FEDERAL COURT OF AUSTRALIA

Retail and Fast Food Workers Union Incorporated v Tantex Holdings Pty Ltd (No 2) [2020] 1644

File number:	QUD 703 of 2019
Judgment of:	**LOGAN J**
Date of judgment:	13 November 2020
Catchwords:	**EMPLOYMENT AND INDUSTRIAL RELATIONS** – where the McDonald's Australia Enterprise Agreement 2013 (**the Agreement**) provides for a 10 minute paid drink break on a 4 hour shift – where second applicant was not provided with 10 minute paid drink break – where respondent admitted contravention of s 50 of the *Fair Work Act 2009* (Cth) (**the Act**) – where Facebook groups were used to communicate with employees – where employees had a right to take short drink or toilet breaks outside this 10 minute break – where that right is a "workplace right" for the purposes of the Act – where respondent contravened ss 340, 343 and 345 of the Act by contents of Facebook posts written by employees – penalties to be imposed – whether payment of penalties should be ordered to first and second applicants
Legislation:	*Evidence Act 1995* (Cth) *Fair Work Act 2009* (Cth) ss 50, 340, 345 343, 546, 556, 557
Cases cited:	*Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Bendigo Theatre Case) (No 2)* (2018) 70 AILR 102-975 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 *Commonwealth of Australia v Director, Fair Work Building Inspectorate* (2015) 258 CLR 482 *Community and Public Sector Union v Telstra Corporation Limited* (2001) 108 IR 228 *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 194 IR 461 *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction*

	Commissioner (*The Broadway on Ann Case*) (2018) 265 FCR 208 *Fair Work Ombudsman v Phua & Foo Pty* Ltd [2018] FCA 137 *Finance Sector Union of Australia v Australia & New Zealand Banking Group Limited* (2002) 52 AILR 4-663 *National Tertiary Education Industry Union v Central Queensland University* (2008) 60 AILR 100-854 *Pattinson v Australian Building and Construction Commissioner* [2020] FCAFC 177 *Retail and Fast Food Workers Union Incorporated v Tantex Holdings Pty Ltd* [2020] FCA 1258
Division:	Fair Work Division
Registry:	Queensland
National Practice Area:	Employment and Industrial Relations
Number of paragraphs:	66
Date of hearing:	10 November 2020
Counsel for the Applicants:	Ms S Kelly
Counsel for the Respondent:	Mr A Gotting
Solicitor for the Respondent:	McCabe Curwood

ORDERS

QUD 703 of 2019

BETWEEN:	**RETAIL AND FAST FOOD WORKERS UNION INCORPORATED** First Applicant
	CHIARA STAINES Second Applicant
AND:	**TANTEX HOLDINGS PTY LTD** Respondent

ORDER MADE BY: **LOGAN J**

DATE OF ORDER: **13 NOVEMBER 2020**

THE COURT ORDERS THAT:

1. In respect of the contravention of s 50 of the *Fair Work Act 2009* (Cth) (**FWA**) specified and declared in the Court's Order of 30 September 2020 (**liability order**), the respondent pay a pecuniary penalty of $30,000.00.
2. Of the penalty imposed by Order 1, $10,000.00 be paid to the second applicant.
3. In respect of the contravention of s 345 of the FWA specified and declared in paragraph 2 of the liability order, the respondent pay a pecuniary penalty of $6,000.00.
4. In respect of the contravention of s 345 of the FWA specified and declared in paragraph 3 of the liability order, the respondent pay a pecuniary penalty of $6,000.00.
5. In respect of the contravention of s 343 of the FWA specified and declared in paragraph 6 of the liability order, the respondent pay a pecuniary penalty of $40,000.00.
6. In respect of the contraventions of s 345 and s 340 of the FWA, respectively specified and declared in paragraphs 4 and 5 of the liability order, it be declared, in light of the penalty imposed by Order 5 and by operation of s 556 of the FWA, that the respondent is not liable to pay a pecuniary penalty in respect of these contraventions.
7. Save as provided by Order 2, each and every pecuniary penalty imposed by this order be paid by the respondent to the first applicant. For the avoidance of any doubt, that means that the total amount which the respondent must pay to the first applicant is $72,000.00.

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

REASONS FOR JUDGMENT

LOGAN J:

1 On 31 August 2020, for reasons set out in my judgment published that day, *Retail and Fast Food Workers Union Incorporated v Tantex Holdings Pty Ltd* [2020] FCA 1258 (**principal judgment**), I concluded that the respondent, Tantex Holdings Pty Ltd (**Tantex**) had committed a number of contraventions of the *Fair Work Act 2009* (Cth) (**FWA**). The remaining issue in these proceedings is the question of what civil penalties, if any, ought to be imposed and what other orders ought to be made as a sequel to that conclusion?

2 These reasons for judgment must be read in conjunction with the principal judgment. I have adopted the same abbreviations in this judgment as adopted in the principal judgment.

3 The particular contraventions of the FWA committed by Tantex were the subject of an order made on 30 September 2020. That order was made after consideration of drafts and related submissions filed by the parties, as contemplated by the orders made when the principal judgment was published. It is desirable to reproduce the contraventions that, by that order, Tantex was declared to have committed but it is not necessary again to recite the particulars of the various dates on which contraventions of s 50 of the FWA were committed. These particulars are to be found in Annexure 1 to the order. The contraventions were as follows:

> 1. [Tantex] breached clause 29 of the McDonald's Australia Enterprise Agreement 2013 (**Agreement**) and thereby contravened s 50 of the *Fair Work Act 2009* (Cth) (**FW Act**) by:
>
> (a) failing to provide the Second Applicant with a 10 minute paid drink break, that satisfied the requirement of clause 29.1 of the Agreement, on 219 shifts, specified in Annexure 1, that were of at least 4 hours in duration but less than 9 hours; and
>
> (b) failing to provide the Second Applicant with two 10-minute paid drink breaks, that satisfied the requirement of clause 29.1 of the Agreement, on 3 shifts, specified in Annexure 1, that were of nine hours in duration or more.
>
> 2. On 21 December 2018, [Tantex] breached s 345 of the FW Act by recklessly making a false representation about the rights of its employees working at its franchise operated, McDonald's Central Station restaurant, located at Shop 3, The Concourse, Ann Street, Brisbane, to the benefit of personal leave in accordance with s 96 of the FW Act by posting a message to a Facebook page it operated for its employees at the Central Station restaurant that stated:
>
> Christmas Day and Boxing Day shifts are final
>
> There are no shift swaps or sick calls on public holidays

Thank you

3. On 21 December 2018, [Tantex] breached s 345 of the FW Act by recklessly making a false representation about the rights of its employees working at its franchise operated, McDonald's Central Station restaurant, located at Shop 3, The Concourse, Ann Street, Brisbane, to the benefit of ss 96, 97 and 107 of Division 7 of Ch 2 of the FW Act by posting a message to a Facebook page it operated for its employees at the Central Station restaurant that stated:

> *4 hours is what we ask for
>
> 2 hours is the base expectation however,
>
> according to the enterprise agreement
>
> We are a 24 hour trading restaurant
>
> I will not accept a sick call past 10pm for an open

4. On 5 January 2019, [Tantex] breached s 345 of the FW Act by recklessly making false representations about the rights of its employees working at its franchise operated, McDonald's Windsor West restaurant, located at Shop 3, 172 Lutwyche Road, Windsor, Brisbane, to the benefit of cl 29 of the Agreement and section 19 of the *Work Health and Safety Act 2011* (Qld) (**WHS Act**) by posting to a Facebook page it operated for its employees at that restaurant a message:

   (a) that represented that the Windsor West Employees were entitled to a 10 minute break if they worked more than four hours, when in fact they were entitled to a 10 minute break if they worked four hours or more; and

   (b) represented that if Windsor West Employees were afforded a 10 minute break that break would be the only time they would ever be permitted to have a drink or to go the toilet, when in fact they were entitled to have a drink and use the toilet outside of their scheduled breaks with reasonable restrictions; and

   (c) represented that [Tantex] could lawfully prevent Windsor West Employees from drinking water or using the toilet outside of their scheduled breaks, when in fact they were entitled to have a drink and use the toilet outside of their scheduled breaks with reasonable restrictions.

5. On 5 January 2019, [Tantex] breached s 340 of the FW Act by threatening to deny its employees working at its franchise operated, McDonald's Windsor West restaurant, located at Shop 3, 172 Lutwyche Road, Windsor, Brisbane, access to the toilet outside of their 10 minute paid breaks and denying the employees the right to drink water outside of their 10 minute paid breaks:

   (a) because of the reason, or because of reasons including the reason, that Windsor West Employees to whom the Agreement applied:

      (i) had the workplace right to the benefit of cl 29 of the Agreement; and/or

      (ii) exercised their workplace right to the benefit of cl 29 of the Agreement; and/or

(iii) proposed to exercise their workplace right to the benefit of cl 29 of the Agreement; and/or

(b) with the motivation or intention of preventing Windsor West Employees to whom the Enterprise Agreement applied from exercising their workplace right to the benefit of cl 29 of the Agreement; and/or

(c) with the motivation or intention of preventing Windsor West Employees to whom the Agreement applied from exercising their workplace right to the benefit of section 19 of the WHS Act.

6. On 5 January 2019, [Tantex] breached s 343 of the FW Act by threatening to deny its employees working at its franchise operated, McDonald's Windsor West restaurant, located at Shop 3, 172 Lutwyche Road, Windsor, Brisbane, access to the toilet outside of their 10 minute paid breaks and the right to drink water outside of their 10 minute paid breaks with intent to coerce those employees not to exercise their workplace right to the benefit of cl 29 of the Agreement.

4 The first of the 219 shifts mentioned in paragraph 1(a) of the Order and detailed in Annexure 1 thereto occurred on 8 May 2017, the last on 28 April 2019. The first of the three shifts mentioned in paragraph 1(b) of the Order and detailed in Annexure 1 thereto occurred on 15 July 2018, the last on 24 November 2018.

Some general observations

5 The parties ordered their respective submissions by reference to groups of contraventions:

(a) the contraventions of s 50 of the FWA, grounded in a breach of cl 29 of the Enterprise Agreement;

(b) conduct on 21 December 2018; and

(c) conduct on 5 January 2019.

6 This is, with respect, a logical approach. I propose to adopt it. However, I do so with these qualifications. The conduct constituting the various contraventions of s 50 of the FWA and the conduct on 5 January 2019 are not unrelated. Underlying all of that conduct is a misunderstanding of the meaning and effect of cl 29 of the Enterprise Agreement. It is just that, on 5 January 2019, that misunderstanding manifested itself in very particular and extreme ways.

7 Delving more deeply into the facts and particularly the nature of the business operated by Tantex, the composition of its workforce and its adoption of an instantaneous or near-instantaneous means of communication as between managers and that workforce discloses an underlying theme in all of its contravening conduct.

8 Tantex did not operate a "9 to 5" business. Its various, McDonald's franchised restaurants operated over extended hours. Necessarily, that dictated that Tantex have shifts of workers, its "crews" and shift managers. The very description of the type of restaurant it operated, "fast food" indicates that, at the heart of the business, was a need to fill, rapidly and consistently accurately from a menu, customer orders, both take away and eat-in. To meet such a demand a system of operation was adopted which not just required a particular crew composition for each shift but also that the crew be reactive in a timely way to customer orders. The type of tasks, related labour costs (inferentially) and the range of hours of operation each manifested themselves, as a matter of managerial value judgement, in Tantex's workforce having a significant proportion of those yet to reach adulthood. More generally, many in its workforce were drawn from adolescent students in secondary or tertiary education. For many of this group, undertaking work at a McDonald's franchised restaurant was their first paid employment.

9 All of this, and doubtless the need to ensure adequate stocks of supplies and functional plant and equipment, must have contributed to singular managerial challenges and pressures in the operation of Tantex's business. There was obviously a need to have assurance that each shift would have adequate crew numbers and composition to meet customer demands. There was a related expediency in tolerating shift swaps but a need nonetheless for certainty as to crew availability.

10 Ordinary experience of life tells one that occasion for the taking of personal/carer's leave can arise in unexpected ways and at unexpected times, all without any fault or artifice on the part of a worker. That same experience tells one that it is not without cause that the Australian colloquialism, "sickie" is defined (Macquarie Dictionary) as "a day taken off work with pay, because of genuine or feigned illness". This apart and inferentially, the composition of Tantex's workforce made it inherently likely that competing commitments might arise in its workforce pool from study and exam commitments and social commitments, perhaps as to the latter at short notice. Perhaps also, there were some in its workforce who, because of immaturity and inexperience, did not appreciate a need for certainty of commitment that an experienced, full time worker may have. I doubt, for example, that the experience and belief of Tantex's managing director, Ms Manteit-Mulcahy in dealing with a particular worker, the subject of an alleged contravention which, as the principal judgment reveals, I found not proved, was unique. The very nature of Tantex's business meant that the late calling in of an absence was inherently likely to have a greater potential impact than in other types of business.

11 The operational contingency to have shifts of crews of a particular duration carried with it the potentiality, realised in practice, of having to give workers the break ordained by cl 29 of the Enterprise Agreement. That break was in addition to a more basic worker's right reasonably to pause work in order to go to the toilet or to have a drink of water.

12 A core managerial function of any employer in operating a business great or small is correctly to understand and apply the legislation, both Federal and State, and industrial instruments such as the Enterprise Agreement, which regulate in whole or in part the terms and conditions of employment of its workforce. Tantex has conspicuously failed to discharge this core managerial function.

13 When an employer chooses to make representations to its workers about those terms and conditions, it has a statutory obligation to be accurate. Tantex has also conspicuously failed to discharge this obligation.

14 Further, an employer who chooses to have the benefits of a workforce with a particular age group composition takes on not just those benefits but also whatever burdens attend a workforce so composed. In dealing with any such burdens, it remains incumbent on an employer to adopt managerial practices that conform to legislation, both Federal and State, and industrial instruments such as the Enterprise Agreement.

15 Tantex employed specially tailored Facebook groups as a means of communicating with its workers and for separate managerial consultations. Managerial value judgements in relation to such matters are for employers, not for the courts. However, where such value judgements manifest themselves in contraventions of the FWA, that then becomes, or may become, a matter for the courts. Given the composition of its workforce, it is not hard to see how the means adopted by Tantex might be attractive. As I observe in the principal judgment, the very convenience and immediacy of such a means of communication carries with it a risk of reactive response without pause for reflection on conformity with the requirements of statute and industrial instrument. The means is also conducive to an emotive rather than measured response. Once again, it is part of the managerial discretion to balance convenience and risk to determine what the appropriate means of communication is in given circumstances.

16 In my view, an underlying theme in each of the contraventions is managerial failure in responding to particular operational challenges and pressures. The various challenges and pressures to which I have referred might very well explain Tantex's conduct but they do not

excuse it. Nonetheless, given the presence of what I regard as a general, underlying theme in the contravening conduct, in addition to assessing for totality, as a final check, particular penalties imposed for particular contraventions or groups of contraventions, I have also assessed for totality the overall, penal outcome to ensure that it is appropriate.

17 Civil penalties are not retributive: *Commonwealth of Australia v Director, Fair Work Building Inspectorate* (2015) 258 CLR 482, at [59] (***Civil Penalties Case***); *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157, at [42] - [43], and, at [87] (***ABCC v CFMEU***). The purpose of the civil penalty regime for which the FWA provides is "primarily if not wholly protective in promoting the public interest in compliance": *Civil Penalties Case*, at [55]. That means that the object is deterrence, which is not limited to the specific deterrence of the particular respondent but extends to general deterrence. That object does not mean that a penalty should be any more or less than one proportionate and adapted to the objective seriousness of the contravening conduct concerned. It is that which is the "appropriate" penalty.

18 That the object of a civil penalty regime is not retributive does not mean that the Court is thereby constrained only to adopt the anodyne in a description of contravening conduct. If, truly and fairly, the objective seriousness of particular contravening conduct is such that it is "deplorable" or "reprehensible" then that is the description that it is apt to employ. Put bluntly, the object of deterrence is not, in my view, served by failing to call a spade a spade.

19 The object of deterrence is served by the imposition of a penalty that is conducive to compliance, by making the price of non-compliance more than just an ordinary business outgoing: *ABCC v CFMEU*, at [87]. That does not mean it is open to increase a penalty beyond that which is "appropriate" to accommodate a judicial perception that the maximum penalty ordained by Parliament is inadequate to achieve deterrence justifies a penalty greater than one that is "appropriate" within the range limited by that maximum. The prevailing applicable maximum penalty is always a "yardstick" in relation to penalisation.

20 Even though the relevant touchstone is the objective seriousness of the contravening conduct concerned, that does not mean that evidence of the experience of particular workers in relation to that contravening conduct is irrelevant. That experience is relevant in that it forms part of the overall factual matrix but subjective perceptions are not determinative.

21 As to that experience, I have the evidence of Ms Staines led at trial, as described in the principal judgment. I now also have other evidence, led for the purposes of the penalty hearing, as to the experience of particular then workers at Tantex's Windsor West restaurant. These workers were members of the target audience to whom Mr Crenicean, general manager of Tantex's restaurants, directed the 5 January 2019 Post. None of these additional witnesses was required for cross-examination.

22 Ms Dana Wieting, a Crew Member on shifts at the Windsor West restaurant, saw that post. She took a screenshot of it and sent it to the Union. Her experience was that, prior to the post, she and other workers were not getting paid drink breaks at all. She was aware of the Union's campaign on that issue and hopeful that there would be a resultant change of position by Tantex. The 5 January 2019 Post upset her. It made her afraid to ask for that break, even though it was one to which she thought she was entitled.

23 Another such Crew Member, Mr Lachlan Haines, also saw this post. Though his age is not stated, he describes himself as "one of the older workers". Inferentially, he was beyond secondary school leaving age. His reaction to it was similar to that of Ms Wieting. He stated:

> After the post was made public and the protest by the union was organised about the issue, we were not allowed to talk about it at work. If we were overheard talking about it we were told off. I asked someone about it and was told to shut up by a manager.

This experience and the tone of the post were factors in his decision in February 2019 no longer to work for Tantex.

24 The reaction to the 5 January 2019 Post of another such Crew Member, Taylor MacDougal-Marshall, was similar to that of Mr Haines. For this witness also, the post conveyed a message that there was no entitlement to both a paid, 10 minute break and breaks to go to the toilet or to have a drink. The evidence given by this witness included the following:

> After 28 November 2018, but prior to the 5 January 2019 post, I was told by a manager that I wasn't allowed to have drinks present in the kitchen area. When I did get a drink, I was sometimes snapped at by managers.

25 Yet another then Crew Member was Mr Coen Jones. He worked at the Windsor West restaurant from about September 2015 to about February 2019. For most of that time, he was employed by McDonald's Australia Limited. On or about 28 November 2018 that changed. He then became employed by Tantex. That accords with the overall evidence as to when Tantex commenced operating that restaurant under franchise. Once again, though his precise age is not stated, I infer from his present occupation (University Tutor) and his references to child Crew

Members that he had completed his secondary education by 5 January 2019. His reaction to the post was similar to that of the other Crew Members who gave evidence. He was "shocked and aggravated" by the post and also disappointed in his employer in making such a post to a workforce that included children (14 or 15 year olds according to his evidence). The post was a factor in his decision no longer to work for Tantex.

26 The overall impression created by the evidence of these additional witness is that of a definite change in tone at the Windsor West restaurant after Tantex commenced operating it in relation to the taking of a paid break if a shift of a particular length was worked or breaks for the purposes of going to the toilet or for a drink of water. That change in tone was unlikely to have been coincidental. It is inherently likely that it was informed by a particular and erroneous view that Tantex had at a senior managerial level (Mr Crenicean) in relation to these workplace rights.

27 The subjective reactions of these workers to the 5 January 2019 Post are completely congruent with features of it that led me to conclude that Tantex, by Mr Crenicean, had engaged in coercion, contrary to s 343 of the FWA. They are not idiosyncratic.

28 Tantex tendered a collection of letters, authored by apparently responsible persons, on behalf of a football club or as the case may be charities, supported by Tantex. The applicants objected to the reception of this material on the basis that the authors of these letters had neither sworn nor affirmed the truth of the statements in them and were not available to be cross-examined on them. As to the latter, reference was made to the absence of precision as to the nature and extent of the author's understanding of the contraventions found to have been committed and the reasons for those findings. In my view, they were relevant and, insofar as the same may have been necessary in order to admit them, I exercised the Court's discretionary power under the *Evidence Act 1995* (Cth) to dispense with the rules of evidence. The bases of objection by the applicants remain legitimate factors to take into account in relation to the weight to give the statements in them. I have done this. Even so, I find that, under Ms Manteit-Mulcahy's control, Tantex has a disposition to support, in more than a token way, community sporting and charitable organisations, even in the absence of any obligation. Of course, in terms of outgoings from its cash flow and in a way incapable on the evidence of precise calculation, its ability so to do may have been enabled by denying to its workers the rights at large in the present case. Even so, that does not diminish the evident disposition to voluntary corporate

benevolence. Whatever gains there were, Tantex did not keep them all to itself. I have taken this into account in relation to the imposition of penalties.

29 Tantex (through its counsel) apologised to its employees and the Court (which means to Australia, through her judicial branch of government) for the contraventions. Having had the benefit of observing Ms Manteit-Mulcahy in evidence at trial, I do not doubt the sincerity of that apology. It is a mitigating factor. I have taken that into account generally in relation to the question of what penalty is "appropriate".

30 Tantex also put, over an objection by the applicants over-ruled by me, that it was relevant to take into account in mitigation media publicity that the Court's conclusions as to contraventions had already attracted. I admitted, because I considered it relevant, an extensive collation of media articles. This discloses that the principal judgment and consequential order attracted extensive publicity unfavourable to Tantex but which offered broadly accurate summations of its contravening conduct. That the publicity was unfavourable reflected the contraventions and the related reasons for the conclusions that they had been committed. The adverse publicity underpinned a submission by Tantex that the s 50 contraventions ought not to attract a penalty at all.

31 Given that the object is deterrence, it is possible to conceive of circumstances in which adverse publicity alone, "naming and shaming" as it were, might appropriately serve that object, both generally and in respect of a contravener or, if there were additionally an individual named as an accessory, perhaps for the individual if not for the principal contravener: see, for example, *National Tertiary Education Industry Union v Central Queensland University* (2008) 60 AILR 100-854 (***CQ University Case***).

32 Equally, there is merit in the applicants' submission that there is something odd in the notion that the very qualities of a contravention that attract publicity beyond the publication of the Court's Order and related reasons for judgment should lead to a conclusion that no penalty ought to be imposed. As a general proposition, I agree with the applicants' submission. As I was in the *CQ University Case*, I am in respectful agreement with this observation made by Finkelstein J in: *Community and Public Sector Union v Telstra Corporation Limited* (2001) 108 IR 228, at 230-1:

> … even if there be no need for specific deterrence, there will be occasions when general deterrence must take priority, and in that case a penalty should be imposed to mark the law's disapproval of the conduct in question, and to act as a warning to others not to engage in similar conduct.

Ultimately, the question as to what penalty to impose, if any, and, if any, its amount, calls for the exercise of a discretion in the overall circumstances of a given case. Penalisation, if any, is a matter for a judicial discretionary value judgement, an "instinctive synthesis", not a matter for newspaper or other media editors in deciding what may or may not be newsworthy. Sometimes, the exercise of that discretion is informed, although not dictated, by an agreement between the parties as to an appropriate penalty: qv the *Civil Penalties Case*. Thus, it is possible to conceive of circumstances where the fact that an applicant, especially a regulator or union, agreed, for the reason promoted in this case by Tantex, to a no penalty outcome would be highly influential, perhaps even decisive, in a court making orders which reflected such an outcome. Here, there is no such agreement. Further, the objective seriousness of the s 50 contraventions is such that the end of deterrence, particularly general deterrence, would not be served by making no order as to penalty.

33 Tantex also made the submission that it was "not BHP" as a factor to consider in mitigation. Equally, it might be observed that it was not operating a corner store. The financial position of a respondent is a factor to take into account. Tantex is not a major, publicly listed, corporation. It is under the control of Ms Manteit-Mulcahy. However, quite what are its financial resources, is, as a matter of deliberate forensic choice on its part, not revealed in evidence. If the objective seriousness of a contravention and the end of deterrence mean that a particular penalty is appropriate, then, usually, that is the penalty to impose. Sometimes, when possessed of particular evidence as to financial resources that such a penalty would impose a crushing burden one might discount this but such particular evidence is lacking in this case.

34 As to the s 50 contraventions, it was also put on behalf of Tantex as a factor in mitigation that these had been admitted prior to trial. That admission occurred after the case had been listed for trial but before the applicants filed their affidavit evidence in chief. The admission was not therefore at the door of the court on the trial date. I do not doubt that some saving to the applicants was entailed. It also I am quite sure resulted in a saving of court time. Tantex is entitled to have such co-operation in the administration of justice taken into account in its favour. I have done this in relation to the penalty I have decided to impose in respect of the contraventions of s 50 of the FWA.

35 Tantex also paid, without the need for formal order, a sum to Ms Staines reasonably and rationally calculated to reflect the amount of pay lost to her by the contraventions of s 50 of the FWA. To this it later added, again without obligation by formal order, a sum also reasonably

and rationally calculated to reflect, at compound interest rates, the loss to Ms Staines over time of the use of such pay. I agree this conduct stands in its favour. I have also taken this into account in relation to penalty in respect of the s 50 contraventions.

36 Tantex paid the compensation awarded to Ms Staines by the Order of 31 August 2020 on 4 September 2020. It submitted that this, too, was a factor to take into account in mitigation. I agree but its mitigating effect is qualitatively different to the other payments it made to Ms Staines, and different for a reason submitted by the applicants. Tantex was obliged by the Court's Order to make the payment. It did not make this particular compensatory payment to her voluntarily. It submitted, as it was entitled to do, that no such payment ought to be made. That it made such a submission is not at all a basis for increasing beyond what is appropriate the penalty in respect of the contraventions. It is just that the absence of voluntary payment has not resonated in any saving either to Ms Staines or the Union of the time, trouble (and for Ms Staines especially) stress of having to litigate the issue. Neither did it result in any saving of court time. These types of savings and the co-operation in the administration of justice manifested by an admission have the greater mitigating effect than paying, albeit promptly, what one is obliged to pay. Even so, the sum has been paid promptly and neither Ms Staines alone nor the Union on her behalf has been put to the expense of having to expend further funds in an endeavour to recover payment. I have taken this into account.

37 Related to Tantex's submission in relation to the loss to Ms Staines and the payment of economic loss voluntarily and non-economic loss as assessed by the Court was a submission that:

(a) "There is no evidence that any Central Station Employee suffered any loss or damage from relying (if they did) upon the 21 December 2018 Posts";

(b) "There is 'limited evidence' of Windsor West Employees suffering loss or damage from relying upon the 5 January 2019 Post".

I agree that, on the evidence as a whole, each of these propositions is made out. However, the evidence as a whole also establishes that, reflecting its continued misunderstanding, Tantex did act on the representation made in the 5 January 2019 Post. Neither before nor after that post is it more likely than not that Ms Staines was the only person denied a paid drink break. Indeed, a reason advanced by Tantex as to why there was a single course of conduct for the purposes of s 557 of the FWA, which told in favour of that conclusion (see further, below), was that its misunderstanding was sustained and systemic. As I have held, the misunderstanding was at a

senior managerial level. It was a misunderstanding pervasive in its workforce impact, not one confined just to Ms Staines. To find beyond that would go beyond the limits of the evidence to hand. The evidence does not permit quantification of any economic loss other than that occasioned to Ms Staines. Neither, even more so, does it permit any quantification of such non-economic loss, if any at all, which any other worker sustained. What I can and do find in relation to the s 50 contraventions is that those contraventions operated to the economic benefit of Tantex and are very likely indicative of a wider economic benefit but the nature and extent of any such benefit is not quantifiable on the evidence.

38 There is evidence from both Ms Manteit-Mulcahy and Mr Crenicean that Tantex introduced in 2019 a system of recording the taking of paid drink breaks in what are termed "break logs". This carries with it a conclusion that Tantex is no longer operating under the misunderstanding confirmed by the present case and has not done so from, at the latest, the end of the period covered by the s 50 contraventions found. That diminishes a need for specific deterrence but does not mean there is no need for general deterrence. The Enterprise Agreement was applicable to more employers than just Tantex. Further, I am firmly of the view that Tantex itself ought to have a reminder by penalisation of the requirement to adhere to the terms of an Enterprise Agreement which binds it.

39 A further submission made by the Union, particularly directed to the conduct on 5 January 2019, although, logically, if correct, one which would extend to each and every contravention after the first in 2017, was that Tantex had a history of prior contraventions. That is just not so, as Tantex correctly submitted. The judicial act on 1 October 2020 of declaring that Tantex had contravened the FWA in the particular ways and on the particular dates set out in that order did not have retroactive effect. At the times when Tantex engaged in the contravening conduct alleged and later found proven, it did not have any history of prior contraventions of the FWA. That means that I am relieved, serendipitously perhaps, from having to consider *Pattinson v Australian Building and Construction Commissioner* [2020] FCAFC 177. As it is, the absence of a history of prior contraventions is a factor in mitigation to be taken into account in relation to the imposition of penalties. I have done so.

The s 50 contraventions

40 The parties were agreed that s 557 of the FWA applied to the contraventions of s 50 of that Act but not as to the manner of its application. Materially s 557 provides:

> **557 Course of conduct**
>
> (1) For the purposes of this Part, 2 or more contraventions of a civil remedy provision referred to in subsection (2) are, subject to subsection (3), taken to constitute a single contravention if:
>
> (a) the contraventions are committed by the same person; and
>
> (b) the contraventions arose out of a course of conduct by the person.
>
> (2) The civil remedy provisions are the following:
>
> …
>
> (c) section 50 (which deals with contraventions of enterprise agreements);
>
> …

41 Ms Staines submitted that s 557 applied such that "there were at least twenty three separate courses of conduct and, in the circumstances of this case, it is appropriate to fix Tantex with twenty three penalties, one for each course of conduct". In the alternative, it was submitted "there were two courses of conduct, and Tantex should be fixed with two penalties". It was further submitted:

> Identification of the relevant courses of conduct is to be assessed by reference to two periods. The first is marked by the period before Ms Staines asserted her right to the benefit of cl 29 of the [Enterprise] Agreement. The second is marked by the period after Ms Staines asserted that right (or perhaps after the Union asserted the rights of all workers to the benefit of cl 29 of the [Enterprise] Agreement.

42 For its part, Tantex submitted that there was but one course of conduct such its contraventions should be taken to constitute a single contravention.

43 A decision as to whether there is a course of conduct requires a case specific inquiry as to whether there was in the circumstances an interrelationship between the legal and factual elements of two or more contraventions for which and respondent has been found to have committed: *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 194 IR 461, at [39], per Middleton and Gordon JJ.

44 Here, there is but one single course of conduct and certainly not 23 (the latter said to be on the basis of the number of contraventions that occurred after Ms Staines first asserted her right to a paid break). Tantex was mistaken as to the application of cl 29 of the Enterprise Agreement in 2017 and remained consistently mistaken as late as up to April 2019. The progressive intensification of agitation as to entitlement to a paid break in accordance with cl 29, initially by Ms Staines and later by the Union, never caused Tantex to waiver from the conduct on which it had embarked, at least from 2017. The conduct was sustained and systemic from 2017

onwards. The two points asserted by Ms Staines to result in separate courses of conduct are, for the purposes of the application of s 557 to the circumstances of this case, artificial constructs. They do have a place in relation to the imposition of penalty but that place is not in yielding separate courses of conduct. Rather, they provide aggravating circumstances in relation to the penalisation of one single course of conduct.

45 Tantex had two occasions, at least, in late November/early December 2018 when Ms Staines asserted a right to a paid break and, at the latest, on 4 January 2019 when the Union manifested its assertion on behalf of workers of that same right which, one might have expected, ought to have yielded pause for thought by a responsible employer about the correctness of its position.

46 It is to be remembered that there was here a power imbalance as between the worker, Ms Staines and Tantex. Employers need to be sensitive to that when a worker asserts a workplace right and not find comfort in that imbalance by not giving weight to the possibility that the worker might be right. On the whole of the evidence, I was left with the distinct impression that this had occurred in relation to Ms Staines' assertion. Even if one were disposed not to react to the assertions of an individual worker, the Union's emphatic adoption of that same position and advocacy for it ought to have occasioned this and at least a careful, studied reading of the clause, if not the taking of advice. Tantex had multiple potential sources of such advice, either in-house from its human resources staff, from the franchisor or, based on its apparent financial resources, from external legal or industrial relations advisers. Unlike some industrial instruments, cl 29 of the Enterprise Agreement presents no particular difficulties of understanding. The corporate intransigence was not a coincidence. It was inherently likely at least to have been referable to the idiosyncratic views of its, by 4 January 2019, general manager, Mr Crenicean as to the meaning and effect of cl 29 of the Enterprise Agreement. It was those views that manifested themselves the following day in deplorable conduct on his part in the 5 January 2019 Post. It is also a measure of that intransigence and a related managerial failure that Tantex continued to contravene s 50 of the FWA as late as April 2019. The misunderstanding was sustained and had systemic or pervasive impact.

47 Mr Gotting of Counsel, who appeared on behalf of Tantex, in manifest discharge of his duty to the Court, expressly drew my attention to the position that, although the period covered by the s 50 contraventions occurred at a time when the applicable maximum penalty was less than that applicable for most of that period, the level of penalty fell for determination against the yardstick provided by the maximum applicable at the end of the period: *Fair Work Ombudsman*

v Phua & Foo Pty Ltd [2018] FCA 137, at [31]. That means that the maximum penalty for the purpose of exercising the power conferred on the court by s 546 of the FWA to order Tantex to pay a pecuniary penalty is $63,000.00.

48 This then is a case of sustained corporate misunderstanding having a systemic operational effect in respect of a workplace right directed to ameliorating the effect of undertaking at or beyond a nominated length of hours the duties workers were engaged to perform. It is aggravated by intransigence but ameliorated by various mitigating factors, as described. In my view, the appropriate pecuniary to impose is $30,000.00.

Conduct on 21 December 2018

49 The Union offered this description in its submissions in relation to the conduct of Tantex, via Ms Locke, on 21 December 2018:

> By making the two posts, Ms Locke abrogated responsible management in favour of emotional, directory, inaccurate and misleading communications intended to relieve her of the burden of the managerial pressures she faced, and which came at the expense of honesty, accuracy and fairness in the treatment of its employees.

50 Subject to one important qualification, this description is, in my view, apt. Ms Locke was not actively dishonest but she was reckless. Her reactive responses that day were facilitated by a mode of communication (Facebook posts) which Tantex had managerially and preferentially selected for communication with its workforce. Ms Locke has since left the employ of Tantex but there is no evidence that it no longer employs Facebook posts as a means of communication. There is a singular need to remind both Tantex itself and employers generally of the risk, highlighted by this case, of a transgression of s 345 of the FWA, entailed by the adoption of this medium of communication. A medium conducive to casual and spontaneous chat does not excuse a casual approach to accuracy of representation as between employer and worker.

51 Tantex submitted that I should "treat the two (proven) contraventions involving the 21 December 2018 Posts as arising from a single course of conduct for the purpose of the common law principles relating to penalties and determine that it is appropriate to impose one penalty in respect of the contraventions". The Union submitted that the two posts made that day by Ms Locke did not constitute a single course of conduct. Correctly, however, it did not dispute Tantex's submission that s 557, which is not applicable to a contravention of s 345 of the FWA, did not "cover the field" or exclude course of conduct analysis in relation to the question of appropriate penalisation: see, for example, *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner* (*The Broadway on Ann*

Case) (2018) 265 FCR 208, at [48] - [50], per Logan J (with whom Tracey J and, in this regard, Bromwich J, agreed).

52 On any view, there were two contraventions of s 345 of the FWA on 18 December 2018, as reflected in the principal judgment and later declaratory order. The maximum penalty and thus the "yardstick" for each contravention is $63,000.00. Is it appropriate to analyse a related need for their separate penalisation by reference to there being revealed nonetheless a course of conduct? Tantex submitted that it was, for these reasons:

1 The two posts were made by the same person ([principal judgment], at [73]).

2 The two posts were made on the same day ([principal judgment], at [73]).

3 The two posts addressed the same subject matter ([principal judgment], at [73], [79], [87]).

4 The two posts involved the same (found) recklessness ([principal judgment], at [84], [89]).

5 There is no suggestion in the evidence that the decision making process of Ms Locke altered between the two posts and in reality there was a continuity of purpose in both posts.

6 The two posts did not treat employees differently.

53 That the conduct was engaged in on behalf of Tantex by the same person on the same day is hardly determinative but then Tantex did not submit that it was. Rather, these are features of what seems to me to have been an overall managerial response that day, via Ms Locke on two occasions which were strictly separate but not, for the reason just given, unrelated, to an apprehended, looming crew availability difficulty. Though I propose to impose two penalties, one for each contravention, I temper those penalties in recognition that those contraventions are particular manifestations of a course of conduct that day. The penalty I impose in respect of each contravention is $6,000.00.

Conduct on 5 January 2019

54 As to the contraventions of ss 340, 343 and 345 of the FWA committed on 5 January 2019 by Tantex via Mr Crenicean, it was common ground (correctly, with respect) that:

(a) s 557 of the FWA was inapplicable to contraventions of these provisions; and

(b) s 556 of the FWA was, in the circumstances, applicable to those contraventions.

55 Section 556 provides:

> If a person is ordered to pay a pecuniary penalty under a civil remedy provision in

> relation to particular conduct, the person is not liable to be ordered to pay a pecuniary penalty under some other provision of a law of the Commonwealth in relation to that conduct.

56 The Union submitted that the "lead contravention" should be the contravention of s 343 of the FWA. It submitted that the Court so conclude. It may be that it is for the Union to make an election. In any event, of the contraventions committed that day, the contravention of s 343 was certainly the most serious. It is apt that this be the particular conduct penalised. The elements of a contravention of s 343 of the FWA, discussed in the principal judgment, disclose one reason why this is so. Recollection of the composition of the target (a word used advisedly) workforce at the Windsor West restaurant provides another. The workplace rights involved provide yet another.

57 Of course, in terms of Australian case law, there was an element of novelty about the subject of whether a worker had a right reasonably to leave the work floor for the purpose of going to the toilet or having a drink of water. But then no employer before Tantex had submitted to an Australian court that there was no such right.

58 The threat made by Tantex by Mr Crenicean on 5 January 2019 was a sinister one. There is a quality of cruelty to workers about it. Its object was to quell agitation about a right to take a break in accordance with cl 29 of the Enterprise Agreement. The threat did hit its target. The evidence led by the Union at the penalty hearing proves that. The Union submitted, "The conduct struck at the heart of the system of industrial relations – being the creation of legally enforceable and mutually beneficial rights and entitlements through the system of enterprise bargaining". This is true. Yet another submission made by the Union, also true, was that the contravention was a manifestation and exploitation of a "gross power imbalance".

59 The particular contravention of s 343 of the FWA was, objectively, a serious one, as any contravention of s 343 is apt to be. The object of deterrence both specific and general requires that the penal response be condign. The Union submitted that a "high range" penalty ought to be imposed. I have reflected long and hard as to whether the objective seriousness revealed means that the maximum end ($63,000.00) of the total range and thus the end of a "high range" ought to be imposed, qv *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Bendigo Theatre Case) (No 2)* (2018) 70 AILR 102-975, at [18], per Tracey J. I have concluded that it would not be appropriate to impose the maximum penalty. This was recklessness and a manifestation of misunderstanding and intransigence but it did have a spontaneous quality about it nonetheless. Contrary to the

Union's submission, I consider that the apology tendered by Tantex does evidence contrition by its controller, Ms Manteit-Mulcahy. In all of the circumstances, the penalty which I impose is $40,000.00.

Payment of Penalties

60 By s 546(3) of the FWA, the Court may order that the pecuniary penalty, or a part of the penalty, be paid to the Commonwealth, an organisation (as defined) or a person.

61 In the *CQ University Case*, at [50], I expressed agreement with the following observation made by Wilcox J in *Finance Sector Union of Australia v Australia & New Zealand Banking Group Limited* (2002) 52 AILR 4-663, at [16]:

> 16 In *CPSU* Finkelstein suggested that such an order should not be made if it is likely to result in a "windfall to the organisation". I am not sure I agree with that; the rationale of the practice is that it tends to encourage a "common informer" to police the relevant legislation: see *Vehicle Builders' Employees' Federation of Australia v General Motors-Holden Pty Ltd* (1977) 32 FLR 100 at 113. That rationale is likely to be defeated if the common informer is not to be allowed to make a profit.

62 I received evidence at the penalty hearing from the Union's Secretary, Mr Joshua Cullinan as to the time, trouble and expense to which the Union had gone to prosecute these proceedings. His evidence was not challenged. The Union had the carriage of the applicants' side of the proceedings including Ms Staines as applicant in relation to the s 50 contraventions. The ordering of payment to an organisation or person under s 546(3) of the FWA is not a surrogate for an order for costs. The power is conferred for a quite separate purpose, long known in relation to pecuniary regimes and, with respect, aptly identified by Wilcox J in the passage just quoted as to "encourage a 'common informer' to police the relevant legislation".

63 The Union submitted that any pecuniary penalty imposed for the contraventions of s 50 should be paid to Ms Staines or, in the alternative, to the Union. It further submitted that "any pecuniary penalties imposed for the contraventions of s 340, 343 and/or 345 should be paid to the Union". This submission accorded with the statutory purpose identified.

64 For this reason, it is appropriate, in my view, to order that part of the penalty imposed in respect of the s 50 contraventions be paid to Ms Staines. I propose to order that she be paid $10,000.00. The balance of that penalty and all other penalties imposed are to be paid to the Union.

65 Related to the making of these orders, I add the following.

66 Ms Staines and the Union have each well-served the public interest. That is not an abstract concept. All Australians have an interest in the conduct of industrial relations, including the employment of workers, according to law. Parliament has provided for civil penalties to be imposed for contraventions of the FWA. Under our system of justice, part of Australia's constitutional inheritance from the United Kingdom, the courts are adversarial, not inquisitorial. That means that the power to impose civil penalties where contraventions are proven only falls for its exercise when a proceeding is instituted. Public resources allocated to police the FWA are limited. The financial ability of an individual worker to police a perceived contravention of the FWA is also in most cases limited. Workers, collectively, via a trade union, are thereby better equipped to do this. The policing by trade unions of compliance with industrial laws is a longstanding, legitimate role of trade unions. This does not just serve the interests of the particular workers concerned, or the trade union. It serves the national interest. As a study of the judgments of this Court discloses, there are occasions, for cause, when the Court has been adversely critical of the conduct of particular trade unions. It is just as important and necessary that the service of a trade union of a national interest be noted. For that reason, I conclude these reasons for judgment by recognising the service to the national interest by the Union in the circumstances of the present case.

I certify that the preceding sixty-six (66) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Logan.

Associate: 

Dated: 13 November 2020