FEDERAL COURT OF AUSTRALIA

Mining and Energy Union v BM Alliance Coal Operations Pty Ltd (No 4) [2023] FCA 1592

File number(s):	QUD 731 of 2018
Judgment of:	**COLLIER ACJ**
Date of judgment:	15 December 2023
Catchwords:	**INDUSTRIAL LAW** – Assessment of pecuniary penalties to be imposed pursuant to s 546 *Fair Work Act 2009* (Cth)– exercise of workplace right referable to safety at a mine - principles relevant to calculation of appropriate penalty – two contraventions arising from one course of conduct – totality principle - assessment of compensation for non-economic loss to be awarded pursuant to s 545 *Fair Work Act 2009* (Cth)
Legislation:	*Fair Work Act 2009* (Cth) ss 340, 361, 545, 546 *Fair Work (Registered Organisations) Act 2009* (Cth) s 116 *Coal Mining Safety & Health Act 1999* (Qld)
Cases cited:	*Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (Toowoomba Bypass Case)* [2021] FCA 1128 *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 Ingham (180 Brisbane Construction Case) (No 2)* [2021] FCA 263 *Australian Building and Construction Commissioner v Pattinson* (2022) 399 ALR 599; [2022] HCA 13 *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243; [2018] FCAFC 73 *Australian Licenced Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* [2011] FCA 333; (2011) 193 FCR 526 *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith*

	(2008) 165 FCR 560 *CFMMEU 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] FCAFC 97; (2018) 264 FCR 15 *Construction, Forestry, Maritime, Mining and Energy Union v BM Alliance Coal Operations Pty Ltd (No 3)* [2022] FCA 1345 *Maritime Union v Fair Work Ombudsman* [2015] FCAFC 120 *New Image Photographics Pty Ltd v Fair Work Ombudsman* [2013] FCA 1385 *Trade Practices Commission v CSR Ltd* (1991) ATPR 41-076
Division:	Fair Work Division
Registry:	Queensland
National Practice Area:	Employment and Industrial Relations
Number of paragraphs:	63
Date of last submission/s:	6 April 2023
Date of hearing:	27 April 2023
Counsel for the Applicant:	Mr C Dowling SC with Mr C Massy
Solicitor for the Applicant:	Hall Payne Lawyers
Counsel for the Respondent:	Mr M Follett KC
Solicitor for the Respondent:	Herbert Smith Freehills

ORDERS

QUD 731 of 2018

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 $80,000 to the applicant within 30 days.
2. Pursuant to s 545 of the *Fair Work Act 2009* (Cth), the respondent pay compensation totalling $15,000 to Ms Kim Star within 30 days.
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

1 On 11 November 2022, I delivered judgment in *Construction, Forestry, Maritime, Mining and Energy Union v BM Alliance Coal Operations Pty Ltd (No 3)* [2022] FCA 1345 (**Liability Judgment**). The factual background is set out at [2] 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 and from 10 November 2017 the respondent, BM Alliance Coal Operations Pty Ltd (**BMA**), contravened s 340 of the *Fair Work Act 2009* (Cth) (the **Fair Work Act**) by taking adverse action against Ms Kim Star, an employee of WorkPac Pty Ltd.

3 On 11 November 2022, I made orders as follows:

> 1. The Respondent contravened s. 340 of *Fair Work Act 2009* (Cth) (the **Fair Work Act**) on and from 10 November 2017 by taking adverse action against Kim Star, an employee of WorkPac Pty Ltd, by refusing to make use of services offered by WorkPac Pty Ltd as an independent contractor to the Respondent within the meaning in Item 3(d) in the table in s. 342 of the Fair Work Act, in that the Respondent excluded Kim Star from the Goonyella Riverside Mine (the **Mine**) because she had exercised a workplace right on or about 9 November 2017.
>
> 2. By reason of s. 362 of the Fair Work Act the Respondent contravened s. 340 of the Fair Act on 10 November 2017 in that, because she had exercised a workplace right on or about 9 November 2017, the Respondent advised, encouraged or incited WorkPac Pty Ltd to exclude its employee, Kim Star, from the Mine thereby discriminating between her and other employees of WorkPac Pty Ltd at the Mine.

4 Remaining for determination by the Court are the claims by the applicant for imposition of pecuniary penalties and an award of general damages.

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 Kim Star filed 10 February 2023
- Affidavit of Joseph John Kennedy filed 10 February 2023

8 In turn, the respondent relied on the following affidavit material:

- Affidavit of Crispin Galvin Scott filed 24 March 2023
- Affidavit of Crispin Galvin Scott filed 24 April 2023

SUBMISSIONS

9 In summary, the applicant submitted as follows:

(a) The Court should approach this matter on the basis that one penalty would not properly reflect the gravity of the wrongdoing by the respondent;

(b) The Court is entitled to proceed on the basis that the respondent engaged in the deliberate conduct of excluding Ms Star from the Mine because she had exercised a safety right;

(c) The respondent's failure to accept that its exclusion and *de facto* termination of a worker for exercising safety rights was wrong, shows that the respondent has no insight into the seriousness of its wrongdoing;

(d) A small penalty would not be effective in deterring the respondent due to the size of the respondent;

(e) The respondent has not offered any evidence of regret or, more importantly, evidence of corrective action of any kind;

(f) Because of the relationship between the respondent and BHP Coal Pty Ltd (**BHP**), the record of BHP is relevant to the question of deterrence;

(g) Publicity which accurately describe the Court's findings does not warrant any mitigation of the penalty to be imposed;

(h) Merely "understanding and appreciating" how a contravention ultimately occurred does not entitle a respondent to a discount;

(i) In determining an appropriate award of compensation, fear of physical harm should be considered, but it should not be said to be one of the key matters. Ms Star's evidence that she was subsequently unwilling to report safety issues at work should also be considered; and

(j) The court should impose penalties and award compensation of:

(i) Two penalties approaching the maximum; and

(ii) An award of $35,000 by way of general damages.

10 In summary, the respondent submitted as follows:

(a) When assessing the penalty to impose, the Court must not be persuaded, under the guise of the need for specific deterrence, to impose a higher penalty on a contravener such that it has retributive effect;

(b) The two contraventions arose out of a single course of conduct and were intrinsically linked, such that the Court should account for the commonalities between the separate contraventions and ensure that the contravener is not punished twice for the same conduct;

(c) The Court did not positively find that the respondent took the adverse action that it did because Ms Star had exercised a workplace right, rather the Court concluded that the respondent had failed to discharge the onus imposed by s 361 of the Fair Work Act. Accordingly, it is not fair to say that the contravention was deliberate or "extremely/very serious" or "egregious";

(d) Although the respondent does not dispute that it is a large corporation, that fact does not of itself or in combination with other facts justify any significant penalty;

(e) The respondent regrets the negative impact the contravening conduct had on Ms Star;

(f) Ms Star's affidavit sworn on 8 February 2023 primarily deals with Ms Star's feelings and state of mind with respect to different events which occurred almost 12 months after the contraventions, and which were not caused by the contraventions;

(g) Mr Gee was not employed by the respondent, however his role was at the mid-point in the management structure of the Mine. Mr Gee did not have any managerial authority for BHP or BMA beyond that which he had at the Mine;

(h) The respondent has no prior incidents of contravening conduct, and is entitled to be treated on the basis that this was its first contravention. The absence of previous contravention can warrant a "significant discount from the maximum penalty";

(i) Prior contraventions of the Fair Work Act by BHP Coal are not relevant as:

(i) The contraventions occurred in July 2011, being six and a half years before the conduct the subject of these proceedings; and

(ii) The respondent does not accept responsibility for all prior actions of other employees of BHP;

(j) The likely reputational impact of the highly publicised outcome of the Liability Judgment acts as a deterrent itself;

(k) The respondent's history of compliance with the Fair Work Act demonstrates that specific deterrence is of limited importance in this case;

(l) The respondent should not be made a "scapegoat" for others in the coal mining industry who have engaged, or may engage in similar conduct;

(m) In relation to compensation, Ms Star has not provided any independent evidence of having suffered psychological harm as a result of the contraventions, and primarily deposes to the impact of events that occurred almost 12 months after the contraventions; and

(n) The following Orders of the Court would be appropriate:

(i) the imposition of two pecuniary penalties, together totalling approximately $20,000-$25,000, payable to the applicant;

(ii) an award of compensation, payable to Ms Star, of approximately $5,000-$10,000; and

(iii) no order as to costs.

CONSIDERATION

Legal Principles

11 The legal principles concerning the imposition of penalties are well established.

12 In *Australian Building and Construction Commissioner v Pattinson* (2022) 399 ALR 599; [2022] HCA 13 (***Pattinson***), the majority explained at [15]:

> 15 Most importantly, it has long been recognised that, unlike criminal sentences, **civil penalties are imposed primarily, if not solely, for the purpose of deterrence**. The plurality in the *Agreed Penalties Case* said:
>
> "[W]hereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty, as French J explained in *Trade Practices Commission v CSR Ltd,* is primarily if not wholly protective in promoting the public interest in compliance:
>
> > 'Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Pt IV [of the *Trade Practices Act*] … The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act.'"
>
> (emphasis added, footnotes omitted)

13 As observed by the Full Court in *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], the following is relevant to determining the appropriate penalty:

> [19] It is unnecessary to engage in any extended discussion of principle. Of particular significance is the recognition that deterrence (general and specific) is the principal and indeed only object of the imposition of a penalty — to put a price on contravention that is sufficiently high to deter repetition by the contravener and others who might be tempted to contravene the Act … Retribution, denunciation and rehabilitation have no part to play.
>
> [20] **Relevant factors in the overall assessment of penalty were helpfully listed by French J in *CSR*. They have been adopted in many cases. For present purposes, they can be restated as follows: the nature, character and seriousness of the conduct; the loss and damage caused; the circumstances in which the conduct took place; the size of the contravener and its degree of power; the deliberateness of the conduct and the time over which it occurred; the degree of involvement of senior officials or management; the culture of the organisation as to compliance or contravention; and, any co-operation with the regulator and contrition.**
>
> [21] The seriousness of the contravention and other features of the conduct which may be seen as relevant to it … find their place in understanding the degree of deterrence that is necessary to be reflected in the size of the penalty …
>
> [22] The overwhelming importance of deterrence as the protective purpose of the penalty does not exclude the need to determine a penalty which is

> proportionate to the contravening conduct. The history of contravention is to be taken into account in fixing the proper level of penalty for the proportionate response to the contravention in question. Proportionality has within it the need to characterise the seriousness of the contravention. Proportionality of penal response to a contravention assessed by reference to its seriousness and gravity is an essential characteristic of the application of the statute. The penal response is for that contravention, not earlier contraventions … Prior contraventions may reveal an apparent disregard for the Act and the need for deterrence by a penalty at a level appropriate to achieve that objective. It is to be borne in mind, however, that it is for the conduct in question that the penalty is imposed, not for prior conduct.

(emphasis added)

14 The factors listed by French J in *Trade Practices Commission v CSR Ltd* (1991) ATPR 41-076 however are not to be utilised as a rigid legal checklist and only relevant factors should be considered: *Pattinson* at [19]; *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at 580 [91].

15 Further, the Court must exercise discretion in considering and balancing relevant factors and ensuring that deterrence is achieved: see *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (Toowoomba Bypass Case)* [2021] FCA 1128 at [55].

Assessment of Penalties

16 I now turn to assessment of the appropriate penalty to be imposed on the respondent for contravention of s 340 of the Fair Work Act.

Nature of the Contravention

17 The nature of the contraventions is set out in [2] of the Liability Judgment, and summarised at [133] of the Liability Judgment as follows:

> I am also satisfied that the respondent's conduct in excluding Ms Star from the Mine, and continuing to exclude her, constituted adverse action and/or advising, encouraging or inciting WorkPac to take adverse action against Ms Star within the meaning of the Fair Work Act, and that the respondent's reason for taking such action was that Ms Star had exercised workplace rights.

18 At [117] of the Liability Judgment, I found that the respondent failed to discharge the onus under s 361 of the Fair Work Act that the adverse action taken by the respondent was not for Ms Star's exercise of a workplace right. It followed that the respondent's actions were presumed to have been taken for a reason that would constitute a contravention of Part 3.1 of the Fair Work Act.

Seriousness of the Conduct

19 The applicant submitted that the conduct of the respondent was "deliberate" and undermined "workplace health and safety in a highly dangerous work environment". In doing so, principal protections within the *Coal Mining Safety & Health Act 1999* (Qld) (**CMSH Act**) were also undermined. It further submitted that, objectively, Ms Star would be exposed to immediate personal danger had she been required to drive the truck and dump the load without adequate lighting. Given these circumstances, the applicant submitted that the Court should find the conduct was very serious.

20 I accept that the respondent's conduct undermined workplace health and safety in a highly dangerous environment and weight should be given to this.

21 The respondent submitted that it was not "fair to say that the contravention was deliberate" as the findings of the Court in the Liability Judgment were not that the respondent took the adverse action that it did but rather that the respondent failed to discharge the onus imposed on it by s 361 of the Fair Work Act. The respondent accepted that the rights and obligations arising under the CMSH Act are important protections for coal mine workers, however submitted that it did not seek to undermine these protections. Accordingly, the respondent submitted that the contravention should not be described as "very serious".

22 Whether or not the respondent intended to contravene the Fair Work Act, the exclusion of Ms Star from the Mine was a deliberate action of decision-makers of the respondent, resulting in contraventions of the Fair Work Act. Relevant issues in this case included that:

- Ms Star was exercising workplace rights referable to safety in the workplace;
- The workplace environment was dangerous, requiring adequate lighting in the middle of the night; and
- The actions of the respondent potentially deter workers from raising concerns in the workplace in equivalent circumstances.

23 However:

- There were no aggravating circumstances associated with the contravention; and
- There were no injuries experienced at the time by Ms Star or anyone else.

24 On balance, I consider that the contravening conduct of the respondent falls within the range of upper mid-range of seriousness.

The Period in which the Conduct Took Place

25 The conduct of excluding Ms Star from the Mine occurred on two separation occasions. First, on 10 November 2017 and again on 24 September 2018 (see Liability Judgment at [64]).

26 In my view the repetition of conduct is an aggravating factor in assessing penalty.

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

27 The applicant submitted that the conduct caused Ms Star significant distress, upended longstanding work arrangements and damaged her confidence in her ability to raise safety issues at work. Further, Ms Star deposed that the contravening conduct had severe adverse effects on her, including stress, humiliation, feelings of hopelessness and devastation.

28 The respondent accepted that Ms Star would have suffered some degree of hurt and humiliation. The respondent however submitted that the claimed harm was not entirely referable to the contravening conduct.

29 There was no evidence that Ms Star (or the applicant) suffered any economic loss as a result of the contravening conduct.

30 I am satisfied that Ms Star experienced psychological damage as a result of the contravening conduct.

Involvement of Senior Management

31 It appears to be accepted by both parties that Mr Gee, who was the "decision-maker", was not a junior manager within the management structure of the Mine.

32 The applicant submitted that it is an aggravating factor that Mr Gee had significant managerial responsibility and the contravening conduct occurred because of his conduct.

33 The respondent submitted that Mr Gee was not actually employed by the respondent, that his role as superintendent was at the 'mid-point" in the management structure of the Mine, and beyond that, he did not have any managerial authority within BMA or BHP.

34 I consider that whilst Mr Gee had authority to make decisions in relation the Mine, including in respect of whether Ms Star would be permitted access to the Mine, he was not a part of the "senior management" of the Mine or the respondent. It follows that limited weight should be attributed to this factor.

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

35 The respondent is a large corporation which, as the respondent submitted, has the capacity to pay any penalty imposed by this Court. The penalty imposed must accordingly be of significant force so as not to simply be part of the cost of doing business*: 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].

36 I am satisfied that, at the relevant time, the respondent had no prior incidents of contravening conduct and is entitled to be dealt with on the basis that this was its first contravention.

37 I note the applicant's submission of prior contraventions of BHP, where the respondent permitted BHP to make decisions of this type on behalf of the respondent. It appears however that the prior contraventions of BHP occurred in 2011.

38 I also note the respondent has been found to have contravened the Fair Work Act after and in circumstances similar to those subject of the present proceedings: see *CFMMEU v BM Alliance Coal Operations Pty Ltd* [2023] FCA 30. There is no evidence that the respondent has made any corrections to ensure that such contravening conduct does not occur again.

39 I am satisfied that there is a need for specific deterrence.

40 I do not accept the respondent's submission that the negative publicity received by the respondent following the Liability Judgment was itself a deterrent to similar future conduct, such that the respondent should receive a lesser penalty. There is no evidence before me that any such publicity was either inaccurate or unfair. The mere publication of a media release, notwithstanding that the publicity may be unfavourable to the respondent, is not a 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].

Amount of penalty to be imposed

41 At the time of contravention, the maximum penalty for a contravention of s 340 of the Fair Work Act by a body corporate was 300 penalty units, with the value of each penalty being $210.00. It follows that the maximum penalty that can be imposed for each contravention by the respondent is $63,000.

42 The applicant submitted that two separate penalties each towards the statutory maximum should be imposed on the respondent, being a total amount of $126,000.

43 The respondent submitted that the imposition of a total penalty in the amount of $20,000-$25,000 was appropriate.

44 In determining the final penalty imposed, although the maximum penalty is not to be "applied mechanically", there is to be some reasonable relationship between the theoretical maximum and the final penalty imposed: see *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25 at [155]–[156]. As discussed by the High Court in *Pattinson* at [53], the maximum penalty is not to be imposed in a civil context in the same manner as in a criminal context, it is to be treated as one of the relevant factors.

45 The common law principles of totality and course of conduct are accepted by each party as being relevant. It is further accepted by both parties that s 557 of the Fair Work Act did not apply.

46 The Full Court set out relevant course of conduct principles in *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243; [2018] FCAFC 73 at [226]-[237]:

> 226. Before analysing the contravening conduct and its interrelationship, we turn to the legal principles applicable to our analysis. In determining the appropriate penalty for a multiplicity of civil penalty contraventions, courts have had regard to two related principles that originate in the criminal law: the "course of conduct" or "one transaction" principle and the "totality" principle. They are not rules, but principles or tools to assist the Court in arriving at an appropriate penalty.
>
> 227. We make this preliminary observation. It is not appropriate or permissible to treat multiple contraventions as just one contravention for the purposes of determining the maximum limit dictated by the relevant legislation. We do not understand the contrary to be decided by the Full Court in *CFMEU v Williams* [2009] FCAFC 171; 262 ALR 417 (Moore, Middleton and Gordon JJ). In support of the contrary position, Yazaki relied upon the statement of the Full Court in *Williams* at [31] as follows:
>
> > In the present case, it is appropriate to take the single course of conduct into account by imposing separate fines for the two offences which when aggregated would represent a single penalty appropriate to punish the single course of conduct concerned. Fixing an amount of fines that when taken together represent a single penalty appropriate to punish the one course of continuing conduct begins from the premise that the maximum penalty for all of the contravening conduct that comprises a single transaction, but constitutes two separate offences, is to be treated, in effect, as $110,000 for the Union and $22,000 for Mr Mates: cf *Mornington* at [18] (per Gyles J) and at [47]-

[49] (per Stone and Buchanan JJ).

228. This statement was made in the context of the Full Court re-exercising the sentencing discretion and based upon the acceptance (on the facts before the Full Court) that there was effectively one activity or one offence (see [15] and [25]), adopting the approach taken in *Mornington Inn Pty Ltd v Jordon* [2008] FCAFC 70; 168 FCR 383.

229. The Full Court was not saying that as a matter of law or principle, in applying the course of conduct tool of analysis, it was appropriate or permissible to treat multiple contraventions as just one contravention for the purposes of determining the maximum limit to consider as a yardstick in reaching the appropriate penalty.

230. At [37] of the relief judgment the primary judge recorded by reference to [31] of *Williams* that the application of the course of conduct "tool of analysis" did "not mean that a number of contraventions become one contravention, but rather, where it is appropriate to apply the approach, a number of contraventions may be treated as if they attract one penalty. But, with respect, to treat a number of contraventions as subject to one maximum penalty (as we think his Honour did here) is to treat them, impermissibly, as one contravention.

231. As observed recently by Beach J in *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd trading as Bet365 (No 2)* [2016] FCA 698 at [24]- [25]:

> ... the "course of conduct" principle does not have paramountcy in the process of assessing an appropriate penalty. It cannot of itself operate as a *de facto* limit on the penalty to be imposed for contraventions of the ACL. Further, its application and utility must be tailored to the circumstances. In some cases, the contravening conduct may involve many acts of contravention that affect a very large number of consumers and a large monetary value of commerce, but the conduct might be characterised as involving a single course of conduct. Contrastingly, in other cases, there may be a small number of contraventions, affecting few consumers and having small commercial significance, but the conduct might be characterised as involving several separate courses of conduct. It might be anomalous to apply the concept to the former scenario, yet be precluded from applying it to the latter scenario. The "course of conduct" principle cannot unduly fetter the proper application of s 224.

232. This statement was approved by the Full Court in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 at [141] per Jagot, Yates and Bromwich JJ and in *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2017] FCAFC 159 at [425] and [426] per Middleton, Beach and Moshinsky JJ.

233. Further, in applying the course of conduct principle the statutory context in which the contraventions occurred must be considered. For instance, the Act contains no equivalent of s 557 of the *Fair Work Act 2009* (Cth). In *Cement*, the Full Court made the following observations:

> 431 We consider that the course of conduct principle must be informed by the particular legislative provisions relevant to these proceedings. In particular, we consider that weight must be given to the fact that the

> legislature has deliberately and explicitly created separate contraventions for each of the making of, and giving effect to, a contract, arrangement or understanding that restricts dealings or affects competition: ss 45(2)(a) and 45(2)(b).
>
> 432 This statutory structure is relevant because it will often be the case that the making of, and giving effect to, a contract, arrangement or understanding will involve overlapping or homogenous conduct. The Court should be wary that it does not undermine this explicit distinction by applying the course of conduct principle too liberally in such circumstances.

234. The "course of conduct" or "one transaction" principle means that consideration should be given to whether the contraventions arise out of the same course of conduct or the one transaction, to determine whether it is appropriate that a "concurrent" or single penalty should be imposed for the contraventions. The principle was explained by Middleton and Gordon JJ in *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; 194 IR 461 at [39]:

> The principle recognises that where there is an interrelationship between the legal and factual elements of two or more offences for which an offender has been charged, care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality. That requires careful identification of what is "the same criminality" and that is necessarily a factually specific enquiry.
>
> (Emphasis omitted.)

235. As Middleton and Gordon JJ further explained in *Cahill*, even if the contraventions are properly characterised as arising from a single course of conduct, a judge is not obliged to apply the principle if the resulting penalty fails to reflect the seriousness of the contraventions.

236. The course of conduct principle has some overlap with the totality principle, at least to the extent that the aim is to avoid a penalty being imposed which is not proportionate with the offending conduct: see *Mill v The Queen* [1988] HCA 70; 166 CLR 59 at 63.

237. We do not need to discuss further the totality principle, or other principles to be applied in the process of imposing a civil penalty under s 76, other than to observe that proper weight must be given to the statutory maximum (it being referrable to the most serious kind of contravention), and that there is little utility in reference to other cases decided at a different time, in different circumstances and with different facts. In this latter connection, Yazaki referred to a number of cases said to give some guidance as to the appropriate penalty to impose…These cases all involved an "agreed penalty" submitted by the parties, and involved different circumstances and facts. It is not necessary to give any particular attention to any of the cases referred to by Yazaki for the purposes of this appeal.

47 As explained in *Australian Building and Construction Commissioner v Ingham (180 Brisbane Construction Case) (No 2)* [2021] FCA 263, the totality principle is applied to ensure that the overall penalty is appropriate for the conduct in question:

[102] The totality principle operates as a final check to ensure that the overall penalty is appropriate for the conduct in question, and not excessive. The Full Court explained the principle in the following terms in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68; [2017] FCAFC 113:

> 116. The totality principle, like the course of conduct principle, has its origins in criminal sentencing. The totality principle was described in the following terms in the frequently cited passage from the judgment of the High Court in *Mill v R* [1988] HCA 70; (1988) 166 CLR 59 at 62 –63 :
>
> The totality principle is a recognized principle of sentencing formulated to assist a court when sentencing an offender for a number of offences. It is described succinctly in Thomas, Principles of Sentencing, 2nd ed. (1979), pp. 56–57, as follows (omitting references):
>
> > The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms: 'when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong ']; 'when … cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences'.
>
> See also Ruby, Sentencing, 3rd ed. (1987), pp. 38–41. Where the principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred.
>
> 117 The totality principle is sometimes confused or conflated with the course of conduct principle. That is perhaps not surprising because application of the totality principle may again result in a court adjusting what would otherwise have been consecutive or cumulative sentences to sentences that are wholly or partially concurrent. The proper approach, however, is to first consider the course of conduct principle and determine whether the sentences should be consecutive, or wholly or partly concurrent. Once that is done, the Court should then review the aggregate sentence to ensure that it is just and appropriate. That may require a further adjustment of the sentences: either by ordering further concurrency or, if appropriate, lowering the individual sentences below what would otherwise be appropriate.

48 The applicant submitted that the Court should impose two separate penalties for each contravention on the respondent on the basis that one penalty would not properly reflect the extent of the respondent's wrongdoing, nor would it effectively deter the respondent.

49 The respondent noted that the Court was not obliged to fix a single penalty for multiple contraventions arising from the same course of conduct, however submitted that the circumstances of the matter did not justify two penalties to be imposed.

50 While the conduct of the respondent was in the nature of two separate contraventions, I am satisfied that those contraventions arose out of a single course of conduct whereby the respondent refused to allow Ms Star to return to work on Mine premises. I do accept that as the respondent is a large and profitable corporation, a penalty of substance is required in order to achieve specific deterrence.

51 Overall I am satisfied that a higher mid-range penalty totalling $80,000 would be appropriate.

Compensation

52 The applicant also sought an award of compensation under s 545(2) of the Fair Work Act in the form of general damages amounting to $35,000.

53 The respondent considered that an amount of $5,000-$10,000 would be appropriate.

54 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].

55 In assessing compensation, a causal connection between the contravention and loss claimed must be established: see *Maritime Union v Fair Work Ombudsman* [2015] FCAFC 120 at [28].

56 In relation to compensation, the applicant relies on the Affidavit of Ms Star dated 8 February 2023. In summary, Ms Star deposes that:

- As a result of no longer working at the Mine, she now spends significantly less time with her partner (who works at the Mine);
- The exclusion from the Mine, termination of employment, and the later attempt to return to work and subsequent resignation caused her to feel hopeless and devasted, and damaged her feelings of self-worth and confidence;

- The contraventions and ongoing uncertainty in relation to her employment caused her to suffer immense personal stress which affected both her and her partner, and placed pressure on their relationship;
- She felt humiliated as a result of being excluded from the Mine and terminated as an employee;
- Resigning from her employment at the Mine caused inconvenience and the process of looking for subsequent employment was demoralising and depressing in circumstances where she felt she had not done anything wrong and there was not a good reason for exclusion from the Mine;
- Her partner and her had planned their lives around working at the Mine; and
- She missed working with colleagues that she had developed strong working relationships with whilst working there over 4 years.

57 It is the applicant's submission that Ms Star's reluctance to now exercise statutory safety rights demonstrates the severity of the impact of the contravening conduct and is of utmost importance in considering an award of compensation. I am satisfied that this aspect of safety should be given weight in the assessment of compensation.

58 Despite accepting that Ms Star would have suffered some degree of hurt and humiliation, the respondent submitted that not all of the impacts deposed to within the Affidavit of Ms Star dated 8 February 2023 were caused by the contravening conduct, rather they related to events of returning to the Mine that occurred almost 12 months after the contravention.

59 I am satisfied that, as a direct consequence of the respondent's contravention of s 340 of the Fair Work, Ms Star suffered distress, humiliation and hurt in circumstances where she raised a safety concern, was excluded from the Mine and her employment terminated, was left in a period of uncertainty about her employment and then, upon attempting to return to the Mine, was treated in a manner that caused her to resign. It follows that Ms Star is entitled to some measure of compensation.

60 I do not consider that the reduction of the Ms Star's time spent with her partner or the fact they planned their lives around working at the Mine is relevant to the assessment of damages in the circumstances. I also do not consider it relevant that Ms Star missed working with colleagues.

61 In the circumstances, I am satisfied that Ms Star should be awarded compensation in the amount of $15,000.

CONCLUSION

62 As I have already observed, the two contraventions of s 340 of the Fair Work Act arose out of one course of contravening conduct on the part of the respondent. For the reasons stated above, I consider it appropriate in the circumstances a total penalty in the amount of $80,000 to be paid by the respondent in respect of both contraventions. Such penalty is to be paid by the respondent to the applicant within 30 days of the date of these Orders.

63 I consider $15,000 to be appropriate compensation to be awarded to Ms Star, such compensation to be paid by the respondent to Mr Star within 30 days of the date of these Orders.

I certify that the preceding sixty-three (63) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Acting Chief Justice Collier.

Associate: 

Dated: 15 December 2023