

FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v MAMAK PTY LTD & ORS

[2016] FCCA 2104

Catchwords:

INDUSTRIAL LAW – Penalty – contraventions of the *Restaurant Industry Award 2010* relating to remuneration – failure to comply with record keeping obligations under the *Fair Work Act 2009* (Cth) - appropriate penalty to be imposed – relevant considerations – applicable penalty of each contravention.

Legislation:

Crimes Act 1914 (Cth), s.4AA(1)

Crimes Legislation Amendment (Penalty Unit) Act 2015 (Cth)

Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012 (Cth), item 9(1) of sch.3

Fair Work Act 2009 (Cth), ss.45, 535, 536, 539, 545, 546, 549, 550, 557

Fair Work Regulations 2009 (Cth), regs.3.32, 3.33, 3.37, 3.40, 3.44, 3.46, 4.01A

Cases cited:

ACE Insurance Ltd v Trifunovski (No. 2) [2012] FCA 793

Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate (2015) 326 ALR 476; [2015] HCA 46

Fair Work Ombudsman v Amritsaria Four Pty Ltd [2016] FCCA 968

Fair Work Ombudsman v Lifestyle SA Pty Ltd [2014] FCA 1151

Kelly v Fitzpatrick (2007) 166 IR 14; [2007] FCA 1080

Articles and other material cited:

Mark Twain and Benjamin Disraeli, *Lies, Damned Lies and Statistics* (8 July 2016) University of York Department of Mathematics

<<http://www.york.ac.uk/depts/maths/histstat/lies.htm>>

Applicant:

FAIR WORK OMBUDSMAN

First Respondent:

MAMAK PTY LTD (ACN 118 546 857)

Second Respondent:

JOON HOE LEE

Third Respondent:

JULIAN LEE

Fourth Respondent: ALAN WING-KEUNG AU
File Number: SYG 3262 of 2015
Judgment of: Judge Smith
Hearing date: 9 May 2016
Date of Last Submission: 9 May 2016
Delivered at: Sydney
Delivered on: 19 August 2016

REPRESENTATION

Solicitors for the Applicant: Mr J Robertson, Office of the Fair Work Ombudsman
Solicitors for the Respondents: Mr J Lee, Comasters Law Firm and Notary Public

DECLARATIONS MADE BY CONSENT:

- (1) The First Respondent, Mamak Pty Ltd, contravened the following civil remedy provisions:
- a) section 45 of the *Fair Work Act 2009* (Cth) (“FW Act”), by failing to pay each of Olivia Kai Li Vun, Khai Sheng Woon, Kian Hui Tan, Tian Hui Melinda Lim, and Nicholas Yeoh Phee Leong the minimum rates of pay prescribed by clauses 20.1 and A.2.5 of Schedule A to the *Restaurant Industry Award 2010* (“Restaurant Award”);
 - b) section 45 of the FW Act, by failing to pay Declan Zhuan Rong Lee the required minimum junior rates of pay prescribed by clause 20.3 of the Restaurant Award;
 - c) section 45 of the FW Act, by failing to pay each of Olivia Kai Li Vun, Khai Sheng Woon, Kian Hui Tan, Tian Hui Melinda Lim, Nicholas Yeoh Phee Leong and Declan Zhuan Rong Lee (together, the “Employees”) casual loading

prescribed by clauses 13.1 and A.5.4 of Schedule A to the Restaurant Award;

- d) section 45 of the FW Act, by failing to pay each of the Employees Saturday penalty rates prescribed by clauses 34.1 and A.7.3 of Schedule A to the Restaurant Award;
- e) section 45 of the FW Act, by failing to pay each of the Employees Sunday penalty rates prescribed by clauses 34.1 and A.7.3 of Schedule A to the Restaurant Award;
- f) section 45 of the FW Act, by failing to pay each of the Employees public holiday penalty rates prescribed by clauses 34.1 and A.7.3 to the Restaurant Award;
- g) section 45 of the FW Act, by failing to pay each of the Employees additional penalty amounts for work performed between 10:00pm and midnight on Monday to Friday as prescribed by clauses 34.2 and A.7.3 of Schedule A to the Restaurant Award;
- h) section 45 of the FW Act, by failing to pay Olivia Vun and Declan Zhuan Ruong Lee penalty rates for work performed between midnight and 7:00am on Monday to Friday including midnight Sunday as prescribed by clauses 34.2 and A.7.3 of Schedule A to the Restaurant Award;
- i) subsection 535(1) of the FW Act, by failing to keep records for the Employees with information prescribed by the FW Regulations.
- j) regulation 3.44(1) of the *Fair Work Regulations 2009* (Cth) (“FW Regulations”), by making and keeping employee records in relation to Nicholas Yeoh Phee Leong, knowing that those records were false or misleading;
- k) regulation 3.44(6) of the FW Regulations, by making use of entries in the employee records in relation to Nicholas Yeah Phee Leong, by providing those records to the office of the Applicant, knowing that those records were false or misleading;

- l) section 536(2) of the FW Act, by failing to ensure that its pay slips included information prescribed by the FW Regulations;
 - m) section 45 of the FW Act, by failing to make available a copy of the Restaurant Award to the Employees as required by clause 5 of the Restaurant Award.
- (2) The Second Respondent, Mr Joon Hoe Lee, also known as "Clement Lee", was involved, pursuant to section 550 of the FW Act, in each of the contraventions committed by the First Respondent, as set out in paragraph 1 above:
- (3) The Third Respondent, Mr Julian Lee, was involved, pursuant to section 550 of the FW Act, in each of the contraventions committed by the First Respondent, as set out in paragraph 1 above.
- (4) The Fourth Respondent, Mr Alan Wing-Keung Au, was involved, pursuant to section 550 of the FW Act, in each of the contraventions committed by the First Respondent, as set out in paragraph 1 above.

ORDERS MADE BY CONSENT:

- (5) By reason of declaration 1 above, the First Respondent is to pay penalties of \$184,960 pursuant to section 546(1) of the FW Act for its contraventions set out in declarations 1(a) to 1(g) and 1(i) to 1(m) above.
- (6) By reason of declaration 2 above, the Second Respondent is to pay penalties of \$36,992 pursuant to section 546(1) of the FW Act for his involvement in the contraventions set out in declarations 1(a) to 1(g) and 1(i) to 1(m) above.
- (7) By reason of declaration 3 above, the Third Respondent is to pay penalties of \$35,360 pursuant to section 546(1) of the FW Act for his involvement in the contraventions set out in declarations 1(a) to 1(g) and 1(i) to 1(m) above.
- (8) By reason of declaration 4 above, the Fourth Respondent is to pay penalties of \$35,360 pursuant to section 546(1) of the FW Act for his involvement in the contraventions set out in declarations 1(a) to 1(g) and 1(i) to 1(m) above.

- (9) Pursuant to sub-section 546(3)(a) of the FW Act, each of the Respondents is to pay their respective penalty amounts to the Consolidated Revenue Fund of the Commonwealth.

FURTHER ORDERS:

- (10) Each of the Respondents is to pay their respective penalty amounts within 28 days of this order.
- (11) Pursuant to section 545(1) of the FW Act, an order that the First Respondent, at its expense, engage a third party with qualifications in accounting or workplace relations to undertake an audit of its compliance with the FW Act and the Restaurant Award on the following terms:
- a) the audit period will be the period commencing on 1 March 2016 and ending 31 December 2016 (“Audit Period”);
 - b) the audit is to be completed by 1 March 2017 (“Audit Completion Date”);
 - c) the audit will apply to all employees and persons otherwise engaged to perform work for the First Respondent at any time during the Audit Period;
 - d) according to each employee's classification of work, category of employment and hours of work worked during the Audit Period, the audit will assess the First Respondent's compliance with the following obligations:
 - (i) wages and work related entitlements under the Restaurant Award; and
 - (ii) record keeping and pay slip obligations in Division 3 of Part 3-6 of the FW Act; and
 - e) within 30 days of the Audit Completion Date, the First Respondent will provide to the Applicant:
 - (i) a copy of the audit report which will include a statement of the methodology used in the audit; and

(ii) written details of any contraventions identified in the audit, the steps the First Respondent will take to rectify any identified contravention(s) and by when the rectification will occur.

**FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY**

SYG 3262 of 2015

FAIR WORK OMBUDSMAN
Applicant

And

MAMAK PTY LTD ACN 118 546 857
First Respondent

JOON HOE LEE
Second Respondent

JULIAN LEE
Third Respondent

ALAN WING-KEUNG AU
Fourth Respondent

REASONS FOR JUDGMENT

Introduction and background

1. The first respondent (“Mamak”) owns and operates a number of restaurants in Australia serving Malaysian cuisine. The other three respondents are the directors and shareholders of Mamak.
2. The applicant (“Ombudsman”) seeks declarations and other orders concerning the underpayment of staff by Mamak and other contraventions of the *Fair Work Act 2009* (Cth) (“Act”¹) and the *Fair Work Regulations 2009* (Cth) (“Regulations”) concerning record-keeping. Mamak admits the contraventions alleged by the Ombudsman and the other respondents admit that they were knowingly concerned in

¹ Unless indicated, all statutory references are to the Fair Work Act.

those contraventions. The issue for determination is the penalty that ought to be imposed upon each of the respondents.

3. The parties prepared an agreed statement of facts for the purposes of the proceedings. The following findings are made on the basis of that statement as well as from affidavit evidence given on behalf of the parties.
4. In August 2013 Mamak was selected by the Ombudsman for an audit. As part of that audit, a Fair Work Inspector asked Mamak to complete a questionnaire and to provide time and wage records for a consecutive two week period in August 2013. In response, on 6 September 2013 the second respondent, Mr Joon Hoe Lee (known as Clement Lee), sent the Ombudsman certain documents and information including payroll advices, roster reports and a list of employees working at the relevant period. In reliance on those documents, no further action was taken by the Ombudsman in respect of Mamak at that time.
5. As a result of three complaints made by employees of Mamak in March 2015, another Fair Work Inspector, Inspector Wang, commenced an investigation into the wages and entitlements paid to employees at the Sydney branch of Mamak. Ultimately, on 25 September 2015, Inspector Wang sent a letter addressed to Mamak and the other respondents outlining her findings and a summary of her conclusions that Mamak had contravened a number of workplace laws in respect of a number of its employees. Those contraventions included the failure to pay the following: minimum hourly rates, casual loading, Saturday, Sunday and public holiday rates, penalty rates for work between 10:00pm and 7:00am Monday-Friday as well as failure to engage employees for 2 hours. I will refer to those contraventions as the underpayment contraventions. I will refer to the remaining contraventions as the record-keeping contraventions.

Underpayment contraventions

6. On 1 October 2015, Mr Clement Lee responded to the 25 September letter on behalf of all the respondents. He indicated, amongst other things, that Mamak was willing to make back-payments to the relevant employees and asked that it be allowed to do so by instalments. This

proposal was agreed to by the Ombudsman and Mamak did pay all the amounts said to have been owing to those employees.

7. The underpayment contraventions affected six people employed as casual wait staff in the period between February 2012 and April 2015. The employment of one of those employees, Mr Leong, was terminated on 2 February 2014. Mamak was required to pay those employees in accordance with the requirements of the *Restaurant Industry Award 2010* ("Award"): s.45 of the Act. The Award provides for different rates of pay according to the age and classification of the employee. Classification is provided for in sch.B to the Award according to experience and duties. At various times, the relevant employees were classified as either introductory level or food and beverage attendant grade 2 and were employed as casual employees.
8. The minimum hourly rates required to be paid to an employee was set out in cl.20 of the Award and in cl.A.2.5 in Schedule A to the Award in respect of the transitional period up to 1 July 2014. In addition, there was a requirement to pay the employees casual loadings prescribed by cl.13.1 and A.5.4 of sch.A of the Award.
9. *Table 1.1* in the annexure to this judgment deals with the underpayment of casual wages for work performed on Monday to Friday. It sets out the amount that each employee was paid, the amount they were entitled to be paid and the amount of underpayment.
10. *Table 1.1* shows that, in total, Mamak underpaid the 6 employees the amount of \$44,429.29 in respect of minimum wages.
11. Penalty rates for work on weekends and public holidays was governed by cl.34 of the Award and calculated by multiplying the minimum wage by a certain percentage. For the periods up to 1 July 2014 this was reduced by certain percentages according to cl.A.7.3 of sch.A of the Award. *Tables 1.2, 1.3 and 1.4* in the annexure to the judgment set out the amounts to which the employees were entitled under those provisions for the relevant periods, the amounts they were paid and the amounts of underpayment in respect of Saturdays, Sundays and public holidays respectively.

12. Finally, Mamak was required to pay the employees an additional penalty amount for each hour or part of an hour for work performed between 10:00pm and midnight on Monday to Friday: cl.34.2 and A.7.3 of sch.A to the Award. *Table 1.5* in the annexure sets out the amounts to which the employees were entitled under those provisions for the relevant periods, the amounts they were paid and the amounts of underpayment.
13. *Tables 1.2, 1.3, 1.4 and 1.5* show that, in total, Mamak underpaid the 6 employees the amounts of:
 - a) \$16,368.37 in respect of Saturdays;
 - b) \$19,077.53 in respect of Sundays;
 - c) \$5,754.61 in respect of public holidays; and
 - d) \$1,714.25 in respect of ordinary hours worked between 10:00pm and midnight.
14. In those circumstances, Mamak committed the following underpayment contraventions:
 - a) Failure to pay minimum rates of pay: cl.20.1 and A.2.5 of sch. A to the Award and s.45 of the Act;
 - b) Failure to pay casual loading: cl.13.1 and A.5.4 of sch.A to the Award and s.45 of the Act;
 - c) Failure to pay junior rates: cl.20.3 of sch.A to the Award and s.45 of the Act;
 - d) Failure to pay Saturday penalty rates: cl.34.1 and A.7.3 of sch.A to the Award and s.45 of the Act;
 - e) Failure to pay Sunday penalty rates: cl.34.1 and A.7.3 of sch.A to the Award and s.45 of the Act;
 - f) Failure to pay public holiday penalty rates: cl.34.1 and A.7.3 of sch.A to the Award and s.45 of the Act; and

- g) Failure to pay evening penalties (for work between 10.00pm and midnight): cl.34.2 and A.7.3 of sch.A to the Award and s.45 of the Act.
15. In addition to these contraventions, it was agreed that, in further contravention of s.45 of the Act, Mamak failed to pay the employees evening penalty rates for work between midnight and 7:00am (cl. 34.2, A.7.3 of sch.A to the Award). However, the Ombudsman sought only a declaration and no penalty in relation to that contravention. For that reason, while I am satisfied on the agreed facts that the contravention has been made out, I do not propose to consider it in any detail.

Record-keeping contraventions

16. Pursuant to s.535 of the Act Mamak was required to keep employee records of the kind prescribed by the Regulations in relation to each of its employees. Those records also had to include any information prescribed by the Regulations.
17. The Regulations relevantly prescribed the following type of record and information for the purposes of s.535:
- a) The employer's name: reg.3.32(a);
 - b) whether an employee's employment was permanent, temporary or casual: reg.3.32(d);
 - c) the date on which the employee's employment commenced: reg. 3.32(e);
 - d) on or after 1 January 2010, the Australian Business Number of the employer: reg.3.32(f);
 - e) if an employee was a casual employee, the hours worked by the employee: reg.3.33(2);
 - f) if an employee was entitled to be paid an incentive-based payment, bonus, loading, penalty rate or another monetary allowance or separately identifiable entitlement, details of that payment, bonus, loading rate, allowance or entitlement: reg. 3.33(3);

- g) details of any superannuation contributions made by Mamak on behalf of the employee: reg.3.37; and
 - h) if an employee's employment is terminated, records of the termination of employment: reg.3.40.
- 18. The records kept by Mamak in respect of the 6 employees did not comply with those requirements. In those circumstances, Mamak failed to keep records prescribed by regs.3.32(a), 3.32(d), 3.32(e), 3.32(f), 3.33(2), 3.33(3), 3.37 and 3.40 of the Regulations and so contravened s.535 of the Act.
- 19. The next group of contraventions concerns the records produced by Mamak on 6 September 2013 during the audit being undertaken by the Ombudsman at that time. The relevant statutory obligations were that Mamak was required:
 - a) to ensure that a record it was required to keep was not false or misleading: reg.3.44(1); and
 - b) not to make use of an entry in an employee record made and kept by it for sub-div.1 of ch.3, pt.3-6, div.3 of the Regulations, if it did not so knowing that the entry was false or misleading: reg.3.44(6).
- 20. Regulation 3.33 (pay records) and reg.3.37 (superannuation records) were in the Subdivision referred to in reg.3.44(6).
- 21. Amongst the documents produced by Mr Clement Lee to the Ombudsman in September 2013 was a payroll advice entitled "12-08-13 to 18-08-13" relating to Mr Leong's employment in the period from 5 to 11 August 2013 ("Leong payroll advice").
- 22. It will be recalled that, as a result of the documents produced on behalf of Mamak in September 2013, no further steps were taken by the Ombudsman in respect of Mamak at that time. However, when the Leong payroll advice was compared to the pay slips for Mr Leong provided by Mr Clement Lee to Inspector Wang on 23 April 2015, it was discovered that it was false and misleading. In particular it showed:

- a) an annual salary that was incorrect;
 - b) that Mr Leong was paid a casual weekday rate for hours between 7.00pm and midnight that he was not paid;
 - c) that Mr Leong was otherwise paid a casual weekday rate that he was not paid;
 - d) showed that superannuation contributions were made in respect of Mr Leong when none were in fact made; and
 - e) showed PAYG income tax deductions made from Mr Leong's salary whereas no such deductions were made.
23. Mamak knew that the Leong payroll advice was false and misleading both when it prepared it and when it made use of it by providing it to the Ombudsman on 6 September 2013.
24. In those circumstances, Mamak contravened both regs.3.44(1) and 3.44(6) of the Regulations.
25. Section 536(2) of the Act required Mamak to give each employee a pay slip in the form required by the Regulations within one working day of paying the employee. Regulation 3.46 required those payslips to include certain details. The payslips provided by Mamak to each of the 6 employees during the relevant periods failed to record any of the following information:
- a) Mamak's name;
 - b) the date on which the payment to which the pay slip related was made;
 - c) the gross amount of the payment;
 - d) any amount paid to the employee that was a bonus, loading, allowance, penalty rate, incentive-based payment or other identifiable entitlement;
 - e) the ABN² of Mamak; and

² Australian Business Number.

- f) if an amount was deducted from the gross amount of the payment, the name, or the name and number, of the fund of account into which the deduction was paid (including any amounts deducted because of an employee's alleged failure to clock in or out).
26. In those circumstances, Mamak failed to comply with reg.3.46 and so contravened s.536(2) of the Act. The parties also agreed that the payslips did not contain any details of superannuation contributions and that this constituted a contravention of s.536(2) of the Act. However, the Ombudsman accepted that no superannuation contributions were in fact made by Mamak in respect of any of the employees. I find it difficult to accept that the requirement to include a record of any superannuation contributions can be breached in those circumstances. For that reason, I am not satisfied that Mamak contravened the Act in that respect.
27. Finally, Mamak was required to ensure that a copy of the Award and the National Employment Standards under the Act were available to all employees to whom they applied. The copies had to be available either on a noticeboard which was conveniently located at or near the workplace or by electronic means, whichever made them more accessible: cl.5 of the Award. However, it failed to make either the Award or the National Employment Standards available at all and so failed to comply with cl.5 of the Award and thereby contravened s.45 of the Act.

Accessorial liability

28. Section 550(1) of the Act provides that a person “who is involved in a contravention of a civil remedy provision is taken to have contravened that provision”. Subsection (2) determines when a person is “involved in a contravention of a civil remedy provision”. Relevantly, a person is so involved if he or she “has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention”: sub-s.550(2)(c).
29. Each of the second, third and fourth respondents knew all the relevant details of the employment of the 6 employees, knew that their employment was governed by the terms of the Award, were jointly

responsible for setting and knew the wages actually paid to each of the employees.

30. Similarly, each of the second, third and fourth respondents was responsible for creating, or at least authorising the creation of the relevant employee records and pay slips for Mamak.
31. The second, third and fourth respondents were also aware of the obligations concerning the availability of the Award and the National Employment Standards and knew that they had not been made available.
32. The position of the individual respondents in respect of the false records provided to the Ombudsman is slightly different. While each of them was responsible for creating or authorising the creation of the Leong payroll advice, it was Mr Clement Lee who actually filled out the questionnaire on behalf of Mamak and provided it to the Ombudsman together with the payroll advices and roster reports. That said, both Mr Julian Lee and Mr Alan Wing-Keung Au agree that they knew that Mr Clement Lee did those things.
33. For those reasons, I am satisfied that each of the second, third and fourth respondents was involved in Mamak's contraventions of the Act within the meaning of s.550(2) and, for that reason, are taken to have committed the contraventions.

Penalty

34. Each of the provisions contravened by the respondents is a civil remedy provision. Accordingly, I have the power to order the respondents to pay a pecuniary penalty I consider appropriate: s.546. Contraventions are not offences: s.549. That means that the penalties are to be imposed by the application of the principles relating to civil rather than criminal penalties.
35. In *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 326 ALR 476; [2015] HCA 46, the High Court explained the purpose of the imposition of penalties for civil contraventions at [55]:

[55] ... *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 Ltd, is primarily if not wholly protective in promoting the public interest in compliance*³:

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 Pt 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 contravenor and by others who might be tempted to contravene the Act.

36. With that focus in mind, there are two preliminary matters to consider. First, the fact that there were multiple contraventions of a number of provisions of the Act; and secondly, the maximum penalties provided for in respect of each of the contraventions. The second matter will require some consideration of the fact that the penalty unit increased during the period of those contraventions.

Multiple contraventions

37. Each time that an employee was underpaid there was a contravention of the Act. As can be seen from the tables in the annexure and from the summary of the facts set out above, there were multiple contraventions of the Act by the respondents.
38. Section 557(1) of the Act provides that two or more contraventions of a civil remedy provision referred to in subsection (2) are, subject to subsection (3), 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.
39. Sections 45, 535 and 536 are referred to in ss.557(2) and (3) does not apply.

³(1991) ATPR ¶41-076 at 52,152.

40. The Ombudsman accepted that contraventions of the same term of the Act, Regulations or an Award in relation to multiple employees may be grouped under s.557 of the Act provided that there was one course of conduct with one single decision. The Ombudsman also accepted that that approach applied in these proceedings.
41. Adopting that approach, I accept that the breaches of minimum wages under cl.20.1 and A.2.5 of sch.A to the Award and the breaches of junior wages under cl.20.3 of the Award should be grouped together as one contravention. In respect of the record-keeping contraventions, I accept the submission that there should be one group of contraventions of s.535(1) for the inadequate record-keeping and one group of contraventions of s.536(1) for the failure to provide pay slips with the required information.
42. For those reasons, I will proceed on the basis that there were the following contraventions by each of the respondents:
- (a) failure to pay minimum adult and junior hourly rate (s.45);
 - (b) failure to pay casual loading (s.45);
 - (c) failure to pay Saturday penalty rates (s.45);
 - (d) failure to pay Sunday penalty rates (s.45);
 - (e) failure to pay public holiday penalty rates (s.45);
 - (f) failure to pay additional penalty amounts for work performed between 10:00pm and midnight on Monday to Friday (s.45);
 - (g) failure to keep records with information prescribed by the Regulations (s.535(1));
 - (h) making and keeping employee records in relation to Mr Leong knowing that those records were false or misleading (reg.3.44(1));
 - (i) making use of entries in the employee records relating to Mr Leong knowing that those records were false or misleading (reg.3.44(1));

- (j) failing to ensure that pay slips included information provided by the Regulations (s.536(2)); and
- (k) failing to make available a copy of the Award and National Employment Standards (s.45).

Maximum penalty

- 43. The pecuniary penalty that may be imposed depends on the type of contravention and whether or not the person in question is an individual or a body corporate. Under sub-s.546(2)(a), a penalty in respect of an individual must not be more than the maximum number of penalty units referred to in the relevant item in column 4 of the table in s.539(2) and, in respect of a body corporate it must not be more than 5 times the maximum number of penalty units in that column: sub-s.546(2)(b).
- 44. The maximum penalty for the contravention of the Regulations is included in the table in s.539(2) by the operation of reg.4.01A.
- 45. A “penalty unit” in the Act has the same meaning as in the *Crimes Act 1914* (Cth) (“*Crimes Act*”). Section 4AA(1) of the *Crimes Act* currently provides that a penalty unit is \$180. At the time of the enactment of the *Fair Work Act*, and until 28 December 2012 a penalty unit was \$110. From 28 December 2012⁴ until 26 June 2015⁵ it was \$170. In the Amending Act, it was provided, by item 9(1) of sch.3, that the amendment “applies in relation to an offence committed after the commencement” of that item, namely, 28 December 2012.
- 46. The Ombudsman submitted that the appropriate penalty unit to apply is \$170 because, amongst other things, that was the penalty unit applicable during the period in which the majority of the underpayment occurred. The Ombudsman also submitted that a number of the employees were not employed when the penalty unit was \$110 and the contraventions of regs.3.44(1) and 3.44(6) occurred when \$170 was the applicable amount. The respondents agreed that the appropriate amount was \$170 but submitted that the court should take into account that

⁴ When it was amended by the *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012*(Cth) (“Amending Act”).

⁵ When it was amended by the *Crimes Legislation Amendment (Penalty Unit) Act 2015* (Cth).

there was, in respect of some of the contraventions, a lower amount that was applicable.

47. I considered a similar situation in *Fair Work Ombudsman v Amritsaria Four Pty Ltd* [2016] FCCA 968 (“*Amritsaria*”) at [45] – [53]. In that judgment I concluded the correct approach was to apply \$170 as the relevant penalty unit but to take into account the fact that a lower penalty unit applied for at least part of the relevant period. For the reason I gave there, as well as for those relied on by the Ombudsman that is the approach I will take in these proceedings. The maximum penalties per breach, then, are as follows:

Contravention	Mamak	Individual respondents
Failure to pay minimum adult and junior hourly rate (s.45)	\$51,000	\$10,200
Failure to pay Saturday penalty rates	\$51,000	\$10,200
Failure to pay Sunday penalty rates	\$51,000	\$10,200
Failure to pay public holiday penalty rates	\$51,000	\$10,200
Failure to pay casual loading	\$51,000	\$10,200
Failure to pay additional penalty amounts for work performed between 10:00pm and midnight on Monday to Friday	\$51,000	\$10,200
Failure to keep records with information prescribed by the Regulations	\$25,500	\$5,100

Failing to ensure that pay slips included information provided by the Regulations	\$25,500	\$5,100
Failing to make available a copy of the Award and National Employment Standards	\$51,000	\$10,200
Making and keeping employee records in relation to Mr Leong knowing that those records were false or misleading	\$17,000	\$3,400
Making use of entries in the employee records relating to Mr Leong knowing that those records were false or misleading	\$17,000	\$3,400
TOTAL	\$442,000	\$88,400

Consideration

48. Over the course of time the courts have developed a number of guidelines for the exercise of their power to impose pecuniary penalties. In *Kelly v Fitzpatrick* (2007) 166 IR 14; [2007] FCA 1080 (“*Kelly*”) at 18-19 [14], Tracey J referred to the following:

- *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 co-operated with the enforcement authorities.*
- *The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employees entitlements and*
- *The need for specific and general deterrence.*

49. Those guidelines are meant to assist in the determination of what penalty is appropriate and do not constitute mandatory considerations. In *Fair Work Ombudsman v Lifestyle SA Pty Ltd* [2014] FCA 1151, Mansfield J said this about the guidelines:

[74] That provides a convenient checklist, but it does not restrict matters that may be taken into account in the exercise of judicial discretion: Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550 at [11]; Australian Ophthalmic Supplies v McAlary-Smith (2008) 165 FCR 560 (Australian Ophthalmic Supplies) at [91]; Offshore Marine Services⁶ at [12]. Nor does it require specific attention to matters which are not relevant or not focused on in submissions. In the exercise of judicial discretion, the Court should not be distracted from paying “appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain the public confidence in the statutory regime which imposes the obligations”: Australian Ophthalmic Supplies at [91]; Offshore Marine Services at [12]; Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Service Union of Australia v QR Limited (No 2) [2010] FCA 652 at [34]-[35].

⁶ *Fair Work Ombudsman v Offshore Marine Services Pty Ltd* [2012] FCA 498.

50. The parties' submissions were addressed to these guidelines and I will consider the question of penalty having regard to those submissions. However, I will not deal with the issue of penalty by considering the matters listed above seriatim. I will deal with the issue by reference to two broad headings: the conduct constituting the contraventions and what has happened since and what might happen in the future.

Mamak's conduct constituting the contraventions

51. The genesis of all of the contraventions appears to have been some informal market research conducted by the individual respondents. In a discussion with Inspector Wang in April 2015, Clement Lee said that before the first restaurant was opened, they did some research to see what other restaurants were paying. They discovered that there were three approaches: the first were star-rated restaurants which paid according to the Award, the second were medium restaurants that followed the Award half the time and the third included small restaurants that just paid illegal rates. Mamak took the third approach.
52. The fact that there are many restaurants in the industry that do not comply with their legal obligations does not exculpate the respondents in any way. In my view, it does the opposite. The point here is that all of the respondents knew that there was an Award but deliberately chose to ignore it in order to maximise profit. That approach, of course, was taken at the cost of the employees who, in reality, funded the success of the business. Although they have now been repaid the amounts that they were owed, Mamak, and the other respondents in turn, had the benefit of that money over a number of years. Those amounts represented a significant proportion of the employees' entitlements. For that reason, although, as the respondents submitted, the total underpayment of \$87,349.68 is not at the highest level of contravention, it is still significant.
53. The respondents submitted that the Court should take into account the fact that the employees did not complain directly to them about the payment of wages or the record keeping and that they knowingly agreed to work under the conditions they were offered. Even if those facts were accepted, I do not accept that they mitigate against the seriousness of the contraventions. Not only did the respondents know that the employees were being paid less than their legal entitlements,

but they also knew that their records were not kept in accordance with law and that the Award or National Employment Standards was not made available. This had the certain effect of minimising the employees' opportunity to actually know what their entitlements were or, if they did know, to verify whether or not they were being honoured.

54. Employee awareness is a large part of the aim of the requirement for proper record-keeping. Another part is to enable the Ombudsman to verify compliance with the law when and if the need arises (such as, as happened in this case, when an employee makes a complaint). In this respect the production of false records to the Ombudsman during the course of the audit in August 2013 was very serious. Not only did it reveal that the respondents were aware that they were contravening the law, but it constituted a deliberate diversion of the Ombudsman from its statutory duty.
55. The respondents also faintly argued that the Award was complex and difficult to understand. I do not accept that; however, even if I did, I give that fact no weight. First, as I have said, the respondents were all aware that there was an Award and that they did not propose to comply with it; secondly, there was no evidence that they made any effort to understand its precise terms; and thirdly, Mamak was a member of *Restaurant and Catering New South Wales*, an industry association which could readily have provided any information or other assistance had it been asked to do so.
56. Finally, there is the question whether there has been other similar conduct by the respondents in the past. The Ombudsman submitted that, while there have been no proven contraventions, the Court should infer that Mamak had the practice of underpaying its staff and take that into account. While I accept that Mamak certainly adopted a business model that included the underpayment of its waiting staff, and propose to take that into account in determining the appropriate penalty, the submission cannot go much further. It is apparent that the 6 employees in question were dealt with differently and I cannot be confident that every employee was underpaid or that, if they were, the extent of that underpayment.

What has happened since the contraventions and what might happen in the future

The respondents' conduct

57. The most significant thing that has occurred since the contraventions is that the respondents have all admitted the contraventions and so have not contested these proceedings (other than the proper amount of penalty). The Ombudsman accepts that this is significant and submits that a discount of 20% should be given for this. I agree, not only because the respondents have shown a willingness to facilitate the course of justice but also because it shows a recognition that the conduct is not acceptable.
58. Secondly, unlike their response to the 2013 audit, the respondents cooperated with the Ombudsman in its investigation in 2015.
59. Thirdly, in February 2016 the individual respondents attended a workshop conducted by NSW Industrial Relations in order to obtain a better understanding of the Award.
60. Fourthly, the respondents have taken steps to restructure the business in relation to employees. The evidence was that there has been a reduction in the number of managers in order to reduce wage costs and that employees were now given correct payslips and that proper records are kept for each employee. There was some dispute about the impact of this on the determination of the appropriate penalty; however, I accept that it shows an intention that Mamak will make every effort to comply with its workplace obligations and that the respondents will take the necessary steps to see that that occurs. The restructure does have some bearing in my view because, as I have already noted, the contraventions arose out of a business model that placed the burden of achieving profit on the waiting staff. The aim of the restructure appears to be to change that model so that, while the overall wages component of the business' costs are maintained, Mamak's legal obligations can be complied with.
61. Fifthly, the respondents have apologised for their conduct. I accept that this was genuine, although, I note the Ombudsman's submission that it is somewhat artificial that a company can apologise or otherwise show

contrition apart from changing its conduct: see *ACE Insurance Ltd v Trifunovski (No. 2)* [2012] FCA 793 at [113]-[114] (Perram J).

Media coverage

62. The respondents submitted that there was evidence that the publicity surrounding these proceedings had resulted in a downturn in business. That evidence was that, following a media release by the Ombudsman, Mamak experienced an immediate downturn of approximately 20% in the following month. At that level of generality, the evidence does not support the submission. Apart from temporal proximity, there is nothing to show that the media release had any direct negative impact on Mamak's business. In any event, I accept the Ombudsman's submission that the media release was part of its function of education and that, given its neutral nature, it should not be taken into account in determining penalty. In any event, as I indicated in *Amritsaria* at [84] – [89], the relevance of the impact of adverse media attention on the determination of a civil penalty is questionable at best.

Deterrence

63. The last matter to consider expressly is the question of deterrence. This is undoubtedly one of the most important factors in determining an appropriate penalty: *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 326 ALR 476; [2015] HCA 46 at [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ). Keane J said much the same thing, at [110]:

It is because the Commissioner may, on occasion, be too pragmatic in taking such a stance that the court must exercise its function to ensure that the penalty imposed is just, bearing in mind competing considerations of principle, including that of equality before the law and the need to maintain effective deterrence to other potential contraveners. In this latter regard, in Australian Competition and Consumer Commission v TPG Internet Pty Ltd, French CJ, Crennan, Bell and Keane JJ approved the statement by the Full Court of the Federal Court in Singtel Optus Pty Ltd v Australian Competition and Consumer Commission that a civil penalty for a contravention of the law:

must be fixed with a view to ensuring that the penalty is not such as to be regarded by [the] offender or others as an acceptable cost of doing business.

(Citations omitted)

64. The respondents' evidence was that Mamak's business model was adopted after research into the conduct of other restaurants. That suggests that there is a significant need for general deterrence.
65. The Ombudsman also relied on evidence of its own research that the hospitality industry represented a significant proportion of both requests of assistance by employees and compliance outcomes such as compliance notices, letters of caution, infringement notices and enforceable undertakings. There are a number of difficulties with this submission. Principally, though, the difficulty is that statistics such as these are meaningless without other information. For example, including judgment in this matter, this year I have delivered four judgments concerning penalties for contraventions of the Act and Regulations. Two of them involved the restaurant industry. However, it would be misleading if not false, to say, without anything else, that 50% of all cases in this Court involve the restaurant industry. On that reasoning, care must be taken when relying on statistics to avoid giving further strength to the observation that there are three types of lies: lies, damned lies and statistics.⁷
66. On the other hand, while Mamak is still operating its restaurant business, it has shown that it has changed course and the other respondents have demonstrated by their conduct that they will ensure future compliance. I accept that diminishes the need for specific deterrence in this case. The future, however, is uncertain and the penalty imposed ought to serve as a reminder to the respondents that it will not be worthwhile to revert to the old model. For that reason, I give some weight to the need for specific deterrence in spite of the respondents' recent conduct.
67. In those circumstances, I consider that it is appropriate to impose a penalty for each contravention by first discounting the maximum by 20% for the respondents' early admission of the contraventions and then, with two exceptions, taking 50% of the result. The exceptions relate to the documents prepared in response to the Ombudsman's

⁷ The source of this observation is uncertain and includes Mark Twain and Benjamin Disraeli, *Lies, Damned Lies and Statistics* (8 July 2016) University of York Department of Mathematics <<http://www.york.ac.uk/depts/maths/histstat/lies.htm>>.

August 2013 audit. Those contraventions are significantly more serious and fall towards the upper end of the scale. I also take into account the greater responsibility of Mr Clement Lee for the contravention. For that reason, I assess the penalty for those contraventions at 80% of the discounted maximum for Mamak and Mr Clement Lee and 70% for the other respondents.

68. The Ombudsman also sought an order pursuant to s.545(1) of the Act that Mamak, at its expense, engage a third party with qualifications in accounting or workplace relations to undertake an audit of Mamak's compliance with workplace laws from 6 February 2012 until 6 months after the date of the Court's orders. The respondents argued that there was no need for any audit in light of advice and training now received by the individual respondents. In my view, an order for an audit ought to be made to ensure future compliance. However, the length of the audit suggested by the Ombudsman will go well beyond what is necessary to achieve that outcome. In my view, it is appropriate that such an audit be ordered, but that it commence from 1 March 2016 (after the individual respondents attended the workshop conducted by NSW Industrial Relations) and finish at 31 December 2016.
69. The parties made submissions as to the appropriate range of penalties in respect of each contravention. The following table sets out the range of the total penalties submitted as appropriate by the parties.

	Fair Work Ombudsman	Respondents
Mamak	\$145,520 - \$180,880	\$86,700 - \$107,100
Clement Lee	\$29,648 - \$36,720	\$17,340 - \$21,420
Julian Lee	\$29,104 - \$36,176	\$17,340 - \$21,420
Alan Au	\$29,104 - \$36,176	\$17,340 - \$21,420

70. I have considered the parties' submissions and set out my conclusions as to each contravention in tables 2.1, 2.2 and 2.3 in the Annexure. The appropriate penalty for each contravention is as follows:

Mamak

Contravention	Penalty
Minimum adult and junior hourly rate	\$20,400
Saturday penalty rates	\$20,400
Sunday penalty rates	\$20,400
Public holiday penalty rates	\$20,400
Casual loading	\$20,400
Additional penalty amounts evening work	\$20,400
Failure to keep records with information prescribed by the Regulations	\$10,200
Failing to ensure that pay slips included information provided by the Regulations	\$10,200
Failing to make available a copy of the Award and National Employment Standards	\$20,400
Keeping false or misleading records	\$10,880
Making use of false or misleading records	\$10,880
TOTAL	\$184,960

Clement Lee

Contravention	Penalty
Minimum adult and junior hourly rate	\$4,080
Saturday penalty rates	\$4,080
Sunday penalty rates	\$4,080
Public holiday penalty rates	\$4,080
Casual loading	\$4,080
Additional penalty amounts evening work	\$4,080
Failure to keep records with information prescribed by the Regulations	\$2,040
Failing to ensure that pay slips included information provided by the Regulations	\$2,040
Failing to make available a copy of the Award and National Employment Standards	\$4,080
Keeping false or misleading records	\$2,176
Making use of false or misleading records	\$2,176
TOTAL	\$36,992

Each of Julian Lee and Alan Wing-Keung Au

Contravention	Penalty
Minimum adult and junior hourly rate	\$4,080
Saturday penalty rates	\$4,080
Sunday penalty rates	\$4,080
Public holiday penalty rates	\$4,080
Casual loading	\$4,080
Additional penalty amounts evening work	\$4,080
Failure to keep records with information prescribed by the Regulations	\$2,040
Failing to ensure that pay slips included information provided by the Regulations	\$2,040
Failing to make available a copy of the Award and National Employment Standards	\$4,080
Keeping false or misleading records	\$1,360
Making use of false or misleading records	\$1,360
TOTAL	\$35,360

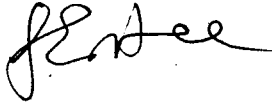
71. The final step in determining penalty is to consider the aggregate penalty and to determine whether it is an appropriate response to the contravening conduct: *Kelly* at [30] (Tracey J). This is often referred to as the totality principle. Taking that approach, I do not consider that there needs to be any adjustment to the penalties stated above.

Conclusion

72. For those reasons, I make the orders set out above.

I certify that the preceding seventy-two (72) paragraphs are a true copy of the reasons for judgment of Judge Smith

Associate:



Date: 19 August 2016

ANNEXURE

Table 1.1 – underpayment of casual wages (Monday to Friday)

Name	Period	Award	Paid	Underpaid
Vun	3.12.13 – 2.3.14	\$3,269.72	\$1,861.08	\$1,408.64
	3.3.14 – 6.7.14	\$1,334.05	\$784.47	\$549.58
	7.7.14 – 16.12.14	\$2,685.25	\$1,567.81	\$1,118.44
	Sub total	\$7,289.02	\$4,213.36	\$3,076.66
Lim	12.5.14 – 6.7.14	\$2,711.67	\$1,672.80	\$1,038.87
	Sub total	\$2,711.67	\$1,672.80	\$1,038.87
Lee	6.8.12 – 11.11.12	\$1,261.74	\$1,068.81	\$192.93
	12.11.12 – 2.12.12	\$610.10	\$503.83	\$106.27
	3.12.12 – 30.6.13	\$5,857.51	\$4,131.61	\$1,725.90
	1.7.13 – 2.12.13	\$3,240.98	\$2,298.37	\$942.61
	3.12.13 – 6.7.14	\$6,565.30	\$4,280.24	\$2,285.06
	7.7.14 – 19.4.15	\$10,917.36	\$7,152.38	\$3,764.98
	Sub total	\$28,452.99	\$19,435.24	\$9,017.75
Tan	18.2.13 – 17.5.13	\$2,593.12	\$1,549.30	\$1,043.82
	18.5.13 – 30.6.13	\$390.25	\$228.21	\$162.04
	1.7.13 – 6.7.14	\$9,464.41	\$5,542.08	\$3,922.33
	7.7.14 – 1.2.15	\$7,226.72	\$4,285.09	\$2,941.63
	Sub total	\$19,674.50	\$11,604.68	\$8,069.82
Leong	6.2.12 – 8.5.12	\$4,308.84	\$2,792.06	\$1,516.78
	9.5.12 – 1.7.12	\$3,818.27	\$2,455.15	\$1,363.12
	2.7.12 – 30.6.13	\$20,450.01	\$13,389.32	\$7,060.69
	1.7.13 – 2.2.14	\$7,157.09	\$4,732.36	\$2,424.73
	Sub total	\$35,734.21	\$23,368.89	\$12,365.32
Woon	4.11.13 – 7.2.14	\$6,875.41	\$4,096.96	\$2,778.45
	8.2.14 – 6.7.14	\$8,323.81	\$4,849.83	\$3,473.98
	7.7.14 – 29.3.15	\$12,604.41	\$7,995.97	\$4,608.44
	Sub total	\$27,803.63	\$16,942.76	\$10,860.87
	TOTAL	\$121,666.02	\$77,237.73	\$44,429.29

Table 1.2 – underpayment of Saturday wages

Name	Period	Award	Paid	Underpaid
Vun	3.12.13 – 2.3.14	\$888.73	\$533.02	\$355.71
	3.3.14 – 6.7.14	\$294.19	\$180.04	\$114.15
	7.7.14 – 16.12.14	\$351.03	\$186.06	\$166.95
	Sub total	\$1,535.93	\$899.12	\$636.81
Lim	12.5.14 – 6.7.14	\$1,136.56	\$731.07	\$405.49
	7.7.14 – 12.8.14	\$339.15	\$174.20	\$164.95
	13.8.14 – 7.9.14	\$527.90	\$253.92	\$273.98
	Sub total	\$2,003.61	\$1,159.19	\$844.42
Lee	6.8.12 – 11.11.12	\$1,007.54	\$820.26	\$187.28
	12.11.12 – 2.12.12	\$455.16	\$386.40	\$68.76
	3.12.12 – 30.6.13	\$2,681.08	\$1,841.74	\$839.34
	1.7.13 – 2.12.13	\$3,400.27	\$2,124.33	\$1,275.94
	3.12.13 – 6.7.14	\$4,443.67	\$2,535.39	\$1,908.28
	7.7.14 – 19.4.15	\$4,241.28	\$2,398.92	\$1,842.36
	Sub total	\$16,229.00	\$10,107.04	\$6,121.96
Tan	18.2.13 – 17.5.13	\$925.50	\$558.26	\$367.24
	18.5.13 – 30.6.13	\$365.97	\$196.76	\$169.21
	1.7.13 – 6.7.14	\$2,853.35	\$1,441.70	\$1,411.65
	7.7.14 – 1.2.15	\$51.90	\$38.72	\$13.18
	Sub total	\$4,196.72	\$2,235.44	\$1,961.28
Leong	6.2.12 – 8.5.12	\$1,108.86	\$506.65	\$602.21
	9.5.12 – 1.7.12	\$805.05	\$267.58	\$537.47
	2.7.12 – 30.6.13	\$8,125.87	\$4,952.91	\$3,172.96
	1.7.13 – 2.2.14	\$5,097.01	\$3,295.79	\$1,801.22
	Sub total	\$15,136.79	\$9,022.93	\$6,113.86
Woon	4.11.13 – 7.2.14	\$180.86	\$104.76	\$76.10
	8.2.14-6.7.14	\$74.74	\$53.60	\$21.14
	7.7.14 – 29.3.15	\$1,290.68	\$697.88	\$592.80
	Sub total	\$1,546.28	\$856.24	\$690.04
	TOTAL	\$40,647.25	\$24,279.96	\$16,368.37

Table 1.3 – underpayment of Sunday wages

Name	Period	Award	Paid	Underpaid
Vun	3.12.13 – 2.3.14	\$354.42	\$158.40	\$196.02
	3.3.14 – 6.7.14	\$290.46	\$122.12	\$168.34
	7.7.14 – 16.12.14	\$418.97	\$205.30	\$213.67
	Sub total	\$1,063.85	\$485.82	\$578.03
Lim	12.5.14 – 6.7.14	\$996.94	\$476.01	\$520.93
	7.7.14 – 12.8.14	\$369.53	\$189.80	\$179.73
	13.8.14 – 7.9.14	\$148.67	\$71.50	\$77.17
	Sub total	\$1,515.14	\$737.31	\$777.83
Lee	6.8.12 – 11.11.12	\$867.83	\$605.02	\$262.81
	12.11.12 – 2.12.12	\$382.06	\$308.36	\$73.70
	3.12.12 – 30.6.13	\$2,171.86	\$1,466.30	\$705.56
	1.7.13 – 2.12.13	\$3,079.44	\$1,960.07	\$1,119.37
	3.12.13 – 6.7.14	\$3,244.42	\$1,879.11	\$1,365.31
	7.7.14 – 19.4.15	\$2,201.86	\$1,508.88	\$692.98
	Sub total	\$11,947.47	\$7,727.74	\$4,219.73
Tan	18.2.13 – 17.5.13	\$1,595.36	\$833.84	\$761.52
	18.5.13 – 30.6.13	\$264.86	\$125.35	\$139.51
	1.7.13 – 6.7.14	\$2,784.31	\$1,217.63	\$1,566.68
	Sub total	\$4,644.53	\$2,176.82	\$2,467.71
Leong	6.2.12 – 8.5.12	\$1,397.61	\$744.05	\$653.56
	9.5.12 – 1.7.12	\$1,987.38	\$1,242.63	\$744.75
	2.7.12 – 30.6.13	\$8,820.48	\$4,752.95	\$4,067.53
	1.7.13 – 2.2.14	\$3,330.95	\$1,912.88	\$1,418.07
	Sub total	\$15,536.42	\$8,652.51	\$6,883.91
Woon	4.11.13 – 7.2.14	\$129.42	\$52.98	\$76.44
	8.2.14 – 6.7.14	\$3,170.45	\$1,401.81	\$1,768.64
	7.7.14 – 29.3.15	\$4,922.43	\$2,617.19	\$2,305.24
	Sub total	\$8,222.30	\$4,071.98	\$4,150.32
	TOTAL	\$42,929.71	\$23,852.18	\$19,077.53

Table 1.4 – underpayment of public holidays

Name	Period	Award	Paid	Underpaid
Vun	3.12.13 – 2.3.14	\$165.79	\$81.30	\$84.49
	Sub total	\$165.79	\$81.30	\$84.49
Lim	12.5.14 – 6.7.14	\$160.29	\$56.77	\$103.52
	Sub total	\$160.29	\$56.77	\$103.52
Lee	6.8.12 – 11.11.12	\$117.90	\$112.15	\$5.75
	3.12.12 – 30.6.13	\$925.07	\$590.71	\$334.36
	1.7.13 – 2.12.13	\$184.78	\$113.52	\$71.26
	3.12.13 – 6.7.14	\$1,878.72	\$1,072.44	\$806.28
	7.7.14 – 19.4.15	\$1,055.52	\$556.76	\$498.76
	Sub total	\$4,161.99	\$2,445.58	\$1,716.41
Tan	18.2.13 – 17.5.13	\$656.02	\$399.01	\$257.01
	1.7.13 – 6.7.14	\$1,884.96	\$859.62	\$1,025.34
	7.7.14 – 1.2.15	\$260.39	\$117.37	\$143.02
	Sub total	\$2,801.37	\$1,376.00	\$1,425.37
Leong	6.2.12 – 8.5.12	\$807.30	\$642.30	\$165.00
	2.7.12 – 30.6.13	\$1,745.76	\$1,015.47	\$730.29
	1.7.13 – 2.2.14	\$397.12	\$217.79	\$179.33
	Sub total	\$2,950.18	\$1,875.56	\$1,074.62
Woon	4.11.13 – 7.2.14	\$959.55	\$471.00	\$488.55
	8.2.14 – 6.7.14	\$862.51	\$408.90	\$453.61
	7.7.14 – 29.3.15	\$799.64	\$391.60	\$408.04
	Sub total	\$2,621.70	\$1,271.50	\$1,350.20
	TOTAL	\$12,861.32	\$7,106.71	\$5,754.61

Table 1.5 – underpayment of evening penalties (for work between 10:00pm and midnight)

Name	Period	Award	Paid	Underpaid
Vun	3.12.13 – 2.3.14	\$33.66	\$0	\$33.66
	3.3.14 – 6.7.14	\$29.07	\$0	\$29.07
	7.7.14 – 16.12.14	\$43.12	\$0	\$43.12
	Sub total	\$105.85	\$0	\$105.85
Lim	12.5.14 – 6.7.14	\$44.37	\$0	\$44.37
	Sub total	\$44.37	\$0	\$44.37
Lee	6.8.12 – 11.11.12	\$29.97	\$0	\$29.97
	12.11.12 – 2.12.12	\$15.54	\$0	\$15.54
	3.12.12 – 30.6.13	\$87.69	\$0	\$87.69
	1.7.13 – 2.12.13	\$44.37	\$0	\$44.37
	3.12.13 – 6.7.14	\$79.56	\$0	\$79.56
	7.7.14 – 19.4.15	\$201.88	\$0	\$201.88
	Sub total	\$459.01	\$0	\$459.01
Tan	18.2.13 – 17.5.13	\$26.64	\$0	\$26.64
	18.5.13 – 30.6.13	\$2.22	\$0	\$2.22
	1.7.13 – 6.7.14	\$191.25	\$0	\$191.25
	7.7.14 – 1.2.15	\$156.80	\$0	\$156.80
	Sub total	\$376.91	\$0	\$376.91
Leong	6.2.12 – 8.5.12	\$25.20	\$0	\$25.20
	9.5.12 – 1.7.12	\$25.92	\$0	\$25.92
	2.7.12 – 30.6.13	\$189.81	\$0	\$189.91
	1.7.13 – 2.2.14	\$114.75	\$0	\$114.75
	Sub total	\$355.68	\$0	\$355.68
Woon	4.11.13 – 7.2.14	\$84.15	\$0	\$84.15
	8.2.14 – 6.7.14	\$104.04	\$0	\$104.04
	7.7.14 – 29.3.15	\$184.24	\$0	\$184.24
	Sub total	\$372.43	\$0	\$372.43
	TOTAL	\$1,714.25	\$0	\$1,714.25

Table 2.1 – penalty for each contravention by Mamak

Contravention	Maximum penalty	After 20% discount	Percentage of maximum	Penalty
Minimum adult and junior hourly rate	\$51,000	\$40,800	50%	\$20,400
Saturday penalty rates	\$51,000	\$40,800	50%	\$20,400
Sunday penalty rates	\$51,000	\$40,800	50%	\$20,400
Public holiday penalty rates	\$51,000	\$40,800	50%	\$20,400
Casual loading	\$51,000	\$40,800	50%	\$20,400
Additional penalty amounts evening work	\$51,000	\$40,800	50%	\$20,400
Failure to keep records with information prescribed by the Regulations	\$25,500	\$20,400	50%	\$10,200
Failing to ensure that pay slips included information provided by the Regulations	\$25,500	\$20,400	50%	\$10,200
Failing to make available a copy of the Award and National Employment Standards	\$51,000	\$40,800	50%	\$20,400
Keeping false or misleading records	\$17,000	\$13,600	80%	\$10,880
Making use of false or misleading records	\$17,000	\$13,600	80%	\$10,880
TOTAL	\$442,000			\$184,960

Table 2.2 – penalty for each contravention by Clement Lee

Contravention	Maximum penalty	After 20% discount	Percentage of maximum	Penalty
Minimum adult and junior hourly rate	\$10,200	\$8,160	50%	\$4,080
Saturday penalty rates	\$10,200	\$8,160	50%	\$4,080
Sunday penalty rates	\$10,200	\$8,160	50%	\$4,080
Public holiday penalty rates	\$10,200	\$8,160	50%	\$4,080
Casual loading	\$10,200	\$8,160	50%	\$4,080
Additional penalty amounts evening work	\$10,200	\$8,160	50%	\$4,080
Failure to keep records with information prescribed by the Regulations	\$5,100	\$4,080	50%	\$2,040
Failing to ensure that pay slips included information provided by the Regulations	\$5,100	\$4,080	50%	\$2,040
Failing to make available a copy of the Award and National Employment Standards	\$10,200	\$8,160	50%	\$4,080
Keeping false or misleading records	\$3,400	\$2,720	80%	\$2,176
Making use of false or misleading records	\$3,400	\$2,720	80%	\$2,176
TOTAL	\$88,400			\$36,992

Table 2.3 – penalty for each contravention by each of Julian Lee and Alan Wing-Keung Au

Contravention	Maximum penalty	After 20% discount	Percentage of maximum	Penalty
Minimum adult and junior hourly rate	\$10,200	\$8,160	50%	\$4,080
Saturday penalty rates	\$10,200	\$8,160	50%	\$4,080
Sunday penalty rates	\$10,200	\$8,160	50%	\$4,080
Public holiday penalty rates	\$10,200	\$8,160	50%	\$4,080
Casual loading	\$10,200	\$8,160	50%	\$4,080
Additional penalty amounts evening work	\$10,200	\$8,160	50%	\$4,080
Failure to keep records with information prescribed by the Regulations	\$5,100	\$4,080	50%	\$2,040
Failing to ensure that pay slips included information provided by the Regulations	\$5,100	\$4,080	50%	\$2,040
Failing to make available a copy of the Award and National Employment Standards	\$10,200	\$8,160	50%	\$4,080
Keeping false or misleading records	\$3,400	\$2,720	50%	\$1,360
Making use of false or misleading records	\$3,400	\$2,720	50%	\$1,360
TOTAL	\$88,400			\$35,360