

# A VISION IN THE WORKPLACE

## This edition includes:

- The Fair Work Ombudsman continues to crack down on businesses who are underpaying their workers;
- A reminder for employers that termination via text message is highly inappropriate; and
- An employee was awarded his legal costs by the Fair Work Commission because his Canadian employer engaged in “unreasonable behaviour” including not attending the hearing and failing to obtain Australian legal advice.



## ***Fair Work Ombudsman “warns employers to ensure they are paying their staff correctly”***

In recent *Vision in the Workplace* articles we reported that the Fair Work Ombudsman (**the FWO**) has pledged

to crack down on businesses and employers that underpay their staff. Since making that commitment to hold businesses accountable, we have seen a substantial increase in the number of businesses that have been monitored, investigated and ultimately penalised for underpaying their workers. With some companies self-reporting in an effort to minimise any penalties. Here are some of the more recent individuals and businesses that have found themselves in hot water with the FWO:

### **George Calombaris, Made Establishment.**

The celebrity chef, George Calombaris, who judges on the Australian show *Masterchef*, has been fined after admitting to underpaying workers \$7.83 million in wages across his hospitality empire and company, Made Establishment.

Mr Calombaris was slapped with a \$200,000 ‘contrition payment’ and must also make a number of public statements to promote compliance with the Fair Work Act. The Company must also pay external auditors every year until 2022 to ensure that pay and conditions are correct for all employees across all restaurants.

### **Sydney businessman, Kit Antony (Tony) Lam**

A Sydney businessman Tony Lam has been accused of underpaying his nanny up to \$155,178, requiring his employee to work between 88 and 106 hours a week and paying her only \$2.33 per hour.

The FWO has launched proceedings in the Federal Court against Mr Lam alleging “the worker in this case was vulnerable to exploitation...and did not know what her workplace rights were”; Mr Lam’s wife, Ms Ming Wei

# A VISION IN THE WORKPLACE

Tong, will also face court for her alleged involvement in requiring the nanny to work unreasonable hours.

## Michael Hill

The Michael Hill jewellery chain announced in early July that it had inadvertently underpaid workers by \$25 million over the past six years. The FWO stated it was not made aware of the underpayment before the company announced it publicly but that it was "concerned by the scale of the reported underpayments" and would be contacting the company directly.

## Super Retail

In February of this year, the retail group that owns Supercheap Auto, Rebel Sport and Macpac announced it had underpaid its workers \$32 million over the past six years as it failed to apply overtime rates properly.

The retail giant is currently engaging in discussions with the FWO in relation to this substantial underpayment. The FWO is yet to decide on the penalties that could be applied for the breaches.

## Wage theft: What does this mean for employers?

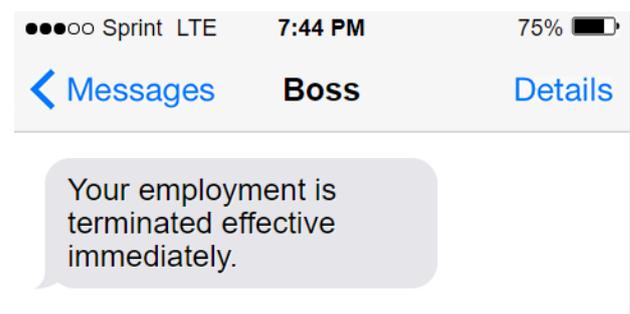
It appears almost certain that the FWO is going to follow through on its promise to crack down on businesses that are underpaying their workers. The maximum penalty that the FWO can impose on a company breaching workplace laws is **\$630,000 per contravention**.

The ramifications for employers don't stop there. The very worst offenders may soon face jail sentences. Prime Minister Scott Morrison, Attorney-General

Christian Porter, former ACCC Chairman Allan Fels, Liberal Senator Eric Abetz and Labor's industrial relations spokesman Tony Burke (among others) have all recently called for employers to face criminal penalties for exploiting workers. It was recently announced that the Attorney-General is currently drafting laws to deal with criminalising worker exploitation.

Employers **must** ensure now more than ever that they are satisfying their obligations under any relevant modern award.

If you have any questions relating to underpaid wages please do not hesitate to contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.



## *Fair Work Commission rejects termination by text message*

The Fair Work Commission (**the FWC**) has reminded employers that terminating employees by text is **not appropriate** and will often constitute unfair dismissal or attract compensation for the employee.

# A VISION IN THE WORKPLACE

Two recent cases which were heard before the FWC on consecutive days both considered the issue of termination by text message. Both Deputy President Sams and Commissioner Cambridge delivered scathing rebukes of employers who considered terminating an employee by way of text message appropriate.

## ***Van-Son Thai v Email Ventilation Pty Ltd [2019] FWC 4116 (27 June 2019)***

The first case involved an employee, Mr Thai who was dismissed by text message after working for his Employer for 12 years, following his refusal to work the same hours with a 22% pay cut.

Upon refusing the lower rate of pay and leaving the workplace, Mr Thai received the following text message: "Effective immediately I give notice of termination of your employment, please note you are required to work your notice period... [you] are entitled to 4 to 5 weeks employment termination notice period". Mr Thai served his notice period and filed an unfair dismissal application shortly after.

Deputy President Sams labelled the dismissal by text message "disgraceful and grossly unfair" and went on to accuse his employer of having no "sense of common decency", and of dismissing Mr Thai "in [a] hopeless manner particularly given the applicant's value to the business and his long period of service."

The Deputy President requested more evidence from the parties to determine any amount of compensation payable to the employee.

## ***Kurt Wallace v AFS Security 24/7 Pty Ltd [2019] FWC 4292 (28 June 2019)***

In the second case, Mr Wallace, a casual security guard, was dismissed by text message after working for AFS Security 24 7 Pty Ltd. Mr Wallace had worked for the employer for 2.5 days a week for approximately 2 years. His employer provided no reason to Mr Wallace for the termination and in defence of its actions submitted that text message was a "normal method of communication" for the company.

Commissioner Cambridge held that notification of dismissal should occur face to face but for the unlikely circumstance of "genuine apprehension of physical violence or geographical impediment". The Commissioner later criticised the employer's conduct as "plainly unjust, unreasonable, harsh, and, unconscionably undignified" and a "disregard for basic human dignity".

Finding that Mr Wallace ought to have been employed for another 6 months, Commissioner Cambridge awarded him over \$12,000 in compensation.

### **Takeaway for Employers**

These recent decisions reaffirm the FWC's clear position that termination meetings should almost always be conducted in person.

Continued next page...

# A VISION IN THE WORKPLACE



## ***Failing to hire a lawyer proves costly for Canadian Company***

The Canadian-based company GuestTek (**the Company**) have been ordered to pay an employee's legal costs incurred in his unfair dismissal proceedings because of the Company's "unreasonable behaviour" in defending the application.

Commissioner Riordan expressed "sympathy with the Applicant" because of the "frustration [he] experienced" in dealing with the Company's "attitude and inactivity" throughout the process before the Fair Work Commission (**the FWC**). The Commissioner commented that the Company was "difficult to contact", "blasé" and did not take the "basic and necessary steps" to defend the application.

### **The Company's Conduct**

The Commissioner criticised the employer's failure to attend the FWC hearing in Sydney, and rejected its

excuse that it could not locate a legal representative to attend and was confused by the time difference between Canada and Australia.

The Commissioner also referred to a settlement offer made by the employee prior to the FWC hearing, to which he noted the Company refused and responded, "I find your position parasitic and disgusting". Importantly, he formed the view that, had the Company sought legal advice from an Australian lawyer, such an offer may have been accepted and the employee wouldn't have incurred additional legal costs.

The Commissioner also stated that the settlement offer, which put the Company on notice of the employee's intention to rely on the offer in an application for costs, should have prompted the Company to obtain Australian legal advice.

The employee was awarded \$9,125.50 in party to party costs.

### **A Warning for Employers**

The outcome of the employee's costs application demonstrates the pitfalls associated with an employer inadequately defending a matter before the FWC and/or not obtaining legal advice.

If you have any questions, please do not hesitate to contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.

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