

EMPLOYER HIT WITH HEFTY PENALTIES FOR SHAM CONTRACTING

25 AUGUST 2017 | EMPLOYER'S LIABILITY

The High Court found an employer contravened the sham arrangement/contracting provisions of the *Fair Work Act 2009* (Cth) (the FW Act). The proceedings were then remitted to the Federal Court which imposed hefty penalties.

In Issue

- Breaches of sham contracting provisions of the FW Act (including dismissal of employees to re-engage them as contractors)

The Background

Quest South Perth Holdings Pty Ltd (Quest) operated a business which provided serviced apartment accommodation (the business). Mr Ashvin Luchmaya, a manager of the business, engaged a contract labour hire company, Contracting Solutions Pty Ltd (CS) to convert Quest's housekeeping and reception employees into independent contractors (the arrangement).

The arrangement affected two housekeepers and a receptionist. With respect to the housekeepers, the arrangement only changed the entity they were paid by as they carried out the same work in the same way and Quest continued to have control over and direct the housekeepers. The receptionist failed to complete the conversion documentation and only did so after Mr Luchmaya made threats of dismissal. Shortly after the receptionist completed the conversion documents, Mr Luchmaya (on Quest's behalf) advised CS that Quest no longer required the receptionist's services.

In May 2011, the Fair Work Ombudsman (FWO) commenced proceedings against Quest, CS and Mr Luchmaya, seeking declarations and penalties as a result of their contraventions of section 357 and 358 of the FW Act (the proceedings). Section 357 prevents an employer from "*misrepresenting an employment relationship as an independent contracting relationship*". Section 358 prevents an employer from dismissing or threatening to dismiss an employee as a means of re-engaging him or her as an independent contractor.

History of litigation

The proceedings have been subject to a substantial amount of litigation having been heard in the Federal Court, the Full Court of the Federal Court and the High Court. The Federal Court found that Quest and Mr Luchmaya only contravened section 358 of the FW Act. The FWO appealed the Federal Court's decision to the Full Court which dismissed FWO's appeal. The

FWO was granted special leave to appeal the Full Court's decision to the High Court. The High Court allowed FWO's appeal; found that Quest also contravened section 357 of the FW Act with respect to each housekeeper; and ordered the proceedings be remitted to the Federal Court to determine the appropriate penalties.

[The Federal Court's decision regarding penalties](#)

When determining the penalties to be imposed, the Federal Court considered a number of factors including the following: the size of Quest and senior management's involvement; whether the contraventions were deliberate; and whether Quest and Mr Luchmaya cooperated, demonstrated contrition or corrective action with enforcement authorities.

The Federal Court deemed the following penalties appropriate: Quest pay a penalty of \$33,000 for two contraventions of section 357 of the FW Act (being 50% of the maximum penalty); Quest pay a penalty of \$21,450 for contravening section 358 of the FW Act (being 65% of the maximum penalty); and Mr Luchmaya personally pay a penalty of \$4,290 for contravening section 359 of the FW Act with respect to his involvement in Quest's contravention of section 358 of the FW Act (being 65% of the maximum penalty).

[Implications for you](#)

An employer breaches its obligations to its employees, competitors and industrial relations legislation generally when it engages in sham contracting arrangements. This is because employees are no longer protected by the minimum standards provided by industrial relations legislation and competitors who comply with their obligations suffer as the employer gains an unfair competitive advantage. Employers should therefore exercise caution when defining an individual's relationship as one of employment or independent contractor as this case clearly demonstrates that an employer's involvement in sham contracting arrangements will result in substantial penalties being imposed against them.

[Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd \(No 4\) \[2017\] FCA 580](#)

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