

FOLLOWING THE BOSS' INSTRUCTIONS – HR MANAGERS BEWARE

In our December 2010 article (see issue 8.12), we discussed the activities of the Fair Work Ombudsman, the independent regulatory agency that investigates complaints involving suspected contraventions of the *Fair Work Act 2009* and its predecessor, the *Workplace Relations Act 1996*, as well as breaches of awards and agreements. Part of the FWO's arsenal includes the capacity to bring Court proceedings seeking the recovery of unpaid entitlements, the reinstatement of employees where appropriate, and the imposition of monetary penalties.

In a recent decision of the Federal Magistrates Court, pecuniary penalties were imposed on a company director and the company's HR manager after both men were found, in a previous judgment, to have been 'knowingly concerned' in the company's contravention of the sham contracting provisions of the *Workplace Relations Act 1996* ('WRA 1996'). Under the relevant provisions of the WRA 1996 (which applied in this case), it was unlawful for an employer to misrepresent an employment relationship, or a proposed employment relationship, as an independent contracting arrangement; it was also unlawful to dismiss a person in order to engage the person to undertake substantially the same duties but as an independent contractor. The *Fair Work Act 2009* contains similar provisions.

In his November 2010 judgment, Federal Magistrate Cameron found that Centennial Financial Services Pty Ltd had contravened a number of provisions of the WRA 1996 – including the sham contracting provisions – and that the company's sole director, Mr Mertes, and the company's human resources manager, Mr Chorazy, were involved in the company's contraventions. The facts were, briefly, that in January 2007, Centennial Financial Services Pty Ltd had employed sales staff known as 'Corporate Associates' under the terms of the Commercial Travellers Award. In April 2007, Centennial required the Corporate Associates to sign 'Sales Consultant Agreements' that effectively changed their status to that of independent contractors, payable on commission only, while their duties remained the same. The company's instructions were issued by its director, Mr Mertes, and implemented by its HR manager, Mr Chorazy. As a consequence, the Corporate Associates did not receive the usual statutory and award entitlements payable to employees. It was the Associates'

evidence that if they did not accept the independent contracting arrangements, their employment would cease. One such Associate who declined to sign the Agreement was in fact dismissed and lodged a complaint with the FWO. Subsequent investigations by the FWO uncovered evidence of several contraventions which proceeded to Court.

In his judgment dated 21 June 2011, Federal Magistrate Cameron was required to determine whether penalties should be imposed on the director and HR manager of the company, the company itself escaping liability as it was in liquidation. In making submissions as to the appropriate quantum of the penalties, the FWO argued that none of the underpayments had been made good at the time of the court hearing, both men had been uncooperative during the investigation and neither man had expressed any remorse for their role in the company's unlawful conduct that benefited the company and Mr Mertes, its sole shareholder. The FWO also submitted that the penalties ought to be seen as a specific deterrent as both men were likely to be in positions in the future where they would be responsible for employing workers. The FWO argued that the penalties to be imposed on the HR manager ought to fall in the low to mid range, in contrast to the director, whose penalties should lie in the mid to high range.

Mr Chorazy argued that he should not be held responsible for the contraventions as he had merely been following the instructions of Mr Mertes and had no input into the decisions that constituted the contraventions. Mr Chorazy also argued that others in the company could have been pursued and that the negative publicity surrounding the case had effectively ruined his HR career and significantly diminished his earning capacity.

Ultimately, FM Cameron imposed penalties totalling \$13,200 on Mr Mertes in respect of nine contraventions, and penalties totalling \$3,750 on Mr Chorazy in respect of 11 contraventions. While the penalties were not necessarily financially onerous, this judgment is a salutary lesson to HR managers to make themselves aware of their obligations under workplace legislation and to resist directions from company management to depart from such obligations.



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