

Employment & Safety Alert June 2011

A cautionary tale for Human Resource Managers

A recent decision of the Federal Magistrates' Court acts as a warning to Human Resources Managers (**HRM**) that they must be aware of compliance obligations, rather than simply focussing on recruitment and day to day activities.

The decision also highlights the tension that can arise for HRMs when management issues directions that are contrary to legislative requirements. In this case, simply following the directions of management was an insufficient defence to an allegation that an HRM had engaged in breaches of the *Workplace Relations Act 1996* (Cth) (**Act**).

FWO action against Centennial and HRM

In 2010, the Fair Work Ombudsman (**FWO**) commenced proceedings against Centennial Financial Services (in liquidation) (**Centennial**), Rolf Mertes (the sole director and shareholder of Centennial) and Christopher Chorazy (Centennial's HRM) in relation to breaches of the Act.

The breaches predominantly related to a sham contracting arrangement whereby employees (known as Corporate

Associates) were dismissed as employees and then re-engaged as contractors and paid on a commission only basis.

Centennial was trying to reduce its costs by engaging the Corporate Associates as contractors. To achieve this, Mr Mertes directed the HRM, Mr Chorazy, to prepare the contractor agreement in accordance with a precedent document.

The Corporate Associates were advised of the change in their positions at a meeting with Mr Mertes and Mr Chorazy. At this meeting Mr Chorazy explained the terms of the contractor agreement and provided a sample tax invoice for use by the Corporate Associates.

Federal Magistrate finds HRM personally liable

In November 2010, Federal Magistrate Cameron determined that the company, sole director Mertes and the HRM had each breached the Act through underpayments and sham contracting. The breach included a failure to pay statutory entitlements and accrue annual leave, threats to dismiss employees for the dominant purpose of rehiring them as an independent contractor and failure to keep records concerning terminations, leave accruals and payments in accordance with the Act.

In his submissions to Federal Magistrate Cameron on penalty, Mr Chorazy claimed that, other than recruitment, he did not carry out human resources functions and that his responsibilities were limited to placing advertisements in newspapers and conducting interviews. He submitted that he had merely been following the instruction of Mr Mertes and had not had any input into the decisions that gave rise to the contraventions. He also claimed that

the FWO's action had ruined his career and contributed to a substantial reduction in his income.

In his decision on penalty, the Federal Magistrate said:

'I am willing to accept that Mr Chorazy was overborne by Mr Mertes and exercised no independent judgement...Nevertheless, as human resources manager, he should have been aware of, and at least attempted to give advice on, Centennial's obligations under the [Act]'. (emphasis added)

The Federal Magistrate also noted that Mr Chorazy's failure to focus on issues of compliance was a deficiency that had not been properly explained.

Mr Chorazy never provided, nor was he asked to provide, advice to Mr Mertes on making the Corporate Associates contractors or whether a change to commission-only payments complied with the Commercial Travellers Award. Although not aware that it was a breach of the Act, the HRM knew the Corporate Associates were not being paid wages, were not accruing annual leave and were not accruing or being paid superannuation contributions. The Federal Magistrate held that, in the circumstances, a qualified and experienced human resources manager would have raised concerns about the lawfulness of the arrangements.

Federal Magistrate Cameron imposed a penalty of \$13,200 on Mr Mertes and \$3,750 on Mr Chorazy as a result of their contravention of the Act.

In making the orders, Federal Magistrate Cameron found that:

- the contraventions were deliberate, arising out of a desire to reduce payroll costs;
- the contraventions would probably have continued indefinitely;
- the defendants did not show contrition;
- significant amounts remained unpaid to the Corporate Associates;
- it was necessary for the FWO to issue final notices and commence proceedings in order to rectify the contraventions because of the limited cooperation from the Respondents; and
- specific deterrence was a consideration to prevent the Respondents engaging in this behaviour in future.

What should HRMs learn from this decision?

HRMs must understand and comply with relevant legislative requirements. Ignorance of the law or turning a blind eye to suspected contraventions will not excuse HRMs from liability. HRMs should ensure that they obtain, and pass on to management, adequate formal legal advice in relation to any decisions involving the engagement of independent contractors.

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