

Court sends \$46,000 message for mistake in payments

The Federal Magistrates Court has confirmed that it considers "sending a message" important and that it will impose significant penalties for underpayments even if they are accidental. The Fair Work Ombudsman's prosecution of a Hungry Jack's franchisee who co-operated openly and acted immediately to remedy the underpayments also reflects the growing focus on enforcement.¹

This prosecution highlights that employers can expect to be punished if they make errors resulting in underpayments to employees.

The employer relied on rates of pay information supplied by the Hungry Jack's Pty Ltd Head Office. However, those were found not to contain sufficient information. Various Award provisions had changed and the employer therefore made errors relating to classification of employees, allowances and rates of pay over a period of four and a half years. The total underpayment was around \$105,000 for 100 employees, ranging from as little as 17 cents to as much as \$8,200 each.

When approached by the Ombudsman's office following a complaint, the employer acted promptly to take advice and responded immediately to correct the errors and contact former employees to repay the amounts. However, a prosecution was launched.

The Court fined the employer \$46,200 – which was 20% of the maximum. Whilst acknowledging the mistaken nature of the error, the employer's cooperation and good standing and the complexity of the numerous industrial instruments, the Court found held that: *'Nevertheless, as an employer, the Respondent was required to meet its lawful obligations.'*

It further held that general deterrence was important and that *'there is a need to send a message to the community at large, and employers particularly, that the correct entitlements for employees must be paid and that steps must be taken by employers (of all sizes) to ascertain and comply with minimum entitlements.'*²

Implications for employers

It is clear that the inspectorate and the judiciary are in the mood to enforce the objectives of the legislation. Employers need to be proactive in determining the entitlements of their workforce, as prompt rectification and cooperation with the Fair Work Ombudsman is not sufficient to escape penalties. If you require assistance in understanding your workforce's entitlements and any applicable transition rules that might apply, EMA Consulting can assist.

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¹ *Fair Work Ombudsman vs Chamdale Pty Ltd* [2011] FMCA 1021

² As above, para 35

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