FEDERAL COURT OF AUSTRALIA

Registered Organisations Commissioner v Mijatov [2018] FCA 939

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| File number: | NSD 2181 of 2016 |
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| Judge: | **BROMWICH J** |
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| Date of judgment: | 22 June 2018 |
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| Catchwords: | **INDUSTRIAL LAW** – penalty dispute arising from conceded liability for contraventions of care and diligence duties in relation to financial management of union under s 285(1) of *Fair Work (Registered Organisations) Act 2009* (Cth) – failure to prepare and table budgets – agreed payment of back pay but disagreement as to entitlement - value of general deterrence for financial management contraventions – whether applicant discharged onus of showing failure of respondent to take necessary care in obtaining back payment and that resulting in payment without entitlement – whether any mitigating circumstances – held: onus discharged by applicant but seriousness of offence lessened by mitigating circumstances – held: penalties ordered totalling $2000 |
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| Legislation: | *Evidence Act 1995* (Cth) s 140(2)  *Fair Work (Registered Organisations) Act 2009* (Cth) ss 240, 285(1)  *Workplace Relations Act 1996* (Cth) Sch 1, ss 240, 285(1) |
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| Cases cited: | *Briginshaw v Briginshaw* (1938) 60 CLR 336  *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482  *General Manager of the Fair Work Commission v McGiveron* [2017] FCA 405  *Hocking v Bell* (1945) 71 CLR 430  *Kelly v Fitzpatrick* [2007] FCA 1080; 166 IR 14  *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; 110 ALR 449  *Rejfek v McElroy* (1965) 112 CLR 517 |
|  |  |
| Date of hearing: | 30 November 2017 |
|  |  |
| Date of last submissions: | 20 December 2017 |
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| Registry: | New South Wales |
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| Division: | Fair Work |
|  |  |
| National Practice Area: | Employment and Industrial Relations |
|  |  |
| Category: | Catchwords |
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| Number of paragraphs: | 55 |
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| Counsel for the Respondent: | Mr J Nolan |
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| **Table of Corrections** |  |
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| 26 June 2018 | In paragraph 12, the word “FWO” has been replaced with “Commissioner”. |

ORDERS

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|  | | NSD 2181 of 2016 |
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| BETWEEN: | REGISTERED ORGANISATIONS COMMISSIONER  Applicant | |
| AND: | MICHAEL MIJATOV  Respondent | |

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| JUDGE: | BROMWICH J |
| DATE OF ORDER: | 22 June 2018 |

THE COURT DECLARES THAT:

1. The respondent, Michael Mijatov, engaged in contraventions of
   1. s 285(1) of Schedule 1 of the *Workplace Relations Act 1996* (Cth) (***WR Act***) (as then in force) in respect of the following periods:
      1. 1 April 2006 to 31 March 2007;
      2. 1 April 2007 to 31 March 2008;
      3. 1 April 2008 to 30 June 2008;
      4. 1 July 2008 to 30 June 2009; and
   2. s 285(1) of the *Fair Work (Registered Organisations) Act 2009* (Cth) (***FWRO Act***) in respect of the following periods:
      1. 1 July 2009 to 30 June 2010;
      2. 1 July 2010 to 30 June 2011;
      3. 1 July 2011 to 30 June 2012,

by failing to exercise his powers and discharge his duty to prepare, or have prepared by a competent person, and submit to the Divisional Council for its consideration, a budget in any form setting out estimated amounts required in respect of proposed items of expenditure as required by rule 28 of the Flight Attendants’ Association of Australia (**FAAA**) Rules, such contraventions to be treated as a single contravention (**the budget contravention**).

1. The respondent, Michael Mijatov, contravened s 285(1) of the *FWRO Act* by failing to ensure that any amount being instructed or directed to be paid to him on account of purported back pay of his FAAA Divisional salary was an amount to which he was actually entitled to be paid by the FAAA and/or that it was an entitlement that had been accurately calculated in accordance with his asserted entitlement, including by failing to obtain independent advice (**the back pay contravention)**.

THE COURT ORDERS THAT:

1. The respondent, Michael Mijatov, pay to the Commonwealth:
   1. $500 in respect of the budget contravention; and
   2. $1,500 in respect of the back pay contravention,

within 60 days of the making of these orders, or such further time as the Court may order.

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

REASONS FOR JUDGMENT

BROMWICH J:

1. This dispute concerns proceedings brought for civil penalties to be imposed for multiple breaches of statutory care and diligence duties relating to the financial management of a union organisation by the respondent, Mr Michael Mijatov. Following mediation by a registrar of this Court, the applicant, the Registered Organisations **Commissioner**, and Mr Mijatov negotiated a settlement on liability. The parties are in agreement that the Court should make declarations to the effect that Mr Mijatov contravened certain civil penalty provisions that applied to his conduct when he held a position as a senior union official, and those declarations will be made at the time of delivery of this judgment. It was not agreed, however, that any penalty should be imposed, let alone as to quantum, largely due to starkly different characterisations of Mr Mijatov’s conduct between the parties. These reasons explain the resolution of that dispute and thereby the penalties imposed.

## Background and overview

1. The Court has had the benefit of an agreed statement of facts as to aspects of this case that were not in dispute between the parties. Also in evidence were three of 18 documents annexed to an affidavit from a principal lawyer employed by the Commissioner, Mr William Steenson (which was not otherwise read), an affidavit from Mr Mijatov, significant parts of which were objected to and either rejected or limited as to use, as well as limited cross-examination of Mr Mijatov. Mr Mijatov’s conduct was partly proved by those agreed facts, partly by contemporaneous records, and partly by his affidavit and oral evidence. The following summary is by way of background and overview of that conduct and the basis of the contraventions proved.
2. There has been a long history of federal legislation regulating employee and employer organisations. The present manifestation of that legislation is the *Fair Work (Registered Organisations) Act 2009* (Cth) (***FWRO Act***). The *FWRO Act* and its immediate predecessor, being Schedule 1 of the *Workplace Relations Act 1996* (Cth) (***WR Act***), were collectively referred to in the Commissioner’s written submissions as the ***Registered Organisations Legislation***. These reasons adopt that convenient descriptor.
3. On 19 December 2016, the predecessor to the Commissioner, the General Manager of the Fair Work Commission, commenced proceedings in this Court under the *FWRO Act*. It is not necessary to detail the particular *Registered Organisations Legislation* provisions by which the Commissioner became the successor applicant, nor the provisions by which he also assumed the role of regulator, largely due to that being clearly set out and agreed upon between the parties.
4. The Flight Attendants’ Association of Australia (**FAAA**) was originally registered in 1956 and has been registered ever since, including under the *Registered Organisations Legislation*. The rules of the FAAA have been registered under the *Registered Organisations Legislation* (***Rules***). A certified copy of the registered *Rules* was in evidence.
5. At all material times:
6. the FAAA has been composed of a National Division and an International Division;
7. the International Division has had:
   1. a **Divisional Council** with powers set out in rr 7 and 8 of the *Rules*; and
   2. a **Divisional Executive** with powers set out in r 8A of the *Rules*; and
8. Mr Mijatov was employed full-time as a flight attendant by **Qantas** Airways Ltd.
9. In March 2004, Mr Mijatov was elected to the position of **Divisional Secretary** of the International Division of the FAAA. He held that position continuously until 30 June 2016. As a result, he was the holder of an office, and an officer of, the FAAA under the *Registered Organisations Legislation*.
10. Mr Mijatov was authorised to take time off from his employment with Qantas to perform work and carry out his duties for the FAAA under arrangements that were similar to, but not the same as, a secondment. This was provided for by a number of industrial agreements in force during the period of time in which he held that position. The secondment-type arrangement was referred to as a “*leave bank*” arrangement until about January 2005, and thereafter as a "*union leave day*” arrangement. As the differences between the leave bank/union leave day arrangement and a secondment are not presently material, it will be convenient to refer to the 12-year period during which Mr Mijatov was employed by Qantas, but worked for the FAAA, as a **secondment**.
11. While carrying out duties for the FAAA on secondment, Mr Mijatov continued to be paid his base salary by Qantas, which was reimbursed to Qantas by the FAAA. Because he was not performing any additional duties, such as shift work, Qantas did not pay anything more than the base salary. In addition to his base salary with Qantas, as reimbursed by the FAAA, Mr Mijatov was entitled:
12. as Divisional Secretary, to payment from the FAAA of an additional amount of 46 weeks’ salary per annum, which was the responsibility of the FAAA to pay in accordance with various salary and expenses policies that were in force during that time, referred to as his **divisional salary**; and
13. six weeks’ annual leave per annum from Qantas, which was the responsibility of Qantas to approve and pay.
14. The 46 weeks’ pay from Qantas that was reimbursed by the FAAA, combined with the 46 weeks of divisional salary paid directly by the FAAA, were apparently designed to put Mr Mijatov in the same position he would have been in had he continued to perform work for Qantas, especially having regard to the various allowances payable to flight attendants as a result of working on international flights. It was in the nature of a “*top-up*”, with the apparent effect that a Qantas employee who worked on secondment for the union would not be worse off than staying in regular employment. Presumably, these arrangements also facilitated the smooth movement of Qantas employees in and out of union positions, maintained continuity of service with Qantas, and, in particular, meant that employee records at the Qantas end and banking arrangements for the payment of base salary and leave pay needed no change during a secondment period.
15. The six weeks’ annual leave Mr Mijatov received from Qantas was the same as he would have been provided had he been continuing to work solely for Qantas. It was necessarily paid on the basis of his base salary because, had Mr Mijatov still been working solely for Qantas, he would not have received the additional allowances whilst on leave. As it transpired, what Mr Mijatov apparently wished to achieve, being something that he maintains was permissible, was to obtain the FAAA top-up not just in relation to working time, but in relation to leave time. Understanding this as the substance of the dispute is considerably easier to state in this short form than it was to ascertain and articulate in detail, due in part to the lack of clear documentation.
16. The allegation that Mr Mijatov obtained a benefit in relation to this arrangement that he was not entitled to is addressed in some detail below, including his quite different characterisation of his conduct to that advanced by the Commissioner. It is important to note at the outset that Mr Mijatov has no antecedent breaches of the *Registered Organisations Legislation* and is no longer a union official.
17. Deterrence is the dominant, if not only, consideration when it when it comes to the imposition of civil penalties: *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 at [55]. Mr Mijatov’s unchallenged evidence was that he is no longer employed by the FAAA or by Qantas and has no intention of returning to union office or employment as a flight attendant. This means that there is little or no role for specific deterrence in this case. However, general deterrence continues to loom large on the Commissioner’s case, while Mr Mijatov suggests it is of no moment.

## The nature of the duties that were breached and the agreement as to how they were breached

1. The pleading, admission and agreement as to the nature of Mr Mijatov’s duties was, to a degree, circular, albeit foundationally necessary to ground the allegation and the breach to the extent that it was admitted. The convoluted manner of expression seems to have been the product of the need to find common ground for the purposes of liability, leaving the disputed area that required adjudication as penalty only. All duties and conduct referred to below are subject to the temporal limitation of existing and taking place respectively at all material times, so that this does not have to be repeated or noted again. Dates will therefore only be referred to insofar as they indicate the age or duration of what took place.
2. It was pleaded, admitted and agreed that Mr Mijatov:
3. had a duty to exercise his powers and discharge his duties as Divisional Secretary with the degree of care and diligence that a reasonable person would exercise if he or she were an officer of a registered organisation or branch of such an organisation in the FAAA’s circumstances, occupied the office of Divisional Secretary and had the same responsibilities as Mr Mijatov; and
4. had a duty not to improperly use his position to gain an advantage for himself or someone else, or cause detriment to the FAAA or to another person.
5. Thus the pleading, admission and agreement as to Mr Mijatov’s duties and his breach of them only really addressed the fact of a breach, and not its true substance and character, which is the content of the dispute requiring resolution in order to decide upon the appropriate penalty. It is therefore convenient to set out what was agreed on each topic, and the further evidence on each topic, before turning to the opposing submissions. The agreed breaches fall under the following two headings:
6. failure to prepare and submit a financial year budget each year to the Divisional Council of the International Division of the FAAA (**the budget contravention**); and
7. payment of back pay without ensuring that he was entitled to receive it (**the back pay contravention**).

### Agreed budget contravention

1. The parties agree that, in the period up to and including 31 March 2008, the FAAA’s business and affairs were conducted on the basis of a financial year running from 1 April of one year to 31 March of the next. From 1 July 2008, the FAAA’s business and affairs were conducted on the basis of a more conventional financial year running from 1 July to 30 June. As a result of the 2008 change, the changeover intervening period of 1 April 2008 to 30 June 2008 was treated as a financial year pursuant to s 240 of Schedule 1 of the *WR Act* (now reflected in s 240 of the *FWRO Act*).
2. Mr Mijatov, as the Divisional Secretary, was required:
3. to attend all meetings of the Divisional Council, and to prepare and place before the Chairperson an abstract of the business to be conducted at such meetings: rr 12(a) and 12(b) of the *Rules*; and
4. in the period from 9 September 2005, to submit to the Divisional Council for its consideration a budget for the ensuing financial year setting out estimated amounts required in respect of proposed items of expenditure: r 28 of the *Rules*.
5. Mr Mijatov did not prepare and submit to the Divisional Council a financial year budget setting out estimated amounts required in respect of proposed items of expenditure for the two full financial years ending 31 March 2007 and 2008, for the truncated financial year from 1 April to 30 June 2008, or for the four full financial years ending 30 June 2009 to 2012; that is, for a total of six years and three months. Specifically, Mr Mijatov agrees that, by failing to exercise his powers and discharge his duty to prepare, or have prepared by a competent person, and submit to the Divisional Council for its consideration, a budget in any form setting out estimated amounts required in respect of proposed items of expenditure as required by r 28 of the *Rules*, he contravened s 285(1) of Schedule 1 of the *WR Act* and s 285(1) of the *FWRO Act*.
6. The parties agree:
7. that Mr Mijatov’s conduct should be treated as arising from a single course of conduct, and should therefore be treated as a single contravention as essentially it was the same unbroken conduct, albeit committed over a protracted period of six years and three months;
8. but that, by reason of the provisions being in separate statutes, separate penalties would need to be imposed for one contravention under Schedule 1 of the *WR Act* and one contravention under the *FWRO Act*; and
9. that those separate penalties should be assessed against the usual principles of totality, effectively so as to be regarded as having been a breach between dates of a single proscription.

That agreed position is appropriate, or at least not inappropriate, and should be accepted.

### Agreed payment of back pay and disagreement as to entitlement

1. In the period after 15 March 2004, Mr Mijatov from time to time went on secondment from his employment with Qantas to carry out his duties as the Divisional Secretary for the FAAA. During that period:
2. Mr Mijatov was paid his Divisional Salary directly by the FAAA in accordance with successive Salary and Expenses Policies of the International Division;
3. the amount paid by the FAAA as the Divisional Salary was 46 weeks’ salary per annum, which, from 24 February 2005, was spread over 52 weeks in equal weekly instalments;
4. the FAAA had no responsibility to approve and provide or pay to Mr Mijatov annual leave, long service leave or sick leave, which remained the responsibility of Qantas; and
5. Mr Mijatov was entitled to apply to Qantas to take the period of annual leave that he had accrued.
6. Mr Mijatov’s accrued annual leave entitlement with Qantas was:
7. as at 24 February 2005 (shortly before the secondment), 9.46 weeks or 66.2226 days;
8. as at 31 March 2011, 12.75 weeks or 89.25 days; and
9. in the period between 24 February 2005 and 31 March 2011, increased by 3.29 weeks or 23.03 days.
10. It is convenient to summarise at this point, and over the following two paragraphs, where the parties most fundamentally disagree and the evidentiary burden on the Commissioner to have his view prevail. The resolution of this disagreement is fundamental to the view to be taken of the events of April 2011, being immediately after the end of the period from 24 February 2005 to 31 March 2011referred to in subparagraph (3) of the preceding paragraph.
11. The Commissioner contends that Mr Mijatov was not entitled to be paid the FAAA top-up in respect of any periods of time when he was on paid Qantas leave, or at any time in respect of such a Qantas leave entitlement. Mr Mijatov contends that he was entitled to be paid that FAAA top-up as an accrued right for such Qantas leave periods for reasons associated with a particular interpretation he gives to the FAAA *Rules*, detailed below. He therefore contends that his only error was the means by which he obtained that payment, in that he failed to ensure that he was, in fact, entitled to receive the payment that was made by the FAAA. Thus the dispute lies in the characterisation as to what was wrong with obtaining the payment in the way that Mr Mijatov did. On his account, it was a mere error of process, with an element of conflict of interest, but that he obtained a payment that he was entitled to in any event. On the Commissioner’s account, the contravening process enabled him to obtain a payment that he was never entitled to.
12. Both views entail contraventions, but the Commissioner’s characterisation, if correct, is undoubtedly more serious by way of aggravation. It goes beyond form and process to substance. While this circumstance of aggravation is not presented as an allegation of fraud, it is of sufficient seriousness to engage the reasoning in ***Briginshaw*** *v Briginshaw* (1938) 60 CLR 336 at 362 as to the quality of evidence required if it is to be relied upon by the Commissioner. *Briginshaw* reasoning, now reflected in s 140(2) of the *Evidence Act 1995* (Cth), is directed to the sufficiency of evidence necessary to discharge the ordinary civil onus or burden of proof, rather than to describing any different standard of proof: see ***Neat Holdings*** *Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; 110 ALR 449 at 449-450, especially at 450.2, the cases cited at footnote 1 in *Neat Holdings* of *Hocking v Bell* (1945) 71 CLR 430 at 500.5 per Dixon J, and *Rejfek v McElroy* (1965) 112 CLR 517 at 519-521, especially at 521.6.
13. On or about 6 April 2011, Mr Mijatov prepared a memorandum addressed to a subordinate employee of the FAAA, Ms Sharon Bodnar, which instructed and directed her to make a back payment to him of his alleged Divisional Salary from the FAAA, as at 1 April 2011, of 89.25 calendar days or 12.75 weeks. This was the same amount as his total accrued Qantas annual leave entitlement at that time.
14. On 6 April 2011, Mr Mijatov attended a meeting of the Divisional Council. At that meeting, he tabled and moved a resolution to approve a new Salaries and Expenses Policy. The Divisional Council passed that resolution approving that policy. Mr Mijatov did not, at any time before or after the approval of that policy, disclose:
15. the fact or existence of his 6 April 2011 memorandum to Ms Bodnar;
16. his intention to give the instruction or direction recorded in that memorandum;
17. the fact that he claimed to have an entitlement to back payment of his Divisional Salary from the FAAA of 89.25 calendar days or 12.75 weeks;
18. that he intended to direct a subordinate employee to process a payment from the FAAA in an amount equal to his claimed entitlement for back pay of his Divisional Salary of 89.25 calendar days or 12.75 weeks; or
19. that he intended to receive a payment from the FAAA in an amount equal to his claimed entitlement for back pay of his Divisional Salary of 89.25 calendar days or 12.75 weeks.
20. After the 6 April 2011 Divisional Council meeting, Mr Mijatov provided the 6 April 2011 memorandum to Ms Bodnar. As a result of the instruction and direction contained in that memorandum, the FAAA paid Mr Mijatov an amount of $14,690.42 and a 9% superannuation amount of $1,322.13, totalling to a benefit of $16,012.55, as purported back pay of 12.75 weeks (or 89.25 calendar days) of Mr Mijatov’s Divisional Salary. Thus Mr Mijatov received the FAAA top-up for the periods of outstanding leave owed to him by Qantas.
21. Mr Mijatov admits that by his conduct detailed above, he contravened s 285(1) of the *FWRO Act* by failing to ensure that any amount being instructed or directed to be paid to him on account of purported back pay of his Divisional Salary was an amount that he was actually entitled to be paid by the FAAA, and/or that it was an entitlement that had been accurately calculated in accordance with his asserted entitlement (including by failing to obtain independent advice).
22. The immediate problem with the form of that admission as to the back pay is that it is confined to a concession that he should have checked that he was entitled to the back pay and perhaps that he went about it the wrong way, but not that he, in fact, was not entitled to the payment. As will be seen, even if Mr Mijatov was not actually entitled to the payment, he explains in some detail how it came about in order to characterise it as, in effect, a trivial contravention. That argument is difficult to sustain if he simply was not entitled to claim the FAAA top-up in relation to Qantas leave payments, especially having regard to the way in which the top-up payment was secured. However, that argument, even if wrong, still has some relevance to moral culpability, amounting to a form of ignorance of the law mitigation.

## Additional evidence beyond the agreed facts

### Evidence for the Commissioner

1. Three documents produced as annexures to the affidavit of Mr Steenson were tendered and admitted into evidence without objection as follows:
2. annexure WRS-16 admitted as exhibit 2: the “*FAAA International Division Salary & Expense Claims Policy*”, effective 24 February 2005;
3. annexure WRS-17 admitted as exhibit 3: the “*FAAA International Division Salary & Expense Claims Policy*”, effective 6 April 2011; and
4. annexure WRS-18 admitted as exhibit 4: the minutes of the International Divisional Council for 1 June 2011.
5. The Commissioner placed reliance on the parts of those documents that addressed the Divisional Secretary’s remuneration. Most of those passages are addressed in portions of Mr Mijatov’s affidavit, reproduced below.

### Evidence for Mr Mijatov

1. The salient additional evidence from Mr Mijatov’s affidavit, which was unchallenged in this respect, was as follows.
2. Mr Mijatov was employed as a flight attendant by Qantas from 2 November 1989 until 30 April 2017. When he left office as a Divisional Secretary of the International Division, there were 2,488 members of that Division and five industrial and administrative staff. The two employers of those members were Qantas and Virgin Australia.
3. Mr Mijatov was first elected to office with the FAAA International Division on 13 May 1997, and served as a part-time Assistant Divisional Secretary until he became Divisional Secretary on 15 March 2004. He lost office in June 2016 after a vigorously contested election.
4. The Division under Mr Mijatov’s direction and management enjoyed robust financial good health and there was no suggestion that the state of the Division’s finances was other than excellent, supported by the fact that during his 12 years as Divisional Secretary, membership fees did not increase. When he started as Divisional Secretary, members’ funds totalled $918,098, which had increased to over $8 million by the time he left.

#### Failure to prepare and submit budgets to the Divisional Council, International Division, FAAA

1. On the topic of budget information and the provision of financial information to the Divisional Council, Mr Mijatov’s additional evidence included the following:
2. When the omission to table each financial year budget was drawn to his attention, Mr Mijatov made an immediate concession that he had inadvertently failed to follow r 28. Mr Mijatov characterised this as an innocent error that he immediately rectified without detriment to the FAAA or its members.
3. Rule 28 is a requirement peculiar to the *Rules* of the FAAA, and is not a (direct) requirement of legislation.
4. The budget is, by r 28, required to be “*in a form decided by Divisional Council or Divisional Executive from time to time*”, but this did not happen because no form of budget was ever decided upon.
5. While Mr Mijatov accepts that he should have been aware of r 28, it came into the *Rules* when the FAAA was restructured on 9 September 2005. Previously, there had been three branches in the International Division in New South Wales, Victoria and Western Australia, which were abolished, resulting in branch obligations becoming Divisional obligations.
6. The rationale for the rule at the branch level was that branches did not collect fees directly, but, rather, received funds from the Division. The amounts were allocated each year to the branches for their running expenses and they were expected to submit a budget to the Divisional Council.
7. Although Mr Mijatov had participated in the decision to restructure the FAAA and was aware of it, and particularly of the abolition of the branches, he had not paid attention to the consequential changes, especially the relocation of r 28, because the responsibility for that had been given to the former Domestic/Regional Division.
8. There could not be any serious suggestion that the breach of r 28 involved funds that had been fraudulently expended or otherwise involved significant sums, nor that this proceeding could have a significant deterrent effect on anyone, given that this was a simple and innocent omission without any suggestion of wilfulness.

#### Payment of back pay

1. On the topic of back pay, Mr Mijatov’s explanation was more convoluted. He annexed to his affidavit the following documents:
2. annexure MM1: the “*FAAA International Division Salary & Expense Claims Policy*”, dated as effective from 25 March 2002, but with a handwritten note stating that it was effective 22 April 2002;
3. annexure MM2: the “*FAAA International Division Salary & Expense Claims Policy*”, effective 20 May 2004.
4. annexure MM3: an extract of a document described in the annexure note as the “*2005 Salaries policy*”;
5. annexure MM4: a copy of the 6 April 2011 memorandum from Mr Mijatov to Ms Bodnar;
6. annexure MM5: an extract of a document described in the annexure note as the “*2011 Salary policy*”, but on its face appearing to be the 6 April 2011 Divisional Council resolution referred to at [26] above;
7. annexure MM6: a resolution that is described in the annexure note as a Divisional Executive resolution of 28 October 2014; and
8. annexure MM7: a letter from the FAAA auditor dated 2 December 2014.
9. It is convenient to interrupt consideration of Mr Mijatov’s affidavit to gather in one place extracts from the “*FAAA International Division Salary & Expense Claims Policy*” in 2002, 2004, 2005 and 2011 as follows, because Mr Mijatov relied upon that policy as being the source of his entitlement to a top-up from the FAAA in relation to Qantas leave, and it is necessary to have this set out in order to understand his evidence that follows:

**March/April 2002**

ANNUAL LEAVE ARRANGEMENTS

It is expected that elected officials should take their allocated annual leave as it becomes due.

However, for officials who are required to perform FAAA business over a period of scheduled annual leave the following shall apply:

1. The Company shall be approached to cancel the period of annual leave; if it has not already commenced, and the official can then later access the cancelled annual leave through the Company ad hoc annual leave arrangements. The official is entitled to claim salary payments as per the General Salary Payments section of this policy i.e. points 1-7. The maximum claimable amount for a roster period as outlined in note 3 also applies.
2. If the Company will not defer the annual leave then any work performed shall be claimable at the $200/day rate for each day of attendance. The maximum claimable amount for a roster period as outlined in note 3 also applies. The official shall be entitled to access FAAA secondment/leave bank days at a time of their choosing for the number of days that the official undertook FAAA work on their annual leave days. The secondment/leave bank days so granted to compensate for working on annual leave days are of course not subsequently claimable.

DIVISIONAL SECRETARY

The FAAA salary payment to the Divisional Secretary is covered by a separate resolution of Divisional Council that sets the salary at $89000 per annum.

The Divisional Secretary is authorised to move to the salary arrangements contained in this policy as an alternative to the current $89000 set by Divisional Council. However, it is understood that a move to these arrangements would mean that no salary claim on the FAAA can be made for periods of annual leave as is also the case for all other elected officials.

(Source – annexure MM1: the “*FAAA International Division Salary & Expense Claims Policy*”, effective dated 25 March 2002, but with a handwritten note stating it was effective 22 April 2002)

**May 2004**

DIVISIONAL SECRETARY

The FAAA salary payment to the Divisional Secretary is covered by a separate resolution of Divisional Council that provides for a salary top up, currently at $47,098 per annum.

The Divisional Secretary is authorised to utilise either the salary arrangements contained in this policy or the top up arrangement. When utilising the arrangements applicable to all other elected officials, rather than the top up, a Divisional Secretary cannot claim for periods of annual leave, as is also the case for all other elected officials.

ANNUAL LEAVE ARRANGEMENTS

It is expected that elected officials should take their allocated annual leave as it becomes due.

However, for officials who are required to perform FAAA business over a period of scheduled annual leave the following shall apply:

1. The Company shall be approached to cancel the period of annual leave; if it has not already commenced, and the official can then later access the cancelled annual leave through the Company ad hoc annual leave arrangements. The official is entitled to claim salary payments as per the General Salary Payments section of this policy i.e. points 1-7. The maximum claimable amount for a roster period as outlined in note 3 also applies.
2. If the Company will not defer the annual leave then any work performed shall be claimable at the $212/day rate for each day of attendance. The maximum claimable amount for a roster period as outlined in note 3 also applies. The official shall be entitled to access FAAA secondment/leave bank days at a time of their choosing for the number of days that the official undertook FAAA work on their annual leave days. The secondment/leave bank days so granted to compensate for working on annual leave days are of course not subsequently claimable.

(Source – annexure MM2: the “*FAAA International Division Salary & Expense Claims Policy*” effective 20 May 2004)

**24 February 2005**

DIVISIONAL SECRETARY

The FAAA salary payment to the Divisional Secretary shall be determined by the following formula.

CSM. MAXIMUM ANNUAL SALARY + $45856 – DIVISIONAL SECRETARY’S AIRLINE ANNUAL SALARY = FAAA DIVISIONAL SECRETARY SALARY.

…

ANNUAL LEAVE ARRANGEMENTS

It is expected that elected officials should take their allocated annual leave as it becomes due.

However, for officials who are required to perform FAAA business over a period of scheduled annual leave the following shall apply:

1. The Company shall be approached to cancel the period of annual leave; if it has not already commenced, and the official can then later access the cancelled annual leave through the Company ad hoc annual leave arrangements. The official is entitled to claim salary payments as per the General Salary Payments section of this policy i.e. points 1-10. The maximum claimable amount for a roster period as outlined in note 3 also applies.
2. If the Company will not defer the annual leave then any work performed shall be claimable at the $218/day rate for each day of attendance. The maximum claimable amount for a roster period as outlined in note 3 also applies. The official shall be entitled to access FAAA secondment/leave bank days at a time of their choosing for the number of days that the official undertook FAAA work on their annual leave days. The secondment/leave bank days so granted to compensate for working on annual leave days are of course not subsequently claimable.

(Source – annexure WRS-16 admitted as exhibit 2: the “*FAAA International Division Salary & Expense Claims Policy*”, effective 24 February 2005)

**6 April 2011**

DIVISIONAL SECRETARY

The FAAA salary payment to the Divisional Secretary shall be determined by the following formula. (which was set on 24 February 2005)

CSM MAXIMUM ANNUAL SALARY + 46 weeks X ($218 x 5) – DIVISIONAL SECRETARY’S AIRLINE ANNUAL SALARY = FAAA DIVISIONAL SECRETARY SALARY.

Notes:

1. The above formula is predicated on the above weekly payment being made over 46 weeks. During periods of annual leave no payment is made (i.e. The 6 weeks of entitlement to annual leave per year).
2. To arrive at a weekly amount you divide the annual salary by 46. To arrive at a daily amount you divide the salary by 230.
3. The Divisional Secretary is entitled to spread the salary amount over 52 weeks, rather than 46 weeks, by proportionally reducing the daily amount i.e. the salary amount is divided by 260. The practical effect of this is that the Divisional Secretary spreads the same amount of income that would be received over 46 weeks to include periods of annual leave.
4. The Divisional Secretary salary is indexed to QF EBA increases since a decision of IDC on 29/3/2001 (IDC 07/01).
5. If the Divisional Secretary undertakes Company flying duties, the FAAA salary is reduced by the appropriate daily amount.

...

ANNUAL LEAVE ARRANGEMENTS

It is expected that elected officials should take their allocated annual leave as it becomes due.

However, for officials who are required to perform FAAA business over a period of scheduled annual leave the following shall apply:

1. The Company shall be approached to cancel the period of annual leave; if it has not already commenced, and the official can then later access the cancelled annual leave through the Company ad hoc annual leave arrangements. The official is entitled to claim salary payments as per the General Salary Payments section of this policy i.e. points 1-10.
2. If the Company will not defer the annual leave then any work performed shall be claimable at the $218/day rate for each day of attendance. The official shall be entitled to access FAAA secondment/leave bank days at a time of their choosing for the number of days that the official undertook FAAA work on their annual leave days. The secondment/leave bank days so granted to compensate for working on annual leave days are of course not subsequently claimable.

(Source annexure WRS-17 admitted as exhibit 3: the “*FAAA International Division Salary & Expense Claims Policy*”, effective 6 April 2011)

1. It may be seen that there are only minor differences in the policies at the various points of time, and that none of them, on their face, support the proposition that Mr Mijatov was entitled to the FAAA top-up in respect of Qantas leave entitlements. The changes in detail between the policies did not provide a basis for any material difference when it came to the absence of any entitlement to the top-up for periods of leave paid for by Qantas. Specifically, it was not a material difference that there was a change between the 2002 policy, in describing the Divisional Secretary’s salary as a single amount (in fact based on two sources of payment), and the 2005 policy, which explicitly set out the two sources of payment. Mr Mijatov’s affidavit, reproduced in full as to this part of his case, is relied upon to demonstrate that, contrary to the preceding observation, there was a material difference between the 2002 policy and the 2005 policy, and that as a result of that difference he had an accrued entitlement to the FAAA top-up in respect of his accrued Qantas leave entitlement, including for the period before the time that he went on secondment.
2. It is not practically possible to summarise Mr Mijatov’s affidavit on this topic, which was difficult to follow, without the risk of losing some nuance in the meaning he sought to convey. His affidavit is in part argumentative, but it does reveal his thought processes and reasoning and thereby, relevantly, his state of mind as well as his argument. In those circumstances, although lengthy, reproduction in full is the only workable option so as to give the truest articulation of why Mr Mijatov contends that he was entitled to the FAAA top‑up in respect of periods of Qantas leave entitlement. He deposed as follows (retaining original paragraph numbers):

35. The disagreement between me and the Registered Organisations Commission ['ROC'] is about the quantum that I was entitled to be paid by the FAAA, resulting from the memo of 6 April 2011. The ROC in its correspondence to me on this matter agrees that I was entitled to 3.29 weeks of payment, whereas it was (and is) my genuine belief that I was entitled to a payment of 12.75 weeks.

36. The ROC position appears to be that my Qantas annual leave balance of 9.46 weeks as at the day preceding the commencement of the 2005 FAAA Salary policy (this policy commenced on 24 February 2005) should be effectively disregarded and thereby deducted from the Qantas annual leave balance of 12.75 weeks as at 1 April 2011, upon which the memo of 6 April was based. In my view this is a fundamental misunderstanding by the ROC of the position.

37. It needs to be understood that as Divisional Secretary, I was entitled to be paid my FAAA Divisional Secretary salary for all periods of Qantas annual leave accrued by me before the policy of 24 February 2005 commenced and after the Divisional Council by resolution IDC 08-11 on 1 June 2011 increased the Divisional Secretaries Salary by 6/ 46 to again have a salary based on 52 weeks rather than 46 weeks – and thereby setting the FAAA salary to the Divisional Secretary to cover 6 weeks of annual leave from Qantas.

38. Both the 2002 and 2004 FAAA Salary policies make it abundantly clear that the salary included annual leave. The 2002 policy operated from 22 April 2002 until 18 May 2004 and the 2004 policy operated from 19 May 2004 until 23 February 2005.

39. The relevant section of the 2002 [Attached and Marked "MM1 "] policy states:

"Divisional Secretary

The Divisional Secretary is authorised to move to the salary arrangements contained in this policy as an alternative to the current $89000 set by Divisional Council. However, it is understood that a move to these arrangements would mean that no salary claim on the FAAA can be made for periods of annual leave as is also the case for all other elected officials".

The relevant section of the 2004 [Attached and Marked "MM2"] policy states:

"Divisional Secretary

The FAAA salary payment to the Divisional Secretary is covered by a separate resolution of Divisional Council that provides for a salary top up, currently at $47,098 per annum.

The Divisional Secretary is authorised to utilize either the salary arrangements contained in this policy or the top up arrangement. When utilizing the arrangements applicable to all other elected officials, rather than the top up, a Divisional Secretary cannot claim for periods of annual leave, as is also the case for all other elected officials."

The 2005 policy [Attached and Marked "MM3"](which I was the author of) adopted a FAAA "salary " amount which was calculated on a 46 week basis. As a Qantas cabin crew member I received 6 weeks of annual leave from Qantas and the 2005 policy specifically arrived at an amount that was based on 46 weeks to exclude payment on 6 weeks of annual leave provided to me by Qantas annually. In other words, there would be no FAAA salary paid during a period of annual leave. Note that there is no explicit mention of the alteration to a position where the FAAA salary was not to be paid for periods of Qantas annual leave but this was understood by me from the formula which calculated the salary amount. In retrospect I agree that this was potentially – and unnecessarily – confusing to any person who read the policy without knowing the background.

42. Prior to the adoption of the 2005 policy, I had accrued annual leave of 9.46 weeks (as at 24 February 2005) and therefore, in my view, I was entitled to be paid the FAAA Divisional Secretary salary on these 9 .46 weeks for any period where this balance was taken or drawn down.

43. Although the basis of the salary was altered on and from February 2005, the new policy did not, (and in my view) could not, have a retrospective operation. Therefore, in my understanding of the policy, I was entitled to 'carry forward' (and thus be paid) the FAAA Divisional Secretary Salary for the balance of Qantas annual leave that stood to my credit at 24 February 2005 (9.46 weeks).

44. It followed in my opinion, that I was able to draw upon that accumulated entitlement as I took leave and 'drew down' on that accumulated leave. It could not be disregarded as if it never existed and must, in my view, have been 'carried forward. Indeed from the adoption of the 24 February 2005 policy until my memorandum of 6 April 2011 [Attached and Marked "MM4"], I had various periods of annual leave that exhausted that 9.46 weeks. It was not correct, in my opinion, to treat the 9.46 weeks as "frozen in time" and then to deduct it from the 12.75 weeks balance that I had accumulated as at 1 April 2011.

45. I concede in retrospect that the 2005 policy I devised is quite confusing to an outside observer and was formulated by me without recourse to outside legal advice. However, I point out that each successive salary policy (including the 2005 policy) was approved by the International Divisional Executive or International Divisional Council.

46. The 2005 policy change to not pay for periods of Qantas annual leave (under the policy adopted on 24 February 2005), was prospective. It was never stated (or intended) to be retrospective and to wipe out an entitlement that I had accrued. I should know this as I was the author of the 2002 and all subsequent FAAA salary policies.

47. It was my view that the annual leave which I had accrued under the policy upon my commencement as Divisional Secretary was not disturbed by the 2005 Policy.

"Spreading out" arrangement

48. It also seems to me that the ROC has not come to grips with the "spreading out" arrangement of the approved FAAA Divisional Secretary's Salary which I instituted from 24 February 2005 – the date from which the policy applied. Put simply, the approved salary amount based on 46 weeks was "spread" over 52 weeks by dividing the total approved amount by 52 weeks rather than 46 weeks and, in effect, creating a continuing underpayment so that I received the FAAA salary based on the 'spread out' amount whilst on Qantas annual leave.

49. It was an administrative decision which I took which spread the approved amount over 52 weeks rather than 46 weeks.

50. My memo of 6 April 2011 reversed that administrative decision to spread the approved salary and to revert to being paid the full approved amount over 46 weeks rather than 52 weeks. It also directed the payment to me of an amount which represented the 12.75 weeks of accumulated annual leave (as at 24 February 2005) that I had not drawn down at that time. In effect it was recovering an underpayment in my view.

51. In my view, it is erroneous to suggest - as the ROC seems to suggest­that this 9.46 wks had to be deducted from the 12.75 weeks for reasons explained earlier.

52. The Salary policy of 6 April 2011 ["the 2011 policy"] [Attached and Marked "MMS"] and the Divisional Council resolution IDC 08-11 (referred to earlier) when read together make all of this issue much clearer - in my opinion.

53. I observe that it was 8 months (10 October 2014) after receiving the information about this payment - which was voluntarily disclosed by me on 20 February 2014 and not the subject of the 2013 'vexatious' complaints - before FWA raised this issue.

54. [Rejected]

55. It is important to note that the Divisional Executive on 28 October 2014 by resolution IDE 46/2014, [Attached and Marked "MM6"] treated the payment made as a result of the memo of 6 April 2011 as consistent with the FAAA salary policy at the time of the payment and to remove any doubt ratified the payment. Also the FAAA Auditor on 2 December 2014 reviewed the issue and stated that in his opinion, the payment was properly authorised and calculated [Attached and Marked "MM 7"].

56. The history and rationale of the FAAA salaries policy and the manner in which it was applied and altered was explained in detail in an extensive exchange of correspondence between the FAAA and FWA.

57. [Not read]

58. If I was wrong about my decision regarding my entitlement to the pay adjustment (and this is not conceded), there is nothing to suggest that I would not have been prepared to rectify it immediately. Any such error (if any) was an entirely innocent error – made in good faith. As it happened, however, the payment was authorised by the IDE on 28 October 2014 – albeit retrospectively.

59. I concede that the direction to my administrative assistant on 6 April 2011 to pay me the annual leave adjustment should not have been made by me at the time but referred for approval to the International Divisional Executive or International Divisional Council. I also did not have recourse to any independent advice about the decision. I also concede that, in retrospect, the successive salary policies should also have been referred for expert outside advice. I appreciate the fact that the 2005 policy is quite confusing.

60. I appreciate now that there was a potential conflict of interest where no outside scrutiny of a payment to me was sought and obtained. My only explanation is that I thought at the time that it was uncontentious and covered by the existing policy. Had I appreciated the conflict of interest this would not have occurred.

61. I point out that I took immediate action to rectify the omission regarding the budget. At all times I co-operated promptly and openly with the ROC and its predecessor. I also point out that I am not now employed by the FAAA or Qantas and I have no intention to return to union office or to employment as a flight attendant. I believe that I can point to my time in office as overwhelmingly successful as the financial good health of the FAAA International Division attests. I would respectfully ask the Court to impose no penalty or alternatively that any penalty be at the lowest level.

62. There is nothing to suggest that I acted otherwise than in good faith having regard to the context of this matter and the wider background of the entire period of my service as a senior officer of the FAAA and the very healthy financial position of the FAAA under my stewardship.

1. Counsel for the Commissioner cross-examined Mr Mijatov and put to him that he was not entitled to be paid by the FAAA in respect of periods in which he was on leave paid for by Qantas. The exception was if he elected to have his non-leave period pay (being 46 weeks per year), paid over 52 weeks, so as to be paid the same top-up from the FAAA whether he was on leave or not, but with that being referrable to his working time on secondment, rather than referable to his leave time. Mr Mijatov maintained that this would result in him being underpaid. The basis for this assertion of being underpaid, both in cross-examination and in re-examination, was no clearer than his evidence reproduced above. In substance, Mr Mijatov asserted that he had a right to be paid the FAAA top-up for leave entitlements accrued before he commenced the secondment, but was unable to demonstrate why that was so. It seemed to be contrary to the design of the secondment arrangement and was not supported by the text of the documents upon which he relied, set out above at [38], just prior to the reproduction at length of his affidavit.

## Budget contravention

1. It is convenient to start first with the submissions made by Mr Mijatov in relation to his failure to prepare and submit budgets to the Divisional Council. He has essentially characterised this as a minor or technical breach through oversight. He points to the lack of intention and to the lack of any demonstrated loss. He relies on his success as Divisional Secretary, how well the Division was run under his stewardship and its substantial improvement in financial health over the time he was in the position. He points to his immediate response in addressing the shortcoming, although it is not entirely clear what he actually did, nor how providing a budget after the period to which it applied could fulfil the purpose of good financial planning and making informed spending and resource allocation decisions. He makes a comparison with more serious cases, such as *General Manager of the Fair Work Commission v* ***McGiveron*** [2017] FCA 405. Mr Mijatov submits that no penalty should be imposed at all.
2. The Commissioner accepts that there was no evidence of financial mismanagement or loss arising out of the failure to submit budgets, but submits that this is beside the point. The failure to submit budgets was just that. The Commissioner submits that the gravamen of the contravention is Mr Mijatov’s failure to read, understand and act in accordance with his obligations. It is to be measured against the nature of the obligation already described, and its evident purpose. The purpose is to provide a clear reference point for financial accountability. In the absence of a proper budget, the Divisional Council was deprived of the means to measure its performance against planning benchmarks and targets. Moreover, the failure took place over a lengthy period of time in respect of six full financial years and a short transitional financial year. The Commissioner submitted that the contravention would best be described as being in the low to mid-range of seriousness.
3. The Commissioner’s submissions should be accepted. For this and the back pay contravention, due regard must be had to a range of factors as applicable in a given case. A useful guide was summarised by Barker J in *McGiveron* at [35] as follows, citing *Kelly v Fitzpatrick* [2007] FCA 1080; 166 IR 14 at [14] per Tracey J:

In broad terms, the parties accept that a range of factors may bear upon the determination of the appropriate penalty in a given case, including this case, such as:

* The nature and extent of the conduct which led to the breaches.
* The circumstances in which the relevant conduct took place.
* The nature and extent of any loss or damage sustained as a result of the contraventions.
* Whether there had been similar previous conduct by the respondent.
* Whether the contraventions were properly distinct or arose out of the one course of conduct.
* The size of the business enterprise involved.
* Whether or not the contraventions were deliberate.
* Whether senior management was involved in the contraventions.
* Whether the party committing the contraventions had exhibited contrition.
* Whether the party committing the contraventions had taken corrective action.
* Whether the party committing the contraventions had cooperated with the enforcement authorities.
* The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements.
* The need for specific and general deterrence.

1. In this case, the dominant consideration, apart from general deterrence, is the nature and extent of the contravention and the circumstances in which it took place. This, in turn, relies heavily upon the nature of the duty imposed and the reasons why it was not complied with. The reason for the obligation to provide financial year budgets is fundamental. Budgets bring discipline and transparency to planning and resource allocation decisions. The duration of the contravention is troubling. That said, there is nothing in the nature of aggravation, and the lack of budgets does not appear to have impeded the Division from being well-run. Mr Mijatov was cooperative and also gave oral evidence, enabling his character to be subjectively assessed. There is no apparent need for specific deterrence. However, the need for general deterrence is real. Financial management obligations and contraventions must be taken seriously and be seen to be taken seriously. Taking all of the competing considerations into account, the contravention may nonetheless be seen to be at the lower end of the spectrum of seriousness for a contravention of this kind, especially having regard to Mr Mijatov’s subjective case. Taking into account Mr Mijatov’s admissions, candour and cooperation, each of which have significantly lowered the penalty that would otherwise be appropriate, and having regard to the other contravention discussed below, the penalty that should be imposed is $500, based upon a practical maximum of $2,200 (while it was that maximum for each of the two statutes contravened, that was an accident of legislative history that would otherwise have had a single maximum). The maximum penalties have since increased, such that the same conduct with the same mitigation would today result in a higher penalty.

## Back pay

1. The competing submissions (particularly those of Mr Mijatov), once distilled from the facts and contentions exhaustively set out above, suggest that this contravention comes down to a few surprisingly simple issues for resolution.
2. The first issue is whether the Commissioner has discharged the onus of showing, by sufficiently compelling evidence, the aggravating circumstance that not only did Mr Mijatov fail to take the necessary care in obtaining the back payment, but that that lack of care resulted in him obtaining a payment to which he was not entitled. This, in turn, depends on comfortably and safely reaching the conclusion that Mr Mijatov was not entitled to be paid the FAAA top-up for periods when he was on leave paid for by Qantas, other than by way of spreading his salary for the non-leave period of 46 weeks per year over 52 weeks. In my view, that conclusion can properly and safely be reached, because a plain reading of the policies reveal that in this particular respect, nothing changed at any material time to give Mr Mijatov any entitlement to be paid the FAAA top-up in respect of Qantas leave entitlements. Whether the FAAA top-up was paid for 46 weeks, calculated for 46 weeks but paid over 52 weeks, or simply paid over 52 weeks but calculated by reference to FAAA working time rather than Qantas leave time, Mr Mijatov was never entitled to be paid a FAAA top-up referable only to Qantas leave entitlements. Yet that is clearly the basis upon which he was paid an extra $16,012.55, including superannuation.
3. The Commissioner having discharged the onus in demonstrating a lack of entitlement to the back pay by way of a top-up on the Qantas leave entitlement, the second issue is then whether Mr Mijatov has pointed to anything to justify his conclusion to the contrary, so as either to cast doubt on the Commissioner’s case, or to otherwise mitigate what he did by reference to an innocent state of mind. The incidence of an evidentiary onus or burden may be seen to change according to the ebb and flow of litigation. That is especially so when a respondent not only runs a positive case, but gives sworn evidence that is tested in cross-examination. Once evidence has been adduced by a party to litigation that may be sufficient to discharge any legal onus or burden imposed upon that party, the opposing party may have an evidentiary onus or burden to overcome that position. If that evidentiary onus, once cast by the flow of evidence, is not met, the party upon whom that onus is thereby cast may suffer the consequence of an adverse finding on the point to which the evidence is addressed. That is what happened in this case.
4. The Commissioner discharged his legal and evidentiary onus in relation to not just the bare contravention that was admitted, but as to the aggravating feature that Mr Mijatov, by his dereliction of duty, obtained a payment to which he was not, in fact, entitled. Mr Mijatov endeavoured, by affidavit, tendered documents and sworn evidence, as well as by written submissions, to resist that conclusion being reached. He failed in that endeavour. However, he did achieve one important thing in his favour, and that was making clear that however misguided his view as to his entitlement was, it was genuinely held. The conduct was deliberate, but he genuinely believed that he was doing no more than obtaining what he was entitled to. It was, in that limited sense, an innocent contravention. That lessens the seriousness of the contravention, albeit that it is still more serious that Mr Mijatov contends.
5. The Divisional Council subsequently ratified the payment. While that was not a decision that was taken to the Division’s members, there is nothing to suggest that the Divisional Council was not entitled to take that step. However, no weight should be given to such an ex post facto determination of entitlement for two reasons. First, the ratification cannot be treated as creating an entitlement retrospectively, as opposed to approving the payment being made even if it was in excess of an entitlement. Second, Mr Mijatov was apparently present when the decision was made, with the fig leaf of abstaining from the vote. In those circumstances, the amount can be noted with some concern, but it cannot properly be treated as a loss for the purposes of imposition of penalty.
6. The Commissioner characterises this as a contravention at the higher end of seriousness. Mr Mijatov’s submissions are predicated upon the adverse finding not being made and, accordingly, only a minimal penalty being imposed.
7. Again, balancing all the competing considerations reproduced above at [44], a penalty of $1,500 is appropriate against a maximum of $2,200. Without the mitigation of a genuine belief as to entitlement, the admission as to the bare contravention and the absence of prior contraventions, it would have been open to categorise the contravention as being in the worst category and one that warranted no departure from the maximum penalty. General deterrence is of particular importance when it comes to union officials obtaining payments for themselves, especially when entitlement is not clear cut. Again, the maximum penalties have since increased, such that the same conduct, even with the same mitigation, would today result in a higher penalty.

## Totality

1. The budget contravention was less serious and took place over some six years and three months between 1 April 2006 and 30 June 2012. The back pay contravention was more serious, but took place in a confined period in April 2011. There was no direct relationship between the two contraventions. The penalties that are individually justified do not warrant any reduction by the application of totality principles.

## Conclusion

1. Mr Mijatov should be ordered to pay $500 in respect of the budget contravention and $1,500 in respect of the back pay contravention, being a total of $2,000. The payment should be required to be made to the Commonwealth within 60 days.

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| I certify that the preceding fifty-five (55) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromwich. |

Associate:

Dated: 22 June 2018