Accountant liable as third party accessory to client's fair work breaches

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The decision of Judge O'Sullivan in *Fair Work Ombudsman v Blue Impression Pty Ltd & Ors* [2017] FCCA 810 is the most recent decision in a line of authority that has found individuals and corporate entities liable for contraventions of the *Fair Work Act 2009* ('***FW Act***'). This decision is of particular relevance given it is the first time the Fair Work Ombudsman ('**FWO**') has named a third party accounting firm as an accessory to the contraventions of its client.

Snapshot

- Under s 550(1) of the *Fair Work Act 2009* (Cth) a person who is 'involved in' a contravention of a civil remedy provision is taken to have contravened that provision as an accessory.
- *Fair Work Ombudsman v Blue Impression Pty Ltd & Ors* [2017] FCCA 810 is the first case in which the Fair Work Ombudsman has named a third party accounting firm as an accessory.
- In order to minimise exposure to liability as an accessory, third party advisers are encouraged to scrutinise their client's compliance with workplace laws and supply chain arrangements.

Background

In 2014, the FWO identified Blue Impression Pty Ltd ('**Blue Impression**') as having contravened the *FW Act* when it failed to pay the minimum hourly rate of pay and entitlements owing to an employee, or provide meal breaks, as required under the *Fast Food Award 2010* ('**the Award**'). After Blue Impression failed to remedy those contraventions proceedings were commenced by the FWO against Blue Impression and two other respondents, one of whom was Ezy Accounting 123 Pty Ltd ACN 105 317 691 ('**Ezy**'), a tax and accounting business that provided services to Blue Impression.

The Federal Circuit Court proceedings which are the subject of this article concerned whether Ezy was liable as an accessory for its involvement in the admitted contraventions of the *FW Act* by Blue Impression.

Accessorial liability

Under s 550 (1) of the *FW Act* a person who is 'involved in' a contravention of a civil remedy provision is taken to have contravened that provision. A person is involved in a contravention of a civil remedy provision if the person has:

- aided, abetted, counselled or procured the contravention (s 550 (2)(a));
- induced the contravention, whether by threats, promises or otherwise (s 550 (2)(b));
- been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention (s 550 (2)(c)); or
- conspired with others to effect the contravention (s 550 (2)(d)).

A 'person' for the purposes of s 550 can be an individual or a corporate entity. This means external corporate advisers (like Ezy) may be found liable as an accessory for civil remedy contraventions of the *FW Act* by their clients.

'Involved in' a contravention and wilful blindness

O'Sullivan J set out relevant authorities that have considered whether a person is 'involved in' a contravention and liable as an accessory (at [17]-[25]).

To be 'involved in' and knowingly concerned in a statutory contravention, a person (either an individual or corporation) must have:

- engaged in conduct which implicates or involves that person in the contravention such that there is a 'practical connection' between that person and the contravention (*Qantas Airways Ltd v Transports Workers' Union of Australia* [2011] FCA 470; (2011) 280 ALR 503 at [324], [325]; *Ashbury v Reid* (1961) WAR 49);
- been, at the time of the contravention, an intentional participant with actual knowledge of the essential elements constituting the contravention (*Yorke v Lucas* [1985] HCA 65; (1985) 158 CLR 661, 670).

Imputed or constructive knowledge of the contravention will usually be insufficient to establish that a person was involved in a contravention (*Young Investments Group Pty Ltd v Mann* [2012] FCAFC 107 at [11]; (2012) 293 ALR 537 at 541). However, as became particularly relevant in this case, actual knowledge can be inferred from a combination of: (i) a person's knowledge of suspicious circumstances; and (ii) that person's decision not to make enquiries to remove those suspicions (*Fair Work Ombudsman v South Jin Pty Ltd* [2015] FCA 1456 at [231]; *Giorgianni v The Queen* [1985] HCA 29; (1985) 156 CLR 473 at 505). This failure to act is known as wilful blindness.

Ignorance of the law is no defence to a contravention

It often comes as a surprise to accessories (and even to those advising them) that, to be held liable for a contravention, a person with knowledge of the essential elements making up a contravention does not need to know that those elements amount to a contravention (*Yorke v Lucas* at 667; *Rural Press Ltd v Australian*

Competition and Consumer Commission [2003] HCA 75; (2003) 216 CLR 53 at [48]; *Fair Work Ombudsman v South Jin Proprietary Limited* at [229]).

That means a person can be liable as an accessory even though they were unaware their conduct would amount to breach of the relevant statute. There is, however, conflicting case law on the amount of knowledge an accessory is required to have in relation to contravention of a modern award (at [21]-[22]).

The liability of Ezy

It was alleged by the FWO that Ezy was an intentional participant in the underpayment contraventions by Blue Impression. The FWO argued that Ezy, who provided all of the payroll services for Blue Impression, failed to ensure the MYOB software it was using reflected updated Award rates.

The FWO claimed Mr Eric Lau, the director of Ezy, and his wife Ms Lina Hii, knew the Award applied and the correct rate of pay due under it because Mr Lau corresponded with the FWO in March 2014 in relation to its audit of a restaurant operated by Blue Impression. As part of that audit Mr Lau was advised by the FWO that the Award applied to employees of the restaurant, and also received advice from Blue Impression's employment law advisers regarding its obligations under the *FW Act* and the Award.

According to the FWO, after he was put on notice of the correct Award rates and entitlements, Mr Lau acted with wilful blindness by failing to ask questions or take any basic steps to check that the rates in his MYOB system were correct.

Ezy denied possessing the knowledge attributed to it by the FWO. It claimed its role was confined to simply inputting payroll information provided by Blue Impression into its MYOB system. Mr Lau gave evidence that he did not question the pay rates provided to him by his client - rather, he just processed what he was given.

It was also claimed by Ezy that, as Mr Lau was not aware the employee the subject of the underpayment contravention worked for Blue Impression, Ezy couldn't be liable as an accessory in respect of his specific underpayment. That argument was not accepted by the FWO which submitted that Mr Lau, and Ezy through him, was aware of the system that led to the employee being underpaid as it operated the payroll software that led to the non-compliance. Mr Lau's deliberate abstention from making inquiries regarding the correct rate of pay to apply in Ezy's payroll software was sufficiently egregious, according to the FWO, to enable a finding of wilful blindness.

The Court's finding

O'Sullivan J was satisfied Mr Lau was the operative mind of Ezy and responsible for arranging for the employee to be paid and the production of payslips throughout the relevant period. Mr Lau was therefore aware of the duties performed by the employee, the amount he was paid, and the hours that he worked.

Once Mr Lau received the audit letter from the FWO he knew the Award provided for ordinary rates of pay, allowances and breaks applicable to employees of his client. According to his Honour, it followed that Ezy must have known:

- the rates maintained in its payroll system were not sufficient to allow Blue Impression to comply with its Award obligations; and
- Blue Impression was underpaying its employees, including the employee the subject of the contraventions.

His Honour found it 'risible' to suggest that even the most basic query would not have revealed the employee was not receiving the relevant minimum hourly rate and associated entitlements. Instead of asking the appropriate questions of his client, Mr Lau deliberately shut his eyes and failed to update Ezy's payroll system with the 'inevitable' result that Award breaches occurred (at [108]).

Observations

This case is an extension of the *FW Act* accessorial liability provisions to third party external advisors. It seems very likely, given the successful prosecution of Ezy, that the FWO will continue joining businesses and individuals who provide advice to clients (such as accountants, management consultants, and perhaps even lawyers) as accessories to breaches of the *FW Act*.

In order to minimise exposure to liability as an accessory, this case suggests it is incumbent on advisers and service providers who have knowledge of the terms and conditions of employment applying to their clients' employees, and who provide advice or services in respect of those matters, to familiarise themselves with the relevant industrial instruments that cover employees. Armed with that knowledge, it is prudent for advisers to take an active role in analysing the information provided to them and query any discrepancies against the industrial instrument.

In addition to employers, the FWO has acknowledged that businesses in a position of power within a supply chain can also be liable as accessories. The type of corporations that have already been named as accessories and 'involved in' contraventions include principals who control the performance of work of subcontractors, and franchisors. Advisers are encouraged to scrutinise their client's supply arrangements, including contracts and tender documentation, to ensure compliance with workplace laws. Whether prices offered are sufficient to offset entitlements owed under modern awards and enterprise agreements should be a key consideration.

Vigilance is particularly important given the Federal government has indicated a willingness to strengthen the liability provisions in the *FW Act* in relation to franchisors and holding companies via the introduction of the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Cth). At the time of writing the Bill has yet to pass through the Senate.

Perhaps the most important message for advisers arising from this case is that a failure to make enquiries of a client will not excuse contravening conduct. **LSJ**