

Mahjong Club's Wrong Move on Employee Entitlements Costs \$400k

In the decision of *Cai v Tiy Loy & Co Ltd** an employer has been heavily penalised by the Federal Circuit Court and a substantial payout awarded to its former employee, as a result of the employer's:

- breaches of the Awards that applied to the employee's employment; and
- contraventions of the *Fair Work Act 2009* (Cth) (**FW Act**) and its predecessor, the *Workplace Relations Act 1996* (Cth) (**WR Act**).

The Court found that the employer underpaid the employee during his employment, did not provide regular payslips, failed to comply with its record keeping obligations and engaged in adverse action against the employee.

Background

The employer, Tiy Loy & Co Ltd, who operates a Mahjong Club, employed Mr Cai on a full-time basis from 1994 until late 2012. In early 2012, Mr Cai sustained a workplace injury when he injured his ankle whilst moving rubbish bins.

Consequently, Mr Cai lodged a workers compensation claim for the injury which was accepted by the employer's insurer. As a result of this claim, the employer was also required to develop an injury management plan (**IMP**) for Mr Cai. However, to reduce the extra costs imposed on Tiy Loy & Co Ltd due to the IMP, Tiy Loy & Co Ltd chose to unilaterally alter Mr Cai's employment from full-time to part-time employment.

This course of action forced Mr Cai to resign from his employment with Tiy Loy & Co Ltd in late 2012.

The 2015 Decision

In March 2015, Judge Manousaridis of the Federal Circuit Court found that Tiy Loy & Co Ltd had engaged in adverse action, as it had injured the employee in his employment and altered his position to his detriment. The employer was unable to demonstrate that it had not altered Mr Cai's employment status as a result of Mr Cai exercising his right to lodge a workers compensation claim.

In addition, Judge Manousaridis held that Tiy Loy & Co Ltd had also failed to:

- pay Mr Cai his correct entitlements in accordance with the applicable Awards that applied
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- to his terms and conditions of employment; and
- meet its record keeping obligations;

which was in direct contravention of the FW Act, WR Act and the Awards.

Due to the employer's numerous contraventions, Judge Manousaridis ordered that a further hearing be conducted to determine the appropriate compensation to be awarded and penalties.

Unpaid Entitlements and Penalties

Tiy Loy & Co Ltd underpaid Mr Cai from July 2007 to July 2012. As a result, the employer was ordered to pay \$415,698.55 (including interest) in unpaid entitlements to Mr Cai. This was for entitlements relating to annual leave loading, rates for working on weekends, outside of ordinary working hours and public holidays that Tiy Loy & Co Ltd failed to pay Mr Cai.

The employer was also penalised for its contraventions of the FW Act and the WR Act as a result of it engaging in adverse action against Mr Cai and for its breaches of the Awards and National Employment Standards (**NES**).

When determining the appropriate penalty for the employer's contravention, Judge Manousaridis said that the penalty should "*signal to the community that the unilateral and disadvantageous alteration of an employee's position because the worker has exercised [their] rights is a serious matter*" even if the action of the employer was due to the employer's "*ignorance of the law*".

In addition, the employer was penalised for not:

- keeping proper employment records;
- issuing regular payslips;
- posting notices about work start and finish times in the workplace;
- paying Mr Cai notice on the termination of his employment; and
- displaying (or having them accessible) the relevant Award and NES in the workplace.

These penalties totalled a further \$53,500.

Lesson for Employers

Employers ought to be mindful that even if they are not aware that a certain action may be unlawful, they can still be penalised under the FW Act. If you are uncertain in any way as to how to manage an employee, we recommend that you consult with a legal advisor to minimise the risk of inadvertently contravening the FW Act.

It is important that employers:

- are mindful of their minimum obligations under the FW Act and any applicable Awards;
- implement mechanisms in the workplace to review rates of pay, the terms of any Awards that apply to the workplace, the NES and record keeping obligations; and
- if in any doubt about employment conditions or how to manage an employee, consult with a legal or industrial relations expert.

* *Cai v Tiy Loy & Co Ltd (No 3) [2016] FCCA 675.*

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