

FEDERAL COURT OF AUSTRALIA

Veeraragoo v Goldbreak Holdings Pty Ltd (No 2) [2018] FCA 1448

File number: WAD 58 of 2018

Judge: **COLVIN J**

Date of judgment: 25 September 2018

Catchwords: **INDUSTRIAL LAW** - application for imposition of pecuniary penalties and for compensation to be paid to employee - termination of employment - unpaid wages and leave entitlements - humiliation and distress - contraventions of *Fair Work Act 2009* (Cth) - consideration of appropriate penalties - consideration of circumstances in which compensation may be ordered to be personally paid by a person involved in contravention - consideration of circumstances in which a single penalty amount may be assessed - factors relevant to penalty - whether penalty should be order to be paid to applicant - penalty imposed - compensation awarded

Legislation: *Fair Work Act 2009* (Cth) ss 550, 546, 545
Fair Work Bill 2008 (Cth)

Cases cited: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27
Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2018] HCA 3
Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (No 2) [2018] FCA 1211
Australian Competition and Consumer Commission v HJ Heinz Company Australia Limited (No 2) [2018] FCA 1286
Australian Competition and Consumer Commission v Yazaki Corporation [2018] FCAFC 73
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8; (2008) 165 FCR 560
Bostik (Australia) Pty Ltd v Gorgevski [1992] FCA 271; (1992) 36 FCR 20
Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate [2015] HCA 46; (2015) 258 CLR 482
Construction, Forestry, Mining and Energy Union v Cahill [2010] FCAFC 39

Dafallah v Fair Work Commission [2014] FCA 328; (2014) 225 FCR 559

Director, Fair Work Building Industry Inspectorate v Foxville Projects Group Pty Ltd [2015] FCA 492

Fair Work Ombudsman v W.K.O Pty Ltd [2012] FCA 1129

Fair Work Ombudsman v Windaroo Medical Surgery Pty Ltd (No 2) [2016] FCCA 2505

Fair Work Ombudsman v Wongtas Pty Ltd (No 2) [2012] FCA 30

Fairwork Ombudsman v Step Ahead Security Services Pty Ltd [2016] FCCA 1482

McCormack v Goldbreak Holdings Pty Ltd trading as The Local Shack [2018] FWA 2362

Sayed v Construction, Forestry, Mining and Energy Union [2015] FCA 27

Sayed v Construction, Forestry, Mining and Energy Union [2016] FCAFC 4; (2016) 239 FCR 336

Scotto v Scala Bros Pty Ltd [2014] FCCA 2374

Sponza v Coalface Resources Pty Ltd [2015] FCCA 1140

Stuart-Mahoney v Construction, Forestry, Mining and Energy Union [2008] FCA 1426

SZTAL v Minister for Immigration and Border Protection [2017] HCA 34

Transport Workers' Union of Australia, NSW Branch v No Fuss Liquid Waste Pty Ltd [2011] FCA 982

Veeraragoo v Goldbreak Holdings Pty Ltd [2018] FCA 1148

Wong v The Queen [2001] HCA 64; (2001) 207 CLR 584

Date of hearing:	3 September 2018
Registry:	Western Australia
Division:	General Division
National Practice Area:	Employment & Industrial Relations
Category:	Catchwords
Number of paragraphs:	81
Counsel for the Applicant:	Mr D Scaife
Solicitor for the Applicant:	Eureka Lawyers
Solicitor for the Respondents:	The Respondents did not appear

ORDERS

WAD 58 of 2018

BETWEEN: **LOVANITASIGN VEERARAGOO**
Applicant

AND: **GOLDBREAK HOLDINGS PTY LTD (ACN 116 804 712)**
First Respondent

BRADLEY DAVID WRIGHT
Second Respondent

JUDGE: **COLVIN J**

DATE OF ORDER: **25 SEPTEMBER 2018**

THE COURT ORDERS THAT:

1. Pursuant to s 546 of the *Fair Work Act 2009* (Cth) the second respondent do forthwith pay to the applicant compensation in the amount of \$8,191.86 together with interest at the rate of 5.5% from 16 October 2017 until the date of this order.
2. Pursuant to s 546(3)(c) of the *Fair Work Act* the second respondent do forthwith pay to the applicant a monetary penalty in the amount of \$20,000.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

COLVIN J:

- 1 On 1 August 2018, default judgment was entered against Mr Bradley Wright in respect of claims brought by Ms Lovanitasing Veeraragoo arising from the circumstances of her dismissal from employment by Goldbreak Holdings Pty Ltd. Mr Wright was then, and continues to be, the general manager of Goldbreak. At the time of entry of default judgment, orders were made for the amount of any compensation, damages and penalties to be assessed at a separate hearing to be held on 3 September 2018.
- 2 Mr Wright was served on 2 August 2018 with a copy of the default judgment and the orders fixing the date for assessment of the quantum of compensation, damages and penalties. The orders provided for the filing of further affidavits and submissions. In response to an email from solicitors acting for Ms Veeraragoo concerning the hearing listed for 3 September, Mr Wright sent an email in which he said simply 'I am an employee. I am not a director. You should have done a company search'.
- 3 Mr Wright did not file submissions. Nor did he appear at the assessment hearing. At the hearing, Ms Veeraragoo sought orders against Mr Wright providing for payment of compensation including interest of about \$23,000, general damages of \$12,500 and penalties totalling \$30,240. Further, Ms Veeraragoo sought an order under s 546(3)(c) of the *Fair Work Act 2009* (Cth) that the penalties be paid to her personally.
- 4 For the following reasons, it is appropriate that orders be made requiring Mr Wright to pay compensation by reason of the nature and extent of his involvement in the conduct found to have contravened the *Fair Work Act*. Further, as Ms Veeraragoo has borne the burden of bringing the proceedings which, in the result, have not been defended by Mr Wright and she is the person directly affected by all the contravening conduct, it is appropriate for Mr Wright to be ordered to pay to her the penalties as assessed. There is no material before me to suggest that there are mitigating factors to explain Mr Wright's conduct. On the evidence, the conduct was deliberate and Mr Wright has chosen not to appear to provide any explanation for his behaviour. The evidence supports the need for penalties assessed at a level to ensure specific deterrence. The evidence also establishes loss suffered by Ms Veeraragoo consequent upon the contraventions claimed. In those circumstances, there should be an order for payment of

compensation of \$8,191.86 plus interest and a penalty order in the amount of \$20,000 with the penalty amount to be paid to Ms Veeraragoo.

Relevant circumstances concerning the employment of Ms Veeraragoo

5 A number of affidavits were relied upon by Ms Veeraragoo. The following account is taken from those affidavits and records my findings based upon that affidavit material.

6 Ms Veeraragoo is a cook. In early 2015, she was interviewed by Mr Wright and Mr Tallarida for work at a chain of restaurants known as The Local Shack. She was asked to do a three hour trial the next day. At the end of the trial, Mr Wright offered Ms Veeraragoo a full-time position at a salary of \$53,907.98 per annum and offered to sponsor Ms Veeraragoo's application for what is known as a 457 visa. Ms Veeraragoo accepted the offer. She met with Mr Agnew, a lawyer for The Local Shack, to discuss her 457 visa sponsorship. On 2 February 2015, Ms Veeraragoo signed an employment agreement with Wright Hospitality.

7 Ms Veeraragoo then commenced working as a cook at various locations of The Local Shack at venues in Perth, Joondalup, Willetton and Forrestfield.

8 The name on the initial payslips given to Ms Veeraragoo was Wright Hospitality, but later payslips were issued with the name Goldbreak.

9 In about February 2016, Ms Veeraragoo had a conversation with Mr Wright about seeking a visa that would allow her to be a permanent resident of Australia. In April 2016 she spoke to Mr Agnew about obtaining a visa. In May 2016, Ms Veeraragoo decided to apply for a visa with Mr Agnew. Mr Wright agreed to help but kept postponing the visa lodgement. In April 2017, Ms Veeraragoo asked Mr Agnew to process the visa on the basis that she was eligible after spending two years on a 457 visa.

10 Mr Agnew said that Mr Wright had several companies and that it would be difficult to transition to a permanent visa unless Mr Wright could show that all of the companies were part of one entity. Mr Agnew said that Mr Wright was not ready to do that yet.

11 Mr Wright was always Ms Veeraragoo's boss while she worked for The Local Shack. His title was general manager throughout that time. Mr Wright would sit at one of the stores and deal with suppliers, staff issues, rosters and venue management. Every decision had to go through him. He employed family members to work at The Local Shack venues. Mr Wright's mother, Ms Lorraine Brown, did administrative work such as the payroll. His father, Mr David Wright,

worked as a handyman. His brother, Mr Nathan Wright, worked as a handyman and sometimes a cook. His brother, Mr Ashley Wright, worked as a venue manager. Accordingly, it was operated with the character of a family business. Mr Wright had overall day to day responsibilities for running the business.

12 On 13 October 2017 Ms Veeraragoo had a telephone conversation with Mr Wright in the evening when she was home with her husband which she recounted as follows:

Mr Wright: How's everything at the restaurant?

Me: I'm not there, Brad.

Mr Wright: How come?

Me: My shift finished at 3.00pm. I'm not working nights.

Mr Wright: Were there five people in the kitchen?

Me: There were four. One of the workers didn't show up, so I stayed back until 3.45pm to help prepare for the night shift and then left.

Mr Wright: How was the steak being cooked? There's been a complaint.

Me: The food was fine. But I'm not there now.

13 Mr Wright then started yelling over the phone. He used foul language a number of times and said things like 'You should fucking be there!'. He kept yelling despite Ms Veeraragoo saying that her shift had finished.

14 Ms Veeraragoo was very upset as a result of the telephone call and spoke to her husband, Koomaren. He then telephoned Mr Wright. Ms Veeraragoo could hear both sides of the conversation.

15 Ms Veeraragoo recounts the conversation as being to the following effect:

Koomaren: Why is my wife crying at this time of night? Why did you make her cry?

Mr Wright: She should have been at the restaurant.

Koomaren: This is not the time to talk to someone about that. It is very late at night. Why couldn't it wait until tomorrow?

Mr Wright: Why the fuck do I have to talk to you? I sponsored you guys. I can cancel your visa any time I like. You should be more compliant with me.

Koomaren: We don't have to stay with you because of the visa. You treat people badly. She might resign.

Mr Wright: Do whatever you have to.

16 That night Ms Veeraragoo cried and barely slept because she was so upset as a result of the conversations with Mr Wright. The following morning, Ms Veeraragoo called the manager of The Local Shack venue on Forresterfield to say that she would not be coming in to work because she was sick. There was no answer. She then sent a message to another employee to say that she would not be at work because she was sick. Later that morning she went to a medical appointment and obtained a medical certificate that she was unfit for work from 14 to 17 October 2017. She sent a copy of the medical certificate to the Human Resources contact person with The Local Shack. Ms Veeraragoo received a text message from the person holding the position Head - Human Resources at The Local Shack, Ms Shabanah Ali, which said 'So sorry to hear what happened last night Lov'. After that, the following text messages were exchanged:

Should i send you my resignation Shabanah? Also do i need to give any notice 11:18

You didn't turn up the today Lov, it's considered abandoning employment. 11:25

I'll call you a bit later I'm at my son's Basketball Game atm 11:25

Ok talk to u soon. Ive sent you my medical certificate 11:27

17 The next day on 15 October 2017, Ms Veeraragoo received the following further text message from Ms Ali:

Lov can you please give me a call back, we need to discuss your notice period, so it works best for both parties. Please give me a call ASAP 15:04

18 The following day on 16 October 2017, Ms Veeraragoo sent the following text message:

Hey shabanah, i'll work my 2 weeks notice. I have sick leaves till tuesday 17th and i'll resume work from wednesday. Thank you. 07:23

19 A response was received from Ms Ali as follows:

Hi Lov, you can work your notice starting Wednesday 12 to close, Thursdav [sic] 12-2 and then 5 to close.

20 After that Ms Veeraragoo was advised that her roster had been changed to include work at the Rockingham store for two weeks which led to the following email exchange:

Why Rockingham? Thats way too far .. 13:14

...

Because Rockingham is calmer and not as busy plus we are trialing out new chef's here 13:18

...

Shabanah i already told you i cant do nights everyday, i have caring responsibilities towards 1 yr old daughter.. i know you guys are doing this becaus³ its my 2 weeks notice but its not fair 13:22

Unfortunately Lov, you're employed on a F/T basis, and sponsored accordingly for your whole family, you're required to travel in between the local shack as per employer's operation request. clause 8.2 13:26

Please advise if you're unable to work your notice ASAP 13:26

The contract that ive got doesnt mentioned anything about clause 8 13:28

Please send me a copy of it with my signature or initial on it 13:28

Thanks 13:28

Mine stop at clause 7 13:29

Please advise if you cannot work your notice Lov, I'm trying to do what's best 14:04

I already told that am happy to work my notice, but rockingham is unfair. 14:38

Theres nothing unfair about that, it's within the required commutable distance to and from work and it is your employer's request. Failure to work these hours would mean that you're refusing the directive of your employer. It's quieter and will be easier for you then in Forrestfield. We are doing the best we can under the circumstances 14:47

I dont have any issue working in a busy kitchen and i 've never had any before that you have to send me to Rockingham because its quieter. A week ago i was the best chef you had, was offered a promotion and after i've been abused verbally by Brad and i decided to stop working with the company, you send me to a quieter venue to work!!! Am trying to do the right thing here by leaving gracefully, but i guess you'd rather i walk out so the company doesnt have to pay any monies left, another cost cutting strategie. 15:29

I will accept this as leaving with no-tice, I have tried to negotiate with you, it's not about the money, it is about leaving gracefully, Brad the owner will be here in the kitchen and that is why I suggested you work in Rockingham since you felt so intimidated

15:38

...

Well if thats the case i can work in joondalup, thats where i've worked all the time

15:42

Understand this, that is the requirement, and that is the roster, either you accept or you don't. I'm not going around in circles with you

15:43

21 The next communication with Ms Ali was on 25 October 2017 when she sent an email to Ms Veeraragoo attaching a letter of termination which included the following:

This letter is to confirm that the Local Shack has decided to terminate your employment effective 16th October 2017. This action is taken in accordance with the terms and conditions of the employment agreement between The Local Shack and Yourself. You were employed under Wright hospitality which was bought by Goldbreak Holdings. Wright Holdings is under administration. To date you have not changed your visa under Goldbreak Holdings.

The following reasons listed below have constituted to serious misconduct and your dismissal.

- wilful or deliberate behaviour by you that is inconsistent with the continuation of your contract of employment. On the 13th of October, you had a conversation with The GM:
 - You argued with the GM about not following instructions, using profanity language together with your partner. Your partner told the GM that you will no longer work and you have quit. You didn't turn up to your shift the next day, only to receive a medical certificate later that day. You didn't follow protocol in advising your employer that you will be a no show and acted out the orders of your partner. This is considered abandonment of employment and a breach of the code of conduct and the code of ethics in accordance with the Fair Work Act.
- You have indulged in how you felt about working with the local shack in a negative manner with the team, causing the teams morale to deteriorate causing a serious and imminent risk to the reputation, viability or profitability of The Local Shack.
- you refused to carry out a lawful and reasonable instruction that was consistent with your contract of employment, and in the circumstances your continued employment during a notice period would be unreasonable. You refused to work your notice period at a venue as per your employer's instructions and had no further communication about working your notice period.

We consider that your actions constitute serious misconduct warranting summary dismissal.

22 Ms Veeraragoo describes the period after her dismissal as being really stressful. She had to find another job and would have to leave Australia if she could not find one within 90 days. She applied for many jobs but had difficulty finding an employer who would take over the sponsorship of her visa. Bills started piling up and she and her husband were struggling to meet the needs of the family. Their rent became late. She had a lot of headaches, slept very badly and had suicidal thoughts.

23 Eventually in January 2018 she found a new job in Kalbarri and arranged to move there with her family. She describes the dismissal from her employment as having had a major effect on her relationship with her husband leading to them not talking much and fighting a lot.

24 Ms Veeraragoo did not earn any income between finishing employment with The Local Shack and being paid by the restaurant in Kalbarri where she started working on 26 February 2018. She did not receive any government benefits or assistance during that time because of her status as a 457 visa holder.

Wright Hospitality, Goldbreak and other companies

25 Goldbreak was registered on 21 October 2005. It is in administration. As at 21 February 2018, strike-off action was in progress against the company. Its principal place of business is said to be an address in Taupo Glade, Joondalup. The address at Taupo Glade is a residential property. On the evidence before me that address is where Mr Wright lives.

26 Since 25 November 2011, Mr Wright's father has been a director and secretary of Goldbreak. Apart from a period between March and October 2015 when Mr Wright was also a director, Mr David Wright has been the sole director of Goldbreak since 25 November 2011. Prior to that, Mr Wright had been the director and secretary having been appointed on 30 June 2006. Mr David Wright is the sole shareholder in Goldbreak. Before that Mr Wright's mother, Ms Brown was the sole shareholder (with her address shown as being the Taupo Glade address). Ms Brown was also the sole director and shareholder of Goldbreak between 31 October 2005 and 30 June 2006.

27 Wright Hospitality Pty Ltd was incorporated in November 2012. Its principal place of business is the Taupo Glade address. The director and secretary of Wright Hospitality is Mr Wright who was appointed at the time of incorporation. Mr David Wright is a former director. There have been no other directors of the company. The shareholders are Mr Wright and Mr David

Wright. The company is in external administration. The liquidator was appointed on 11 October 2016.

28 The Local Shack Pty Ltd was registered on 27 October 2017. Its principal place of business is also said to be the address in Taupo Glade. Since 5 December 2017 the sole director has been Ms Debono. All the shares in the company were held by The Local Shack Holdings Pty Ltd (its address also being the property in Taupo Glade). On the evidence, the current shareholder is The Local Shack Holdings Australasia Pty Ltd.

Contraventions and their consequences

29 Default judgment has been entered against Mr Wright for declaratory relief in terms that reflect a determination based upon deemed admissions that he was involved in contraventions by Goldbreak of the *Fair Work Act*. By the terms of s 550 of the *Fair Work Act*, Mr Wright is taken to have himself contravened the provisions. Relevantly for the purposes of assessing the quantum of compensation, there are three contraventions that have been declared. First, dismissing the applicant from her employment because she had exercised her workplace right to take personal leave. Second, dismissing the applicant from her employment because she had exercised her workplace right to be temporarily absent due to illness. Third, making a false or misleading representation that she had abandoned her employment.

30 In order to assess the claim for compensation, it is necessary to consider the consequences of those breaches for Ms Veeraragoo.

31 On the evidence before me, Goldbreak maintained that the termination of Ms Veeraragoo's employment had occurred on 16 October 2017. It relied upon the alleged terms of the telephone conversations with Mr Wright on 13 October 2017 and an alleged abandonment of employment by Ms Veeraragoo on 16 October 2017. This was the position maintained on that date when Ms Ali told Ms Veeraragoo that she had abandoned her work and was restated in the letter dated 25 October 2017 when Ms Veeraragoo's employment was purportedly terminated with effect from 16 October 2017.

32 Having regard to:

- (1) the evidence of the role of Mr Wright in the management of the business;
- (2) the evidence of the statements made by Mr Wright in the conversations on 13 October 2017 and the threats made by him;

- (3) the contents of the letter of 25 October 2017 which purports to set out details of the conversations on 13 October 2017 in which Mr Wright as general manager was the only person involved on behalf of Goldbreak; and
- (4) the sympathetic position initially advanced by Ms Ali to Ms Veeraragoo by saying 'sorry to hear what happened last night',

I infer that the purported termination occurred at the direction of Mr Wright or, at least, with his full knowledge of all relevant events and with his support and was a consequence of the conversations on 13 October 2017.

33 The purported terminations with effect from 16 October 2017 occurred even though Ms Veeraragoo had provided a medical certificate and was taking sick leave or personal leave in circumstances where she was entitled to do so.

34 Therefore, the quantum of any compensation or damages is to be assessed on the basis that the termination was ineffective.

35 However, I find that at about the same time, Ms Veeraragoo intended to tender her resignation. It may be that her decision to do so was as a result of the events on 13 October 2017. However, it was not those events that were alleged to contravene the *Fair Work Act*. Rather, the claims made were that the purported termination on the basis of abandonment for failing to attend work in circumstances where there was an entitlement to take sick leave or personal leave or both was in contravention of the legislation.

36 As to the claim that Ms Veeraragoo was misled by the statement that she had abandoned her work, there was no evidence of reliance by Ms Veeraragoo on that statement. There is no evidence before me from which I could conclude that the misleading statement about abandonment led Ms Veeraragoo to leave her employment and as a result she suffered loss and damage due to seeking to find work over an extended period.

37 Significantly, on 16 October 2017, Ms Veeraragoo asked Ms Ali 'Should I send you my resignation ... Also, do I need to give any notice'. After that, she communicated with Ms Ali about the length of the notice period that she had to work out. The content of those communications is consistent only with her making a decision to resign. Taken as a whole the text message was not an inquiry as to how to resign if Ms Veeraragoo was to choose to do so. Nor was it a statement reflecting a view on her part that she had abandoned her employment as was stated by Ms Ali. Rather, the communications manifested an intention on the part of

Ms Veeraragoo to resign. There was no evidence as to why Ms Veeraragoo sent the messages indicating that she was to resign. In particular, there was no evidence that she did so only because she thought she could no longer work at The Local Shack because of the conduct of Mr Wright or because she would be dismissed anyway.

38 Ms Veeraragoo did give evidence that:

If The Local Shack had let me return to work, then I would have kept working for them. Even though I was intimidated by the idea of working for Mr Wright, I needed the visa sponsorship and the income.

39 However, the above evidence must be read in the context of the contemporaneous communications at the time. I find that the messages sent by Ms Veeraragoo concerning her resignation and working out her notice have not been demonstrated to be a consequence of the breaches of the *Fair Work Act* that have been declared. Nor is there evidence to support the conclusion that, in all the circumstances, she was forced to resign. Indeed, no submissions were advanced to that effect. Rather, submissions were advanced on the basis that all that had occurred was that Ms Veeraragoo had been dismissed by conduct in breach of the *Fair Work Act*.

40 In all the circumstances, I find that if Ms Veeraragoo had not been dismissed then she would have resigned by giving two weeks notice. Therefore, her claims should be assessed on that basis.

41 I note, in addition, that in assessing the quantum of compensation it is appropriate to consider that an employer would be entitled to terminate in the manner most beneficial to the employer by determining the contract at the earliest date possible: *Bostik (Australia) Pty Ltd v Gorgevski* [1992] FCA 271; (1992) 36 FCR 20 at [54]. The submissions advanced by Ms Veeraragoo were on the basis that her employment could be terminated on two weeks notice.

Compensatory orders against Mr Wright

42 Mr Wright has been declared to have contravened the *Fair Work Act* in a number of respects by reason of his involvement in the contraventions of Goldbreak: *Veeraragoo v Goldbreak Holdings Pty Ltd* [2018] FCA 1148. As I have noted, the declarations were made on the basis that he was a person involved in a contravention of a civil remedy provision. Such a person is taken to have contravened the provision: s 550(1). On the face of that provision, any order that may be made against a contravener of a civil remedy provision may be made against a person involved in the contravention because they are taken to be a contravener.

43 As to contraveners, the court may make any order it 'considers appropriate' if satisfied that a person has contravened a civil remedy provision: s 545(1). The power conferred under s 545(1) is broad and is conferred for the purposes of the *Fair Work Act: Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3 at [103]. Even so, 'it is limited to making appropriate preventative, remedial and compensatory orders': at [110]. Section 545(2) states expressly that the orders may include an order awarding compensation for loss that a person has suffered because of the contravention. Those words import a requirement for a causative connection between the contravention and the loss to be compensated.

44 However, it is to be noted that s 545(1) provides that any order the court considers appropriate may be made if the court is satisfied that 'a person' has contravened the civil remedy provision. It does not, in terms, state that a person who is taken to have contravened a provision by operation of s 550(1) may be the subject of an order awarding compensation for loss suffered because of the contravention. In that respect it is to be contrasted with s 546(1) which provides that the court may order a person to pay a pecuniary penalty 'if the court is satisfied that *the* person has contravened a civil remedy provision' (emphasis added). Whereas penalty orders are to be imposed upon contraveners, s 545 requires the court to have formed the view that the particular order (relevantly a compensation order) is appropriate before it may be made. In any particular case, a view as to the appropriateness of ordering that a person involved in a contravention should pay compensation is to be formed having regard to the purposes of the *Fair Work Act*.

45 The nature and extent of the power to order an accessory to a contravention to pay compensation has been considered in a number of decisions in the Federal Circuit Court: *Scotto v Scala Bros Pty Ltd* [2014] FCCA 2374; *Sponza v Coalface Resources Pty Ltd* [2015] FCCA 1140; *Fairwork Ombudsman v Step Ahead Security Services Pty Ltd* [2016] FCCA 1482; and *Fair Work Ombudsman v Windaroo Medical Surgery Pty Ltd (No 2)* [2016] FCCA 2505. In those decisions, reference has been made to the Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) which includes the following statement concerning s 550 of the *Fair Work Act*:

2176. The clause means that a pecuniary penalty for a contravention of a civil remedy provision can also be imposed on a person involved in a contravention. For example, where a company contravenes a civil remedy provision, a pecuniary penalty can also be imposed on a director, manager, employee or agent of the company.

2177. However, while a penalty may be imposed on a person involved in a contravention, the clause does not result in a person involved in a contravention being personally liable to remedy the effects of the contravention. For example, where a company has failed to pay, or has underpaid, an employee wages under a fair work instrument, the director is not personally liable to pay that amount to the employee.

46 In my view, the statement in para 2177 reflects the important distinction between the imposition of a penalty (which can be imposed in all cases upon a person who is taken to have contravened by being involved in a contravention: see s 546) and compensatory orders (which can only be imposed upon a person involved in a contravention if the court forms the view that such an order is appropriate: see s 545). So, the mere fact that a penalty is imposed upon a person involved in a contravention does not mean that it is appropriate for that person also to be liable to pay compensation. Rather, the court must be satisfied as to the appropriateness of such an order in the particular circumstances.

47 The task of statutory construction must begin with a consideration of the text and extrinsic materials cannot be relied upon to displace the clear meaning of the text: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 at [47]. Where the semantic breadth of a word is such that it needs to be understood in its statutory, historical or other context, then those matters may suggest some other meaning of the word which requires the ordinary meaning to be rejected: *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 at [14]. However, the task remains one of statutory construction. It is the provisions in s 545, s 546 and s 550 that are to be construed, not the terms of the statement in para 2177 of the Explanatory Memorandum. In my view, having regard to the purposes of the *Fair Work Act*, the meaning of s 545 is that where the court has determined that there has been a contravention then before any person (including a person involved in the contravention) may be ordered to pay compensation, the court must have formed the view that such an order is appropriate in the particular circumstances.

48 For the following reasons, it is appropriate in the circumstances of the present case to make compensatory orders against Mr Wright even though Ms Veeraragoo's employer was Goldbreak.

49 Mr Wright was the general manager of the business and was personally involved in the contravening conduct. Indeed, I have found on the evidence that the contraventions have their origins in his conduct and the relevant contravening conduct occurred at his direction or with his full knowledge and support as general manager. Mr Wright has been a director of

Goldbreak in the past. The evidence concerning the ownership and directorships of various companies that appear to be associated with The Local Shack business and also that have an association with Mr Wright and other members of his families, together with the evidence of Ms Veeraragoo as to his role in the business, support the conclusion that together with other family members he has an interest in the business that trades as The Local Shack and has done so for many years. Further, Mr Wright is in charge of that business. Mr Wright's communications with solicitors acting for Ms Veeraragoo in respect of the declarations made against him indicate a belief that he can act without personal liability.

50 The above matters would be sufficient for it to be appropriate for compensatory orders to be made against Mr Wright. In my view, in addition, it is also relevant that Goldbreak is in administration. The likelihood is that Ms Veeraragoo will not obtain full compensation from Goldbreak. This is a further reason why compensation orders against Mr Wright are appropriate.

51 However, compensation should be confined to that which is referable to the contravening conduct of Mr Wright. In the circumstances of the present case, he was not just a participant in the conduct of Goldbreak. His behaviour was the instigating cause and all of the contravening conduct that provides the basis for the compensatory orders sought occurred at his direction or, at least, with his full knowledge of all relevant events and with his support. There is a causative nexus between his involvement in the contraventions and loss of the kind that Ms Veeraragoo advances as the basis for the compensatory orders that she seeks. (As to the failure to provide the Fair Work Information Sheet, I note that no compensation is sought concerning that contravention.)

52 It follows that Mr Wright should be ordered to pay compensation for loss to Ms Veeraragoo consequent upon the contraventions relating to her dismissal.

53 Orders of this kind are commonly made in such circumstances: see for example *Transport Workers' Union of Australia, NSW Branch v No Fuss Liquid Waste Pty Ltd* [2011] FCA 982; *Fair Work Ombudsman v Wongtas Pty Ltd (No 2)* [2012] FCA 30; and *Fair Work Ombudsman v W.K.O Pty Ltd* [2012] FCA 1129.

54 The principles to be applied in determining the quantum of compensation were summarised in *Dafallah v Fair Work Commission* [2014] FCA 328; (2014) 225 FCR 559 at [148]-[161].

Salary entitlement

55 On the evidence, Ms Veeraragoo was not paid for the period 1 to 15 October 2017, nor was she paid for two weeks in lieu of notice. The total of those entitlements is \$4,146.78, including tax. Goldbreak has not made that payment as her employer. Therefore, it has not remitted the applicable tax. The failure to pay the salary was itself a consequence of the purported dismissal in contravention of the *Fair Work Act* because Goldbreak did not pay Ms Veeraragoo on the basis that she had been summarily dismissed. Therefore the fact that Ms Veeraragoo does not have the money is a consequence of that contravening conduct. Mr Wright should be ordered to pay the amount in full by way of compensation on the basis that Ms Veeraragoo will ultimately have to remit taxation on the amount.

Annual leave entitlements

56 The last payslip received by Ms Veeraragoo prior to the termination of her employment showed that she had accrued 86.32 hours of annual leave. She did not take any further leave after that time. Her final payslip included payment for 72.18 hours of annual leave. The failure to include the additional amount appears to follow from Goldbreak's claim that Ms Veeraragoo could be summarily dismissed when that conduct was a contravention of the *Fair Work Act*. She is entitled to a further payment of \$545.08, including tax. For reasons I have given, Mr Wright should be ordered to pay the full amount.

Further compensation

57 Ms Veeraragoo claims that she is entitled to further compensation or damages on the basis that but for her wrongful dismissal she would have continued to work at The Local Shack until she found new employment and would not have suffered a further 17 weeks without work. For reasons I have given, I do not uphold the claim to further compensation.

General damages

58 Compensation may be awarded for humiliation and distress caused by the circumstances of a dismissal: *Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 27. The award must be for consequences that are causally connected to the contravention. In this case, Ms Veeraragoo was terminated in circumstances where she should have been allowed to give notice, continue her employment for the notice period or be paid in lieu of notice. Instead she was treated as though there was proper justification for her dismissal on the basis that she had abandoned her employment. She was in a vulnerable circumstances by reason of her visa.

Leaving employment in adverse circumstances was likely to give rise to distress. I found that Ms Veeraragoo did suffer considerable distress. There should be an award of compensation for that distress. The award should take account of the consequences I have identified and her salary level. I assess compensation in an amount of \$3,500.

Interest

59 Ms Veeraragoo is entitled to compensation that includes interest on the unpaid salary and annual leave entitlements: s 547(2). Interest was claimed on the unpaid salary and leave entitlements at 5.5% from 16 October 2017 when accrued entitlements should have been paid (including payment in lieu of notice). I uphold that claim. I also award interest on the general award of compensation from the same date.

Penalties

60 If the court is satisfied that a person has contravened a civil remedy provision then the court may order the person to pay a pecuniary penalty that the court considers is appropriate: s 546(1). For an individual, the maximum penalty for each of these identified contraventions is \$12,600 (60 penalty units, being \$210 each during the relevant period).

61 A pecuniary penalty order is primarily if not wholly protective in promoting the public interest in compliance and seeks to put a price on future contraventions that is sufficiently high to deter repetition by the contravener and others who might, but for the level of penalty, consider engaging in the same conduct: *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482 at [55]. Ultimately, if a penalty is devoid of sting or burden, it may not have much or any deterrent effect and will be unlikely to achieve its statutory object: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* at [116]. However, the penalty should not be so large as to be oppressive or crushing in its totality when compared to the total contravening conduct: *Stuart-Mahoney v Construction, Forestry, Mining and Energy Union* [2008] FCA 1426 at [60].

62 In assessing penalties, the court follows orthodox sentencing conceptions as they apply to the imposition of civil penalties: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* at [116]. Those conceptions require the court to undertake a process of instinctive synthesis by which all relevant factors are brought to account to arrive at a single result: *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR

584 at [74]-[76]. They involve the application of the course of conduct principle in those instances where there is an inter-relationship between the factual and legal elements of a number of contraventions: *Australian Competition and Consumer Commission v Yazaki Corporation* [2018] FCAFC 73 at [226]-[236]. Application of the course of conduct principle may require an evaluation of any degree of overlap to ensure that the same conduct is not being penalised twice. It does not require the court to measure the overlap or indeed separate the penalties for each contravention and then apply the totality principle. Provided the court properly identifies those cases where there is an overlap and brings that to account, the court may conclude that the separate penalties for each contravention may be captured in a single amount that brings to account the principle of totality: see the recent analysis by White J in *Australian Competition and Consumer Commission v HJ Heinz Company Australia Limited (No 2)* [2018] FCA 1286 at [67]-[74].

63 The matters to be considered and brought to account where appropriate in determining penalties for contraventions of the *Fair Work Act* were thoroughly reviewed by Tracey J in *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (No 2)* [2018] FCA 1211 at [12]-[32]. I gratefully adopt that review.

64 I have also had regard to each of the matters listed by Buchanan J in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; (2008) 165 FCR 560 at [89].

65 In this case, I consider the following aspects of the contravening conduct to have particular significance in determining penalty.

66 First, the manner in which Mr Wright has approached these proceedings supports the submission advanced for Ms Veeraragoo that significant penalties are required for the purposes of specific deterrence. There is evidence that Mr Wright took steps to evade service resulting in the need for an application to be made for substituted service. Further, the evidence shows that he takes the view that he has no personal responsibility for his actions by reason that he was not a director of Goldbreak at the time. Having regard to the evidence as to his involvement in the management of the company and, on the evidence, its character as a family business employing hospitality staff at a number of venues it is a matter of considerable concern that Mr Wright has chosen to ignore these proceeding. He provides no explanation for his conduct.

67 Second, the conduct concerns dealings with Ms Veeraragoo only and there is no evidence that
it was systematic or related to other employees working at The Local Shack venues.

68 Third, the conduct in causing the letter to Ms Veeraragoo was considered and deliberate. The
letter of purported termination was sent some time after the conversations and conduct to which
it refers. As I have found, the sending of the letter was conduct which occurred with the
authority of Mr Wright as the general manager of the business.

69 Fourth, Ms Veeraragoo was in a vulnerable position given the circumstances of her visa and
the need for her to maintain employment to meet those requirements. This was a matter known
to Mr Wright and which he raised in the conversations which I have found led to the wrongful
termination of the employment of Ms Veeraragoo. Indeed, he used her need for a visa in a
threatening way.

70 Fifth, the absence from employment that was relied upon by Goldbreak and Mr Wright as the
basis for the alleged dismissal of Ms Veeraragoo was brought about by Mr Wright's own
unreasonable conduct.

71 Sixth, Ms Veeraragoo acted appropriately in taking leave which she was entitled to take.

72 Seventh, Ms Veeraragoo was at an economic disadvantage in her dealings with Goldbreak and
Mr Wright. She was being paid a modest wage.

73 Eighth, the evidence is that The Local Shack operates from a number of venues. It is a
significant enterprise and, it may be inferred, has numerous employees.

74 Ninth, there is no evidence of contrition or corrective action.

75 Reliance is placed upon the decision in *McCormack v Goldbreak Holdings Pty Ltd trading as
The Local Shack* [2018] FWA 2362 in which there was some evidence about Mr Wright. I do
not consider that such material could bear upon the assessment of penalty in any material way.
Ms Veeraragoo otherwise makes her submissions on the basis that she is unaware of any
previous contraventions of industrial laws by Mr Wright.

76 Section 556 provides that a pecuniary penalty cannot be imposed in respect of the same conduct
under different provisions in the *Fair Work Act*. As to civil double jeopardy, it is accepted on
behalf of Ms Veeraragoo that the declared contraventions of s 340(1) (dismissal because of
personal leave) and s 352 (dismissal because of personal absence due to illness or injury) apply
to the same conduct and should be the subject of a single penalty. It is also accepted that the

declared contraventions of s 44(1) and s 323(1) by reason of the failure to pay accrued annual leave should be the subject of a single penalty because they apply to the same conduct.

77 Otherwise, it is necessary to consider whether there are separate 'aspects of criminality' reflected in the multiple contraventions that have been declared: *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39 at [39]-[41]. There are five separate aspects to the contravening conduct that has been declared to contravene the *Fair Work Act* for which separate penalties should be determined, namely:

- (1) the dismissal of Ms Veeraragoo on the alleged basis that she had abandoned her employment even though she was entitled to be absent from work;
- (2) the misrepresentation of her rights by the statements made in the letter purporting to record the dismissal of Ms Veeraragoo being conduct that might have deterred a person in her position from taking further action;
- (3) the failure to provide the Fair Work Information Sheet, being an important means to ensure employees are aware of their rights (see *Director, Fair Work Building Industry Inspectorate v Foxville Projects Group Pty Ltd* [2015] FCA 492 at [43] (Flick J)); and
- (4) the failure to pay salary and annual leave;
- (5) the failure to make payment of salary in lieu of notice (which was a consequence of the dismissal and may be viewed as part of the dismissal itself, a matter to which I have had regard in determining penalty).

78 I consider the dismissal to be relatively serious in the circumstances given the position of Ms Veeraragoo, the failure to pay basic entitlements to a vulnerable employee and that specific deterrence requires a higher penalty than might otherwise be indicated. On the other hand, I note that the conduct concerns dealings with one employee.

79 Applying the course of conduct principle to the dismissal and noting that the failure to pay salary was to some extent a consequence of the wrongful dismissal and approaching the matter on the basis that is appropriate to fix a single amount as an aggregate amount recognising that separate penalties are to be imposed for each of the contraventions I have identified and bringing to account the totality of penalties, I determine that Mr Wright should be ordered to pay a penalty of \$20,000.

Payment of penalties to Ms Veeraragoo

80 The Court may order the payment of penalties to a particular person: s 546(3)(c).

81 The application for penalties was brought by Ms Veeraragoo at her own expense. There have been a number of hearings involved. Orders as to the manner of service had to be sought. A number of affidavits have been required. It is evident from the record that there has been considerable time, trouble and lost opportunity costs involved for Ms Veeraragoo. There is no evident feature that would count against the court ordering the payment of the penalties to Mr Veeraragoo as both the prosecutor and the person who was the person principally burdened with the consequences of the contravention. In those circumstances, the usual order is that the penalties be paid to Ms Veeraragoo: *Sayed v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4; (2016) 239 FCR 336 at [102]-[121]. I will so order.

I certify that the preceding eighty-one (81) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Colvin.

Associate:



Dated: 25 September 2018