

Perth labour supply business faces Court for alleged building site underpayments

4 July 2018

NOTE: All allegations made by the Fair Work Ombudsman in this matter were dismissed by the Federal Court on 6 November, 2019.

The Fair Work Ombudsman has commenced legal action against a labour supply company in Perth, alleging it misclassified young labourers as independent contractors, when they were in fact employees, and underpaid them thousands of dollars.

Facing the Federal Court is Personnel Contracting Pty Ltd, which trades as Construct Contractor Solutions and provides labour to the operators of construction sites in Perth, including those operated by building company Hanssen Pty Ltd.

The Fair Work Ombudsman alleges Personnel Contracting underpaid five labourers aged between 16 and 21 a total of \$19,111 for work performed over a four-month period in 2016 at a construction site operated by Hanssen Pty Ltd at 189 Adelaide Terrace, East Perth.

Fair Work Ombudsman inspectors commenced a self-initiated investigation into compliance with workplace relations laws at the site after concerns were raised about general compliance issues following a fatal workplace accident at the site in 2016.

The Fair Work Ombudsman's investigation focused on whether employees at the site had received their full lawful wages and entitlements (the Fair Work Ombudsman does not have jurisdiction to investigate occupational health and safety matters).

In documents lodged in the Federal Court, the Fair Work Ombudsman alleges inspectors found that Personnel Contracting Pty Ltd had purported to engage five workers as 'self-employed contractors' - but that under workplace laws, the workers were actually employees of Personnel Contracting.

It is alleged that Personnel Contracting paid the workers flat hourly rates and that three of the workers were paid rates that coincided with their ages.

It is alleged that a 16-year-old employee was paid an hourly rate of \$16 for all work performed; a 17-year-old was paid \$17 an hour and a 19-year-old was paid \$19 an hour.

The two workers aged 20-21 were allegedly paid \$23 to \$25 an hour.

However, the Fair Work Ombudsman alleges the workers were entitled to receive the minimum wage rates and entitlements under the Building and Construction General On-Site Award 2010. It is alleged that the rates Personnel Contracting paid them were not sufficient to meet the Award rates and entitlements.

It is alleged the five workers were underpaid their minimum hourly rates for ordinary hours, casual loadings, overtime rates, allowances and minimum engagement pay.

It is alleged that underpayment of individual workers ranges from \$2324 to \$6539, and that the underpayments remain outstanding.

The Fair Work Ombudsman examined the nature of the relationship between Personnel Contracting and the five workers using a multi-factor test to consider whether the workers were 'employees' entitled to minimum wages and conditions under the Fair Work Act, or 'self-employed contractors'.

Having applied the tests, the Fair Work Ombudsman alleges the workers were actually employees of Personnel Contracting for a range of reasons, including the level of control, supervision and direction exercised over the workers and their pay rates, and that the workers were not genuinely conducting their own businesses.

Acting Fair Work Ombudsman Kristen Hannah says a decision was made to commence legal action because the matter involves vulnerable young workers allegedly being denied basic lawful minimum employment entitlements and protections.

"All businesses that treat the individuals who perform work for them as contractors must take great care to ensure that they have classified those individuals correctly," Ms Hannah said.

“Courts have found again and again that merely labelling the relationship to be one of independent contracting does not make it so, and it is the substance of the relationship that decides the status of the workers and the regulatory requirements that flow.”

Ms Hannah says misclassification of workers is a priority for the Fair Work Ombudsman, not just because of the direct impact of these arrangements on individual workers, but because it can involve businesses obtaining an unfair competitive advantage by depriving workers of their lawful minimum employment conditions and protections.

“Relevant to the decision to litigate in this case is the extent to which contracting arrangements are utilised by this company,” Ms Hannah said.

“If we are successful in this matter, we hope that a key outcome will be Personnel Contracting classifying all workers correctly in future and paying all workers’ full lawful minimum entitlements.”

The Fair Work Ombudsman makes no allegations against Hanssen Pty Ltd but has provided the company with information about steps it can take to ensure the workers on its work sites are receiving their full lawful entitlements, even if it does not directly employ the workers.

The Fair Work Ombudsman alleges Personnel Contracting committed several breaches of the Fair Work Act. The company faces penalties of up to \$54,000 per contravention.

The Fair Work Ombudsman is also seeking Court Orders for Personnel Contracting to: back-pay the workers in full; display workplace notices detailing employees’ workplace rights; and commission an external audit of its compliance and report the results to FWO.

If the legal action is successful, the Fair Work Ombudsman will also seek a Court Order requiring Personnel Contracting to provide information about the changes to its labour arrangements. A case management hearing has been scheduled in the Federal Court in Perth for July 25.

Employers and employees seeking assistance can visit www.fairwork.gov.au, where information is available in 40 languages, or call the Fair Work Infoline on 13 13 94. Small business callers can opt to receive priority service via the Small Business Helpline and an interpreter service is available on 13 14 50.

Information on the website includes a detailed explanation of the difference between employees and contractors and advice about the factors to consider when determining the correct category for a worker.

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