IN THE MAGISTRATES' COURT OF VICTORIA
AT MELBOURNE
INDUSTRIAL DIVISION

Case No. MAG-CI-230098150

SHEHAN JAYAWARDANA Plaintiff

and

TELSTRA LIMITED TRADING AS TELSTRA Defendant

MAGISTRATE:	K Fawcett
WHERE HELD:	Melbourne
DATE OF HEARING:	26 February 2025
DATE OF DECISION:	11 April 2025
CASE MAY BE CITED AS:	Jayawardana v Telstra Limited (Penalty)
MEDIUM NEUTRAL CITATION:	

INDUSTRIAL LAW – *Fair Work Act 2009* (Cth) ss 50, 546, 557 – pecuniary penalty orders – course of conduct – contravention of the same clause of successive enterprise agreements – deliberate conduct and awareness of risk – genuine and reasonable error of construction – contrition and corrective action.

APPEARANCES:

For the Plaintiff	Daniel Dwyer	Communications Electrical and Plumbing Union (**CEPU**)
For the Defendant	Counsel	Solicitors
	Dimitri Ternovski	Seyfarth Shaw Australia

BACKGROUND

1 In this proceeding, Mr Jayawardana claimed that Telstra[1] had incorrectly classified him at level CFW4 in his employment as a Fibre Technician on Telstra's optic fibre network. On 11 October 2024 I determined that Mr Jayawardana was entitled to be classified at level CFW5 under the applicable enterprise agreements (**Liability Decision**). Accordingly Telstra contravened the enterprise agreements applicable to Mr Jayawardana's employment and s 50 of the *Fair Work* Act *2009* (**the Act**). On 24 December 2024 I made orders by consent for the payment of compensation by Telstra of $98,187, reflecting an agreed sum in settlement of all monies due to Mr Jayawardana for the period 1 October 2019 to 11 October 2024.

2 Section 546(1) of the Act provides that an eligible State or Territory court may order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision. Section 50 of the Act is a civil remedy provision.[2] This decision concerns Mr Jayawardana's remaining claim for the imposition of pecuniary penalties.

3 In considering the matter, I have had regard to the written and oral submissions of each party and the additional evidence relied on by Telstra in the affidavit of Michael Cooper dated 17 February 2025, along with the evidence and findings in the Liability Decision. This decision assumes familiarity with the Liability Decision, and terms have the same meaning in both decisions.

ADDITIONAL EVIDENCE OF MR COOPER

4 The following evidence of Mr Cooper was uncontested and I accept it.

5 Telstra has approximately 20,670 current employees, most of whom are covered by the *Telstra Limited Enterprise Agreement 2024-2027* (**2024 Agreement**). Over the

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1 Mr Jayawardana was employed by Telstra Corporation Ltd until 8 December 2022, with his employment transfer to Telstra constituting a transfer of business under the *Fair Work Act 2009* (Cth) and all liabilities of Telstra Corporation Ltd transferred to Telstra Limited. Both entities are referred to as 'Telstra' in this decision.

2 Act, s 539.

last 20 years there has been over 70 collective agreements covering Telstra employees.

6 Telstra reviewed Mr Jayawardana's classification in around 2020 after he raised concerns. The review concluded that Mr Jayawardana was correctly classified as a CFW4. Mr Cooper then conducted his own secondary review and reached the same conclusion. He acknowledges this conclusion has been held to be incorrect but he genuinely considered Mr Jayawardana was correctly classified.

7 Telstra has undertaken remedial steps in respect of Mr Jayawardana, including reaching agreement on a compensation figure in respect of his claim, changing his classification in the payroll system to CFW5 on 1 January 2025, and paying Mr Jayawardana the difference between the CFW4 and CFW5 rates from the date of judgment to the date of reclassification.

8 Telstra has also expedited a review, which commenced in 2023, of the Core Job Descriptions (**CJDs**) upon which the classifications are based. It has provided draft revised CJDs to field employees and the CEPU for feedback. It has identified 32 CFW4 employees who may be reclassified, based on the draft updated CJDs, and has voluntarily commenced paying them higher duties allowances so their remuneration is in line with a CFW5. This will continue until either 31 July 2025 or when the updated CJDs come into effect, at which time Telstra will conduct a further assessment as to whether the employees are reclassified as CFW5.

9 Mr Cooper is only aware of two prior contraventions of civil penalty provisions of the Act or its predecessors by Telstra, being *CEPU v Telstra Corporation Ltd* (***CEPU v Telstra***)[3] and *CPSU v Telstra Corporation Ltd.*[4]

LEGAL PRINCIPLES FOR DETERMINING APPROPRIATE PENALTIES

10 There was no issue between the parties as to the general principles the Court should

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3 (2007) 168 IR 368; [2007] FCA 1607.
4 (2001) 108 IR 228; [2001] FCA 1364.

apply in determining appropriate penalties, and the established procedural approach for doing so.

11 The purpose of civil penalties is primarily, if not solely, the promotion of the public interest in compliance with the Act by both specific and general deterrence of further contraventions.[5] A civil penalty must be fixed with a view to ensuring that it is not regarded by the contravenor or others as an acceptable cost of doing business.[6] For the purpose of general deterrence, it is important to send a message that the relevant contraventions are serious and not acceptable.[7] An 'appropriate' civil penalty will not exceed what is reasonably necessary to achieve the deterrence of future contraventions of a like kind by the contravenor and others,[8] and will strike a reasonable balance between oppressive severity and the need for deterrence.[9] Both the circumstances of the contravenor as well as the conduct involved in the contravention may be considered, as both may bear on the need for deterrence.[10]

12 The maximum penalty is one factor in determining an appropriate penalty, in that there must be some reasonable relationship between the theoretical maximum and the penalty imposed.[11] However, the maximum penalty is not to be applied 'mechanically'.[12]

13 Other factors which may be relevant to determining an appropriate penalty in respect of the Act include: the nature and extent of the contravening conduct; the amount of loss or damage caused; the circumstances in which the conduct took place; the size of the contravening company and its market power; the deliberateness of the

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5 *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450; [2022] HCA 13 (***Pattinson***), [9].

6 Ibid, [17]; *Australian Competition and Consumer Commission v TPG internet Pty Ltd* 20130 250 CLR 640, 659 [66]*; Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249, 265 [62].

7 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68; (2017) 271 IR 321; [2017] FCAFC 113, [98].

8 *Pattinson,* [9].

9 Ibid, [46]-[47].

10 Ibid, [55].

11 Ibid, [53], quoting *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25; [2016] FCAFC 181 (***Reckitt Benckiser***), 63 [155]-[156].

12 Ibid.

contravention and the period over which it extended; whether the contravention arose out of the conduct of senior management or a lower level; whether the contravener has a corporate culture conducive to compliance or had taken corrective action; and whether the contravenor has cooperated with authorities responsible for enforcement of the Act in relation to the contravention.[13] They may also include: whether there has been any similar previous conduct by the contravenor; whether the contravenor had exhibited contrition; and the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement.[14] These factors are non-exhaustive and should not be applied as a checklist.[15] Deterrence remains the primary consideration,[16] with these other factors to be 'seen through the prism of what is necessary to achieve deterrence.'[17]

14 Further, principles of totality, parity and course of conduct from criminal sentencing may assist in the assessment of what is considered reasonably necessary to achieve deterrence.[18] Ultimately, as with criminal sentencing, determination of a civil penalty is an evaluative exercise, taking account the relevant factors through a process of 'instinctive synthesis.'[19]

15 Below I have considered appropriate penalties in accordance with the established procedural approach as set out in *Fair Work Ombudsman v NSH North Pty Ltd* (**NSH**) as follows:[20]

> (1) Identify the separate contraventions, with each breach of each obligation being a separate contravention, and each breach of a term of the [Agreement] being a separate contravention.
> (2) Consider whether each separate contravention should be dealt with independently or with some degree of aggregation for those contraventions arising out of a course of conduct, noting that s 557 of the FW Act provides that two or more contraventions of a given civil remedy provision are to be

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13 Ibid, [18]; quoting *Re Trade Practices Commission v CSR Limited* [1990] FCA 521; (1991) ATPR 41-076; [42].
14 *Kelly v Fitzpatrick* (2007) 166 IR 14; [2007] FCA 1080, [14].
15 *Pattinson,* [19].
16 Ibid, [18].
17 *Fair Work Ombudsman v Sushi Bay Pty Ltd (in liq) (No 3)* [2024] FCA 869 (***Sushi Bay***), [15].
18 *Pattinson,* [45].
19 *Sushi Bay*, [18], citing *Reckitt Benckiser*, [44] and *Flight Centre Ltd v Australian Competition and consumer Commission (No 2)* (2018) 260 FCR 68; [2018] FCAFC 53 (***Flight Centre***), [55].
20 (2017) 275 IR 148; [2017] FCA 1301, [36].

> taken to be a single contravention if committed by the same person and arising out of a course of conduct by that person.
>
> (3) Consider whether there should be further adjustment to ensure that, to the extent of any overlap between groups of separate aggregated contraventions, there is no double penalty imposed, and that the penalty is an appropriate response to what [the] respondent did.
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> (4) Consider the appropriate penalty in respect of each final individual group of contraventions, taken in isolation.
>
> (5) Consider the overall penalties arrived at … and apply the totality principle, to ensure that the penalties … are appropriate and proportionate to the conduct viewed as a whole, making such adjustments as are necessary **[citations omitted].**

16 Whilst the parties agreed on the generally applicable principles, the critical difference between them related to whether Telstra's contraventions should be characterised as deliberate, or a genuine and reasonable error of construction. The parties referred to alternate authorities on this issue. I have dealt with this in detail below in the course of considering the steps in *NSH.*

Step 1 – identifying separate contraventions

17 The parties were in dispute as to the relevant contraventions.

18 Mr Jayawardana's Statement of Claim alleged contraventions of the following agreements, in each of which the classification provisions were relevantly identical:

a. Telstra Enterprise Agreement 2015-2018 (**2015 Agreement**), which applied from 12 November 2015 until 18 June 2020;

b. Telstra Enterprise Agreement 2019-2021 (**2019 Agreement**), which applied from 19 June 2020 until 12 July 2022; and

c. Telstra Limited Enterprise Agreement 2022-2024 (**2022 Agreement**), which applied from 13 July 2022 until 1 October 2024.

19 Mr Jayawardana contended that there should also be findings of contravention in respect of the 2024 Agreement, which commenced operation on 1 October 2024. Telstra contended that the 2024 Agreement was not the subject of Mr Jayawardana's claim and was not part of the evidence in the proceeding.

20 Mr Jayawardana further contended that for each Agreement, there should be five

findings of contraventions of s 50 of the Act, being:

a. Clause C1.1 and C1.2 of Appendix C, relating to the obligation to correctly classify staff;

b. Clause B2 of Appendix B, relating to the obligation to pay the correct salary;

c. Clause 19.2, relating to payment of overtime at time and a half;

d. Clause 19.2, relating to payment of overtime at double time; and

e. Clause 9, relating to superannuation.

21 Telstra contended that Mr Jayawardana is confined to declarations and penalties in respect of contraventions of cl C1 of the 2015 Agreement, 2019 Agreement and 2022 Agreement, because Mr Jayawardana did not plead contravention of the other provisions and cannot now add them. Telstra relies on the principles articulated in *Australian Building and Construction Commissioner v Hall*[21] that pleadings must state with sufficient clarity the case to be met, to ensure procedural fairness to the other party, and that a party is not entitled to depart from their pleaded case unless both parties have deliberately chosen to conduct the dispute on a different basis, particularly where the serious consequence of imposition of civil penalties is sought.[22] Mr Jayawardana contended that because the issues of wages, overtime and superannuation were raised in his Statement of Claim, Telstra was on notice that these contraventions were alleged and he should therefore be permitted to obtain declarations and penalties in respect of them. Further he contended that the penalty proceeding is a new proceeding.

22 Mr Jayawardana's Complaint was made by way of the Form 13A template provided for under the Court rules,[23] and he selected the relevant breach to be 'failure to pay

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21 (2018) 261 FCR 347; [2018] FCAFC 83.

22 Ibid, [49-[50], quoting *Banque Commerciale S.A., En Liquidation v Akhil Holdings Limited* (1990) 169 CLR 279, 286-7, Mason CJ and Gaudron J. Telstra also relied on *Chin v Visual Thing Australia Pty Ltd* [2024] FedCFamC2G 896, [123].

23 *Magistrates' Court (Miscellaneous Civil Proceedings) Rules 2020,* r 13.02.

wages.' Where Form 13A requires a description of each alleged breach, Mr Jayawardana referred to his attached statement, being his Statement of Claim. The Statement of Claim does not allege breaches of cl 9, cl 19.2 or cl B2 of Appendix B. Nor was contravention of those provisions alleged to be a contravention of s 50 of the Act. The only relevant relief sought is as follows:

> 29 The Plaintiff seeks:
> …
> (c) A finding that between 1 October 2019 and 1 November 2022 the Defendant, by not assessing the correct classification of the work of the Plaintiff, has contravened section 50 of the Fair Work Act 2009 by failing to comply with:
> - Clause C1.1 and Clause C1.2 of the *2015 Agreement*, and
> - Clause C1.1 and Clause C1.2 of the *2019 Agreement*, and
> - Clause C1.1 and Clause C1.2 of the *2022 Agreement*.

23 Mr Jayawardana also sought 'an order pursuant to s 546(1) of the FW Act that the Defendant pay pecuniary penalties in respect of the contraventions.' Given no other contraventions were pleaded, this reference to 'contraventions' can only be to the contraventions identified in paragraph 29(c).

24 The relief sought also included orders pursuant to s 545 of the FW Act for compensation and 'adjusted appropriate allowances including overtime and superannuation contributions.' However, these matters were not the subject of contravention allegations. Further, no alleged contravention of the 2024 Agreement was pleaded. I conclude that it is not open for Mr Jayawardana to now obtain declarations of contravention or pecuniary penalties in respect of these additional contraventions or the 2024 Agreement.

25 There was a further issue between the parties as to whether Telstra contravened cl C1 or more specifically cl C1.2(a). I conclude that within cl C.1, it is only cl C1.2(a), which provides '[w]ork in each Workstream will be evaluated in accordance with the Company's Job Evaluation and Classification System and these principles', which has been contravened by Telstra. There was no issue as to the appropriateness of declaratory relief, and I will make the relevant declaration to this effect.

Steps 2 and 3 – course of conduct considerations

26 Section 557 of the Act provides:

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

27 Section 557 does not permit contraventions of multiple clauses within a single agreement to be taken as a single contravention.[24] It has also been considered inapplicable in respect of contraventions of identical clauses across multiple agreements (albeit with application to different employees).[25] However, Telstra contended that if the fact of contravention of three successive Agreements prevents the contraventions being treated as a single contravention pursuant to s 557, they nonetheless ought to be so treated pursuant to common law principles.

28 The common law course of conduct principle 'recognises that where there are multiple contraventions arising out of a single course of conduct, there is a danger of a contravenor being punished more than once for essentially the same offending conduct.'[26] Telstra contended that here, the contraventions of the 2015 Agreement, 2019 Agreement and 2022 Agreement wholly overlap as the same conduct constitutes a contravention of the same classification provision of each of them. Mr Jayawardana did not contest this analysis, and I accept it. Telstra maintained Mr Jayawardana's incorrect classification under the 2015 Agreement, 2019 Agreement and 2022 Agreement. The commencement of each new Agreement did no more than provide for the continuous operation of relevantly identical classification provisions. The net effect is no different than if only one Agreement had applied. Accordingly I

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24 *Rocky Holdings Pty Ltd v Fair Work Ombudsman* [2014] 221 FCR 153; [2014] FCAFC 62 (***Rocky Holdings***), [10]-[27].

25 *QR Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2010) 204 IR 142; [2010] FCAFC 150, [48], cited in *Rocky Holdings*, [21].

26 *Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union* [2019] FCAFC 69, [181], Rangiah J.

regard the three contraventions as a single course of conduct. Whilst application of the common law course of conduct principle does not confine the Court to imposing a single penalty,[27] to avoid imposing more than one punishment I consider that to be the appropriate approach. As this approach conforms with s 557, it has not been necessary to decide whether s 557 has direct application.

Step 4 – determining appropriate penalties

29 The evidence and submissions raise the following matters for consideration in determining an appropriate penalty, each of which I have considered in the context that they inform what penalty is reasonably necessary to achieve both specific and general deterrence of further contraventions.

Maximum penalty

30 The parties agreed, and I accept, that the relevant maximum penalty for a single contravention (ascertained by averaging the applicable maximum penalties over the relevant period) is $76,500.

Deliberate contraventions or a genuine and reasonable error of construction?

31 Telstra contended that its contravening conduct was a bona fide and reasonable mistake, as Telstra genuinely believed Mr Jayawardana was appropriately classified at CFW4. Telstra argued that the assessment of Mr Jayawardana's classification was complex, about which reasonable minds could differ. It turned on the construction of the CJDs which have not been updated since 2002 and their application to Mr Jayawardana's work after numerous changes to Telstra's network. Whilst Telstra was in error in applying the CFW4 classification, Mr Jayawardana's primary contention, that his correct classification was CFW7, was also incorrect. Further, CFW4 and CFW5 describe very similar roles. The specific examples in the CJDs differentiating each role were mostly obsolete and not directly applicable to Mr Jayawardana's work. Key differences thus related to abstract questions of complexity which are difficult to

27 Ibid.

assess. To the extent that the Court found useful distinctions, these were subject to disputed questions of construction and Telstra's construction, whilst rejected in part by the Court, was nonetheless reasonable. For this reason, Telstra contended that no penalty should be imposed.

32 Mr Jayawardana acknowledged that the matter of his classification was not straightforward. However he contended that Telstra, nonetheless, was aware of the risk associated with its misclassification of Mr Jayawardana, meaning that Telstra's conduct was deliberate, and a penalty at the higher level would be appropriate.

33 Both Telstra and Mr Jayawardana referred the Court to authorities which each contended supported their position.

34 Telstra relied on *AEU v Yooralla Society of Victoria* (***Yooralla***).[28] In *Yooralla*, the applicable award and classification were in dispute.[29] At first instance, the union's claim had been dismissed.[30] On appeal the union's claim had been allowed in part and the Court had stated the matter was 'finely balanced,' there was a lack of clarity as to how the two awards were to be read together and the question of the relevant classification was 'somewhat complex.'[31] The Court dismissed a penalty appeal and observed:

> In other circumstances where there has been a *bona fide* defence of a penalty proceeding, and where, for instance, questions of construction of Awards have arisen that were not of easy resolution, courts have held that the imposition of a penalty is not always required because in those circumstances there was no need for specific or general deterrence: [citations omitted]. This case is not in that category, because the primary judge considered that some penalty should be imposed. However, those authorities illustrate that the circumstances in which a dispute might arise, and whether there was a *bona fide* basis for the contravener to defend its position, may bear upon the extent to which there is a need for either general or specific deterrence.[32]

35 Telstra also relied on *CEPU v Telstra*, in which Telstra had failed to maintain the salary of an employee redeployed then made redundant from a lower paying position.

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28 [2021] FCA 954.
29 Ibid, [3].
30 Ibid, [2].
31 Ibid, [4], in reference to *Australian Education Union v Yooralla* [2019] FCA 1511, [45], [51].
32 Ibid, [23].

Telstra's obligations depended upon the proper construction of the interaction between two enterprise agreements.[33] The Court determined not to impose a penalty, stating:

> …[T]he breaches arose out of a disputed and disputable construction of [the two agreements]. Neither breach was flagrant, wilful or deliberate. … Where the unlawful conduct arises out of an arguable but erroneous construction of a relevant term, and the subsequent breach cannot be characterised as demonstrating a flagrant or wilful disregard for the agreement, [the] legislative purpose [of deterrence] is not furthered by imposition of a penalty. In these circumstances, neither general nor specific deterrence is a significant factor weighing in favour of imposing a penalty. Moreover, Mr McDonald has been fully compensated for the loss suffered as a result of the breach. I do not consider that the circumstances in which the conduct took place warrant the Court exercising its discretion to impose a penalty on Telstra.[34]

36 Telstra also relied on *Australian Rail, Tram and Bus Industry Union v Qube Logistics (Rail) Pty Ltd*.[35] In that matter, the employer underpaid 31 employees for a period of two years, due to a genuinely held but erroneous view that it was not required to increase salaries because it had commenced re-negotiation for a replacement agreement, as opposed to having concluded that negotiation.[36] The Court stated:

> But no order should be made for the imposition of any penalty. The Union has advanced no submission nor adduced any evidence to suggest that Qube Rail pursued the course which it did without a genuine and *bona fide* belief that it was entitled to do so. In those cases, such as the present, where no question arises as to the need for general deterrence, let alone specific deterrence, an imposition of a penalty is not always required: cf. *PIA Mortgage Services Pty Ltd v King* [citation omitted]. The contraventions that did occur in the present case, as their Honours observed in that case, were "not deliberate, but result[ed] from an arguable but erroneous misconstruction of an industrial instrument …".[37]

37 Mr Jayawardana relied on *Danaratna v Arunatilaka (Penalty)* (***Danaratna***).[38] In that matter, the contravening conduct was held to be extremely serious.[39] The Court concluded that the contravener's conduct was deliberate,[40] having earlier stated:

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33 *CEPU v Telstra*, [2].

34 Ibid, [18].

35 (2020 300 IR 198); [2020] FCA 1520.

36 Ibid, [1], [3]-[4].

37 Ibid, [50]. In *PIA Mortgage Services Pty Ltd v King* (2020) 274 FCR 225; 292 IR 317, [55] the Court (Rangiah and Charlesworth JJ) held that because the relevant contraventions of s 340(1) of the Act were 'deliberate' and had serious consequences, the object of deterrence required the imposition of a penalty, notwithstanding that there was a construction argument raised in respect of s 340(1).

38 [2024] FCA 1431.

39 Ibid, [20]-[25]. Despite being entitled to over $374,000 in unpaid wages and entitlements, the Applicant only received $11,212.70 which equated to being paid less than $0.90 an hour. This was associated with a serious deprivation of the Applicant's liberty by the contravener.

40 Ibid, [31].

> … The concept of deliberateness within the civil penalty context is spectral: Conduct may be deliberate if done consciously, in the sense of being aware of each of the essential facts constituting the elements of the contravention without understanding them to be unlawful, or while apparently believing them to be lawful or otherwise due to an innocent mistake … [citing *Flight Centre*, [61]–[65]]. As observed by the Full Court in *Flight Centre*, the precise basis of purported "innocence" may give rise to the need for consideration when determining deterrence.
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> Consideration must be given to whether the contravention involves a relevant state of mind including, a deliberate flouting of the law, recklessness, wilful blindness, "courting the risk", negligence or innocence: *Reckitt Benckiser* at [131]. Furthermore, where there is any degree of awareness (noting the spectrum) of the actual or potential unlawfulness, the contravention is necessarily more serious. It is worthwhile extracting the Full Court's holding in full ….[41]

38 The two authorities referred to in the passage above from *Danaratna* concerned contraventions of trade practices/consumer law. The passage extracted in *Danaratna* from *Reckitt Benckiser* is as follows:

> If a contravention does not involve any state of mind then it is for the party asserting any particular state of mind (be it a deliberate flouting of the law, recklessness, wilful blindness, "courting the risk", negligence, or innocence or any other characterisation of state of mind) to prove its assertion. If, in the event, neither party discharges its onus to establish any particular state of mind in relation to the contraventions, the Court determines penalty on no more than the fact of the proscribed nature of the conduct … However, if any degree of awareness of the actual or potential unlawfulness of the conduct is proved then, all other things being equal, the contravention is necessarily more serious. Such awareness may be able to be inferred from the very nature of the conduct or representations constituting the conduct. However absence of such proof does not establish a mitigatory state of mind … It means only that the neutral state of mind required for liability has not been disturbed for the purposes of penalty. If a contravening party wishes to go beyond the neutral statutory state of mind for liability and positively assert a lack of consciousness of the character of the conduct for the purposes of penalty, that is a circumstance of mitigation which the contravening party must prove.[42]

39 *Flight Centre* concerned 'price fixing'[43] contraventions and involved a conclusion that Flight Centre as agent for various airlines was part of the same market as those airlines.[44] Flight Centre characterised this as 'novel'[45] and the Court accepted that 'an intuitive or analytical view might have been taken that agents and principals do not compete with one another'[46] which may give the conduct an 'innocent hue.'[47] Flight Centre relied on *CEPU v Telstra* with its primary submission being that no penalty

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41 Ibid, [14-[15].
42 *Reckitt Benckiser*, [131] (citations omitted).
43 *Flight Centre,* [62].
44 Ibid*,* [13].
45 *Ibid*, [31].
46 Ibid, [61].
47 Ibid.

should be imposed. [48] The Court accepted that the relevant decision-maker believed in the lawfulness of the conduct and there was therefore no deliberate contravention. However, the Court said that the 'innocence' should not be overstated because the basis for it was unexplained, and given that the conduct concerned was purposely seeking to deny consumers a price benefit for the benefit of Flight Centre, it did not obviate the need for deterrence.[49] The Court held that both could be taken into account, stating:

> Once the above is appreciated, the approach of Flight Centre to no, or a very light, penalty should be rejected. The circumstances are quite unlike those faced by Kiefel J in the Meat Holdings case and by Gordon J in the Telstra case. In the former case, there was a reasonable construction of a clause in an award that led to underpayment of wages of $431.97. This led Kiefel J not to impose a penalty. It is a decision (and an entirely explicable and apparently just one) on its own facts. It is misconceived to extrapolate from it, as Flight Centre does in its submissions, a proposition that if one reasonably misunderstands one's liability position in circumstances that give rise to a civil penalty, one should be relieved of the penalty or one should receive a light penalty. No principle arises out of the case; to seek to draw legal principle from a factual evaluative conclusion of this kind is misconceived. The decision of Gordon J in Telstra … should be viewed no differently.[50]

40 Mr Jayawardana contended that the authorities relied on by Telstra were old cases which did not reflect appropriately the modifications to the Act and the increased focus on the seriousness of contraventions. Telstra contended that *Danaratna* must be viewed in the context of the very serious nature of the contravening conduct in that matter. Telstra contended that its authorities were more specific to the industrial relations context than those referred to in *Danaratna*. Further, *CEPU v Telstra* is on all fours with this case, where there is a difficult and disputed construction of the provision and the determination of the matter turned to a large extent on an evaluative characterisation of the work performed and its complexity.

41 I accept, based on the authorities relied upon by Telstra, that where difficult or disputable construction issues arise in respect of the provision which has been contravened, and the contravenor had a genuine and reasonable belief that it was entitled to pursue the course it did, then there may be no need for the imposition of a

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48 Ibid, [34].
49 Ibid, [62].
50 Ibid, [63].

penalty as there may be no need for specific or general deterrence. However, I consider that I must also have regard to *Reckitt Benckiser* and *Flight Centre.* Whilst they arise in a different regulatory context, they have been cited with approval in an industrial context in *Danaratna*. Critically, these authorities identify that innocence is 'spectral'[51] and requires close analysis, and that conduct may nonetheless require deterrence even in the context of a genuine and reasonable misconstruction of the legal obligation concerned. Further, the decision in *CEPU v Telstra* was considered and characterised in *Flight Centre* as a 'factual evaluative conclusion'[52] from which no general legal principle arises.

42 Mr Jayawardana contended that Telstra was 'courting the risk' within the meaning of that term in *Reckitt Benckiser* and *Danaratna* because Telstra stopped allocating Mr Jayawardana Wideband Work in May 2023, after he had questioned his supervisor as to his entitlement to be classified at CFW5 or CFW7. In the Liability Decision I made no finding as to Telstra's reason for doing so. The evidence as to this matter is summarised at [64] of the Liability Decision, as follows:

> It was agreed that Mr Jayawardana has not performed Wideband Work since May 2023. Mr Jayawardana said that from mid-2021 he was part of the initial MFT group doing all the Wideband Work. He helped upskill newer staff. In May 2023, after he questioned his supervisor Mark Mays whether the upskilling work should be classified at level 5 or level 7, Mr Mays took Mr Jayawardana off Wideband Work. He did not refuse to do the work; the work was not provided to him. Mr De Blasio said that Wideband Work ceased being allocated to technicians who did not perform data base entry, however none of the Telstra witnesses had direct knowledge of why Mr Jayawardana was taken off Wideband Work.

43 Mr Jayawardana contended in effect that Telstra deliberately withdrew Wideband Work from Mr Jayawardana so as to reduce the risk of a higher classification applying to him. Whilst Telstra's reason was unexplained, on balance I do not consider the evidence sufficient to draw this inference.

44 Mr Jayawardana also argued Telstra was 'courting the risk' because of the earlier reclassification of employees by Telstra from CFW4 to CFW5, and the fact that Mr Jayawardana had raised the issue of his classification with Telstra. In the Liability

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51 *Danaratna*, [14].
52 *Flight Centre*, [63].

Decision, I held that in 2012, Mr De Blasio was performing the same work as Mr Jayawardana when he and around 14 staff in the Fibre Maintenance Group (**FMG**) were reclassified by Telstra from CFW4 to CFW5.[53] Also relevant, and to similar effect, I held that Telstra classified all but two employees who performed the same work as Mr Jayawardana in the FMG at CFW5,[54] that there was no distinguishing features and no greater complexity or degree of specialisation between the work performed by other employees in the FMG and Mr Jayawardana, and that the most complex work within that team was performed by CFW5 employees.[55] Telstra led no evidence, either during the liability hearing or in respect of penalties, as to why Mr Jayawardana was differently classified than these CFW5 employees performing the same work. In the Liability Decision, in the absence of evidence from Telstra as to alternative reasons for those employees, including Mr De Blasio, to be classified at CFW5 not CFW4, I held that they had been so classified because of their duties and functions.[56]

45 I consider the classification of these other employees gave rise to an obvious line of inquiry relevant to whether Mr Jayawardana was correctly classified as CFW4. The classification of these employees is not of itself determinative of Mr Jayawardana's classification.[57] However, if the CFW5 employees were so classified because of their duties and functions, and Mr Jayawardana performed the same work, then there is nonetheless an apparent risk that Mr Jayawardana has been incorrectly classified. I have accepted that Telstra followed a process to address the question of Mr Jayawardana's classification when he raised it internally, and that Mr Cooper genuinely but wrongly believed Mr Jayawardana was correctly classified at CFW4. However, the evidence does not address the process of the review or what considerations were undertaken in that assessment. In particular, it is unknown whether Mr Cooper considered this obvious line of inquiry.

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53 Liability Decision, [104].
54 Ibid, [103].
55 Ibid, [111].
56 Ibid, [109].
57 See Liability Decision, [107]-[111].

46 Telstra contended that if it were required to have had regard to the risk of misclassification, it would have had to reclassify Mr Jayawardana at CFW7. This submission wrongly equates considerations relevant to CFW5 and CFW7 and I was not persuaded by it. The CFW7 CJD describes complex functions and expertise and there was no evidence of its application to work of a similar nature to Mr Jayawardana's work.[58] In contrast, the CFW5 CJD describes a 'very similar'[59] role to CFW4 and there was evidence of employees doing comparable work to Mr Jayawardana being classified at CFW5.

47 In light of the 'spectral'[60] nature of deliberateness, given Telstra was on notice of the risk insofar as it had classified other employees doing the same work as Mr Jayawardana at CFW5, I conclude that Telstra's state of mind was something more than 'innocence' in the sense described in *Danaratna*, *Reckitt Benckiser* and *Flight Centre.* Whilst Mr Cooper may have genuinely believed Mr Jayawardana's classification was CFW4, the absence of evidence that Mr Cooper considered this obvious risk in making his assessment undermines the reasonableness of his belief. Because of this, I do not consider it appropriate that no penalty be awarded, as any degree of awareness of the potential unlawfulness of the conduct means that the contravention is necessarily more serious. I consider that there is a need to impose a penalty accordingly, for the purpose of both specific and general deterrence.

48 However, I consider that the significance of Telstra's awareness of the risk is very greatly reduced by the objective difficulty in applying the classification provisions.

49 In that respect, the Liability Decision states:

> 244 It is evident from this decision that the exercise of determining Mr Jayawardana's correct classification in the context of changed technology has been far from straightforward. It has required extensive analysis of both historic and current functions. It has required careful consideration of a range of opposing and sometimes contradictory submissions in order to determine, firstly, what the CJDs meant at the time they were written, and, secondly, to arrive at a technology-appropriate and internally consistent approach to

58 Ibid, [185]-[188].
59 Ibid, [198]-[199].
60 *Danaratna,* [31].

> interpreting the CJDs some 22 years later. It must be observed that complexity of this nature is hardly beneficial for either Telstra or the employees to which the CJDs apply. For completeness I note that the 2022 Agreement contains both a tripartite process for designing new CJDs and robust dispute resolution procedures. Each of these processes would potentially facilitate not only the resolution of classification disputes but the development of new, agreed approaches which could address this undesirable complexity to the benefit of both parties in future agreements.

50 Enterprise agreements are the product of negotiation and agreement between the employer, employees and (sometimes, as in this case) their representatives. They are often not drafted with precision. The industrial context sometimes makes interpretation of enterprise agreements more complex. It is not uncommon that differences in construction of enterprise agreements arise between parties. A contravenor cannot simply rely on a reasonable alternative construction to be relieved of a penalty.[61] However, I conclude that the difficulty in deriving meaning from the CFW4 and CFW5 CJDs and applying them to Mr Jayawardana's role, as evidenced by the Liability Decision, is so substantial that this is a rare matter whereby the construction difficulties were the primary cause of the misclassification. Thus, despite Telstra's awareness of the risk, I conclude that the extent of the penalty required to deter future like conduct by Telstra or others is greatly reduced.

The nature and extent of the contravening conduct, the circumstances in which it took place and the loss and damage caused

51 Mr Jayawardana contended, and Telstra accepted, that the loss suffered by Mr Jayawardana, reflected in the sum agreed between the parties, was significant. Mr Jayawardana further submitted that the amount of compensation payable to him, being over $98,000, is more than the maximum penalty, which should be borne in mind when undertaking instinctive synthesis. In addition, the dispute was inherently stressful for Mr Jayawardana. Mr Jayawardana further submitted that the contravening conduct took place over at least 5 years, which was not contested and is a relevant consideration. Whilst Telstra contended that the contravention related solely to classification, with the resultant impact on Mr Jayawardana being consequential only, I consider this to be a distinction without a difference. The

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61 *Flight Centre,* [63].

underpayment was a consequence which naturally flowed from the misclassification.

52 Regarding the extent of the conduct, Mr Jayawardana accepted that there was no evidence that the contravening conduct is more widespread. Telstra's evidence that it has voluntarily identified 32 employees who would likely be classified as CFW5 should the new CJDs be implemented does not permit me to take the matter further, as the new proposed CJDs were not in evidence, nor was there any evidence as to how they compared to the current CJDs. Further again, the findings in the Liability Decision were highly factually contingent on Mr Jayawardana's work.

53 I conclude that in light of these matters that the contravention had significant consequences for Mr Jayawardana. However, on the evidence before me, the extent of the contravening conduct is limited to Mr Jayawardana. I have had regard to both of these matters in considering an appropriate penalty.

54 Mr Jayawardana also contended that his career prospects had been reduced due to his classification at the lower level. Telstra contended that there was no evidence that this was the case. I accept Telstra's submission. There was no evidence that had Mr Jayawardana not been misclassified over the relevant period, he would have been promoted to some other role.

Contrition/corrective action

55 Mr Jayawardana contended that Telstra exhibited no contrition and defended the proceedings all the way. Telstra contended that this approach should be rejected, given its genuine and reasonable mistake. I do not consider Telstra's defence of the claim warrants any penalty considerations.

56 I consider that Telstra has demonstrated contrition in acknowledging its error, and taking a number of remedial steps, including: reaching agreement with Mr Jayawardana on a compensation figure; reclassifying Mr Jayawardana at CFW5; acknowledging observations in the Liability Decision as to the desirability of agreeing upon new, updated CJDs, and expediting this process, noting that it is also contingent

on the agreement of the CEPU; and voluntarily identifying 32 employees who may be reclassified as CFW5 and paying them a higher duties allowance.

57 Mr Jayawardana contended that Telstra had not considered employees who may be entitled to back payment based on the current CJDs and that Telstra's actions in respect of the 32 employees is therefore not appropriately corrective or contrite. Further, Mr Jayawardana contended that the arrangement put in place for payment of higher duties is temporary only and may cease on 31 July 2025. The difficulty with this contention is, again, that the only evidence before the Court as to the contravention of the classification provision is in respect of Mr Jayawardana. Telstra acknowledged in submissions that there are other CFW4 employees in respect of whom a process is underway and that the group identified by Telstra covers employees who perform similar work to Mr Jayawardana. However, notwithstanding this, the identification of these 32 employees by Telstra does not establish that they are entitled to backpay. Further, the temporary measure appears reasonable in circumstances where the development of new CJDs requires the agreement of the CEPU and the final form of the proposed updated CJDs may change.

58 Accordingly, I consider Telstra has exhibited appropriate contrition and has taken appropriate corrective action. This reduces the need for specific deterrence.

Any similar previous conduct by contravenor

59 Telstra, based on Mr Cooper's evidence, identified only two prior occasions where Telstra had been found to have contravened the Act or its predecessor legislation. The most recent such matter was *CEPU v Telstra* in 2007, referred to above, in which no penalty was imposed. The other matter, *CPSU v Telstra Corporation Ltd*, was determined in 2001.

60 Telstra contended that accordingly, its compliance history is good. Mr Jayawardana did not contend otherwise. In light of the size of Telstra's workforce and the number of industrial instruments which have applied to it over the relevant period, these

previous contraventions do not lead me to conclude that there is any greater need for deterrence, either general or specific, than results from the other factors I have considered.

Size of the business

61 Mr Jayawardana submitted that Telstra has over 30,000 staff and is one of the largest corporations in Australia, with substantial assets, profits and employees. It has a large and experienced human resources group. Its net profit after tax in FY24, reported in its Annual Report, was $2.3 billion. These matters were not the subject of evidence and I have accepted Mr Cooper's evidence that Telstra has approximately 20,670 current employees. The other matters raised in submissions were not confirmed or contested by Telstra. Telstra accepted however that its size could be a significant factor if there was a need to ensure that penalties are not simply an acceptable cost of doing business. However, Telstra contended that this is not a relevant consideration in circumstances where the contravention arose from a genuine and reasonable position as to Mr Jayawardana's classification, and in light of the steps being taken by Telstra to remedy the error and prevent similar errors occurring in the future.

62 I consider that I must have regard to Telstra's size in order to address the specific deterrence objective in light of Telstra's awareness of the risk it was misclassifying Mr Jayawardana, and to achieve general deterrence for the same reason. But this does not change my assessment of the limited extent to which a penalty is required, in light of the construction difficulties with the relevant provisions.

QUANTUM OF PENALTY AND WHO IT IS PAYABLE TO?

63 Taking all those matters into consideration, I have determined that the imposition of a penalty of $7,650, being 10 per cent of the maximum penalty, is appropriate, and is reasonably necessary to meet the objectives of specific and general deterrence.

64 The CEPU, which represented Mr Jayawardana in the proceeding, contended that the penalty should be payable to the CEPU. The CEPU contended that this is

permissible pursuant to s 546(3), that the CEPU is entitled to represent Mr Jayawardana's interests and could have been the named Plaintiff in the proceedings.

65 Telstra contended that penalties should be made payable to Mr Jayawardana and it is open to him to pass those monies on to the CEPU, however, there is no evidentiary foundation for ordering that penalties be paid to the CEPU.

66 Pursuant to s 546(3), the Court may order that the penalty, or part of the penalty, be paid to the Commonwealth, a particular organisation or a particular person. The power in s 546(3) 'is ordinarily to be exercised by awarding any penalty to the successful applicant.'[62]

67 Accordingly, in the ordinary course, the penalty would be payable to Mr Jayawardana. I accept the Court may depart from that principle depending on the particular circumstances. I do not consider that there would be anything inherently inappropriate in ordering that penalties be payable to the CEPU in this matter, in light of the role the CEPU has played in the proceeding. However, Mr Jayawardana's request that this occur was made only by way of the CEPU's submission. In the absence of evidence directly from Mr Jayawardana communicating that he seeks an order that the penalty be payable to the CEPU and the basis for it, I decline to make that order. I will order that the penalty be paid to Mr Jayawardana. He may give effect to any administrative arrangement with the CEPU privately.

ORDERS

68 I order as follows.

1. The Court declares that the Defendant contravened s 50 of the *Fair Work Act 2009* (Cth) (the Act) by classifying the Plaintiff at level CFW4 not level CFW5 in contravention of clause 1.2(a) of Appendix C of each of:
    a. the Telstra Enterprise Agreement 2015-2018;
    b. the Telstra Enterprise Agreement 2019-2021; and
    c. the Telstra Limited Enterprise Agreement 2022-2024.

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62 *Sayed v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4, [101], [107].

2. The Court orders:
    a. pursuant to s 546(1) of the Act, that the Defendant pay a pecuniary penalty of $7,650 in respect of the contravention referred to in Order 1.
    b. pursuant to s 546(3) of the Act, that the Defendant pay the pecuniary penalty to the Plaintiff.