

\$124,000 in penalties for underpayment of charity collector in Sydney

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Penalties totalling \$124,000 against a fundraising company and its director for underpaying a backpacker working as charity-collector in Sydney less than \$8000 send a message about the seriousness of sham contracting, according to the Fair Work Ombudsman.

Australian Sales and Promotions Pty Ltd (ASAP), which has held contracts with charity and not-for-profit organisations to conduct fundraising activities on their behalf, has been penalised \$100,000 in the Federal Circuit Court.

The company's sole director and part-owner Paul Ainsworth has been penalised a further \$24,000.

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

Australian Sales and Promotions and Ainsworth breached sham contracting laws by hiring a 26-year-old British backpacker on a 417 working holiday visa as a charity collector and treating him as an independent contractor, when they knew the Fair Work Act required them to classify and pay him as an employee.

The sham contracting led to the backpacker being underpaid \$7853 in basic employment entitlements for four months of charity collecting work performed in 2013, mostly at shopping centres throughout Sydney.

The sham contracting occurred despite the Fair Work Ombudsman having previously taken legal action against Australian Sales and Promotions for underpaying young sales workers.

The first legal action led to the company being penalised \$23,000 in Court in 2013 for underpaying five sales workers – including 417 visa-holders from the US and Taiwan – more than \$9000 after misclassifying them as contractors.

In the latest matter, Australian Sales and Promotions and Ainsworth told the charity collector he was an independent contractor operating his own business and required him to obtain an Australian Business Number (ABN) and invoice another company operated by Ainsworth (PMA Unit Pty Ltd) to receive payment.

The charity collector had never operated a business before and had no sales experience – and the company exercised a high degree of direction, supervision and control over his duties.

The charity collector was paid on a commission basis, earning a daily rate as low as \$50 to \$67, rather than the minimum hourly rate and casual loadings he was entitled to as a casual employee.

Australian Sales and Promotions also contravened workplace laws by requiring the charity collector to spend a total of \$465 on public liability insurance and other fees. Record-keeping laws were also contravened.

After the charity collector lodged a complaint, the Fair Work Ombudsman investigated and Australian Sales and Promotions back-paid him in full.

However, the Fair Work Ombudsman commenced legal action because of the seriousness of the contraventions and because the company had clearly been put on notice not to misclassify employees as contractors.

Judge Robert Cameron found that the company and Ainsworth had deliberately contravened the Fair Work Act, saying it was their intention “to enjoy the financial benefit of paying (the charity collector) as an independent contractor while also enjoying the power and authority of an employer in the control it exercised over him in the course of his work”.

Judge Cameron said that “the interposition of PMA between ASAP and (the charity collector) was designed to create some form of labour-hire arrangement which would distance ASAP from any potential employment relationship”.

However, the relationship between PMA and ASAP was not “an arm's-length relationship”, Judge Cameron said.

“Persons should understand that attempting to evade the minimum employment conditions provided by the Fair Work Act by contriving to make employees independent contractors can have serious financial consequences of an adverse kind,” Judge Cameron said.

Judge Cameron found that in seeking donations and pledges, the charity collector's “remuneration depended entirely on how

successful he was in that speculative undertaking”.

Judge Cameron found that the charity collector’s unfamiliarity with Australia and its employment laws “placed him in a position of particular vulnerability” and the underpayments had caused him difficulties, financial insecurity and reduced the ability for him to enjoy his time in Australia.

The conduct of Australian Sales and Promotions and Ainsworth had “frustrated the purpose of (the charity collector’s) visa and his visit to Australia”, Judge Cameron said.

The Fair Work Ombudsman submitted evidence in Court that Australian Sales and Promotions, as recently as this year, continued to place job advertisements targeting transient and potentially vulnerable workers.

Judge Cameron found that the company and Ainsworth had failed to “demonstrate contrition or willingness to not repeat the contravening conduct”.

Fair Work Ombudsman Natalie James says the Court’s latest decision sends a message that serious consequences apply for employers who exploit corporate structures to try to deny vulnerable employees their basic lawful entitlements.

“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,” Ms James said.

“Where there is evidence of sham contracting occurring, the Fair Work Ombudsman and the Courts will look behind the often carefully crafted legal documents and structures to determine the true state of affairs for affected workers.”

Ms James says the case serves as another warning that business models and supply chains that involve exploitation of vulnerable workers are not acceptable and will not be tolerated.

“We are currently looking at the way the charity sector engages workers, in particular for their fundraising activities as part of a National Inquiry,” she said.

“This follows concerns about the exploitation of young charity collectors and misclassification of employees as independent contractors by companies engaged to carry out fundraising on behalf of charities.”

Ms James says the Court’s decision clearly highlights the dangers of companies using artificial triangular arrangements under which they purport to engage labour from another company that is set up for little other reason than to provide it with labour.

Earlier this month, the Fair Work Ombudsman revealed that it had recovered \$1.9 million for 1500 cleaners at Oaks Hotels & Resorts Ltd after they were misclassified as independent contractors in a triangular relationship involving a subsidiary entity established by Oaks.



“There is a difference between legitimate contracting and labour-hire arrangements and an artifice used to try to avoid lawful obligations to workers who should properly be classified as employees,” Ms James said.

Employers and employees seeking assistance can visit 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.

Details of the Fair Work Ombudsman’s first legal action against Australian Sales and Promotions are available in the media release: [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) .

Details of the Fair Work Ombudsman’s Inquiry into the supply chains of major charities are available in the media release: [Australian charities face scrutiny in new Inquiry \(www.fairwork.gov.au/about-us/news-and-media-releases/archived-media-releases/2016-media-releases/october-2016/20161006-charity-inquiry-mondial-release\)](http://www.fairwork.gov.au/about-us/news-and-media-releases/archived-media-releases/2016-media-releases/october-2016/20161006-charity-inquiry-mondial-release) .

Details of the Fair Work Ombudsman’s recovery for cleaners at the Oaks’ hotels is available in the media release: [Cleaners at Oaks Hotels & Resorts back-paid \\$1.9 million \(www.fairwork.gov.au/about-us/news-and-media-releases/archived-media-releases/2016-media-releases/november-2016/20161109-oaks-cleaners-back-pay\)](http://www.fairwork.gov.au/about-us/news-and-media-releases/archived-media-releases/2016-media-releases/november-2016/20161109-oaks-cleaners-back-pay) .

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