Federal Court of Australia

Singh v Fair Work Ombudsman [2021] FCA 71

|  |  |
| --- | --- |
| Appeal from: | *Fair Work Ombudsman v Sinpek Pty Ltd (in liq) (No 4)* [2020] FCCA 97 |
|  |  |
| File number: |  |
|  |  |
| Judgment of: | **BROMWICH J** |
|  |  |
| Date of judgment: | 5 February 2021 |
|  |  |
| Catchwords: | **INDUSTRIAL LAW** – notice of appeal from the Federal Circuit Court of Australia – primary judge did not err in determining the objective seriousness of the contraventions – primary judge did not fail to take into account, and did not miscategorise, the subjective features of the appellants – primary judge did not err in application of the principles of totality in respect of the penalties imposed – primary judge did not err in application of principles of common law course of conduct – appeal dismissed |
|  |  |
| Legislation: | *Fair Work Act 2009* (Cth) ss 44, 45, 90(2), 99, 117(1), 325, 535(1), 536(1), 550  *Fair Work* *Regulations 2009* (Cth) regs 3.36(1), 3.40  *Vehicle Manufacturing, Repair, Services and Retail Award 2010* cls 33.4, 42.2, 43.3(a), 43.4(a) |
|  |  |
| Cases cited: | *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93; 261 FCR 301  *Auimatagi v Australian Building and Construction Commissioner* [2018] FCAFC 191; 267 FCR 268  *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; 254 FCR 68  *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25  *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; 117 FCR 424  *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Broadway on Ann Case)* [2018] FCAFC 126; 265 FCR 208  *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Non-Indemnification Personal Payment Case)* [2018] FCAFC 97; 264 FCR 155  *Fair Work Ombudsman v Sinpek Pty Ltd (In Liq) (No 4)* [2020] FCCA 97  *Fair Work Ombudsman v Sinpek Pty Ltd (In Liq) (No 3)* [2020] FCCA 88  *House v The King* (1936) 55 CLR 499  *Parker v Australian Building and Construction Commissioner* [2019] FCAFC 56; 270 FCR 39  *Pattinson v Australian Building and Construction Commissioner* [2020] FCAFC 177; 384 ALR 75; 299 IR 404  *Rocky Holdings Pty Ltd v Fair Work Ombudsman* [2014] FCAFC 62; 221 FCR 153 |
|  |  |
| Division: |  |
|  |  |
| Registry: |  |
|  |  |
| National Practice Area: |  |
|  |  |
| Number of paragraphs: | 30 |
|  |  |
| Date of hearing: | 14 October 2020 |
|  |  |
| Date of last submissions: | 4 November 2020 |
|  |  |
| Counsel for the Appellants: | I Latham |
|  |  |
| Solicitor for the Appellants: | Taylor & Scott Lawyers |
|  |  |
| Counsel for the Respondent: | Y Shariff SC |
|  |  |
| Solicitor for the Respondent: | Office of the Fair Work Ombudsman |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | NSD 155 of 2020 |
|  | | |
| BETWEEN: | MR KAMALDEEP SINGH  First Appellant  MS UMA SINGH  Second Appellant | |
| AND: | FAIR WORK OMBUDSMAN  Respondent | |

|  |  |
| --- | --- |
| order made by: | BROMWICH J |
| DATE OF ORDER: | 5 FEBRUARY 2021 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. There be no order as to costs.

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

REASONS FOR JUDGMENT

BROMWICH J:

## Introduction

1. This is an appeal against orders made by a judge of the Federal Circuit Court of Australia by which civil penalties were imposed for contraventions of the *Fair Work Act 2009* (Cth) (***FW Act***) involving two former employees of a company in relation to failure to pay award entitlements and related conduct. The regulator applicant before the primary judge, and respondent to this appeal, is the Fair Work Ombudsman (**FWO**). The first respondent before the primary judge was the employer company, **Sinpek** Pty Ltd. Sinpek went into liquidation not long before the first hearing day before his Honour. The second respondent before the primary judge, and first appellant in this Court, is Mr Kamaldeep Singh. The third respondent before the primary judge, and second appellant in this Court, is Ms Uma Singh. The appellants, Mr and Ms Singh, who are husband and wife, were director and manager respectively of Sinpek. They were found to be involved in contraventions by Sinpek in that capacity as detailed below, and thereby liable.
2. After a hearing over four days separate days in August, September, November and December 2019, and after hearing further submissions on 20 January 2020, the primary judge delivered a written judgment on liability and compensation: *Fair Work Ombudsman v Sinpek Pty Ltd (In Liq) (No 3)* [2020] FCCA 88 (**liability judgment**). The liability judgment made declarations of contravention against Mr and Ms Singh and ordered them to pay compensation to the former employees with interest. His Honour then heard submissions on penalty, and later that day delivered an ex tempore judgment, subsequently published as *Fair Work Ombudsman v Sinpek Pty Ltd (In Liq) (No 4)* [2020] FCCA 97 (**penalty judgment**).
3. There is no appeal against the liability judgment. The compensation ordered has been paid. This appeal is confined to the quantum of the penalties imposed upon Mr and Ms Singh. In such an appeal by way of rehearing, the appellants must demonstrate error on the part of the primary judge in relation to the exercise of the penalty imposition discretion: *House v The King* (1936) 55 CLR 499, 505; see also *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93; 261 FCR 301 at [45]; *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; 117 FCR 424 (Full Court) at [21]-[25]. Demonstrating error in the exercise of that discretion is no easy task. It is not enough that this Court might have reached a different conclusion on the same facts and evidence.

## Contraventions established and penalties imposed

1. Sinpek operated a petrol station and convenience store, including a cafe, at Doyalson on the Central Coast of New South Wales, trading continuously “24/7”. The business was sold on 26 July 2018 and the premises were apparently vacated the same day. Sinpek was found to have contravened the *FW Act* in relation to two of its employees, Mr Sandeep Singh Dhariwal and Ms Raman Kumari, during the period from 8 January 2015 to 10 August 2016. Mr and Ms Singh were found to be involved in Sinpek’s contraventions and thereby liable for them under s 550 of the *FW Act*.
2. The substance of the declarations were that:
3. both Mr and Ms Singh were involved in contraventions of the following provisions:
   1. s 45 of the *FW Act* by failing to pay to Ms Kumari the minimum full-time hourly rates as required by cl 33.4 of the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* (***Modern Award***);
   2. s 45 of the *FW Act* by failing to pay to Ms Kumari the Shiftwork Loading Rates as required by cl 42.2 of the *Modern Award*;
   3. s 45 of the *FW Act* by failing to pay to Ms Kumari the Full-time Saturday Rates as required by cl 43.3(a)(i) of the *Modern Award*;
   4. s 45 of the *FW Act* by failing to pay each of Mr Dhariwal and Ms Kumari the Full-time Sunday Rates as required by cl 43.3(a)(ii) of the *Modern Award*;
   5. s 45 of the *FW Act* by failing to pay each of Mr Dhariwal and Ms Kumari Public Holiday Rates as required by cl 43.3(a)(iii) of the *Modern Award*;
   6. s 45 of the *FW Act* by failing to pay each of Mr Dhariwal and Ms Kumari overtime rates for overtime hours worked between Monday to Saturday as required by cl 43.4(a)(i) of the *Modern Award*;
   7. s 45 of the *FW Act* by failing to pay each of Mr Dhariwal and Ms Kumari overtime rates for overtime hours worked on Sundays as required by cl 43.4(a)(ii) of the *Modern Award*;
   8. s 45 of the *FW Act* by failing to pay each of Mr Dhariwal and Ms Kumari overtime rates for overtime hours worked on public holidays as required by cl 43.4(a)(iii) of the *Modern Award*;
   9. s 44 of the *FW Act* by failing to pay each of Mr Dhariwal and Ms Kumari annual leave on termination of employment as required by s 90(2) of the *FW Act*;
   10. s 44 of the *FW Act* by failing to pay Mr Dhariwal his personal leave during his employment as required by s 99 of the *FW Act*;
   11. s 44 of the *FW Act* by failing to pay each of Mr Dhariwal and Ms Kumari any amount in lieu of the Minimum Period of Notice as required by s 117(1) of the *FW Act*; and
   12. s 536(1) of the *FW Act* by failing to provide each of Mr Dhariwal and Ms Kumari with pay slips between 1 January 2016 and 29 August 2016.
4. Mr Singh alone was involved in the following further contraventions:
   1. s 325 of the *FW Act* by requiring Mr Dhariwal to pay the Fuel Payment for the theft of fuel by customers to Mr Singh;
   2. s 325 of the *FW Act* by requiring Mr Dhariwal to pay the Income Tax Amount and/or the Tax Payment to Mr Singh in respect of income tax; and
   3. s 535(1) of the *FW Act* by failing to keep leave and termination records in relation to Mr Dhariwal and Ms Kumari as prescribed by regs 3.36(1) and 3.40 of the *Fair Work* *Regulations 2009* (Cth).

All of the above contraventions were contested, except for a late concession as to annual leave, being the Sinpek contravention listed at [5(1)(i)] above.

1. The maximum penalty for each contravention was $10,800 except for [5(1)(l)] and [5(2)(c)], being contraventions of the requirement to provide payslips and keep leave and termination records, in relation to each of which the maximum penalty was $5,400. However, the sixth to eighth contraventions listed at [5(1)(f)-(h)] above, all relating to overtime, were treated as a single course of conduct as submitted by the FWO to be appropriate. The effect of that approach was that Mr Singh was effectively penalised for 13 contraventions, and Ms Singh for 10 contraventions. Treated in that way, the contraventions gave rise to a collective maximum penalty of $129,600 for Mr Singh and of $102,600 for Ms Singh.
2. In orders made for reasons given in the penalty judgment, necessarily to be read with the reasons in the liability judgment, the primary judge imposed penalties totalling $120,000 on Mr Singh and $90,000 on Ms Singh. Those penalties were above the ranges set out in FWO submissions furnished pre-trial which were expressly sought to be departed from by reason of what emerged at the trial, by a submission to the effect that the penalties should be at least at the top of the ranges suggested pre-trial. The appellants, via their lawyers, were therefore on notice that the penalty that might be imposed could be in excess of the ranges initially suggested by the FWO, such that there was no denial of procedural fairness by his Honour: cf *Australian Competition and Consumer Commission v* ***Reckitt Benckiser*** *(Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 at [178]-[179]; *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The* ***Broadway on Ann*** *Case)* [2018] FCAFC 126; 265 FCR 208 at [156]-[157]; see also *Pattinson v Australian Building and Construction Commissioner* [2020] FCAFC 177; 384 ALR 75; 299 IR 404.
3. The primary judge’s reasons for imposing such a high proportion of the maximum available penalties are among the key issues in this appeal. The payment of the penalties has been stayed by consent pending the outcome of this appeal. His Honour also refused an application for the payment of the penalties by instalments.

## The notice of appeal

1. The notice of appeal raises five grounds. The first four grounds may be summarised as alleging the following overt errors leading to penalties, individually and collectively, that are said to be manifestly excessive in all the circumstances:
2. error in determining the objective seriousness of the contraventions, and in particular in concluding that all of the contraventions were in the worst category;
3. error in relation to the subjective circumstances of the appellants, in substance allegations of taking into account irrelevant considerations and failing to take into account relevant considerations;
4. error in the application of the totality principle; and
5. error in the application of the course of conduct principles.
6. The notice of appeal also has a fifth ground asserting error in refusing the application to pay the penalties imposed by instalments. That ground of appeal was appropriately abandoned at the appeal hearing, and therefore will not be considered further in these reasons.

## The burden of the liability and penalty judgments as relevant to penalty imposition

1. The primary judge made a series of adverse findings which reflected not just the seriousness of the conduct, but the way in which the appellants sought to obscure or otherwise deny their responsibility for what had taken place. This included an unsuccessful attempt to shift responsibility for the conduct onto one of the former employees, Mr Dhariwal, by the use of a job title that did not reflect his true duties and responsibilities, and which was also used in an attempt to deny him award coverage. Contrary to the appellants’ case, his Honour found that Mr Dhariwal was monitored throughout his employment by the appellants. His Honour similarly found that Ms Kumari did not perform a management role, as the appellants asserted in an attempt to make her responsible instead of them as well.
2. The primary judge accepted that Mr Dhariwal and Ms Kumari each consistently worked between 40 and 60 hours per week, including regular evening and weekend work, and additionally that Ms Kumari was paid at a rate insufficient to meet additional award entitlements. His Honour found that Ms Kumari was not paid any wages for the first three months that she worked for Sinpek; that neither employee was paid additional amounts for weekend and public holiday work, or overtime; and, that neither was paid for untaken annual leave or on termination of employment. Each was found to have been constructively dismissed, rather than having resigned as the appellants contended. The total unpaid entitlements were $52,722.48 (being the sum ordered to be paid as compensation) in addition to which the Court ordered that pre-judgment interest be paid.
3. The primary judge made a range of findings that the appellants were directly involved in allocating duties, keeping records and setting and paying wages, which was done exclusively by bank deposit so as to be a record of what had, and had not, been paid. These findings were all contrary to alternative cases advanced by the appellants that were found to be false. On any view, the appellants’ moral culpability was high because they were the means by which Sinpek actually committed the contraventions. Given the confinement of the purpose of civil penalties to deterrence, these false claims were found to elevate the need for specific and general deterrence.
4. The attempted exculpatory testimony of the appellants as to payroll, pay slips and rosters was found by the primary judge, at [49] of the liability judgment, to be “*unresponsive, evasive and implausible*”. As was observed in *Reckitt Benckiser* at [131], “*if any degree of awareness of the actual or potential unlawfulness of the conduct is proved then, all other things being equal, the contravention is necessarily more serious*”. The primary judge expressly found that both appellants knew that their company’s employees were being underpaid for what was a protracted period of time, including knowing that the *Modern Award* applied to them and that the entitlements under it were greater than what the employees were receiving. A further and important aggravating feature was that Ms Singh was found to have prepared a false statutory declaration for Mr Dhariwal to sign, despite her denying ever having seen it before.
5. There are many other adverse findings of credit and truthfulness made against the appellants. Not all of them need to be detailed here. It suffices to say that the burden of the primary judge’s reasoning and conclusions was that this was deliberate and planned contravening conduct over some 18 months, including false recording keeping. As the case emerged at trial, it would have been quite artificial for his Honour to have assessed the conduct in respect of each contravention in isolation. The nature and extent of each contravention contributed to an important understanding of the states of mind that existed in light of the evidence taken as a whole. The making of such findings, when available to be made, is an “*essential judicial function*”: *Reckitt Benckiser* at [132].

## Ground 1 – objective seriousness and worst category

1. The appellants allege that the following constitute errors by the primary judge:
2. Acting upon a wrong principle by finding that the appellants’ conduct was at the “*worst end*”, that is, in the worst category, in terms of gravity, because the contraventions were not at or near that class of case, citing *Auimatagi v Australian Building and Construction Commissioner* [2018] FCAFC 191; 267 FCR 268 at [176]; in turn citing *Broadway on Ann* at [102]-[110] and *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Non-Indemnification Personal Payment Case)* [2018] FCAFC 97; 264 FCR 155| at [22]. Those authorities serve to emphasise the evaluative judgment involved in such an assessment.
3. Appearing to adopt a uniform approach to penalty irrespective of the facts of each individual contravention, citing an unreasonable requirement to pay for petrol stolen by customers, in the instant case worth $30. I note that the heart of that contravention was not the amount involved as a matter of chance determined by the conduct of an individual customer, but rather the approach of making an employee financially responsible for conduct of that kind.
4. Failing to consider whether the penalty was proportionate to the contravening conduct, citing *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; 254 FCR 68 at [107] at which it was observed, supported by well-established prior authority that “[e]*ven where the maximum penalty for the contravention is high, and the amount necessary to provide effective deterrence is large, the amount of the penalty should be proportionate to the contravention and should not be so high as to be oppressive*”. In this case, the assessment was significantly affected by the attitude of the appellants towards their own conduct, improperly endeavouring to evade responsibility for what they had done, elevating the need for both specific and general deterrence and enabling the conduct to be viewed in that light.
5. Imposing penalties that were not appropriate and were therefore beyond the undoubtedly broad discretion available and were manifestly excessive.
6. The main problem is that each of these arguments, and especially the last of them, are advanced as conclusions or suppositions, rather than by a process which identifies and establishes error. They rise little higher than suggesting that different conclusions could have been reached by viewing the contraventions in a different way. When the primary judge’s reasons are read in a holistic way, having regard to the totality of the conduct and the dishonest attempts to evade responsibility for aspects of it, the duration of key aspects of the conduct, and its planned and deliberate nature, it is clear that his Honour was entitled to reach the conclusions that he did, even if nuanced fault can perhaps be found in aspects of the detail. Cherry picking aspects of the reasoning process by reference to isolated passages, and pointing to minor infelicities, does not do justice to his Honour’s detailed assessment of what had taken place and the overall conclusions reached.
7. In the way in which this ground was advanced orally and in writing, it did not rise higher than taking issue with the conclusions reached. Far from being satisfied that error has been established, I am in substantial agreement with the reasoning and conclusions reached. Accordingly this ground must fail.

## Ground 2 – irrelevant and relevant considerations

1. The grounds of irrelevant and relevant considerations are best understood as allegations of having regard to something that is forbidden, and failing to have regard to something that is mandatory. In the context of criminal sentencing and civil penalty imposition they are inherently very difficult grounds to succeed upon because of the breadth of the discretion being exercised and the role of the judicial officer in attributing significance, or lack of significance, to any particular fact or circumstance. Moreover, taking issue with the weight or emphasis given to a particular feature of the case falls well short of establishing this kind of error. The ground is complicated in this proceeding by the submissions advanced in support of it referring to a denial of procedural fairness, which is a very different kind of error if established.
2. The central complaints made in support of this ground are that the primary judge appeared to have placed significance upon the making of substantial unsecured loans by Sinpek shortly before it was put into liquidation, with the intention of preventing enforcement of compensation orders, and that this series of findings is contrary to the evidence. It is submitted that the appellants were not put on notice that this approach was going to be taken. This was the source of the allegation of a denial of procedural fairness. The other aspect of the way in which this ground was sought to be advanced concerns an alleged failure to have regard to the absence of prior contraventions, the relatively small size of Sinpek with some 10-15 employees, and the mitigating admission of the failure to pay annual leave upon termination of employment.
3. This ground fails both as to its pleaded aspect of relevant/irrelevant considerations, and as to its unpleaded aspect of denial of procedural fairness. The objective facts readily available to be found on the available evidence as to the asserted irrelevant considerations are that at the time allegations had been made that Sinpek was indebted to its employees, the appellants caused unsecured loans to be made to their accountant with no benefit to the company being apparent, and there being a proper basis for a serious concern as to solvency. Sinpek was placed into voluntary liquidation after the loan was made and during the pendency of the proceeding before the Federal Circuit Court. One of the reasons for that taking place was the fact of defending those proceedings. In those circumstances, it was both open and obvious that his Honour might infer that the appellants were taking steps intended to be adverse to the interests of the former employees, irrespective of whether this endeavour was likely to succeed.
4. Whether or not the evidence necessarily supported the full sequence of events identified by the primary judge, the general thrust of what had taken place was, predictably, available to be taken into account, and this was far from irrelevant in the general sense, let alone the specific sense required to be established of being a forbidden consideration. The real point is that this lent weight to the conclusion already available to be reached that Sinpek, and the appellants as the natural persons involved in conducting its affairs, were not focused on complying with the obligations held to the company’s employees, including paying or repaying their entitlements. It would have been surprising had the primary judge not had regard to this material as contributing to the overall picture and the seriousness of the contraventions.
5. As to the asserted obligation to have regard to the absence of prior contraventions, the size of Sinpek, and the admission that was made as to the failure to pay out annual leave to the employees, the appellants acknowledge that the primary judge referred to each, and that his Honour described them has having some force but for the need for specific and general deterrence. Once that approach is identified, the basis for this complaint becomes one of weight, not absence of consideration. There is no error in the approach taken by his Honour.
6. This ground must therefore fail.

## Grounds 3 and 4 – totality and course of conduct

1. These two grounds were addressed together by the appellants. The substance of these complaints is that the contravening conduct overlapped to such a degree that the primary judge erred in limiting the size of the overall totality reduction from the available maximum and also erred in failing to treat aspects of the conduct as falling within a single course of conduct, thereby failing to reduce the scope of the maximum penalty effectively available to be imposed.
2. The principles involved are not in doubt, nor that the primary judge was aware of them and clearly enough intended to apply them. The issues raised concern their application. It is important to keep in mind the observation in ***Parker*** *v Australian Building and Construction Commissioner* [2019] FCAFC 56; 270 FCR 39 at [273] that course of conduct and totality are “*not rigid rules of law, but, rather, general principles to guide the exercise of the penalty imposing discretion*”. Further, as observed by reference to long-standing authority in *Parker* at [274], “*course of conduct is not a straitjacket, denying a judge the capacity to craft a result that properly reflects the conduct in question even if the course of conduct principle does squarely apply*”. Totality is even less of a straitjacket, because it ordinarily operates as a final check to ensure that penalties correctly arrived at by reference to individual contraventions do not combine to create an unjust result overall. In relation to both principles, it is necessary for the appellants not merely to identify an alternative way of viewing what took place, but to demonstrate error: *Parker* at [280].
3. The problem with the complaint as to totality is that this was expressly referred to by the primary judge and taken into account. Unless there is some reason to conclude that this is not in fact what took place, that evaluative exercise is one for the primary judge to carry out with the benefit of observing all of the evidence first hand over numerous hearing days. The very fact that a totality discount was not just referred to, but in fact applied, and the complaint concerns only the quantum of that discount, indicates the steepness of the hurdle in establishing error in this evaluative exercise. I am not satisfied that surmounting this hurdle has been meaningfully attempted, let alone achieved. I see no error in the careful and considered approach taken in this regard by his Honour.
4. In relation to the complaint made about the primary judge’s approach to course of conduct, his Honour had regard to the different provisions that had been contravened, identifying those in common and those which were separate and distinct. As the FWO points out, this is consistent with principle, especially as detailed for contraventions of this kind by *Rocky Holdings Pty Ltd v Fair Work Ombudsman* [2014] FCAFC 62; 221 FCR 153 at [10]-[23]. As noted at [6] above, his Honour did regard aspects of the conduct (concerning overtime) as reflecting a course of conduct, but not other aspects. Doubtless his Honour could have aggregated the conduct differently, but I am not satisfied that the approach taken involved any error.
5. As the necessary error has not been established, both of these grounds must fail.

## Conclusion

1. As all four grounds of appeal that were pressed have failed, the appeal must be dismissed. There is no suggestion that this case requires any departure from the usual rule that this is a “*no costs*” jurisdiction.

|  |
| --- |
| I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Bromwich. |

Associate:

Dated: 5 February 2021