

“VISION IN THE WORKPLACE”

July 2016

In this edition of *Vision in the Workplace*, we explore the issues associated with the underpayment and exploitation of worker rights through the recent penalties imposed on multiple 7-Eleven franchises. We also consider a recent decision of the Federal Circuit Court, where serious misconduct resulted in a repudiation of certain rights in the employment contract under the *Fair Work Act 2009* (Cth).

7-Eleven Exploitation raises significant Work Health and Safety concerns

Significant work health and safety issues within 7-Eleven stores have been exposed by an independent Fairness Panel which was established by Allan Fels, the former chairman of the Australian Competition and Consumer Commission. One former 7-Eleven worker, Mr Sam Pendem, has made an appeal to the panel alleging a breach of his workplace rights.

The work health and safety issues associated with Mr Pendem’s work at 7-Eleven include:

- Working shifts of up to 16 hours without proper breaks;
- During an armed robbery, the franchisee instructed Mr Pendem that he “*should fight*” rather than “*hand over the money*”, ostensibly prioritising money over the safety of his employee; and
- Mr Pendem was overworked, effectively doing the job of two people at the store.

7-Eleven’s failure to satisfy its work health and safety obligations remained unchallenged for years as the long hours which breached Mr Pendem’s visa conditions gave the franchisee leverage, because the franchisee could threaten to cancel his visa if he ever complained about his salary or working conditions.

However, since the establishment of the Fairness Panel hundreds of claims have been processed and more than \$12 million in fines have been ordered against the 7-Eleven to compensate the workers for exploitation.

Stevens and Associates Lawyers would be delighted to assist you to ensure your business is able to satisfy its work health and safety obligation. If you have any queries please contact Nick Stevens, Megan Cant or Jane Murray.

Concerned about your Work Health and Safety exposure?

Stevens & Associates Lawyers offers a comprehensive work health and safety service tailored to your business, which includes conducting an audit of your existing policies and procedures (including site visits).

Please contact Nick Stevens, Megan Cant or Jane Murray to discuss our suite of work health and safety services.

Beware: Heavy penalties for underpayment of employees

The Fair Work Ombudsman (‘FWO’) recently secured its largest penalty against a 7-Eleven franchise which “*systematically exploited its employees*” and manipulated financial data in order to deceive payroll processes. The investigation into the franchise was conducted as part of an ‘audit campaign’ by the Office of the FWO into the employment practices of 7-Eleven stores generally.

The investigation revealed that the franchisee had refused to pay its employees according to the *General Retail Industry Award*, which governed their employment. Instead, the franchisee had deliberately disregarded employee entitlements and rights.

Further investigation revealed a sophisticated system of data manipulation and false record keeping, designed to protect the various underpayments from being discovered.

The total value of the underpayments was estimated at \$82,000 affecting 12 employees.

Furthermore, the FWO found that the franchisee secretly demanded the employees to return thousands of dollars of back pay, that was intended to rectify a small amount of the substantial underpayment.

Judge Jarrett ruled that significant penalties should be imposed on the respondents because of the serious nature of their conduct.

Both Respondents admitted to the following contraventions:

- Knowingly applying rates of pay below the lawful minimums;
- Entering inaccurate data into the company's payroll system;
- Knowingly providing false records to the FWO; and
- Accepting back payment amounts that were intended as rectification for the contraventions.

The Judge fined both Mr Mai, the owner of the store, and Mr Lo, the operator of the store, \$425,363 and \$85,073 respectively. This serious financial penalty, which stands at 75% of the maximum penalty, was awarded due to the Respondents "*contemptuous disregard*" for Australian workplace laws, demonstrated by their "*systematic exploitation of employees*" and "*persistent attempts*" to deceive Fair Work Inspectors."

Finally, Judge Jarrett hoped that this penalty would act as a general deterrent to this type of conduct in the retail industry, and more specifically in the 7-Eleven franchise network, which claims it has paid \$700,000 to 21 underpaid employees since it moved its rectification process in-house.

If you would like more information about issues relating to underpayments please don't hesitate to contact Nick Stevens, Megan Cant or Jane Murray.

Termination without notice valid?

An accountancy firm manager's appeal for unfair dismissal has failed after he secretly attempted to sell part of his employer's business to Macquarie Bank for a \$5 million personal profit. Andrew Baird (**'the Applicant'**) sought \$122,512.50 in liquidated damages from Crowe Horwath (Aust) Pty Ltd (**'the Respondent'**) contending that his dismissal constituted contending that his dismissal constituted a contravention of the *Fair Work Act 2009* (Cth) (**'the Act'**).

The Respondent contended that Mr Baird's conduct constituted serious misconduct, warranting dismissal without notice under section s123(1)(b) of the Act. This section provides that an employee terminated "*because of serious misconduct*" is not covered by the division within the Act relating to notice of dismissal.

The Applicant's alleged misconduct involved:

- Soliciting clients from the Respondent;
- Convincing employees from the Respondent to join a new business venture; and
- Meeting with Macquarie Capital's executive director to discuss the sale of part of the Respondent's business.

Furthermore, the Court heard that the Applicant had prepared a business proposal for Macquarie which valued his employer's business at \$315 million, the potential to make a profit of \$100 million and that he sought to make \$5 million for both himself and his colleague.

Judge Wilson found that the Applicant's plan to profit at the expense of his employer breached his fiduciary obligation to his employer, which required him to act in the best interests of the Respondent rather than his own self-interest.

The Court also acknowledged that soliciting both company clients and employees reinforced that the Applicant's actions were motivated by self-interest.

For further information on workplace misconduct and employee rights under the *Fair Work Act 2009* (Cth) please contact Nick Stevens, Megan Cant or Jane Murray.

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