

## Court action over alleged sham contracting and underpayment of backpacker

28 November 2014

A fundraising company which was fined more than \$23,000 late last year for underpaying young sales workers is to face court for a second time over allegations of sham contracting.

The company allegedly told an overseas backpacker engaged as a charity collector that he was a contractor, rather than an employee.

The Fair Work Ombudsman claims the 26-year-old British worker was wrongly classified and as a result was underpaid almost \$8000.

The Agency has commenced legal proceedings in the Federal Circuit Court against Australian Sales and Promotions Pty Ltd.

Also facing Court is the company's sole director and part-owner Paul Ainsworth.

It is the second time the Fair Work Ombudsman has taken legal action against Australian Sales and Promotions.

In October, 2013, the Federal Circuit Court fined the company \$23,100 after a Fair Work Ombudsman investigation found it had underpaid five sales workers – including 417 working holiday visa-holders from the US and Taiwan – more than \$9000 (see: [Strong criticism of employer who failed to pay young workers \(www.fairwork.gov.au/about-us/news-and-media-releases/archived-media-releases/2013-media-releases/october-2013/20131014-asap-penalty\)](http://www.fairwork.gov.au/about-us/news-and-media-releases/archived-media-releases/2013-media-releases/october-2013/20131014-asap-penalty) ).

Australian Sales and Promotions holds contracts with charity and not-for-profit organisations to conduct fundraising activities on their behalf.

In the latest matter, the Fair Work Ombudsman has alleged that a backpacker engaged as a charity collector in Sydney was told he was an independent contractor operating his own business.

The company allegedly required the worker to obtain an Australian Business Number (ABN) and invoice another company operated by Mr Ainsworth (PMA Unit Pty Ltd) to receive payment.

Documents filed in Court allege the backpacker had never operated a business before and had no sales experience. Further, the company allegedly exercised a high degree of direction, supervision and control over his duties.

Court documents also allege that Mr Ainsworth was "aware of or wilfully blind to the fact" that the worker's correct classification was as an employee.

The worker was allegedly paid \$50 to \$67 a day plus commission, rather than the minimum hourly rate and casual loadings he was entitled to as a casual employee.

Australian Sales and Promotions also allegedly contravened workplace laws when it required the worker to spend a total of \$465 on public liability insurance and other fees.

Breaches of record-keeping obligations are also alleged.

Mr Ainsworth faces maximum penalties of up to \$10,200 per contravention, while Australian Sales and Promotions faces penalties of up to \$51,000 per breach.

The alleged underpayment was rectified earlier this year.

Fair Work Ombudsman Natalie James says that despite last October's court penalty against the company, it allegedly continued to represent to an employee that he was a contractor, despite having previously been put on notice to comply with workplace laws.

"We allege that this company's non-compliance is of an ongoing nature and is deliberately designed to avoid paying employees their lawful entitlements," Ms James said.

Employers should be aware that simply calling a worker a 'contractor' and requiring them to obtain an ABN does not automatically make them so under workplace laws.

“Where we suspect misclassification or sham contracting is occurring, we will look behind the often carefully drafted legal documents to determine the true state of affairs for affected workers,” Ms James cautioned.

Contracting arrangements can be appropriate, but not as a mechanism to reduce payments to workers who are performing specified duties at specified times under direction from an employer.

Employers and employees seeking assistance can visit [www.fairwork.gov.au](http://www.fairwork.gov.au) or contact the Fair Work Infoline on 13 13 94. A free interpreter service is available by calling 13 14 50.

Follow Fair Work Ombudsman Natalie James on Twitter [@NatJamesFWO](https://twitter.com/NatJamesFWO) (<http://twitter.com/NatJamesFWO>), the Fair Work Ombudsman [@fairwork\\_gov\\_au](https://twitter.com/fairwork_gov_au) ([http://twitter.com/fairwork\\_gov\\_au](http://twitter.com/fairwork_gov_au)) or find us on Facebook [www.facebook.com/fairwork.gov.au](http://www.facebook.com/fairwork.gov.au) (<http://www.facebook.com/fairwork.gov.au>).

Media inquiries:

Ryan Pedler, Assistant Media Director

Mobile: 0411 430 902

[ryan.pedler@fwo.gov.au](mailto:ryan.pedler@fwo.gov.au) (<mailto:ryan.pedler@fwo.gov.au>)

**Page reference No: 5117**

## Contact us

Fair Work Online: [www.fairwork.gov.au](http://www.fairwork.gov.au)

Fair Work Infoline: 13 13 94

Need language help?

Contact the Translating and Interpreting Service (TIS) on 13 14 50

Hearing & speech assistance

Call through the National Relay Service (NRS):

For TTY: 13 36 77. Ask for the Fair Work Infoline 13 13 94

Speak & Listen: 1300 555 727. Ask for the Fair Work Infoline 13 13 94

The Fair Work Ombudsman is committed to providing advice that you can rely on. The information contained on this website is general in nature. If you are unsure about how it applies to your situation you can call our Infoline on 13 13 94 or speak with a union, industry association or workplace relations professional. Visitors are warned that this site may inadvertently contain names or pictures of Aboriginal and Torres Strait Islander people who have recently died.