FEDERAL MAGISTRATES COURT OF AUSTRALIA

ARMSTRONG v HEALTHCARE RECRUITING AUSTRALIA PTY LTD & ANOR (NO.2) *[2008] FMCA 1050*

INDUSTRIAL LAW – Contravention of Workplace Relations Act – employment of nurses working under labour-hire agreements – employees' entitlements withheld – exploitation of migrant nurses in vulnerable position – four breaches by company – involvement of sole director – deterrent penalties appropriate – application of totality principle – total penalties of $48,000 and $8,000 ordered.

Federal Magistrates Act 1999 (Cth), s.77
Federal Magistrates Court Rules 2001 (Cth), r.26.01
Industrial Relations Act 1996 (NSW), s.118(2)
Workplace Relations Act 1996 (Cth), ss.719, 722, 723, 728

Armstrong v Healthcare Recruiting Australia Pty Ltd & Anor [2008] FMCA 357
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8
Cantil v Minister for Immigration [2008] FMCA 849
Jarvis v Imposete Pty Ltd (No.2) [2008] FMCA 101
Kelly v Fitzpatrick (2007) 166 IR 14
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550
Villas v Minister for Immigration [2008] FMCA 850

Applicant:	INSPECTOR DAVID ROBERT ARMSTRONG
First Respondent:	HEALTHCARE RECRUITING AUSTRALIA PTY LTD
Second Respondent:	MICHELLE SANTOS LLOYD
File Number:	SYG 2998 of 2007
Judgment of:	Smith FM
Hearing date:	16 July 2008

Delivered at: Sydney

Delivered on:

REPRESENTATION

Counsel for the Applicant: Mr D Jordan

Solicitors for the Applicant: Freehills

Counsel for the Respondents: Second respondent in person

ORDERS

(1) There is imposed on the first respondent pursuant to s.719(1) of the *Workplace Relations Act 1996* (Cth) ('the Act') a penalty in the amount of $10,000 for its failure to pay wages in accordance with s.182(1) of the Act.

(2) There is imposed on the first respondent pursuant to s.719(1) of the Act a penalty in the amount of $10,000 for its failure to pay casual loadings in accordance with s.185(2) of the Act.

(3) There is imposed on the first respondent pursuant to s.719(1) of the Act a penalty in the amount of $10,000 for its failure to pay its employees penalty rates in accordance with cl.12 of the Nursing Homes Award.

(4) There is imposed on the first respondent pursuant to s.719(1) of the Act a penalty in the amount of $10,000 for its failure to pay its employees holiday pay in accordance with cl.21of the Nursing Homes Award.

(5) The penalties payable under orders 1, 2, 3, and 4 must be paid to the Commonwealth pursuant to s.841 of the Act.

(6) There is imposed on the second respondent pursuant to s.728(1) of the Act four penalties in the amount of $2,000 for her involvement in each of the contraventions identified in orders 1, 2, 3 and 4, totalling $8,000.

(7) The penalties payable under order 6 must be paid by the second respondent pursuant to s.841 of the Act to Edwin Soriao Villar as to

$1,000 thereof, to Leilani Caldreon Aliermo as to $1,000 thereof, and to the Commonwealth as to the balance.

(8) The first respondent must pay to Olga Deguzman Soriano the sum of $194 pursuant to s.719(6) of the Act.

(9) The first respondent must pay to Edwin Soriao Villar the sum of $1,246 pursuant to s.719(6) of the Act.

(10) The first respondent must pay to Leilani Caldreon Aliermo the sum of $1,246 pursuant to s.719(6) of the Act.

(11) The judgment debts arising under orders 5, 7, 8, 9 and 10 shall carry interest from the date of this order at the rate prescribed by the Federal Court Rules, provided that no interest shall be payable on amounts paid within 21 days of this order.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 2998 of 2007

INSPECTOR DAVID ROBERT ARMSTRONG
Applicant

And

HEALTHCARE RECRUITING AUSTRALIA PTY LTD
First Respondent

MICHELLE SANTOS LLOYD
Second Respondent

REASONS FOR JUDGMENT

1. Inspector Armstrong brings this application for pecuniary penalties and other relief against Healthcare Recruiting Australia Pty Ltd ('HRA') and its managing director, Ms Lloyd. He alleges that HRA was the employer of three nursing assistants, Ms Aliermo, Mr Villar, and Ms Soriano, in periods during 2006, and that they were not paid substantial entitlements to wages, casual loadings, penalty rates and sums in lieu of annual leave on termination. He alleges against HRA four contraventions of 'applicable provisions' conferring these entitlement, giving rise to possible maximum total penalties of $132,000 under s.719(1) of the *Workplace Relations Act 1996* (Cth). He also seeks the imposition of penalties on Ms Lloyd under s.728(1) as a person involved in HRA's contraventions, giving rise to her maximum liability to penalties of $26,400. For the reasons which follow, I am satisfied that the contraventions are established, that HRA should be ordered to pay total penalties of $40,000, that Ms Lloyd should pay total penalties of $8,000, and that the employees should receive the benefit of

judgments against HRA and Ms Lloyd to compensate for underpayments and lost interest.

2. In the course of the proceedings, Ms Lloyd instructed two firms of solicitors to act on behalf of HRA and herself, but they have both filed notices of ceasing to act after filing documents on the respondents' behalf. She now represents herself and the company. The first hearing appointed for March 2008 was vacated in circumstances which I described in *Armstrong v Healthcare Recruiting Australia Pty Ltd & Anor* [2008] FMCA 357, due to HRA's failure to comply with the directed time-table for filing evidence. At the commencement of the second hearing, appointed for 10 July 2008, the respondents' second solicitor obtained leave to withdraw, leaving no appearance by or on behalf of HRA or Ms Lloyd. I adjourned the hearing, to proceed on an undefended basis in the following week.

3. However, Ms Lloyd then appeared, and was anxious for the hearing not to be further adjourned, but to be completed that day. In the course of the hearing, she did not contest most aspects of Mr Armstrong's case, and made only brief submissions on liability and penalty. Although her position left poorly explored some areas of factual contention in the pleadings and evidence, I do not consider that she has been disadvantaged by her lack of legal representation at the hearing. I have given her the benefit of doubts where I could not arrive at confident conclusions on the evidence.

4. Ultimately, the only live issue was whether HRA was in fact the 'employer' of the three nurses, so as to be principally liable for the payment of their entitlements, or whether, as Ms Lloyd still maintains, it was only a recruitment agency for the two nursing homes at which their work was performed. She also, somewhat inconsistently, claimed that the employees authorised her to make deductions or withholdings from their wages. For reasons which I can explain briefly, I have accepted Mr Armstrong's submissions that HRA was the employer, and that it had no lawful excuse for withholding payment of the employees' entitlements.

An employment relationship

5. I accept the following submissions by counsel for Mr Armstrong as an accurate and appropriate summary of the relevant evidence and authorities:

> ***Background Information***
>
> *5. The Employees are Philippino nationals who travelled to Australia for the purposes of working for the First Respondents. On their arrival in Sydney, the Employees were employed by the First Respondent, which acted as a 'labour hire' agency, providing the services of nursing staff to various nursing homes in Sydney.*
>
> *6. The Second Respondent, on behalf of the First Respondent, directed Mr Villar and Ms Aliermo to perform nursing work at St Ezekiel Moreno Nursing Home ('St Ezekiel') and directed Ms Soriano to perform nursing work at Meredith House Aged Care Facility ('Meredith House').*
>
> *7. Mr Villar worked at St Ezekiel from September 2005 until 27 October 2006. Ms Aliermo worked at St Ezekiel from approximately 2 September 2005 until 27 October 2006. Ms Soriano worked at Meredith House from 16 August to 31 August 2006.*
>
> *8. The Employees worked as "Assistants in Nursing' at the respective nursing homes. Their duties included providing personal care and assisting residents with showering, dressing and eating.*
>
> *9. The First Respondent invoiced the nursing homes for the services provided by the Employees. At no time did the Employees receive any payments directly from the nursing homes either in respect of wages or otherwise.*
>
> *10. Ms Soriano received no payment for the work she performed at Meredith House.*
>
> *11. Mr Villar and Ms Aliermo were paid some wages by the First Respondent. The First Respondent made deductions from Mr Villar and Ms Aliermo's wages which were said to be for expenses such as rent, agency fees and airfares. Mr Villar and Ms Aliermo state in their affidavits at paragraphs 58 and 67 respectively that they did not consent to these deductions being made.*

12. *On 13 August 2007 the Applicant served a Notice to Produce Documents on the Second Respondent, in her capacity as director of the First Respondent, requesting production of "all documents relating to the authorisation and consent given by the above named claimants (referring to the Employees, and another claimant) for the deduction of monies from their wages". No document was produced under this Notice to evidence any authorisation to deduct monies ever being given to the First Respondent or the Second Respondent.*

13. *Mr Villar and Ms Aliermo recount at paragraphs 56 and 48 of their respective affidavits, that the Second Respondent informed them money was being 'saved for tuition fees' for their studies at the Burwood College of Nursing, which was to enable them to become registered nurses in Australia. At paragraphs 68 and 71 of their respective affidavits, Mr Villar and Ms Aliermo confirm that the Second Respondent never arranged for them to attend Burwood College of Nursing or any other equivalent institution. Any monies put aside for tuition fees were not reimbursed to Mr Villar and Ms Aliermo at the end of their employment.*

14. *On 27 June 2008, in accordance with a settlement agreement reached between the parties on or around 29 May 2008 ('the settlement agreement'), the Respondents made 'without prejudice' payments to the Applicant, on behalf of the Employees, in the sum of $13,125.09. This amount represented a net payment of the Employees unpaid entitlements, less appropriate taxation. In breach of the settlement agreement the Respondents have failed to remit the applicable taxation to the Australia Taxation Office. The effect of this is that the Employees are likely to be liable to pay the relevant taxation amounts out of the net payments received. A sum of $2,685.99 remains outstanding.*

15. *The settlement agreement expired 26 June 2008. The Applicant extended the offer until 4 July 2008 to facilitate payment of the outstanding sum. Payment did not occur in accordance with the terms of the settlement agreement and the settlement agreement has now lapsed.*

The Employment Relationship

16. *The Applicant submits that a relationship of employment existed between the First Respondent and the Employees for the following reasons:*

(a) *the Second Respondent, on behalf of the First Respondent, directed the Employees as to where they would work and the nature of that work, as Assistants in Nursing;*

(b) *the Employees worked exclusively for the First Respondent at the placements as directed by the Second Respondent;*

(c) *the Second Respondent, on behalf of the First Respondent, directed the Employees to provide a record of hours worked by them in order to receive wages. The timesheets presented were handwritten records of times worked and did not take the form of an invoice;*

(d) *the First Respondent invoiced the nursing homes for the services provided by the Employees. The invoices included superannuation and workers compensation premium amounts, indicating the First Respondent would make such payments in respect of the Employees;*

(e) *the First Respondent was responsible for the payment of wages to the Employees, and all wages received by the Employees were paid by the First Respondent;*

(f) *the First Respondent purportedly withheld amounts of income tax from the payments made to the Employees, and required Mr Villar to complete a Tax File Number declaration; and*

(g) *there is no evidence of any agreement between the Employees and the First Respondent to create an independent contractor relationship.*

17. *The nature of the labour hire arrangements limited the First Respondent's day to day direction and control over the work of the Employees. However the Courts have held that in such tripartite arrangements it is the 'ultimate or legal control' over the worker which is most relevant, rather than day-to-day direction of the worker [see Mason & Cox Pty Ltd v McCann (1999) 74 SASR 438 at 29 and Swift Placements Pty Limited v. WorkCover Authority of New South Wales (2000) 96 IR 69 at [43]-[44]].*

18. *In the case of Drake Personnel Ltd & Ors v. Commissioner of State Revenue (2000) 2 VR 635 ('Drake'), the Victorian Court of Appeal found an employment relationship existed between a labour hire company and the temporary workers that it placed with its clients. In so finding, the Court rejected the contention that absence of day-to-day control prevented an employment relationship existing between Drake and the worker. Phillips JA stated at [55]:"Rather, in a case like this, it may be that control, day-to-day, is not as significant as it was in the cases cited to us...the fact that the client exercises day-to-day control may be referred back to the contract made between Drake and the temporary; for it is under and by virtue of that contract that the temporary accepts direction from Drake's client...". The facts in this case are similar to the arrangement between the parties in Drake. In Drake the labour hire firm entered into a contract with the client to supply the services of temporary workers, and engaged the services of workers whom it then placed at the client's site. The client paid Drake for the services of the workers, and Drake paid the workers. There was no direct contractual relationship between the client and the worker.*

19. *The Applicant submits that despite the staff of the respective nursing homes directing the Employees in their duties, the First Respondent retained the ultimate right to control and direct the Employees as to where and when, and for whom they would work. Further, the nursing homes had no direct contract with the employees and did not make any payments to the Employees.*

20. *Consistent with the authorities referred to above, it is submitted that for the purposes of the labour hire service it provided to the nursing homes, the First Respondent was the employer of the Employees.*

21. *Further, in examining the totality of the relationship between the Employees and the First Respondent, the Employees cannot be said to be independent contractors, in that they cannot be said to be 'running their own business enterprise' [see Hollis v Vabu Pty Ltd (2001)207 CLR 21].*

6. Ms Lloyd argued that HRA's business was that of assisting overseas nurses to gain visas, qualifications, accommodation, and employment in Australia, without itself ever entering into an employer relationship with them. However, I have decided that, at least in relation to these three nurses, this was not the true legal situation.

7. It is clear to me that she operated in the context of the Sydney nursing home industry at a time when it was desperate for nurses and nursing assistants, and where the regulatory frameworks were particularly complex and confusing – not least for the overseas workers who were being recruited. I have recently, in the Court's immigration jurisdiction, had occasion to observe other instances of this (see *Cantil v Minister for Immigration* [2008] FMCA 849 and *Villas v Minister for Immigration* [2008] FMCA 850). The evidence in the present case raises uncertainty whether Ms Lloyd's companies were complicit with others in the industry in exploiting this regulatory situation and the overseas workers involved, or whether they were only unwitting victims of regulatory and legal complexity.

8. There are in evidence forms of 'agency' agreements signed by Mr Villar in October 2004 and Ms Aliermo in 2005, which are in ambiguous terms as to the true legal relationship arising under their terms. They appear to have been drafted in the hope that, while the 'agent' will receive and control all amounts paid by a nursing home in respect of the salary and wages of its recruited nurses, it will incur none of the liabilities and responsibilities of an employer. The obscurity, lack of rights given to the 'principals', and other aspects of these agreements, leave me doubting whether they would survive examination under contracts review legislation or principles of unconscionability.

9. However, I do not need to examine the evidence concerning how these agreements were executed, nor arrive at conclusions as to their legal effect, since the 'agent' identified in the agreement was not HRA but another company apparently associated with Ms Lloyd. It is not challenged by Ms Lloyd in the present case that HRA was the entity with whom St Ezekiel contracted to receive the assistance of Mr Villar and Ms Aliermo's labour over the relevant periods, and with whom Meredith House contracted to receive the assistance of Ms Soriano's labour. Ultimately, I understood Ms Lloyd also to have conceded in cross-examination that HRA's relationship with these nursing homes and these three nurses was not covered by the written 'agency agreements' nor any agreement in the same terms. I find that this was not the situation.

10. The evidence before the Court as to how the managers of the two nursing homes regarded the employment of the three nurses is clear. They understood that they were hiring labour from HRA, and not employing it themselves. When the Director of Nursing at St Ezekiel wished to dispense with the services of Ms Aliermo and Mr Villar, she sent a request to Ms Lloyd *"please transfer them somewhere else"*. Meredith Nursing Home at one stage submitted to Ms Lloyd a signed contract in a form prepared by another of Ms Lloyd's companies, in which, despite what appear to be some deliberate obscurities, it takes the role of a hirer of the labour of its nurses. Thus, it assumes responsibility *"for the payment of contract payments to the Nurse and deduction and payment of all statutory contributions of Income Tax"*, and *"for other required statutory contributions with respect to payroll tax, workers' compensation and superannuation"*. However, Meredith Nursing Home appears to have been instructed that Ms Soriano's labour was being provided by HRA and not that other company.

11. The evidence suggests that there was a degree of frustration on the part of the managers of these two nursing homes, because they could not obtain clear invoicing from HRA, and therefore they resorted to themselves compiling HRA invoices setting out the agreed periodic hire charges. These were forwarded to HRA accompanied by regular cheques for the amounts thus calculated, and HRA undoubtedly accepted both the calculations and the funds as properly reflecting its agreements with the two nursing homes. These documents, in my opinion, provide the best evidence confirming the true nature of the relationship. The invoices set out periodic amounts of payments calculated by reference to the nurses' time sheets, with no deduction of PAYG income tax or any other employer payroll liabilities and, in the case of St Ezekiel, with an added 18% commission and a 10% GST on commission. Meredith House's HRA invoice included added components relating to superannuation, workers compensation and GST. I find that HRA received these payments not as agent for the nurses to receive their wages, nor as agent for the nursing homes when paying their wages, but as their employer and as the agreed consideration for hiring out their labour to the nursing homes.

12. For the above reasons, including my acceptance of the submissions of Mr Armstrong's counsel, I find that HRA was the relevant 'employer'

of these three nurses at the relevant times, for the purposes of the Workplace Relations Act and other 'applicable provisions' in relation to their remuneration.

The contraventions

13. The contraventions by HRA of relevant applicable provisions are identified and particularised in the following paragraphs of the further amended statement of claim. Mr Armstrong's affidavits identified how these calculations are arrived at, and the source documents upon which they are based. Ms Lloyd made no challenge to any of the facts or conclusions alleged in these paragraphs, and I make findings of fact in terms of these paragraphs:

> ***Applicable provisions***
>
> *24. The Employees were engaged in the profession of nursing in nursing homes and hostels within New South Wales, and their employment was subject to the Nursing Homes & c Nurses' (State) Award (the Nursing Homes Award) operating as a Notional Agreement Preserving State Awards (NAPSA) within the meaning of Part 1 of Schedule 8 of the Act.*
>
> *25. In respect of the Employees, the First Respondent was at all material times bound by:*
>
> > *(a) the Australian Fair Pay and Conditions Standard; and*
> >
> > *(b) a term of a collective agreement, being a NAPSA derived from the Nursing Homes Award.*
>
> ***Breaches of the Australian Fair Pay and Conditions Standard***
>
> ***a. Section 182(1)***
>
> *26. From 27 March 2006, the First Respondent was bound by a preserved Australian Pay and Classification Scale derived from the Nursing Homes Award and forming part of the Australian Fair Pay and Conditions Standard (the Standard) in respect of the employment of the Employees.*
>
> *27. The Employees were entitled to be paid for the hours they worked at an hourly rate at least equal to that applicable to the classification of 'Assistant in Nursing over 18 – 1st year' as*

contained in the preserved Australian Pay and Classification Scale.

Particulars

(i) The Employees worked as Assistants in Nursing.

(ii) The Employees were over 18 years of age at the relevant times.

(iii) The Employees were in their first year of employment in Australia.

(iv) The basic hourly rate for an 'Assistant in Nursing over 18 – 1st year' at the relevant times was $13.83.

28. On the basis of the material facts pleaded in paragraphs 6-11 and 16-21 above, the First Respondent breached section 182(1) of the Act in that it:

> *(a) failed to pay Ms Soriano at all in respect of her employment; and*
>
> *(b) did not pay Mr Villar and Ms Aliermo at the minimum hourly rates they were entitled to be paid under the Standard.*

b. Section 185(2)

29. The Employees were employed on a casual basis by the First Respondent.

Particulars

(i) The Employees worked shifts of varying lengths and start times as requested.

(ii) Mr Villar and Ms Aliermo were paid on the basis of the hours they worked each month.

30. On the basis of the material facts pleaded in paragraphs 6-11 and 16-21 above, the First Respondent breached section 185(2) of the Act in that it failed to pay the Employees the guaranteed casual loadings they were entitled to be paid under the Standard.

Particulars

(i) The preserved Australian Pay and Classification Scale derived from the Nursing Homes Award provides for a loading of 10% of the relevant basic hourly rate for casual employees.

(ii) The hourly casual loading for an 'Assistant in Nursing over 18 – 1st year' at the relevant times was $1.38 (10% of $13.83).

(iii) The ordinary hourly rate of pay for the Employees, including the applicable casual loading, was $15.21

(iv) The First Respondent failed to pay the Employees the ordinary hourly rate, including the applicable casual loading, in respect of each hour worked, resulting in an underpayment.

Breaches of a collective agreement (NAPSA)

a. Penalty rates

31. Under the terms of the NAPSA derived from the Nursing Homes Award, the Employees were entitled to be paid penalty rates, in addition to their base rates, for afternoon and night shifts, and shifts worked on Saturdays, Sundays and Public Holidays.

Particulars

(i) Clause 12(i) of the NAPSA provides for the following additional rates to be paid on the ordinary hourly rate ($15.21) where shifts commence prior to 6.00am or finish subsequent to 6.00pm:

Afternoon shift commencing at 10.00am and before 1.00pm	*10%*
Afternoon shift commencing at 1.00pm and before 4.00pm	*12.5%*
Night shift commencing at 4.00pm and before 4.00am	*15%*
Night shift commencing at 4.00am and before 6.00am	*10%*

(ii) Clause 12(iv) of the NAPSA provides that a rate of:

- *time and one-half the ordinary hourly rate ($15.21) is to be paid for ordinary hours worked between midnight on Friday and midnight on Saturday; and*
- *time and three-quarters the ordinary hourly rate ($15.21) is to be paid for ordinary hours worked between midnight on Saturday and midnight on Sunday.*

(iii) Clause 21 Part II of the NAPSA provides that a rate of double time and one half of the basic hourly rate ($13.83) is to be paid for hours worked on a Public Holiday.

32. On the basis of the material facts pleaded in paragraphs 6-11 and 16-21 above, the First Respondent breached clause 12 of the

NAPSA in that it failed to pay the Employees the penalty rates they were entitled to be paid under the NAPSA.

b. Holiday pay

33. Under clause 21 of the NAPSA derived from the Nursing Homes Award, the Employees were entitled to annual leave in accordance with the Annual Holidays Act 1944 (NSW).

Particulars

(i) The Annual Holidays Act 1944 (NSW) provides that upon termination of employment of an employee who has worked less than one year, an employer must pay the employee a pro rata entitlement equal to one-twelfth of the employee's ordinary pay for the period of employment: (section 4(3)).

34. On the basis of the material facts pleaded in paragraphs 6-12 and 16-24 above, the First Respondent breached clause 21 of the NAPSA in that it failed to pay the Employees an amount in respect of annual leave on termination of their employment, which they were entitled to under the NAPSA.

Particulars

(i) Ms Soriano worked a total of 44 hours for the period 16-31 August 2006.

(ii) Ms Soriano was entitled to receive a payment in lieu of annual leave equal to one-twelfth of her ordinary pay over the period from 16-31 August 2006, being $55.77 ($15.21 multiplied by 44 hours, divided by 12).

(iii) Ms Soriano did not receive any payments in respect of holiday pay.

(iv) Mr Villar worked a total of 725 hours for the period 1 April - 27 October 2006.

(v) Mr Villar was entitled to receive a payment in lieu of annual leave equal to one-twelfth of his ordinary pay over the period 1 April - 27 October 2006, being $918.94 ($15.21 multiplied by 725 hours, divided by 12).

(vi) Mr Villar did not receive any payments in respect of holiday pay.

(vii) Ms Aliermo worked a total of 881 hours for the period 1 April - 27 October 2006.

(viii) Ms Aliermo was entitled to receive a payment in lieu of annual leave equal to one-twelfth of her ordinary pay over the period 1 April - 27 October 2006, being $1,116.67 ($15.21 multiplied by 881 hours, divided by 12).

(ix) Ms Aliermo did not receive any payments in respect of holiday pay.

Underpayments in respect of wages, casual loadings and penalty rates

35. As a result of the breaches plead in paragraphs 28, 30 and 32 above, the First Respondent underpaid the Employees.

36. Ms Soriano worked a total of 44 hours for the period 16-31 August 2006.

37. Ms Soriano was entitled to be paid at least $15.21 per hour for this work, as the ordinary casual rate.

38. During the period 16-31 August 2006 Ms Soriano worked 6 hours on a Saturday and 8 hours on a Sunday, entitling her to be paid the applicable penalty loadings particularised above at paragraph 31.

39. In accordance with the calculations set out in the attached table (Table 1) Ms Soriano was entitled to receive $806.18 in respect of wages, casual loadings and penalty rates for all hours worked.

40. Ms Soriano did not receive any payment at all for her work in the period 16-31 August 2006.

41. Mr Villar worked a total of 725 hours for the period 1 April - 27 October 2006.

42. Mr Villar was entitled to be paid at least $15.21 per hour for this work, as the ordinary casual rate.

43. During the period 1 April – 27 October 2006 Mr Villar worked:

- *178.5 hours on afternoon shifts;*
- *374.5 hours on night shifts;*
- *133.5 hours on Saturdays;*
- *22 hours on Sundays; and*
- *16.5 hours on Public Holidays,*

entitling him to be paid the applicable penalty loadings particularised above at paragraph 31.

44. In accordance with the calculations set out in the attached table (Table 2) Mr Villar was entitled to receive $13,806.67 in respect of wages, casual loadings and penalty rates for all hours worked in the period 1 April – 30 October 2006.

45. Ms Aliermo worked a total of 881 hours for the period 1 April - 27 October 2006.

46. Ms Aliermo was entitled to be paid at least $15.21 per hour for this work, as the ordinary casual rate.

47. During the period 1 April – 27 October 2006 Ms Aliermo worked:

- *123 hours on afternoon shifts;*
- *55.5 hours on night shifts;*
- *170 hours on Saturdays; and*
- *59 hours on Sundays; and*
- *18.5 hours on Public Holidays,*

entitling her to be paid the applicable penalty loadings particularised above at paragraph 31.

48. In accordance with the calculations set out in the attached table (Table 3) Ms Aliermo was entitled to receive $16,085.32 in respect wages, casual loadings and penalty rates for all hours worked in the period 1 April – 30 October 2006.

49. Mr Villar and Ms Aliermo jointly received $16,978.47 as payment of their work in the period 1 April - 27 October 2006.

Total underpayments

50. Edwin Villar and Leilani Aliermo jointly received wages of $16,978.47. Total joint earnings were $31,927.60 leaving a total underpayment of $14,949.13 as set out in the attached tables headed 'Leilani Aliermo', 'Edwin Villar' and 'Table 5'.

51. Olga Soriano received no wages. Her total earnings were $861.95 leaving a total underpayment of $861.95 as set out in the attached table headed 'Table 4'.

14. I have above accepted a submission that Ms Lloyd's claim that the three nurses gave authority for deductions and withholdings from their

unpaid entitlements should be rejected. I can find no persuasive evidence to support the claim. Rather, as clearly emerged in cross-examination, HRA's own accounts showing what was due to Ms Aliermo and Mr Villar showed that it was withholding substantial amounts from them with no justification. The accounts were given to them in March 2006 and to Mr Armstrong in November 2006. The latter account, and Ms Lloyd's evidence to the court, attempted to justify claiming $10,509.16 from them in anticipation of HRA paying their future expenses of obtaining College of Nursing qualifications. However, as Ms Lloyd was driven to concede, Ms Aliermo and Mr Villar had made very clear to her and she was aware no later than October 2006, that they were making their own arrangements to get those qualifications. At no time did Ms Soriano authorise, even orally, any withholding from her remuneration for any purpose. Moreover, as Mr Armstrong points out, s.118(2) of the *Industrial Relations Act 1996* (NSW) prohibited any withholdings which were not authorised in writing, and HRA never obtained such authorisations from these nurses.

15. The circumstances in which most of the withheld monies were belatedly paid to the three nurses on 27 June 2008 under an attempted 'settlement' of the present proceeding, are summarised in paragraphs 14 and 15 of the submissions of counsel for Mr Armstrong which I have extracted above. In my opinion, Ms Lloyd could present to the Court no legal or moral basis which could justify her continuing to withhold these amounts from the nurses until the week before the second hearing appointed in this Court.

16. The tables attached to the further amended statement of claim, and a summary table, indicate that one reason why the 'settlement' which might have caused Mr Armstrong to discontinue this proceeding was not perfected, was because HRA failed to make PAYG payments in relation to the net payments which it made to the employees. I accept that these amounts of $194 in respect of Ms Soriano's entitlements, and $1,246 each in respect of Ms Aliermo and Mr Villar's entitlements, should now appropriately be the subject of an order under s.719(6) of the Workplace Relations Act. This will have the effect that they will receive their gross unpaid entitlements, and must themselves account to the taxation office.

17. It is clear from the circumstances which I have indicated above, and Ms Lloyd did not seriously contest, that she was a person who was 'involved' in the contravening conduct of HRA, as the active – and it would seem the only – officer of HRA managing its business. I find that she was 'knowingly concerned in' and 'party to' all of its relevant actions, within the meaning of s.728(2)(c). She is therefore liable to penalty under ss.728(1) and 719(1).

Appropriate penalties

18. Counsel for Mr Armstrong made submissions on penalty by reference to the list of considerations identified by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7, and summarised by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14 at [14]. I accept his submissions, and do not propose to repeat all the points he makes, nor provide discussion under each of those heading. The list of considerations can guide, but is not a substitute for "*the unrestrained statutory discretion"* (cf. Gyles J in *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550 at [11]). Ultimately, I must arrive at an amount within the range of penalties provided in the legislation which is proportionate to the gravity of the offence committed (cf. Graham J in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 at [54]).

19. I have above identified the circumstances in which the contraventions occurred, their very substantial nature relative to the entitlements of the three nurses, and the lack of any acceptable justification for their withholding. I accept that a degree of muddled thinking, business incompetence, and genuine confusion about the legal and regulatory context governing the employment of nursing assistants residing in Australia under temporary work visas, partly explains HRA and Ms Lloyd's failure properly to appreciate and implement its obligations as the employer of these nurses. However, I consider that there also was an element of conscious exploitation of three very vulnerable workers. Moreover, it was HRA's duty, if it wished to engage in its specialised recruitment business involving vulnerable overseas workers, to obtain proper advice and properly understand all its statutory obligations, especially when acting as a labour hire employer. The present case

reveals a serious dereliction by HRA of these responsibilities, and a reprehensibly casual attitude towards them on Ms Lloyd's part.

20. The impact of HRA's behaviour on the three nurses is briefly described in their affidavits, which I accept. Ms Aliermo said:

> *70. My first year working in Australia at the Nursing Home was a very difficult time for me, both financially and emotionally. Despite the fact that I was working full time, there were times when I did not have any money because Michelle Lloyd did not pay me all of my pay. At times, I was living on the charity of friends and who bought Edwin and I food and when I needed money to send back to my children in the Philippines, I would borrow money from friends.*
>
> *71. Despite Michelle's promises, she never arranged for me to study to become a Registered Nurse in Australia either at Burwood College of Nursing or anywhere else.*

21. Mr Villar said:

> *66. I resigned from St Ezekiel Moreno Nursing Home on 27 October 2006. I resigned because two days before, representatives from the Department of Immigration had come to the Nursing Home. They had interviewed Leilani and we both resigned on their advice. The Department of Immigration helped us to find a new sponsor. Our new sponsor was Health Call. They paid us properly.*
>
> *67. My first year in Australia working for the Nursing Home was a very difficult time for me, both emotionally and financially. Because Michelle Lloyd did not pay us properly we sometimes did not have enough money for food and we could not pay our rent at the Convent. I was ashamed in front of the nuns, who I respected greatly, that I could not get up to date on my rent. The situation also took its toll on my family in the Philippines who were relying on me to send money to them from my earnings in Australia.*
>
> *68. Michelle Lloyd never did arrange for me to attend the Burwood Nursing College as she had promised. Nor did she ever attend for me to do any training or get my qualifications as a Registered Nurse in Australia.*

22. Ms Soriano tolerated Ms Lloyd's conduct for a much shorter period, but it is clear from her affidavit how frustrating and upsetting she, and

the Matron at Meredith House, must have found the total withholding of her wages and the succession of false promises and threats, with which she was fobbed off.

23. Notwithstanding the seriousness of the contraventions, there are a number of mitigating factors which I have brought into account. The evidence about the general business and financial situation of HRA at the relevant time, and currently, is sparse. However, I would give it the benefit of impressions which I have drawn from the evidence that its business was of marginal financial strength, and that it has ceased to engage in the overseas nurses recruitment business which was mismanaged by Ms Lloyd. I would also give her the benefit of some doubts, when she claims that the situation of these three nurses was not repeated in relation to other nurses, and that her arrangements in relation to their employment were not usual for her business.

24. I accept that in the course of these proceedings Ms Lloyd has been forced to reflect upon the circumstances which have brought her to court, and that she will consciously seek to avoid getting into a similar situation. I therefore accept that she and HRA should be treated as first offenders who are disposed to reform. I would expect this judgment itself could have a significant impact on the abilities of both of them to become involved in a similar business in the future.

25. The above factors impact on the deterrent qualities required in the penalties, by suggesting that a penalty at a significant level within the range available is likely to have real impact on HRA and Ms Lloyd, and that its imposition and my findings will also carry a clear general message to other operators in the relevant industry. In all the circumstances, I do not consider that it is necessary in this case to impose penalties at the highest available levels.

26. I would also take into account that most of the unpaid remuneration was very belatedly paid, and that Ms Lloyd ultimately attempted to expedite, rather than protract, the proceedings in this Court. However, her actions in the course of the proceedings suggests reluctant acceptance of the inevitable, rather than contrition, and I do not consider that a quantified or substantial reduction should be applied for these matters.

27. Under the 'totality principle', where there are multiple contraventions arising out of the same circumstances, the Court must assess appropriate individual penalties, and then consider whether the total of these amounts is *"out of proportion to the overall conduct"* (cf. *Australian Ophthalmic Supplies Pty Ltd v McAlary Smith* [2008] FCAFC 8, per Gray J at [23], also Graham J at [71], and Buchannan J at [94]-[101]).

28. Applying this principle, I have concluded that separate penalties of $15,000 would be appropriately imposed on HRA, and of $3,000 on Ms Lloyd. I would not attempt to differentiate the penalties for the different contraventions, which all involved important entitlements. These would produce total penalties of $60,000, and $12,000. On reflection, I consider that these are at a level which should be reduced by one third under the totality principle, and I would therefore reduce the individual penalties to $10,000 on HRA and $2,000 on Ms Lloyd.

29. Counsel for Mr Armstrong pointed out the substantial hardship suffered by Ms Aliermo and Mr Villar as a result of the delay between October 2006 and July 2008 in their receiving the net remuneration which was withheld by HRA. He submitted that notwithstanding that this remuneration was paid before the Court could make an order for its payment under s.719(6), it would be possible to frame an order under that power and s.722(1) so as to impose a liability on HRA to pay amounts by way of interest for this period.

30. In *Jarvis v Imposete Pty Ltd (No.2)* [2008] FMCA 101, at [55] I noted doubts whether the power to award interest remains available in relation to an amount of money which has already been paid and is not part of 'the money' which is ordered to be paid under s.719(6). I remain doubtful of this power. As in *Jarvis*, I consider that the preferable approach in the circumstances of the present case is to direct part of the penalty to be paid to Ms Aliermo and Mr Villar as compensation for lost interest. In all the circumstances, I consider that it is just for this to be paid out of the penalties for which Ms Lloyd, rather than HRA, is liable. I shall not arrive at a precise calculation of that compensation, but have arrived at the sum of $1,000 to be paid to each of Ms Aliermo and Mr Villas, after taking into account the interest calculations set out in paragraph 49 of the affidavit of Ms Peters sworn

on 16 July 2008. In view of the lesser sum involved, I would not direct any payment on the same basis to Ms Soriano. I have excluded the amounts of PAYG tax liability from my rough calculations of interest, since there is no evidence that these have yet been paid to the Deputy Commissioner of Taxation by anyone, nor that he is likely to charge the employees interest. I shall order that the balance should be paid to the Commonwealth, which has funded this application.

31. I shall order that the various amounts payable will carry interest after judgment until they are paid, unless they are paid within 21 days of this judgment (cf. s.723 of the Act, s.77 of the *Federal Magistrates Act 1999* (Cth), and r.26.01 of the *Federal Magistrates Court Rules 2001* (Cth)).

32. My costs order made on 12 March 2008 remains in force, but no other costs orders have been sought by the applicant.

I certify that the preceding thirty two (32) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: Michael Abood

Date: 8 August 2008