

FWO secures first accessorial liability penalties against an accounting firm

19 September 2018

Note: On 7 December 2017, Ezy Accounting 123 Pty Ltd filed an appeal in these proceedings. On 20 August 2018, the Full Court of the Federal Court handed down the decision of *Ezy Accounting 123 Pty Ltd v Fair Work Ombudsman* [2018] FCAFC 134 dismissing the appeal with the exception of the contraventions relating to rest and meal breaks. As a result, the declaration in respect of rest and meal breaks was set aside and the penalty was varied to \$51,330.

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The Fair Work Ombudsman has for the first time used accessorial liability laws to obtain penalties against a professional services firm for knowingly helping one of its clients exploit a vulnerable worker.

Victorian accounting firm Ezy Accounting 123 Pty Ltd has been penalised \$53,880 after the Federal Circuit Court found earlier in the year that it facilitated underpayments by its client, fast food operator Blue Impression Pty Ltd.

Blue Impression has been penalised an additional \$115,706 after admitting it underpaid two Taiwanese workers at its Hanaichi QV Japanese fast food outlet in the Melbourne CBD a total of \$9549 between September 2014 and April 2015.

Ezy Accounting 123 was involved in facilitating \$750 of the underpayments relating to one of the workers.

The penalties, imposed in the Federal Circuit Court, are the result of legal action by the Fair Work Ombudsman.

Ezy Accounting 123 provided payroll services for Blue Impression and processed wage payments for one of the two underpaid Taiwanese workers at the Hanaichi QV outlet despite knowing the rates the worker was being paid were below lawful minimums.

Both the Taiwanese workers, who were in Australia on 417 working holiday visas, were paid flat rates as low as \$16.50 an hour.

This was below the minimum hourly rate and not enough to cover public holiday penalty rates and weekend, night and casual loadings they were entitled to under the Fast Food Industry Award.

The workers, aged in their 20s, were also not provided with a clothing allowance and their entitlements to breaks under the Award. Record-keeping and pay slip laws were also contravened.

The underpayments occurred despite the Fair Work Ombudsman having previously put both Blue Impression and Ezy Accounting 123 on notice of their obligations under workplace laws.

Blue Impression was previously audited in 2014 as part of the Fair Work Ombudsman's proactive National Hospitality Campaign and was put on notice of its workplace obligations after it was found to have underpaid 12 employees a total of \$8800.

Ezy Accounting 123 was also apprised of minimum Award rates at the time of the audit, as it assisted the company to calculate and rectify the wage underpayments.

In his judgment, Judge John O'Sullivan found that the two Taiwanese employees at the Hanaichi QV outlet were vulnerable workers and had been "the victim of exploitation".

In relation to the worker Ezy Accounting 123 was involved in underpaying, Ezy submitted in Court that the worker "was not Ezy's employee" and that "Ezy did not exploit (the employee) in his work".

However, Judge O'Sullivan said that it was a "circumstance of aggravation" that Ezy Accounting 123 had been "knowingly involved in conduct that constitutes illegality".

"Ezy was not subject to direction by (Blue Impression) as an employee," Judge O'Sullivan said. "Ezy was involved in a relationship with (Blue Impression) where it provided payroll services. As such it must put compliance with the law ahead of business interests. Ezy had a responsibility to ensure there was compliance with, inter alia, the FW Act."

The judgment comes after the Fair Work Ombudsman earlier this month used accessorial liability laws to secure a \$21,760 penalty

against the HR manager of the New Shanghai restaurant in NSW for her role in facilitating the wide-scale exploitation of overseas workers.

In that matter, Federal Court Justice Robert Bromwich dismissed the HR manager Ting “Sarah” Zhu’s submission that her culpability was greatly reduced due to the fact she was following the owner’s directions. Justice Bromwich found the HR manager had “acted in her own interests” in knowingly facilitating the exploitation of workers and that “there is nothing wrong with sending the message that an employee should indeed resign if that is the only alternative to continuing to participate knowingly in illegal activity”.

Acting Fair Work Ombudsman Kristen Hannah says the successful legal actions send a clear message that her Agency is prepared to use accessorial liability laws to hold any party involved in the exploitation of vulnerable workers to account.

“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,” Ms Hannah said.

“External business advisers need to understand that they must put compliance with the law above their own personal interests – or face serious consequences.

“The Courts have made it clear that if you are knowingly involved in the exploitation of workers, you can face significant penalties.

“These types of trusted advisers must explain the rules to their clients, make it clear when they are in danger of breaking them and not become involved in breaches of the law themselves,” Ms Hannah said.

Ms Hannah says employers should be aware that the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 has now come into effect, increasing the maximum penalties for conduct including deliberate exploitation of workers and false records.

“The wealth of free advice and educational material on our website – including in 30 different languages – and availability of our small business helpline means there is no excuse for mistakes, regardless of an employer’s background.”

Employers and employees can visit www.fairwork.gov.au or call the Fair Work Infoline on 13 13 94 for free advice and assistance about their rights and obligations in the workplace.

The Fair Work Ombudsman’s online tools and resources can assist employers to determine their applicable Award, as well as classification and pay rates, allowances, overtime and penalty rates.

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