

Are you getting the right advice at the right time?

Address to Council of Small Business Australia (COSBOA) National Small Business Summit by Natalie James, Fair Work Ombudsman

Thursday, 7 July 2016

Most employers want to do the right thing

Most employers want to do the right thing. You may be thinking “I’ve heard her say that before” and you’d be right. I said it in 2014 when I spoke at this event in Melbourne.

This is as true today as it has always been. It reflects the experience of our people, who talk to hundreds of small businesses every day, on the phone and via email. Employers we meet at the Fair Work Ombudsman (the **FWO**), by and large, want to get compliance with workplace laws right. They want to understand what they need to do to fulfil their employment obligations.

We know that workplace laws can be complex and they aren’t the only regulatory obligations small businesses are grappling with.

FWO business model

The FWO has placed this assumption that people want to do the right thing at the centre of our business model. Under this approach, we resolve around 90% of disputes without any enforcement action at all.

We focus on voluntary dispute resolution for the majority of the 25,000 requests for assistance we receive every year.

We want to be involved in these disputes for a short time – at the right time – before the matter escalates into something more serious.

It is on this basis that in March 2014 we piloted a new way of dealing with potential disputes that were coming to us through the Fair Work Infoline.

Early Intervention program

The idea of our Early Intervention program is to empower employees and employers to find their own solutions to workplace issues before they escalate into disputes. We recognise the principle that ‘prevention is better than the cure’. We know that most employers want to work with us to fix the problems.

So what is an Early Intervention?

We direct people into the Early Intervention pathway when they come to us for advice, and in the course of our interaction with them it becomes evident that there is a problem arising in the workplace. An employer may have had a worker ask questions about their pay rates, for example,

and so they are ringing to check. Instead of just giving them information, or directing them to our pay calculator, PACT, we direct their call to an experienced Customer Solutions officer, who would then talk through what was going on.

The purpose is to support them to resolve the issue in the workplace, with the right information and perhaps some coaching from us about how to broach a difficult conversation.

In fact, our 'difficult conversations' online learning module gets quite a workout in Early Interventions, because invariably we find that the best way to address what is going on is for the parties to sit down and talk about the issues, rather than letting the issues fester or the parties getting into their corners and becoming adversarial.

Most importantly, we want to preserve this employment relationship if that's possible. To enable the parties to address their concerns and then get back to work.

Let me give you an example. A kitchen-hand contacted us recently after quitting her job at a restaurant. She wanted to know what her final pay should be.

When she realised she hadn't been paid for what she was owed, we discussed with her options for raising the issue with her former employer.

Then we did something pretty simple. We invited the employer to have a conversation with us to discuss this employee's concerns. The employer did give us a call and without any fuss we were able to talk her through what the employee was owed. This business owner was happy to resolve the issue, and to pay what was owed, once she understood all of her obligations.

When we get involved at these early stages it ends up saving time and money for everyone involved.

A few months after that issue was resolved, the same employer gave us another call.

This time she wanted guidance on how to manage an unexpected situation that had arisen; one of her employees had just told her out-of-the-blue that she was quitting, then 'downed tools' and walked out the door. The employer wasn't sure what to do and she didn't want to lose her employee but also wanted to make sure she knew what she was required to do by law.

Importantly, the employer felt comfortable to seek assistance from us after the way things were handled the first time. It built her confidence in her own abilities to manage the situation, provided she had the right support.

In the end, after a good discussion and some frank advice from the Customer Solutions officer, she was able to talk to the employee about what had happened. She and the employee were able to discuss the underlying issues, resolve the situation, and the employee stayed on.

The Employer later told us that *'It was good to get an idea of the resolution process and also the law regarding termination. It's hard to get good information out there and I think the information you provided can be used next time if we ever face something like this again'*.

We at the Ombudsman love a result like that. This is an employer who took the initiative to get the right advice to ensure that she will be self-reliant in compliance in future. And she knows where to turn for guidance if she isn't sure of what's right.

Around 40% of all matters this financial year have been resolved via the early intervention program. And over the past 2 years and four months that the program has been running, the FWO has assisted over 3000 employees and businesses to resolve workplace issues to the value of more than \$7 million in entitlements. All of that without infringement notices, compulsory powers or dragging businesses into court.

We're not the only ones who can help. The right information can come from other trusted advisers.

Recently, a panel beater came to us for help. Like the kitchen-hand, this employee was concerned he hadn't received all of his entitlements after his employment relationship ended.

Our Early Intervention team helped the employee draft a letter to his employer asking about his entitlements. Our aim was to encourage resolution at the workplace level, with the parties having the conversations and making the decisions.

The owner of the business later shared his thinking with us after he received the employee's letter. It was important to him that he make clear to us – and the employee – that he was not in the business of short-changing his workers and that he would do what is right. Those were his words.

He just wasn't quite sure what right was.

With the employee's letter in hand, the owner went to his employer association for advice. He found out that he'd been getting his payments wrong. By the time the owner called us to discuss the situation, he had all of the right information and was confident to act accordingly. He promptly agreed to repay the employee almost \$6,000 in underpaid wages and unpaid annual leave.

The employee was thrilled, and the owner put processes in place to avoid a repeat of the issue in future. There was no need for the FWO to take any further action.

This shows the value of the right advice at the right time. It also shows how the advice of the FWO and trusted and responsible advisers can both be drawn upon to support business.

Record keeping campaign

The fact that most employers want to do the right thing, and that most are succeeding, is also borne out by one of our most recent campaigns.

During this campaign, we conducted spot checks of almost 1400 businesses across a number of outer suburban and regional locations. We were focused on employment records and payslips.

Now I know no one likes admin, and record keeping may feel like another form of Government-imposed red tape. But it is important. Critical in fact, to ensuring that you can show that you have met your obligations to pay employees correctly. And critical for your employees to see that this is the case. It means if there are any questions or errors, they can be resolved easily and quickly.

This has been recognised by the Courts, which have said that the central importance of record keeping and payslips cannot be underestimated.

Now we know that it's easy to overlook things when it comes to paperwork. The FWO has a number of online tools to help including template pay slips and employee records.

And so it was encouraging to see that 72% of the businesses we checked were fully compliant with the record-keeping rules. Fully compliant means every hour worked recorded, overtime hours clearly delineated. It means payslips provided showing the ABN, wages paid, delineating between ordinary rates as well as identifying loadings, allowances, bonuses and penalty rates, deductions from pay, and superannuation fund and contributions paid into it.

You can imagine that the odd error might arise, even if you have good systems, given the number of things that need to be correctly recorded in order to show that an employee has received their entitlements. So 72% compliance is a pretty good result.

And what is even more encouraging is that, the record-keeping and payslip errors that did arise in that 28% cohort were generally minor. Most of the non-compliant businesses had fallen down on providing proper payslips. Typically, it was superannuation that was not being recorded, which is a requirement under the regulations. And the missing information was often down to businesses using payroll software that wasn't up to date.

So in the greater scheme of things, these unintentional and minor transgressions are not serious and easily fixed. These are not the sort of record keeping deficiencies you may have heard about that can end up in court, cases where there are no records at all or false records, as we saw in the 7-Eleven matters.

My Inspectors know the difference between a small business trying to get the admin right and a business that is using fabricated records to cover up exploitation of its workers. And of course we treat those situations differently. We take into account the response we get from the employer, the reasons for and consequences of the non-compliance, and most importantly whether there is a willingness to fix the issue.

I want to emphasise this because it is possible that in the course of the last year or so you might have read a strongly worded press release or tweet from me, or some words quoted in the paper or replayed on the radio, talking tough with respect to those employers out there who do not want to do the right thing.

We know they are out there, ripping off workers to gain a competitive advantage. Undercutting those of you battling to run a business lawfully and working hard to get the wages right and maintain a productive and happy workforce.

Often these employers won't work with us at all and won't engage. They might ignore our notices to produce documents, which is of course a breach of the law. They may dissolve their company when we start to get serious, leaving us with limited assets to draw on to secure those underpayments.

They are the minority of cases that come to us, the ones where we find ourselves reaching for our enforcement tools to resolve an issue. The experiences of 7-Eleven, Baiada, Woolworths and others should give all businesses pause for thought.

There should be serious, visible consequences for such systemic and opportunistic breaches of the workplace laws. And so it is right that we come down hard on those employers with every legal and reputational lever that we have at our disposal.

But there is a range of conduct we see that sits in between the 'fully compliant' gold star business and likes of 7-Eleven, Baiada and Woolworths' trolley collectors. There are the honest and reasonably minor errors we see, like those who were not 'fully compliant' in our recent spot checks of records.

But then there's something else. Something that is less positive and more complex.

We do see small businesses that are paying below minimum rates, who could have checked to make sure but didn't. Or who are cutting corners by rounding up to flat rates, ignoring the penalty rates and not, overall, paying enough to meet their obligations.

They may feel confident that it'll be alright. But their confidence is not always matched with sound levels of understanding. And our experience is backed up by research that tells us that small businesses are often overconfident when it comes to their understanding of workplace obligations.

We're also finding that people aren't doing their homework from the start but only seeking advice after a problem has arisen. If they are getting the wages wrong, this could result in a huge back pay bill.

And the membership by small businesses of industrial organisations, especially in some sectors, is low. We know that members of employer organisations are better informed of their obligations and are far less likely to be the subject of a complaint to us.

Of course there are many sources of good advice. We at the FWO, and qualified workplace advisers or lawyers. But we also know that not every person who 'knows a bit' about workplace laws is qualified to give accurate advice.

And we know that small businesses can balk at having to go to yet another specialist adviser. They don't have time for that, or the money. Many prefer the one-stop-shop of their accountant or family lawyer, for example, who may not be sufficiently informed to give the right advice.

And we think this is what is behind some very different and less encouraging results from another campaign that we reported on earlier this year.

Hospitality – Takeaway foods Campaign

In March we released the findings of our three year National Hospitality campaign. The hospitality industry has been a focus of ours for some time. When the campaign was developed in 2012 just over one in ten (11 per cent) of requests for assistance were from the hospitality industry. The industry remains consistently our top ranked sector for requests for assistance.

These businesses often employ vulnerable people such as young workers or people from culturally and linguistically diverse backgrounds. Nearly half (about 44%) of employees in the hospitality industry are aged between 15 and 24. They are over represented in this industry, given workers of this age make up 16% of total Australian workforce. They are also over represented in our complaints – consistently a quarter of those coming to us for help are 25 years old or younger.

The third wave of our campaign looked at over 500 businesses in the takeaway foods industry. The takeaway food industry is comprised largely of small and family businesses. They generally don't access their own professional workplace relations advice. And this lack of advice no doubt contributed to the very poor levels of compliance that we discovered in our audit.

Even taking all that into account, the compliance rate of just 33% of take away food businesses we checked is unacceptably low. This means that nearly 7 in every 10 of these businesses were not getting it right.

Almost half (45%) of the businesses with errors were getting minimum rates of pay wrong. So this wasn't about penalty rates or overtime. They were getting the base rates of pay wrong. Something that is easy to work out. Just visit our Pay Calculator and you can work this out in minutes, or call our Fair Work Infoline.

Those who got penalties and loadings wrong accounted for a further 15% of the errors.

We found some businesses providing flat rates of pay for all hours worked, with many advising they had adopted this practice to simplify their payroll process.

I understand they were just trying to get on with running their business and keeping the costs of payroll down. I can understand the desire to make it simpler, but this is not a lawful way to reduce your red tape. It's easy to check pay rates, and seek help.

I understand that businesses are under the pump, but getting it right from the beginning ensures these businesses are sustainable, and they aren't put in a position of having to rectify a massive underpayment later down the track.

So what can we do about this? And by 'we', I don't just mean the FWO. I mean the broader advisory community, responsible businesses and advisers

What can we do to help?

Our experience and research tells us businesses are over-confident about workplace laws. Our experience and our own data tell us that members of employer associations have higher levels of compliance.

But our research tells us that 4 in 10 small businesses have not heard of employer organisations and 6 in 10 have never considered joining. And our experience and research suggest many businesses don't seek advice or help until something starts to go awry.

On the upside, our research also tells us that between 60 and 66% of small and family businesses want to know more about workplace relations.

The appetite is there. The question is; how do we satisfy it?

All of us with an interest in building a culture of compliance with workplace laws, who want to support business do the right thing, need to do better at getting them what they need in a form that is accessible and useful.

We at FWO deliver a range of reliable resources online and over the phone including:

- the Fairwork website, which had more than 13 million visits last financial year;
- the small business helpline – a priority service for small business callers who contact us for tailored advice;
- the Pay and Conditions Tool – our mobile-friendly PACT can assist business owners to calculate the correct pay rates and leave entitlements for their employees;
- Online Learning Modules – a suite of free easy-to-follow courses available on our website
- My Account – a great way of staying up to date by setting up a My Account profile, where you can save all of the pay rates for your business, send us online enquiries and receive an answer, and receive regular email updates on what's new in the workplace relations space in your industry. We've had over 80,000 My Account registrations in the last 12 months.

We also need to acknowledge that a resource written in the English Language may not reach a key group of businesses. 30% of small businesses are run by owners born outside of Australia. And 19% of the small business owners speak a language other than English at home – with Mandarin featuring as one of the most common languages spoken.

Our Chinese Engagement strategy, launched this year, is the beginning of working with a significant cohort for whom an English language PDF fact sheet may not be effective. As part of the strategy, new resources have been made available on our website for workers and businesses in both Simplified and Traditional Chinese.

We all need to think more about the ways we can work with these businesses and their communities and investing more in talking to people in a way that works for them.

Partner with us

So here is what I would like to see. I want us to partner together, the FWO, Government, business and advisers, to help time poor businesses navigate the complexities of the workplace relations system.

You can do this by proactively engaging with us, whether it's through our helplines, through My Account or other channels. Use our other tools and resources to keep yourselves informed of what's new. And tell us about the issues you're facing, in your business and in your industry. The more information you share, the better informed we are to help.

I want to make it as easy as possible for people to access the information they need about their workplace.

I encourage all businesses to proactively seek information on workplace relations from the FWO, employer organisations and other professionals advising in this space. We know that, with the benefit of their expert advice, businesses are more likely to be compliant. It gives them more confidence navigating the system, especially when a dispute arises.

We all have a part to play in compliance. Whether you're an employer, employee, industrial adviser or government agency. There are many opportunities for us to draw on our mutual interests: to see employers do the right thing, avoid a nasty back-payment bill, ensure a level playing field for all business and to build a culture of compliance.

To the advisers in the audience, I want to partner with you so that, between us, we help business obtain good, professional advice from those who know what they are talking about. You can help us reach businesses that may not want to directly approach the regulator. And we can support you in your work, enabling you to confidently advise business. We can work together to design and distribute the right materials through the right channels to help businesses understand what they need to do

As for the business owners and managers in the room, make sure you ask for help early and often – not just when there is a problem at your doorstep. It's up to you to know what your obligations are. But you don't have to figure it out on your own.