SQUIRE SANDERS

Federal Circuit Court of Australia Fines Chinese Company for not Paying its Workers Their Full Pay While in Australia - FWO v China Sanan Engineering Construction Corp [2013] FCCA 1177 (29 August 2013)

澳大利亚联邦巡回庭就一家中国企业未向在澳中国员工全额支付酬劳对该企业处以罚款—*公平工作调查局起诉中国三安工程建设公司[2013年] FCCA1177 （2013年8月29日）*

In an unusual twist, a foreign company that brought its workers to Australia temporarily has been fined by the Federal Circuit Court (**Court**) not for underpayment, but for not paying its workers what they were owed while they were in Australia.

一家海外企业在一起不常见的案件中被澳大利亚联邦巡回庭处以罚款。该企业调派员工来澳短期工作，其被罚款的理由不是支付过低报酬，而是没有在相关员工在澳工作期间向他们全额支付相关报酬。

In fining the company AUS$14,850, the Court explained foreign businesses and individuals who bring workers into to Australia must actively inform themselves about Australian industrial laws and ensure compliance.

法庭在对该企业处以14,850澳元罚款的同时也指出：调派员工来澳大利亚工作的海外企业和个人必须积极了解澳大利亚的相关行业法律以确保各方面的合规工作。

The Facts
案件事实

In this case, 24 workers from China came to dismantle machinery the company had purchased. For several months in late 2009 and early 2010, the workers were paid their Chinese wage equivalent on a monthly basis, based on hours worked – between AUS$1.90 and AUS$6.75 an hour. However the workers were also entitled to an overseas travel allowance that amounted to an additional AUS$622 per week. This meant that overall the workers' pay was higher than the then federal minimum hourly wage at the time of AUS$14.31. The problem was that the workers were only paid a small portion of the overseas travel allowance while they were in Australia, with the balance retained by the company until the workers returned to China.

本案中，24名工人被企业从中国调派到澳大利亚负责拆卸企业之前采购的一批机器。2009年末至2010年初的几个月中，企业每月按这批工人的中国工资标准向工人发放工资；基于实际工作小时数，工人的每小时工资在1.90澳元到6.75澳元之间。但是，这批工人每周还可获得622澳元的海外差旅补助。因此，工人的每小时总酬劳依然高于当时联邦政府规定的最低小时工资（即14.31澳元）。但是，企业在工人在澳工作期间仅向工人支付了很小一部分海外差旅补助，其余未支付部分则留待员工返回中国后再支付。

The Fair Work Ombudsman (**FWO**), who prosecuted the claim, argued the company breached section 323 of the *Fair Work Act* 2009 (Cth) in failing to pay the workers what they were owed monthly. The FWO told the Court that in failing to pay the workers their full wages, the company denied them an opportunity to enjoy the privileges usually associated with working in Australia. The FWO claimed the company was well-resourced and "sophisticated enough to discharge its legal obligations".

提起诉讼主张的公平工作调查局认为：由于没有及时向相关工人支付他们每月应得的酬劳，该企业已违反了《（联邦）2009公平工作法》第323部分的规定。公平工作调查局在法庭指出：该企业未向相关工人全额支付工资的行为剥夺了工人在澳工作期间应该享有的特权。公平工作调查局主张：该企业资源充足，并且该企业"擅长于免除其自身义务"。

The company told the Court it was a state-owned enterprise in which the Workers Congress held the ultimate decision-making power and the workers would therefore "not exploit themselves". The company claimed it did not intentionally fail to observe Australia's labour laws, and this was accepted by the Court.

被起诉的企业在法庭表示：作为一家国有企业，其最终决定权由"职工代表大会"掌握，因此工人不会"剥削自己"。该企业主张其并非有意违反澳大利亚劳工法，并且该该等主张获得了法庭的认可。。

However the Court found the company's argument that the workers preferred to be paid their overseas allowance when they were home and so did not suffer a loss, carried "very little weight in relation to the imposition of a penalty". Further, the Court noted translation difficulties were not a "proper excuse for not taking steps to become informed about what Australian industrial laws require".

但是，法庭认为：该企业所做的'工人们倾向于在其回中国后再被支付海外差旅补贴以避免损失'的抗辩依据，"就是否处以罚款而言缺乏说服力"。此外，法庭还指出：翻译困难并不能作为其"未采取措施以了解澳大利亚相关行业法规的恰当理由"。

Visa Issues
签证问题

Significant to this case was the initial mistake made by the company in regard to the correct work visas for the workers. The company had incorrectly applied for subclass 456 visas, rather than subclass 457 visa. The company understood that under the 456 business visa, Australian labour laws would not apply to its workers. The company accepted that in hindsight, it was an error not to seek independent advice on this important point of the correct visa. While the Department of Immigration and Citizenship (**DIAC**) cancelled the 456 visas and the company was able to successfully apply instead for 457 visas (in early 2010), it is not known if DIAC took any action against the company for this mistake.

本案的另一个重点是该企业最初就相关工人应申请的相应工作签证所犯的错误。该企业所犯的错误是：为工人申请了456签证，而不是457签证。该企业了解：456商务签证下，澳大利亚劳工法将不适用相关的工人。企业在事后承认其所犯的未就相应的正确签证征询独立意见的错误。虽然澳大利亚移民与公民部已经取消了该企业相关工人的456签证，并且该企业（于2010年初）重新为相关工人申请了457签证，但目前尚不清楚澳大利亚移民与公民部是否已就错误申请签证一事对该企业采取了任何措施。

What This Means for Employers
本案对雇主的借鉴意义

The bar is set high for foreign companies and compliance with Australian labour laws. Foreign companies must ensure they are taking positive steps to understand and fully apply Australian labour laws. A foreign company cannot rely on a defence of good intentions and translation issues to avoid penalties for non-compliance, even when they are new to doing business in Australia.

澳大利亚就海外企业及澳大利亚劳工法合规所作的相关规定非常严格。海外企业必须确保其积极主动地了解澳大利亚劳工法并完全遵守该等法律法规。海外企业（包括刚刚开始在澳大利亚经营业务的企业）不得将“良好的用意与翻译问题”作为抗辩依据以逃避法庭对其不合法行为的处罚。

Please contact Squire Sanders for any assistance you may need on understanding Australian labour laws or bringing workers into Australia.

如果阁下需要就调派员工来澳工作事宜或了解澳大利亚劳工法获得协助，请与翰宇国际联系.

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