

## Article Information

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Service: Employment & Labour

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## Ezy as 123? More like section 550!

### A recent Federal Circuit Court decision in which Judge O'Sullivan held that an accounting business which provided payroll services to an employer

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A recent Federal Circuit Court decision in which Judge O'Sullivan held that an accounting business which provided payroll services to an employer, was accessorially liable for the employer's contraventions of the Fair Work Act. The case demonstrates the pitfalls of being wilfully blind to the contraventions of another person. **Ben Motro, Senior Associate** reviews this decision.

Accessorial liability results in a person being liable for a contravention of legislation, even though they themselves may not have directly contravened the law. Section 550 of the *Fair Work Act (the Act)* contains provisions to ensure those who are 'involved' in a contravention of the Act, are also taken to have contravened the legislation.

The public policy reasoning behind accessorial liability is logical. It ensures that those with intimate involvement in someone else's contravention can also be penalised for their culpability. In the past it has typically been used by aggrieved employees, and more commonly by the Fair Work Ombudsman (**FWO**), to hold directors, senior management and even human resources managers, to account for their involvement in an employer's primary contravention of the Act.

For this reason, the case of *Fair Work Ombudsman v Blue Impression Pty Ltd & Ors* [2017] FCCA 810 is an interesting development in what is an ever-increasing body of law.

#### Case Details

Blue Impression operated a Japanese fast food restaurant. Its contraventions concerned breaches of the *Fast Food Industry Award 2010*. The contraventions were discovered after the FWO made investigations into the alleged underpayment of an employee, Mr Zheng.

During the relevant period, Mr Zheng was paid a flat hourly rate. This included times that attracted penalty rates (including Saturdays, Sundays and public holidays). This resulted in Mr Zheng being underpaid. Blue Impression subsequently made full admissions of the contraventions of the Act.

Unfortunately for Ezy Accounting, the FWO was not content to simply seek the scalp of Blue Impression, and also Mr Wong (who was responsible for the day to day operation of Blue Impression at its Melbourne Doncaster site). The FWO also sought to hold Ezy Accounting accessorially liable for Blue Impression's breaches of the Act.

Ezy Accounting is a tax and accounting business which professed to be a 'book keeping' service provider, which included processing the payroll of its client and Mr Zheng's employer, Blue Impression.

Crucially, the FWO placed emphasis in its case upon the knowledge of Mr Lau, the director of Ezy Accounting. The Court held that Mr Lau was well aware of the FWO's concerns about Blue Impression's payment of wages (namely the payment of a flat hourly rate), through a 'National Hospitality Industry Campaign' that resulted in many fast food businesses being audited by the FWO between 2012 to 2015.

Following that audit, Ezy Accounting did not change the flat hourly rates of pay in its MYOB accounting database to ensure that Blue Impression's employees would not continue to be underpaid.

The position of Mr Lau was that Ezy Accounting did not provide employment or industrial relations advice, and that it

would simply enter data given to it by its client, Blue Impression, and had no authority to adjust any figures.

The Court did not find this to be an acceptable position, and found that Mr Lau knew, as a matter of inference, that Blue Impression was underpaying its staff, and that he wished to avoid having objective evidence of this fact. The Judge described this as “designed or calculated ignorance”.

It was held that Mr Lau knew, because of the audit, how to check correct award rates, and that it was “inevitable because of the way Ezy’s MYOB system worked, if the rates weren’t altered, there would be underpayments and that Ezy did not alter those flat rates”.

Although Mr Lau allegedly spoke to a director of Blue Impression after the audit, to ‘follow up and act according to the letter’, Mr Lau did nothing to ensure that Ezy Accounting updated the pay rates in the MYOB system which was controlled by Ezy Accounting.

In concluding that Ezy Accounting was accessorially liable for some contraventions of the Act by Blue Impression, the Court was satisfied that Ezy Accounting, through Mr Lau, “deliberately shut its eyes” to the contraventions of Blue Impression, and was “wilfully blind”.

### **Lessons for Employers**

Although this case contained a very unusual set of circumstances which led to Ezy Accounting’s downfall, it does highlight an important lesson for those persons or entities that play a part in activities that may involve a contravention of the Act.

Wilfully shutting one’s eyes to the obvious has the dangerous effect of landing that person in the firing line. A person who has a role in the activities relevant to the contravention and who reasonably suspects that a contravention has or will occur, cannot rely on their lack of professional expertise, or absence of authority to effect change, as a means of escaping liability.

*Should you have any questions concerning how the decision may affect your business, please contact a member of Piper Alderman’s Employment Relations team.*