

JANUARY 2017

Recent penalties for underpayment claims serve as a stark warning for employers

Failure to pay employees the minimum monetary entitlements (including wages, allowances or penalties) prescribed by a modern award can lead to the imposition of significant penalties for employers.

Recent penalties in underpayment claims highlight the need for employers to ensure they comply with workplace legislation and industrial instruments. We have seen the Courts willing to impose significant penalties, even in cases where employers have made seemingly innocuous errors which caused relatively minor underpayments.

Recently, in *Fair Work Ombudsman v Cuts Only The Original Barber Pty Ltd & Ors*, the Federal Circuit Court fined the employer \$50,160 and each of its directors \$10,032 for underpaying an apprentice approximately \$8,000. In handing down its decision, the Court noted that it was important to send a message to the broader industry that failure to pay workers their correct entitlements is not acceptable.

Employers are not only at risk of the imposition of penalties – the Fair Work Ombudsman (FWO) can seek to enter into enforceable undertakings to remedy employee underpayments. In June 2016, the FWO secured its largest pay-back payment, after making an enforceable undertaking with a Victorian-based mining services company – it required the employer to reimburse \$2 million to 205 underpaid workers and provide industrial relations training to all managers with HR and payroll responsibilities.

Employers need to continually assess employees' minimum entitlements to achieve compliance and ensure they are not exposed to underpayment claims. We regularly undertake employee entitlement health checks to ensure that our clients are compliant.

How are penalties determined and calculated?

In *Mason v Harrington Corporation Pty Ltd [2007] FMCA 7*, Federal Magistrate Mowbray listed factors that had been taken into consideration by the Federal Court in several different underpayment matters in determining a penalty. These included:

- the nature and extent of the conduct
- the nature and extent of any loss or damage
- whether there had been similar previous conduct by the respondent
- whether the breaches were properly distinct or arose out of one course of conduct
- the deliberateness of the breaches
- the extent to which senior management was involved in the breach
- the corporation's contrition, corrective action and co-operation with enforcement authorities
- general deterrence.

Hotel pays more than \$300K in damages for sexual harassment

The Queensland Industrial Relations Commission (QIRC) has ordered a hotel and its night caretaker to pay more than \$300,000 in damages for the sexual assault of a female employee after unsolicited sexual advances were made.

The QIRC held that the unsolicited advances constituted sexual harassment and found the hotel and caretaker jointly and severally liable.

The QIRC rejected the hotel's claim that it was not vicariously liable for the assault because it did not occur 'at work' and that it was unable to prevent the assault.

The QIRC held that the hotel did not take reasonable steps to prevent the assault. Crucially, the hotel did not have an anti-discrimination policy in place nor had it taken any meaningful steps to inform or educate its employees about acceptable standards of conduct.

The QIRC noted that had the hotel taken steps to inform its workers and provide training, then it may have avoided responsibility for the unlawful acts of its worker.

This serves as a timely reminder that it is incumbent on employers to ensure that relevant policies and procedures are legally compliant, and that employees are regularly trained on those policies.

We often work with employers to ensure that their policies and procedures are compliant and roll out employee training sessions on those policies.

When was the last time you reviewed your policies and conducted training?

STU v JKL (Qld) Pty Ltd & Ors

Recent developments for employers

On 1 December 2016 the Queensland Industrial Relations Bill was passed. The bill impacts employers in the following ways:

- As of this year, **Easter Sunday is now a public holiday in Queensland.**
- **The QIRC will now hear all work-related anti-discrimination matters.**
- The Queensland public sector industrial landscape now includes:
 - **a general protections jurisdiction** - allowing employees to claim adverse action;
 - **an anti-bullying jurisdiction** - allowing employees to apply to the QIRC for a stop bullying order; and
 - **the expansion of core employee standards** - including domestic violence leave, and flexible working arrangements.

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