Federal Court of Australia

Fair Work Ombudsman v Austrend International Pty Ltd (No 2) [2020] FCA 1193

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| File number: | WAD 131 of 2017 |
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| Judgment of: | **BANKS-SMITH J** |
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| Date of judgment: | 20 August 2020 |
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| Catchwords: | **INDUSTRIAL LAW** - contravention of s 351 of the *Fair Work Act 2009* (Cth) - adverse action taken by employer because of employee's sex and pregnancy - refusal to allow employee to return to work after period of parental leave - where admissions made by respondents - single contravention - appropriate form and content of declaration - where employer has met financial loss of employee - whether employer should pay compensation to employee for non-economic loss - relevant factors in assessment of pecuniary penalties - relevance of legal costs incurred by employer - relevance of adverse publicity from media release published by Fair Work Ombudsman - whether media release accurate and fair |
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| Legislation: | *Fair Work Act 2009* (Cth) ss 14, 65, 342, 351, 360, 361, 531, 550, 539, 545, 546, 701, Division 2, Part 3‑1, Part 5‑2 |
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| Cases cited: | *ACE Insurance Limited v Trifunovski (No 2)* [2012] FCA 793  *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 254 FCR 68  *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining, and Energy Union (Syme Library Case) (No 2)* [2019] FCA 1555  *Australian Competition and Consumer Commission v AirAsia Berhad Company* [2012] FCA 1413  *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405  *Australian Competition and Consumer Commission v Multimedia International Services Pty Ltd* [2016] FCA 439; (2016) 243 FCR 392  *Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* [2011] FCA 333; (2011) 193 FCR 526  *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; (2008) 165 FCR 560  *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482  *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v ACI Operations Pty Ltd* [2006] FCA 122  *Construction, Forestry, Mining and Energy Union v Clermont Coal Pty Limited (No 2)* [2016] FCA 809  *Dafallah v Fair Work Commission* [2014] FCA 328; (2014) 225 FCR 559  *Director of Consumer Affairs Victoria v Meng* [2015] VSC 668  *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1213  *Fair Work Ombudsman v Austrend International Pty Ltd* [2018] FCA 171  *Fair Work Ombudsman v Contracting Solutions Australia Pty Ltd* [2013] FCA 7  *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357  *New Image Photographics Pty Ltd v Fair Work Ombudsman* [2013] FCA 1385  *Ponzio v B & P Caelli Constructions Pty Ltd* [2007] FCAFC 65; (2007) 158 FCR 543  *Re The Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* [1997] HCA 3; (1997) 186 CLR 622  *Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 27  *Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 338  *Tomlinson v Ramsay Food Processing Pty Ltd* [2015] HCA 28; (2015) 256 CLR 507  *Trade Practices Commission v Cue Design Pty Ltd* (1996) 85 A Crim R 500 |
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| Division: | Fair Work Division |
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| Registry: | Western Australia |
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| National Practice Area: | Employment and Industrial Relations |
|  |  |
| Number of paragraphs: | 191 |
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| Date of hearing: | 16 June 2020 |
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| Counsel for the Applicant: | Mr AJ Power |
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| Solicitor for the Applicant: | Office of the Fair Work Ombudsman |
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| Counsel for the Respondents: | Mr JB Blackburn SC |
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| Solicitor for the Respondents: | CLI Lawyers |

ORDERS

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|  | | WAD 131 of 2017 |
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| BETWEEN: | FAIR WORK OMBUDSMAN  Applicant | |
| AND: | AUSTREND INTERNATIONAL PTY LTD (ACN 095 733 092)  First Respondent  DENZIL GODFREY RAO  Second Respondent | |

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| order made by: | BANKS-SMITH J |
| DATE OF ORDER: | 20 AUGUST 2020 |

HAVING REGARD TO THE RESPONDENTS' ADMISSIONS, THE COURT DECLARES THAT:

1. On or about 1 April 2016 the first respondent contravened s 351 of the *Fair Work Act 2009* (Cth) (**FW Act**) by taking adverse action against Ms Aragon because of her sex and pregnancy by refusing to allow her to return to work following a period of unpaid leave to have and care for her first child (**Contravention**).
2. The second respondent was involved, within the meaning of s 550 of the FW Act, in the Contravention.

THE COURT ORDERS THAT:

1. The first respondent pay a pecuniary penalty in respect of the Contravention in an amount of $15,500 in accordance with s 546 of the FW Act.
2. The second respondent pay a pecuniary penalty in respect of his involvement in the Contravention in an amount of $2,800 in accordance with s 546 of the FW Act.
3. The penalties imposed on the respondents be paid to the Commonwealth within 90 days of the Court's orders.
4. The respondents (jointly and severally) pay compensation to Ms Aragon in the sum of $2,000 for the hurt and distress caused by the Contravention within 28 days of the Court's orders.
5. In the event that the respondents are unable to locate Ms Aragon they are to pay the compensation referred to in order 6 to the Commonwealth within 28 days of the Court's orders.
6. Within six months of the date of this order the first respondent engage, at its own expense, a person or organisation with professional qualifications in workplace relations to provide training, to the directors of and management personnel engaged by the first respondent, that covers the obligations on employers under the National Employment Standards and Part 3-1 (General Protections) of the FW Act.
7. Within 30 days of completing the training in order 8 above, the first respondent provide to the applicant in writing:
   1. the date on which the training was completed;
   2. the name of the person or organisation that conducted the training; and
   3. the details of the method of delivery of the training and the content of the training.
8. The applicant have liberty to apply on seven days' notice in the event that any of the preceding orders are not complied with.

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

REASONS FOR JUDGMENT

BANKS-SMITH J:

## Introduction

1. This proceeding concerns the manner in which an employer treated its employee upon her attempted return from parental leave.
2. The employer, Austrend, accepts that it took adverse action in relation to Ms Lindsey Aragon by discriminating against her because of her sex and pregnancy, and so contravened s 351 of the *Fair Work Act 2009* (Cth) (**FW Act**)*.* It remains for the Court to consider the position as to penalty.
3. The Fair Work Ombudsman (**Ombudsman**) is a statutory appointee under Division 2 of Part 5‑2 of the FW Act, a Fair Work Inspector pursuant to s 701 of the FW Act and a person with standing pursuant to s 539(2) of the FW Act to apply for orders, including penalties and compensation, in respect of contraventions of civil remedy provisions under the FW Act.
4. Austrend is a gourmet food and beverage distributor. It is not in issue that Austrend was at all material times a national system employer within the meaning of s 14 of the FW Act and bound by Part 3‑1 ('General Protections') of the FW Act, relevantly including s 351 ('Discrimination').
5. Austrend employed Ms Aragon from about 16 September 2013 until 19 July 2016 as a sales executive. Ms Aragon's tasks included visiting customers, such as grocery stores and supermarkets, soliciting orders for foods and beverages and dealing with associated sales.
6. Ms Aragon commenced parental leave on 10 July 2015 and initially sought to return on or about 20 November 2015. Those plans changed when it became apparent that Austrend required her to return on a full-time basis, and she then sought to return to work on a later date, being 4 April 2016.
7. Austrend has admitted that it contravened s 351 of the FW Act by taking adverse action against Ms Aragon when it refused to allow Ms Aragon to return to work on 4 April 2016 on a full‑time basis because of her sex and pregnancy. Austrend's conduct is described further below.
8. The second respondent, Mr Denzil Rao, was at all material times a director and the general manager of Austrend who authorised decisions regarding Austrend's operations, including decisions about its employees. He was responsible in a practical sense for ensuring that Austrend complied with its legal obligations to its employees under the FW Act. Mr Rao has admitted that by his knowledge and conduct (in the agreed circumstances), he was knowingly involved in Austrend's contravention of s 351 and that, pursuant to s 550(1) of the FW Act, he is thereby taken to have also contravened s 351 of the FW Act.
9. These basic facts are recorded in significantly more detail in a statement of agreed facts dated 6 June 2019 that was filed jointly by the parties. However, before turning to the detailed facts, it is appropriate to note the statutory context.

## Statutory context

1. The provisions relevant to this case are contained in Part 3‑1 of the FW Act that deal with general workplace protections and the responsibilities of employers, employees and organisations.
2. Section 351 of the FW Act is a civil penalty provision. It provides:

**Discrimination**

(1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

1. 'Adverse action' is defined in s 342(1) of the FW Act. Item 1 is relied upon for the Ombudsman's case:

**Meaning of adverse action**

(1) The following table sets out circumstances in which a person takes ***adverse action*** against another person.

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| … |  |  |
| **Item** | **Column 1**  ***Adverse action* is taken by …** | **Colum 2**  **if …** |
| … |  |  |
| 1 | an employer against an employee | The employer:  (a) dismisses the employee; or  (b) injures the employee in his or her employment; or  (b) alters the position of the employee to the employee's prejudice; or  (c) discriminates between the employee and other employees of the employer |
| … |  |  |

1. Section 360 provides that a person takes action for a particular reason if the reasons for that action include that particular reason.
2. Section 361 is a reverse onus provision that provides that where it is alleged that a person took or is taking action for a particular reason or intent, which reason or intent would constitute a contravention of Part 3‑1, it is presumed that the action was or is being taken for that reason or intent, unless the person proves otherwise. Section 361 does not remove the need for an applicant to establish the objective facts which form the basis of the respondents' conduct.

## History to pleading

1. This is a matter that commenced with the Ombudsman's pleading that asserted some 12 contraventions by Austrend. Over time, the majority of those claims were abandoned without any determination or admissions, but the Ombudsman's claim for constructive dismissal was dismissed with indemnity costs following a summary judgment application brought by the respondents: *Fair Work Ombudsman v Austrend International Pty Ltd* [2018] FCA 171 (***FWO v Austrend (No 1)***) (Gilmour J).

## Pleaded contravention

1. By the time of the respondents' admissions as to liability and the hearing before me, the Ombudsman's pleaded claim had reduced to the following:
   1. by the conduct of Mr Rao in sending an email of 1 April 2016 Austrend injured Ms Aragon in her employment and/or altered her position to her prejudice by refusing to allow Ms Aragon to return to work on 4 April 2016 on a full‑time basis; and
   2. Austrend took that adverse action because of Ms Aragon's sex and/or pregnancy.
2. The claim was particularised by reference to emails of 27 November 2015, 30 November 2015, 11 March 2016, 1 April 2016 (3.22 pm), 1 April 2016 (8.26 pm) and by the fact that Ms Aragon did not return to work on 4 April 2016. The emails are all described in these reasons below.
3. The pleaded defence does not squarely address that pleaded claim. It assumes (without addressing the nature of the claim as particularised) that the only relevant impugned conduct was imposing a requirement that there be a medical certificate and the respondents plead that it was lawful to impose such a requirement.
4. As the pleaded reply makes express, the requirement of a medical certificate was not lawfully required but in any event, the requirement was communicated to Ms Aragon in particular circumstances, including after Ms Aragon had been informed there was agreement as to the date of her return to work and after Austrend purported to extend her unpaid parental leave. These matters are important in the context of the contravention, are referred to in the statement of agreed facts and are addressed further below.
5. By the statement of agreed facts, it is agreed that:

[Austrend] has admitted that it contravened section 351 of the FW Act by taking adverse action against Ms Aragon, by injuring Ms Aragon in her employment or altering Ms Aragon's position to her prejudice when it refused to allow Ms Aragon to return to work on 4 April 2016 on a fulltime basis because of her sex and pregnancy in the circumstances set out in this [statement of agreed facts].

## Agreed orders

1. The Ombudsman and the respondents have agreed to the following relief in respect of the admitted contravention of s 351:
   1. a declaration that the first respondent contravened s 351 of the FW Act by taking adverse action against Ms Aragon because of her sex and pregnancy;
   2. a declaration that the second respondent was involved in the first respondent's contravention of s 351 of the FW Act;
   3. an order pursuant to s 546(1) of the FW Act that the first respondent pay a penalty in respect of its contravention of s 351 of the FW Act;
   4. an order pursuant to s 546(1) of the FW Act that the second respondent pay a penalty in respect of his involvement in the contravention of s 351 of the FW Act;
   5. orders pursuant to s 546(3)(a) of the FW Act that all penalties imposed on the first and second respondents be paid to the Commonwealth within 90 days of the Court's orders;
   6. an order pursuant to s 545(1) that the first respondent is to engage, at its own expense, a person or organisation with professional qualifications in workplace relations to provide training to the first respondent's directors and management that covers the obligations of employers under the National Employment Standards and the General Protections provisions in the FW Act, such training to be provided within six months of the date of the Court's order;
   7. an order that, within 30 days of completing the training in para (f) above, the first respondent is to provide to the Ombudsman, in writing:
      1. the date on which the training was completed;
      2. the name of the person or organisation that conducted the training; and
      3. the details of the methods of delivery of the training and the content of the training.
   8. an order that the Ombudsman have liberty to apply on seven days' notice in the event that any of the Court's orders are not complied with.
2. Three aspects of the proposed civil remedies remain in issue between the parties: the nature and extent of the proposed declaration of contravention; the quantum of any penalty award; and whether compensation should be paid to Ms Aragon.

## Facts

### Austrend and its employment of Ms Aragon

1. Ms Aragon was initially employed by Austrend on a full‑time basis, working Monday to Friday, and worked full‑time until she commenced a period of leave to have and care for her first child on 10 July 2015.
2. Ms Aragon performed duties which included visiting customers (including supermarkets, cafes and independent grocery stores), mostly using a vehicle provided by Austrend, for the purpose of soliciting orders for or selling, among other things, gourmet foods, beverages and other goods and undertaking administrative tasks associated with those sales, including entering sales data into Austrend's computer system. Ms Aragon's duties required her to drive for extended periods, perform lifting and climb stairs.
3. During her employment, Ms Aragon reported to Dr Garrie Rao, who was one of Austrend's managers. For reasons of clarity and convenience I will refer to the second respondent (Denzil Rao) as Mr Rao, and to Garrie Rao as Dr Rao.
4. Other people who feature in the history of events are Mr Rao's wife, Ms Ann-Marie Rao, who was also a director of Austrend, and Mr Ricky Lam.

### Ms Aragon's first pregnancy

1. Ms Aragon became pregnant in November 2014 with her first child. The baby was due on around 24 July 2015.
2. In or around February 2015 Ms Aragon told her employer that she was pregnant. On 18 May 2015 Ms Aragon sent an email to Mr Rao and Mr Lam advising that she intended to commence parental leave on 26 June 2015.
3. As it happened, Ms Aragon continued working until 10 July 2015, when she commenced a period of authorised unpaid leave to have and care for her first child.
4. On 14 July 2015 Ms Aragon gave birth to a daughter.

### Agreed return to work of 4 April 2016

1. In October 2015 Ms Aragon started correspondence with Austrend about her return to work. On 26 October 2015 Ms Aragon sent an email to Mr Rao (copied to Mr Lam), in which she said she would return to work on 20 November 2015 and was only able to work on Mondays and Fridays.
2. On 2 November 2015 Ms Aragon followed up, seeking a response to the 26 October email.
3. Mr Rao provided a response later that day, indicating that Dr Rao was her direct point of contact, that Dr Rao was busy with his pending wedding and would be overseas until the end of November, and that it would be best if Ms Aragon could start work on 27 November 2015.
4. On 4 November 2015 Ms Aragon sent an email to Mr Rao thanking him for the response.
5. On 13 November 2015 Ms Aragon wrote to Dr Rao, copied to Mr Lam, making a formal request under s 65 of the FW Act for a flexible work arrangement on her proposed return to work starting from 20 November 2015. The email was incorrectly addressed and was not received by Dr Rao, but was received by Mr Lam. A second attempt to email the request to Dr Rao also failed but apparently it was successfully sent to him by email on 14 November 2015.
6. Later on 14 November 2015 Ms Aragon sent an email to Mr Lam. She explained that she had been unsuccessful in contacting Dr Rao; that she had requested an official start date of 20 November 2015; that she could only work on Mondays and Fridays; that she would like confirmation of when she could start work again; and that Mr Rao had previously referred to her commencing on 27 November 2015. She asked Mr Lam to look into the matter and confirm the position.
7. On 16 November 2015 Ms Aragon sent an email to Mr Lam following up on her email of 14 November 2015, but no response was received.
8. On 17 November 2015 Ms Aragon sent an email to Mr Rao, copied to Ms Rao, following up on her previous emails with the subject line of 'End of maternity leave'. Ms Aragon noted that she had been having difficulties contacting Dr Rao and obtaining confirmation about her return to work date, and asked whether Dr Rao had informed them about a date for her return to work.
9. Ms Aragon did not return to work at Austrend on 20 November 2015, as she had proposed in the 26 October 2015 email and had requested in the 13 November 2015 email.
10. On 22 November 2015 Ms Aragon sent (or attempted to send) an email to Dr Rao in which she referred to her previous communications, referred to her request for a flexible working arrangement and asked whether she could attend the premises to arrange her return to work. The email was copied to Mr Lam and received by him.
11. Ms Aragon received no response from any representative of Austrend in relation to any of her attempts to contact them between 13 and 22 November 2015 (inclusive).
12. On 26 November 2015 Dr Rao sent the following email to Ms Aragon:

With reference to your e-mail dated 14 November 2015, we reply as follows:

As you are well aware, most of the managers/owners of all the groceries stores/supermarkets are on leave on Mondays and your visit on Mondays to the grocery stores/supermarkets is totally unnecessary and a waste of revenue, time and effort.

Secondly, on Fridays your visit is useless as all the grocery stores/supermarkets order before Fridays to ensure that all the products are to be delivered on or before Friday for the weekend to ensure supply of products to their customers.

Thirdly, if you work for two days a week, then our company has to employ staff for the other three days alone. Newcomers are interested only in a full time job and they refuse to work part time which certainly is a huge burden to our company.

Fourthly, our company is not in a position to undertake any revenue loss in any form.

Fifthly, in compliance with the laws of WA, as an employee, your position shall be kept vacant until you resume the job in your full capacity.

Sixthly, in any event you are advised to submit a medical certificate for your fitness before joining duty.

Seventhly, when many sales staff attend the same grocery store/supermarket on different days this leads only to unnecessary confusion with lack of proper communication.

I have noticed that your e-mail letter is rather similar to a legal notice than a request letter. Your hued letter is absolutely unnecessary.

In conclusion you are at liberty to come down to our office for a discussion with a prior appointment timing convenient to both of us.

1. Ms Aragon and her partner attended the Austrend premises on 26 November 2015 and met with Mr Rao and Mr Lam. During the meeting Mr Rao repeated the matters that had been set out in the email of that day and provided a copy to Ms Aragon. Mr Rao confirmed that Ms Aragon could only return to work on a full-time basis.
2. Ms Aragon says in her affidavit that on or around 27 November 2015 she contacted the Fair Work Ombudsman and spoke to a (named) representative about the fact that her request for flexible work had been denied and was advised that she should nominate a date to return to work full-time. She decided to nominate the date of 4 April 2016 as the date to return on a full-time basis as by then her child would be older and of an age she considered more reasonable for day care.
3. On 27 November 2015 Ms Aragon sent an email to Dr Rao, copied to Mr Rao, Ms Rao and Mr Lam in which she noted that her request to work Mondays and Fridays had been refused. She informed Dr Rao that she had spoken with a contact at Fair Work Australia and nominated a return to work date of 4 April 2016. She indicated that she would be 'more than happy' to discuss any questions and that she looked forward to seeing everyone on her return on 4 April 2016. It was not in issue that, having regard to the preceding meeting, this return would be on a full-time basis.
4. On 30 November 2015 Dr Rao sent an email to Ms Aragon, also copied to Mr Rao, Ms Rao and Mr Lam, in which he advised that she was 'most welcome to join duty' on 4 April 2016.
5. The emails of 27 November 2015 and 30 November 2015 are important as they indicate Ms Aragon's request to return to work on 4 April 2016 and Austrend's acceptance of that return date.

### Refusal to allow Ms Aragon to return to work on 4 April 2016 on a full‑time basis

1. In or around January 2016 Ms Aragon became pregnant again with an expected delivery date in about September 2016.
2. On 4 March 2016 Ms Aragon sent an email to Mr Rao, copied to Dr Rao, in which she confirmed she would be returning to work on 4 April 2016. She requested that she have Tuesdays off in order to take care of her child but work extended hours on the other days. She confirmed again that she would be happy to discuss any arrangements prior to her return.
3. On 11 March 2016 Ms Aragon sent an email to Mr Rao, informing him of her pregnancy and confirming that she would be returning to work on 4 April 2016. Mr Aragon did not repeat her request to have Tuesdays off. She concluded her email by stating:

Please don't hesitate to contact myself before then as I understand you may have questions. If I do not hear from you prior I will see you on the 4th of April although I was hoping to sit down the week prior and go through any changes in products & pricing that may have taken place in my time of on maternity leave so I can return to work and get straight into it.

1. On 18 March 2016 and 19 March 2016 Ms Aragon sent emails seeking a response (the 18 March 2016 emails were re-sent on 19 March 2016 due to some errors in the email addresses). Other than Ms Rao sending an email to Ms Aragon on 20 March 2016 to confirm receipt of the 19 March email, Ms Aragon did not receive any response to her 18 March and 19 March emails until 1 April 2016.
2. On 1 April 2016 at about 12.15 pm Ms Aragon sent an email to Mr Rao, Dr Rao and Ms Rao requesting a response to her previous emails and inviting contact if they wished her to attend at the premises that afternoon to organise any return to work matters.
3. On 1 April 2016 at about 12.30 pm Mr Rao sent an email to Ms Aragon, on behalf of Austrend, stating that:

[Y]our unpaid leave has been extended to a further period until you deliver your second baby.

We assure you that your position will be kept vacant for the maximum tenure as is prescribed by law.

1. Shortly after (at about 3.22 pm), Ms Aragon sent an email to Mr Rao in which she stated that she had not requested an extended period of unpaid leave. She said she had spoken to Fair Work Australia and had been informed that she was entitled to return to work on 4 April 2016 'as per our agreement'. Ms Aragon asked for a response by close of business that day.
2. Later that evening and after the close of business (at about 8.26 pm), Mr Rao sent an email to Ms Aragon which relevantly stated that:

1. There is no Agreement entered between us with regard to the date of your joining duty on 04th April 2016. Your email claiming as though there is an Agreement regarding the same is absolutely false and untrue.

2. One [partner] accompanied you on 26/11/2015 at around 5.00pm who was not authorized to meet the employer or employee of Austrend. You had forcibly brought him into the premises and indulged into negotiation against the principles and ethics stipulated by Austrend. You are instructed to note that there is no legal nexus between Austrend or its employees with [redacted].

3. Despite the above, few days ago [partner] had again called our Company employee [redacted].

4. Without any prejudice, you cannot join duty on 04th April 2016 for the reason mentioned below.

On 26 November 2015, Dr Garrie Rao had sent you a detailed email which is self explanatory by itself. In that email he had clearly narrated that you should produce medical certificate to prove your physical fitness before joining duty. You had not produced any evidence pertaining the same.

5. You are equally advised to recollect our earlier emails regarding your poor performance from time to time.

6. I'm not in the country until 9th April 2016. You may contact me on 12th April 2016, until then you are advised not to disturb any of our employees or harass them …

1. I have redacted parts of the above correspondence because it makes heavy-handed allegations and threats, including threats of litigation, against Ms Aragon's partner. Her partner is not a party to the proceedings. It was not proved nor agreed that he had acted in the manner alleged by the correspondence. It is not appropriate in those circumstances to publish further the matters stated in the email.
2. Ms Aragon did not return to work on 4 April 2016 and continued on unpaid leave with Austrend.
3. On 5 April 2016 Ms Aragon sent an email to Mr Rao, in which she informed him of contact details for the Fair Work Ombudsman and provided a copy of the email of 30 November 2015 in which Dr Rao had said she could return to work on 4 April 2016.

### Employment at Aldi

1. Sometime prior to 7 March 2016 Ms Aragon applied for employment at Aldi, and on 7 March 2016 was invited to attend an interview. On 30 March 2016 Aldi offered Ms Aragon employment as a store assistant, working an average of 40 hours per fortnight. Ms Aragon was invited to accept the offer by logging on to the Aldi website and selecting the appropriate option. Ms Aragon was also invited to attend a 'contract signing' at Aldi's premises at 2.30 pm on 1 April 2016. Ms Aragon accepted the offer online and on 1 April 2016 attended the contract signing.
2. As is apparent from the email exchanges, despite securing part-time employment with Aldi, Ms Aragon continued to seek to return to her full-time job at Austrend.

### Events following the 4 April 2016 contravention

1. It is apparent from correspondence produced by the Ombudsman that from (at least) 27 November 2015 and after 4 April 2016 Ms Aragon sought advice from the Ombudsman about returning to work at Austrend. For example, an internal Ombudsman email of 19 April 2016 states as follows:

The employee would like to return to work ASAP. I have advised the employee that she may resolve this issue by providing the employer with a 'fit to return to work certificate' as requested by the company. This is not a requirement for her to meet under the Fair Work Act, but it is an option that may allow her to return to work quickly. She is hesitant to provide the employer with this certificate as she believes the employer's request to do so is discrimination in itself. However, she will obtain the certificate and will have another discussion with me about her options.

1. There were various communications between the Ombudsman and Mr Rao between May 2016 and June 2016. Mr Rao provided written responses, some of which can be described objectively and diplomatically as being intemperate and containing allegations about Ms Aragon and her partner.
2. On 24 June 2016 the Ombudsman wrote to Ms Aragon as follows:

As discussed, on the basis of the allegations and issues that have arisen in respect to your matter, the FWO may choose to initiate legal proceedings. Before the FWO can consider and refer this matter through the appropriate channel, it would be beneficial for you to attempt to return, providing a fitness for duty certificate to the business. If you could please seek a fitness for duty certificate/medical certificate, and email the Employer advising of your fitness and providing the evidence requested by the company, and provide that you are fit and available to return to work, and if the Employer could contact you to discuss a date for return (taking into consideration your need to seek child care) requesting a response within 5 business days as to if they will return you to work until you leave again on maternity leave (further in the email you can notify them of your intention to take maternity leave with your intended start date) and also request back payment of wages to 4 April 2016 being the date you and the company agreed to for your return (as evidence[d] by the approval and agreement provided by Garrie Rao by email).

1. On 5 July 2016 Ms Aragon sent an email to Mr Rao providing a copy of a medical certificate stating that she was fit to return to work and requesting that he contact her about her return to work. Ms Aragon asked for payment of her entitlements from 4 April 2016 and informed Mr Rao that she intended to commence parental leave from 13 September 2016.
2. Mr Rao responded, asking Ms Aragon to contact Austrend's HR business consultant, Mr Vinnie Rajaratnam, to set up a meeting.
3. Ms Aragon replied the following day requesting a response to her questions about her return to work and back payment of lost wages.
4. On 7 July 2016 the Ombudsman provided to Austrend a copy of its parental leave fact sheet, which was also available from its website.
5. Later that day Mr Rao wrote to Ms Aragon, stating that he considered no payment was due to her as Austrend had not prevented her from starting work; that Austrend required a 'fit for work' because of its duty of care; that Ms Aragon should advise when Austrend could expect her to work; that she would be required to work full‑time and that Austrend would like to engage a medical practitioner to see her on her first day back to advise on 'Safe Job' requirements.
6. A meeting between Ms Aragon and Austrend was then arranged for 19 July 2016. As will be seen, it is of some relevance that the email suggesting this meeting by way of the 'next step' came from Ms Aragon. Ms Aragon attended with her partner, and Mr Rao attended with Mr Rajaratnam.
7. The parties agreed at the meeting that:
   1. Mr Rao on behalf of Austrend would pay Ms Aragon her wages for the period from 4 April 2016 to 19 July 2016, plus two weeks with respect to payment in lieu of notice; and
   2. Ms Aragon would resign her employment with Austrend and withdraw her complaints with the Fair Work Ombudsman.
8. Ms Aragon signed a letter at the meeting giving effect to the arrangement and Austrend paid Ms Aragon an amount of $16,343.80 less tax or $14,653.80 (net). Ms Aragon's employment with Austrend ceased effective 19 July 2016.
9. Ms Aragon did not disclose at the meeting that she had obtained a part-time job at Aldi.
10. On 20 July 2016 Ms Aragon sent an email to Mr Nathan Forwood of the Ombudsman's office (with whom she had previously been in contact), stating that:
    1. the meeting on 19 July 2016 had gone 'really well';
    2. after 'back and forward discussions' an arrangement was 'agreed upon (MUTUALLY)'; and
    3. Ms Aragon believed that 'given [her and her partner's] current situation and my expressed concerns with going back to Austrend after all of this' that the outcome was 'a win for us and I can now focus on the pregnancy, the house and look for a new job when ready without any issues in the future'.
11. On 21 July 2016 Mr Forwood raised with Ms Aragon the issue of payment for accrued annual leave entitlements. Ms Aragon asked that if he were concerned he take it up with Austrend, as 'we agreed with them we would not pursue more money'.
12. After correspondence with Mr Forwood, Austrend agreed to pay an additional amount of $2,893.05 less tax to Ms Aragon's account.
13. On 22 September 2016 Austrend also paid an amount of $1,552.66 into Ms Aragon's superannuation fund.
14. On 23 September 2016 Ms Aragon gave birth to her second child.

### Mr Rao's knowledge

1. At all relevant times Mr Rao knew of:
   1. Ms Aragon's first pregnancy and authorised unpaid leave to have and care for her first child;
   2. Ms Aragon's request for flexible working arrangements and attempts to return to work from unpaid parental leave in November 2015;
   3. Austrend's refusal of Ms Aragon's request for flexible working arrangements in 2015;
   4. Ms Aragon's second pregnancy;
   5. Ms Aragon's proposal to return to work on 4 April 2016 and Austrend's agreement, in writing on 30 November 2015, to allow her to return to work on that date; and
   6. Austrend's refusal to permit Ms Aragon to return to work on 4 April 2016.

### The media release

1. On or about 20 March 2017 the Ombudsman published on its website a media release titled 'Perth company faces Court over pregnancy discrimination allegations'. The media release is set out below, together with 'notes' that were subsequently added to the release and references to media coverage.
2. I was told that save for the notes, the media release otherwise remains on the Ombudsman's website in its original form.

## The principles in determining relief

1. The principles relevant to parties jointly seeking the making of orders by the Court in the context of a penalty and civil remedy regime were not seriously in issue between the parties. They were summarised by Gordon J in *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405:

[70] The applicable principles are well established. First, there is a well-recognised public interest in the settlement of cases under the Act: *NW Frozen Foods Pty Ltd v Australian Competition & Consumer Commission* (1996) 71 FCR 285 at 291. Second, the orders proposed by agreement of the parties must be not contrary to the public interest and at least consistent with it: *Australian Competition & Consumer Commission v Real Estate Institute of Western Australia Inc* (1999) 161 ALR 79 at [18].

[71] Third, when deciding whether to make orders that are consented to by the parties, the Court must be satisfied that it has the power to make the orders proposed and that the orders are appropriate: *Real Estate Institute* at [17] and [20] and *Australian Competition & Consumer Commission v Virgin Mobile Australia Pty Ltd (No 2)* [2002] FCA 1548 at [1]. Parties cannot by consent confer power to make orders that the Court otherwise lacks the power to make: *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 163.

[72] Fourth, once the Court is satisfied that orders are within power and appropriate, it should exercise a degree of restraint when scrutinising the proposed settlement terms, particularly where both parties are legally represented and able to understand and evaluate the desirability of the settlement: *Australian Competition & Consumer Commission v Woolworths (South Australia) Pty Ltd (Trading as Mac's Liquor)* [2003] FCA 530 at [21]; *Australian Competition & Consumer Commission v Target Australia Pty Ltd* [2001] FCA 1326 at [24]; *Real Estate Institute* at [20]-[21]; *Australian Competition & Consumer Commission v Econovite Pty Ltd* [2003] FCA 964 at [11] and [22] and *Australian Competition & Consumer Commission v The Construction, Forestry, Mining and Energy Union* [2007] FCA 1370 at [4].

[73] Finally, in deciding whether agreed orders conform with legal principle, the Court is entitled to treat the consent of Coles as an admission of all facts necessary or appropriate to the granting of the relief sought against it: *Thomson Australian Holdings* at 164.

1. Such principles have more general application than under the consumer protection legislation considered in *ACCC v Coles*, and are apposite in the context of the FW Act: see generally *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482 at [58], [103].
2. In any event, this is not a case where the parties have agreed all aspects of the proposed civil remedies or have made common recommendations.
3. Factors that might be relevant to the exercise of the court's discretion in assessing what penalty should be imposed are well known and set out elsewhere: see *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1213 at [11]‑[23] (Tracey J) and the cases cited therein.

## Issues to be addressed

1. The issues raised by the parties are as follows:
2. the content of the contravention of s 351 and the terms of the proposed declaration;
3. the impact of the contravention on Ms Aragon and whether Austrend should pay compensation for non-economic loss;
4. the extent of the respondents' contrition, having regard in particular to the communications that were drafted by third parties but adopted and sent on behalf of Austrend;
5. the size of the business of Austrend and the relevance of legal costs incurred; and
6. the relevance of the media release and subsequent publicity.

## Issue 1: content of declaration

1. I have set out the agreed content of the contravention above, as reflected in the statement of agreed facts.
2. The parties do not agree as to the level of detail which should be recorded in the proposed declaration of contravention.
3. The principles as to where it is appropriate to make a declaration were collected in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 254 FCR 68:

[91] The facts necessary to support the declaration may be established by agreed facts (under s 191 of the *Evidence Act 1995* (Cth)) and admissions: *Minister for* *Environment, Heritage and the Arts v PGP Developments Pty Ltd* (2010) 183 FCR 10.

[92] The Court has a wide discretionary power to make declarations under s 21 of the *Federal Court of Australia Act 1976* (Cth): *Forster v Jododex Australia Pty Limited* (1972) 127 CLR 421 at 437-438 (per Gibbs J, citing *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Limited* [1921] 2 AC 438 at 448); *Tobacco Institute of Australia Limited v Australian Federation of Consumer Organisations Inc (No 2)* (1993) 41 FCR 89 at 99 (per Sheppard J). Before making a declaration, the Court should be satisfied that the question is real, not hypothetical or theoretical, that the applicant has a real interest in raising the issue, and that there is a proper contradictor: *Forster* at 437-438.

[93] Declarations relating to contraventions of legislative provisions are likely to be appropriate where they serve to record the Court's disapproval of the contravening conduct, vindicate the regulator's claim that the respondent contravened the provisions, assist the regulator to carry out its duties, and deter other persons from contravening the provisions: *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2006] FCA 1730; (2007) ATPR 42-140 at [6], and the cases there cited; *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at [95].

1. The decision of Reeves J in *Construction, Forestry, Mining and Energy Union v Clermont Coal Pty Limited (No 2)* [2016] FCA 809 provides useful guidance as to the form of declarations. As in this case, the parties disputed the level of detail required for the declaration. The applicant's proposed declarations included many particulars of the contravening conduct. The respondent considered that only the 'gist' should be identified. His Honour relevantly said:

[5] Clermont Coal's claim to have captured the gist of its contraventions appears to be based upon the High Court decision in *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53; [2003] HCA 75 where (at [89]) Gummow, Hayne and Heydon JJ were critical of declarations that spoke 'merely of "an arrangement" having a purpose and effect, without giving any content to that expression and without indicating the gist of the findings of the primary judge identifying the arrangement'.

[6] In *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2014] FCA 148, Greenwood J considered the form a declaration should take in the context of proceedings under Parts IV and V of the Trade Practices Act 1974 (Cth). His Honour observed that such a declaration should capture the essence of the conduct in question, as follows (at [21]):

It follows that if a declaration is to be made in exercise of the discretionary power, it must recite the rights of the parties with respect to the final resolution of the matter in controversy with precision rather than represent some form of shorthand summary of the outcome of the controversy such as reciting that a party contravened s 45(2)(a)(ii) of the Act or s 45(2)(b)(ii), or that a party did not contravene s 46 of the Act. In principle, the formulation of the declaration ought properly reflect the essence of the conduct constituting the declared state of affairs and not simply be framed in terms of the language of the section itself which begs the question of the conduct …

In general terms, I consider these principles apply equally to proposed declarations in this matter relating to contraventions of the FWA.

[7] Bearing in mind the above observations, I consider the set of proposed declarations submitted by Clermont Coal are too abridged and the set submitted by Mr Scott are too detailed. However, I consider the latter set form a more suitable foundation for declarations that identify the gist or essence of Clermont Coal's contravening conduct and also provide a suitable definition of the final resolution of this matter.

1. In this case, the differences between the drafting of the declaration as to Austrend's contravention proposed by the parties are not stark. However the respondents submit that the contravening conduct referred to in the declaration should be limited by reference to Mr Rao's requirement that Ms Aragon provide a medical certificate.
2. I do not consider such limitation is appropriate as it tends to misrepresent the relevant conduct viewed as a whole.
3. The email of 26 November 2015 from Dr Rao, which rejected for a list of reasons Ms Aragon's proposal for her return to work, included as point 6 in its list that it 'advised' Ms Aragon to submit a medical certificate before 'joining duty'. It did not require a medical certificate and did not suggest it should be provided at any particular time before recommencing work.
4. The 30 November 2015 email did not refer to any need for a medical certificate.
5. There was no response from Austrend to Ms Aragon's emails that informed her of any requirement of a medical certificate until the after‑hours email of 1 April 2016. That email from Mr Rao of 8.26 pm states categorically that 'There is no agreement between us' with regard to recommencing on 4 April 2016. It is true that later in the email, and under the qualification that is said to be 'without prejudice', Austrend states that Ms Aragon cannot 'join duty' because she has not provided a medical certificate. In my view it is clear from the email exchanges read as a whole that by including those words, the author sought to seize upon the absence of a medical certificate as a reason for justifying the decision to refuse to permit Ms Aragon to return to work. However, by the same email Mr Rao in effect prevented Ms Aragon from providing a medical certificate after 1 April 2016 by demanding that she make no contact with him or any employees before 12 April 2016. Even if it were appropriate for Austrend to demand a medical certificate, it might have remained open at that point for Ms Aragon to provide a medical certificate on or before 4 April 2015 (even allowing for the intervention of a weekend): that was made difficult by the short time frame but was in effect made impossible once the ban on communication was imposed.
6. If the real and only issue was the absence of a medical certificate, rather than send an email that denied there was any agreement, Austrend simply could simply have stated that Ms Aragon was welcome to return to work on 4 April 2016 on the condition that she provide an appropriate medical certificate. One would have expected to see that sort of communication.
7. Counsel for the respondents seeks to rely upon the fact that the Ombudsman later suggested to Ms Aragon that she provide a medical certificate as supporting the respondents' contention that the absence of a medical certificate was *the* reason Ms Aragon's return to work was refused. I do not accept that the actions of the Ombudsman support that contention. Rather, it is apparent that the Ombudsman was suggesting that one method by which it may be possible for Ms Aragon to promote her return to work was to provide such a certificate, so removing that issue as any point of contention, albeit that it was not something that lawfully could be required by Austrend. So much is reflected in the internal email referred to at [61] above. It was a suggestion based on clear and appropriate common sense on the part of the Ombudsman. It is not evidence that the Ombudsman agreed with the contentions of the respondents. In July 2016 (after the Ombudsman became involved) Austrend asked Ms Aragon when she might return to work - but that does not alter the events of 1 April 2016.
8. The fact that Austrend was not entitled under the FW Act to require a medical certificate in the circumstances should not be forgotten. The respondents admit by Mr Rao's affidavit evidence that the insistence on a medical certificate as a condition of Ms Aragon's return to work was unlawful and made without a reasonable basis. They did not seek to rely on the s 351(2)(b) FW Act exception: that is, they did not contend there was something inherent in the requirement of the particular job that required a medical check-up or certificate in the case of pregnancy.
9. Having regard to all of the circumstances, a declaration that suggests that the only reason Austrend refused to permit Ms Aragon to resume work was her failure to provide a medical certificate does not accurately reflect the circumstances of the refusal and seeks to colour the events of 1 April 2016.
10. In my view the terms of the declaration should fall somewhere between the two suggestions of the parties. There should be specificity as to the relevant date of the contravention, having regard to the period of time during which the parties were in communications. But it should not qualify the conduct by reference (only) to the absence of a medical certificate. The declaration I propose with respect to Austrend's contravention remains consistent with the matters in the statement of agreed facts.
11. Accordingly there will be a declaration that:

On or about 1 April 2016 the first respondent contravened s 351 of the Fair Work Act by taking adverse action against Ms Aragon because of her sex and pregnancy by refusing to allow her to return to work following a period of unpaid leave and care for her first child.

## Issue 2: the impact of the contravention on Ms Aragon, and whether Austrend should pay compensation

1. The Ombudsman accepts that Ms Aragon has been compensated for the financial effects of the contravention and has been paid her entitlements. Compensation for the financial effects of the contravention can therefore be put to the side. However, the Ombudsman seeks an order that $2,500 be paid to Ms Aragon by way of compensation for non‑economic loss suffered by her as a result of the admitted contravention.
2. Section 545 of the FW Act relevantly provides:

**Orders that can be made by particular courts**

Federal Court and Federal Circuit Court

(1) The Federal Court or the Federal Circuit Court may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision.

…

(2) Without limiting subsection (1), orders the Federal Court or Federal Circuit Court may grant include the following:

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

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

(c) an order for reinstatement of a person.

1. Compensation may be awarded for non-economic loss such as hurt and humiliation: *Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* [2011] FCA 333; (2011) 193 FCR 526 at [441]; and *Dafallah v Fair Work Commission* [2014] FCA 328; (2014) 225 FCR 559 at [178]‑[179]. An assertion of non‑economic loss is not sufficient to found a claim for compensation; a causal link must be shown between the contravention and the loss claimed.
2. In *Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 27 Mortimer J awarded a 'modest amount' of $3,000 in 'general compensation' pursuant to s 545(2)(b) for the unlawful way in which the applicant's employment was terminated, about which her Honour stated that 'any reasonable person … would find … humiliating and distressing'. The circumstances giving rise to the compensation were described as follows:

[316] … Taking into account the absence of any probative evidence other than the applicant's display of despondency, disappointment and anger, but recognising that he relocated from Melbourne to Queensland and then to Perth, and was dismissed summarily and placed directly on a plane back to Melbourne from Sydney, having been compelled to back up and leave Perth at short notice, any reasonable person in the applicant's position would find this humiliating and distressing …

1. The applicant in that case was separately compensated for his lost income: *Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 338 at [1].
2. In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v ACI Operations Pty Ltd* [2006] FCA 122 at [11] Marshall J commented that 'something more than the usual element of distress which accompanies most terminations must be demonstrated'.
3. Ms Aragon gave evidence by affidavit about the emotional impact of the admitted contravention, including that:
   1. she was worried when she had not heard from Mr Rao and so made contact on 1 April 2016, and was shocked to receive a response saying her unpaid leave was to be extended;
   2. she was shocked, distressed and hurt by Austrend's email of 1 April 2016, particularly as she had received conflicting answers. Dr Rao had said she was most welcome to return on 4 April 2020 (email of 30 November 2015) whereas Mr Rao said on 1 April 2016 (8.26 pm) that there was no agreement for her to return on that date. Further, the email of 1 April 2016 (8.26 pm) included upsetting and hurtful remarks that were untrue, such as the reference to there being 'poor performance' issues;
   3. she experienced a high level of stress and anxiety in not being able to return to work, including as a result of her changed financial circumstances; and
   4. the alternative employment arrangements with Aldi through which she mitigated the financial loss in the period she had expected to be back working at Austrend had personal disadvantages, including the stress of starting a new job but also stress associated with the lack of fixed shifts, missing out on weekend activities with her family and needing to arrange day care on an ad hoc basis.
4. The respondents submit that little weight should be put on Ms Aragon's evidence. They submit that taking into account that Ms Aragon sought employment with Aldi during the period of the contravention and afterwards, and noting that she did not provide a medical certificate until July 2016 and then only 'at the behest of the [Ombudsman]', the Court should infer that she had no real intention of returning to work with Austrend or was ambivalent about doing so, because she had other priorities and part‑time work at Aldi. The respondents refer to adverse credibility findings as to Ms Aragon's evidence made by Gilmour J in the summary judgment application. They also refer to discrepancies in Ms Aragon's evidence as to when she was offered a job at Aldi.
5. It is necessary to traverse some of the evidence relating to Ms Aragon's employment at Aldi.
6. In her affidavit (sworn on 2 July 2019) Ms Aragon said that she attended an interview with Aldi in mid‑April 2016 after which she was offered a position as a part‑time sales assistant working 20 hours per week and started working at Aldi on 26 April 2016.
7. Prior to the hearing, the respondents sought the issue of a subpoena to Aldi and received in response documents that confirmed the dates relating to Ms Aragon's employment offer as set out above at [59]. It is apparent that Ms Aragon's evidence in her affidavit was wrong as to the date of her application to work at Aldi. Ms Aragon deposed in her affidavit that she had not kept a copy of the email by which she applied for the job at Aldi (although the respondents say an email was later produced by Ms Aragon).
8. The respondents seek that I make adverse credibility findings with respect to the evidence given by Ms Aragon as to the hurt and stress she felt as a result of the admitted contravention.
9. I decline to do so, because it is entirely credible that Ms Aragon would have felt distressed and hurt at the time, having regard to the tone of the communications with Ms Aragon, the failure to properly reply to her emails over a period of time, the manner in which her agreement to return to work on 4 April 2020 was then in effect revoked by the 1 April (8.26 pm) email and the hope she retained at that point to return to her former job.
10. I accept, as the respondents submit, that one might expect that Ms Aragon might have recalled that she accepted the role with Aldi on the same day of the 1 April 2016 emails passing between her and Austrend. However, I take into account that Ms Aragon said she did not have a copy of her email application at the time of swearing the affidavit; that the evidence about the job application process was given apparently without the benefit of reviewing relevant supporting documentary evidence; and that the position was only clarified after a subpoena was issued. These matters explain to some extent, in my view, the incorrect evidence.
11. The respondents also seek to rely on conduct that occurred after 4 April 2016 in support of their submission to the effect that Ms Aragon had no real intention of returning to work at Austrend. To my mind, it is by no means apparent that Ms Aragon had no intention of returning to her former job. She had contacted the office of the Fair Work Ombudsman and nominated the date of 4 April 2016 many months before, and had struggled to obtain meaningful answers from Austrend over a period of time as to her return. It is not surprising that Ms Aragon sought the back-up of alternative work, particularly as Ms Aragon said that without a second income she and her partner were at that time struggling financially. Had her return to work at Austrend been secured, it was always open to Ms Aragon to resign from her position at Aldi.
12. I do not consider it appropriate in assessing the effect of the admitted contravention on Ms Aragon as at 1 April 2016 and thereabouts to place any great weight on her subsequent conduct: with the fullness of time Ms Aragon was able to consider her options, obtain advice and negotiate a settlement with Austrend in July 2016 that included her resignation from her position. That does not persuade me that prior to the events of 1 April 2016 (and for some time afterwards) Ms Aragon did not hold the desire and hope that she could return to her previous job.
13. Nor am I satisfied that Ms Aragon should be denied, on the Ombudsman's application, compensation relating to the events of 1 April 2016 because she had entered into a settlement agreement on 19 July 2016 with Austrend, apparently without disclosing her employment at Aldi. The settlement agreement is not impugned in these proceedings. It was open to Ms Aragon to seek other employment while the communications about her return to work with Austrend played out. It should also be recalled that having entered into the settlement agreement and resigning, Ms Aragon was reluctant to ask for further money from Austrend to reflect unpaid leave entitlements: that payment was pursued by the Ombudsman (see [74]‑[75] above).
14. Finally, I do not consider it appropriate to assume on the basis of adverse credibility findings made by Gilmour J in February 2018 regarding Ms Aragon's evidence then before the Court about the meeting of 19 July 2016 that I should doubt the veracity of her evidence recounted at [107] above. It does not follow that a witness who may have lied or exaggerated on one occasion about one event will therefore lie on another occasion about another event. Having been the subject of such an adverse credibility finding, one could just as reasonably assume that Ms Aragon would have taken greater care with the subsequent affidavit. In any event, there is no great difficulty in accepting Ms Aragon's evidence on this aspect of the case. Ms Aragon's evidence that she felt hurt and stressed by the email of 1 April 2016 in its context is inherently believable. Whilst I accept that some parts of her evidence as to her employment with Aldi are of concern, those concerns are not such as to persuade me I should reject her evidence that she felt stressed and hurt, having regard to what I have said at [113] above. I note that Ms Aragon was not required for cross-examination.
15. For all of those reasons I accept Ms Aragon's evidence that she felt hurt and stressed as a result of the 1 April 2016 (8.26 pm) email and that she is entitled to compensation in accordance with the principles and authorities discussed at [103]‑[106] above. I am satisfied that Ms Aragon endured 'more than the usual element of distress which accompanies most terminations' in that she was left in the dark for some time about her options and rights upon a return to work after giving birth, and was led to believe that she was welcome to return on a particular date, only to have that position change at the last minute and in unnecessarily harsh, threatening and combative language. I also take into account that by the time of the July 2016 agreement Ms Aragon's distress had been alleviated such that she was content with the terms upon which she resigned. Her distress was in that context short-lived. In those circumstances I consider the amount of $2,000 is a modest but reasonable sum, and although there is no tariff for such awards, that sum is not disproportionate to awards in other cases such as *Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 27.
16. The fact that Ms Aragon and Austrend entered into the arrangement referred to at [70] above does not deny the power of this Court to make an award of compensation in proceedings brought by the Ombudsman. The Ombudsman in bringing these proceedings did so in exercise of the Ombudsman's functions under s 682 of the FW Act and does not claim 'under or through' Ms Aragon or do so as her agent. There is no estoppel that binds the Ombudsman arising out of the settlement agreement: *Tomlinson v Ramsay Food Processing Pty Ltd* [2015] HCA 28; (2015) 256 CLR 507 at [5]‑[6], [45]‑[47].
17. Whilst I acknowledge the value in certainty of settlement agreements reached between parties, the Ombudsman retains the power to seek relief from the Court that reflects the nature and severity of any relevant contravention. That said, the principle of double recovery remains relevant: *Tomlinson* at [47]. I do not disregard the terms of the settlement in considering more generally the penalties and remedies sought by the Ombudsman. In this case, the sum referred to in the arrangement at [70] above was calculated on the basis of income entitlements that Austrend would have paid Ms Aragon had she returned on 4 April 2016 as she had hoped until the date upon which she agreed to resign (that is, for the period 4 April 2016 to 19 July 2016, plus two weeks with respect to payment in lieu of notice). Had the Ombudsman sought relief relating to financial entitlements, there would have been an issue of potential double and over recovery, and the payments Ms Aragon received from Aldi for her part-time work may have been relevant. However, the compensation for non‑economic loss recognises a different type of loss and harm arising from a contravention, and the Ombudsman was not prevented from seeking such relief. The position may well be different in other cases where the parties have agreed settlement terms: each case must be considered on it facts.
18. In all the circumstances I consider that only a relatively modest award is appropriate, as I have indicated.

## Issue 3: the extent of the respondents' contrition

1. At this point it is important to raise a matter that, with the benefit of hindsight, might be seen as the cause of much of the difficulty faced by Ms Aragon in attempting to return to work on 4 April 2016.
2. Regrettably, the email of 1 April 2016 (8.26 pm) was not drafted by Mr Rao, Dr Rao or any Austrend representative who had any first-hand knowledge of Ms Aragon's circumstances. Rather, Mr Rao asked for a friend in India to assist, Mr Iyer. Mr Rao understood that Mr Iyer was a lawyer. He said that Mr Iyer assured him he was familiar with Australian employment law. Mr Rao said he used Mr Iyer for employment and business advice at that time.
3. Mr Iyer drafted the emails of both 26 November 2015 and 1 April 2016 (8.26 pm). Mr Rao did not review the drafts before they were emailed to Ms Aragon. It is not clear how Mr Iyer came to draft the email of 1 April 2016 (8.26 pm) or the nature of his instructions, but Mr Rao says that Mr Iyer drafted it, he (Mr Rao) did not review it and it would have been sent to Ms Aragon by his wife on his behalf.
4. Mr Iyer also drafted the correspondence to the Ombudsman, being the communications referred to at [62] above.
5. Mr Rao expresses remorse in his affidavit filed in this proceeding for having relied on Mr Iyer. He says he is embarrassed by and regrets having relied on Mr Iyer, regrets that he did not pay attention to the correspondence which Mr Iyer drafted for him and regrets sending it.
6. Mr Rao's counsel submits that his reliance on Mr Iyer was entirely misplaced. Not only did Mr Iyer give him bad advice but to make matters worse the inappropriate tone and content of the emails and letters which Mr Iyer drafted for Austrend and which Mr Rao caused to be sent to Ms Aragon,and later the Ombudsman,without questioning or reviewing them, undoubtedly damaged relations between the respondents and Ms Aragon and between the respondents and the Ombudsman. The letters, particularly to the Ombudsman, as Mr Rao now accepts, were rude and aggressive and contained many claims which lacked any proper legal basis.
7. The tone of the correspondence to Ms Aragon is one of the more significant reasons why I decided to award compensation, as discussed above. Ms Aragon was not to know that Mr Rao (or another Austrend representative) had not drafted those emails. Receipt in the circumstances in which she found herself would inevitably, in my view, cause unnecessary and unjustifiable hurt and distress. It was irresponsible to say the least to simply pass on such emails without any review, independent thought or consideration.
8. However in assessing the pecuniary penalty I accept that it is appropriate to take into account significant contrition on Mr Rao's part. In various parts of his evidence he refers to his happiness when Ms Aragon told him of her pregnancy, and that she was a polite and well‑mannered employee he would have been happy to have back in the office. He also refers to his concern for her health, and his understanding that he was justified in seeking a medical certificate as a condition of her employment. He says that he thought that, based on what he had been told by Mr Iyer and an insurance broker, he had the right to require a medical certificate before Ms Aragon returned to work (although it was Mr Iyer who included the reference to a medical certificate in the unreviewed emails).
9. All of this I accept, but it rather tends to emphasise the damage caused by reliance on Mr Iyer. If Mr Rao's only concern was a genuine one about seeking a medical certificate upon or before a return to work, that could easily have been dealt with by a simple, polite request that Ms Aragon should bring a certificate with her upon her return to work (or before). Instead, Ms Aragon was met with an email that denied any agreement about her return to work, sought to elevate a previous request for a medical certificate to the (unlawful) justification for denying a right to return and demanded there be no further communications until after expiry of the proposed return date. Viewed objectively, Mr Iyer's drafting, unchecked by the respondents, put an end to the prospect of Ms Aragon returning to work on 4 April 2016 and rather poisoned the relationship between the parties going forward.
10. In all the circumstances I accept the respondents' submission that Mr Rao's conduct was deliberate and unlawful, but not malicious. I accept that he was at times preoccupied with his business and his mother's poor health (about which there was evidence) and that he wrongly thought Mr Iyer 'knew what he was doing'. I take into account that Austrend voluntarily has entered into a five year contract with an Australian workplace relations consultant to advise it on employment matters. I accept that Mr Rao is contrite and regretful, and unlikely to again engage in such conduct.

## Issue 4: the size of the business of Austrend and legal costs incurred

1. The respondents submit that Austrend is a small family business, and that the size of a business is relevant not only to the deterrent effect a penalty may have but also to the capacity of the business to sustain the significant legal costs associated with proceedings of this type.
2. Evidence on behalf of the respondents was to the effect that in 2015-2016, the entire Austrend group made a net profit of $658,761. In 2016-2017 it made a net profit of $106,912. In 2017‑2018 it made a net profit of $327,914.
3. Mr Rao's evidence is that as at 16 August 2019, Austrend had spent over $246,655 on legal costs in relation to this matter of which $82,000 was recovered from the Ombudsman when it was ordered to pay Austrend's indemnity costs relating to the constructive dismissal allegation. I accept that further costs will have been incurred since then in relation to this proceeding.
4. The legal costs incurred by a defendant in proceedings are relevant when determining the quantum of penalty: *Director of Consumer Affairs Victoria v Meng* [2015] VSC 668 at [62]‑[65]; and *Ponzio v B & P Caelli Constructions Pty Ltd* [2007] FCAFC 65; (2007) 158 FCR 543 at [138]. They are relevant in the context of both the capacity to pay and the impact of such costs on the contravener. However, costs generally should not be considered an ameliorating factor. In *ACE Insurance Limited v Trifunovski (No 2)* [2012] FCA 793 Perram J said:

[126] There are risks in permitting the incurring of legal costs to count as an ameliorating factor in assessing a civil penalty. To do so may provide an economic incentive to a respondent to draw out a proceeding confident that money spent on its defence may result in a reduction in penalty. This, in turn, would conflict with the policy of encouraging early admission of wrongdoing by taking account of it in the process of penalty assessment as a positive matter: cf *Minister for Sustainability, Environment, Water, Population and Communities v De Bono* [2012] FCA 643 at [60], [73]; *Secretary, Department of Health and Ageing v Export Corporation (Australia) Pty Ltd* [2012] FCA 42 at [91].

[127] Despite that there can be cases where it is appropriate to take the incurring of costs into account. This will be particularly so where it is obvious that the costs have been incurred in defending related civil proceedings rather than the penalty proceedings themselves. This is such a case and, in my opinion, it is a significant matter.

1. In this case the respondents submit that the Court should take into account that the costs incurred by them were exacerbated having regard to the many claims that were abandoned prior to this hearing and any penalty should accordingly be at a lower level than it may have otherwise been.
2. In *Fair Work Ombudsman v Contracting Solutions Australia Pty Ltd* [2013] FCA 7 Lander J at [104] noted that the Ombudsman has an obligation to bring proceedings and to prosecute those proceedings in a manner which causes the least cost to the persons against whom the proceedings are brought. His Honour considered that, having regard to the costs that had already been incurred in the relevant proceedings, some of which were thrown away by reason of the way in which the Ombudsman had prosecuted them, it was appropriate to order penalties at the lowest end of the proposed range.
3. As noted above, this matter commenced with a pleading that asserted some 12 contraventions by Austrend. Over time, the majority of those claims were abandoned without any determination or admissions. The claim for constructive dismissal was dismissed with indemnity costs.
4. The chronology of the 'abandonment' of claims by the Ombudsman occupied considerable time in oral submissions. As counsel for the Ombudsman accepted, there was no evidence as to the circumstances of the change in pleadings to abandon claims other than the decision whereby the constructive dismissal claim was dismissed. Counsel emphasised that those claims should not be described as unfounded but rather as unproven or unsubstantiated. I was told by counsel for the Ombudsman that two claims were abandoned prior to the summary judgment application and the balance were abandoned in about April 2018. I was also told that the underlying facts relating to the abandoned claims were beyond those that remained relevant for the purpose of the claim that remained and is the subject of these reasons. I therefore accept that there would have been some costs thrown away as a result of the abandonment of claims by the Ombudsman. Quantification of such costs is not possible having regard to the absence of evidence addressing with any particularity costs thrown away by the respondents and having regard (albeit in a different context) to the principles discussed in *Re The Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* [1997] HCA 3; (1997) 186 CLR 622 at 624‑625.
5. As part of my overall assessment of penalty I will take into account in the respondents' favour that some costs were incurred by them as a result of claims that were made but subsequently abandoned by the Ombudsman, but in light of the generality of the evidence it is not a matter that has any significant weight in that assessment.

## Issue 5: the relevance of the media release and subsequent publicity

### Principles

1. When a court assesses the likelihood of a respondent or others repeating the contravening conduct, or similar conduct, the consequences that the conduct has had upon the respondent, including publicity of that conduct, are a relevant matter: *Australian Competition and Consumer Commission v Multimedia International Services Pty Ltd* [2016] FCA 439; (2016) 243 FCR 392 at [107]‑[112] (Edelman J).
2. The financial consequences from publicity of a respondent's conduct can be a matter taken into account. However, often where adverse publicity surrounding a respondent's conduct led to a significant decline in customers and a loss of profit, such adverse publicity will not be a mitigating factor because it may be seen as flowing from a failure to comply with statutory obligations or from publicity that often flows from prosecutions or proceedings: *Trade Practices Commission v Cue Design Pty Ltd* (1996) 85 A Crim R 500 at 506‑508; and *Australian Competition and Consumer Commission v AirAsia Berhad Company* [2012] FCA 1413 at [60]. Further, it might be that no causal connection is established between the publicity and claimed financial consequences: *ACCC v Multimedia International Services* at [113].
3. Where media publicity has been instituted by a prosecutor or regulator, the courts have been prepared to take a different approach. *New Image Photographics Pty Ltd v Fair Work Ombudsman* [2013] FCA 1385 is a useful example, particularly as it concerns the office of the Fair Work Ombudsman. In that case Collier J stated:

[65] First, I accept the submission of the respondent that it is within the scope of its duties to publicise its activities, including action taken to promote compliance with the law. The mere publication of a media release informing the public of such activities, notwithstanding that the publicity may be unfavourable to the recipient of the regulator's attentions, is not reason to mitigate any penalty the Court proposes in respect of contravening conduct. Hansen J in *Cousins v Merringtons Pty Ltd (No 2)* [2008] VSC 340 at 60 helpfully summarised the rationale for this principle as being:

… a reasonably worded, accurate news release serves a useful purpose; without it the media is left to make their own inquiries and compile their own summaries, which carries a risk of inaccuracy.

(cf O'Loughlin J in *Trade Practices Commission v Cue Design Pty Ltd* (1996) 85 A Crim R 500 at [25].)

…

[67] It is where publicity is 'adverse' in the sense of inaccurate or unfair that the mitigation of penalty may be appropriate. As was explained in *Australian Competition & Consumer Commission v Nissan Motor Co (Australia) Pty Ltd* (1998) ATPR 41-660:

If a defendant is the subject of media publicity, initiated by the prosecutor, that is inaccurate and on that account the defendant suffers damage that would not have occurred had the media reliance been fair and accurate that is a factor which may go to mitigation of penalty: *Eva v Southern Motors Box Hill Pty. Ltd.* (1977) 1 ATPR 40-026 at 17,366, 30 FLR 213 at 222‑223. However, 'adverse' means something more than fair reporting; there must be unfair or incorrect reporting: *Trade Practices Commission v Cue Design Pty Ltd & Anor* (1996) 18 ATPR 41-475 at 41,836, and *ACCC v Nationwide News Pty Ltd and Others* (1996) 18 ATPR 41-519 at 42,507.

[68] Second, I do not accept the submission of the respondent that his Honour erred because there was no evidence of the impact of the media releases on the appellants. His Honour did not make any findings as to the impact of the media releases on the appellants - he confined his findings to the question whether the use of the word 'prosecution' in the context of the media releases was misleading. In any event, I do not accept that there was a need for such evidence before his Honour. The media release was issued for an obvious purpose - for the respondent to inform the media (and through the media, the public) of its activities in relation to the appellants. Inquiries were invited, and specific details of the matter provided, for that purpose. It ill-behoves the respondent to suggest that there was no evidence of impact on the appellants when the very purpose of the media releases was to attract public attention to the appellants' failings and the respondent's investigations and commencement of proceedings.

1. The respondents accept, as endorsed by Collier J, that the Ombudsman is entitled to issue media releases to publicise its activities. However, they contend that this is a case where the content of the Ombudsman's media release that has remained on its website over the course of a number of years is unfair and accordingly the adverse publicity received by the respondents should be taken into account as mitigating in the context of penalty.

### The media release and adverse publicity in this case

1. The media release issued by the Ombudsman on 20 March 2017 was in the follow terms:

The operators of a gourmet food distribution business are facing Court for allegedly discriminating against a pregnant employee.

The Fair Work Ombudsman has commenced legal action in the Federal Court against Austrend International Pty Ltd, trading as Austrend Foods, and company director and part-owner Denzil Godfrey Rao.

The Fair Work Ombudsman alleges Austrend and Mr Rao took unwarranted performance-management action against a sales executive after she fell pregnant with her first child, denied her lawful right to return to work after taking parental leave and constructively dismissed the employee by presenting her with a pre-written resignation letter after she informed management that she had fallen pregnant with her second child.

In early 2015, the employee informed that she intended to commence a period of parental leave in mid-2015. The Fair Work Ombudsman alleges that a short time later, Austrend raised performance issues with her for the first time and subsequently issued her a written warning.

It is alleged that Austrend’s performance management action against the employee was unwarranted and was a form of adverse action taken against the employee in response to her flagging her intention to exercise her lawful right to parental leave.

Two months after receiving the written warning, it is alleged that the worker agreed to delay her maternity leave in order assist Austrend in a staff shortage. The employee's formal leave period began one day before she gave to her first child.

The Fair Work Ombudsman alleges that in November 2015, while the employee was on parental leave, Austrend rejected her request to return to work with flexible working arrangements and advised in writing that the employee could return to full-time duties in 2016.

The employee subsequently fell pregnant for a second time and advised Austrend of her pregnancy in March 2016. The Fair Work Ombudsman alleges the employee advised Austrend that it was still her intention to return to work in April, however the company told her it was extending her unpaid leave until after the birth of her second child.

It is alleged that the employee subsequently alerted Austrend to the fact she had not requested an extension of unpaid leave and informed the company that she had received advice that she was within her rights to return to work in April 2016 as originally agreed.

It is alleged that Mr Rao and Austrend responded by denying the existence of any agreement that she return to work in April 2016 raised allegations of performance issues and asked her to obtain a medical certificate as to her fitness to return to work.

It is alleged that after the employee provided a medical certificate in July 2016, Austrend asked her to attend a meeting where she was asked to sign a Letter of Resignation pre-prepared by Austrend management.

It is alleged the Letter of Resignation, which the employee signed, amounted to a constructive dismissal of the employee.

It is alleged the conduct of Mr Rao and Austrend in denying the employee's lawful right to return to work and constructively dismissing her contravened the National Employment Standards and the pregnancy discrimination and workplace rights provisions of the Fair Work Act.

Fair Work Ombudsman Natalie James said the agency initiated proceedings as the allegations were particularly serious.

'Under the Fair Work Act employees have a lawful right to return to work following a period of parental leave,' Ms James said.

…

The Fair Work Ombudsman is seeking penalties against Austrend and Mr Rao for alleged contraventions of workplace laws, as well as a Court Order requiring them to pay compensation to the employee for economic and non-economic loss.

Mr Rao faces penalties of up to $10,800 per contravention and the company faces penalties of up to $54,000 per contravention.

…

Employers and employees seeking assistance should visit www.fairwork.gov.au or call the Fair Work Infoline on 13 13 94. An interpreter service is available on 13 14 50.

1. On 13 September 2017 following a complaint from the respondents' solicitors, the Ombudsman amended the media release on its website by adding a note in a box at the beginning of the media release as follows:

Note: Allegations outlined in the FWO's media releases relating to the commencement of litigation reflect those put forward in our Statement of Claim at the time of filing. Some details may vary over the course of the proceeding.

1. On 28 February 2018 (the date of the summary judgment decision in *FWO v Austrend (No 1)*) the Ombudsman further amended the media release by adding a sentence to the note so that it read:

Note: Allegations outlined in the FWO's media releases relating to the commencement of litigation reflect those put forward in our Statement of Claim at the time of filing. Some details may vary over the course of the proceeding.

The Fair Work Ombudsman's allegation that Austrend and Mr Rao constructively dismissed the employee has been dismissed.

1. After the summary judgment decision Mr Rao also wrote to various media outlets and asked them to remove the articles they had published after the March 2017 media release. Some of them obliged. Others agreed to add an editor's note referring to the decision. Others did not reply to Mr Rao or action his request.
2. The statement of agreed facts was filed on 6 June 2019.
3. On 2 September 2019 the Ombudsman further amended the media release on the website by adding a substitute note that read:

NOTE (2/9/2019): Allegations outlined in the FWO's media releases relating to the commencement of litigation reflect those put forward in our Statement of Claim at the time of filing. Some details may vary over the course of the proceeding. This matter now concerns only one alleged contravention of section 351 of the Fair Work Act, namely that the Respondents took adverse action by refusing to allow the employee to return to work on 4 April 2016 on a full-time basis due to her sex and pregnancy. Other alleged contraventions have been dismissed or are no longer pressed.

1. I was informed that despite Austrend's requests to the Ombudsman to remove reference to the constructive dismissal and other abandoned allegations including those relating to performance management, the media release remains on the Ombudsman's website with all the allegations in their original form, save only for the note appearing at the head of the article. The previous note which stated that the constructive dismissal claim has been dismissed has been removed.
2. The Ombudsman did not dispute that the original media release remains on its website, preceded by the latest version of the note.

### Evidence as to adverse publicity

1. The respondents' solicitors compiled copies of various media reports that were published in newspapers and online in March 2017 following the issue of the media release. It is apparent that many of those reports remain accessible online despite the passage of time.
2. Most of the articles and reports focused on the allegations that the respondents had constructively dismissed Ms Aragon and had given her performance warnings because of her pregnancy.
3. It is sufficient to refer to two of the reports. An article appearing in *The West Australian* on 20 March 2019 (and online where it can still be found) had the headline 'Boss "made" pregnant worker resign from job' and began by stating:

A Perth boss is being prosecuted by the Fair Work Ombudsman for allegedly discriminating against a female employee by telling her to resign when she became pregnant with her second child.

1. It also stated that:

Shortly after [Ms Aragon] announced the pregnancy, she was issued with a written warning for what she was told were poor sales results …

…

Ms Aragon claims she … was summoned to a meeting at the company's Bibra Lake headquarters in July where she was allegedly handed the resignation letter. She agreed to sign it in order to access $16,000 in back pay, but then took her complaint to the Ombudsman's office.

1. The report named Austrend and Mr Rao.
2. An article appearing on Channel Nine's website finance.nine.com.au dated 19 March 2017 relevantly stated:

A female sales executive in Perth was allegedly given a pre-written resignation letter and faced unwarranted performance management after she told her boss she was expecting her second child, it has been claimed.

…

In July last year, she claims Austrend asked for a meeting with her at which time she was allegedly told to sign a pre-prepared resignation letter. She signed the letter.

1. Again, both Austrend and Mr Rao were named.
2. Mr Rao deposed to the effect of the adverse publicity. He said that the media release resulted in the allegations being aired on print media, television, radio and the internet. In the days and months following the media release, the respondents received numerous calls, inquiries and comments from customers, suppliers and members of the public, causing considerable distress to employees as well as to Mr Rao and his family and placing strains on his mental health. He said that at least one customer withdrew his business as a result of the publicity and that a debtor sought to use the adverse publicity to pressure Austrend to pay a disputed debt: emails were tendered that provided some support for these claims. Mr Rao also said that the adverse publicity generated by the media release affected Austrend's cash flow and its relationships with its banks and suppliers and that they questioned Austrend's solvency. In support of this contention Mr Rao tendered an email exchange with Austrend's banker that indicates that there was ongoing correspondence about the debt level of Austrend and that the bank requested, as one item in a list, a report as to the status of the litigation with the Ombudsman. However, there was no documentary evidence that more specifically linked adverse publicity with financial loss or difficulties with the bank.

### The submissions as to the media release

1. The respondents contend that the Ombudsman issued the media release notwithstanding that:
   1. it had received Ms Aragon's email of 20 July 2016 and knew or ought to have known from that email that Ms Aragon had not been constructively dismissed but rather had expressed that she was happy with a mutual agreement that included her resignation;
   2. the allegation that the respondents asked Ms Aragon to attend the 19 July 2016 meeting was wrong as Ms Aragon had suggested the meeting and that email (and others) had been forwarded to the Ombudsman's office; and
   3. it had no evidence to support the allegations that the respondents had issued Ms Aragon with warnings because of her sex and/or pregnancy.
2. The respondents contend that the media release falsely gave the impression that the respondents had summoned Ms Aragon to the meeting and then forced her to resign, and that most of the articles and reports focused on the allegations that the respondents had constructively dismissed Ms Aragon and had given her performance warnings because of her pregnancy
3. The respondents submit that the media release had the effect of publicly disparaging and shaming them, in advance of the Court determining the issues and in circumstances where the Ombudsman had no evidence to support the most serious allegations and in fact had some evidence to the contrary.
4. The respondents submit that it is open to infer that the Ombudsman has left the allegations on the website 'because it can' and to further punish the respondents, notwithstanding the Court's condemnation of the bringing of the constructive dismissal claim as reflected in the indemnity costs order made against it.
5. The Ombudsman submits that the media release accurately reported the matters alleged against the respondents at the time it was released. The Ombudsman noted that the release described the claims as 'allegations' rather than a prosecution (in contrast to the facts in *New Image Photographics*) and it did not suggest that facts were proven. Reliance was placed on the notes to the media release as protecting against unfairness. The Ombudsman also submits (in effect) that it was not possible in any event to separate any adverse publicity that might have been incurred from the reporting of the matters that were dismissed or abandoned from adverse publicity that flowed from the adverse action that is admitted by the respondents, adverse action that the respondents have accepted was a serious contravention.
6. In my view the conduct of the Ombudsman in maintaining the original media release on its website qualified only by the notes operated unfairly to perpetuate adverse publicity. The drafting of the media release inappropriately coloured the circumstances around the meeting of 19 July 2016 and gave the impression that Austrend had required Ms Aragon to attend a meeting and had required her to sign a pre-prepared resignation letter. Whilst one might argue about the ambiguity of the evidence as to some events, Gilmour J had no difficulty in finding that it was Ms Aragon who wanted the meeting (*FWO v Austrend (No 1*) at [39]). Nor was there any difficulty in accepting that in the 20 July 2016 email to the Ombudsman Ms Aragon did not state or suggest that she had been forced to resign (*FWO v Austrend (No 1*) at [67]). In subsequent correspondence between the Ombudsman and Mr Rao it was not alleged or suggested to Mr Rao that Ms Aragon had been forced to resign (at [76]). Indeed Gilmour J found that the 20 July 2016 email means 'exactly what it states': that Ms Aragon, following negotiations with Austrend, reach an agreement voluntarily that she would resign upon terms, an agreement that was mutually reached (at [93]). His Honour concluded:

[103] I accept the respondents' submission, made at the hearing, that it should have been apparent to the FWO, particularly because of the content of the 20 July email, that this claim had no real prospects of success from the outset and that it must fail. I make the finding that the proceedings were therefore instituted by the FWO without reasonable cause, for the purposes of ss 570(1) and (2)(a).

1. In those circumstances, it should also have been apparent that there was no reasonable basis to issue a media release that gave the impression that Austrend had required Ms Aragon to attend a meeting and had required her to sign a pre-prepared resignation letter.
2. The Ombudsman ought to have been disabused of any doubts as to whether it was fair to maintain the media release online in its then form after the publication of Gilmour J's reasons. Whilst it may have been technically correct to 'note', as it did that the constructive dismissal claim had been dismissed, such note left it to the reader to attempt to work through the media release (so reading all of the allegations) and then to attempt to ascertain which parts of the conduct were captured by the reference to 'constructive dismissal' and so should be disregarded. That task is not straight forward, and the outcome if such a task were to be undertaken is unclear. 'Constructive dismissal' is referred to twice: once by reference to the letter of resignation, and once more generally in the sentence that reads 'It is alleged the conduct of Mr Rao and Austrend in denying the employee's lawful right to return to work and constructively dismissing her contravened the National Employment Standards and the pregnancy discrimination and work place rights provision of the Fair Work Act'. In my view it would be by no means clear which of the matters presented as factual allegations in the preceding paragraphs of the release are in some way separately or cumulatively connected to the constructive dismissal claim and so are to be disregarded by the reader.
3. The notes do not address the underlying factual allegations and so do not assist the reader in understanding what factual allegations remained against the respondents. It would have been a simple task, one would think, to withdraw the media release and prepare a fresh one, edited so that it no longer referred to such conduct or to abandoned and dismissed claims (as the case may have been at the relevant point in time).
4. The shorthand approach of the Ombudsman was not, in my view, a fair manner in which to deal with the changing course of the proceedings brought against the respondents. There may be occasions where the claims are so carefully delineated that a reference in a note to the abandonment of a claim may comprise fair disclosure to the public, but in my view, and having regard to the content of the notes, this was not such a case. Nor do I understand why there was a gap of some months between finalising the statement of agreed facts and the Ombudsman's addition of the final note to the media release.
5. I accept the Ombudsman's submission insofar as it is said that the respondents would have suffered adverse publicity in any event. The nature of the admitted contravention is such that had the facts underlying it been fairly disclosed, it was open to the Ombudsman to legitimately publish a media release and it is inevitable that there would have been adverse publicity. It is not possible to quantify the difference in the level of the adverse publicity that may have resulted. I consider, however, that the respondents have been on the receiving end of adverse publicity that was based on a media release that was to some extent unfair.
6. It is not enough, in my view, for the Ombudsman to rely on its argument as to the inevitability of adverse publicity to obviate the need for careful review and editing of its media releases with an eye to ensuring that such releases are fair when published and remain fair as proceedings unfold. Otherwise, to take that argument to its extreme, as long as a media release includes details of one valid claim that might bring about adverse publicity, any number of other claims, regardless of merit, that may also attract adverse publicity might be included in the same media release without reproach.
7. Having regard to all the circumstances, I consider the publicity received by the respondents as a result of the unfair media release is a matter to be taken into account in mitigation of penalty. It is highly relevant to the question of specific deterrence but also to the question of general deterrence, having regard to the adverse publicity that the respondents' conduct has already received.

## Penalties - other matters

1. As is clear from the above, issues 3, 4 and 5 are relevant to the level of pecuniary penalty. There are a number of other less significant matters that I accept are to be taken into account and might reduce the level of penalty that might otherwise be imposed, and I will briefly deal with some of those.
2. Austrend has been in business for over 18 years and has retained the services of human resources advisors and administrative staff to process leave and other payments. However the circumstances involving Ms Aragon revealed a lack of systems or expertise relating to parental leave and returns to work. Unfortunately Ms Aragon was left to her own devices in attempting to work out just what her position was when it came to a return to work.
3. Austrend has subsequently engaged a workplace relations consultant to assist with employment matters and has agreed to orders that require it to undertake targeted workplace relations training.
4. Austrend is a family-run and family-owned company and the penalty imposed on Austrend will indirectly have a financial effect on Mr Rao personally, in addition to the penalty to be imposed upon him for his personal contravention.
5. Further, the Ombudsman accepts that Austrend has not previously been the subject of any findings of contravention of Commonwealth workplace laws. The approach in such a case was addressed in *Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 338 as follows:

[51] The absence of any evidence of previous contraventions by the respondent means, as Jessup J pointed out in *Murrihy (No 2)*, that the respondent's conduct must be measured in and of itself, without reference to previous conduct. I do not consider this as some kind of positive factor in the respondent's favour, which seemed to be the implication from the respondent's submissions. Especially in relation to unlawful discrimination, where the true reasons for conduct are often difficult to uncover, one cannot simply infer, as the respondent seemed to suggest the Court might, that this kind of conduct has not occurred before within the CFMEU. Nor can one infer it has. Rather, the conduct stands to be assessed for what it has been found by the Court to be. In my opinion absence of evidence about prior contraventions that have been litigated and determined simply means there is no evidence of that nature which might otherwise have contributed to an increase in the penalty to be imposed.

## The respective positions of the parties on the quantum of penalties

1. Section 539(2) and s 546(2) of the FW Act prescribe the maximum penalties that the Court may impose for contraventions of civil penalty provisions. Those maximum penalties are calculated by reference to 'penalty units' within s 4AA of the *Crimes Act 1914* (Cth). At the time of the contraventions, one penalty unit was $180.
2. Section 546(2), read with s 539(2) Item 11, provides that the maximum penalty for a body corporate for a contravention of s 351(1) is 300 penalty units. Therefore the maximum penalty for Austrend is $54,000.
3. Section 546(2), read with s 539(2) Item 11, provides that the maximum penalty for an individual for a contravention of s 351(1) is 60 penalty units. Therefore the maximum penalty for Mr Rao is $10,800.
4. The Ombudsman submits that penalties imposed should be in the range of 40-50% of the applicable statutory maximum, less a discount of 10-15%, having regard to the respondents' admissions which have reduced the cost and complexity of the proceedings, and having regard to Mr Rao's contrition, so that the following penalties should be imposed:
5. Austrend be ordered to pay between $18,360 and $24,300; and
6. Mr Rao be ordered to pay between $3,672 and $4,860.
7. The respondents submit that the level of seriousness of the contravention is at the low end and, having regard to the respondents' cooperation, contrition and the punishment already incurred by them by way of costs and adverse publicity, that the penalties imposed should be no more than 5-10% of the applicable statutory maximum, which would lead to the following:
8. Austrend be ordered to pay between $2,700 and $5,400; and
9. Mr Rao be ordered to pay between $540 and $1,080.
10. However, it must be noted that the respondents' suggested percentage range was formulated on a calculation that included a 20-30% discount for the fact that the respondents are first time offenders, a submission that properly was withdrawn having regard to *Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 338 at [51]. To that authority I would add Wheelahan J's discussion in *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining, and Energy Union (Syme Library Case) (No 2)* [2019] FCA 1555 at [96].
11. Whilst I have considered the respective submissions of the parties as to quantum, it remains for the Court to fix a penalty which pays appropriate regard to the circumstances in which the contravention has occurred and the need to sustain public confidence in the statutory regime which imposes the obligations: *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; (2008) 165 FCR 560 at [91] (Buchanan J). The penalty must be just and proportionate, and is not an exercise in mathematical compartmentalisation. Rather, the process of determining an appropriate penalty is that described as 'instinctive synthesis' in *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357 at [37] (Gleeson CJ, Gummow, Hayne and Callinan JJ), and cited in (relevantly) *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* at [27] (Gray J), [55] (Graham J)*.*

## Determination of penalties

1. Making matters so difficult for a person seeking to return to work from parental leave simply should not happen in this day and age. The level of seriousness of the contravention does not fall at the low end, as the respondents submit. But in all the circumstances it is not in the category of the worst of such contraventions. Accordingly, I accept the Ombudsman's submission (by reference to its suggested range) that whilst the contravention is serious, the starting point in terms of penalty should be in the mid-range. However, as is apparent from my reasons above, I consider there are factors to be taken into account by way of mitigation that exceed those identified by the Ombudsman. The appropriate penalties in the case of both respondents are therefore less than those proposed by the Ombudsman.
2. Whilst I have had regard to the numerous matters raised by the parties, I have had particular regard to Mr Rao's contrition and acceptance of responsibility for his conduct as a director of Austrend and in his own right; that he has been somewhat surprised by and elucidated as to an employer's obligations to its employees through this process; that his actions were based in ignorance rather than capriciousness; that this was a single contravention and the financial loss has been made good; that the need for specific deterrence has been substantially satisfied by the adverse publicity relating to the media release that I have found was to a degree unfair; and that whilst there is a strong need for general deterrence of such behaviour towards pregnant women (and indeed all parents), the level of penalty necessary to achieve such general deterrence is mitigated and tempered in this case by that same adverse publicity.
3. In all of the circumstances, and having regard to the other orders to be made, for Austrend's contravention of s 351 I consider the appropriate penalty is $15,500.
4. For Mr Rao's involvement in the contravention I consider the appropriate penalty is $2,800.
5. There will be orders accordingly.

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| I certify that the preceding one hundred and ninety-one (191) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Banks-Smith. |

Associate:

Dated: 20 August 2020