

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA
(DIVISION 2)

Fair Work Ombudsman v Buchanan [2022] FedCFamC2G 92

File number(s): BRG345 of 2021

Judgment of: **JUDGE VASTA**

Date of judgment: 18 February 2022

Catchwords: **INDUSTRIAL LAW** – breach of s 325 and s 789GD of the *Fair Work Act 2009* (Cth) – JobKeeper payments – employer not passing on payment – employer directing repayment - Assessment of pecuniary penalties

Legislation: Fair Work Act 2009 (Cth): s 325,s 546, s 789GD

Cases cited: *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46
Mason & Harrington Corporation Pty Ltd t/as Pangea Restaurant & Bar [2007] FMCA 7

Division: Division 2 General Federal Law

Number of paragraphs: 60

Date of last submission/s: 8 February 2022

Date of hearing: In Chambers

Place: Brisbane

Solicitor for the Applicant: Office of the Fair Work Ombudsman

Solicitor for the Respondent: The Respondent representing himself

ORDERS

BRG345 of 2021

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN: **FAIR WORK OMBUDSMAN**
Applicant

AND: **KHAN ANDREW BUCHANAN**
Respondent

ORDER MADE BY: **JUDGE VASTA**

DATE OF ORDER: **18 FEBRUARY 2022**

THE COURT DECLARES THAT:

1. The Respondent contravened section 325(1) of the FW Act by directly or indirectly requiring the Employee to pay to the Respondent an amount of the Employee's money where the requirement was unreasonable in the circumstances and the payment was directly or indirectly for the benefit of the Respondent or a party related to the Respondent.
2. The Respondent contravened section 789GD of the FW Act by failing to ensure the wage condition was satisfied by the end of a JobKeeper fortnight.

THE COURT ORDERS THAT:

3. Within 28 days of this order, the Respondent pay a pecuniary penalty of \$14,000 to the Consolidated Revenue Fund of the Commonwealth pursuant to s 546(1) of the FW Act for the contraventions declared in paragraphs 1 and 2 above.
4. The Applicant has liberty to apply on seven days' notice in the event that any of the preceding orders are not complied with.

Note: The form of the order is subject to the entry in the Court's records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to

r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

JUDGE VASTA

INTRODUCTION

1 Khan Andrew Buchanan, the Respondent, is a sole trader who carries on a business known as River City bus service. This is a private bus charter business that employed around five persons. The employee, Michael Raymond Evans, is a 70-year-old man who worked for the respondent from 21 August 2017 to 8 September 2020.

2 The employee was a recipient of JobKeeper, a temporary wage subsidy scheme introduced by the Australian Government at the beginning of the COVID-19 pandemic. The *Fair Work Act 2009* (Cth) (“the FW Act”) had specific provisions enacted to ensure that payments made to employers were passed on to employees. In this case, the employer directed the employee to make cashback payments, contrary to the provisions of the FW Act as well as failing to pass on the payment on one occasion.

Summary of the Contravention

3 When the COVID-19 pandemic hit, the business of the Respondent was going to be affected. The business operated a school bus route which was not going to be utilised while schools were shut to all students (except for the children of essential workers).

4 The business was eligible for JobKeeper payments. The employee signed the necessary paperwork given to him by the Respondent so that JobKeeper could be utilised by the business which would be given \$1500 a fortnight to pay for the wages of the employee. The business was obliged to pass on the \$1500 (gross) per fortnight to the employee but to also make the statutory deductions as would normally happen with any wages paid to an employee.

5 In the case of the employee, the hours that he normally worked would not see him earn anything close to \$1500 gross per fortnight. Often, the employee would work about 12 hours per week which equated to less than \$350 gross per week. Yet, under JobKeeper, the employee was still entitled to be paid \$750 gross per week.

6 The employee was directed by the Respondent to “give back” to the Respondent the nett amount that was deemed to be the “overpayment” or “top up”. For the last period of time for which the employee worked, the Respondent failed to pass on the JobKeeper payment.

Evidence of the Employee

- 7 The employee testified that he usually worked between 10 and 30 hours a week for the business and had done so since the first began working for the Respondent in August 2017. The employee said that the Respondent spoke to him about the JobKeeper program in March 2020. He said that the Respondent asked him to sign up for the scheme to help the business during the COVID-19 lockdown. The employee said that this was why he signed up for JobKeeper.
- 8 The employee said that the Respondent told him that *“you will need to repay me the JobKeeper each fortnight after taxes as I am using my own money before I get paid by the government”*. The employee said that he was confused as to how JobKeeper worked but that the Respondent said to him *“the whole purpose of the JobKeeper program was a general reimbursement for the running costs of my business like bus repairs and registration and JobKeeper payments you receive are to be given back to me in cash as it’s easier for me that way”*.
- 9 The employee said that the Respondent also told him that *“most of the other workers are not eligible for JobKeeper for one reason or another and it is your JobKeeper payments that would make sure that you would be kept in a job and employed. If you don’t sign up for JobKeeper, there would be no job for you as I cannot afford to keep paying for everybody”*.
- 10 The employee said that he believed that the Respondent would not have kept him on as an employee if he did not agree to re-pay his JobKeeper payments to the Respondent.
- 11 The employee said that he paid back the JobKeeper amounts as directed in cash but he was not aware if the JobKeeper payments he returned to the Respondent were, in fact, used to pay the payroll of other employees. The employee said that he did not discuss with co-workers any of the arrangements with regard to JobKeeper.
- 12 The employee had also been receiving the aged pension since about May 2016. The employee informed Centrelink that his income had increased because of JobKeeper payments. He did not let Centrelink know that he was paying part of that money back to the Respondent. This increase in his income had the effect of reducing the employee’s pension by about \$200 almost every fortnight.
- 13 The employee said that this reduction in income was hard because his only source of income was the pension and whatever he was paid by the Respondent. Because of the “cashback arrangement” the employee was being paid what he thought he normally would have been paid pre-COVID-19 but was being paid less by way of the aged pension.

14 The employee he said that he told the Respondent in August 2020 that “*I’m going downhill; I’m going backwards financially because of this JobKeeper I’m giving back to you*”. He said that the Respondent replied “*you were never one to complain about not having enough money and you should be better off under this now*” but this conversation ended because of an interruption.

15 The employee said that he began to have doubts about what was happening and spoke to a friend of his who explained that the JobKeeper money was meant for him and for him alone. For this reason, the employee said that he resigned on 8 September 2020. Soon after his resignation, the employee sought assistance from the Fair Work Ombudsman (the Applicant).

16 He said that the Respondent did not ever apologise, or even speak to him, after the resignation but he did send him a text message telling him to stay away from the work Christmas party.

Payments and calculations

17 The employee said that the Respondent would give him payslips which recorded his ordinary hours and also detail the JobKeeper “top-up” payments. I have reproduced (attached as Annexure A to this judgment) a random payslip for the period 20 May 2020 to 26 May 2020 to illustrate this point.

18 As can be seen from this particular payslip, the Respondent has clearly delineated that the gross pay that the employee had earned was \$412.67 and that the “top up” from JobKeeper amounted to a gross payment of \$337.33.

19 The gross amount of pay was \$750 and the nett figure given to the employee after deduction was \$654. After this particular payment, the Respondent told the employee to give him the sum of \$240 in cash (presumably the calculation as to what the net figure would be from a gross figure of \$337.33).

20 Reproduced below is a table that indicates the payments made by the Respondent to the employee and details the amounts that the employee was directed to give back to the Respondent. The first two payments were payments made for the period between when JobKeeper was to take effect (end of March) and when the respondent actually paid the employee (6 May 2020).

Pay Period (2020)	Date Paid (2020)	Paid (gross)	Paid (nett)	Cashback amount	Date cashback amount paid to respondent (2020)
20/04-26/04	6 May	\$2,018.14	\$1,470.00	\$1,470.00	7 May
29/04-05/05	6 May	\$1,144.25	\$911.25	\$630.00	7 May
06/05-12/5	13 May	\$750.00	\$654.00	\$300.00	14 May
13/05-19/05	21 May	\$750.00	\$654.00	\$240.00	25 May
20/05-26/05	29 May	\$750.00	\$654.00	\$240.00	29 May
27/05-02/06	4 June	\$750.00	\$654.00	\$85.00	8 June
03/06-09/06	11 June	\$750.00	\$654.00	\$185.00	8 June
10/06-16/06	18 June	\$750.00	\$654.00	\$270.00	25 June
17/06-23/06	25 June	\$750.00	\$654.00	\$5.00	25 June
24/06-30/06	1 July	\$750.00	\$654.00	\$430.00	9 July
01/07-07/07	10 July	\$750.00	\$654.00	\$650.00	16 July
08/07-14/07	16 July	\$750.00	\$654.00	\$440.00	24 July
15/07-21/07	22 July	\$750.00	\$654.00	\$220.00	31 July
22/07-28/07	29 July	\$750.00	\$654.00	\$200.00	6 August
29/07-04/08	6 August	\$750.00	\$654.00	\$220.00	14 August
05/08-11/08	12 August	\$750.00	\$654.00	\$150.00	20 August
12/08-18/08	19 August	\$750.00	\$654.00	\$70.00	27 August

21 As can be seen from this table, the employee paid a total of \$5,805 to the Respondent. What is also seen by reference to the table is that the Respondent did not make any payment to the employee after 19 August 2020 even though the employee worked for the Respondent until 8 September 2020. This last period is the period where the Respondent simply failed to pass on the JobKeeper payment.

22 What is also clear is that during the beginning of the pandemic, when the JobKeeper scheme was just starting, the employee gave the whole of his JobKeeper payment back to the Respondent.

Interview with the Respondent

23 As part of the investigation, the Applicant interviewed the Respondent on 3 December 2020. This was a voluntary interview conducted over the phone between two officers of the Applicant (one in Adelaide and one in Hobart) and the Respondent who was in Brisbane.

- 24 The Respondent admitted that he had caused the “cashback payment” regime to be instituted. He said that he had told the employee that he (the Respondent) would be surrendering his own JobKeeper payment to continue payroll with the other staff members. He said he asked the employee if he would be interested in volunteering his time for that as well.
- 25 The Respondent said that he told the employee that he needed to be aware that this could affect his pension but reiterated that by participating in this scheme, everybody would receive “*a little bit of coin*”.
- 26 The Respondent outlined that only himself, the employee and one other staff member were eligible for JobKeeper. The other staff member decided that he did not want to join the JobKeeper scheme and so that was never pursued. The Respondent said that, of the other staff members, one was a New Zealand citizen and so was not eligible for any kind of assistance, another had a husband who had lost his job and the cleaner was on the autism spectrum. He also added that the New Zealand staff member was the carer of two people and that the other members of the cleaner’s family had lost their jobs.
- 27 The Respondent said that because those other three staff members were ineligible for JobKeeper payments, he felt it was his responsibility to keep paying them during the COVID-19 lockdown. He said that 100% of his JobKeeper payments went straight back into payroll. He said that, whilst the employee worked an average of 12 hours a week, two of the other staff members worked an average of 25 hours a week and the cleaner worked about 10 hours a week. The Respondent said that there was no work and that everything was shut down but he continued to pay those three staff members at their current rate.
- 28 The Respondent said that JobKeeper may work for other industries but that it “is backwards” for his industry. He said that he still has many other expenses such as maintenance of vehicles for which there was little to no assistance available. He said that he needs to make revenue to offer work and that it doesn’t work the other way round.
- 29 He reiterated that he explained to the employee why it was that he wanted the employee to give him the extra money from JobKeeper. He said that he explained to the employee what the personal circumstances were of the other staff members that were not eligible for JobKeeper. He said that he told the employee, a number of times, that his participation was “completely voluntary”. He said that he told the employee, many times, that JobKeeper might interfere

with his pension so that he had to think very long and hard before he decided to participate in the scheme.

30 The Respondent said that the employee was “*never made or forced to actually hand back any cash; he was - I had asked him, I said this would be fantastic if we could do this because we can keep everyone you know, fed, everyone could pay their rent, you know, but just at the moment because it was uncertain times for everyone. So he went into this 100% knowing what my intentions were*”.

31 Notwithstanding that the Respondent said that JobKeeper didn’t work for his industry, the Respondent told the officers of the Applicant that JobKeeper had saved his business.

History of Litigation

32 The Applicant filed the Originating Application on 12 August 2021. The application alleged breaches of s 325 of the FW Act as well as one breach of s 789GD of the FW Act. The matter did not come to Court before me on the first court date because the parties asked me to make a consent order in Chambers timetabling for the resolution of the matter by way of a penalty hearing.

33 On 16 September 2021, I made such orders where the Respondent was to file whatever material that he wanted to put before the Court by 13 December 2021. I set the matter down for a penalty hearing to take place on Friday, 18 February 2022. The Respondent has not put any material before the Court, but he has signed the statement of agreed facts.

34 On 8 February 2022, the parties asked me to consider the question of penalty upon the material that was already filed in the Court and conduct the hearing “on the papers”. I agreed to do so and the matter was reserved for judgment from that day.

35 This course has been one that has saved a great deal of time and money and it means that the first time that the matter will be mentioned in open court will be when I deliver these reasons for judgment and my orders as to penalty. Unfortunately, I do not have any material from the Respondent upon which to make my decision except for the interview given to officers of the Applicant. There are many issues with what was said in that interview upon which I will expand later in these reasons.

Pecuniary penalty

36 The law in relation to assessment of pecuniary penalties has really been laid down quite comprehensively. The High Court, in *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46, said, at paragraph 55 of that judgment,

No less importantly, whereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty, as French J explained in *Trade Practices Commission v CSR Ltd*, is primarily if not wholly protective in promoting the public interest in compliance:

“Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Pt IV [of the Trade Practices Act]. ... The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act.”

37 In *Mason & Harrington Corporation Pty Ltd t/as Pangea Restaurant & Bar* [2007] FMCA 7 (“the Pangea Case”), the Court went through, in effect, a number of factors that Courts should be mindful of when imposing pecuniary penalties. One must be careful though, in looking at the *Pangaea* case, that one doesn’t simply look at those matters as some form of checklist to see whether or not the facts of the case, with the particular factors, either aggravate or mitigate the penalty.

38 As such, the list compiled in *Pangaea* is extremely useful, but it should not be a formula used by the Court to slavishly come up with some sort of, almost mathematical, guide for the imposition of penalties.

Factors in determining penalty

39 Notwithstanding that there were 17 occasions upon which the Respondent asked the employee to make a cashback payment (and therefore 17 separate contraventions of s 325 of the FW Act), it seems to me that this is a course of conduct and should be treated as a single contravention of s 325 of the FW Act. The contravention of s 789GD of the FW Act is a different contravention in that the Respondent simply did not pass on the JobKeeper payment as he was obliged to do.

40 For this reason, I will be imposing penalties for two separate contraventions. I have accepted the submission that the maximum penalty for each contravention is \$13,320 which means that the total maximum penalty for which the Respondent is liable is \$26,640.

41 Using the maximum penalty as the proper parameter, I have looked at a number of factors. Because these contraventions involve a temporary scheme, many of the usual factors that apply in contraventions of civil penalties will not apply in this case.

42 The contraventions have to be seen in the light of the JobKeeper scheme. It is common knowledge that JobKeeper was a program whereby the Federal Government would pay employers the cost of wages which they were obliged to pass on to their employees. It was a scheme whereby employers were able to keep employees employed during the pandemic. It was always meant to only be a temporary measure.

43 The philosophy behind the scheme was clear; businesses were to keep doing what they were set up to do (within the respective State pandemic requirements) and the Federal Government was to ensure that their (in most cases) largest expense, namely employee wages, was not going to be a concern for the business. By taking out a significant cost for the business, it enabled a large number of businesses to remain as going concerns notwithstanding the devastating effects of the pandemic.

44 Of course, there would always be “hard luck” stories and the scheme was not going to be all things for all people. There would be instances where even this assistance may not have been able to keep the business as a going concern. There would also be instances where employees were being paid more than they would normally be paid. All of these things were known, but they were “swings and roundabouts” that the community was prepared to suffer to ensure that this scheme, which would be of tremendous assistance to the vast majority of businesses, was able to be enacted as quickly as possible.

45 The background relayed by the Respondent to officers of the Applicant, during his interview, is a “hard luck” story, if it were accepted. However, there has been a dearth of material to substantiate any of the claims made by the Respondent. There has been nothing put before the Court to say that the other staff members were ineligible for JobKeeper. There has been nothing put before the Court to show that the cashback payments made by the employee were used to make up the wages of those other staff members.

46 Without such material, it makes it difficult for the Court to accept that the situation described by the Respondent was in fact the reality that faced the business.

47 But even if the hard luck story told by the Respondent did have some factual basis, it could not excuse the reprehensible behaviour of the Respondent. Just because the Respondent may think

that it is unfair that the employee is being paid more than he would normally be paid, does not give him a license to redistribute the money as he saw fit.

48 As previously noted the scheme was devised to “*deliver a wage subsidy to those employers significantly impacted by the Coronavirus outbreak to continue paying their employees*”. Section 789GD was inserted into the FW Act to ensure that employers who receive JobKeeper money would be required to pass it through to the employee for whom it was intended.

49 The employee was a 70-year-old man who did not fully comprehend what the scheme truly entailed. The Respondent took advantage of the ignorance of the employee. His statement to the employee that “*the JobKeeper program was a general reimbursement for the running costs of my business, like bus repairs and registration*” was a deliberate misrepresentation of what the scheme was all about.

50 In this way, the Respondent undermined the objects of the JobKeeper scheme and perverted it so that he could profit from a specific economic innovation that was meant to help keep his business afloat by paying his employees. This was deliberate and calculated conduct on behalf of the Respondent.

51 It affected the employee by reducing his pension. He was honest with Centrelink and his pension payments were reduced because of the increase in his income. In one such payment week (the payment made on 10 July 2020), the employee received the usual \$654 nett but was directed to make a cashback payment of \$650 which left him with four dollars for his week’s work as well as a reduced pension.

52 Deterrence is the major factor in setting the appropriate pecuniary penalty and it is so even though the JobKeeper scheme has now ended. The trust that the government gave to the Respondent, in giving him payments to pass on to the employee, as well as the trust the employee had in the Respondent, has been breached in a most callous and despicable manner.

53 If it had not being for the complaint of the employee, the actions of the Respondent would not have come to light. This is because the Respondent had seemingly complied with his duties under the scheme.

54 For those reasons, I consider the contraventions of s 325 of the FW Act to be very close to being in the worst category of offending.

Mitigation

55 The Respondent did cooperate with the Applicant in the investigation. While he provided an explanation, he failed to provide any corroboration for that explanation even though it would have been extremely simple for him to have done so.

56 On 26 February 2021, after receiving the contravention letter from the Applicant, the Respondent paid the employee all of the cashback amounts that he had directed the employee to give to him, as well as the payment for the final week's work conducted by the employee. But there was no apology to the employee for the reprehensible behaviour.

57 As I have previously remarked, the cooperation of the Respondent has meant that there has not been any need for the Applicant to file lengthy affidavits or to prepare for trial. This matter has not even needed to have been heard in a courtroom and this will remain so until it is that I deliver these reasons.

Order

58 Taking into account all of the matters, including those of mitigation, I am of the view that the appropriate penalty for the contravention of s 325 of the FW Act is \$10,000.

59 For the contravention of s 798GD of the FW Act, I am of the view that the appropriate penalty is one of \$4,000.

60 I will order that those sums be paid within 28 days and also I will make the declarations sought, and agreed to, by the parties.

I certify that the preceding sixty (60) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Vasta.

Dated: 18 February 2022

Annexure A



Michael Evans
7 Kerwin Street
REDBANK PLAINS QLD 4301

RiverCity Bus Service

ABN: 98403152450
Period Starting: 20/05/2020
Period Ending: 26/05/2020
Date Paid: 29/05/2020
Employee Id: 830338

Job Title: **Bus Driver**
Base Pay Rate: **\$28.46 Per Hour (includes \$5.69 loading)**
Hours Paid: 14.5
Gross Earnings: **\$750.00**
Net Payment: **\$654.00**
Super Payments: **\$39.20**

Pay Slip Components		Hours/Units	Rate	This Pay	Year To Date
Wages and Earnings					
Casual Ordinary Hours		14.50	\$28.46	\$412.67	\$16,863.32
JOBKEEPER-TOPUP		1.00	\$337.33	\$337.33	\$3,946.69
JOBKEEPER-START-FN01					\$0.01
				\$750.00	\$20,810.02
Taxes					
PAYG				\$96.00	\$2,131.14
				\$96.00	\$2,131.14
Superannuation Breakdown					
SG				\$39.20	\$1,602.05
				\$39.20	\$1,602.05
Bank Payments					
			Account	This Pay	
Michael Raymond Evans	Manual Deposit		734292 - ****0417	\$654.00	
Super Contributions <small>Super payments are processed on a quarterly basis</small>					
			Member Number	This Pay	
Tasplan Superannuation Fund	Super Guarantee		****0526	\$39.20	