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HR Disasters | How can advisors help?

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Table of Contents

1. Human Resource Disasters - How can advisors help?

1.1 In a nutshell the best way an advisor can help their client who comes to them with a potential workplace or employment related issue is to advise them to seek independent qualified advice from a lawyer or for you to check the advice you wish to give with a lawyer, before doing so. This step will not only ensure that your client is provided with appropriate advice and strategy but will protect you, as the advisor, from being roped into potential litigation should the advice you give them prove to be inaccurate, incorrect or not comprehensive.

1.2 Workplace and employment related matters and issues can be very difficult and complex as it generally involves the application of, and compliance with, not only ever changing legislation and regulations but on many occasions, interpretation of modern awards and/or enterprise agreements. As a consequence, many businesses get it wrong and in HR when you get it wrong it can go really wrong, resulting in ramifications, ranging from loss of time and money to being involved in lengthy litigation.

1.3 This potential is even more so for small to medium businesses who do not often have dedicated human resources personnel and it is these business who will often come to you, as their trusted business advisor, for assistance and advice in these circumstances.

1.4 So…when a client comes to you with questions regarding business restructures, altering methods of engaging employees, interpretation, compliance and payment of wages under various Modern Awards, managing employees in their workplace, including dismissal and redundancies, I would seriously urge you to consider not engaging in any type of response, even casual comments, let alone advice before speaking with a legal professional.

1.5 This recommendation is even more important today as we have seen in the last 2 -3 years a significant increase in the courts' willingness to penalise third party advisors, both internal and external, for their part in their client's (or employer's) breaches of workplace laws.

1.6 I am aware that this step may be a difficult one to take, but it is one that you should seriously consider, to protect, not only your client, but your business.

1.7 This presentation will discuss some real life examples of common place scenarios in which consequences have occurred as a result of the advisor providing incorrect advice and will highlight the increased use of legislation which renders the advisor personally liable for the outcome of poor advice

2. HR Disasters - Where do you start

2.1 Absolutely every business, no matter how well they operate or how large their human resources department may be, are inevitably going to be involved in an incident at their workplace/business which will have a poor outcome for one, if not all, of the parties involved.

2.2 Workplace and/or employment law is constantly changing and evolving with either new legislation with each new government or new precedent decisions being established to keep in touch with the modern day reality of the workplace and employees in general. It is at times difficult and challenging for those of us legal practitioners who work solely in this area to remain up to date with the changes. As such it is not at all surprising that advice, given by advisors in absolute good faith, is incorrect and has landed these advisors in hot water.

2.3 The most significant and/or common HR issues which you as the advisor may be asked to give advice on are:

(a) Compliance with current laws and regulations in relation to workplaces and employees

(b) Restructuring and management changes, including redundancy

(c) Underpayment of employees

(d) Drafting of employment contracts

2.4 The provision and acceptance of an advisor's incorrect advice in regard to the above issues, can have potentially significant consequences and repercussions for you the business advisor, namely:

(a) loss of business;

(b) loss of reputation;

(c) loss of money;

(d) involvement in lengthy and expensive litigation

(e) incursion of penalties; and

(f) increase in insurance premiums.

3. The Trusted Business Advisor and Clients

3.1 In many cases an external advisor, eg: accountant, business advisor, HR advisor, bank manager etc, is one of the most trusted people utilised by a business. The advisor may very well have been with business since its inception or has become a trusted asset as the business has grown. As such these advisors play an integral role in the health and wellbeing of a business. It is therefore, very common, that when questions or issues in regard to their business and in particular their employees, arise, for many business owners their first point of contact will be with their business advisor irrespective of whether the issue is finance related, law related or otherwise.

3.2 By way of example, accountants can and do, play an essential role in advising their clients as was noted by the then Australian Competition and Consumer Commission (ACCC) Deputy Commissioner Dr Michael Schpaer in 2018 when he stated that

> *"Accountants play a similar role in their small business customers as a general medical practitioner does in patients."*
>
> *"The GP is of often the primary source of contact. I see the accountant in the same way. They are a primary source of contact and a trusted advisor and people go to them for problem solving on issues from the law to employment regulations. Even if they are not the person who gives the final answer, they often give guidance on where the small business owner can go next."*

3.3 He continued by detailing that accountants (and by extrapolation other business advisors) can play a vital role in helping small business clients through a number of issues, just as medical patients confide in their GP about a wide range of issues, not all of them being medical. His experience is that small business owners often turn to their accountant for advice not just on finance, but on wider questions around the law, human resources and competition.

3.4 What happens though when your client asks you to advise on work which is beyond your professional expertise or casually poses a question in conversation, the answer to which you are unsure of. The critical issue for the business advisor at that point, is to be able to determine if the issue or question being posed is one for which they are professionally equipped to deal with and if not then to acknowledge that and advise your client accordingly.

3.5 Advising your client to spend more money on anther professional whilst acknowledging that you are unable to answer their query, can however be a difficult step to take as we are all blatantly aware that today's client is expectant, knowledgeable, have choice and can and do move fast. As such there is a demand to ensure that your client is satisfied and, more importantly retained, by ensuring that all their needs and expectations are meet by your business. This becomes more difficult when you are aware that a question or issue should be dealt with and addressed by an external advisor. However - your

priority should be on ensuring that your client has the best advice to enable them to make their decision.

3.6 It is very tempting to offer advice based on your years of experience and knowledge of the area, even on a casual basis, however the consequence of giving same may be significant. According to Greg Hayes, Hayes Knight Director, there is an industry temptation and tendency to provide advice beyond what accountants are actually qualified to do. He notes that the danger is not the risks that aren't so obvious and are often associated with the casual advice given on an informal basis which can result in accountants being caught out. Specifically, the casual piece of advice where the accountant doesn't believe they are giving advice, but rather general commentary or helping their client out. But then something goes wrong and the client says - well my accountant was giving me advice and it's wrong and I'm going to take action against them for negligence.

3.7 In these circumstances the professional's professional indemnity insurance may not cover the consequences of such action as depending on the advice being given, it may very well be outside the scope of the advisor's professional capacity and therefore not covered by your insurance.

3.8 Additionally, and increasingly so, the advisor may be roped into litigation as an accessory to a breach of a workplace law by your client.

4. Accessorial Liability - personal implications for advisors

4.1 Imagine this scenario - you assist your client with their bookkeeping, payroll and audit. You know or you suspect, as a result of your experience and general business knowledge, that the pay rates given to you do not correspond with the applicable award or the rates are the same for all employees and yet you know the business involve shift work or you feel the pay rates are just too low to even cover the minimum hourly rate. You have not been asked to provide any advice as to these issues, but simply to process payroll, and, despite your concerns, you do not raise this issue with the client. You rationale this by determining that it is not your concern as to whether your client is breaching any laws or awards as it is your client's obligation to ensure compliance and not yours. As such you are entitled to turn a blind eye and not take any steps to ensure compliance or question the action. Right? Wrong!

4.2 Recent decisions have highlighted the courts propensity and willingness to take action against advisors, who knew or, suspected and did nothing, of breaches of employee rights, and hold them personally liable for such breaches.

4.3 Such action is known as accessorial liability and regulatory agencies, such as the Fair Work Ombudsman ("**FWO**"), are increasingly interested in seeking to hold third parties accountable for their involvement in contraventions of the *Fair Work Act 2009* (Cth) (the "**FW Act**"). In the 2018-2019 financial year the FWO sought orders against accessories in 46 out of their 50 court proceedings

4.4 In an October 2016 media release, Natalie James, of the FWO, stated that

"*We are prepared to use the accessorial liability provisions of the Fair Work Act, where it is in the public interest to hold anyone to account for their involvement in exploiting workers* and noted that *"There must be a clear consequence for those in trusted positions, those whose advise is relied upon and those with the responsibility to know better who play a part in undermining workplace laws."*

4.5 She continued by stating that the Ombudsman is concerned that, while small businesses rely heavily on trusted advisors, those businesses often receive bad or incorrect advice from those trusted advisors. Even worse the trusted advisor deliberately assists in the contravention of the law and as such these trusted advisors should be held accountable.

4.6 The way in which the FWO is now applying s550(2) of the Act highlights the personal liability risk of external and internal advisors.

5. What is the law?

5.1 In essence, under Australian law, where an employer breaches the Fair Work Act, National Employment Standards or the Modern Slavery Act, a director or manager of that business and professional advisors to the business, can be held personally liable for the breach as an "*accessory*", i.e.: involvement in a contravention is treated in the same way as an actual contravention.

5.2 In particular s 550 of the Fair Work Act (FWA) imposes liability on a person involved in a contravention of a civil remedy provision, specifically a person who is "*involved*" in an employer's contravention of a civil remedy provision, is also taken to have contravened that provision under employment law.

> ***FAIR WORK ACT 2009 - SECT 550***
> ***Involvement in 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.*
>
> *Note: If a person (the **involved person**) is taken under this subsection to have contravened a civil remedy provision, the involved person's contravention may be a serious contravention (see subsection 557A(5A)). Serious contraventions attract higher maximum penalties (see subsection 539(2)).*
>
> *(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.*

5.3 So, for a business advisor to be held liable under this section, it must be shown that:

(a) the contravention was of a civil remedy provision; and'

(b) the person was involved in that contravention.

6. What is a civil remedy provision?

6.1 S539 details the many provisions in the *FWA* which are defined as civil remedy provisions, which means that the court can order entities or individuals that contravene these provisions to pay large sums of money; either as a fine, or to the people who have been injured by the contraventions.

Some of the relevant civil remedy provisions include:

(a) obligations to comply with the NES, modern awards and enterprise agreements;

(b) the general protection, or adverse action, provisions;

(c) the unfair dismissal provisions;

(d) the sham contracting provision;

(e) rights of entry provisions;

(f) industrial action provisions;

(g) payment of minimum wages provisions;

(h) workers being bullied at work provisions; and

(i) corona virus economic response provisions.

6.2 The section also details the penalty for such contraventions, which can be as much as 600 penalty units for a company or 60 penalty units for an individual.

6.3 A penalty unit amount is as prescribed under s4AA of the *Crimes Act 1914* Qld as being $210, as such a person who is held to have breached such a civil remedy provision can be personally liable to a civil penalty pf up to **$12,600 per contravention**.

7. What is “involved” in?

7.1 What does “involved” mean and how does the court determine if a person has been “*involved*” in the contravention of a civil remedy provision?

7.2 S 550*(2)* of the FWA establishes that 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.

The two limbs commonly relied on to establish a persons involvement are subparagraphs (a) and (c).

7.3 The concept of aid and abet requires the person to intentionally participate in the contravention with the requisite intention to achieve a contravention. That does not mean the person must know their actions are a contravention; rather have actual knowledge of the matters or things constituting the contravention.

7.4 Actual knowledge may also be inferred from "*a combination of suspicious circumstances and a failure to make an inquiry*".

7.5 The concept of being knowingly concerned has a different emphasis and the person must have engaged in some act or conduct which "*implicates or involves him or her*" in the contravention so that there be a "*practical connection between*" the person and the contravention: *Fair Work Ombudsman v Devine Marine Group Pty Ltd* [2014] FCA 1365 at [178].

7.6 The case of *Fair Work Ombudsman v South Jin Pty Ltd* considered a broad range of issues relating to accessorial liability. It established the general principle that a person’s actions must implicate or involve them in a contravention, such that there is a connection between the person and the contravention.

7.7 In practice, this means that the person involved must have knowledge or some or all of the facts that make up a contravention, and that there must be some conduct that contributed to, or failed to prevent the contravention

7.8 The courts have generally held that individuals must possess actual knowledge of the essential elements of the contravention.

7.9 **Actual knowledge** may be established when:

(a) the person knows directly about the facts of the contravention (for example because of an audit or because they have actually seen documents or had conversations);

(b) the person has been exposed to obvious circumstances that constitute a breach where an ordinary, decent person would appreciate the wrongdoing;

(c) the person has suspicions of wrongful behaviour and deliberately chooses not to learn more, for fear they may implicate themselves (also known as wilful blindness) i.e.: a person deliberately abstains from asking questions or making enquiries of the client if the advisor believes there may be a breach. By way of example - when doing a pay roll the advisor thinks that the pay for all employees is the same and yet is aware that the business operates a 24 hour roster and as such the pays should reflect some differences to cater for the shift work;

(d) there is a combination of known suspicious circumstances of the client and the lack of questioning by the advisor to alleviate such suspicions; and

(e) when the person had actual knowledge of the 'system' of non-compliance and in such cases knowledge of each contravention or each specific breach is not necessary *FWO v Grouped Property Services*. In regard to this issue there are still questions surrounding the level of knowledge that will implicate an individual in specific breaches, for example:

i. Knowledge of the award rate in underpayment cases may not be required, but only if it is very obvious that workers are being underpaid

ii. If an individual has knowledge of past breaches and knows that systems have not been updated, this may imply continuing knowledge of the initial breach

7.10 In the decision of Fair Work Ombudsman v Priority Matters Pty Ltd & Anor and Fair Work Ombudsman v Superlattice Solar Pty Ltd & Anor and Fair Work Ombudsman v Geneasys Pty Ltd (in liq) & Anor and Fair Work Ombudsman v Silverbrook & Anor and Fair Work Ombudsman v Mpowa Pty Ltd & Anor (No 4) [2019] FCCA 56 (22 February 2019) Driver J said

> '*actual knowledge can be inferred from the combination of a respondent's knowledge of suspicious circumstances and the decision by the respondent not to make enquiries to remove those suspicions,* ***but*** *not every deliberate failure to make enquiries will support the inference of actual knowledge. Where a person does not know because he does not want to know …. but deliberately refrains from asking questions or seeking further information in order to maintain a state of apparent ignorance. That is wilful blindness."*

7.11 Therefore, an advisor turning a blind eye to conduct constituting a contravention or doing nothing and not seeking clarification or asking questions, because they prefers not to know they may be treated as having the knowledge which they deliberately abstained from acquiring and thereby satisfy the knowledge aspect.

8. Internal advisors

8.1 The liability under s550 extends to directors, internal advisors and managers of the employer and as such HR managers or any advisors that has knowledge of, and make decisions regarding, the working conditions of employees can also be captured by this section.

8.2 There have been recent decisions which show the courts willingness to fine individuals for their role in contravening the FWA, namely:

(a) In *Fair Work Ombudsman v Crystal Carwash Café Pty Ltd* both the director and a manager of the company were found to be involved in the contraventions on the basis that they were responsible for setting the terms and conditions of employment, including wages and working hours, and were involved in breaching the obligation to pay minimum wages for the shifts employees worked. In addition to the back pay due to the employees, the company was fined $70,000 and the director and manager were each fined $10,000 for their role in the breaches.

(b) In the cleaning services industry, in *Fair Work Ombudsman v Jooine (Investment) Pty Ltd* the Court considered how the company's director (who was also the company's internal workplace adviser) was knowingly involved in breaching the FW Act through the use of sham contracting. The matter involved the underpayment of a foreign worker who was engaged by the company in a sham contracting arrangement. Both the company and its director/internal workplace adviser were found liable for the contravention. The Court commented that the director/adviser who had prepared the contracting documents did so "*with a deliberate intention to circumvent the legislative framework that has been put in place to protect vulnerable individuals from exploitation.*" The Court further foreshadowed the need to deter advisors (internal and external) from assisting businesses evade their obligations under the FW Act: "*The deterrent should also extend to the advisors who have facilitated the orchestration of these scams, to prevent their further proliferation of such advice and facilitation*."

(c) A Human Resources Manager was found to have contravened the FW Act in *Fair Work Ombudsman v Centennial Financial Services Pty Ltd & Ors*. This was based on the HR Manager's involvement in setting up sham contractor arrangements. The HR Manager was initially involved in employing the employees and preparing their contracts of employment. At a later point in time the HR Manager terminated the contracts of employment and prepared "Consultant Agreements" to replace the contracts. The HR Manager did this on the instructions of the employer. The "Consultant Agreements" were to perform the same duties in the same positions, with the only substantive difference being that the individuals would be paid commission only rather than wages. The Court found that the knowledge of the terms of the employment agreement and the terms of the consultant agreement was sufficient for the HR Manager to be "knowingly concerned in" the contravention, and cautioned HR professionals with regards to following directions from "higher up" as not being a defence to breaches of the FW Act. In this context, the Court observed that "*as Human Resources Manager, he should have been aware of, and at least attempted to give advice on, Centennial's obligations under the WRA*".

9. External advisors

9.1 As alluded to above external advisors such as accountants and business consultants are being closely watched by the FWO as to the degree of involvement that these third parties have in any non-compliance. If it can be shown that these external advisors have been 'knowingly concerned in or party to the contravention' or alternatively have engaged in 'wilful blindness' regarding their client's obligations, the FWO may take action against these third-party businesses which can result in heavy fines for the individual advisors and their companies.

9.2 A recent and interesting decision of *Fair Work Ombudsman v Blue Impression Pty Ltd & Ors [2017] FCCA 810* demonstrates how wide a net the FWO is casting to penalise advisors for their role in employer breaches.

9.3 This case involved a Japanese fast food chain and their accountants. The employer was advised by the Fair Work Ombudsman of specific breaches of:

(a) the FWA by the employer, namely underpayments of wages, leave loading, penalty rates and clothing allowances; and

(b) the Fast Food Industry Award 2010 by failing to provide employees with meal breaks.

9.4 The FWO demanded rectification and provided a letter in 2014 which identified the relevant provisions of the Award which were in breach and detailed the underpayments which arose due to the employer

using a flat rate of pay in calculating remuneration. Consequently, the employer engaged EZY Accounting Pty Ltd, and provided them with a copy of same letter, to assist in the rectification of these breaches.

9.5 Despite this the breaches continued, and an employee sought the assistance of the FWO to recover their unpaid wages and entitlements.

9.6 The FWO commenced proceedings against not only the employer but also EZY, the employer's external accountants and advisors, for being "involved" in the ongoing breaches of the Act and the Award on an accessorial basis under s 550 of the Act.

9.7 Now the employer admitted the breach, but Ezy did not and argued that it was not liable under s 550 because they claimed that they had no knowledge of the essential ingredients of the contraventions on the grounds that EZY:

(a) knew nothing about the particulars of the employee, who made the complaint, employment (i.e.: particular hours he worked or specific Award provisions applicable to him);

(b) only had a limited retainer from the employer, in that the retainer:

iii. did not require EZY to advise the employer of their obligations under the Award; and

iv. did not instruct EZY to amend pay roll data which the employer provided.

(c) was only following the client's instructions and argued that:

"we just process payroll and do data entry"

"we were not engaged to provide any employment related advice"

"It was not my business to know whether or not the rates complied with any award. That was a matter for the employer."

9.8 The Federal Court, found EZY liable under s550(2) and determined that EZY did indeed have actual knowledge of the Award and its requirements and the facts which constituted a breach of the Award and the Act because:

(a) a Director of EZY had been provided with a copy of the FWO correspondence in 2014;

(b) EZY knew that the employees were covered by an Award and knew how to access Award rates;

(c) EZY knew that the restaurant was continuing to underpay the employees because the rates in the payroll system, which EZY ran, were not changed from 2014 and were not sufficient to meet the requirements of the Award .

9.9 The Court further held that EZY, despite knowing all the above, took no steps to change the payroll data or the manner of calculating the remuneration after 2014 which inevitably continued the underpayments and EZY made no enquiries of the employer to ensure that the figures which they provided to EZY were correct and in accordance with the Award.

9.10 The Court noted that the fact that EZY had specific knowledge of the employer's prior breaches and failings of the employer's systems makes it unnecessary to show that EZY knew of each particular instance of breaches in order to show the requisite knowledge.

9.11 Consequently, it determined that EZY had the requisite knowledge and practical connection between it and the employer as EZY had facilitated the underpayments by the processing of the restaurants payroll. EZY was fined $51,330.00

9.12 Whilst it is important to note that this case did somewhat turn on the particular facts that EZY was specifically engaged to assist the Employer in rectifying the contraventions of the Act and Award, the

decision is still very important and has a broader application to 3rd party service providers engaged to assist employers with payroll and auditing.

10. Implications

10.1 This decision has serious implications as it appears to place a greater responsibility on payroll accountants and other outsourced service providers to ensure their clients comply with Awards. This has the flow on effect of ensuring compliance with superannuation payment obligations.

10.2 Further if you are in receipt of instructions that appear suspicious or raise some concerns with you in light of your business knowledge, it appears that you, as the advisor, have an obligation to ask the difficult questions and insist on seeing the source of the client's data.

10.3 This decision also demonstrates that advisors can not simply rely on the information as provided by the client but rather you as the advisor are obligated to

(a) confirm instructions as provided and make enquiries with their clients regarding the source of the information; and

(b) check any applicable award or agreements from which pay rates and allowances are derived.

10.4 As the FWO has stated

"External business advisors need to understand that they must put compliance with the law above their own personal interests – or face serious consequences. The Courts have made it clear that if you are knowingly involved in the exploitation of workers, you can face significant penalties."

11. Accessorial liability limitations

11.1 There are limitations to the accessorial liability claims and they generally focus on the question of knowledge. The following detail the limits to this litigation:

(a) A person cannot be "*involved in*" conduct for the purposes of s 550 "*merely by reason of* [their] *knowledge of the conduct being pursued*": *Fair Work Ombudsman v Priority Matters Pty Ltd* [2017] FCA 833.

(b) To be "*involved in*" conduct there has to be some conduct which "*implicates*" a person in the offending conduct such that they become "*involved in*" or "*associated with*" that conduct, merely being a manager in the business is not enough: Construction, *Forestry, Mining and Energy Union v Clarke* [2007] FCAFC 87.

(c) The person must have been an intentional participant with knowledge at the time of the contravention of the essential elements constituting the contravention.

(d) A person cannot be involved in an adverse action claim if they have no knowledge of the protected attribute or workplace right: *Milardovic v Vemco Services* [2016] FCA 19; *Fair Work Ombudsman v Oz Staff Career Services Pty Ltd* [2016] FCCA 105.

(e) A person's knowledge is assumed because of their position or some duty to take reasonable care, is not sufficient to assume constructive knowledge.

12. So, what can you do to ensure you don't fall foul of the accessorial liability?

12.1 As anyone involved in a contravention may now be held liable, if you are a company director, an external advisor (e.g. an accountant), or an internal human resources manager/officer, it is essential that you:

(a) seek legal advice about these issues;

(b) are aware of general obligations arising under the *FW Act*, including under the relevant modern award or enterprise agreement as ignorance of these obligations does not provide a defence;

(c) make inquiries to client to confirm compliance with the *FW Act*;

(d) do not turn a blind eye to possible breaches of the *FW Act* as the Court may be able to infer actual knowledge from wilful blindness;

(e) are not afraid to raise concerns over instructions that do not seem right to you as simply implementing an instruction of a manager or a client that you know, or suspect, is wrong may make you liable.

13. Advice for third-party advisors specifically

13.1 It is important for you as advisors to be sure that you have taken and implemented all necessary actions to ensure your exposure to accessorial liability is minimised.

13.2 We would advise that you:

(a) inform your client's of your obligation to ensure compliance with workplace laws, and ask for their confirmation on the basic matters, such as:

(i) Modern Award knowledge of coverage and compliance with applicable terms,

(ii) their record keeping processes, especially in relation to time keeping and wage records,

(iii) that they are not engaging in sham contracting arrangements.

(b) Be very clear in your communication with clients about the professional responsibilities that exist for advisors, and the exposure to accessorial liability in circumstances where we are aware of, and facilitate, breaches of the law.

(c) Regularly review the information provided by clients during the course of a relationship for any indicators that their compliance may be slipping, or even misrepresented to you, earlier in the engagement.

(d) Schedule semi-regular compliance check-ins with clients to get them to re-affirm their position on knowledge of their obligations and the status of their compliance with those obligations.

(e) Reconsider providing advice, be it casual or formal, about the FWA without first having it checked by a legal professional. Be aware of your professional limits and seek advice to ensure proper compliance. Where you do provide advice to a client that concerns their compliance with the FWA, take the time to follow-up and ask whether they have implemented that advice. If they haven't and are misleading you, at least you have taken that positive step to attempt to ensure that they are compliant.

(f) Where you are asked to do something that is outside the scope of your professional capabilities, very seriously consider whether the risk is too great to get involved.

13.3 In general, you should always be very careful when engaging with employees or clients who you suspect may not be fulfilling their obligations under the FWA. It is essential to find the balance between meeting the demands of your business/clients and mitigating your own risks.

14. Will I be insured?

14.1 If it can be shown or argued that in the giving of advice which is outside your professional expertise and damage and loss ensues then it is highly likely that your professional indemnity insurance will not cover such acts and as such you may find yourself being uninsured! The following real life examples will delve into this issue a little more.

15. Real life scenarios to discuss

15.1 So in light of the above potential issues which an advisor may face if the advice they give is wrong and the impact same may have on their business, I thought it may be on benefit to see how in real life these situations can occur - it is not so difficult to see how.

15.2 Although some of these may not result in the advisors being captured by the accessorial provisions of the Act these actions resulted in other significant impact on their businesses including but not limited to loss of client's business and significant impact on the reputation to their business.

15.3 The following detail some of the major workplace issues which all businesses will face over the life of their business and shows how easily advice can be given which turns out to be wrong which could have been avoided with either a simple phone call to confirm the accuracy of the advice given or in most circumstances acknowledge

15.4 Redundancy Advice

(a) Redundancy is unfortunately a common scenario which many workplaces, particularly in today's weird world, are facing. To ensure that an employer engages in a process which ensures that the redundancy process is genuine, fair and legal, various questions and factors must be addressed, including whether the employee's terms and conditions of employment are governed by the FWA, an enterprise agreement or a contract of employment. Each of these documents may in fact require totally different methods of redundancy process and appropriate redundancy payments.

(b) As such redundancy is not a simple and easy process and is one which can have significant consequences if you get it wrong.

(c) By way of example we were involved in a matter where an experienced accountant gave advice to a client about making a key employee of a food manufacturing facility redundant. It transpired that the employer still required the employee's position and its duties to be undertaken by somebody and the employer actually wanted to terminate the employee as a consequence of performance issues. The accountant did not seek any legal advice and determined that redundancy was appropriate in circumstances where it was clearly obvious to an employment lawyer that this situation was not a legitimate redundancy.

(d) This termination, based on the accountant's advice, lead to the redundant employee making an unfair dismissal claim which was successfully and resulted in the employee being:

(i) reinstated; and

(ii) awarded compensation.

(e) The advisor lost the client and had the costs associated with bringing a claim for professional negligence, for which they may not have been covered for professional indemnity insurance, not been so prohibitive for the client, it could have been a very serious financial cost.

15.5 Restructure Mistake

An experienced accountant was asked to implement a restructure for a long term client to move their legal structure from a partnership to a trading company. The accountant incorporated a Pty limited company and insured the shares in that company were held appropriately and that the partners of the former partnership were appointed as directors. What the accountant did not do was consider the ramifications of shifting individuals involved in performing work in the business from partners of a partnership to two people delivering services on behalf of the company.

Down the track after a marriage break down and the provision of legal advice to one of the parties, a claim for unpaid wages, in the amount of $500,000 was made. The claim was brought against the company and the accountant was joined to the preceding based on professional negligence and breach of contract.

The accountant's insurer refused to indemnify arguing that the type of advice alleged to have been given was not within the scope of the insurance policy. The accountant's civil liability insurance policy extended coverage too any loss caused as a result of a wrongful act committed solely in the performance of professional services but as the services, the subject of the claim, were not "professional services", indemnity was refused. "Professional Services" was defined to include: accounting and bookkeeping; audit; business valuations; company secretarial work; executorships and trusteeships; insolvency/liquidation/receivership; forensic accounting; management accounting; superannuation fund administration; taxation; migration services; IT consultancy (accounting software only); and other as advised to and agreed in writing by the Insurer. Accordingly, professional services around industrial relations or human resource management advice was not covered.

The accountant in this case lost the client, lost significant amounts of money and time and suffered a loss to their reputation.

15.6 Award Misinterpretation

An inexperienced junior accountant was asked to offer thoughts and advice on the classification and payment of staff of a client. The accountant was unsure of the full position description for the category of worker the subject of the request nor did they knew enough about the client and its business operations to appreciate all that was involved in the client's business enterprise. As a result, the advice given by the accountant as to the rights of pay owing to certain categories of workers was wrong and the workers were for a period of years subsequently underpaid, and in some cases overpaid.

Apart from losing the client when the wage climb came the accountant also had to deal with the reputational fallout in what was a relatively small community. Had the costs associated with mitigating not been prohibitive then there is little doubt any claim that was brought would not have been indemnified by a professional indemnity insurer because it would be no coverage for the type of human resources and industrial relations advice being given in this example.

15.7 Unfair Dismissal, Adverse Claims & Discrimination

An experienced accountant who had practised for several decades had seen many cases of unfair dismissal claims being brought against his clients. In his experience he noted that these claims, on most occasions, settled fairly cheaply, he took a very pragmatic approach to advising his clients with off the cuff remarks about letting employees go when things weren't working out, holding back any notice period which might be payable and using that as a negotiating chip when it came to trying to settle the unfair dismissal claims at conciliation conferences.

The accountant had however failed to maintain currency in respect of the expanding levels of claims in the adverse action and anti discrimination arena of workplace law. He was unaware that in both of these circumstances there is no cap on the damages that might be payable by an employer if they have treated the worker adversely or have discriminated against the worker based on some attribute.

15.8 Dual Engagement - Wage Claim

A local bus company hired a bus driver who had some unique skills also as a mechanic and diesel fitter. Over time the employer increasingly allocated work to the driver as a mechanic and failed to properly pay for the time spent performing mechanical duties at the higher rate of pay under the relevant award. This was based on advice obtained from the employer's accountant and whilst the accountant claimed she did not appreciate the full extent of hours being undertaken as a mechanic or diesel fitter the reality was that it then became the client's word against the accountant once a wage claim for six years was brought on behalf of the employee.

The client sought to have the accounting firm indemnify him for any underpaid wages because the client saw it entirely as the accountant's fault. The client left the accounting firm, bad mouthed the accountant and the firm, the accountant left the firm, and ultimately left town.

16. Lessons from these!!

16.1 Engage a lawyer.

16.2 Any questions or suspicions of behaviour which in your experience does not seem correct or legal - ask!!! Failing to ask may result in you being held to be aware of the breach.

16.3 Only work within your professional capabilities.

16.4 Have open and frank discussions with your clients regarding the need for external advice - don't try to be the jack of all trades when in doing so can result in disastrous outcomes for you, your client and your business.

16.5 Be aware of general FWA, regulation and other workplace laws and Awards if you are involved in payroll.

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