
THE NEW SOUTH WALES (NSW) SOCIETY OF LABOR LAWYERS

OPTIONS AVAILABLE TO EMPLOYEES TO PURSUE THEIR ENTITLEMENTS WHERE UNDERPAYMENT HAS OCCURRED,
AND OTHER ENFORCEMENT MEASURES VIA THE FWO

Adam Guy | Barrister

H.B. Higgins Chambers | Level 6/82 Elizabeth Street
SYDNEY NSW 2000 | DX 190 Sydney

T: (02) 8998 8373 | F: (02) 8998 8345

E: guy@hbhiggins.com.au

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HOW DOES AN UNDERPAYMENT ARISE?

I. Contraventions of a Modern Award

- Awards (modern awards) are legal documents that outline the minimum pay rates and conditions of employment
- *The Fair Work Act 2009* states that as an employer or senior contractor, you cannot contravene a term of a modern award.

45 Contravening a modern award

A person must not contravene a term of a modern award.

Note 1: This section is a civil remedy provision (see Part 4-1).

Note 2: A person does not contravene a term of a modern award unless the award applies to the person: see subsection 46(1).

2. Contraventions of an Enterprise Agreement

50 Contravening an enterprise agreement

A person must not contravene a term of an enterprise agreement.

Note 1: This section is a civil remedy provision (see Part 4-1).

Note 2: A person does not contravene a term of an enterprise agreement unless the agreement applies to the person: see subsection 51(1).

3. Minimum Wage Contraventions

293 Contravening a national minimum wage order

An employer must not contravene a term of a national minimum wage order.

QUANTIFYING UNDERPAYMENTS (I)

- 1. Determine the applicable award or enterprise agreement**
- 2. Work out how long the employee has been underpaid**
- 3. Work out how much the employee was actually paid**
- 4. Work out how much the employee should have been paid**
- 5. Calculate how much the employee has been underpaid**

OTHER CAUSES OF ACTION (I)

SUPERANNUATION

Superannuation

Under the *Superannuation Guarantee (Administration) Act 1992* (Cth), employers have to pay superannuation contributions of 9.5% of an employee's ordinary time earnings if:

- When an employee is paid \$450 or more before tax in a month and is:
 - (a) over 18 years; or
 - (b) under 18 years and works over 30 hours a week
- This applies to full-time and part-time employees and some casual employees, and includes temporary residents
- Superannuation has to be paid at least every 3 months, into the employee's nominated account

OTHER CAUSES OF ACTION (2.1)

NSW LONG SERVICE LEAVE ACT 1955

3 Definitions

Ordinary pay, in relation to any worker, means the sum of—(a) where the worker is, on the prescribed date, remunerated wholly in relation to an ordinary time rate of pay fixed by the terms of the worker's employment —

- (i) the amount of the ordinary remuneration of the worker, as on the prescribed date, or
- (ii) the average weekly amount of the ordinary remuneration which was earned by the worker as a worker during that part of the period of 5 years ending on the prescribed date during which the worker was so remunerated,

4 Long service leave

- (1) Except as otherwise provided in this Act, every worker shall be entitled to long service leave on ordinary pay in respect of the service of the worker with an employer. Service with the employer before the commencement of this Act as well as service with the employer after such commencement shall be taken into account for the purposes of this section
- (2) (a) Subject to paragraph (a2) and subsection (13) the amount of long service leave to which a worker shall be so entitled shall— (i) in the case of a worker who has completed at least 10 years service with an employer be —
 - (A) in respect of 10 years service so completed, 2 months, and
 - (B) in respect of each 5 years service with the employer completed since the worker last became entitled to long service leave, 1 month, and
 - (C) on the termination of the worker's services after the completion of 15 years service, in respect of the number of years service with the employer completed since the worker last became entitled to an amount of long service leave, a proportionate amount on the basis of 2 months for 10 years service, and
- (ii) in the case of a worker who has completed at least 10 years service but less than 15 years with an employer and whose services with the employer are terminated or cease for any reason, be a proportionate amount on the basis of 3 months for 15 years service, and
- (iii) in the case of a worker who has completed with an employer at least five years service, and whose services are terminated by the employer for any reason other than the worker's serious and wilful misconduct, or by the worker on account of illness, incapacity or domestic or other pressing necessity, or by reason of the death of the worker, be a proportionate amount on the basis of 2 months for 10 years service.

FORUM (I)

FEDERAL COURT AND FEDERAL CIRCUIT COURT

- ***Fair Work Act (FWA) 2009 (Cth) s545 'Orders that can be made by particular courts'***
 - (1) The Federal Court or the Federal Circuit Court may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision
 - (2) without limiting subsection (1), orders the Federal Court or Federal Circuit Court may make include the following:
 - (a) an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention;
 - (b) an order awarding compensation for loss that a person has suffered because of the contravention;
 - (c) an order for reinstatement of a person.

FORUM (2)

ELIGIBLE STATES AND TERRITORY COURTS

- **Fair Work Act (FWA) 2009 (Cth) s545 ‘Orders that can be made by particular courts’**

- (3) An eligible State or Territory court may order an employer to pay an amount to, or on behalf of, an employee of the employer if the court is satisfied that:
 - (a) the employer was required to pay the amount under this Act or a fair work instrument; and
 - (b) the employer has contravened a civil remedy provision by failing to pay the amount.
- (3A) An eligible State or Territory court may order an outworker entity to pay an amount to, or on behalf of, an outworker if the court is satisfied that:
 - (a) the outworker entity was required to pay the amount under a modern award; and
 - (b) the outworker entity has contravened a civil remedy provision by failing to pay the amount.

Fair Work Act 2009 (Cth) s545, ss(3)(3A) **Commentary**

- In *Ervin v Smipat Pty Ltd t/as LJ Hooker Burleigh Heads* [2013] QCATA 153 at [29]:

‘The courts referred to in the FWA form an exhaustive list of appropriate forums in which an employee may choose to commence proceedings against current and former employers.’

DIRECTOR'S LIABILITIES

- **Fair Work Act 2009 (Cth) s550 'Involvement in a contravention treated in same way as actual contravention'**

- (1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.
- (2) A person is involved in a contravention of a civil remedy provision if, and only if, the person:
 - (a) has aided, abetted, counselled or procured the contravention; or
 - (b) has induced the contravention, whether by threats or promises or otherwise; or
 - (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
 - (d) has conspired with others to effect the contravention.

- **Fair Work Act 2009 (Cth) s550, ss(1)(2) Commentary**

- In *Fair Work Ombudsman v Centennial Financial Services Pty Ltd* (2010) 245 FLR 242; [2010] FMCA 863; at [151], Cameron FM stated that:

'Involvement in a contravention ... can only be made out if it is proved that a person has engaged in conduct specified... Thus, to make out involvement it is necessary to allege that a person has engaged in such conduct ... It is also necessary to particularise which acts or set of acts constituted conduct amounting to involvement ... Further, to form the requisite intent the respondent must have had knowledge of the essential matters which have gone to make up the contravention in question ... Consequently, an allegation of accessorial liability requires a pleading that the accessory had actual knowledge of each and every element of the principal's contravening conduct and an election to engage in the relevant conduct; the pleading must assert as material facts that the accessory was sufficiently aware of all the relevant facts going to the contravention...'

REMEDIES

Payment

- Order of the relevant court – ordinarily payable within 28 days
- Payment plans may be entered into or ordered by the Court

Interest

547 Interest up to judgment

- (1) This section applies to an order (other than a pecuniary penalty order) under this Division in relation to an amount that a person was required to pay to, or on behalf of, another person under this Act or a fair work instrument.
- (2) In making the order the court must, on application, include an amount of interest in the sum ordered, unless good cause is shown to the contrary.
- (3) Without limiting subsection (2), in determining the amount of interest, the court must take into account the period between the day the relevant cause of action arose and the day the order is made.

Penalties

- penalties of up to \$12,600 per contravention for an individual
- penalties of up to \$63,000 per contravention for a body corporate
- orders to pay the employee what they're owed (plus interest)
- orders granting an injunction or interim injunction
- orders awarding the employee compensation for loss suffered

RECENT CASES

***Fair Work Ombudsman v Wells* [2019] FCCA 3488 (3 December 2019)**

- Federal Circuit Court has meted out a \$41,040 fine to an NBN subcontractor that was “entirely uncooperative” with FWO proceedings re. non-payment of a teenage labourer
- The company [Attain Solutions] was served with a notice to produce employment records by FWO but failed to respond nor did they participate in the later hearing regarding the matter
- Text messages between the labourer [the NBN subcontractor] and the company director [of Attain Solutions] during his employment demonstrated that he knew that the labourer wasn't being paid
- The contraventions in this matter can only be seen as deliberate
- Judge said the director failed to pay the labourer even though he was invoicing and receiving payments at the time, and even though it warranted in its contracts to comply with its obligations under Commonwealth workplace relations laws
- The company's contravention involved the complete non-payment of the labourer

***Boyson v Centre Court Care Pty Ltd & Anor* [2020] FCCA 229 (6 February 2020)**

- An employer [Finding Centre Court Care Pty Ltd] did not respond to a claim that it short-changed a teenage worker by \$8000 (underpay by 30% of his entitlements) must now pay him an additional \$240,000 in penalties; according to the presiding judge the reasons for this penalty were:
 - (a) Despite its similarity in facts to other cases, the penalty was high because no discount for admission was made,;
 - (b) the director did not participate in the proceedings in any way
 - (c) there was need for general and specific deterrence in this case where the teenage worker was young and vulnerable when engaged by the company
 - (d) The company showed no sign of any contrition or corrective action with their contraventions continuing despite the worker bringing them to the employer's attention, therefore, illustrating an element of contempt on the company's behalf towards the teenage worker's claim
- In approaching the employer regarding his underpayment, he was shouted at and questioned as to whether it [money] was all he cared about; on another point, he was directed to drive a forklift, even though he lacked the appropriate license, and in effect, was deemed irresponsible and before resigning was accused of stealing \$30 of petty cash

OTHER ENFORCEMENT OPTIONS

The Fair Work Ombudsman (FWO)

- FWO offers education and assistance to employees and employers who may have workplace disputes (including underpayments.)
- The Ombudsman provides the following advice in respect of underpayments:
 - (1) check with your employer to determine whether a genuine mistake was made. Many issues can be resolved simply; or
 - (2) If your employer becomes obstinate or has purposely underpaid wages, you should make a written request of him or her to fix the situation. At this point, it may be wise to consult with a solicitor or your union representative, as well; or
 - (3) When these avenues have been exhausted, make a complaint to the Fair Work Ombudsman. The Ombudsman may recommend Assisted Voluntary Resolution, which is a process undertaken to assist the employer and employee to find a mutually acceptable resolution, before commencing a full investigation. It is a relatively quick process often complete within 40 working days of the lodgement of the complaint; and
 - (4) Thereafter, the Fair Work Ombudsman may initiate a full investigation for all unresolved issues and litigation is an option.