

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2020 WAIRC 00316

CORAM : INDUSTRIAL MAGISTRATE D. SCADDAN

HEARD : THURSDAY, 11 JUNE 2020, ON THE PAPERS

DELIVERED : THURSDAY, 11 JUNE 2020

FILE NO. : M 130 OF 2018

BETWEEN : GAVIN SMITH

CLAIMANT

AND

SILKWOOD HOLDINGS (WA) PTY LTD AS TRUSTEE FOR
THE DIABLO DISCRETIONARY TRUST T/A DOUGLAS JONES
FINANCIAL SERVICES

RESPONDENT

CatchWords : INDUSTRIAL LAW – FAIR WORK – Assessment of pecuniary penalties for contraventions of *Fair Work Act 2009* (Cth)

Legislation : *Fair Work Act 2009* (Cth)
Fair Work Regulations 2019 (Cth)
Industrial Relations Act 1979 (WA)
Crimes Act 1914 (Cth)

Instrument : *Clerks – Private Sector Award 2010* (Cth)

Case(s) referred to in reasons : *Smith v Silkwood Holdings (WA) Pty Ltd* [2020] WAIRC 00275
Association of Professional Engineers, Scientists and Managers Australia v Bulga Underground Operations Pty Ltd [2019] FCA 1960
Stratton Finance Ltd v Webb [2014] FCAFC 110
Ambrosini v Grandbridge & Anor [2019] WAIRC 00210
Fair Work Ombudsman v Maritime Union of Australia (No 2) [2015] FCA 814
Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate [2015] HCA 46
Trade Practices Commission v CSR Ltd [1990] FCA 521

Miller v Minister of Pensions [1947] 2 All ER 372
Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336
Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2) [2017] FCA 557
Kelly v Fitzpatrick [2007] FCA 1080; 166 IR 14
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8; (2008)165 FCR 560
Rocky Holdings Pty Ltd v Fair Work Ombudsman [2014] FCAFC 62; (2014) 221 FCR 153
Fair Work Ombudsman v South Jin Pty Ltd (No 2) [2016] FCA 832
Milardovic v Vemco Services Pty Ltd (Administrators Appointed) (No 2) [2016] FCA 244
Sayed v Construction, Forestry, Mining and Energy Union [2016] FCAFC 4
Gibbs v The Mayor, Councillors and Citizens of City of Altona [1992] FCA 553

Result : Pecuniary penalty to be paid

Representation:

Claimant : Mr P. Mullally (Industrial Agent)
Respondent : Mr D. Jones (Director) on behalf of the Respondent

SUPPLEMENTARY REASONS FOR DECISION

- 1 On 15 May 2020, the Respondent was found to have contravened s 44 of the *Fair Work Act 2009* (Cth) (the Act) in that the Respondent failed to pay Mr Gavin Smith (the Claimant) untaken paid annual leave upon termination of employment,¹ and in doing so failed to comply with the National Employment Standards (NES) and contravened a civil remedy provision.
- 2 The Respondent was ordered to pay \$33,244 in accrued untaken annual leave.²
- 3 Further, the Respondent was found to have contravened s 535(1) and s 536(1) of the Act in failing to keep and maintain certain prescribed records of employment and failing to provide pay slips during the course of the Claimant's employment,³ and contravened a civil remedy provision.
- 4 In *Smith v Silkwood Holdings (WA) Pty Ltd* [2020] WAIRC 00275 the Industrial Magistrates Court of Western Australia (IMC) provided its reasons for decision in respect of the claim under the Act, the Respondent's contraventions and the court's construction of the *Clerks – Private Sector Award 2010* (which was found not to apply to the Claimant). In addition, the court determined the Claimant's entitlement under the *Long Service Leave Act 1958 (WA)* (LSL Act), exercising its state jurisdiction.
- 5 These supplementary reasons are in relation to an application by the Claimant for a pecuniary penalty pursuant to s 546(1) of the Act.
- 6 The parties each provided an outline of written submissions on the payment of a pecuniary penalty.

- 7 Schedule I: Jurisdiction, Practice And Procedure Of The Industrial Magistrates Court (WA) Under The Fair Work Act 2009 (Cth) of these supplementary reasons outline the jurisdiction, standard of proof and practice and procedure of the IMC.
- 8 Schedule II: Pecuniary Penalty Orders under the Fair Work Act 2009 (Cth) of these supplementary reasons outline the provisions of the Act and principles relevant in determining an appropriate pecuniary penalty (if any) for the Respondent's contraventions.

Payment Of A Civil Penalty

- 9 The effect of s 557(1) of the Act is that two or more contraventions of the Act are taken to constitute a single contravention if they are committed by the same person and arose out of a course of conduct by that person.
- 10 I am satisfied having regard to the findings made in the substantive decision that there was a single course of conduct by the Respondent in failing to pay untaken paid annual leave, and this failure will be treated as one single contravention.
- 11 I intend to deal with the other contraventions relating to failing to keep and maintain employment records and failing to provide pay slips as two separate single contraventions.
- 12 The maximum penalty with respect to a contravention of s 44 of the Act by the Respondent is 60 penalty units which equates to a maximum penalty \$63,000 given the Respondent is a body corporate.⁴
- 13 The maximum penalty with respect to each contravention of s 535 and s 536 of the Act by the Respondent is 60 penalty units which equates to a maximum penalty \$63,000 given the Respondent is a body corporate.⁵ A '*serious contravention*' attracts a maximum penalty of 600 penalty units or \$630,000 where the Respondent is a body corporate.

The Claimant's Submissions

- 14 In summary, the Claimant submits that:
- the amount of untaken paid annual leave and long service leave has been outstanding for over two years;
 - the employment relationship was a lengthy one;
 - the failure to keep and maintain certain employment records and to provide payslips when to the heart of the failure to regulate employment contemplated by the NES;
 - the absence of record keeping over a long period of time is serious and shows a cavalier disregard of the Respondent's obligation noting the Respondent's business is in financial services;
 - however, the lack of record keeping and provision of pay slips shows a systemic failure on the Respondent's part;
 - the Respondent's business is owned and operated by the Respondent's director and the Respondent's director admitted not providing pay slips to other previous employees;
 - therefore, the Respondent's failure to provide pay slips extends beyond the individual and is a matter of public policy and public interest and supports a finding that it was a '*serious contravention*';

- the non-payment of long service leave is a contravention of s 323(1) of the Act where it is an entitlement payable in relation to work and a finding ought to be made that it was a '*serious contravention*' where it was deliberate conduct on the part of the employer; and
 - the Claimant has been put to the time and expense of a hearing to determine his entitlements.
- 15 The Claimant characterises the Respondent's conduct as between the low-mid to mid-range in seriousness and suggests penalties as follows:
- failing to pay untaken paid annual leave upon termination of employment - \$5,000;
 - contravention of s 535(1) of the Act - \$6,000;
 - contravention of s 536(1) of the Act - \$45,000 (as a '*serious contravention*'); and
 - contravention of s 323 (1) of the Act (for failing to pay long service leave) - \$45,000 (as a '*serious contravention*').
- 16 Principles of totality ought to apply with a suggested reduction but no global reduction.

The Respondent's Submissions

- 17 In response and in summary, the Respondent submits:
- the Respondent has no previous records of contravening any award or other industrial law;
 - during the Claimant's employment period, the Claimant was predominantly the only employee;
 - the first time the Respondent was made aware that there was an issue with respect to the Claimant's employment was when the Respondent was presented with a letter of demand in December 2017;
 - the Respondent does not currently employ any employees and, accordingly, personal deterrence is less relevant;
 - while the IMC found otherwise, the Respondent genuinely believed there was no issue related to annual leave or the provision of employment records during the course of the Claimant's employment where the issue was never raised by the Claimant and where the Respondent genuine believed it had provided all entitlements;
 - while the Respondent did not provide the Claimant with pay slips, in all other respects the Respondent provided annual and other regular records to the Claimant, including gross salary, income tax deductions, superannuation, bonus report sheets and annual leave closure periods;
 - at no time did the Respondent seek to exploit the Claimant or exploit the employer's position over an employee;
 - the Respondent's conduct should be characterised as a single course of conduct;
 - the Respondent is a small business, akin to a sole trader, with a turnover of \$160,000 per annum;

- the contraventions were not deliberate but arose as a lack of understanding and appreciation of certain obligations under the Act. However, the Respondent did provide the Claimant with other records and documents relevant to his wages and deductions;
- the Respondent should not be prejudiced for defending the Claimant's claim and, in doing so, did not unnecessarily waste the IMC's or the Claimant's time. The Respondent complied with the IMC processes. Further, the Respondent made several offers to settle the Claimant's claim. I also note that part of the Claimant's claim was unsuccessful;
- the Respondent does not hold a high community profile, nor does it conduct trade and commerce, nor were the breaches intention, and therefore general deterrence has limited relevance in this case;
- the nature and extent of the contraventions overall were at the lower end of the spectrum and any penalty should be similarly at the low or non-existent end of the scale; and
- the Respondent is already crushed.

Relevance Of The Claimant's Submission On S 323 Of The Act As It Relates To Long Service Leave

- 18 The Claimant seeks a civil penalty under the Act in relation to the Respondent's failure to pay pro rata long service leave under the LSL Act. The Claimant submits that s 323(1) of the Act was contravened by the Respondent by failing to pay in full to the Claimant 'amounts payable ... in relation to the performance of work' concerning the non-payment of pro rata long service leave.
- 19 There are a number of difficulties with respect to the Claimant's submission:
- the Claimant's claim never alleged a contravention of s 323 of the Act because of the Respondent's failure to pay in full the Claimant's pro rata long service leave;
 - thus, there is no finding that there has been a contravention of s 323 of the Act. The only finding made relevant to long service leave was that the Claimant was entitled to the payment of pro rata long service leave upon termination of his employment and the amount he was owed;
 - further, the finding as to the amount owed in relation to long service leave was made under the LSL Act,⁶ rather than an amount owed under the Act or a fair work instrument;⁷
 - therefore, leaving aside the arguable lack of procedural fairness to the Respondent in now introducing a new cause of action and contravention under the Act, the IMC cannot order the payment of a pecuniary penalty under s 546(1) of the Act in relation to the non-payment of long service leave under the LSL Act; and
 - in addition, an order for the payment of a pecuniary penalty is a discretionary order. Even if I was satisfied that the non-payment of state long service leave under the LSL Act was capable of being considered a contravention of s 323 of the Act, I would decline to exercise my discretion in ordering the payment of a pecuniary penalty where the Claimant never litigated his claim alleging a contravention of s 323 of the Act.
- 20 In that respect, I note by way of comment only that, in my view, there exists considerable doubt whether s 323 of the Act applies to the non-payment of a state based entitlement such as that under the LSL Act. To the extent there is some other commentary on this issue, s 323 of the Act

was considered in the context of a long service leave entitlement under other Commonwealth legislation⁸ or in the context of an unpaid annual leave entitlement under the Act⁹ or in the context of an unsuccessful claim where the state entitlement did not appear to be fully argued.¹⁰ In any event, in the Claimant's claim the application of s 323 of the Act to a state entitlement, such as long service leave under the LSL Act, was not argued at all.

Determination

21 The following considerations are significant in assessing penalties in this case:

- the determination of the claim, in part, required consideration and construction of the Award and its applicability to the Claimant (the IMC found that the Award did not apply);
- there was a fundamental disagreement between the parties of various issues determined by the IMC;
- the Respondent's lack of record keeping contributed to outcome of the Claimant's claim. This was underscored primarily by ignorance of the Act and its requirements and complacency most likely because, for the relevant time period, the Respondent employed one employee who worked from home. Of course, any underpayment or non-payment has serious consequences for the Claimant and must be treated accordingly by the IMC;
- however, the more sinister character attributed by the Claimant to the Respondent in terms of the conduct being deliberate and, in some way, designed to foil the Claimant is not borne out;
- the lack of contrition is not an aggravating circumstance which might increase the penalty;¹¹
- there is no evidence the Respondent either 'exploited' the Claimant or 'profited' from its 'exploitation' of the Claimant;
- the Respondent has not been found to have previously contravened the Act;
- the Respondent operates a small business and no longer employs employees. Therefore, the need for specific deterrence is low; and
- while there was a course of conduct because of the failure of the Respondent's to keep records and provide pay slips, the Respondent otherwise paid wages and maintained other records associated with the Claimant's employment. Therefore, in that sense the Respondent did not attempt to 'hide' any contraventions.

22 While criminal penalties import notions of retribution and rehabilitation, the primary purpose of a civil penalty is to promote the public interest in compliance with the law and not as an additional award of compensation for financial or emotional stress, hurt feelings, inconvenience or legal fees.¹²

23 Considering the above, while considerations of punishment and specific deterrence are of importance, it is perhaps of less importance in this case than the need to ensure employers maintain and provide proper records, thus adhering to the requirements of the Act. There is benefits for both employer and employee if the employer does so.

- 24 Notwithstanding this, I do not accept that the Respondent's contravention of s 536(1) of the Act is a '*serious contravention*', albeit the Respondent did not provide the Claimant with any pay slips over the course of the Claimant's employment.
- 25 In my view, the Respondent's conduct in all the circumstances is properly categorised in the low range. Further, I have regard to the size of the Respondent's business and capacity to pay.
- 26 For these reasons, and having regard to principles of totality, penalties fixed in the sum of:
- \$5,000 for the failure to pay untaken paid annual leave upon termination of employment in accordance with the terms of the NES and the Act;
 - \$4,000 for failing to provide pay slips; and
 - \$2,000 for failing to keep and maintain the prescribed employment records,
- is a proportionate reflection of the gravity of the contravening conduct by the Respondent.
- 27 The Claimant seeks an order pursuant to s 546(3)(c) of the Act that the penalties be paid to him and an order is made that the Respondent pay a pecuniary penalty of \$11,000 to the Claimant.

Orders

- 28 Having heard from the parties, the Respondent is ordered to pay to the Claimant a pecuniary penalty of \$11,000 in respect of the contraventions of the Act.

**D SCADDAN
INDUSTRIAL MAGISTRATE**

¹ Contravening s 90(2) of the Act.

² Contravening s 44 of the Act by failing to comply with s 61 of the Act (NES) – item 2 of the Civil Remedy Provisions in s 539(2) of the FWA.

³ Regulation 3.32, reg 3.33 and reg 3.34 of the *Fair Work Regulations 2009* (Cth) (the Regulations).

⁴ Section 546(2)(b) of the Act.

⁵ Section 546(2)(b) of the Act.

⁶ *Smith v Silkwood* [146].

⁷ Section 545(3) of the Act.

⁸ *Association of Professional Engineers, Scientists and Managers Australia v Bulga Underground Operations Pty Ltd* [2019] FCA 1960.

⁹ *Stratton Finance Ltd v Webb* [2014] FCAFC 110.

¹⁰ *Ambrosini v Grandbridge & Anor* [2019] WAIRC 00210.

¹¹ *Fair Work Ombudsman v Maritime Union of Australia* (No 2) [2015] FCA 814.

¹² *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 [55] (referring to *Trade Practices Commission v CSR Ltd* [1990] FCA 521).

Schedule I: Jurisdiction, Practice And Procedure Of The Industrial Magistrates Court (WA) Under The Fair Work Act 2009 (Cth)

Jurisdiction

1. An employee, an employee organization or an inspector may apply to an eligible state or territory court for orders regarding a contravention of the civil penalty provisions identified in s 539(2) of the Act. The Industrial Magistrates Court (WA) ('IMC' or 'the Court'), being a court constituted by an industrial magistrate, is '***an eligible State or Territory court***': s 12 of the Act (see definitions of '***eligible State or Territory court***' and '***magistrates court***'); *Industrial Relations Act 1979* (WA), s 81 and s 81B.
2. The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: s 544 of the Act.
3. The civil penalty provisions identified in s 539 of the Act include:
 - Section 44 of the Act;
 - Section 535 of the Act; and
 - Section 536 of the Act.
4. An '***employer***' has the statutory obligations noted above if the employer is a '***national system employer***' and that term, relevantly, is defined to include 'a corporation to which paragraph 51(xx) of the Constitution applies': s 14 and s 12 of the Act. The obligation is to an 'employee' who is a '***national system employee***' and that term, relevantly, is defined to include 'an individual so far as he or she is employed by a national system employer': s 13 of the Act. It is not in dispute and it was found that the Respondent is a corporation to which paragraph 51(xx) of the Constitution applies and that the Claimant was employed by the Respondent.
5. Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for:
 - A person to pay a pecuniary penalty: s 546 of the Act.

Burden and standard of proof

6. In an application under the Act, the Claimant carries the burden of proving the claim. The standard of proof required to discharge the burden is proof 'on the balance of probabilities'. In *Miller v Minister of Pensions* [1947] 2 All ER 372, 374, Lord Denning explained the standard in the following terms:

It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not.
7. In the context of an allegation of the breach of a civil penalty provision of the Act it is also relevant to recall the observation of Dixon J said in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences. [362]

8. Where in this decision it is stated that a finding has been made, the finding is made on the balance of probabilities. Where it is stated that a finding has not been made or cannot be made, then no finding can be made on the balance of probabilities.

Schedule II: Pecuniary Penalty Orders under the Fair Work Act 2009 (Cth)

Pecuniary Penalty Orders

9. The Act provides that the Court may order a person to pay an appropriate pecuniary penalty if the court is satisfied that the person has contravened a civil remedy provision: s 546(1). The maximum penalty for each contravention by a natural person, expressed as a number of penalty units, set out in a table found in s 539(2) of the Act: s 546(2) of the Act. If the contravener is a body corporate, the maximum penalty is five times the maximum number of penalty units proscribed for a natural person: s 546(2) of the Act.
10. The rate of a penalty unit is set by s 4AA of the *Crimes Act 1914* (Cth): s 12 of the Act. The relevant rate is that applicable at the date of the contravening conduct:

Before 28 December 2012	\$110
Commencing 28 December 2012	\$170
Commencing 31 July 2015	\$180
Commencing 1 July 2017	\$210

11. The purpose served by penalties was described by Katzmann J in *Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)* [2017] FCA 557 [338] in the following terms (omitting citations):

In contrast to the criminal law, however, where, in sentencing, retribution and rehabilitation are also relevant, the primary, if not the only, purpose of a civil penalty is to promote the public interest in compliance with the law. This is achieved by imposing penalties that are sufficiently high to deter the wrongdoer from engaging in similar conduct in the future (specific deterrence) and to deter others who might be tempted to contravene (general deterrence). The penalty for each contravention or course of conduct is to be no more and no less than is necessary for that purpose.

12. In *Kelly v Fitzpatrick* [2007] FCA 1080; 166 IR 14 [14], Tracey J adopted the following ‘non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does the amount of the penalty’ which had been set out by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7:

- *The nature and extent of the conduct which led to the breaches.*
- *The circumstances in which that conduct took place.*
- *The nature and extent of any loss or damage sustained as a result of the breaches.*
- *Whether there had been similar previous conduct by the respondent.*
- *Whether the breaches were properly distinct or arose out of the one course of conduct.*
- *The size of the business enterprise involved.*
- *Whether or not the breaches were deliberate.*
- *Whether senior management was involved in the breaches.*
- *Whether the party committing the breach had exhibited contrition.*
- *Whether the party committing the breach had taken corrective action.*

- *Whether the party committing the breach had cooperated with the enforcement authorities.*
 - *The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and*
 - *The need for specific and general deterrence.*
13. The list is not ‘a rigid catalogue of matters for attention. At the end of the day the task of the court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations’. (Buchanan J in ***Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith*** [2008] FCAFC 8; (2008)165 FCR 560 [91]).
14. ‘Multiple contraventions’ may occur because the contravening conduct done an employer:
- (a) resulted in a contravention of a single civil penalty provision or resulted in the contravention of multiple civil penalty provisions;
 - (b) was done once only or was repeated; and
 - (c) was done with respect to a single employee or was done with respect to multiple employees.
15. The fixing of a pecuniary penalty for multiple contraventions is subject to s 557 of the Act. It provides that two or more contraventions of specified civil remedy provisions (including contraventions of an enterprise agreement and a contravention on s 323 on the payments) by an employer are taken be a single contravention if the contraventions arose out of a course of conduct by the employer. Subject to proof of a ‘course of conduct’, the section applies to contravening conduct that results in multiple contraventions of a single civil penalty provision whether by reason of the same conduct done on multiple occasions or conduct done once with respect to multiple employees: ***Rocky Holdings Pty Ltd v Fair Work Ombudsman*** [2014] FCAFC 62; (2014) 221 FCR 153; ***Fair Work Ombudsman v South Jin Pty Ltd (No 2)*** [2016] FCA 832 [22] (White J) The section does not to apply to case where the contravening conduct results in the contravention of multiple civil penalty provisions (example (a) above): ***Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)*** [2017] FCA 557 [411] (Katzmann J).
16. The totality of the penalty must be re-assessed in light of the totality of the offending behaviour. If the resulting penalty is disproportionately harsh, it may be necessary to reduce the penalty for individual contraventions: ***Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith*** [2008] FCAFC 8; (2008) 165 FCR 560; 246 ALR 35 [47] - [52].
17. Section 546(3) of the Act also provides:
- Payment of penalty
- (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.*
18. In ***Milardovic v Vemco Services Pty Ltd (Administrators Appointed) (No 2)*** [2016] FCA 244 [40] - [44], Mortimer J summarised the law (omitting citations and quotations) on this

provision in light of *Sayed v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4:

*[T]he power conveyed by s 546(3) is ordinarily to be exercised by awarding any penalty to the successful applicant ... [T]he initiating party is normally the proper recipient of the penalty as part of a system of recognising particular interests in certain classes of persons ... in upholding the integrity of awards and agreements the subject of penal proceedings. Where a public official vindicates the law by suing for and obtaining a penalty, it is appropriate that the penalty be paid to the Consolidated Revenue Fund. Otherwise, the general rule remains appropriate, that the penalty is to be paid to the party initiating the proceeding, with the 'Gibbs' [*Gibbs v The Mayor, Councillors and Citizens of City of Altona* [1992] FCA 553] ... exception that the penalty may be ordered to be paid to the organisation on whose behalf the initiating party has acted.*