EXPLOITERS OF OVERSEAS WORKERS RECEIVE RECORD FINE OF OVER AUD500,000

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With the regulator actively pursuing rogue employers and the Courts willing to impose higher penalties, it is clear that a spotlight has been cast on identifying and exposing non-compliance with the Fair Work Act (FW Act).

As we outlined in our recent Legal Insight in September 2017, penalties for serious exploitative conduct of vulnerable workers increased significantly under the recent *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*. Just this week, we have seen the *Fair Work Ombudsman (FWO) commence legal action against a Caltex* franchisee in Sydney for allegedly falsifying records of the wage rates it paid to overseas workers. The FWO has now secured a record penalty of AUD510,840 against a husband and wife cleaning business for underpaying three Taiwanese domestic cleaning workers on working holiday visas. The order was made in the Federal Circuit Court by Judge Toni Lucev who reprimanded the couple for their 'deliberate and repeated' exploitation of vulnerable workers.

The couple's company, Commercial and Residential Cleaning Group Pty Ltd, was fined AUD361,200 and the husband and wife were given individual fines of AUD72,240 and AUD77,400 respectively. The penalties were for 15 contraventions of the FW Act, predominately around failure to pay the employees their full and proper entitlements (and in the case of one employee, any payment at all). They also failed to keep accurate records, provide pay slips and failure to comply with a notice to produce during the FWO investigation.

Over their respective periods of employment of between three days and three months, the three employees were underpaid a combined total of AUD11,511.66. Judge Lucev said that while the underpayments were not large per se, they represented a "not insignificant amount for employees reliant on the minimum entitlement provisions of the Cleaning Award and the FW Act". Evidence was given by the employees of financial stress, with one employee claiming she had to borrow money from a friend and only ate one meal a day to be able to pay her rent.

HIGH PENALTIES FOR DIRECTORS

The record penalties awarded were found to be warranted due to the:

- range of contraventions
- vulnerability of the employees
- prior compliance history of the directors.

Judge Lucev repeatedly referred to the 2013 case where the same couple and another cleaning company were fined $343,860 for exploiting local and overseas workers in Perth.

In the current judgement, Judge Lucev found that *"it is open to infer that the [directors'] actions towards the employees formed part of a deliberate business strategy to engage vulnerable employees, refuse to pay them during their first few weeks of employment, refuse to pay them their full entitlements when they fell due […] and*

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then refuse to pay outstanding wages owed to the employees on the termination of the employment relationship." Due to the couple's prior similar conduct, their behaviour was indicative of a "systemic" exploitation of vulnerable workers.

SIZE AND FINANCIAL CIRCUMSTANCES OF EMPLOYERS DIDN'T AFFECT THE PENALTY

While the court accepted the cleaning company was a small business, and the directors indicated that they did not have any assets to pay the claims made by the employees (noting the compensation and penalties from the 2013 case remained unpaid), Judge Lucev found that in considering the size of the penalty, capacity to pay was of less relevance than consideration of objective general deterrence.

Judge Lucev was disinclined to reduce penalties available to him given the directors' lack of cooperation during the FWO's 14 month investigation, their lack of contrition and no evidence of corrective action by the directors', stating the penalty *"ought to be fixed at a level which ensures [it] cannot be regarded simply as [the] usual cost of doing business".*

FAIR WORK AMENDMENT (PROTECTING VULNERABLE WORKERS) ACT 2017

The employees involved in this case were all Taiwanese nationals on working holiday visas in Australia, with limited experience in, and knowledge of, the Australian workplace relations regime. Being workers from non English speaking backgrounds, they had limited choice of employment options and limited understanding of their options when they were being underpaid.

Whilst these workers were 'vulnerable workers', employers of less vulnerable workers can still be exposed to significant penalties for underpayment claims and/or other non-compliance allegations, whether that be related to Award conditions or pay slip requirements. If your business operates under an Award, we recommend regular compliance checks to minimise the risk and, if in doubt, be proactive and seek our advice.

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