

Employer Update

Accounting firm penalised under accessorial liability laws for underpayment of its client's employees.

Accessorial liability laws have been used for the first time by the Fair Work Ombudsman (FWO) to obtain penalties against an accounting firm for knowingly helping one of its clients exploit a worker.

The accounting firm was penalised \$53,880 after the Federal Circuit Court of Australia held that the firm was accessorially liable for underpayment of its client's employees.

Background

The Fair Work Ombudsman (FWO) commenced underpayment proceedings against the employer and the accounting firm it had engaged to provide payroll and bookkeeping services. The FWO submitted that the accounting firm was involved in the underpayments and was accessorially liable under section 550 of the *Fair Work Act*.

The FWO argued that the accounting firm had information about the modern award that applied to the employees, the employees' working hours and their hourly rates of pay and knew that the workers were being paid below the minimum prescribed by the applicable Award, however it took no steps to address these risks with the employer.

The accounting firm denied it had knowledge of the employer's contraventions or that it was an intentional participant in the contraventions by the employer.

Part of the accounting firm's defence was that it simply compiled the payroll on the client's instructions. The accounting firm also submitted that the work was performed by a bookkeeper who was unfamiliar with the applicable Award and, while the director of the firm knew generally about award obligations, he was not involved in the provision of services to the employer.

In finding the accounting firm liable as an accessory, the Court noted that the firm had all the necessary information that confirmed the failure by the employer to meet its obligations under the modern award. The Court found that despite this, the accounting firm persisted with processing the employer's payroll which inevitably led to the underpayments.

The Court found that the director of the accounting firm exercised overriding control over the firm and was 'wilfully blind' to the risk and existence of underpayments.

In his judgment, Judge John O'Sullivan Judge John O'Sullivan said that advisors must put compliance with the law ahead of business interests.

The judgement sends a clear message that the FWO is prepared to use accessorial liability laws to hold external advisers to account.

Following the judgement the Fair Work Ombudsman said "the accessorial liability laws extend not only to culpable in-house managers at businesses that exploit their employees, but also to external advisers who facilitate the underpayment of workers".

"External business advisers need to understand that they must put compliance with the law above their own personal interests — or face serious consequences. Advisers must explain the rules to their clients ... and not become involved in breaches of the law themselves."

Tips for Employers

This decision clearly illustrates that third parties may be found accessorially liable for contraventions of the *Fair Work Act* by an employer, such as underpayments to employees. Examples of those found to be involved in contraventions

have included Directors, day-to-day business managers, HR advisors, service providers (such as accountants) franchisors and businesses in a supply chain.

In order to avoid this risk, employers should:

- be vigilant in monitoring employees' pay rates and employment conditions;
- conduct frequent checks for potential discrepancies; and,
- ensure that those involved in setting remuneration and processing payroll are fully informed of the employer's obligations under the *Fair Work Act*.

Those who provide advice in relation to pay and conditions need to be familiar with relevant minimum terms and conditions of employment to ensure compliance and take prompt action if errors are discovered.

Personal liability of individuals for breaches of the *Fair Work Act*.

Section 550 of the *Fair Work Act* imposes liability on a person who is 'involved' in a contravention of a civil remedy provision.

A person is involved if the person:

1. has aided, abetted, counselled or procured the contravention; or
2. has induced the contravention, whether by threats, promises or otherwise; or
3. has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
4. has conspired with others to effect the contravention.

An involved individual can still be liable even if they were not specifically aware that their conduct constituted a breach of the FW Act.

An individual found to have contravened the Act is also exposed to an order for compensation for the loss that an employee has suffered because of the contravention. The

maximum penalty for an individual for breach of the general protections provisions is currently \$10,800 (\$54,000 for a company).

This is another case that highlights the importance of ensuring that any service providers (such as accountants or bookkeepers) engaged by the organisation also comply with their employment law obligations.



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If you are considering conducting a review of your workplace or project employment practices, contact Savvy Human Resources Associates:

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