IN THE MAGISTRATES' COURT
AT MELBOURNE
INDUSTRIAL DIVISION

No. X00210142

BETWEEN:

INSPECTOR ZELJKO KOVACEVIC (A workplace inspector appointed pursuant to s.167(2) of the *Workplace Relations Act 1996 (Cth))*

Plaintiff

and

PAREKER ENGINEERING CORPORATION (AUSTRALIA) PTY LTD
(ACN 081 663 309)

First Defendant

FERHAN PARKER

Second Defendant

ORDERS

1. That the First Defendant pay to Consolidated Revenue an aggregate penalty of $50,000.00 for breaches of the *National Electrical, Electronic and Communications Contracting Industry Award 1998* (**the Award**) and the Australian Fair Pay and Conditions Standard (**the AFPCS**).

2. That the Second Defendant pay to Consolidated Revenue an aggregate penalty of $10,000.00 for breaches of the Award and the AFPCS.

3. That payment of the pecuniary penalty referred to in paragraphs 1 and 2 be made within 30 days.

REASONS FOR DECISION

Introduction

1. Ferhan Parker is the Managing Director and sole shareholder of Pareker Engineering Corporation (Australia) Pty Ltd (**Pareker**). Pareker was established in 1998 but commenced business in February, 2006 calibrating and installing industrial and electrical instruments.

2. These proceedings arise from the underpayment of two employees of Pareker, Mr Gregory Havelberg and Mr Timothy Norman. Mr Havelberg was employed as an Operations Co-ordinator between 28 February, 2006 and 15 September, 2006. Mr Norman was employed as a Calibration Technician between 22 May and 24 August, 2006. The proceedings were instituted against Pareker on 17 January, 2008 with Mr Parker joined as a defendant on 1 October, 2008[1].

3. The proceedings relate to breaches of the *National Electrical, Electronic and Communications Contracting Industry Award 1998* (**the Award**) and the Australian Fair Pay and Conditions Standard (**AFPCS**) under the *Workplace Relations Act (Cth) 1996* (**WR Act**) by Pareker in failing to pay to the employees:

   - a basic periodic rate of pay - section 182 of the WR Act;
   - a basic periodic rate of pay - clause 17 of the Award;
   - a motor vehicle allowance - clause 30.4.6 of the Award;
   - superannuation contributions - clause 19.1 of the Award;
   - annual leave on termination - section 235 (2) of the WR Act;
   - annual leave loading on termination - clause 24.3 of the Award; and
   - accrued Rostered Days Off (**RDO**)- clause 13.4 of the Award.

4. On 25 November, 2008 Orders were made by the Court in accordance with Minutes of Consent Declarations and Orders filed on 30 October, 2008 regarding the underpayment of the employees. Pareker was ordered to pay Mr Havelberg the sum of $9,204.76 in respect of unpaid wages, $2,305.23 in

[1] The second defendant was joined on Application of the Plaintiff with the consent of Mr Parker.

interest and to make a payment of $740.68 into Mr Havelberg's nominated superannuation fund. In respect of Mr Norman, Pareker was ordered to pay $3,936.39 representing unpaid wages, interest in the sum of $1,011.91 and to make a payment of $285.54 into Mr Norman's nominated superannuation fund. The order required payment within 14 days in respect of the unpaid wages and interest and 21 days for payments to the nominated superannuation funds.

5. The matter was listed for hearing as to penalty only on 21 January, 2009. As at that date, Pareker had substantially failed to comply with the Order of the Court dated 25 November, 2008.[2] I was provided with an Agreed Statement of Facts. Having heard evidence and submissions as to penalty, the Court adjourned the matter to 4 February, 2009 at its initiative[3] for Pareker to make either partial or full payment to the employees[4].

The Relevant Legislative Provisions

6. Under section 719(1) of the WR Act, a penalty may be imposed in respect of a breach of a term of an award (and a term of the AFPCS) on a person bound by that provision. The maximum penalty that may be imposed on a corporation such as Pareker for the breach of a term of an award (or the AFPCS) is $33,000. The maximum penalty that may be imposed on an individual, in this case Mr Parker, is $6,600.00.[5]

7. Significantly, section 719(2) of the WR Act provides that where the breaches of the award provision "arise out of a course of conduct" the breaches shall be taken to constitute a single breach of the term.

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[2] Mr Parker gave evidence of having paid the monies owed into the respective superannuation funds. However, at the time of the penalty hearing, neither fund had been able to confirm receipt of payment. No payment had been made by Pareker with respect to the underpayments or interest owed to the employees.

[3] With the consent of the Plaintiff

[4] On 4 February, 2009 the matter was listed for mention. Mr Parker appeared. The Court was advised that the sum of $400 in total had been paid on 3 February, 2009 towards the Judgment Order.

[5] It is noted that this was the maximum penalty for the duration of the employment under s178(4)(a) of the pre-reform WR Act and the current s719(4)(a).

8. In this case, it is not disputed[6] that the underpayments occurred because of the defendants' failure to pay the employees their wages and entitlements in full on a regular periodic basis. As to penalty, the defendants submit this failure arose due to an incapacity to pay the employees in full when the wages fell due. This submission is analysed in detail later in this decision. However, as a consequence of the manner of the breach, the plaintiff submits[7] that each decision not to pay the employees in full at various times gives rise, on each occasion, to a distinct course of action. Accordingly, the plaintiff submits that s719(2) of the WR Act does not apply and that each occasion on which the employees were underpaid constitutes a separate and distinct breach of the term of the Award/AFPCS. The plaintiff was unable to provide any authority in support of this proposition.

Course of Conduct

9. It is clear that s719(2) of the WR Act only operates in respect of the one term of an award or order: *Gibbs v. The Mayor, Councillors and Citizens of the City of Altona* (1992) 37 FCR 216 at 223 (**Gibbs' case**). The question that arises is whether the underpayment of the employees on separate occasions constitutes a course of action in the circumstances of this case.

10. In Gibbs' case, Gray J sets out the purpose of s.178(2)[8] at [223] as follows:

"The object of s.178(2) appears to be that a party bound by an award and pursuing a course of conduct involving repeated acts or omissions, which would ordinarily be regarded as giving rise to a series of separate breaches, should not be punished separately for each of those breaches."

11. A similar argument to that made by the Plaintiff was urged upon the Federal Court in *Industrial Relations Bureau v. Ismail Hassan* (1982) 62 FLR 169. In that case, it was submitted that the underpayments to the employees could not be said "to have arisen out of a course of conduct" by the employer "because

[6] See Exhibit 9, Statement of Agreed Facts dated 20 January, 2009 at
[7] Plaintiff's Submissions on Penalty at para [5.1] to [5.3].
[8] Relevantly equivalent to s.719(2)

each week... in deciding to pay less than the award, the respondent committed a separate breach". However, Keely J rejected the argument on the basis of the Full Court of the Federal Court authority of *Quinn v. Martin* (1977) 31 FLR 25 (Smithers, Evatt and Keely JJ) (**Quinn's case**). Quinn's case involved an employer who had failed to pay employees' wages, overtime and special allowances prescribed by an award over various periods. The Full Court held (at pages [30-33]) that those breaches of the award had arisen out of a course of conduct.

12. Based on this authority, and in light of the object of s719(2) as set out in Gibbs case, I am satisfied that the each repeated breach is treated as part of the same course of conduct, as is each breach in relation to each of the two claimants. In my view, it would defeat the purpose of s719(2) if a continuous failure to pay wages over a period were to be treated as a course of conduct, but not where an employer, as here, intermittently fails to pay wages or entitlements owed over a period of time.

13. Accordingly, the maximum penalty that may be imposed on the company, Pareker is $231,000.00 for each of the seven separate breaches ($33,000.00 x 7) in respect of which Declarations have been made.

14. In relation to Mr Parker, the maximum penalty that may be imposed is $39,600.00 for each of the six separate breaches ($6,600.00 x 6) occurring after 27 March, 2006, being contraventions with which he was involved: see section 728 of the WR Act.

Factors Relevant to Penalty

15. Factors relevant to penalty have been considered in a number of decisions, to which I was referred: see for instance *Mason v. Harrington Corporation Pty Ltd T/as Pangaea Restaurant & Bar* [2007] FMCA 7, *Mornington Inn Pty Ltd. v. Jordan* (2008) 168 FCR 383 at [41] –[46] (Stone and Buchanan JJ). These cases set out a list of non-exhaustive factors which, in light of the objects of the WR

Act, may be considered in determining an appropriate penalty. I analyse the evidence in light of these considerations below.

Nature and Extent of the Conduct

16. Mr Havelberg and Mr Norman gave evidence in these proceedings and Affidavits were admitted into evidence[9] detailing the circumstances in which each was underpaid. The evidence of each employee was largely uncontested by Mr Parker, representing himself and Pareker.

17. Mr Havelberg's evidence is that he first met Mr Parker whilst working as an Instrument Engineer for another business, Sudel Industries Pty Ltd. Mr Parker was the Manager of Sudel's Victorian operation. When told that Sudel was closing down, Mr Parker approached Mr Havelberg in 2006 advising that he was taking over the business operation in Melbourne and offered him a job. At the time, Mr Havelberg considered Mr Parker a friend.

18. Mr Havelberg commenced employment with Pareker on 28 February, 2006. Under the terms of his contract[10], he was to be paid a base salary of $38,500.00 per annum, which together with a car allowance and superannuation, entitled him to a total remuneration package of $53,965.00 per annum.

19. Mr Havelberg's evidence is that he did not receive any wages for his first fortnight commencing 1 March, 2006 although he received a payslip reflecting what he should have been paid. When he approached Mr Parker to say he had not been paid his wages he says Mr Parker responded with words to the effect:

"Sorry mate, we just need some time to get the business up and running. I will pay you when we get some money in, don't worry."[11]

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[9] Exhibits 2 and 3.
[10] Exhibit 2, "GH 1"
[11] Exhibit 2, para [7]

20. This was the first of what became a pattern throughout Mr Havelberg's employment. Sometimes he received no wages, at other times he was underpaid. The underpayments related to wages, allowances, annual leave, RDO's and superannuation. With the exception of wages (contractually he was paid above award wages), he was underpaid basic entitlements that are prescribed as a safety net of minimum conditions.

21. In approximately March, 2006 Mr Havelberg approached Mr Parker regarding his underpayments (then approximately $5,500) as a result of which an agreement was drafted to address the underpayments by way of 10 monthly instalments of $500.00.[12] Mr Havelberg's evidence is that this agreement gave him a "sense of security that Mr Parker would get the Company back on track" so he continued to work for the company. However, ultimately no payments were made under the agreement.

22. In failing to pay wages and entitlements when due, I consider the defendants not only exploited and breached the relationship of trust that existed with Mr Havelberg, but also a fundamental duty/responsibility as an employer.

23. It is also relevant, and in my view an aggravating feature of the conduct, that in August, 2006 Mr Parker requested a loan in the sum of $22,000 from Mr Havelberg *"to inject into the business".* Mr Parker proposed that *"out of the $22,000 loan you can take the money I owe you of $5,539.41 but even giving it to me which means you could forward to me $16,460.59."*[13] In other words, part of the loan was to be used to repay to Mr Havelberg the monies owed to him. Mr Havelberg did not agree to lend Mr Parker or the company the money requested.

24. Moreover, at a time when neither the company nor Mr Parker was able to pay Mr Havelberg in full, Mr Parker offered another employee, Mr Norman, employment with Pareker on 22 May, 2008. Mr Norman was employed full-time for approximately three months as a Service Manager. Whilst Mr

[12] Exhibit 2, "GH 4"
[13] Exhibit 2, "GH 5"

Havelberg continued to be underpaid, Mr Norman was paid his wages, until August, 2006 when he received no payment of wages for the previous fortnight. His employment was terminated on 24 August, 2006. Mr Norman was underpaid $4,221.93 gross.

25. When Mr Norman sought to pursue his entitlements, he received a letter in response from Mr Parker on behalf of the company, stating *"we have been advised we have acted within our rights and obligations".* Under cross-examination, Mr Parker conceded he had not sought professional advice at the time of the letter. In my opinion, the letter was clearly intended to discourage Mr Norman from pursuing his lawful entitlements further.

26. The underpayments are significant, particularly in Mr Havelbergs' case. Moreover, in addition to the loss occasioned by the underpayments, Mr Havelberg was unable to find alternative employment after he resigned, being forced to rely on Centrelink payments in the interim. He deposed in his Affidavit[14] to the stress of being in debt to the bank.

Similar Previous Conduct

27. No previous contraventions of the WR Act or other workplace legislation are alleged against either Defendant and I have taken this into account in determining penalty.

Size of the Business

28. I am satisfied, on the balance of the evidence, that the business operation of Pareker was a relatively modest one. I note the evidence of the website of Pareker created by Mr Parker, which represents the business as large enterprise with 8 interstate offices[15]. I accept however that this was not in fact the case, and that Mr Parker created the site to give prospective customers

[14] Exhibit 2, para [32]
[15] Exhibit 1, "ZK 12"

the (misleading) impression they were dealing with a larger, more sophisticated organisation.

Demonstration of Contrition, corrective action and co-operation

29. It is clear that neither Pareker nor Mr Parker has never contested that the monies claimed by the Plaintiff were owed to the employees. To that extent, there has been a measure of co-operation with the Plaintiff.

30. However, it is equally clear that, notwithstanding attempts by the Plaintiff to negotiate payment plans with the Mr Parker over an extensive period of time[16], no genuine attempt has been made to repay the amounts owed.

31. Moreover, the Defendants have shown contumelious disregard for Orders made by this Court on 25 November, 2008.

32. Mr Parker gave evidence in the penalty hearing. Mr Parker led evidence that the underpayments arose due to "ongoing cash problems" and the "pressure of creditors". He agreed that it was his proposal to obtain a loan from Mr Havelberg to inject $22,000 into the business as "a shareholding in the business". However, under cross-examination he conceded that the proposal contained in his email to Mr Havelberg dated 30 August, 2006[17] makes no offer of a share in the business. He also conceded that he proposed to deduct the wages owed to Mr Havelberg from the loan under the proposal, saying he "was a bit desperate" at the time.

33. In response to a subpoena, Mr Parker produced documents revealing the turnover for Pareker for the period February, 2006 through to June, 2008[18]. These documents show a turnover of $207,258.85 as at 30 June, 2007 and of $184,545.27 as at 30 June, 2008. Also produced were the "Aged Receivables Summary" as at 14 January, 2009[19]. These show a total of $24,278.04 owed to

[16] See Exhibit 1, paras [6] – [26]
[17] Exhibit 2, "GH 5"
[18] Exhibit A
[19] Exhibit B

the company as at that date. However, I note that the majority (44.1%) of the debt is only 30 days old. Mr Parker was unable to produce any profit and loss statements for the company. Under cross-examination, Mr Parker conceded he did not know whether the company was making a profit or not. The company continues to trade.

34. Based on the material before me, significant doubt must attend the assertion of Mr Parker that Pareker was unable to pay the employee's wages when they fell due. In forming this view, I also note Mr Parker's evidence that he drew an annual wage of between $80-85,000 out of the company's drawings during 2006/2008. Similarly, Mr Parker gave evidence that he met other personal expenses from the company's drawings, including his personal mortgage and medical expenses.

35. In my view, the failure of the Defendants to take corrective action, particularly in response to an Order of this Court, displays a concerning lack of contrition.

36. It is also clear that Mr Parker, as the Managing Director of Pareker (being the sole director and shareholder), was solely responsible for the day to day operation and management of the company. It is clear from the Agreed Statement of Facts that he managed the employment and payment of entitlements to the employees. I accept that he was, in effect, the "guiding mind" of the company.

Specific and General Deterrence

37. Clearly, both specific and general deterrence are relevant considerations in determining an appropriate penalty in this case. As to general deterrence, it is important that employers seeking to rely on an incapacity to pay their employees heed the comments of Keely J in *Lynch v. Buckley Sawmills Pty Ltd* (1984) 3 FCR 503, at 508:

"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 obligations to comply with particular provisions of an award or the award generally should only be taken after careful consideration. The must not be left 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."

Discretion/Totality

38. The Plaintiff submits that a penalty in the medium to high range should be imposed. However, the Plaintiff concedes that given the number of contraventions and the extent to which the contraventions have common elements, "that the totality and instinctive synthesis principles will work to significantly reduce the overall quantum of penalty awarded in this matter".[20]

39. I note however, that this submission was also made in the context of the Plaintiff's submission that s719(2) had limited application. Given that the defendants derive significant benefit from s719(2) of the WR Act as a result of my decision, I consider that the extent to which further reduction is appropriate must now be moderated.

40. That said, however, I accept that there is some overlap in the obligations imposed by, for instance, s182 of the WR Act/clause 17 of the Award (failure to pay a periodic rate of pay) and ss235 of the WR Act/clause 24.3 of the Award (leave and leave loading payable on termination). I have taken this into account in determining penalty, as the defendants should not be penalised more than once for the same conduct. I have also given weight to the absence of any prior matters for either defendant, the modest size of the business and to a limited extent, given the circumstances, the plea in reducing the maximum penalty.

[20] Plaintiff's Submissions on Penalty, para [5.4]

41. However, the combination of aggravating circumstances combined with a lack of demonstrable contrition in this case, requires the court to impose a penalty that manifestly denounces the conduct of both defendants. In this regard I have given particular weight to:

- the period over which the underpayments occurred;
- the manipulation of the employees by Mr Parker on behalf of the company evidenced by the proposed instalment agreement never acted upon and loan request made of Mr Havelberg;
- the lack of any genuine co-operation with the Office of Workplace Services in relation to repayment; and
- finally, the absence of any corrective action (even when afforded an opportunity to do so by the Court) coupled with the blatant disregard of an Order of this Court.

42. Taking all of the above factors into account, I consider that the following penalties are appropriate:

- Failure to pay a periodic rate of pay – s182 of the WR Act - $13,200.00
- Failure to pay a periodic rate of pay – clause 17 of the Award – no penalty
- Failure to pay a motor vehicle allowance – clause 30.4.6 - $13,200.00
- Failure to pay annual leave on termination – s235 - $13,200.00
- Failure to pay annual leave loading on termination – clause 24.3 – no penalty
- Failure to pay superannuation contributions – clause 19.1 - $13,200.00

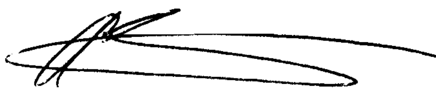
43. I have had regard to the totality principle and considered whether the imposition of an aggregate penalty of $52,800 is just and appropriate to the conduct. I am satisfied that an aggregate penalty of $50,000 should be imposed on the company, Pareker.

44. As the individual involved in each contravention occurring after 27 March, 2006, Mr Parker is liable under the WR Act to have separate penalties imposed on him. I have noted the observation in *Longmine v. Murray Clarke Enterprises Pty Ltd* [2008] FMCA 1028 (Barnes FM) that *"it is legitimate to avoid double counting where the individual contravener is an owner of a corporate contravener"*. However, it is equally the case that individuals who are, in truth, the "directing mind and will" of a proprietary limited company should, in appropriate cases, be liable as directors for conduct which they have aided in, abetted or procured. This is the case in respect of Mr Parker. In my view, the need for specific deterrence is such that a penalty should be imposed on him, as an individual. I consider the following penalties should be imposed in respect of each breach:

- Failure to pay a periodic rate of pay – s182 - $2,640.00
- Failure to pay a motor vehicle allowance – clause 30.4.6 - $2,640.00
- Failure to pay annual leave on termination – s235 - $2,640.00
- Failure to pay annual leave loading on termination – clause 24.3 – no penalty
- Failure to pay superannuation contributions – clause 19.1 - $2,640.00

45. Having regard to the totality principle, I consider an aggregate penalty of $10,000 should be imposed, as just and appropriate, on Mr Parker.

46. I order that the pecuniary penalty be paid into the Consolidated Revenue, with a stay of 30 days on my Order.



AJ Chambers
Magistrate
18 February, 2009.