FEDERAL COURT OF AUSTRALIA

Mining and Energy Union v BM Alliance Coal Operations Pty Ltd (No 2) [2023] FCA 1594

File number(s):	QUD 155 of 2020
Judgment of:	**COLLIER ACJ**
Date of judgment:	15 December 2023
Catchwords:	**INDUSTRIAL LAW** – Assessment of pecuniary penalty to be imposed pursuant to s 546 *Fair Work Act 2009* (Cth) - exercise of workplace rights referable to safety– principles relevant to appropriate penalty – assessment of compensation for economic and non-economic loss to be awarded pursuant to s 545 *Fair Work Act 2009* (Cth) – compensation for hurt, humiliation and distress – whether compensation awarded for subsequent unemployment
Legislation:	*Fair Work Act 2009* (Cth) ss 340, 545, 546 *Fair Work (Registered Organisations) Act 2009* (Cth) s 116
Cases cited:	*Australasian Meat Industry Employees Union v Dick Stone Pty Ltd (No 2)* [2022] FCA 1263 *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (Bendigo Theatre Case) (No 2)* [2018] FCA 1211 *Australian Building and Construction Commissioner v Pattinson* (2022) 399 ALR 599; [2022] HCA 13 *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 3)* [2005] FCA 265 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 *Australian Licenced Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* (2011) 193 FCR 526; [2011] FCA 333 *Bostik (Australia) Pty Ltd v Gorgevski* (1992) 36 FCR 20 *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v ACI Operations Pty Ltd* [2006] FCA 122 *Construction Forestry, Maritime, Mining and Energy Union v BM Alliance Coal Operations Pty Ltd* [2023] FCA 30 *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction*

	Commissioner (The Non-Indemnification Personal Payment Case) (2018) 264 FCR 155 *Construction, Forestry, Maritime, Mining and Energy Union v BM Alliance Coal Operations Pty Ltd (No 3)* [2022] FCA 1345 *Dafallah v Fair Work Commission* (2014) 225 FCR 559 *Maritime Union v Fair Work Ombudsman* [2015] FCAFC 120 *New Image Photographics Pty Ltd v Fair Work Ombudsman* [2013] FCA 1385 *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249; [2012] FCAFC 20
Division:	Fair Work Division
Registry:	Queensland
National Practice Area:	Employment and Industrial Relations
Number of paragraphs:	60
Date of last submission/s:	11 May 2023
Date of hearing:	24 May 2023
Counsel for the Applicant:	Mr C Massy
Solicitor for the Applicant:	Hall Payne Lawyers
Counsel for the Respondent:	Mr D Mahendra
Solicitor for the Respondent:	Herbert Smith Freehills

ORDERS

QUD 155 of 2020

BETWEEN:	**MINING AND ENERGY UNION** Applicant
AND:	**BM ALLIANCE COAL OPERATIONS PTY LTD** Respondent

ORDER MADE BY: **COLLIER ACJ**

DATE OF ORDER: **15 DECEMBER 2023**

PENAL NOTICE

TO: BM ALLIANCE COAL OPERATIONS PTY LTD
IF YOU (BEING THE PERSON BOUND BY THIS ORDER):

(A) REFUSE OR NEGLECT TO DO ANY ACT WITHIN THE TIME SPECIFIED IN THIS ORDER FOR THE DOING OF THE ACT; OR

(B) DISOBEY THE ORDER BY DOING AN ACT WHICH THE ORDER REQUIRES YOU NOT TO DO,

YOU WILL BE LIABLE TO IMPRISONMENT, SEQUESTRATION OF PROPERTY OR OTHER PUNISHMENT.

ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS YOU TO BREACH THE TERMS OF THIS ORDER MAY BE SIMILARLY PUNISHED.

THE COURT ORDERS THAT:

1. Pursuant to s 546 of the *Fair Work Act 2009* (Cth), the respondent pay pecuniary penalties totalling $40,000 to the applicant within 30 days.
2. Pursuant to s 545 of the *Fair Work Act 2009* (Cth), the respondent pay compensation to Mr Daryl Meikle, being:
   (a) $5,000.00 for non-economic loss; and

(b) the equivalent of six months remuneration, with the parties to agree to an average monthly amount that Mr Meikle would have received had he remained working at the Daunia Mine after 16 January 2020.

3. 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

COLLIER ACJ

INTRODUCTION

1 On 30 January 2023, I delivered judgment in *Construction Forestry, Maritime, Mining and Energy Union v BM Alliance Coal Operations Pty Ltd* [2023] FCA 30 (**Liability Judgment**). The factual background of this matter is set out in [4] of the Liability Judgment. I note that as a result of the Mining and Energy division's withdrawal from the amalgamated Construction, Forestry, Maritime, Mining and Energy Union pursuant to Part 3 of the *Fair Work (Registered Organisations) Act 2009* (Cth) (**FWRO Act**), the applicant is now the Mining and Energy Union (**applicant**). By operation of s 116 of the FWRO Act, these proceedings have continued with the Mining and Energy Union as the applicant.

2 Relevantly, I made findings that on or about 16 January 2020 the respondent, BM Alliance Coal Operations Pty Ltd (**BMA**), contravened s 340 of the *Fair Work Act 2009* (Cth) (**Fair Work Act**) by taking adverse action against Mr Daryl Meikle, an employee of WorkPac Pty Ltd, because Mr Meikle had exercised workplace rights.

3 On 30 January 2023, I made the following declaration:

> BM Alliance Coal Operations Pty Ltd (respondent) contravened s. 340 of the *Fair Work Act 2009* (Cth) (**FW Act**) by taking adverse action within the meaning of Item 3(d) in the table in s. 342 of the FW Act against Mr Daryl Meikle, an employee of WorkPac Pty Ltd (**WorkPac**), by refusing to make use of services offered by WorkPac as an independent contractor to the respondent, in that the respondent excluded Mr Meikle from the Daunia Mine on or about 16 January 2020 because he had exercised workplace rights on 7, 8 and 9 December 2019.

4 Currently before the Court are the questions of quantum of penalty to be imposed on the respondent under s 545 of the Fair Work Act, and whether an award of compensation should be made to Mr Daryl Meikle under s 546 of the Fair Work Act.

RELEVANT LEGISLATION

5 Section 545 of the Fair Work Act provides:

> **Orders that can be made by particular courts**
>
> *Federal Court and Federal Circuit and Family Court of Australia (Division 2)*
>
> (1) The Federal Court or the Federal Circuit and Family Court of Australia (Division 2) may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil

remedy provision.

Note 1: For the court's power to make pecuniary penalty orders, see section 546.

Note 2: For limitations on orders in relation to costs, see section 570.

Note 3: The Federal Court and the Federal Circuit and Family Court of Australia (Division 2) may grant injunctions in relation to industrial action under subsections 417(3) and 421(3).

Note 4: There are limitations on orders that can be made in relation to contraventions of subsection 463(1) or (2) (which deals with protected action ballot orders) (see subsection 463(3)).

(2) Without limiting subsection (1), orders the Federal Court or Federal Circuit and Family Court of Australia (Division 2) may make include the following:

(a) an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention;

(b) an order awarding compensation for loss that a person has suffered because of the contravention;

(c) an order for reinstatement of a person.

Eligible State or Territory courts

(3) An eligible State or Territory court may order an employer to pay an amount to, or on behalf of, an employee of the employer if the court is satisfied that:

(a) the employer was required to pay the amount under this Act or a fair work instrument; and

(b) the employer has contravened a civil remedy provision by failing to pay the amount.

Note 1: For the court's power to make pecuniary penalty orders, see section 546.

Note 2: For limitations on orders in relation to costs, see section 570.

(3A) An eligible State or Territory court may order an outworker entity to pay an amount to, or on behalf of, an outworker if the court is satisfied that:

(a) the outworker entity was required to pay the amount under a modern award; and

(b) the outworker entity has contravened a civil remedy provision by failing to pay the amount.

Note 1: For the court's power to make pecuniary penalty orders, see section 546.

Note 2: For limitations on orders in relation to costs, see section 570.

When orders may be made

(4) A court may make an order under this section:

(a) on its own initiative, during proceedings before the court; or

(b) on application.

Time limit for orders in relation to underpayments

(5) A court must not make an order under this section in relation to an underpayment that relates to a period that is more than 6 years before the proceedings concerned commenced.

6 Section 546 of the Fair Work Act provides:

Pecuniary penalty orders

(1) The Federal Court, the Federal Circuit and Family Court of Australia (Division 2) or an eligible State or Territory court may, on application, order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision.

Note 1: Pecuniary penalty orders cannot be made in relation to conduct that contravenes a term of a modern award, a national minimum wage order or an enterprise agreement only because of the retrospective effect of a determination (see subsections 167(3) and 298(2)).

Note 2: Pecuniary penalty orders cannot be made in relation to conduct that contravenes a term of an enterprise agreement only because of the retrospective effect of an amendment made under paragraph 227B(3)(b) (see subsection 227E(2)).

Determining amount of pecuniary penalty

(2) The pecuniary penalty must not be more than:

(a) if the person is an individual--the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2); or

(b) if the person is a body corporate--5 times the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2).

Payment of penalty

(3) The court may order that the pecuniary penalty, or a part of the penalty, be paid to:

(a) the Commonwealth; or

(b) a particular organisation; or

(c) a particular person.

Recovery of penalty

(4) The pecuniary penalty may be recovered as a debt due to the person to whom the penalty is payable.

No limitation on orders

(5) To avoid doubt, a court may make a pecuniary penalty order in addition to one or more orders under section 545.

EVIDENCE

7 The applicant relied on the following affidavit material:

- Affidavit of Luke Tiley filed 11 May 2023
- Affidavit of Daryl Meikle filed 11 May 2023

8 The respondent relied on the following affidavit material:

- Affidavit of Susan Margaret Ditton filed 28 April 2023
- Affidavit of Crispin Galvin Scott filed 28 April 2023

SUBMISSIONS

9 In summary, the applicant submitted as follows:

(a) The Court should find that the respondent's conduct was very serious, and that a penalty approaching the maximum was appropriate.

(b) The respondent's conduct was deliberate and could not be said to have "occurred in the heat of the moment".

(c) The respondent initially excluded Mr Meikle from the Daunia Mine (the **Mine**) on 10 December 2019, and on 16 January 2020 permanently excluded him. That the conduct took place over a period in excess of one month, in which time there was ample opportunity for the respondent to have reflected on and corrected its conduct, is an aggravating factor.

(d) The respondent's conduct undermined important protections of the *Coal Mining Safety and Health Act 1999* (Cth) (**CMSH Act**).

(e) Mr Meikle suffered substantial economic loss and personal distress as a result of the adverse conduct.

(f) The relevant decision-maker was not a junior employee, but rather a superintendent who had significant managerial responsibility.

(g) The respondent was recently found to have contravened the Fair Work Act with almost identical conduct, suggesting the need for deterrence is very high.

(h) The respondent arranged its affair to allow employees of BHP Coal Pty Ltd (**BHP**) (which had prior contraventions of Part 3(1) of the Fair Work Act) to make decisions regarding the matter subject of this proceeding.

(i) The respondent is a large and profitable company, and it follows that, to have a deterrent effect, a penalty approaching the maximum is appropriate.

(j) Compensation in the form of general damages for hurt, humiliation and distress, as well as compensation for past economic loss, should be awarded.

(k) Compensation in the amount of $20,000 would be appropriate compensation for the hurt, distress and humiliation that Mr Meikle suffered as a result of the contravening conduct.

(l) Mr Meikle was unable to find alternative work after being excluded from the Mine for a period of 16 months, resulting economic loss of $139,744.09. This amount should be grossed up to reflect increased taxation.

10 In summary, the respondent submitted:

(a) It was not fair to describe the contravention as "extremely serious" or "very serious", warranting a penalty "approaching the maximum".

(b) The respondent did not seek to undermine the protections of the CMSH Act.

(c) The period in which the conduct took place was limited to the decision to exclude Mr Meikle from the Mine on 10 December 2019. It cannot be said that the reaffirmation of the decision on 16 January 2020 amounted to a "considerate and deliberate" contravention "over a period in excess of one month".

(d) The fact that BMA is a large corporation is relevant to specific deterrence, but does not justify any significant penalty.

(e) The applicant did not provide any evidence that the respondent's contraventions resulted in Mr Meikle experiencing any health issues.

(f) Mr Meikle's inability to obtain work could not be entirely attributed to the respondent, and could be the consequence of a significant number of other factors.

(g) Whilst Mr Hennessey had authority to make decisions about access to the Mine on behalf of the respondent, Mr Hennessey was not employed by the respondent. Mr Hennessey's role was at the "mid-point" in the management of the Mine, and he did not have any managerial authority beyond that.

(h) The respondent had only had one prior incident of contravening conduct, and was a good corporate citizen.

(i) The respondent did not accept responsibility for all prior actions of employees of BHP.

(j) Subsequent to the Liability Judgment, the respondent developed a presentation to be delivered to workers to the Mine during pre-start and return to work meetings seeking to reinforce that all workers have a right to report safety concerns without fear of reprisal.

(k) The likely reputational impact caused by publication of the Liability Judgment was itself a deterrent.

(l) The respondent's history of compliance with the Fair Work Act demonstrates that specific deterrence was of limited importance in this case.

(m) The Court should avoid making the respondent a "scapegoat" for others in the coal mining industry.

(n) There was no proper evidentiary basis to award compensation by way of general damages.

(o) In assessing Mr Meikle's economic loss, the Court was required to consider the likelihood that Mr Meikle would have remained working at the Mine, the likelihood that he would have been able to find other work if excluded from the Mine, and the period of time relevant to those considerations.

(p) Any economic loss should be limited to 3 months' remuneration.

(q) It would be appropriate for the Court to Order the following:

(i) The imposition of one pecuniary penalty totalling $15,000 - $20,000 payable to the applicant;

(ii) An award of compensation, payable to Mr Meikle, limited to 3 months' remuneration with the parties to agree to an average monthly amount that he would have received had he remained working at the Mine; and

(iii) No order as to costs.

CONSIDERATION

Legal Principles

11 It is well established that the primary object of imposing pecuniary penalties for contraventions of the Fair Work Act is to deter further contraventions by the contravener: see *Australian Building and Construction Commissioner v Pattinson* (2022) 399 ALR 599; [2022] HCA 13 at

[15]; *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Non-Indemnification Personal Payment Case)* [2018] FCAFC 97; (2018) 264 FCR 155 at [19]-[22].

12 It is not, however, appropriate for an imposed penalty to be disproportionate to the relevant contravention: see *The Non-Indemnification Personal Payment Case* at [19]-[22].

13 The penalty imposed should also be such that it is not an "acceptable cost of doing business" for the contravener: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at [66].

14 In the present case it is not in dispute that there was only one contravention of the Fair Work Act by the respondent.

15 As Katzmann J explained in *Australasian Meat Industry Employees Union v Dick Stone Pty Ltd (No 2)* [2022] FCA 1263 at [25], factors which may guide the Court in determining the penalty to be imposed include:

> the nature and extent of the contravening conduct and the circumstances in which it took place; the nature and extent of loss or damage; whether the conduct was deliberate; the period over which the conduct extended; whether senior management was involved; whether the contraventions are truly distinct or arose out of the one course of conduct; whether the contravener has previously engaged in similar conduct; the size of the contravening company; the existence and extent of any contrition and corrective action; and whether the company has a corporate culture conductive to compliance. See, for example, *TPC v CSR* at 52, 152–3 (French J); *Kelly v Fitzpatrick* [2007] FCA 1080; 166 IR 14 (Tracey J) at [14].

Assessment of penalty

Seriousness of the Conduct

16 The applicant submitted that the respondent's conduct was "deliberate" and "very serious" as the conduct:

(a) amounted to *de facto* termination of Mr Meikle's employment;

(b) directly undermined the primary method by which the objects of the CMSH Act were to be achieved;

(c) undermined a principal protection for workers within the CMSH Act;

(d) was likely to dissuade other workers from exercising important statutory rights; and

(e) undermined workplace health and safety in a highly dangerous work environment.

17 The applicant submitted that a penalty approaching the maximum would be appropriate.

18 The respondent submitted that it was not fair to describe the contravention as "extremely serious" or "very serious" warranting a penalty "approaching the maximum". It was accepted by the respondent that the rights and obligations arising under the CMSH Act were important protections, however it did not follow that the respondent sought to undermine these protections by excluding Mr Meikle from the Mine.

19 The contravening conduct of the respondent was serious in that, by taking adverse action against Mr Meikle for exercising workplace rights referable to workplace health and safety, the protections offered by the provisions of the CMSH Act were to that extent undermined. However in the circumstances of this case there was no evidence that, at the time of the respondent's conduct, Mr Meikle himself or anyone else was at risk of injury, nor was there evidence of aggravating conduct by either the decision-maker or other management employees at relevant times. In the circumstances I am satisfied that the objective seriousness of the respondent's contravention falls within the mid-range.

The Period in which the Conduct Took Place

20 Following Mr Meikle's exercise of workplace rights on 7, 8 and 9 December 2019, Mr Meikle was initially excluded from the Mine on 10 December 2019 pending the outcome of an investigation. On 16 January 2020, Mr Meikle was formally excluded from the Mine as a result of the outcome of the investigation.

21 Whilst Mr Meikle was subject to uncertainty as to his employment for the period between 10 December 2019 and 16 January 2020, the contravening conduct actually took place over no more than 3 days.

Nature and Extent of any Loss or Damage Sustained as a Result of the Conduct

22 The applicant submitted that the contravening conduct caused Mr Meikle significant economic loss amounting to approximately $139,744.09, and had a significant adverse effect on his health and wellbeing. Mr Meikle deposed that, following his exclusion from the Mine, he was unemployed for approximately 16 months, he felt worthless and like a failure, and he felt

excluded from social interactions. The applicant submitted that the significant impact on Mr Meikle was an aggravating factor.

23 The respondent did not dispute that the contravening conduct would have had a negative impact on Mr Meikle, however submitted that caution needed to be exercised in respect of Mr Meikle's evidence and his ability to recount his perception of mental health with respect to events that occurred almost 3 years earlier.

24 Overall, I accept that Mr Meikle suffered some damage and economic loss as a result of the contravening conduct, which is an aggravating factor. I am however not persuaded that the duration of long-term unemployment claimed by Mr Meikle can necessarily be attributed to the contravening conduct of the respondent. It is also somewhat implausible that Mr Meikle's social life would have been seriously affected by the respondent's contravention.

Involvement of Senior Management

25 Mr Hennessy was an employee of BHP at the time of the contravention. Whilst not an employee of the respondent, it is not in dispute that Mr Hennessy had authority to make decisions about access to the Mine on behalf of the respondent.

26 The parties accepted that the decision-maker, Mr Hennessy, did not hold a junior position within the Mine.

27 The respondent submitted that Mr Hennessy's role was at the "mid-point in the management structure of the Mine" and beyond that, he did not have any managerial authority for the respondent.

28 Whilst he had authority to make decisions in relation to the Mine, I am satisfied that Mr Hennessy was not involved in "senior management" within the Mine or BMA. Rather, Mr Hennessy appeared to be what is sometimes described colloquially as "middle management".

Circumstances of the Contravener, including prior contraventions and the need for deterrence

29 It is not in dispute that the respondent is a large and well-resourced company. It is generally accepted that a higher penalty may be justified in respect of a large, well-resourced contravener as effective specific deterrence, and to avoid the penalty simply being the cost of doing business: see *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 3)* [2005] FCA 265 at [39]; *Australian Competition and Consumer Commission v TPG*

Internet Pty Ltd (2013) 250 CLR 640 at [66]; *Pattinson* at [17]; *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (Bendigo Theatre Case) (No 2)* [2018] FCA 1211 at [16]; *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249; [2012] FCAFC 20 at [62].

30 On 11 November 2022, in a separate matter before me, I found that the respondent contravened s 340 of the Fair Work Act on and from 10 November 2017: see *Construction, Forestry, Maritime, Mining and Energy Union v BM Alliance Coal Operations Pty Ltd (No 3)* [2022] FCA 1345 (***BM Alliance (No 3)***). I note that at the time of the contravention the subject of these proceedings, *BM Alliance (No 3)* had not yet been decided. The circumstances of *BM Alliance (No 3)* are largely similar to those the subject of the present proceedings.

31 In my view, there is a need for specific deterrence given the recurrence of similar contraventions by the respondent across separate mine sites. The penalty to be imposed should reflect this.

32 The applicant additionally submitted that BHP's previous contraventions were relevant, in circumstances where the respondent has arranged its affairs such that decisions about matters of this type are made by employees of BHP on behalf of the respondent. The respondent submitted that it did not accept responsibility for all prior actions of BHP. Both arguments have merit. It follows that previous contraventions of BHP (as distinct from BMA) should be accorded limited weight.

33 The respondent submitted publicity of the Liability Judgment likely caused it reputational impact in circumstances where the respondent has an established profile in the community, and to that extent that publicity itself acts as a deterrent. I do not accept this submission. Negative publicity, even in the form of an adverse judgment, is no reason to mitigate any penalty in respect of the contravening conduct: see *New Image Photographics Pty Ltd v Fair Work Ombudsman* [2013] FCA 1385 at [65]. I do not consider that a lower penalty should be awarded for that reason.

Cooperation and contrition

34 The evidence of Ms Ditton that, since the Liability Judgment, the respondent has developed a presentation to be delivered to workers at the Mine, aiming to reinforce that all workers have a right to report safety concerns without fear of reprisal, is evidence of some corrective action by the respondent.

35 Whilst important to reinforce this message to employees, it is also important to ensure the contravening conduct is not repeated. The applicant submitted that a more appropriate indication of contrition by the respondent would have been for it to instruct Mine management to desist from future similar contravening conduct. There is merit to this submission.

Amount of penalty to be imposed

36 The maximum penalty for a contravention of s 340 of the Fair Work Act by a body corporate is 300 penalty units. At the time of the contravention, one penalty unit amounted to $210.00. It follows that the maximum penalty is $63,000.00.

37 The maximum penalty is not to be "applied mechanically": *Pattinson* (2022) 399 ALR 599 at [50]–[54].

38 The applicant submitted that the Court should impose a penalty approaching the maximum.

39 The respondent submitted that a penalty in the middle of the low range amounting to $15,000-$20,000 would be appropriate.

40 In my view, a penalty in the mid-range totalling $40,000 would be appropriate for the following reasons:

(a) The objective seriousness of the contravening conduct was in the mid-range;

(b) The decision-maker was not part of senior management;

(c) The contravening conduct did not extend over a lengthy period of time;

(d) The respondent is a large corporation;

(e) The penalty to be imposed should not be such that it could be viewed as simply a cost of doing business;

(f) The contravening conduct caused economic and non-economic loss to Mr Meikle;

(g) The contravening conduct concerned safety standards at the Mine, in respect of which workers should always feel comfortable to approach management; and

(h) There is a need for specific deterrence, noting further that this was the respondent's second instance of contravening conduct of a similar nature.

Compensation

41 The applicant also sought an award of the following compensation under s 545(2) of the Fair Work Act:

(a) $20,000 in the form of general damages; and

(b) $139,744.09 in respect of economic loss (to be "grossed up").

42 The respondent submitted that if an amount of compensation were to be awarded, the following would be appropriate:

(a) $5,000 to $10,000 in general damages; and

(b) An amount representing 3 months' remuneration for Mr Meikle.

Non-Economic Loss (general damages)

43 The Court has a wide power under s 545(2) to make any order it deems appropriate, including claims for distress, hurt or humiliation: see *Australian Licenced Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* [2011] FCA 333; (2011) 193 FCR 526 at [421], [441]-[449]. A causal connection between the contravention and loss claimed must be established: see *Maritime Union v Fair Work Ombudsman* [2015] FCAFC 120 at [28].

44 In his affidavit dated 23 March 2023, Mr Meikle deposed that as a result of exclusion from the Mine he:

(a) Felt worthless, deprived of the sense of achievement that comes with succeeding at work, like a failure and like he had let his family down;

(b) Was unable to afford basic living expenses;

(c) Was unable to afford to go home to New Zealand to see his partner, children, or father who had advanced Parkinson's Disease;

(d) Felt socially isolated because he could not afford to socialise with his friends and he was deprived of the usual social interactions of working in a team at a Mine; and

(e) Attended counselling to assist with his deteriorating mental health however was unable to continue due to financial reasons.

45 The respondent submitted that there was no proper evidentiary basis referable to Mr Meikle's "mental health" to award Mr Meikle any compensation by way of general damages.

46 I note that there is no requirement for medical evidence to be provided to support non-economic loss in the nature of the current proceedings: *Dafallah v Fair Work Commission* (2014) 225 FCR 559.

47 In awarding compensation for hurt, humiliation and distress, I must be satisfied Mr Meikle suffered "more than the usual element of distress which accompanies most terminations": see *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v ACI Operations Pty Ltd* [2006] FCA 122 at [11].

48 I am satisfied that, as a direct consequence of the exclusion, the circumstances of the exclusion and the period of uncertainty caused Mr Meikle more distress than that which usually accompanies employment termination. I have formed this view in circumstances where, as I explained in the Liability judgment:

- Mr Meikle had exercised workplace rights referable to safety;
- His exclusion from the Mine was allegedly on the basis that he was an unacceptable safety risk at the Mine, which was not substantiated;
- Mr Meikle's exclusion was also associated with his alleged incorrect use of a "wrong" "SOP", when in reality that was not the case; and
- A relatively minor event involving Mr Meikle was escalated to his exclusion from the Mine.

49 However, I agree with the respondent that caution needs to be exercised concerning Mr Meikle's evidence of the psychological harm he suffered following the contraventions by the respondent.

50 In my view, the appropriate amount of compensation for non-economic loss suffered by Mr Meikle is $5,000.

Economic Loss

51 In summary, Mr Meikle deposed in his affidavit dated 23 March 2023 that:

(a) After being excluded from the Mine, he was unemployed until 11 May 2021;

(b) During the period from January 2020 until 11 May 2021 he applied for 51 jobs but was unsuccessful in all applications;

(c) His annual remuneration whilst working at the Mine was $105,787.50;

(d) In addition to his remuneration he received bonuses, the last bonus being $2,034.37; and

(e) During the period of 16 January 2020 and 11 May 2021 (a period of 68.71 weeks), he suffered a total loss of earnings of $139,744.09 comprising:

(i) wages of $139,781.9 ([$105,787.50 / 52] x 68.71);

(ii) three bonuses totalling $6,103.12 (3 x $2,034.37);

(iii) $13,859.07 lost superannuation (9.5% of $145,885.02);

(iv) Less $20,000 settlement from Workpac.

52 The applicant further sought that the amount of $139,744.09 be grossed up to account for increased taxation Mr Meikle would be required to pay.

53 The respondent submitted that the court should have regard to the likelihood that Mr Meikle would have remained working at the Mine, the likelihood he would have been able to find other work, and the period of time relevant to those considerations. The respondent's position was that economic loss should be limited to 3 months' remuneration having regard to (in summary):

- Mr Meikle's short length of service at the Mine;
- the limited experience Mr Meikle had working in the mining industry;
- Mr Meikle's age and ability to work in other industries; and
- the fact that, on basis of the limited evidence provided, Mr Meikle seemingly only applied for jobs for which he did not have any real experience (based on the evidence he has led).

54 At the hearing, Counsel for the applicant submitted that the majority of roles for which Mr Meikle applied were positions for which he was qualified.

55 As observed by Sheppard and Heerey JJ in *Bostik (Australia) Pty Ltd v Gorgevski* (1992) 36 FCR 20 at [32]:

> Where an employee is wrongfully dismissed, he is entitled, subject to mitigation, to damages equivalent to the wages he would have earned under the contract from the date of the dismissal to the end of the contract. The date when the contract would have come to an end, however, must be ascertained on the assumption that the employer would have exercised any power he may have had to bring the contract to an end in the way most beneficial to himself; that is to say, that he would have determined the contract at the earliest date at which he properly could do so …

56 In the present case I consider the evidence of Mr Meikle's attempts to mitigate his loss is relatively persuasive. However, I also accept the submission of the respondent that Mr Meikle's inability to obtain work could be the consequence of a significant number of other events, not directly attributable to the respondent. Further, the evidence that Mr Meikle would have remained working at the Mine is inconclusive. Mr Meikle gave evidence of other skills he held and industries in which he had worked. It is not clear to me that he sought to mitigate his loss by reference to those other skills or experience.

57 In assessing the calculation of economic loss, there is no persuasive evidence of substance before me to warrant the inclusion of bonuses, particularly where bonuses are generally dependent on various factors and it may be that Mr Meikle was not guaranteed to the receive the bonuses. The applicant has not provided evidence as to the prior frequency, amount or conditions of the bonuses.

58 On balance, I consider an appropriate award of compensation would be six months remuneration, with the parties to agree to an average monthly amount that Mr Meikle would have received had he remained working at the Mine from 16 January 2020.

CONCLUSION

59 For the reasons stated above, I consider the appropriate penalty to be paid by the respondent for contravention of s 340 of the Fair Work Act is in the amount of $40,000. Such penalty is to be paid by the respondent to the applicant within 30 days of the date of these Orders.

60 Further, for the reasons I have explained, I consider it appropriate for compensation to be payable to Mr Meikle by the respondent pursuant to s 545 of the Fair Work Act, being:

- $5,000.00 for non-economic loss, and
- The equivalent of six months remuneration, with the parties to agree to an average monthly amount that Mr Meikle would have received had he remained working at the Mine.

I certify that the preceding sixty (60) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Acting Chief Justice Collier.

Associate: 

Dated: 15 December 2023