

\$188,100 penalty for underpaying trolley pushers

10 March 2016

A former company director and his operations manager have been penalised a total of \$188,100 for their role in underpaying 10 Adelaide trolley collectors more than \$220,000.

The penalty, handed down by Justice Anthony Besanko in the Federal Court, ends more than five years of action by the Fair Work Ombudsman to uphold the workplace rights of trolley collectors in the Coles supply chain in Adelaide.

Sydney-based Starlink entities - now in liquidation - provided trolley collection services to Coles supermarkets at West Lakes, Elizabeth, Munno Para and Gawler.

Starlink director Nidal Albarouki and operations general manager Clency Ferriere each have been penalised \$94,050 for their part in sub-contracting arrangements which short-changed vulnerable overseas trolley collectors over 18 months.

One migrant employee from India was underpaid almost \$90,000.

The Fair Work Ombudsman has worked down three levels of the Coles supply chain to gain enforcement outcomes on the Adelaide underpayments.

At the top of the chain, Coles signed an Enforceable Undertaking (EU) with the Fair Work Ombudsman in October 2014, publicly admitting it had "an ethical and moral responsibility" for the conduct of all persons involved in its business.

This followed concerns by the Fair Work Ombudsman that trolley collectors employed by some of its sub-contractors were being paid as little as \$5 an hour.

As part of the EU, Coles agreed to back-pay more the \$220,000 owed to the 10 Adelaide trolley collectors by the two third-tier trolley service providers at the end of the supply chain.

The EU also required Coles to establish a \$500,000 fund to be used to back-pay any other trolley collectors who were subsequently found to have been underpaid.

The company announced plans to progressively move its trolley collection services "in-house" to minimise the risk of underpayments by sub-contractors.

Justice Besanko has previously made declarations against the third-tier trolley collection service providers, Ahmad Hamid Mohammed Al Hilfi and Ayam Rahmah Al Basry. No penalty Orders were made or sought against them.

Justice Besanko has now imposed 75 per cent of the maximum penalty against Mr Albarouki and Mr Ferriere, key figures at Starlink, the first-tier sub-contractor to Coles at the time of the underpayments.

He found they were both responsible for making the contracts between Starlink and their sub-contractors and both were familiar with the basis and rates of pay for trolley collectors.

Both Mr Al Hilfi and Mr Al Basry raised with Mr Albarouki their concerns about how much was being paid to their trolley collectors.

Mr Albarouki told Mr Al Hilfi he didn't care how much the trolley collectors were being paid.

Sydney-based Mr Albarouki was declared bankrupt last June.

He made regular overseas trips during the court proceedings, including numerous trips to Syria for extended periods.

The court heard that Starlink commenced its own legal proceedings against Mr Albarouki in 2012, resulting in a penalty against him of almost \$750,000. That judgment debt remained outstanding when he was declared bankrupt.

Further, it heard that Mr Albarouki divested himself of three properties, including one with a price guide of more than \$2 million that was transferred to his former wife.

Justice Besanko determined Mr Albarouki had intentionally divested himself of assets and, in part, his bankruptcy arose as a result of his own conduct.

As such, there was no consideration by the court to impose a lesser penalty.

“As the Fair Work Ombudsman points out, Mr Albarouki has had the opportunity to appear at every stage of the proceeding,” he said.

“Mr Albarouki has not appeared and there is no evidence of contrition, corrective action or co-operation with the relevant authorities,” Justice Besanko said.

Mr Ferriere was declared bankrupt in February, 2012. The bankruptcy was discharged in February last year and Justice Besanko determined it had no impact on the penalty imposed on him either.

Fair Work Ombudsman Natalie James welcomed the penalties, saying the decision completed a trifecta for the Adelaide underpayment matter.

“This is the culmination of a lot of hard work by the Agency’s Overseas Workers Team to develop a strategy to stop the exploitation of vulnerable workers in the non-compliant trolley collecting industry by involving the benefactors of the labour in the enforcement outcomes,” Ms James said.

Meanwhile, Coles has now provided a first-year report to the Fair Work Ombudsman on steps it has been taking to stamp out exploitation of vulnerable trolley collectors across hundreds of its sites.

Coles has revealed that since the EU was signed in October, 2014:

- Seven trolley collectors have been back-paid a total of \$41,030,
- The wages of 400 collectors working for 15 sub-contractors were audited,
- Workplace relations training has been delivered to relevant Coles team members, and
- 558 of its 776 stores now have in-house trolley collection services.

Coles Operations and Supply Chain Director Andy Coleman has told the Fair Work Ombudsman the company has transformed its trolley collection service across Australia to eradicate underpayment of trolley collectors.

“We believe it is vital to ensure fair practices apply to all team members at our stores and believe positive relationships with our team members are essential for our business,” Mr Coleman said.

“We previously had around 30 contractors engaged to provide trolley collection services, but moved to one national trolley collection provider in late 2012.

“We have since made further improvements to the management of our trolley collection by directly employing our own team to collect trolleys at more than 520 stores across Australia.”

Coles believes it is achieving better results for the business with its own collection team than the contracted-out services.

Coles reported its team members responsible for collecting trolleys are happy to be part of the Coles brand and to be given opportunities for career progression and they are receiving positive feedback from customers and store managers.

Underpayment of trolley collectors around Australia has been a persistent problem for many years.

Trolley collectors are arguably among Australia’s most vulnerable and potentially-exploited workers, with Census data showing many are young, do not have an education level beyond Year 10, come from non-English speaking countries and have physical or other disabilities.

Ms James says she is heartened that Coles is making progress on the issue after admitting that its former practice of contracting third parties to manage its trolley collection was open to abuse.

“Contracting or outsourcing are legitimate options for business. However, the effect of these arrangements can be to undermine entitlements to employees, particularly when there is a very competitive tendering process,” she said.

“There is a risk that, without taking conscious steps, the beneficiaries of the labour can lose a line of sight to what workers toiling for their benefit are being paid.

“While they may think they have contracted out the responsibility, the community and the law can hold them to account if it turns out they are benefiting from black market labour.”

“A diligent approach is required when outsourcing work, particularly when engaging lowest-cost providers. It is important to ensure that the lower costs are achieved through legitimate means, such as enhanced efficiency or economies of scale, and not due to exploitation of vulnerable workers paid below the lawful minimum rates.”

Ms James says it is encouraging to learn that Coles is reporting improved business outcomes and higher levels of employee engagement and satisfaction at work as a direct result of employing its own trolley collectors, as opposed to contracting out this significant part of its operations.

“This is evidence that working with the Fair Work Ombudsman to comply with obligations can be a positive and rewarding experience

for both the employer and employees," she said.

"Experience and the Coles program of wage audits for its trolley collectors tell us, however, that there yet remains more to be done in this sector throughout the supply chain to ensure all of workers get their minimum wages."

Coles has given a commitment to continue to work with the Fair Work Ombudsman to improve its supply chain compliance.

The Fair Work Ombudsman has a number of active strategic Inquiries which focus on sub-contracted workers in supply chains where there is a heightened risk of there being underpaid wages and entitlements, including a review of the wages and conditions of workers in Australia on the 417 working holiday visa, an Inquiry into the workplace arrangements of workers cleaning 4 and 5-star hotels and a national Harvest Trail Inquiry into the horticulture and viticulture sectors.

Companies which operate with a network or chain of entities where the business benefits from the labour of workers for which it is not directly responsible are reminded that they remain obligated to ensure these workers receive the correct wages and entitlements.

Workers in these sub-contractor arrangements are often low-skill and vulnerable workers and the operations involve tight profit margins.

The Fair Work Ombudsman's activities aim to foster behavioural change by lead businesses and create sustainable monitoring arrangements where the price-makers can take pro-active steps to ensure compliance.

The Fair Work Ombudsman provides practical advice that is easy to access, understand and apply in support of encouraging compliant, productive and inclusive Australian workplaces.

Employers and employees alike are encouraged to use the free tools and resources available at www.fairwork.gov.au

People seeking assistance can also contact the Fair Work Infoline on 13 13 94.

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Media inquiries:

Bryan Littlely, Assistant Media Director

Mobile: 0447 692 007

bryan.litteley@fwo.gov.au (<mailto:bryan.litteley@fwo.gov.au>)

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