts: The defendant is a body corporate. Prior to 1 January 2005 it was bound by schedule 1A and the *Property and Business Services Industry Sector Minimum Wage Order Victoria 1997*, and from 1 January 2005 it was bound by the *Clerical and Administrative Employees Victoria, Victorian Common Rule Award*.
 6. The defendant employed Janet Langshaw on a casual basis from 24 June 2003. The office manager of the defendant, one Nola Merrin, was responsible for engaging Ms Langshaw. Between 24 June 2003 and 31 December 2004 Ms Langshaw was employed by the defendant, performing the duties of a level 9 employee under the Minimum Wage Order, until the commencement of the Award. From 1 January 2005 she was performing the duties of a grade 3 employee with more than six months experience under the award. The defendant paid Ms Langshaw \$15 gross per hour from the commencement of her employment until 25 June 2004. On 26

June 2004 her hourly rate was increased to \$16.50 gross. Pursuant to the Minimum Wage Order the defendant was obliged to pay Ms Langshaw the following minimum rates of pay for ordinary hours worked Monday to Fridays, at \$17.59 per hour effective from 1 August 2003, thereafter at \$18.21 per hour, and from the commencement of the award, on 1 January 2005, a minimum rate of pay of \$18.46 gross per hour, and also pro rata annual leave on the termination of her employment. There has been tendered to the Court and admitted a schedule setting out the ordinary hours worked and the rate of pay at which she should have been paid. In total the amount of the underpayments was \$4,314.19.

7. The defendant ran a small family property valuation business in the Point Lonsdale area. At its height, the company engaged approximately 12 full-time and casual staff and various contract valuers. Mr Hendrey, the sole director, was actively involved in the valuation side of things and left the running of the administration to an office manager, Ms Nola Merrin, and an accounts manager during the relevant period which this claim involves. Those two employees were responsible for engaging staff and determining their employment conditions. They did so unsupervised by Mr Hendrey and he placed a considerable trust in their knowledge and experience in employee relations. The business was a member of the local Chamber of Commerce and the Australian Property Institute and received regular updates about employment matters.
8. The defendant company ceased trading on 14 March 2005. I'm told that at that point the business was sold to a larger operation, which carried on the substance of the business from the same office for a period of 12 months or 18 so after that date. I understand Ms Langshaw continued to be or was employed by the new entity in a similar position which she had occupied with the defendant.
9. It's agreed that the underpayment of wages to Ms Langshaw did not come to the defendant's notice until after the defendant had ceased trading. The Office of Workplace Services wrote to the defendant on 5 May 2006, 8 June 2006, 26 June 2006 and 20 July 2006 in relation to the underpayments. I have heard from Mr Hendrey that he met with an officer of the plaintiff on at least two occasions and engaged in correspondence with him. He admits that copies of the relevant industrial instruments were provided to him and that he had extensive discussion with Mr O'Leary, the officer of the plaintiff, about the appropriate classification of Ms Langshaw, and he was given repeated opportunities to remedy the underpayment prior to the ultimate issue of legal proceedings.
10. The defendant itself was placed into a members' voluntary liquidation on 22 March of this year and it's agreed that Mr Hendrey states that the breach was not intentional and that the

underpayment of wages to Ms Langshaw was made as a result of an inadvertent error by the defendant's bookkeeper and office manager as to Ms Langshaw's correct classification. It's also agreed that the defendant has not previously been found by a court to have engaged in similar conduct.

11. Mr Hendrey was concerned at the outset of the hearing and at the conclusion of the hearing, also, about the contents of the plaintiff's submissions on penalty. He alleged that there was an agreement reached between the solicitors as to those submissions and as a matter of fairness I, accordingly, afforded him the opportunity to give sworn evidence to expand this court's understanding about the circumstances of the breach. He did so; I did not allow evidence of negotiations between solicitors prior to the agreed statement of facts, as I don't consider that to be relevant. What is relevant is the ultimate agreement which is before the Court in the context of the evidence given by Mr Hendrey today.
12. In evidence, Mr Hendrey maintained that whilst he ultimately accepted that the classification afforded to Ms Langshaw by the Office of Workplace Services, he maintained that the classification issue was one of some debate and that his decision to accept that was on the basis of what I might refer to as commercial reasons. He did submit steadfastly that regard was had to the relevant industrial instruments at all times. To that end he referred to the e-mail of 26 March 2006 from his former office manager, Nola Merrin. However the contents of that e-mail suggest quite the contrary was in the mind of Ms Merrin. It states, and I quote: "Janet, like all staff, were issued with an employment contract which overruled the award system at that time. I think that the award system came back into play late 2004, early 2005. But I thought we relied mostly on the employment contract whilst I was working with you." It's not said that there was ever an Australian Workplace Agreement in force, is it?

MS RICHARDS: 13. No.

HER HONOUR: 14. This quote is illustrative that the person upon whom Mr Hendrey relied did not appear to have regard to the appropriate industrial instruments in determining the minimum rates of pay at the relevant times. To describe this breach as mere inadvertence is not appropriate, in my view. Apart from broad statements that your staff were absent from work on training, there is no evidence before this court to suggest that you sought, as an employer, correct advice as to your legal obligations. It's not sufficient for an employer to shift responsibility to another employee to ensure that legal obligations are met. Those legal obligations, including adherence to minimum wage rates are ultimately the responsibility of the employer. I note, however, that you have acknowledged that responsibility as the employer, Mr Hendrey.

15. Repeated opportunities to remedy the underpayment were provided to the defendant prior to the issue of legal proceedings. Care was taken to discuss the appropriate classification and to ensure that the defendant had an understanding of the basis upon which this claim was to be made. I note that the defendant defended these legal proceedings and only admitted the breach and remedied the underpayment the week before this matter was listed to proceed as a contested hearing. No interest has been paid on those wages and the employee has been deprived of money she had rightfully earned from a point as early as 2003. I note that there has actually been no application for interest to be paid in these proceedings so I do take that into account.
16. It's appropriate to refer to the principal objects defined under the *Workplace Relations Act* in section 3. Those principal objects include providing the means to ensure the maintenance of an effective award safety net, a fair and enforceable minimum wages and conditions of employment and providing a framework of rights and responsibilities for employers and employees in their organisations which supports fair and effective agreement making and ensures that they abide by awards and agreements applying to them. This statement emphasises the importance of minimum standards and the enforcement of those standards. I note that the employee, the subject of this claim, is reliant on that safety net of a minimum rate of pay. I suspect her bargaining position was unlikely to be strong. It's also relevant to note the approach Parliament has taken to these matters. Parliament increased the maximum penalty in relation to breaches of this type in August 2004 from \$10,000 per breach to \$33,000 per breach. Accordingly the Court must view a failure to pay minimum rates of pay and conditions not as mere trifling matters. I'm also aware that for a matter to reach the point of judgment in a court, it has a history. Attempts at voluntary compliance have been unsuccessful, legal proceedings are a last resort.
17. I turn to the plaintiff's submissions on penalty. The defendant has admitted three categories of contravention. Two of those overlap, in a sense that they relate to underpayment of wages at the appropriate minimum wage rate. The second is that, upon the termination of Ms Langshaw's employment, she was not paid pro rata annual leave as required. Properly, those breaches ought to be viewed as two distinct breaches, rather than three, attracting, under the legislation at the relevant time, a potential maximum penalty of \$66,000.
18. All right, I don't intend to go into the mechanics of the totality principle and the like, I think it's sufficient to reach the conclusion which I have just concluded.

19. The factors relevant to penalty were -- or The Court was referred to the various factors relevant to penalty to which it is well aware, and these conclusions that I will reach subsequently certainly do take into account the consideration given to these matters by the Federal Court and the Federal Magistrates' Court in cases such as *Gibbs v. City of Altona*, the *CFMEU v. Cole and Allied*, the *TCFUA v. Lotus Cove*, and the principles which I consider have been very neatly summarised by Federal Magistrate Mowbray in *Mason v. Harrington Corporation*, and the subsequent decision in - the name has presently escaped me. Anyway, the principles that he outlines are the same in both.
20. In this case the plaintiff submits that the following matters would warrant the imposition of a significant penalty, and, Mr Hendrey, I stress that these are the factors, if you like, in favour of significant penalty; I will turn subsequently to the factors which mitigate against the imposition of a significant penalty.
21. The defendant's underpayment of Ms Langshaw continued over a period of one year and nine months, the amount of the underpayment was a total in excess of \$4,000, which is a most significant amount for a casual employee who worked fluctuating hours over a period of one year and nine months or thereabouts. She ought to have been employed as a minimum wage rate employee and that amount of the underpayment in the context of her overall rates of pay is a significant amount. The plaintiff also submits that the defendant resisted compliance with its obligations until after the prosecution had been commenced and the matter fixed for hearing. The Office of Workplace Services was put to the trouble and expense of bringing this prosecution and commenced preparation for a contested hearing. Whilst the defendant maintains its breaches were unintentional, there is no evidence that the defendant sought advice as to its legal obligations in respect of its minimum wages and conditions, and that there is general considerations of deterrence and the desirability of sending a clear message to the community that employers must understand the importance of meeting their obligations under awards and orders of the Commission.
22. In Mr Hendrey's favour, the Court takes into consideration that ultimately the defendant has admitted these breaches and accepted responsibility for those breaches, that he, Mr Hendrey, personally was not involved in determining the rates of pay and that this occurred via a subordinate employee, that he, out of his own pocket, as the sole director, has remedied the underpayment from his personal funds, and has not been previously found by a court to have engaged in similar conduct. These acts are evidence of contrition, corrective action and, most importantly, Mr Hendrey has appeared at court today and fully accepted his responsibility for these breaches. I place considerable weight on your actions

today, Mr Hendrey, in appearing and taking responsibility for these matters. That appearance does warrant a substantial discount on what would otherwise have been the penalty I would have imposed today.

23. The plaintiff submits that this is not a case where a nominal penalty only should be imposed, but does submit that the penalties imposed ought to be at the lower end of the range of possible penalties. I certainly accede to that submission.
24. In conclusion, the orders I propose to make are that the defendant pay to - I take it that Consolidated Revenue is sought - that the defendant pay to Consolidated Revenue the following penalties for breaches of the *Property and Business Services Industry Sector Minimum Wages Order Victoria 1997* and the *Clerical and Administrative Employees Victorian Common Rule Award 2005*. Firstly, an aggregate amount of \$5,000 for breaches of the minimum rates of pay clauses, and secondly, a further sum of \$2,500 for breach of the clause requiring payment of pro rata leave upon termination. Payment of those penalties is to be made into Consolidated Revenue within 30 days unless there is agreement reached to some other scheme of payment arrangement.

ADJOURNED ACCORDINGLY