WAGE THEFT

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23 July 2020

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Introduction

The phrase “wage theft” has recently become part of the ordinary language in employment law. In the past, it has just been considered to be an underpayment of wages.

The difference is that wage theft tends to indicate some intention on the part of the employer not to pay its obligations in accordance with the employment law in place in Australia. However, not all cases fall in this category. Some mistakes are based on ignorance and that’s not limited to small businesses. Last year in particular saw a record number of large employers in the press either confessing or being found to have made large scale underpayments. Wesfarmers, Qantas, the Commonwealth Bank and the ABC were all culprits.

In October 2019, Woolworths admitted underpaying its workers as much as $300 million over the past decade, thought to be the biggest such case in Australia. Minor celebrities were not immune either with Masterchef George Calombaris having to pay back more than $7.8 million to over 500 employees and pay a fine of $200,000. Many of these cases appeared to be as a result of bad processes. Many were due to the fact that staff were being paid annualised salaries without checking whether the amounts were above the minimum rates contained in the relevant Award once overtime and penalty rates were worked.

The categories of wage theft can broadly be described as follows:

— an intentional refusal by an employer to comply with industrial instruments, such as an award, to increase their profit;

— an intentional refusal by an employer to comply with industrial instruments, such as an award due to an incapacity to pay due to poor business performance;

— a mistake by the employer as to the coverage of an employee so that they pay in accordance with the wrong industrial instrument, or misapply the correct industrial instrument;

— ignorance.

There is a range of obligations upon employers that may lead to “wage theft”, primarily arising under the *Fair Work Act 2009* (Cth). These include the following:

— breach of award or enterprise agreement, including classification and appropriate wage rate, as well as the application of penalty rates and overtime;

— breach of minimum standards in respect of notice, leave entitlements;

— miscellaneous obligations in respect of the provision of Information Statements, pay slips and availability of the relevant industrial instrument;

— superannuation.

The following paper assumes general knowledge as to employment terms and conditions. The focus of the paper is on practical issues for a practitioner to consider when pursuing the recovery of wages.

Practical considerations before filing

Is there an employment relationship?

The difference between an employee and an independent contractor (or volunteer) is often fundamental to determining jurisdiction. Although the specific provisions in the legislation relating to employer and employee must be taken into account, nevertheless the long-standing common law authority remains relevant in determining the meaning of an employer and an employee, as opposed to an independent contractor.

As observed by the High Court in *Leighton Contractors Pty Ltd v Fox; Calliden Insurance Limited v Fox*;[1]

> *It is common in the construction industry for the principal contractor to arrange for the works to be carried out by subcontractors rather than by employing its own labour force. Among the advantages that accrue to the principal contractor in adopting this model for its undertaking is that it does not incur the obligations that the law imposes on employers.*

Common law

In determining whether a contract is one of employment or not, the common-law definition of employment needs to be considered. Although the High Court has expressed some doubts as to the underpinning reasoning and policy in respect of the distinction between employment and contracting, it has nevertheless recognised that it is so well entrenched as to be unavoidable.[2]

The concept of control remains an important factor (some may say central) in making a determination, but it is not an absolute. As the nature of employment and similar relationships has developed over time, a greater focus on the wholistic nature of the relationship is required. All factors need to be considered, and the weight to be given to any particular factor may vary depending on the particular circumstances of any situation.

In *Stevens v Brodribb Sawmilling Co Pty Ltd*[3] Mason J of the High Court said that:

> *"the common law has been sufficiently flexible to adapt to changing social conditions by shifting the emphasis in the control test from the actual exercise of control to the right to exercise it, "so far as there is scope for it", even if it be "only in incidental or collateral matters". Furthermore, control is*

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1 *Leighton Contractors Pty Ltd v Fox; Calliden Insurance Limited v Fox* [2009] HCA 35

2 *Australian Mutual Provident Society v Chaplin* (1978) 18 ALR 385; *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; *ACE Insurance Limited v Trifunovski* [2013] FCAFC 3

3 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16

> *not now regarded as the only relevant factor. Rather it is the totality of the relationship between the parties which must be considered."*

In *Hollis v Vabu Pty Ltd*[4] the High Court had to determine whether bicycle couriers were employees or independent contractors. The principal had argued that, as the couriers provided their own bicycles, they were providing capital and equipment to carry out the tasks and, therefore, were independent contractors.

In his judgment McHugh J noted:

> *I also agree with their Honours that the courier was not an independent contractor in the sense of someone who acts as an independent principal, exercising an independent discretion in carrying out a task for his own business interest and who is retained simply to produce a result. The couriers in this case were far removed from the paradigm case of an independent contractor — the person who has a business enterprise and deals with any member of the public or a section of it upon terms and conditions that the contractor sets or negotiates. Moreover, I agree that certain aspects of the work relationship between Vabu and the couriers suggest an employer/employee relationship, according to the classical tests. But while the couriers were subject to extensive direction and control by Vabu, were Vabu's representatives and worked for Vabu's business interests, there were features of the relationship which are not typical of a traditional employment relationship. They include the provision by employees of their own equipment — in some cases, motor vehicles — the capacity to incorporate or form their own business structure, the tax and superannuation arrangements, and the lack of actual provision for annual leave and sick pay benefits.*

Control (whether exercised or as a right to be exercised), nevertheless, remains the central factor. As a consequence, issues such as the absence of set hours of work, payment for a task rather than hours, no specific direction on how a task is to be completed, the capacity to use others to assist in the completion of the task, must all be considered, but control remains the key.

In *Putland v Royans Wagga Pty Limited*[5] the Federal Court was asked to determine whether a radio base operator was an employee. The Court reviewed (and applied) the line of High Court authority. In doing so, the Court highlighted the complexity of the issue and said:

> *The legal principles applicable to establishing whether work is performed pursuant to an employment contract or pursuant to a contract for services (i.e. as an independent contractor) were not in dispute. The difficulty arises in their application, especially in circumstances such as these in which certain features of the working arrangements indicated an independent contractor relationship, whereas other features indicated an employment relationship.*

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4 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21

5 *Putland v Royans Wagga Pty Limited* [2017] FCA 910

It observed that the notion of control was critical but, in modern society, it was the capacity to control that was fundamentally relevant, even it was not actually exercised.

Practical Considerations

From a practical perspective, the following matters need to be considered and balanced:

— does the worker control the method of performance of the particular task? This relates to the notion as to whether or not the employer has the power to direct the worker, or alternatively the worker (so long as he or she fulfils the contractual obligations) may organise their own work, including tools, parts and the assistance of others;

— is the worker required to wear a uniform or some other distinctive manner of dress identifying them with the particular business?

— Is the worker paid a fee for the task, or paid on an hourly basis? This may be relevant as most employee relationships, particularly if they are not at a senior level, are based on payment by the hour. Conversely, most contractors are engaged on the basis of the task, with the price usually agreed in advance;

— Can the worker employ others to assist in the task? This is more consistent with a contract arrangement in that it is a matter for the worker as to how he or she organises the work to be done, and the costs incurred in doing so.

— Is the worker able to do work for others? Again, this is more consistent with the relationship of a contract. This is particularly the case where the employee is carrying out, for instance, a trade and is providing the trade to various clients;

— Does the worker have a business name by which he or she trades, and advertises? This is less critical in most cases, but again relates back to fact that businesses tend to advertise and have business names, whereas employees do not;

— Does the worker provide capital for the performance of the task (for instance, motor vehicles, tools)? This can be a very important point, or of limited significance, depending on circumstances. A worker, such as a trades person, who carries their own tools is unlikely to have this taken as a negative in assessing his or her status. This is primarily because it is generally accepted that trades persons, whether employee or not, provide at least their basic tools. Conversely, a person who purchases or owns a significant piece of equipment, such as a prime mover, looks more like a contractor. Ordinarily, with the exception of minor capital matters such as tools, an employee is supplied by his or her employer with the necessary equipment to carry out their job. The greater the value and significance of the capital equipment, the more likely it is to indicate a contractor arrangement.

— Does the worker provide the materials for the performance of the task?

— Is the worker paid employment like allowances, such as superannuation, annual leave, sick leave?

— Does the worker provide insurance for their own risk?

— What are the taxation arrangements of the worker? For instance, do they claim deductions that would typically be those of a contractor? Do they have an Australian Business Number? Do they account for GST in relation to their income? Do they render taxation invoices?

Although the factors set out above provide a useful guide in assessing the nature of a work relationship, it is inappropriate to use the factors as some type of checklist that can be considered on an arithmetic basis. It remains for the court to make an assessment based on the facts of the particular case.

Identifying and correctly naming the employer

If there is, or is arguably, an employment relationship, the further task is to correctly identify the employer. It might sound obvious, but on many occasions it is not immediately clear and filing against the wrong employer can prejudice the employee's claim.

It is risky to rely only on the employee's instructions or understanding of who their employer is. Many employees only take notice of their employer's trading name, which is frequently different from the owner of the business.

It is not unusual, especially with large corporate employers, that the employees may be employed by a subsidiary or a related company to that which conducts the business. Or they may be labour hire employees who only deal with the labour hire employer for what they see as payroll issues.

If at all possible, documentary evidence of the employment relationship should be viewed to support the correct naming of the employer in a claim. Employment contracts and letters of offer may have only the trading name of the business or the group name of a group of companies. They may also have a different entity named as the employer, compared with the payslip. The most reliable document is generally the payslip, which is required by the *Fair Work Act 2009* to identify the employer, including its ABN. However, even here one must be cautious. Some employers contract out their payroll function and the payslip may have a confusing combination of entities in the print.

If the underpayment claim is attached to another action in the Fair Work Commission, such as an adverse action claim, there may be other implications. An adverse action claim involving dismissal has a strict time limit and, if not settled in the FWC a certificate is issued by the FWC. This certificate is required for the claim to then be taken to the Federal Court or the Federal Circuit Court. If the Court application has different parties named to the certificate it could be refused by the Court or struck out on the application of the wrongly named party. The Court has no capacity to amend the FWC certificate or to amend the application to name a party who is not named in the FWC certificate.

Of course, there are time limits to underpayment claims as well (6 years rather than 21 days) and identifying the correct employer immediately may be necessary to preserve the full extent of the underpayment claim.

Which court?

There are a number of different avenues an employee can take when pursuing their former employer for underpayments.

Underpayments usually comprise of breaches of industrial instruments such as Awards and enterprise agreements, or the minimum standards set out in the National Employment Standards under the *Fair Work Act*. All of those are 'civil remedy provisions' under the Act. Under s 539, an employee is able to commence proceedings against their employer in either the Federal or Federal Circuit Court, or an 'eligible State or Territory' court which is defined as the Magistrate or District Court, or the South Australian Employment Tribunal (SAET).

Most underpayment claims by an individual employee are commenced in SAET. There are a number of reasons for this. Firstly, there is no filing fee for making an application and the form of the application does not involve formal pleadings.

Secondly, the process followed is relatively prompt and will involve a conciliation conference being set down which aims to resolve the matter by agreement. If it cannot be resolved then the matter will be set down for trial.

The judges of the SAET all have an industrial background and are therefore very familiar with the issues and with the terms of the *Fair Work Act* generally.

There are, however, some limitations with the SAET which can mean that other courts are more appropriate. One of these relates to when other people are involved in the contravention so that the employee wishes to commence proceedings against particular individuals as well as the corporate entity employer. Such individuals are referred to as accessories and their liability is addressed in s 550 of the *Fair Work Act.* In summary, s 550 provides for individuals to be subject to orders, including the imposition of pecuniary penalties, if they are "involved in" a civil contravention.

The Federal Court or Federal Circuit Court may make any order the court considers appropriate if the court is satisfied that a *person* has contravened, or proposes to contravene, a civil remedy provision. That can therefore include individuals. By contrast, SAET as an eligible court is limited to ordering an *employer* to pay an amount to an employee if the court is satisfied that the employer was obliged to pay an amount to an employee and has breached a civil remedy provision by failing to do so.[6]

Underpayments can also constitute a breach of contract. The SAET, constituted as the South Australia Employment Court, has jurisdiction to hear such claims. So too does the Magistrate and District Courts. In addition, the Federal Circuit Court can also determine such claims through the use of its associated jurisdiction. That is, matters

6 Section 545(3) *Fair Work Act 2009*

not otherwise within its jurisdiction that are associated with matters in which the jurisdiction of the Federal Circuit Court of Australia is invoked.[7]

Generally speaking, underpayment claims are not run solely as breach of contract claims. Rather, they may constitute a breach of contract *in addition to* a breach of an industrial agreement. That has cost implications. As long as the jurisdiction of the *Fair Work Act* is invoked, section 570 of the *Fair Work Act* applies which provides that a party to proceedings in a court (including an eligible state court) exercising jurisdiction under the *Fair Work Act* may be ordered by the court to pay costs only if the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or that the party's unreasonable act or omission caused the other party to incur the costs. In other words, costs are only payable in limited circumstances.

By contrast, if the proceedings comprise solely of a breach of contract, the usual cost rules will apply in the Magistrate or District Courts.

In addition, if SAET is exercising its jurisdiction under the *State Fair Work Act 1994* pursuant to s 10 of that legislation, which allows for the determination of claims based on breach of an employment contract (rather than an industrial Award or Agreement) the costs of any proceedings will be awarded on the same basis as costs would be awarded in a corresponding civil action brought in the District Court or the Magistrates Court.[8]

"Involved In" Contraventions

As referred to above, individuals are also sometimes prosecuted in underpayment claims and this is a factor which many people are unaware of. It is not correct to say or assume that because an employee was "just doing their job" they are protected from claims being made against them personally.

When pursuing an underpayment claim on behalf of an employee, it is always worth considering whether individual managers or directors should also be included in the claim.

A person is "knowingly concerned in a contravention" if they have knowledge of the essential facts constituting the contravention and is an intentional participant.[9] It is not necessary that the person knows that the conduct constitutes a contravention.[10]

Under previous provisions which used the phrase "party to, or concerned in" the Full Court of the Federal Court in *Construction, Forestry, Mining and Energy Union v Clarke*[11] stated:

> *"Regardless of the precise words of the accessorial provision, such liability depends upon the accessory associating himself or herself with the*

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7 Section 18 *Federal Circuit Court of Australia Act 1999*

8 Section 10(6) *Fair Work Act 1994* (SA)

9 Section 545(3) of the *Fair Work Act 2009* Cth

10 *Yorke v Lucas* (1985) 158 CLR 661; *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd (No 2)* (1999) 95 FCR 302; *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236; *Rafferty v Madgwicks* (2012) FCAFC 37

11 *Construction, Forestry, Mining and Energy Union v Clarke* (2007) 164 IR 299

> *contravening conduct — the accessory should be linked in purpose with the perpetrators (per Gibbs CJ in* Giorgianni v The Queen *(1985) 156 CLR 473 at 479-480; see also Mason J at 493 and Wilson, Deane and Dawson JJ at 500). The words "party to, or concerned in" reflect that concept. The accessory must be implicated or involved in the contravention (*Ashbury v Reid *(1961) WAR 49 at 51;* R v Tannous *(1987) 10 NSWLR 303 per Lee J at 307E-308D (agreed with by Street CJ at 304 and Finlay J at 310) or, as put by Kenny J in* Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union *(2002) 117 FCR 588 at (34), must participate in, or assent to, the contravention*."

The phrase "aid, abet, counsel and procure" has its ordinary common law meaning. Each is used to convey the concept of conduct that brings about or makes more likely the commission of an offence.

No one may be found to have been aiding, abetting, counselling or procuring the commission of an offence unless, knowing all the essential facts which made what was done a contravention, they intentionally aided, abetted, counselled or procured the acts of the principal offender. Wilful blindness, that is to say the deliberate shutting of one's eyes to what is going on, is equivalent to knowledge, but negligence is insufficient.

"Inducing the contravention, whether by threats or promises or otherwise" is broad on its face, but must be limited in its scope by having regard to the other provisions, and also by reference to the specific issues of "threats or promises". In any event, inducing requires positive action (and this is supported by the rest of the provision which refers to positive actions).

The concept of "conspiracy" is well understood at common law. It may be either criminal or civil in nature, such as arises in respect of the tort of conspiracy. There is no reason why a different meaning would be used in civil penalty provisions.

The fundamental element of the offence of conspiracy is the common intention of two or more parties to carry out a contravention. Proof of intention to commit a contravention requires proof of the individual's knowledge of, or belief in, the facts that make the proposed conduct a contravention.[12] Not only must there be intention, but there must also be a common intention with another party.[13]

Where the contravention is a failure to pay award rates, an accessory must know what rates are being paid but need not know that the rates which were paid were below the rates prescribed by the applicable award. As White J acknowledged in *South Jin*, "*(a)n accessory does not have to appreciate that the conduct involved is unlawful*".

However, it is not sufficient for a person to merely have some role in the administration of the adverse action. For instance, a payroll officer who prepares the final payment for an employee who has been dismissed for a prohibited reason, would not be found to have been involved in the prohibited reason without having some wider, substantive involvement.

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12 *Giorgianni v The Queen* (1985) 156 CLR 473 at 505, 506-507

13 *Gerakiteys v The Queen* (1984) 153 CLR 317

Wilful blindness is not a defence. It is insufficient to merely deny liability, for instance, on the basis that the individual was not aware of the precise terms of the award.[14]

As was said in *The Zamora (No 2)*[15] and cited with approval by the Federal Circuit Court in *Fair Work Ombudsman v Liquid Fuel Pty Ltd & Ors:*[16]

> *A thing may be troublesome to learn, and the knowledge of it, when acquired, may be uninteresting or distasteful. To refuse to know any more about the subject or anything at all is then a wilful but a real ignorance. On the other hand, a man is said not to know because he does not want to know, where the substance of a thing is borne in upon his mind with a conviction that full details or precise proofs may be dangerous, because they may embarrass his denials or compromise his protests. In such a case he flatters himself that where ignorance is safe, 'tis folly to be wise, but there he is wrong, for he has been put upon notice and his further ignorance, even though actual and complete, is a mere affectation and disguise.*

Although the categories of persons who may be involved in a contravention is very wide, it is fair to observe that the most obvious target would be a human resource professional.

Role of the FWO

The Fair Work Ombudsman, or 'FWO', as it is referred to, is an independent statutory Government agency which investigates workplace complaints and enforces compliance with the *Fair Work Act*. An employee who believes they are being underpaid may make a complaint to the FWO free of charge and the FWO may investigate the complaint to establish whether a contravention of the Act is occurring.

Fair Work Inspectors are able to use statutory compliance powers for a 'compliance purpose', which includes determining whether a person is complying with the FW Act or a fair work instrument, or, in certain circumstances, whether a safety net contractual entitlement has been contravened.[17]

Inspectors are also able to issue Compliance Notices.[18] A Compliance Notice requires that the person take specified action to remedy the direct effects of the identified contraventions and/or require the person to produce reasonable evidence of compliance.[19]

Where a person complies with a Compliance Notice the FWO is unable to commence Court proceedings against that person for the particular contraventions that are the subject of the Compliance Notice.[20]

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14 *Fair Work Ombudsman v Nobrace Centre Pty Ltd & Ors* [2018] FCCA 378
15 *The Zamora (No 2)* (1921) 1 AC 801 at 812
16 *Fair Work Ombudsman v Liquid Fuel Pty Ltd & Ors* [2015] FCCA 2694
17 FW Act s 706(1)(a) & (b) and s 706(2)
18 FW Act s 716
19 FW Act s 716(2)
20 FW Act s 716(4A)

If a person fails to comply with the Compliance Notice and does not have a reasonable excuse,[21] that person has contravened the FW Act and a Court may impose penalties of up to $6,300 for an individual or $31,500 for a body corporate.[22]

The FWO can commencing its own court proceedings,[23] but s 682(1)(f) of the FW Act provides that the FWO may also represent employees who are a party to proceedings in a court or the FWC, if the FWO considers that the representation will promote compliance with the FW Act or fair work instrument.

The FWO may commence legal proceedings and seek orders against any person who contravenes their obligations under Commonwealth workplace laws, as well as those who are "involved" in such contraventions, as discussed above. Consequently, this might include company directors or company secretaries or human resources managers or other managers.

As a Commonwealth Government Agency, the FWO will only commence proceedings if it considers that there is sufficient evidence to do so and it would be in the public interest to do so.

Penalties

It is generally the practice that liability and penalty will be dealt with separately. Consequently, if your client is successful with their claim, the court will set the matter down for a separate penalty hearing in order to determine the appropriate amount to impose.

The principal object of a pecuniary penalty is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene.[24] As a general proposition, an employer may be fined up to $63,000 for each contravention, and an individual may be fined $12,600 for each contravention.

The issue of who will pay any penalty becomes relevant to an individual who has been found to have been involved in a contravention. In larger organisations, it is commonplace for such penalties to be paid by the business. However, it is open to the Court to require penalties against individuals to be paid by the particular individuals from their own resources. It is suggested that if this was avoided by the business paying the penalty on behalf of the employee, there would be a potential for a finding of contempt of court.

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21 FW Act s 716(6)

22 FW Act s 539: a failure to comply with s 716(5) can result in a maximum penalty equal to 30 penalty units. Pursuant to s 546 of the FW Act a body corporate may face a pecuniary penalty of up to five times 30 penalty units. A penalty unit is $210 (as at 21 June 2019): *Crimes Act* s 4AA.

23 FW Act s 682(1)(d)

24 *Australian Securities and Investments Commission v Southcorp Ltd (No 2)* [2003] FCA 1369; (2003) 130 FCR 406

Section 342 of the *Fair Work Act* provides:

> *(2) The pecuniary penalty must not be more than:*
>
> *(a) if the person is an individual--the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2); or*
>
> *(b) if the person is a body corporate--5 times the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2).*
>
> *(3) The court may order that the pecuniary penalty, or a part of the penalty, be paid to:*
>
> *(a) the Commonwealth; or*
>
> *(b) a particular organisation; or*
>
> *(c) a particular person.*
>
> *(4) The pecuniary penalty may be recovered as a debt due to the person to whom the penalty is payable.*
>
> *(5) To avoid doubt, a court may make a pecuniary penalty order in addition to one or more orders under section 545.*

In broad terms, the method of calculation of penalty is similar to the general principles at criminal law. It is necessary for the Court to consider specific deterrence, general deterrence and the totality principle.[25] It is also relevant to consider the nature and extent of the breach and the consequent extent of any loss or damage.[26] This is a similar approach to that taken in criminal matters, but does create some conceptual complexity. A contravention is not a criminal offence.

In proposing a penalty, it may be relevant to have regard to:

- the nature and extent of the impermissible conduct, and the surrounding circumstances
- the period over which the contravention occurred;
- number of employees affected by the contravention, including the impact and extent of the contravention;
- the obviousness of the contravention (such as a failure to pay award wages);
- previous contraventions;

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25 *Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union* (2008) 177 IR 243; [2008] FCAFC 170; *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8

26 *Fair Work Ombudsman v Skilled Offshore (Australia) Pty Ltd* [2015] FCA 275

— whether the contraventions were distinct or arose out of a course of conduct;

— the size of the business involved and the level of management at which the breaches were committed;

— the individual circumstances of the employees, such as their ability to speak English, and the extent of losses or damages suffered;

— compliance history;

— contrition, although it must be kept in mind that a mere apology is unlikely to carry much weight;

— cooperation with the enforcement authorities;

— the impact of the specific industry in which the contravention occurred.

In *Construction, Forestry, Mining & Energy Union v Coal & Allied Operations Pty Ltd (No 2)*[27] the Federal Court said at [232]:

> *The following matters, which are not intended to comprise an exhaustive list, seem to me to be considerations to which the Court may appropriately have regard in determining whether particular conduct calls for the imposition of a penalty, and assuming that it does, the amount of the penalty:*
>
> *(a) The circumstances in which the relevant conduct took place (including whether the conduct was undertaken in deliberate defiance or disregard of the Act).*
>
> *(b) Whether the respondent has previously been found to have engaged in conduct in contravention of Pt XA of the Act.*
>
> *(c) Where more than one contravention of Pt XA is involved, whether the various contraventions are properly seen as distinct or whether they arise out of the one course of conduct.*
>
> *(d) The consequences of the conduct found to be in contravention of Pt XA of the Act.*
>
> *(e) The need, in the circumstances, for the protection of industrial freedom of association.*
>
> *(f) The need, in the circumstances, for deterrence.*

[27] *Construction, Forestry, Mining & Energy Union v Coal & Allied Operations Pty Ltd (No 2)* (1999) 94 IR 231

In *Fair Work Ombudsman v Contracting Solutions Australia Pty Ltd*[28] the Federal Court observed:

> *However, the Court will also take into account matters subjective to the party upon whom the penalty is to be imposed. In that regard, the Court may take into account, if the respondent is a corporation:*
>
> *(a) its size;*
>
> *(b) its assets and liabilities;*
>
> *(c) its profitability;*
>
> *(d) the effect of any penalty upon its employees; and*
>
> *(e) its ability to absorb the penalty.*
>
> *The Court will, in considering a penalty against a person not a corporation, have regard to:*
>
> *(a) the person's assets and liabilities;*
>
> *(b) the person's income;*
>
> *(c) the person's ability to pay a penalty.*

The Federal Court in *Standen v Feehan (No 2)*[29] identified the behaviour of the Respondent as being relevant to the issue of penalty. Whether it was premeditated and deliberately provocative were important considerations.[30] In addition, the Court stated the following additional considerations:

> *First, that the regulator's resources will be saved which would allow the regulator to detect other contraventions which would increase the deterrent aspect of the penalty. Secondly, the Court is not required to limit itself to considering whether the penalty is within the permissible range. The Court may wish to take that approach but the Court could address the appropriate range of penalty independently of the parties' proposed figure. Thirdly, the regulator should always justify any discounted penalty to which the regulator has agreed.*

Admitting the contravention is not enough to demonstrate contrition. Although a similar concept, it is not the same as that found in criminal matters. However, depending upon the timing, accepting responsibility for the contravention may not only save the cost of the trial, but also acknowledge liability. Cooperation in the process is also relevant.[31]

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28 *Fair Work Ombudsman v Contracting Solutions Australia Pty Ltd* [2013] FCA 7
29 *Standen v Feehan (No 2)* [2008] FCA 1574
30 *Fair Work Ombudsman v Contracting Plus Pty Ltd* (2011) 205 IR 281
31 *Australian Competition and Consumer Commission v Clinica Internationale Pty Ltd (No 2)* [2016] FCA 62

In criminal matters, it is common to provide a discount due to the early plea of guilty. This is not the case in respect of civil contraventions. It is not enough to merely say the costs of the contested hearing have been saved. There needs to be an appropriate demonstration of contrition and acceptance of the inappropriate nature of the conduct.[32] Further, contrition may be demonstrated by the Respondent being prepared to cooperate in the investigation and litigation.[33] The making of early admissions and cooperation is also a relevant factor.[34]

The application of the totality principle is difficult. It requires the exercise of discretion based upon the particular facts.[35] It is virtually impossible to identify the impact of applying the totality principle. It is said that penalties are not a matter of precedent by comparison with previous decisions in different matters. This reinforces the individuality of the process. Nevertheless, it is accepted that the totality principle is part of the sentencing process.[36]

Financial difficulties may be relevant in mitigating the amount of penalty to be imposed.[37] This includes the circumstances of any individual who may be personally exposed to a penalty.

Although the Court has warned against applying a checklist approach to the calculation of penalties,[38] nevertheless categories can be helpful.

In *Wotherspoon v Construction Forestry Mining and Energy Union*[39] the Federal Court (per Jessup J) described the following:

> *The touchstone by reference to which to approach the question whether the penalties agreed in the present case are either manifestly inadequate or manifestly excessive is that the penalties should pay "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."*

The Court may also have regard to the capacity of the Respondent to pay the penalty.[40] It is appropriate to take into account so as to avoid the penalty from being oppressive.

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32 *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70
33 *Ponzio v B & P Caelli Constructions Pty Ltd* [2007] FCAFC 65
34 *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 at [75]-[76]
35 *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8
36 *General Manager of the Fair Work Commission v Thomson (No 4)* [2015] FCA 1433
37 *Olsen v Sterling Crown Pty Ltd* [2008] FMCA 1392
38 *Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216; 42 IR 25
39 *Wotherspoon v Construction Forestry Mining and Energy Union* [2010] FCA 111
40 *Australian Competition & Consumer Commission v ABB Transmission & Distribution Ltd (No 2)* [2002] FCA 559

By way of a cautionary example, the decision in *Zhang v Duo Rice Noodle Pty Ltd & Ors* [2019] SAET 140 is informative. The applicant sued for underpayment of wages and related penalties. He was successful in respect of the underpayment, but not to the extent that he claimed, being $25,243.20. However, it is the penalty decision that is of particular interest. The direct employer was fined $150,000, while the individual persons involved in the contraventions were each fined $40,000. It is important to note that this matter is subject to an appeal, but nevertheless the scope of the discretion of the Court is extremely wide.

Recent Developments

The recent decision of the Full Court of the Federal Court of Australia *WorkPac Pty Ltd v Rossato [2020] FCAFC 84* has raised wide-ranging concerns as to whether an employee supposedly engaged as a casual employee is, in fact, entitled to annual and other paid leave.

Although the decision has raised concerns, it is not fundamentally different to the long-standing view as to a casual. The major difficulty that is caused is by persons who have engaged employees on the basis that they are casual, but have made no specific provision as to the intention of the additional loading that is typically paid.

If an employee is entitled to annual and other leave, and is not entitled to have the 25% loading offset against these entitlements, then there is a potential underpayment for the six-year period prior to the claim being made. This has the potential to impact significantly on business, but particularly small business.

The general understanding of casual employment is an engagement that is intermittent and irregular, without any expectation of ongoing employment.

In determining the status of employment it is appropriate to consider the totality of the relationship. The determination of the question is not decided by the fact that the parties described the employment as casual.[41]

Although there is a common belief to the contrary, there is no reason why a casual employment relationship cannot continue for an extended period of time. However, repetition of a particular working arrangement may be so predictable and expected that it has become a tacit understanding of the parties of regular and systematic employment. On the other hand, the recording of actual hours of work, absences at the discretion of the employee may indicate that the parties have decided to continue the initial arrangements.

In Fair Work Ombudsman v South Jin Pty Ltd [42]the Federal Court (per White J) observed:

> *Although casual employment is common, its precise definition has proved elusive. In its original conception, casual employees were those whose work was intermittent or irregular so that the employees did not know when completing one period of work if, or when, they would be employed again.*

[41] MacMahon Mining Services Pty Ltd v Williams (2010) FCA 1321
[42] Fair Work Ombudsman v South Jin Pty Ltd (2015) FCA 1456

Casual employees were generally thought to be engaged under a series of separate and distinct contracts with each contract terminating on the completion of the task or period for which they were engaged. Being generally paid by the hour, their employment could be terminated on an hour's notice.

In WorkPac Pty Ltd v Skene [43] the Full Court of the Federal Court reviewed the definition and application in respect of casual employees. It was faced with a claim by a former employee for various leave. The claim was fundamentally defended on the basis that the employee was a casual employee and, therefore, had no entitlement pursuant to section 86 of the Fair Work Act 2019.[44] It is to be noted that the employee in question was also covered by an enterprise agreement which dealt with annual leave. Although the matter was obviously based on the particular facts, it nevertheless set forward a number of matters that are of general application.

In WorkPac Pty Ltd v Rossato [2020] FCAFC 84 the Full Court of the Federal Court of Australia found:

- the presence or absence of the "firm advance commitment" may be assessed by regard to the employment contract as a whole, including by considering whether it provided for the employment to be regular or intermittent, whether it permitted the employer to elect whether to offer employment on a particular day, whether it permitted the employee to elect whether to work, and the duration of the employment. It has also found that the description given by the parties as to the nature of their relationship is relevant, but not a conclusive consideration.
- WorkPac was not entitled to bring into account the payments of remuneration that it had made to Mr Rossato on the basis that he was a casual employee.
- This was because the purposes of the payments of remuneration did not have a close correlation to the entitlements that Rossato sought
- the decision in Skene was not materially different.

There was reference to the long-standing authority in *Poletti v Ecob (No 2)* (1989) 31 IR 321 at 332-333:

> *The first situation is that in which the parties to a contract of employment have agreed that a sum or sums of money will be paid and received for specific purposes, over and above or extraneous to award entitlements. In that situation, the contract between the parties prevents the employer afterwards claiming that payments made pursuant to the contractual obligation can be relied on in satisfaction of award entitlements arising outside the agreed purpose of the payments. The second situation is that in which there are outstanding award entitlements, and a sum of money is paid by the employer to the employee. If that sum is designated by the employer as being for a*

[43] WorkPac Pty Ltd v Skene (2018) FCAFC 131
[44] Section 86 Fair Work Act 2009

> *purpose other than the satisfaction of the award entitlements, the employer cannot afterwards claim to have satisfied the award entitlements by means of the payment. The former situation is a question of contract. The latter situation is an application of the common law rules governing payments by a debtor to a creditor. In the absence of a contractual obligation to pay and apply moneys to a particular obligation, where a debtor has more than one obligation to a creditor, it is open to the debtor, either before or at the time of making a payment, to appropriate it to a particular obligation. If no such appropriation is made, then the creditor may apply the payment to whichever obligation or obligations he or she wishes.*

There is no reason to believe that the authority in this matter has been overwritten by the current decision. In fact, based upon the findings of fact by the Full Court, the decision in *Poletti* would tend to indicate that the same result would have occurred.

In considering the meaning of the term "casual" in section 86 of the Fair Work Act 2009 the Federal Court noted:[45]

> *Our conclusion however reinforces the importance of the "essence of casualness" referred to in Hamzy. We respectfully agree with Wilcox, Marshall and Katz JJ in Hamzy at (38) that the "absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work" is the essence of casualness.*

If an employee is entitled to annual and other leave, and is not entitled to have the 25% loading offset against these entitlements, then there is a potential significant underpayment for the six-year period prior to the claim being made. This has the potential to impact significantly on business, but particularly small business.

The main problem is that many businesses assume that employment is casual just because it has been labelled as such.

If it is determined to engage a casual employee, then the following matters need to be considered:

- a specific recognition of the purpose of the 25% loading and the right to offset against any subsequent finding of an entitlement to annual leave or other leave;
- a recognition as to the situation when the casual employment changes to regular and systematic employment and, therefore, attracts the entitlement to leave payments;
- written documentation at the commencement of the contract, and appropriate recordkeeping in respect of hours and times;
- an assessment as to whether casual employment is appropriate. It may be that casual employment is appropriate initially, but then the relationship changes to make the hours of work more regular and systematic. In this case, consideration should be given to changing the status of employment.

[45] WorkPac Pty Ltd v Skene (2018) FCAFC 131

Labour hire firms have a particular difficulty. They largely promote themselves as being able to provide a risk-free and cheaper alternative than direct employment. It is not necessary to determine whether this is in fact the case. However, if the labour hire firm has engaged a person as a casual employee, and then provided them as labour to a host employer based upon the employee being casual, it may be that the finding of the Federal Court of Australia diminishes or even removes any capacity to make a profit out of the arrangement.

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5 February 2020