

# ALERT

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## HR Managers Beware: Rise in Findings of Personal Liability

It is a common misconception that only companies and/or their directors may be held liable for any breaches of applicable employment and workplace relations laws. In fact, under the *Fair Work Act 2009* (Cth) (**FW Act**) any person "involved" in a breach of the Act may be held liable for it, including any managers responsible for staff and the HR function at a business. Indeed, there appears to have been an increase in cases this year where HR Managers have been found personally liable for the part they played in a breach of the FW Act by their employer and incurred significant fines as a result.

### Accessorial Liability

In summary, the FW Act provides that a person who is "involved" in a contravention of the FW Act is taken to have contravened that Act, and will thereby be liable for a fine of up to \$10,800 per breach. This is in addition to any sanction which may be imposed against any others for the contravention, including the employer.

A person is "involved" in a contravention 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 (section 550).

Importantly, case law has established that a person need not know that the conduct in question constituted a breach of the FW Act in order to be "involved" in a contravention. Further, the cases have made it clear that it is no defence to personal liability for a Manager to say that they were simply doing what they were told by a director or more senior manager.

In a recent case, the Federal Circuit Court of Australia fined construction company Baulderstone \$25,000 for taking adverse action against a worker who resigned his union membership, and



also imposed \$7,000 in penalties against two of the Company's HR Managers who followed the directions of one of the Company's Operations Managers in effecting the adverse action (see *Director of the Fair Work Building Industry Inspectorate v Baulderstone Pty Ltd & Ors (No 2)* [2015] FCCA 2129). The Court expressly noted that the two HR Managers "were employed in role in which they were expected to know, or to make it their business to know, Baulderstone's obligations under the FW Act". Further, the two Managers had a choice to inform the Operations Manager that his instructions were improper and to elect not to follow them. However, they failed to exercise that choice.

Similarly, an HR Manager was recently fined \$1,020 by the Federal Circuit Court of Australia for the part she played in her employer's failure to provide a departing employee with the statutory minimum notice of termination (*Cerin v ACI Operations Pty Ltd & Ors* [2015] FCCA 2762). In that case, the employer provided the employee with payment in lieu of 1 months' notice of termination in circumstances where the employee was entitled to 5 weeks' notice of termination under the National Employment Standards (**NES**). The employer was also ordered to pay \$20,300 in penalties for the breach.

## Lessons for employers

Recent cases suggest that individuals are increasingly being held liable for breaches of the applicable employment and workplace relations laws in addition to their employer. This is not just directors of companies, but also HR Managers and those responsible for managing staff. It is therefore more important than ever that those who are responsible for the HR function at a workplace ensure that they understand the applicable obligations under the FW Act and that their business is complying with them. If a breach is found to have been committed, it will not be a defence for a Manager to claim that they were simply doing as they were told.

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