

Almost \$60,000 in penalties for sham arrangements send message to unscrupulous employers

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A sham arrangement case that was the subject of a successful High Court appeal by the Fair Work Ombudsman has now been finalised, with the former operators of a Perth accommodation facility penalised a total of \$58,740 in the Federal Court.

Quest South Perth Holdings Pty Ltd, which formerly operated the Quest on Arlington serviced apartments in South Perth, has been penalised \$54,450 and the company's former manager Ashvin Luchmaya has been penalised \$4290.

The penalties are the result of Fair Work Ombudsman legal action commenced in 2011.

The Fair Work Ombudsman alleged that Quest South Perth Holdings contravened the sham arrangement provisions of workplace laws in 2009 when it purported to convert three employees – two housekeepers and a receptionist – at Quest on Arlington into independent contractors.

Quest South Perth Holdings dismissed the workers and immediately re-hired the two housekeepers as purported independent contractors to perform the same duties. The receptionist was not re-hired after Quest dismissed her.

The Fair Work Ombudsman alleged the purported contracting arrangement was a sham and the correct relationship for the three workers was as employees.

After part of the Fair Work Ombudsman's case was dismissed by the Federal Court and the Full Court of the Federal Court, the Fair Work Ombudsman lodged its first ever High Court appeal.

The High Court unanimously upheld the appeal in December 2015, ruling that Quest South Perth Holdings' conduct contravened sham contracting laws.

The matter was referred back to the Federal Court, where penalties have now been imposed against the company and Luchmaya by Justice John Gilmour.

Justice Gilmour found that the contraventions were the result of "Quest's strategy and desire to engage the employees as independent contractors so their rights and entitlements would not be protected by industrial relations legislation".

"The FWO submits correctly, in my opinion, that the impact of sham contracting contraventions is that workers believe that they are deprived from the wide ranging entitlements afforded to employees, including minimum rates of pay, annual leave, personal leave, long service leave, parental leave, superannuation, workers compensation, notice upon termination of employment and eligibility to access other protections such as unfair dismissal applications, general protections applications or an application for an order to stop bullying," Justice Gilmour said.

Justice Gilmour said Quest's contraventions involved "deliberate and conscious acts designed to circumvent industrial relations legislation and the protections they provide" and found that the impact on the three workers was significant.

After the purported conversion to independent contractors, the receptionist was offered no further shifts, while the two housekeepers were paid a flat rate that did not make provision for entitlements such as weekend and public holiday penalty rates or overtime.

Justice Gilmour found that the conversion of the receptionist "was implemented with the specific intent to allow Quest to terminate her employment without risk of unfair dismissal and to remove her other entitlements".

Justice Gilmour found there was a need to impose penalties that helped to maintain a level playing field for employers with respect to wage costs and deterred others from similar conduct.

"The sham arrangement provisions are, I accept, important provisions that protect employees from unscrupulous employers," Justice Gilmour said.

Fair Work Ombudsman Natalie James says the outcome of the matter sends a clear message that her Agency will not tolerate attempts to use corporate trickery to try to disguise employment relationships as contracting situations.

"The significant resources we have committed to pursuing this matter for several years reflect the seriousness with which we treat sham contracting behaviour," Ms James said.

“These proceedings send a message to unscrupulous employers about the consequences of sham contracting behaviour.

“The High Court ruling we secured in this matter was also important because it creates greater legal protection for employees in situations where employers attempt to avoid responsibility for providing employees’ lawful minimum wages and entitlements by claiming employees are independent contractors,” Ms James said.

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