



Australian Government
Workplace Ombudsman

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

COURT NUMBER W03363017

BETWEEN

**Suzanne Lewis (a workplace inspector appointed pursuant to section 167(2) of the
Workplace Relations Act 1996)**

Plaintiff

and

Adam Coombes-Pearce

Defendant

TRANSCRIPT OF HEARING 26 JUNE 2008

Magistrate Kate Hawkins
For the Plaintiff: Costa Brehas
For the Defendant: No representation

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

- HER HONOUR:
1. I will now give my reasons for my decision in relation to the matter of Inspector Suzanne Lewis and Adam Coombes-Pearce.
 2. I have already concluded that the Defendant has committed a total of 9 breaches of the *National Building and Construction Industry Award 2000* ("the Award") and the *Workplace Relations Act 1996* ("the Act"). Those breaches arise in respect of:
 - failure to pay two employee apprentices the minimum rates of pay provided for under that Award;
 - failure to pay industry allowance;
 - failure to pay tool allowance;
 - failure to pay travel allowance arising under the Award;
 - failure to pay overtime in respect of one of those employees;
 - failure to pay for personal leave for periods of illness in respect of one employee; and
 - failure to pay a proportionate amount of annual leave and annual leave loading on the termination of their employment;
 3. I've also concluded that the Defendant has breached the Award by failing to make superannuation contributions on behalf of these two employees.
 4. These proceedings are brought under the Act in respect of the breaches of the Award. You've said under the *Fair Pay and Conditions Standard* ("the Standard"), but breaches of that are not alleged. Are they incorporated?
- COSTA
BREHAS :
5. That's in relation to the minimum wages under the Standard, your Honour.
- HER HONOUR:
6. Ah, of course, yes, my apologies. These proceedings are brought in relation to breaches of both the Award and the Standard. The breaches occurring both pre and post the reform to the Act on 27 March 2006.
 7. The Defendant has failed to defend these proceedings which were issued in this Court on 14 December last year. Accordingly, judgment in default of filing a defence was made and orders in respect of the underpayments alleged to each of the two employees were made.
 8. The extent of the underpayments in respect of the first employee was that he was underpaid an amount of \$5,995.79 and the second employee was underpaid an amount of \$5,491.55. These amounts were a significant percentage of the total entitlement for each of these employees.

9. It's pertinent to note that the first employee was entitled to receive a total amount of \$7,976.96, yet only received \$2,650.48. That's a calculation that doesn't include his superannuation entitlement. Similarly the second employee only received \$2,747.62 of his total entitlement, exclusive of superannuation, of \$7,614.67.
10. This matter concerns two apprentices, one of whom was 16 years old and the other only 18 years old. There are quite lengthy periods during which these apprentices were paid no wages, or very little by way of wages at all, and certainly were not able to rely on any consistent and regular form of income during their employment with this employer. Given the sporadic pattern of the payments, such as they were, indeed the non-payment by this Defendant, who is a sole trader, I conclude that the breaches in this case were entirely deliberate and made with the full conscious knowledge of the Defendant.
11. I have received by way of evidence on affidavit from the inspector in this case, a detailed chronology of the attempts made by the Workplace Ombudsman to endeavour to obtain compliance in this matter. The Defendant has wilfully avoided many attempts at contact and all attempts to resolve this matter and it is really only a last resort that this matter has been brought to Court after nearly two years of attempted compliance.

COSTA
BREHAS

12. The breaches arose in 2006, but I believe initial complaints were made...

HER HONOUR

13. These were employments that commenced in March and April of 2006 and terminated in September 2006.

COSTA
BREHAS

14. Yes, that is correct.

HER HONOUR

15. And so it's well in excess of 12 months before proceedings have been issued.

COSTA
BREHAS

16. That is correct.

HER HONOUR

17. The employer was given every opportunity to make good the underpayments in this case. He has avoided meeting with the inspector and he has failed to comply with the Court order to rectify the underpayments. He has filed no material in respect of this application for penalty and does not appear at Court today. These are matters that I take into account as one factor in determining penalty. Clearly there has been no contrition displayed by the Defendant in respect of these breaches.

18. In determining what penalty is appropriate in relation to this matter, it is necessary first to identify and consider the separate contraventions involved and to treat multiple offences involving a course of conduct as a single offence in compliance with s 178(2) of the pre-reform Act, which became s 719(2) of the post-reform Act. By doing so, the

Defendant does receive a significant reduction in the potential maximum penalty which may be levied against him.

19. Secondly the Court is then to consider appropriate penalty in respect of each contravention having regard to all of the circumstances of the case. Further more, if two or more of the contraventions have common elements that is to be taken into account in considering what is to be an appropriate penalty in all the circumstances. Clearly it's a matter of law that the Defendant ought not be penalised more than once for the same conduct. And the penalty to be imposed should be an appropriate response to what the Defendant did.
20. Finally, having fixed an appropriate penalty in respect of each separate contravention, or groups of contraventions or a course of conduct, it's necessary for the Court to have a final look at the aggregate penalty and determine whether it's an appropriate response to the conduct which led to the breaches. This have become as the "instinctive synthesis" approach to making this assessment and it is done separately from that first task which has recently been described as applying the totality principle. I do apply the approach strictly, which has been described by the Full Federal Court in what is known as the "*Merringtons*" case, or the case of *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8, decision of the Full Federal Court.
21. In considering the identified contraventions in this case, I do consider that there is considerable overlap between the contravention alleging failure to pay annual leave upon the termination of employment and the failure to pay annual leave loading upon the termination of employment. I will therefore collapse those two breaches and for the purpose of penalty will consider them as one.
22. It has been submitted by the Plaintiff that the breaches in respect of industry allowance, tool allowance and travel allowance ought be treated as separate and distinct breaches of the Award. I consider that to be a proper approach. The breach of the industry allowance is included in the Award for the purpose of compensating employees for the physical difficulties associated with construction work. And the Award describes the disabilities associated with that work to take account of things like climatic conditions when working in the open; having to climb upstairs and ladders; working on scaffolding or swing scaffolding suspended in a boson's chair and the like, and the lack of the usual amenities associated with factory work like having established meal rooms, change rooms, lockers and the like. That is quite distinct from the other allowances alleged. The tool allowance which clearly compensates the employee for obtaining the tools required to perform their work, and for the travel allowance which relates to that which is describes. I am moved by those submissions and consider it appropriate to treat those three breaches quite separately.
23. The remaining breaches alleged in respect of failure to pay the appropriate rate of overtime, personal leave and superannuation

contributions are also properly distinct from one another.

24. Applying that approach to the number of breaches in this case we reach a number of eight. The applicable maximum penalty in respect of this matter, the Defendant being an individual, is \$6,600 per breach. So the total maximum penalty faced by the Defendant in respect of these eight breaches is therefore \$52,800.
25. In determining what ought be the appropriate penalty in this matter, I do have reference to the factors which have been discussed in many cases, but are neatly summarised in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7, ("*Pangaea Restaurant*"), which was adopted by His Honour Justice Tracey in the *Kelly v Fitzpatrick* [2007] FCA 1080 case. Clearly that's not an exhaustive list of factors, but it does serve as a useful guide for the principles to be applied by this Court in determining penalty.
26. This conduct involved employees who were young first year apprentices and as such were particularly vulnerable and reliant on the minimum wage set out by the Award and the Standard. Apprentices are a category of employees who are particularly vulnerable to exploitation. They are young and inexperienced and need to stay with their employer in order to gain their relevant trade qualifications. As such the aims of the Act in terms of protecting and ensuring a fair safety net of minimum wages and conditions and ensuring compliance with those, are particularly pertinent to this case.
27. This case involves a substantial non-payment of wages over a period of four months. The amount of the underpayment during such a short period is immense. I've already concluded that the Defendant acted with deliberate disregard to his legal obligations and that as a sole trader he was directly involved in this matter. The Defendant allowed the claimants to work for him for a period of four months in circumstances where it is clear that he was either unable or unwilling to pay them for the work that they had performed for his benefit. This is a flagrant disregard for his responsibilities as an employer.
28. Given that the Defendant has failed to defend these proceedings, has failed to cooperate with the Plaintiff and fails to appear at Court today, the Court has no evidence of his financial circumstances or of any personal circumstances of his which occurred during the relevant period or continued to today.
29. The extent of the underpayment is extremely large as I have already outlined. The financial burden upon these young employees was huge. There were significant periods of time where they received no money whatsoever.
30. It's not alleged that this Defendant has any prior similar conduct. I've already addressed the nature in which these breaches occurred in respect of the course of conduct provisions of the Act. It appears that the Defendant is a sole trader, but again, I have no information, nor any evidence in respect of those matters. The Court is unaware whether or

not the Defendant continues to operate in any business.

31. I particularly note that there has been no corrective action or any endeavour to comply with the orders of this Court prior to the matter being listed for hearing today, and I conclude that there is no evidence of any contrition whatsoever by the Defendant for his actions.
32. This is a case where both specific and general deterrence loom large. These employees are particularly vulnerable and the principle objects of both the pre- and post-reform Act need to be emphasised both by way of specific and general deterrence in this matter. I am of the view that the conduct in relation to this matter warrants a significant penalty, both by way of specific deterrence and general deterrence. Whilst clearly any penalty imposed ought not be so great as to crush the person upon whom the penalty is imposed, it is impossible for this Court to make any meaningful assessment as to what level any penalty imposed may be crushing on this Defendant, given the complete lack of evidence before the Court about his financial circumstances.
33. This case is an appropriate one to be a vehicle for the message to be sent by way of general deterrence to employers in this industry and indeed sole traders generally that no matter what the size of the business it is critical that they ensure that they comply with their minimum legal obligations and pay all employees and particularly so, vulnerable young apprentices, their legal entitlements in respect of minimum wages and conditions. Employers ought not be allowed to profit from the labours of such employees without in return complying with their legal obligations. And as such, the penalty imposed in this case is levied at a level to serve as a reminder to other employers that they must take care to ensure that they comply with those obligations.
34. The total maximum penalty I have indicated in relation to these eight breaches is \$52,800. Having gone through a process of considering each of those breaches separately and the conduct relating to each of those, and then considering the course of conduct of the circumstances and finally applying the instinctive synthesis approach to determining penalty, I conclude that the total aggregate penalty to be imposed in respect of these eight breaches is the sum of \$30,000.
35. I direct that that penalty imposed on the Defendant be paid into the consolidated revenue of the Commonwealth, pursuant to s 841(a) of the Act within 30 days.

COSTA
BREHAS

36. Thank you, your Honour.

HER HONOUR

37. Thank you.

Hearing adjourned.