FEDERAL CIRCUIT COURT OF AUSTRALIA

FWO v MHONEY PTY LTD & ANOR *[2017] FCCA 811*

Catchwords:
INDUSTRIAL LAW – Application for imposition of penalties arising upon contraventions of the Fair Work Act and the relevant award following earlier liability hearing – consideration of matters relevant to penalty – respondents' serious contraventions – applicant's proposed range of penalties accepted – whether earlier orders should be varied pursuant to the slip rule to make second respondent jointly and severally liable for part of unrepaid wages.

Legislation:
Fair Work Act 2009, ss. 44, 45, 321, 323, 350, 531, 536, 546, 550, 557, 712
Federal Circuit Court Rules 2001, r. 16.05

Cases cited:
A & L Silvestri Proprietary Limited v Construction, Forestry, Mining and Energy Union [2008] FCA 466
ACCC v Leahy Petroleum Limited (No. 2) [2005] FCA 254
Arnett v Holloway (1960) VR 22
Australian Ophthalmic Supplies Proprietary Limited v McAlary-Smith [2008] FCAFC 8
Cawood v Inframworth Proprietary Limited (1992) Qd R 114
Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate & Ors [2015] HCA 46
Construction, Forestry, Mining and Energy Union v Cahill (2010) FCAFC 39, (2010) 269 ALR 1
Construction, Forestry, Mining and Energy Union v Williams (2009) 191 IR 445
Fair Work Ombudsman v Promoting U Proprietary Limited & Anor [2012] FMCA 58
Fair Work Ombudsman v Safecorp Security Group Pty Ltd & Anor (2017) FCCA 348
Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd [2012] FMCA 258
Jordan v Mornington Inn Proprietary Limited [2007] FCA 1384
L. Shaddock and Associates Pty Ltd v Parramatta City Council (No. 2) (1982) 151 CLR 590
Mornington Inn Proprietary Limited v Jordan [2008] FCAFC 70
Rocky Holdings Pty Ltd v Fair Work Ombudsman [2014] FCAFC 62

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	MHONEY PTY LTD
Second Respondent:	ABDULRAHMAN TALEB
File Number:	MLG 1223 of 2015
Judgment of:	Judge Burchardt
Hearing date:	24 March 2017
Date of Last Submission:	24 March 2017
Delivered at:	Melbourne
Delivered on:	28 April 2017

REPRESENTATION

Counsel for the Applicant:	Ms Knowles
Solicitors for the Applicant:	Office of the Fair Work Ombudsman
Counsel for the Respondent:	Ms Line
Solicitors for the Respondent:	Souki Lawyers

ORDERS

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE

No. MLG 1223 of 2015

FAIR WORK OMBUDSMAN
Applicant

And

MHONEY PTY LTD
First Respondent

ABDULRAHMAN TALEB
Second Respondent

REASONS FOR JUDGMENT

Introductory

1. On 24 November 2016 I handed down reasons for judgment. I found the first respondent to have contravened the provisions of both the *Fair Work Act 2009* ("the *Act*") and the relevant award on numerous occasions, and found the second respondent was knowingly involved within the meaning of s 550 of the *Act* with the contraventions of the legislation alleged against the first respondent. Given the multiplicity of the contraventions, I requested the applicant to prepare a schedule of proposed orders to give effect to those reasons.

2. On 12 December 2006, I made consent orders in chambers by which I made various declarations and orders. Inter alia, I ordered the first respondent to pay a total of underpayments to a Mr Kazemi in the sum of $25,588.09. Given that I also declared that the second respondent was involved in breaches of the *Act*, it would have been open to me to make an order against the second respondent requiring him to have

paid to the applicant amounts of money underpaid in terms of wages and annual leave.

3. The court made further orders by consent on 16 December 2016 permitting the parties to put on evidence in respect to penalty and generally setting the matter down for a penalty hearing on 24 March 2017 at 9.30.

4. There are numerous differences between the parties about almost every aspect of the penalty hearing, and it is appropriate to record by way of introduction that the applicant will be generally successful.

The Course of the Proceeding – Cross-Examination of Witnesses

5. Although I had given the parties the opportunity by consent to put on further evidence, when the matter was called at 9.30 (a timetabling that might reasonably have alerted the parties to the fact that the matter would proceed by way of submissions) it transpired that all the various deponents were required for cross-examination. I dissuaded the parties from proceeding in this way.

6. In my view, it is one thing to give a party (particularly, in this context, a respondent) an opportunity to put on further material, by way of example as to contrition. It is another altogether to reopen the proceeding in circumstances where there have already been credit findings made about the various witnesses. What I had intended was to give the parties an opportunity to put on further uncontroversial materials, such as, for example, any prior conduct by the respondents or the like.

7. I ruled, in effect, that I was not prepared to allow cross-examination. It needs to be borne in mind, as I indicated at the time, that the primary purpose of penalties is to deter others from non-compliance. Detailed cross-examination about the extent of contrition and the like is, in the ultimate, although not irrelevant, at the margins of such a consideration. The extra benefit that the court could conceivably have obtained by the way of cross-examination was, clearly, utterly outweighed by the laborious and very extensive amount of time and effort it would have taken.

8. As I indicated to the parties, it is a matter of making what one reasonably can of the evidence that they have put on in the light of all the circumstances of the case.

First Issue – Were There Two Sets of Contraventions or One?

9. The applicant submitted that the course of conduct embarked upon by the respondents fell into two discreet periods, being the two periods of employment that I had decided in my earlier judgment had, in fact, subsisted, notwithstanding the respondents' denials. The respondents, by way of contrast, said only one course of conduct was indicated.

10. S 557 of the *Act* relevantly provides that two or more contraventions of the same civil remedy provision will be treated as a single contravention where that contravention was committed by the same person and arose from the same course of conduct.

11. The primary point made by the applicant is at paragraphs 13 - 14 of the applicant's written submissions in the following terms:

> *Notwithstanding that the Mhoney Liability Decision found the evidence did not establish that Mr Taleb had the required knowledge for accessorial liability of Award contraventions, the FWO submits that Mr Taleb, on behalf of Mhoney, was made aware on 24 April 2012 that the minimum rate was in the vicinity of $17 and above and then, again on behalf of Mhoney, made a separate decision in December 2012 to hire Mr Kazemi a second time and pay him rates which were grossly inadequate.*
>
> *The FWO submits that Mhoney is not entitled to the benefit of section 557(1) in respect to the two separate employment periods. These periods are separate employment engagement decisions that are not the same course of conduct and, therefore, do not fall within the scope of section 557(1).*

12. It needs to be borne in mind, contrary to his denials at the liability hearing, that I have found that Mr Taleb employed Mr Kazemi twice. Plainly, the first decision will stand as a separate period. Assuming in his favour that he was unaware of the various underpayments that he had made earlier, I accept that no later than 24 April 2012 Mr Taleb was told by FWI Read that the current casual rate for a level 1 employee was approximately $22 gross per hour and that the current

rate for a part time and full time employee was approximately $17 and above and that the rates would be increasing from 1 July onwards.

13. This meant that when Mr Taleb re-employed the applicant at a substantially lower rate of pay than either of those rates informed to him by Ms Read, Mr Taleb did so deliberately and wittingly.

14. In these circumstances, the various breaches of payments arising from the underpayments of wages do not, in my view, properly characterise themselves as one course of conduct. There is a different mental quality (putting the matter at its best for Mr Taleb) to the second employment.

15. If one were to assume, on the other hand, that the first employment period was characterised by the same witting breach of the award this would not, in my opinion, improve the position for Mr Taleb. He would simply be repeating his misconduct.

16. In these circumstances, I fully accept that there are two courses of conduct involved.

Was There One Course of Conduct Because All the Underpayments Arose Out of a Single Decision, Namely to Pay a Flat Rate of Pay?

17. Here the respondents submit that all eight contraventions of the *Act* alleged arose from the same source, namely the decision to pay Mr Kazemi a flat rate of $10 per hour up to $120 per day (see respondents' written submissions, paragraph 5). The respondents rely upon the decision of Judge Manousaridis in *Fair Work Ombudsman v Safecorp Security Group Pty Ltd & Anor* (2017) FCCA 348 ("*Safecorp*").

18. It is clear that in that case Judge Manousaridis found that the respondent had engaged in 12 contraventions of s 45 of the *Act*, and the second respondent was involved. His Honour went on to say at [139]:

> *The source of the contraventions, however, is the same. It consists in Mr Lohr concluding that paying employees a flat rate of $25 an hour would be sufficient to discharge old SSGs obligations under whatever award applied to its employees. The acts constituting each of the 12 contraventions were also the same, namely, paying amounts calculated solely by reference to the $25 per hour rate without Mr Lohr making any attempt to calculate*

the precise amounts for which each old SSG Employee became entitled, depending on the day and time of day that employee performed work. For these reasons, I am of the opinion that old SSGs 12 contraventions should be treated as one contravention.

19. Counsel for the respondents submitted that, this being a recent and reasoned decision of this court, I am obliged to follow it unless I think it is plainly wrong, something that was submitted not to be the case.

20. The written submissions of the applicant traversed this issue at paragraphs 15 - 18. Most particularly, they point to the decision of the Full Court of the Federal Court in *Rocky Holdings Pty Ltd v Fair Work Ombudsman* [2014] FCAFC 62 ("*Rocky Holdings*"). That case was certainly not referred to by Judge Manousaridis in *Safecorp*.

21. At paragraph 16 of written submissions the applicant relevantly submitted that the following matters flow from *Rocky Holdings*:

> *(a) one of the key objects of the FW Act is to ensure, through an effective penalty regime, compliance with minimum terms through the NES and modern awards, and section 557 of the FW Act does not operate simply to reduce the number of contraventions (Rocky Holdings at [12]);*
>
> *(b) it is wrong to characterise the provision of the NES in terms of the modern award alleged to be contravened as mere particulars of contraventions of section 44(1) and 44 – 45 of the FW Act (Rocky Holdings at [24]); and,*
>
> *(c) adopting such an approach could lead to arbitrary and capricious outcomes whereby (for example) an employer who had contravened a wide range of award provisions, leading to widespread underpayment of a number of employees, would be subject to the same maximum penalty as an employer who had contravened an award provision in respect of one employee on one occasion, which is counterintuitive (Rocky Holdings at [26]).*

22. Those subparagraphs of the written submissions, in my view, correctly characterise the conclusions of the Full Court in that case. I note further in *Rocky Holdings* that at [18] the Full Court stated relevantly:

> *The object and purpose of provisions such as section 557 and its predecessor provisions is to ensure that an "offender is not punished twice for what is essentially the same criminality". When considering the principles to be applied when imposing a*

penalty for contraventions of the Building and Construction Industry Improvement Act 2005 (Cth) Middleton and Gordon JJ in Construction, Forestry, Mining and Energy Union v Cahill (2010) FCAFC 39, (2010) 269 ALR 1 stated the issue to be resolved in that appeal as follows:

> *[35] The appellants submitted that the sentencing discretion miscarried because her Honour failed to consider a relevant matter (whether the three contraventions ought properly be seen as arising out of the one course of conduct) or because her Honour misdirected herself in the application of the "one course of conduct" or the "one transaction" principle...*

In resolving that argument, their Honours concluded:

> *[39] As the passages in Construction, Forestry, Mining and Energy Union v Williams (2009) 191 IR 445 explain, a "course of conduct" or the "one transaction principle" is not a concept peculiar to the industrial context. It is a concept which arises in the criminal context generally and one which may be relevant to the proper exercise of the sentencing discretion. The principle recognises that where there is an interrelationship between the legal and factual elements of two or more offences for which an offender has been charged, care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality. This requires careful identification of what is "the same criminality" and that is necessarily a factually specific enquiry. Bare identity of motive for commission of separate offences will seldom suffice to establish the same criminality in separate and distinct offending acts or omissions.*

These observations, it may be noted, have been applied when considering the operation of section 557 of the Fair Work Act (authorities omitted).

23. I note, with respect, the observations of Middleton and Gordon JJ just referred to, that the identification of the same criminality is necessarily a factually specific inquiry.

24. The facts in *Safecorp* are somewhat different to those in *Rocky Holdings* and, again, different to those in this particular case. That may be sufficient to explain the different conclusion that I reach about the applicability of the outcome in *Safecorp*.

25. Each of the contraventions alleged by the FWO is, prima facie, a separate one. It is a contravention of a separate term, either of the *Act* or the award. The fact that this arose out of a single decision by Mr Taleb to pay the applicant a flat rate of pay up to a certain amount does, indeed, show a single source in one sense. Nonetheless, the contravening conduct that exfoliated from this decision was multiple in its effects.

26. It would be plainly anomalous to treat the numerous contraventions in this case as one contravention when a single contravention by another employer would produce the same result. The proper way in which to consider this aspect of the matter is in consideration of the totality principle to which I shall come in due course.

27. I note that it would appear that Judge Manousaridis did not have the benefit of the decision of the Full Court in *Rocky Holdings*. If the different outcome is not explained by different facts, I would respectfully have to say that his Honour's decision appears, to me, to run counter to the gravamen of the binding Full Court authority in *Rocky Holdings*. I certainly regard the decision in *Rocky Holdings* as both applicable and binding on me. It is directly on point, and I should follow it.

28. Even if I were to be wrong in this regard, I would, with the greatest of respect, have to say that I take a totally different view to that of Judge Manousaridis. I do not accept that a single decision to pay a flat rate of pay that gives rise to multiple contraventions of the *Act* and/or of an award should be treated in each and every instance, and certainly not in the circumstances of this case, as one contravention. If that is the purport of his Honour's decision I respectfully believe that it is clearly wrong and I would decline to follow it. As it happens, I think that the better view is that *Rocky Holdings* is binding on me in any event.

29. The 22 separate contraventions alleged against the first respondent are set out at annexure A to the applicant's written submissions. In my opinion, they are appropriate. Each of the contraventions alleged constitutes a discreet and different form of contravention of a different term of the legislation and/or the award. It should be noted that in each instance they involve multiple contraventions. The respondents do

gain, as they should do, in the particular circumstances of this case, the benefit of not being penalised twice for what is essentially the same criminality.

30. There is no question that the contraventions alleged against the second respondent are correctly itemised in annexure A.

The Factors to be Taken Into Consideration

31. The parties have provided very extensive case law in support of their positions. Their submissions are also reasonably lengthy. There are, perhaps, two overarching matters that should be borne in mind as a matter of introduction.

32. The first is that in *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate & Ors* [2015] HCA 46 (*"Commonwealth of Australia v FWBII"*) the plurality of the High Court stated at [55]:

> *No less importantly, whereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty, as French J explained in Trade Practices Commission v CSR Limited, is primarily if not wholly protective in promoting the public interest in compliance:*
>
> > *"Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution, and rehabilitation. Neither retribution nor rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Part IV [of the Trade Practices Act] ... The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene the Act."*

33. A further consideration is that while there are lists of factors to be considered, but which are, of course, not checklists (see *Australian Ophthalmic Supplies Proprietary Limited v McAlary-Smith* [2008] FCAFC 8 at [89] - [91] per Buchanan J) the preferable approach is well illustrated by the judgment of Gyles J in *A & L Silvestri Proprietary*

Limited v Construction, Forestry, Mining and Energy Union [2008] FCA 466 where his Honour said at [6]:

> *...the discretion is at large. There are no mandatory statutory criteria and it is wrong to regard factors seen as relevant by one court as statutory criteria. Indeed, lists of factors can confuse an essentially straightforward task and lead to over-elaborate reasoning.*

34. With all these observations well in mind, I come to the particular matters to which the parties have turned their attention.

The Particular Matters Alleged

35. I will take these matters in the order in which they happen to be addressed in the applicant's written submissions and deal with any other matters raised by the respondents thereafter.

The Nature, Extent and Circumstances of the Contravening Conduct

36. The period of contravention, as the respondents submit, was itself relatively short. What is noteworthy, however, is that the underpayments were so significant that the total not paid to Mr Kazemi was, in relative terms, enormous for such a short time. Furthermore, for some of the time Mr Kazemi was simply not paid at all.

37. In my opinion, the different emphasis placed by each of the parties as to the size and scale of the first respondent's operations is not a matter of great moment. It has all the appearance of being essentially a family business. What is important is that through the actions of the second respondent there was a conscious decision made to pay Mr Kazemi a very low wage which, by the period of the second employment period, Mr Taleb well knew was radically lower than that prescribed by law.

38. The applicant seeks to emphasise Mr Kazemi's position as a vulnerable employee. Affidavit material about Mr Kazemi's personal circumstances has been put on before the court. This is the part of the material in which I refused cross-examination.

39. In the ultimate, I do not think this aspect of the matter takes the applicant much further forward. It is true that Mr Kazemi was a vulnerable employee in that he was a recent arrival to Australia and

totally lacked fluency in English, and could reasonably be understood to be most unlikely to be aware of any entitlements at law. I have no doubt that Mr Taleb was aware of all these matters and took advantage of them, but this, in a sense, is simply part of the underlying background which gave rise to the egregious failure to pay Mr Kazemi an appropriate wage.

Recordkeeping and Payslips

40. There is no question that the pay records kept by the first respondent were utterly inadequate and clearly contravened the legislative requirements. No payslips were ever provided to Mr Kazemi, and the failure to do so is important, as was pointed out by this court in *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd* [2012] FMCA 258 at [67]. There is nothing in the respondents' submissions that gainsays this proposition.

The Notice to Produce

41. There is no question that the first respondent kept an exercise book which records amounts paid to employees of the business. These records were not produced in response to the Notice to Produce issued on 1 September 2014, as I found in my earlier judgment. I accept the submission of the applicant that the failure to produce the pay records, coupled with the first respondent's failure to provide payslips to Mr Kazemi, hindered the ability of the applicant to efficiently carry out its role under the *Act*. I accept the written submission at paragraph 44 that, "*such contraventions must be met with penalties which sanction such noncompliance and deter future conduct*".

42. Once again, nothing is said in the first respondent's written submissions about this.

The Nature and Extent of Loss Suffered

43. In written submissions the applicant points to the significant underpayment in what was a brief period of employment amounting in total to in excess of $25,000. Nonetheless, the matters agitated in the written submissions, in my opinion, are a repeat, in effect, of the matters raised under the heading of the Nature, Extent and

Circumstances of the Contravening Employment. It is inappropriate to punish the respondent twice in this regard.

Deliberateness of Contraventions

44. I accept that Mr Taleb was well aware of the small amount of money Mr Kazemi was being paid, and knew that he was not paid for various periods of time. He also knew, more particularly, because the applicant told him so, that in the second period of employment he was underpaying significantly under the award. Like the matter just mentioned, however, this issue has already been addressed above, and it would be inappropriate to penalise the respondents twice for it.

Similar Previous Conduct

45. No similar previous conduct is alleged.

Involvement of Senior Management

46. Mr Taleb clearly was senior management in the context of the first respondent's operations. He was the sole director of it, and was clearly in control of the operations of the business. He was the person directly involved in the contraventions in setting the relevant wage rates and failing to pay Mr Kazemi the moneys he should have been paid.

47. Nonetheless, the notion of the involvement of senior management should not be exaggerated in what, on any view, is a relatively small employer (it appeared approximately a couple of dozen employees) most of whom appear to have been family members. It is not an irrelevant issue, but not one to which overly significant emphasis should be given.

Contrition, Corrective Action and Cooperation

48. This was an area in which the parties perhaps locked horns rather more significantly. It is the applicant's position that there is no evidence before the court of any contrition or remorse expressed by the respondents for their conduct. It is submitted that no apology has been given to Mr Kazemi. The written submissions point to the fact that Mr Taleb sought to deflect blame to others, including his accountant, and point to the fact that during the currency of the proceedings

Mr Taleb's brother (who had taken over as the director of the first respondent in the meantime) lodged an application to voluntarily deregister the company.

49. The applicant concedes a measure of cooperation by the respondents with the investigation of Inspector Goonan and, in particular, the fact that Mr Taleb's wife voluntarily participated in a recorded interview, and their solicitor corresponded with the applicant.

50. At paragraph 59 of the written submissions, reasons are given why this cooperation should be given little weight. Likewise, reference is made to an offer of settlement which it is submitted the court should discount.

51. The submissions of the respondents point to the affidavit of Mr Taleb in which it is put that there is, indeed, contrition demonstrated, and, without traversing the materials in detail, put in issue the approach adopted to cooperation and the settlement offer made by the respondents.

52. I note that the written submissions of the respondents accurately assert that the respondents did make admissions prior to hearing in relation to a number of contraventions (including one by Mr Taleb). This is a relevant matter to which some weight should be given. One matter to which no weight can be given is the alleged threats made by Mr Taleb to Mr Kazemi. While Mr Taleb, I have to confess, has struck me at all times as being a man perhaps well capable of making such threats, the evidence has not been tested, and I am not prepared to give that matter any weight.

53. As I indicated to counsel for the respondents during the running of the hearing, the arrangements that have come to pass involving the first respondent from time to time have all the appearance of what is sometimes described as a phoenix company, and I strongly suspect that the Taleb family still has a significant influence in it, if not actually controlling it. Nonetheless, the evidence does not go far enough to support such a finding, and I expressly do not make it. What I think I should give emphasis to is what Mr Taleb, the second respondent, has actually said in his affidavit going to the question of contrition.

54. At paragraph 11 he relevantly says that:

These Fair Work proceedings have been a very big eye opener for me. I have learned a lot and I am determined to never get into this situation again with Fair Work Act breaches. Had I known all that I know now, things would have been very different when I was managing the Market. I have no formal business qualifications and this was the first operation I ever had employing employees. Before I started managing the Market, I had a fish and chip shop that I ran with my wife, Samia Taleb, and so employment of staff was a new thing for me at the Market. I relied on my accountant for compliance with the law regarding minimum wage.

55. He went on to say at paragraphs 13 - 16:

> *Due to the impact of these proceedings and my ill health, it is unlikely that I will ever operate a business again.*
>
> *These proceedings have taught me a very tough lesson about how to best operate and manage a business, and it is a lesson that I have learned well. I have made a mistake and I have suffered for it. These proceedings have been stressful and have brought me great shame, because I pride myself on being a leader within the Melbourne Lebanese Muslim community and being a person who other Lebanese Muslims look up to and approach to help resolve their disputes within each other.*
>
> *I am sincerely apologetic. It was never my intention to hurt anyone. I have made it my life work mission to support migrants and gave them a chance when no one else would, and I wish I had dealt better with complying with the Fair Work laws.*
>
> *I just want to pay any applicable penalties against me and move on with my life and focus on my health and family.*

56. I should make it clear that I formed a significantly adverse view of Mr Taleb when he gave evidence in the liability hearing (see earlier decision paragraph 120). I note that when the matter came on in the penalty hearing I indicated to counsel for the respondents that the Talebs were free to leave, but that I would take note if they did so. The minute they were not required for cross-examination both the Taleb brothers immediately left the court. Given that the second respondent says he is no longer in employment one would have thought that if he was genuinely contrite and ashamed he might have had some interest in hearing what was said at court.

57. The tenor of Mr Taleb's contrition as expressed in his affidavit is unimpressive. He at no stage apologises to Mr Kazemi, and I accept that he has not done so in any event. He well knew that he was underpaying Mr Kazemi in the second employment period, and his conduct in doing so, in my view, stands strongly against him.

58. It is to be noted that much of the affidavit is dedicated in its terms to self-pity rather than contrition, and if Mr Taleb is a significant figure in the Lebanese Muslim community in Melbourne one might express a hope that the community would extend their admiration to someone perhaps more worthy of it than Mr Taleb.

59. It is important to emphasise, however, that although I remain completely unimpressed by the affidavit material filed on behalf of Mr Taleb, there is no question whatever of increasing his penalty as a result. All it means is that he does not, in my view, attract any significant discount save to the limited extent that he and his wife cooperated with the investigation.

Compliance With Minimum Standards

60. The applicant submits that this is an important matter. I accept that that is the case. I accept the submission of the applicant that the way it worked out was that Mr Kazemi was paid wages of between $3.49 and $9.29 per hour. This was an egregious underpayment. It gave the respondents an unfair advantage in the competitive retail industry. I note that this aspect of the matter is not addressed in terms in the respondents' submissions.

Deterrence

61. I have already quoted the High Court's approval in *Commonwealth of Australia v FWBII* of the remarks of French J about the importance of both specific and general deterrence. It is not necessary to repeat those remarks.

62. So far as specific deterrence is concerned, the affidavit evidence is, by no means, entirely satisfactory in as much as Mr Taleb says, effectively, he is not in employment in circumstances where the materials taken as a whole suggests that may not be the case (see applicant's written submissions paragraphs 75 - 76).

63. While there are hints that Mr Taleb's state of health may make future employment questionable, there is no medical evidence to support such an assertion. In all the circumstances, I think it is important to bring home to Mr Taleb the undesirability of his offending in the future. Although he says he will never do so, the fact is that he deliberately continued to underpay Mr Kazemi in the second employment period even though he knew this was what he was doing.

General Deterrence

64. The parties agree that general deterrence is a relevant consideration. In the light of the remarks of French J it is clearly one of the most important matters the court has to consider. The court is required to set penalties at a level to deter likeminded persons from contravening in the same way as the respondents.

65. The applicant seeks to rely upon a number of their own materials set out in research conducted by the Fair Work Ombudsman and annexed to the affidavit of Ms Goonan. The respondents seek to downplay the weight to be granted to these materials.

66. I accept that the materials provided by the applicant are open to some measure of qualification. It is not important to embark on a detailed analysis of why this is so. That is because it is notorious, in my view, that the retail industry is prone to underpayment. This court has dealt with this industry on numerous occasions in the past. It seems to be a fact of life that persons in the retail industry are unpaid. I note in this instance the employment was that of a recently arrived person in Australia with no English. Mr Taleb's own affidavit seems to suggest that he employed similar persons in the past (his endeavours to help other refugees and the like).

67. In my view, general deterrence is important, and particularly in an industry such as this characterised often by small operators with little understanding of industrial instruments and the law.

Size of the Business

68. Although the applicant has raised this matter it does not of itself, in my opinion, take the matter much further. There is limited evidence about

the first respondent's financial position and it may, indeed, be as parlous as the respondents suggest that it is.

69. In this regard, however, while I respectfully note the passages from *ACCC v Leahy Petroleum Limited* (No. 2) [2005] FCA 254 (per Merkel J) and *Jordan v Mornington Inn Proprietary Limited* [2007] FCA 1384 per Heerey J at [89] which are set out in the applicant's written submissions, I do not resile from what I said in *Fair Work Ombudsman v Promoting U Proprietary Limited & Anor* [2012] FMCA 58 at [57] ("*FWO v Promoting U*") where I said:

> *Nonetheless, the respondents cannot hope to have their conduct, in effect, exonerated by the court merely because they are impecunious. Parliament has set significant penalties for the sort of contraventions that the respondents engaged in and I do not think that it is appropriate for the totality principle to operate simply to ensure that penalties are imposed in suitably insignificant amounts to meet the respondents' capacity to pay.*

Totality and the Recommended Penalty

70. Consistent with the decision of the High Court in *Commonwealth of Australia v FWBII* [2015] HCA 46, both parties have made submissions as to the range of penalty that the court should impose.

71. The applicant submits that, "*The conduct of the respondents in this case is highly aggravating and extremely serious with few, if any, redeeming features*" (written submissions paragraph 92).

72. The applicant seeks high range penalties of 80 to 90 per cent of the available maximum for most contraventions, including the contraventions relating to recordkeeping and payslips, underpayments of the minimum hourly rate, overtime rates, failure to provide meal and rest breaks, and the failure to comply with the NTP, and midrange penalties of between 50 to 60 per cent for underpayment contraventions which resulted in nominal underpayments. The applicant sought the same penalty ranges for both respondents on the basis that Mr Taleb was at all times the primary actor and decision-maker of Mhoney.

73. These would provide a range of $562,200 to $644,400 in respect to the first respondent (68 to 78 per cent of the available maximums) and

$13,680 to $16,020 in respect to Mr Taleb (58 to 68 per cent of the available maximum penalties).

74. The written submissions go on to refer to the totality principle which was described in *Mornington Inn Proprietary Limited v Jordan* [2008] FCAFC 70 at [42] per Gyles, Stone and Buchanan JJ as:

> *...the totality principle, which is a final check to be applied to ensure that a final, total or aggregate, penalty is not unjust or out of proportion to the circumstances of the case.*

75. The totality principle has also been described as the process of instinctive synthesis, and it is to be noted that a result should not be crushing in its effect (although I refer to and repeat my remarks in *FWO v Promoting U* set out above).

76. The written submissions of the respondents observe, correctly, that while maximum penalties provide a yardstick, it is rarely appropriate to look to a maximum penalty and then proceed by a proportional deduction from it. It is submitted that this is not the worst type of case. Nonetheless, at paragraph 77 the respondents' written submissions assert:

> *The respondents agree that the contraventions of Mhoney are serious, and do not attempt to unduly minimise their seriousness, and so accept the 80 to 90 per cent of the maximum penalty proposed by the FWO.*

77. The written submissions go on, however, to propose that in relation to the contraventions concerning ss 44, 531 and 536 of the *Act*, an appropriate range is 30 to 40 per cent of the maximum penalty, not the 40 to 50 per cent recommended by the applicant. Unsurprisingly, the total figure produced for Mhoney is $113,400 to $131,700 prior to any totality discount being applied and, likewise, for Mr Taleb $7260 to $8580 dollars.

78. There was some discussion before me as to what the appropriate penalty unit rate should be, but I find the submissions of the applicant persuasive, and have adopted the figures proposed by the applicant.

The Relevant Outcome

79. In my opinion, the concession by the respondents that the contraventions of both respondents in relation to the contraventions of ss 45, 321 and 712 of the *Act* are serious and would support a range of outcomes of 90 per cent is correct. The underpayments were very significant, and led to a situation where an employee employed for no more than 18 weeks was owed over $25,000. This speaks for itself. As I have indicated, this is an industry in which general deterrence is significant. In all the circumstances, there should be penalties in that range.

80. So far as the other matters are concerned, I again accept the submissions of the applicant. The amounts that would be required to be paid by Mhoney are, of course, enormous. Nonetheless, it is not a matter of crafting orders that Mhoney will necessarily be able to pay.

81. The amounts in respect of Mr Taleb are significant, but it should be noted that there is no meaningful evidence before the court to suggest that such a result would be crushing upon him. He was at all times the mind and will of Mhoney. His actions have really very little in the way of any mitigating factors attracting to them (although I have referred to and bear in mind those where I have felt some measure of mitigation is appropriate).

82. In the ultimate, and applying the totality principle, I think the penalties sought by the applicant are appropriate.

Who Should Pay the Underpayments

83. It is common cause that the liability findings I made showed that Mr Taleb was involved within the meaning of s 350 of the *Act* in the contraventions of ss 323 and *44* of the *Act*. It seems to be common cause that the amounts relating to each of those contraventions were $5407.21 (s 323) and $1111.31 (s 44) of the *Act*.

84. It is also common cause that Mhoney has not paid these two sums (or, indeed, any of the other sums ordered) to Mr Kazemi.

85. There is no question in my mind given the involvement of Mr Taleb the terms of the *Act* mean that he could have been ordered to be jointly and severally liable for the sums now under discussion.

86. The gravamen of the respondents' objection is at paragraph 86 of the written submissions as:

> *By now arguing that there should be joint and several liability for part of the underpayment, having unsuccessfully argued at the liabilities hearing that there should be joint and several liability for the entire underpayment, the FWOs submission at FWO Outline [101] attempts to re-litigate this point, contrary to his Honour's ruling.*

87. With respect, I do not think that that entirely accurately expresses the matter. There is nothing in my reasoning that suggests that I actively considered and rejected an application that the parties be jointly and severally liable for the contraventions. Rather, what I did determine was whether or not Mr Taleb was involved within the meaning of s 550 in the contraventions of both the *Act* and the award. In relation to the former, the applicant was successful, and in relation to the latter the applicant was not.

88. The orders made were made by consent in chambers, and did not require Mr Taleb to pay any part of the moneys that were ordered to be paid by Mhoney.

89. While the orders were made by consent, I did not turn my mind to this aspect of the matter. Had I done so, I would have undoubtedly ordered Mr Taleb to be responsible for the contraventions of the *Act* proved against him. That is because he was found to have been involved within the meaning of s 550.

90. While, of course, the respondents are correct to say that the raising of this matter now by the applicant does constitute an endeavour to revisit the issue, the better and proper characterisation of the matter is that this is an indication to the court to use the slip rule (*Federal Circuit Court Rules 2001* at r 16.05). The slip rule enables the court to amend judgments which do not correctly express the intention of the judge when judgment was pronounced (*Arnett v Holloway* (1960) VR 22) and may be extended to mistakes by inadvertence (*Cawood v*

Infraworth Proprietary Limited (1992) Qd R 114) or omissions resulting from counsel's failure to bring the relevant circumstances to the attention of the court (*L. Shaddock and Associates Pty Ltd v Parramatta City Council (No. 2)* (1982) 151 CLR 590) (see Butterworths Australian Legal Dictionary).

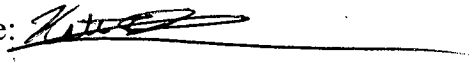
91. In my view, all those circumstances apply here. I had intended to make Mr Taleb jointly and severally liable because I had found that he was involved within the meaning of the *Act*. It was inadvertence on my part, and, indeed, I infer, by counsel for the applicant not to have noticed this at the time. It was likewise an omission on counsel's part to bring this matter to my attention. In my view, interests of justice are properly served in this instance by making the order that the applicant seeks.

Payment of the Penalties to the Applicant Personally

92. The applicant seeks that the penalties be paid to Mr Kazemi personally pursuant to s 546(3)(c) of the *Act*. In the circumstances where the more probable outcome than any other in this proceeding is that the first respondent will be placed into liquidation, and where the respondents generally show a pronounced disinclination to pay Mr Kazemi anything, it is entirely appropriate that the penalties be paid to him.

93. I will direct the parties to bring in orders reflecting these reasons for judgment within 7 days.

I certify that the preceding ninety-three (93) paragraphs are a true copy of the reasons for judgment of Judge Burchardt

Associate: 

Date: 28 April 2017