

## Wages and Your Business

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Under the Fair *Work Act (FW Act)*, advisers can be held liable for business clients not meeting their obligations. The following 4 questions can be used as “conversation pieces” either from an adviser or client’s viewpoint.

### **Question 1: When is it okay to pay below award rates?**

Paying less than the modern award is a breach of the FW Act under section 45 while section 550 states that a person who is involved in a breach is deemed to be in the same position as the party that actually breached it.

In the case involving Ezy Accounting 123 Pty Ltd (“Ezy Accounting 123”), its client Blue Impression, operator of a fast food outlet, was alleged by the Fair Work Ombudsman to have underpaid two workers nearly \$10,000.

Ezy Accounting 123 provided payroll services to Blue Impression, but claimed to have no knowledge of applicable minimum rates and that it was up to the client to ensure its employees were paid correctly.

The judge found otherwise, stating that even “the most basic query” would have revealed the contravention. This, he said, constituted “wilful blindness”. Further, the Ombudsman demonstrated that Ezy Accounting 123 did in fact know what was going on and it was convicted for being an accessory to its client’s breach of the FW Act.

### **Question 2: Will all my employee records be checked?**

In September 2017, the Fair Work Amendment (Protecting Vulnerable Workers) Act took effect. Although in part squarely aimed at franchisors, it strengthened the Ombudsman’s powers to investigate all employers involved in “cashback” schemes (i.e. those who on face value comply with award rates but deduct or demand employees pay back some of their pay) and significantly increased penalties for giving false or misleading pay slips to employees or knowingly making or keeping false or misleading employee records.

“Payroll records are an increasing focus for the Fair Work Ombudsman and recent decisions by the Federal Court, in particular, highlight that the requirement to keep appropriate payroll records is a very serious obligation,” says Melbourne-based employment lawyer [Peter Vitale](#).

“A lot of people think it’s just another unwanted layer of administration and red tape, but the courts see it as an important way of verifying that workers are receiving all their legal entitlements. If as an employer you are not keeping those records properly, there may be an inference drawn that you have something to hide.”

Notably, employers that fail to meet record-keeping or pay slip obligations and can't give a reasonable excuse now need to disprove wage claims made in a court; in effect, a "reverse onus of proof".

### **Question 3: Would I be better off with contractors instead of employees?**

A sham contracting arrangement is when an employer attempts to disguise an employment relationship as an independent contracting arrangement, usually to avoid responsibility for employee entitlements.

"Most employers are looking for ways to contain costs, but questions like, 'Can I enter a contract that overrides the award?', 'Is there a way around the award?', 'Do we really have to comply with that?' or 'Isn't that just a guideline?' could flag compliance issues," Vitale says.

Indeed, under the sham contracting provisions of the FW Act, there are serious penalties for misrepresenting an employee relationship, dismissing or threatening to dismiss an employee so as to engage them as an independent contractor, or knowingly making a false statement to persuade or influence an employee to become a contractor.

### **Question 4: How can I make someone redundant but avoid unfair dismissal?**

If an employee's dismissal is a genuine redundancy it precludes a claim for unfair dismissal, but with the exception of some small businesses and casual employees, they are entitled to severance pay.

A dismissal is not a genuine redundancy if the employer still needs someone else to do the job; has not consulted with the employee in accordance with an award or registered agreement; or could have reasonably offered the employee alternative work. In such situations, the Fair Work Commission might order reinstatement or compensation.

"Advisors need to tell clients that compliance with the law is not optional," Vitale says. "If a client is clearly in breach of the law, they should consider whether to continue to act for that client."

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Further Resources:

Fair Work Ombudsman  
<https://www.fairwork.gov.au/>

ATO website: Employee or contractor  
<https://www.ato.gov.au/business/employee-or-contractor/>