FEDERAL CIRCUIT COURT OF AUSTRALIA

LARCOMBE v MACKERETH *[2015] FCCA 2646*

Catchwords:
INDUSTRIAL LAW – contraventions by company of Fair Work Act through non-payment of accrued by untaken annual leave and annual leave loading – no payment of superannuation entitlements – whether respondent involved in contraventions.

Legislation:
Fair Work Act 2009, ss. 43, 45, 539, 550(1), 550(2), 557(1)
Amusement, Events and Recreation Award 2010 cl.20.2
Corporations Act 2001 ss. 493 and 513B
Crimes Act 1914, s.4AA

Cases cited:
FWO v Wegra Investments Pty Ltd (2012) FMCA 933
Giorganni v R (1985) HCA 29
Kelly v Fitzpatrick (2007) FCA 1080
Mason v Harrington Corporation Pty Ltd (2007) FMCA 7
McEvoy v Incat Tasmania Pty Ltd (2003) 46 ACSR 392
Midland Counties District Bank Ltd v Attwood [1905] 1 Ch 357

Applicant:	BRENTON LARCOMBE
Respondent:	RAYMOND MACKERETH
File Number:	BRG 558 of 2014
Judgment of:	Judge Jarrett
Hearing date:	17 & 18 August 2015
Date of Last Submission:	18 August 2015
Delivered at:	Brisbane
Delivered on:	18 August 2015

REPRESENTATION

The Applicant appeared on his own behalf

Counsel for the Respondent: Mr Kronberg

Solicitors for the Respondent: Redland Legal Pty Ltd

ORDERS

(1) The respondent pay to the applicant the sum of $12,455.07 by way of unpaid annual leave and annual leave loading within 28 days of today.

(2) The respondent pay a pecuniary penalty of $2160.00 with such sum to be paid to the applicant within 28 days of today.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT BRISBANE

No. BRG 558 of 2014

BRENTON LARCOMBE
Applicant

And

RAYMOND MACKERETH
Respondent

REASONS FOR JUDGMENT

ex tempore

1. Mr Larcombe was employed by Klub Kruise Pty Ltd, a company now in liquidation, as its manager from on or about 7 July, 2002 until on or about 15 August, 2012. Save for Mr Larcombe's 20 per cent shareholding in that company Mr Mackereth was, at all relevant times, the only director and shareholder of Klub Kruise Pty Ltd. The company voluntarily entered into liquidation on or about 13 August, 2012. A resolution of the company on that date effected the winding up. The relevant notice given to ASIC about the winding up suggests that it was a creditors' voluntary winding up but, in fact, it was a members' voluntary winding up. However, nothing turns on that.

2. There is no dispute in this case that the company did not pay to Mr Larcombe all of his entitlements when his employment came to an end. So much is admitted on the pleadings. Mr Larcombe's claim is that he was owed annual leave entitlements, loading on those annual leave entitlements, amounts for superannuation, which ought to have been paid to him or on his behalf, and an amount which he describes as "notice".

3. By these proceedings Mr Larcombe alleges that Mr Mackereth is liable to make good the company's underpayments to him by reason of s.550(1) of the *Fair Work Act* 2009.

4. Whilst Mr Mackereth admits most of the allegations against him he denies that he was the "controlling mind" of the company and that he was involved in the company's contraventions for the purposes of s.550(1) of the Act.

5. It is necessary to set out some background.

6. The company conducted "the business of a men's sex on premises venue" in Fortitude Valley, Brisbane. Mr Mackereth was, at all times, the only director, the secretary and the majority shareholder of the company. Further, by his amended response filed on 12 January, 2015 Mr Mackereth admits that he was:

   a) responsible for the corporate behaviour of the company;

   b) responsible for the overall direction, supervision and management of the company's operations; and

   c) responsible for determining Mr Larcombe's employment conditions.

7. There is a plea in his amended response that he was not the only controlling mind of the company and he suggests that Mr Larcombe was also a controlling mind at the company because he was a manager. But nothing turns on that, because, as the evidence clearly demonstrates and as the respondent's own admissions make clear, he was able to control the behaviour of the company, and, as the admissions to which I will refer to shortly demonstrate, he made decisions on behalf of the company and controlled what it did.

8. There is no dispute that Mr Larcombe was employed by the company. There was no written contract of employment, at least in evidence. The parties agree that his employment with the company was regulated by the Fair Work Act and the *Amusement, Events and Recreation Award* 2010. So much is agreed by the amended response filed on 12 January, 2015 and signed by Mr Mackereth. It is important to note the document was not, or does not, purport to have been prepared by a

lawyer on his behalf, and has been signed personally by him. That is important because during the course of the hearing Mr Mackereth sought to resile from the admission that Mr Larcombe's employment was covered by the Award to which I have just referred. He claimed, in cross-examination, that he did not know, accept or intend that Mr Larcombe's employment was governed by the Award, but I reject his denial of that. I am satisfied that he intended to admit it as he did in the amended response. There was no formal application for leave to withdraw the admission and so Mr Mackereth is bound by it. In any event, having admitted that there was an employment relationship the Award must have covered Mr Larcombe's employment.

9. The parties seem also to agree that the work undertaken by Mr Larcombe was probably classified under the classification list in clause 8 schedule B8 of the Award as a "level 7" earning $40 per hour or an annualised salary of $79,040. Again, so much was admitted by the amended response. To the extent that Mr Mackereth sought to withdraw from that position in his evidence, by suggesting that there was some oral agreement between the parties to vary the rate of pay at some stage in April or May of 2012, I reject his evidence. I reject his evidence on this basis. Such an agreement was not put to the applicant when he was cross-examined. The annual rate of pay and the hourly rate of pay is something that is important in this case, because it goes to inform both the calculation of annual leave, annual leave loading and the calculation of any superannuation that might be owed. It is important, therefore, to get the hourly rate right. To the extent that there was a dispute about the hourly rate one would have expected it to be pleaded, and then put to the applicant. Neither was done, and Mr Mackereth's evidence struck me as simply being made up in the witness box.

10. Pursuant to clause 24 of the Award, provision is made for annual leave. The annual leave provided to an employee is that provided for in the National Employment Standards. The National Employment Standards is that part of the Fair Work Act which incorporates into most employment contracts certain standard terms and conditions. In the past, it has been referred to as "the safety net".

11. Pursuant to s.87(2) of the Fair Work Act an employee's entitlement to paid annual leave accrues progressively during a year of service according to the employee's ordinary hours of work. Once an employee's employment ends there is an obligation on an employer to pay out any period of untaken annual leave. Subsection 90(2) of the Fair Work Act makes that provision. Section 44 of the Fair Work Act provides that an employer must not contravene a provision of the National Employment Standard.

12. Here then, Mr Larcombe's case is that by reason of the Award and the National Employment Standard he was entitled to accrue annual leave. When his employment was terminated he was entitled to have any unused accrued leave paid out to him by the employer and a failure to pay that by the employer was a breach of the Fair Work Act. He says that is a breach for which the respondent is responsible.

13. Mr Mackereth pleads that he was not the only controlling mind of the company. As I have already indicated, he suggested that Mr Larcombe was also a controlling mind of the company because he was employed as a manager, but it is clear from the evidence that Mr Larcombe was a manager of the company's business. He was not a manager of the company that conducted the business. He was not an office bearer of that company. He held 20 per cent of the issued shares.

14. Mr Mackereth admits, in his response, that Mr Larcombe was owed at the conclusion of his employment with the company, $3,988.02 by way of accrued but unused leave. That sum is calculated at 123.43 hours at $32.31 per hour including leave loading of 17.5 per cent. Mr Larcombe claims that he is owed 311.78 hours of annual leave totalling $12,471.20 plus annual leave loading of 17.5 per cent amounting to a further $2,182.46. A total of $14,653.66.

15. In addition to the claim for annual leave entitlements, Mr Larcombe also claims, for what he terms, a "notice period". By an email sent by Mr Larcombe to Mr Mackereth dated 14 August, 2012 Mr Larcombe resigned his employment. He purported to give four weeks notice of his resignation. It is not in contest that Mr Larcombe gave the notice. However, a liquidator had been appointed to the company on 13 August, 2012. The effect of the resolution to wind up in circumstances where the company was no longer solvent was apt to amount to notice

of termination of Mr Larcombe's employment from the date of the resolution to wind up: ss.493 and 513B of the *Corporations Act* 2001, *McEvoy v Incat Tasmania Pty Ltd* (2003) 46 ACSR 392 at [7] and *Midland Counties District Bank Ltd v Attwood* [1905] 1 Ch 357.

16. As to superannuation, Mr Larcombe suggests that he is entitled to make his claim for superannuation pursuant to cl.20.2 of the Award. The Award provides:

> *Employer Contributions. An employer must make such superannuation contributions to a superannuation fund for the benefit of an employee as will avoid the employer being required to pay the superannuation guarantee charge under superannuation legislation with respect to that employee.*

I will return to that clause shortly.

17. The case was presented by the applicant himself. He is not a lawyer, and his case suffered because of it. There is, as counsel for the respondent has pointed out, perhaps some significant gaps in the evidence. But there is sufficient evidence to make some findings about the annual leave. There are two exhibits that bear on this. One, in my view, is more probative than the other. The first exhibit is exhibit 12 which is headed "Payroll Transaction Detail June 2010 through August 2012". It has various figures on it relating to holidays, superannuation, holiday loading and the like. I formed the impression, however, from the evidence of Mr Mackereth that that document is perhaps something of a reconstruction.

18. The other documents that bear on the issue are the payslips, exhibit 13. In my view, those payslips are more probative. They are the payslips given to the employee in discharge of the company's obligation to provide payslips to him and which record various matters.

19. The first is his salary at the rate of $40 per hour, his holiday entitlements, his accrued leave, his personal leave and his other entitlements including superannuation. There are two payslips in evidence - one for the pay period 9 May, 2012 to 15 May, 2012 and the other for 2 May, 2012 to 8 May, 2012. They demonstrate that at the time those payslips were issued Mr Larcombe had used 224 hours of

personal leave and he had taken more personal leave than he had accrued so that he had a negative balance for personal leave.

20. The documents also show that he had accrued 265.94 hours of annual leave according to the payslip dated 9 May, 2012 but by 16 May, 2012 that had decreased to 265.01 hours. As I have indicated, Mr Larcombe claims for annual leave which is beyond that. He says it was 311 and some hours, but the evidence only permits me to find, I am satisfied, that he was owed 265.01 hours by way of annual leave when his employment was terminated. The failure by the company to pay that to him when his employment came to an end was clearly a contravention of s.44 of the Fair Work Act. That the company was in contravention of the Fair Work Act in that respect does not seem to be in dispute.

21. As to the issue concerning his notice. For the reasons I have already indicated that claim must be dismissed. Whilst there was a contravention by the company for failing to either permit Mr Larcombe to work out his notice period or paying him in lieu, the termination in this case came about because the company had a liquidator appointed to it. It is, in those circumstances, a question for the liquidator to make good whatever it was that Mr Larcombe was entitled to because his employment came to an end without notice. Once in the hands of the liquidator, the respondent had no power to permit the company to allow Mr Larcombe to work out his notice period.

22. But whatever the case might be, the case that Mr Larcombe has mounted in these proceedings based upon his resignation from employment or his own termination of it, by his email dated 14 August, with effect from 15 August, must fail because that was an ineffective notification.

23. As to the question of superannuation I am satisfied that the Award creates an entitlement in the employee to have payments made by the employer for the benefit of the employee. So much is established by the first two phrases of clause 20.2 of the Award. The Award imposes a positive obligation on an employer to make superannuation contributions to a superannuation fund for the benefit of the employee. The balance of the clause goes on to determine the quantum of those payments. The balance of the clause:

> *As will avoid the employer being required to pay the superannuation guarantee charge under superannuation legislation with respect to that employee…*

works to allow the parties to determine how much needs to be paid, but the obligation to make the payment comes from cl.20.2 of the Award. Having made the payment the employer's potential liability, under the relevant superannuation guarantee legislation, is avoided.

24. That is not to say that an employee is entitled to take now, as cash in the hand, what the employee would otherwise receive from the employer by way of superannuation, but I will refer to that issue again shortly. I am satisfied that by failing to the make the payments of superannuation – any payments by way of superannuation, as the applicant alleges, the company contravened the Fair Work Act. The contravention of a modern award is a contravention of the Fair Work Act: s.45 of that Act.

25. As to the quantum of the superannuation that has not been paid the evidence is, again, less than satisfactory. There are further and better particulars which set out the amounts claimed by the applicant, but they are not evidence that the Court can act on as to the quantum of the superannuation except to the extent that the amounts so particularised are accepted by the respondent. He accepted none of them. There is, in my view, no other evidence that supports the claim for the superannuation payments. So whilst I am satisfied that some payments were not made, I cannot be satisfied of the quantum of them. Nonetheless, the company has contravened the Act as I have indicated.

26. The real issue in this case is the extent to which the respondent was involved in the contraventions of the Act pleaded by the applicant. The starting point is s.550 of the Fair Work Act:

> ***50 Involvement in contravention treated in same way as actual contravention***
>
> *(1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.*
>
> *(2) A person is involved in a contravention of a civil remedy provision if, and only if, the person:*

> *(a) has aided, abetted, counselled or procured the contravention; or*
>
> *(b) has induced the contravention, whether by threats or promises or otherwise; or*
>
> *(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or*
>
> *(d) has conspired with others to effect the contravention.*

27. There is no doubt here that the contraventions that I have identified the company as having committed are contraventions of civil remedy provisions of the Fair Work Act. Section 550 has application. The contrary was not argued.

28. However, the respondent says that despite being in control of the company, the company's contraventions of the Act were beyond his control. He says that he was powerless in the circumstances that developed in this case to ensure that the company met its obligations to the applicant. I reject the contention. I reject the contention for the following reasons.

29. The respondent gave evidence and a witness called by the applicant gave evidence, that in June or July 2012 uncertainty developed about the lease in respect of the premises from which the company conducted its business. The lease term had expired and it needed renewal if the company was to continue to conduct its business. There were negotiations between the company and the respondent on the one part, and Mr Senison on the other. Mr Senison, or perhaps interests associated with him, was the landlord. The evidence permits of a finding that there were difficulties in the landlord/tenant relationship. Mr Senison wanted to increase the rent, and the company and the respondent wished to resist the rent increases. There were perhaps some other issues as well. But what is clear enough is that the parties did not reach an agreement about renewing the lease.

30. At best, what was put in place was a month-to-month tenancy. Both the respondent, in his amended response, and Mr Senison, in his oral testimony, said that the company took up the month-to-month tenancy

so that it could continue to trade and the company could meet its employees' entitlements: see, for example, paragraph 26 of the amended response where the respondent positively asserts:

> *Accordingly, the respondent determined that the company should only take one month's tenancy for the purposes of trading to obtain whatever monies would be necessary to pay any entitlements.*

31. Notwithstanding that that statement is contained in a pleading and therefore, on its face, has no evidential status it is, nonetheless:

    a) a pleading delivered by the respondent;

    b) signed by him; and

    c) clearly a statement against his interest

    which therefore has evidential value.

32. The statement in paragraph 26 of the amended response carries with it some unexpressed assertions. *First* is that the respondent had the capacity on behalf of the company to make determinations about how much longer the company's business would trade. Indeed, paragraph 26 of the amended response almost says that in terms. *Second*, the company was quite able to continue trading its business for as long as it took "to obtain whatever monies would be necessary to pay any entitlements." On the respondent's own case, a month-to-month tenancy for three months, or as pleaded in paragraph 23 of the amended response, up to three months, was offered by Mr Senison. There is nothing to suggest that the company could not have taken up a second term in the month-to-month tenancy, or even a third.

33. Mr Senison's oral evidence was consistent with what was pleaded in paragraph 26 of the amended response. He gave evidence that the respondent had told him that he was going to trade the company's business long enough for the company to pay out its employee's entitlements.

34. Further, in paragraph 31 of the amended response the respondent pleads this:

> *In the last months of trading the respondent ensured that all necessary bills were paid including all rent and outgoings up until 11 August. On Monday, 13 August 2012, the affairs of the company were placed in the hands of an insolvency company, then in turn a liquidator.*

35. And then in paragraph 32:

> *The sum of $8551.12 was paid to the relevant authority for outstanding superannuation for non-company shareholder staff which brought those employees' entitlements up to the compliance date.*

36. Again, from those paragraphs, a number of propositions are clear. The first is that the respondent made the decisions about what bills were necessary to be paid, and he made sure, according to paragraph 31 of his own pleading, that those necessary bills were paid including "all rent and outgoings up until 11 August."

37. He also ensured, according to paragraph 32, that "non-company shareholder staff" had their outstanding superannuation brought up to date. On a number of occasions during the course of the trial I put to counsel for the respondent that the only person who was not paid was the applicant. There was no demur to that proposition. It was said by the respondent that he did not pay the applicant because he was a shareholder, and that he had received advice from an accountant/bookkeeper and some lawyers that he should not pay the applicant because he was a shareholder. But that evidence of itself plainly demonstrates that he had the capacity to:

    a) make the decision about whether the applicant should be paid or not; and

    b) exercised that capacity and decided that he should not be paid.

38. It was argued for the respondent that it was necessary for the applicant to demonstrate that the respondent intended that the company contravene the Fair Work Act, or that he intended his actions, in some way or other, would be the actions of the company. I was taken to the decision of Lindsay FM, as his Honour then was, in *Fair Work Ombudsman v Wegra Investments Proprietary Limited* (2012) FMCA 933, where his Honour, amongst other cases, considered *Giorgianni v*

R (1985) HCA 29, but nothing in that case changes the position in this one, because all of the matters to which I have just referred demonstrate a deliberate action and intention on the part of the respondent on his own case.

39. He put the company in a position to be able to discharge its obligations to all of its other employees. The company exercised, or took up, the month-to-month tenancy, at least for a month, so that it could do that. He took advice about whether he could pay, or should pay, he says, the applicant, and having taken that advice he deliberately decided not to pay him. The contraventions of the Act identified above were not beyond the control of the respondent as he asserts.

40. I am satisfied in all of the circumstances that the respondent was involved in the contraventions for the purposes of s.550(1) of the Fair Work Act. He was knowingly concerned in the contraventions. He knew that the company was contravening the Act, otherwise why would he take advice from either the bookkeeper or the lawyers?

41. In those circumstances he is taken to have contravened both s.45 and s.44 of the Fair Work Act, as the applicant alleges against him. The applicant is entitled to his annual leave and his annual leave loading calculated for 265.01 hours at $40 an hour. I have not done the calculation, but I will leave it to those at the Bar table to agree on the amount.

42. In respect of the superannuation, I do not intend to make an order for that for two reasons. First, as I have already indicated, the evidence does not permit of a finding of how much was not paid, but second, it is not an amount to which the applicant would be immediately entitled in any event. It would be an amount which, in my view, could only be paid on his behalf to a superannuation fund. That is not to say that he is not entitled to the money, he is eventually, and he will be deprived of the benefit of having that money in his fund, but the primary reason for rejecting this claim must carry the day. There is simply no evidence before me upon which I can make the appropriate assessment.

ORDERS DELIVERED

RECORDED: NOT TRANSCRIBED

43. The matters to be taken into account in imposing pecuniary penalty orders are the subject of a number of well-known authorities. Here, the contraventions with which I have to deal are contraventions for which the respondent is liable by reason of s.550(1) of the Fair Work Act.

44. The contraventions were committed by a company not a party to these proceedings. The first relates to the non-payment of annual leave and annual leave loading. There are two contraventions there, but they will be dealt with as a single contravention either pursuant to s.557(1) of the Act or according to the general principles relating to the accumulation of contraventions where they arise out of the same course of conduct.

45. The second contravention is an amalgam of multiple contraventions for failing to pay to the applicant his superannuation entitlements. They are clearly to be dealt with as a single contravention having regard to the terms of s.557(1) of the Fair Work Act.

46. They are the contraventions with which I have to deal. The matters to be taken into account in terms of the exercise of the discretion to impose a penalty are, again, the subject of numerous authorities, but perhaps the most often cited authority is the decision of Mowbray FM in *Mason v Harrington Corporation Proprietary Limited* (2007) FMCA 7, applied and approved by Tracey J in *Kelly v Fitzpatrick* (2007) FCA 1080.

47. So, to the extent that they are relevant and the evidence permits, I should have regard to the following matters:

    a) the nature and extent of the conduct which led to the breaches;

    b) the circumstances in which that conduct took place;

    c) the nature and extent of any loss or damage sustained as a result of the breaches;

    d) whether there had been similar previous conduct by the respondent;

    e) whether the breaches were properly distinct or arise out of one course of conduct;

    f) the size of the business enterprise involved;

g) whether the breaches were deliberate;

h) whether senior management was involved in the breaches;

i) whether the party committing the breaches had exhibited contrition;

j) whether the party committing the breach had taken corrective action;

k) whether the party committing the breach had cooperated with the enforcement authorities;

l) the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employees' entitlements; and

m) the need for specific and general deterrence.

48. In the context of imposing a pecuniary penalty on an accessory, as I am here, many of those matters will not be particularly relevant. They will have greater relevance in respect of a primary contravener. Nonetheless, they offer a reasonable guide as to the things that might be important. Here, I have already discussed in the course of my primary reasons for judgment the nature and extent of the conduct which led to the breaches and the circumstances in which that conduct took place.

49. It was said on a number of occasions in submissions in support of a low penalty, if no penalty at all, that the respondent had acted in a genuine way and with a view to trying to make sure that he discharged the company's obligations. I reject those submissions. If it is not already clear from the reasons that I have already delivered I am satisfied that the respondent, in this case, took a deliberate decision not to pay the applicant his entitlements and structured the cessation of the business so that that could occur.

50. He was able to make proper arrangements for all of the other employees except this one. It is deliberate and it is outrageous. To treat an employee in that way is the antitheses of the policy of the Fair Work Act.

51. There is no evidence before me about the financial circumstances of the respondent. The company that conducted the business is now in liquidation, but I know nothing of the finances of the respondent. There was no attempt to place evidence before me about his financial circumstances.

52. There is no contrition exhibited by the respondent at all. Indeed, he still takes the view that he has done nothing wrong. He took and acted on advice, no doubt, with a view to ensuring that what it was that he set about doing he could do with an air of legitimacy.

53. There is no evidence before me that the respondent has breached the Fair Work Act in any other way on any other occasion.

54. Given the very special circumstances of this case and what, according to the respondent's own evidence, was a personal relationship between he and the applicant in the past, in my view, any penalty imposed in this case should not reflect a particular need for specific or general deterrence. This is a case which, I suspect, should be confined to its own facts.

55. The maximum penalty to be imposed for each of the contraventions, according to s.539 and the table set out in that section of the Fair Work Act, is 60 penalty units in respect of each of the contraventions. A penalty unit is prescribed by s.4AA of the *Crimes Act* 1914 to be $180. Accordingly, the total penalty for each of the contraventions is $10,800 or a maximum of $21,600 if the two are combined.

56. This is a contravention which, for the reasons I have indicated, ought to attract a pecuniary penalty of 10 per cent of the maximum in respect of each contravention.

57. So in respect of each contravention I impose upon on the respondent a pecuniary penalty of $1080. A total of $2160.

58. The applicant asks for an order that the penalty be paid to him. There are authorities demonstrating that, in certain circumstances, it is appropriate to order the payment of pecuniary penalty to an applicant, and others that suggest that in certain circumstances it is inappropriate. The matter is one of discretion. Here, I am satisfied that I should order that the penalty be paid to the applicant rather than the Commonwealth.

59. I am satisfied of that, because, primarily, I am unable to make any orders about the superannuation to which the applicant was entitled, but that he has not been paid. The lack of evidence about that has prevented me from making an order, but payment to the applicant of the pecuniary penalty might go some way towards alleviating that issue.

60. Whilst it is not intended to be a substitute one for the other it is, in my view, a proper exercise of the discretion to take the matter to which I've just referred into account.

ORDERS DELIVERED

I certify that the preceding sixty (60) paragraphs are a true copy of the reasons for judgment of Judge Jarrett delivered 18 August, 2015.

Associate:

Date: 30 September 2015