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## ***PENALTIES IMPOSED AGAINST EMPLOYER AND DIRECTOR FOR UNLAWFUL INDIVIDUAL FLEXIBILITY AGREEMENTS***

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The Fair Work Act and Modern Awards allow employers and employees to enter into IFAs in order to reach flexible work arrangements around a limited number of work conditions such as hours of work.

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In a Federal Court proceeding instituted by the Fair Work Ombudsman, an employer and its director were ordered to pay \$25,000 and \$5,000 respectively in penalties by the Federal Court for entering into unlawful Individual Flexibility Agreements ('IFA') with its employees. The Court further ordered that the employer and director pay compensation in the amount of \$7,146 to an employee who had been removed from the work roster and denied further work when he refused to execute the IFA.

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CCI Lawyers is a boutique workplace relations practice.

CCI Lawyers operates as an independently managed legal practice, providing legal services that are charged at competitive rates to employers across Australia.

CCI Lawyers is associated with the Victorian Employers' Chamber of Commerce and Industry ([VECCI](#)). Your business does not need to be a VECCI member to engage our services.

The employer, Australian Shooting Academy, had incorrectly believed that the Modern Award applying to its workforce did not provide for casual employment and had therefore sought to make its casual employees permanent by entering into IFAs.

The terms contained within the IFAs did not comply with Fair Work Act 2009 (the 'Act') and the Modern Award. The IFAs removed entitlements to penalty rates and overtime, hence failed to ensure that the employees were better off overall under these agreements than they otherwise would have been under the applicable award.

Seven employees signed the IFAs, including one employee who had been threatened with dismissal if he refused to sign the IFA. Another employee was removed from the work roster and denied further work when he refused to sign the IFA.

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The employer had contravened the provisions of the Act and the Modern Award in a number of ways including:

1. the IFA did not include the date on which it commenced operation;
2. the IFA failed to identify the terms of the Modern Award which were to be varied and failed to set out how each term of the Modern Award had been varied;
3. the employer had taken adverse action against an employee by removing an employee from the work roster and denying him further work when he refused to sign the IFA; and
4. the employer had taken adverse action against another employee by threatening him with dismissal if he refused to sign the IFA. The employer applied undue influence and pressure on the employee to obtain his consent to the IFA.

The director had been knowingly concerned in the breaches by the employer and was therefore also in breach of the Act.

In determining the penalty to be ordered, the Court considered a number of mitigating factors including that the employer and director had been cooperative with the Fair Work Ombudsman, the employer's financial position, and that the employer proposed to provide each employee with a letter of apology. These mitigating factors were weighed against the need to deter employers from engaging in similar conduct.

**Lessons**

- IFAs entered into must comply with the Fair Work Act, and the relevant Modern Awards or enterprise agreements in terms of their form and contents.
- Employers must ensure that any IFA agreed to results in the employee being better off overall than the employee would have been under the terms of the applicable award or enterprise agreement.
- As IFAs must be genuinely agreed to by the parties, employers must ensure that employees have not been coerced or subjected to undue influence or pressure to agree to the terms of the IFA.
- Directors and Seniors Managers are exposed to personal

liability if they discriminate against employees because they are either covered or not covered by workplace instruments. Similarly, they are exposed to prosecution where they cause their company not to allocate duties to an employee.

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