

Employment & Safety Alert

Sham contracting and unlawful termination provisions - Beware!

June 2012

Company director personally liable for sham contracting and unlawful termination

A recent decision of the Federal Court demonstrates how company directors, executive managers and other persons can be held personally liable for breaches of the sham contracting and unlawful termination provisions of the *Fair Work Act 2009* (Cth) (**FW Act**)¹.

The Fair Work Ombudsman brought this case, alleging, amongst other things, that in relation to 9 current/former employees, Maclean Bay Pty Ltd (**Maclean Bay**) had breached:

- the sham contracting provisions, which prohibit:
 - dismissing (or threatening to dismiss) an employee for the sole or dominant purpose of engaging the employee as an independent contractor to perform the same, or substantially the same, work;
 - entering (or offering to enter) into a contract and representing that the contract is one for services even though it is actually a contract of employment; and
- the unlawful termination provisions, which prohibit dismissing an employee because s/he is entitled to benefits under workplace laws.

Maclean Bay owned and operated Diamond Island Resort at Bicheno, Tasmania. Mr and Mrs Wells were the only directors of Maclean Bay. Mrs Wells decided to place all casual staff on independent contracting arrangements in order to eliminate the 'extra worries' associated with payment of superannuation and payroll tax. It appeared

that her aim was not to avoid employee entitlements, but rather administrative efficiency.

In November 2008, Mrs Wells directed Mrs Robinson, the Resort Manager, to speak with all casual staff about obtaining an ABN and entering into independent contracting arrangements.

The positions held by casual staff included receptionist, gardener, hospitality worker, laundry worker, housekeeper and chef. Some of the employees agreed to enter into independent contracting arrangements with Maclean Bay, whilst others refused and their employment was subsequently terminated.

Justice Marshall found that, under the independent contracting arrangements, the newly appointed independent contractors were required to perform substantially the same roles as when they were employees. Further, the contractors were: required to perform their duties at the direction of Maclean Bay; required to wear Diamond Island shirts; and not required to provide any of their own tools or equipment to perform their respective roles.

Justice Marshall also found that Maclean Bay had breached the sham contracting and unlawful termination provisions under the *Workplace Relations Act 1996* (Cth) (**WR Act**). He also found that 'Mrs Robinson engaged in [the] conduct at the direction of Mrs Wells pursuant to the strategy of Maclean Bay, decided in September-October 2008, that all casual staff would become contractors... I am satisfied that Mrs Wells was the sole decision maker in respect of the conduct...'

Justice Marshall ordered Maclean Bay to pay damages for back pay totalling \$37,466.26 to the current and former employees, and also a penalty of \$280,500.

¹ *Fair Work Ombudsman v Maclean Bay Pty Ltd* [2012] FCA 10.

Accessorial liability of the director

In addition to Justice Marshall's finding that Maclean Bay contravened provisions of the WR Act, Mrs Wells, who was described as the 'moving force' in Maclean Bay, was also found to be personally liable for the contraventions of section 902(1) and 901(1) of the WR Act because she was 'involved in' the contravening conduct within the meaning of section 728 of the WR Act.

Although submissions were made on behalf of Maclean Bay and Mrs Wells that the reference to 'employer' alone in section 902(3) shows that section 902 is not capable of attracting accessorial liability, this was rejected by Justice Marshall. Justice Marshall stated that *'there is no reason to construe the reference to employer in section 902(3) as excluding the possibility of **accessorial liability** in anyone who is not the employer but is, nonetheless, involved in the contravention'*.

Given the findings that Mrs Wells was a *driving force* and *guiding hand* behind all the decisions which lead to the Company's contraventions, Mrs Wells was held **accessorily liable** for the related conduct of the Company and was ordered to pay a penalty of \$13,860.

Sections 358 and 550 of the FW Act are cast in almost identical terms to sections 728 and 902 under the WR Act, and so one would expect the courts to apply the FW Act provisions in a similar way.

What must employers be aware of?

To avoid corporate and/or personal liability, company directors and other senior managerial staff must ensure that they act within the scope of the law in their employment arrangements and that they are properly advised about any planned restructuring of the business.

For further information on your obligations, please contact one of our partners below.

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