

Record penalties imposed over sham contracting, underpayments

29 July 2013

A Judge has fined the operators of a NSW transport business a record \$286,704 for displaying “wilful blindness” of workplace laws by engaging in sham contracting activity that resulted in seven employees being underpaid \$26,000.

Happy Cabby Pty Ltd, a Newcastle-based company that was engaged in transporting passengers from Newcastle to the Sydney airport, has been fined \$238,920.

The company’s operator and sole director Graeme Thomas Paff, of Nords Wharf, just south of Newcastle, has been fined a further \$47,784.

The total fines, imposed in the Federal Circuit Court in Sydney, are a record for a Fair Work Ombudsman legal action in NSW and one of the highest ever obtained by the Agency nationally.

The fines were imposed after Paff admitted he was centrally involved in Happy Cabby breaching sham contracting laws by misclassifying seven shuttle bus drivers as independent contractors, rather than employees.

The misclassification continued even after the Fair Work Ombudsman issued Happy Cabby with a Letter of Caution in January, 2011 - and the drivers were consequently underpaid a total of \$26,082 in employee entitlements between January and November, 2011.

Prior to this, the Happy Cabby drivers’ correct classification as employees had also been confirmed by two determinations by the Australian Taxation Office and an Administrative Appeals Tribunal (AAT) decision.

In his judgment, Judge Driver said: “Based on this history of similar previous conduct I accept that high penalties are appropriate in this case for the sham contracting contraventions as the respondents were put on notice, on multiple occasions, of the differences between an employment and independent contracting relationship.

“The Company and Mr Paff could have been in little doubt of the true legal position following the AAT proceedings, and any lingering doubt should have been removed by the Letter of Caution. Their refusal thereafter to change their position was deliberate, based on wilful blindness.”

Judge Driver said all contraventions in the case flowed from the misclassification of the drivers as contractors.

The misclassification resulted in the drivers being paid fixed rates of pay per airport run, regardless of time taken to complete the run and time spent waiting.

This led to underpayments of a range of employee entitlements, including minimum wages and penalty rates for weekend, overtime, public holiday and early/late work. Happy Cabby has since rectified the underpayments, though more than \$2000 in interest owed to the drivers remains outstanding.

The drivers, aged between 50 and 71, were also not provided with other employee entitlements including superannuation and insurance coverage.

Record-keeping and pay slip laws were also breached, making it difficult for the Fair Work Ombudsman to determine the true extent of the underpayments.

Judge Driver also noted the safety implications of failing to keep records of hours that drivers spent driving and waiting and failing to pay drivers for waiting time.

“There is a well-established link between fatigue and poor road safety; as a result, there is significant public interest in keeping track of the hours worked by drivers of public vehicles to ensure that the drivers do not undertake excessive shift lengths and are granted appropriate breaks to ensure they are alert and responsive when on the road,” Judge Driver said.

“The fact that the Company did not pay the waiting periods means that the Company did not have any incentive to reduce these periods.

“I find that penalties should be imposed on a meaningful level so as to deter other employers within the transport industry from failing

to record their employees' driving hours, and deter other employers for not paying their workers for all hours worked."

Earlier this year, the operation of the airport shuttle business was transferred from Happy Cabby to another company controlled by Paff, Happy Cabby Shuttles.

Judge Driver said he "noted, while making no finding, that an available inference is that the unexplained organisational restructure is part of a deliberate attempt by Mr Paff to avoid the financial consequences of the admitted contraventions."

Fair Work Ombudsman, Natalie James, said the case highlights that sham contracting is a very serious matter because it leads to employees being denied workplace rights and entitlements.

"In cases where we suspect sham contracting is occurring, we look behind the often carefully drafted legal documents to determine what the correct classification for workers is under workplace laws," Ms James said.

"A business operator cannot automatically convert an employee who is clearly not operating their own business into an independent contractor simply by directing the worker to obtain an Australian Business Number (ABN).

"The correct classification for the workers in this case was clearly as employees for reasons including that Happy Cabby owned the buses they drove, had a high degree of control over their work and determined how much they would be paid.

"There are serious consequences for business operators who ignore warnings to comply with workplace laws and disregard employees' basic lawful entitlements."

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