

\$216k in penalties for sham contracting, underpayments

4 January 2019

Two labour-hire companies that provided workers exclusively to a major home care company in Adelaide have been penalised a total of more than \$200,000 over a sham contracting scheme that resulted in underpayments and significant hardship for workers.

Easttrac Pty Ltd and Klemtrac Pty Ltd - which formerly provided labour to Care Providers Pty Ltd, trading as ESAR Home Care - have been penalised \$125,874 and \$77,112 respectively, in the Federal Circuit Court.

The penalties are the result of legal action by the Fair Work Ombudsman.

In addition, two individuals have been penalised in Court for their involvement in the sham contracting activity and other contraventions:

- Victorian man Leo Welch, who was the sole director of Klemtrac at the time of the contraventions and from 23 June 2015 sole director of Easttrac, has been penalised \$7711.
- Peter Wallis, a consultant who was responsible for the engagement and management of the affected workers, has been penalised \$5783.

The matter involved Easttrac and Klemtrac contravening the sham contracting provisions of the Fair Work Act by each recklessly misclassifying two employees as independent contractors and paying them amounts that did not meet their minimum lawful entitlements.

The workers included two personal care workers and two who performed cleaning and domestic duties. The underpayments left the two personal care workers struggling to afford basic living expenses.

Easttrac, Klemtrac, Mr Welch and Mr Wallis admitted in Court that they were responsible for the contraventions. The Fair Work Ombudsman initially also made allegations against Care Providers Pty Ltd but those allegations were not proceeded with. Care Providers offers in-home personal care and domestic assistance services to elderly and disabled persons in Adelaide under contracts the company holds with local councils, government agencies and non-government organisations.

The Fair Work Ombudsman first investigated the matter after receiving a request from a firm of liquidators to investigate the practices of Easttrac, Klemtrac and Care Providers.

In his judgment on the matter, Judge Timothy Heffernan found that the sham contracting activity by Easttrac and Klemtrac was the result of a "strategic decision made substantially for the purpose of saving money" to engage workers as independent contractors, without seeking legal advice as to the proper classification of the workers.

Judge Heffernan found Mr Welch and Mr Wallis "were in positions of senior management and directly involved in the decisions to engage the workers as independent contractors" and that it "was those decisions that led to the underpayment contraventions".

The strategy involved Easttrac and Klemtrac entering into independent contracting agreements with each of the four affected workers and supplying them to Care Providers to perform work for its clients.

However, the correct classification for the workers was as employees of Easttrac and Klemtrac.

As a result of treating the workers as independent contractors, Easttrac and Klemtrac underpaid their employee entitlements under the Social, Community, Home Care and Disability Services Award, including allowances, superannuation, leave entitlements and penalty rates for overtime, weekend and public holiday work.

The sham contracting activity resulted in the four workers being underpaid a total of \$8354 between February and September 2015. They have been back-paid in full.

Workplace laws relating to record-keeping, pay slips, entering into written part-time work agreements and making unlawful deductions were also contravened.

Judge Heffernan said: "Whilst the amounts of underpayment and non-payment do not appear at first blush to be large, the contraventions had a significant impact on the employees and occasioned them financial stress and worry."

The inconsistency in one of the worker's income caused her to have difficulties in covering basic living expenses, like petrol. She

also felt the need to take out an expensive income protection insurance policy because she had pre-existing medical conditions.

"This made it especially difficult and stressful because she had four children living at home at the relevant time", Judge Heffernan said. "There were occasions when she only fed the children and not herself because of lack of money. There were times when she could not afford to pay utility bills and was forced to borrow money from her parents."

The low rate of pay and lack of entitlements resulted in another worker, who had limited education, struggling to set enough money aside for tax purposes and incurring an unpaid tax liability of \$5000. She was also unable to pay utility bills and went without basic household items.

A third worker said there were occasions when she did not take time off work when she was unwell because she believed that she had no entitlement to sick leave.

Judge Heffernan said the penalties imposed should deter others from similar conduct.

Fair Work Ombudsman Sandra Parker said the outcome of the matter demonstrates that sham contracting is serious unlawful activity that will not be tolerated.

"We treat instances of sham contracting activity very seriously because it involves workers being deprived of not only their lawful minimum wages, but also fundamental entitlements such as sick leave, superannuation and entitlements relating to job security," Ms Parker said.

"Sham contracting often has an acute financial and personal impact on workers who are already in low-paid positions.

"Employers should be on notice that the Fair Work Ombudsman will take the strongest possible enforcement action when we find instances of sham contracting occurring."

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. A free interpreter service is available on 13 14 50.

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