Third Party Liability under the Fair Work Act

- **Section 550 of the *Fair Work Act* 2009 (Cth) provides:**

  (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.*

  An employer can be penalised up to $63,000 per contravention, whilst a manager of the employer can be liable for up to $12,600 per contravention.

- ***EZY Accounting 123 Pty Ltd v Fair Work Ombudsman* [2018] FCAFC 134**

  In the first instance, EZY Accounting (**EZY**) through its sole Director Mr Lau, was found to be involved in its client's underpayment of wages.

  EZY disputed liability on the basis its role was simply to enter data into a payroll system and that it did not have instructions or authority under its retainer to review hours worked or rates paid to employees.

  In drawing on the findings made in the first instance, the Full Court of the Federal Court found that;

  - Mr Lau was aware that the Award provided for a base rate of pay for ordinary hours and for additional penalty rates and allowances;
  - Mr Lau knew that "*the rates in* [EZY Accounting's] *payroll system were not sufficient to allow* [Blue Impression] *to comply with the obligations imposed on it by the Award*";
  - The act of facilitating the underpayments knowing them to be underpayments, meant EZY was involved in the contravention;
  - There was a *"practical connection*" between Mr Lau's involvement and the client's contravention;
  - EZY should pay a penalty in the sum of **$51,330,** plus costs.

➢ **What can you do to reduce your exposure to liability?**

- Know the current law - review recent case law to better understand the potential exposure and pitfalls;
- Look for irregularities particularly in administrative processes;
- Engage with employees and address concerns or complaints raised;
- Make genuine attempts to rectify a contravention once one has been identified.

Casual employee entitlements & Unfair Dismissal and Facebook

1. When a casual employee should receive entitlements?

WorkPac Pty Ltd v Skene [2018] FCAFC 131

- Mr Skene, a FIFO dump-truck operator employed by WorkPac on a casual basis, claimed that he was entitled to payment of annual leave upon termination of his employment.
- Workpac argued that a "casual employee" is an employee designated as casual by the relevant industrial instrument that covers that employee;
- Mr Skene worked 12.5 hour shifts on a 7 days on, 7 days off roster;
- Mr Skene was provided his roster 12 months in advance.

The full bench of the federal court found:

- the "*essence of casual employment was missing*" and that Mr Skene's continuous roster arrangement was "*regular and predictable*", "*continuous*" and "*not subject to significant fluctuation*".
- there was an expectation that Mr Skene would be available on an "*ongoing basis*", particularly given his roster was provided well in advance.
- Mr Skene's employment contract did not allocate any part of his rate of pay to a casual loading.
- National Employment Standards are at the "pinnacle" of the hierarchy of terms and conditions of employment, and have primacy over terms and conditions of employment provided by all other instruments, including enterprise agreements, modern awards, or contracts of employment.

Tips for employers:

- Review contracts and ensure the payment of casual loading in the employee's employment contract;
- Ensure that there is an element of uncertainty, discontinuity, intermittency of work and unpredictability in the employee's pattern of work.
- Ensure work is not to be continuing or indefinite;
- Review recent case law and keep informed of changes to the law.

2. Employees' social media accounts and what can amount to Unfair Dismissal?

a) *Colby Somogyi v LED Technologies Pty Ltd* (U2016/11018)

- Employee was dismissed following a brief phone call without a reason;
- Employee later learned the reason for the dismissal was his Facebook status which stated *"I don't have time for people's arrogance. And your [sic] not always right! your position is useless, you don't do anything all day how much of the bosses c**k did you suck to get were [sic] you are?".*

- Employee argued that he was not referring to the employer rather a work conflict his mother was involved in. The original post was deleted after five minutes and replaced with a post specifically about his mother's employment;
- The commission found whilst the post used robust language, similar language appeared to have been used in the workplace;
- The commission further found was apparently not provided with a reason for termination at that time of dismissal;
- Finally, the brevity of the telephone conversation meant that the employee did not have an opportunity to respond or put his case in any way before his dismissal.

b) *Luke Colwell v Sydney International Container Terminals Pty Limited* (U2017/9239)

- Employee was dismissed on the grounds of 'wilful misconduct' after he shared a sexually explicit video with 19 colleagues on Facebook messenger;
- The video received a "mixed reaction" by colleagues though nobody had complained;
- Employee later posted an apology on Facebook when learning some of his colleagues had been offended by the video;
- Employee went on leave during which time the employer asked him to respond to claims of the video. The employee did not provide a response and was dismissed;
- Employee claimed he had sent the message outside of working hours and therefore his conduct was not sufficiently linked to his employment;
- The commissioner disagreed noting any conduct that "materially affects", or has the potential to "materially affect", a worker's employment is a matter that legitimately attracts the employer's attention and intervention, whether outside of the workplace or not;
- The decision is a significant expansion on how out of work conduct can be considered when determining a valid reason for dismissal;
- The decision also confirmed an employer should not wait for a formal complaint and may investigate when policies had been breached;
- It is prudent for employers to develop and implement social media, bullying, and sexual harassment policies which include a reference to conduct outside of work hours.