



Australian Government

Fair Work OMBUDSMAN

GPO BOX 9887
Sydney NSW 2001

19 October 2018

[REDACTED]
Audi Enterprises Pty Ltd
t/a Audi Repair & Service Centre
44 Chesterville Rd
Cheltenham VIC 3192

Reference number: MAT-0019-0477

Via email and registered post: [REDACTED]

FINDINGS OF CONTRAVENTION

(issued under Regulation 5.05 of the *Fair Work Regulations 2009*)

Dear [REDACTED]

Your former employee Mr Maxim Zintchenko (**Mr Zintchenko**), lodged a dispute form with the Fair Work Ombudsman (FWO) on 14 August 2018. It alleged that your Company, Audi Enterprises Pty Ltd trading as Audi Repair & Service Centre (**Company**) failed to comply with a Fair Work Commission Order (**Order**) relating to unfair dismissal with respect to Mr Zintchenko and [REDACTED]. Mr Zintchenko also alleged that, as a result of wrongfully engaging him as an independent contractor, the Company failed to provide him with the relevant employee entitlements, such as superannuation, and annual leave between July 2011 and 24 May 2017 (**Relevant Period**).

We don't act for either side in workplace disputes. We're here to support and enforce compliant, productive and inclusive workplaces.

I am writing to let you know the outcome of my investigation into these allegations.

Investigation findings

Based on information and evidence given to the FWO during my investigation, I have found that the Company:

- has contravened Commonwealth workplace laws in relation to the employment of Mr Zintchenko; and
- owes Mr Zintchenko a total of \$11,929.61 (**gross**).

And:

- has contravened a Fair Work Commission Order (**attached**) given on 13 July 2018; and
- owes both Mr Zintchenko and [REDACTED] \$3,990 gross, plus 9.5% superannuation **each**, less taxation.

Details of the specific contraventions are set out in **Appendix A**.

You are required to pay Mr Zintchenko \$15,919.61 (gross), by 5 pm on Wednesday 7 November 2018.

You are also required to pay [REDACTED] a total of \$3,990 (gross) by 5pm on Wednesday 7 November 2018.

Evidence considered

In finding there has been a contravention of Commonwealth workplace laws I have relied upon the following documents which were provided to the FWO by the Fair Work Commission:

1. Fair Work Commission Decision [2018] FWC 1097 of 28 March 2018 in the matter of Maxim Zintchenko v Audi Enterprises Pty Ltd T/A Audi Repair & Service Centre (U2017/6360); and
2. Fair Work Commission Decision [2018] FWC 3576 of 13 July 2018 in the matter of Mr Maxim Zintchenko v Audi Enterprises Pty Ltd T/A Audi Repair & Service Centre (U2017/6360); and
3. Fair Work Commission Order dated 13 July 2018 in the matter of [REDACTED] v Audi Enterprises Pty Ltd T/A Audi Repair & Service Centre (U2017/6357) and Mr Maxim Zintchenko v Audi Enterprises Pty Ltd T/A Audi Repair & Service Centre (U2017/6360).

On 28 September 2018, the FWO provided the Director of the Company, [REDACTED] with the opportunity to participate in an electronically recorded Record of Interview to which [REDACTED] declined.

Details of how the underpayment has been calculated is included at **Appendix B**. Calculations for the backpayment of annual leave has been conducted for the sample period of 24 January 2014 to 24 May 2017 (**Assessment Period**).

What you need to do

You must correct the underpayment and send evidence of the payment to me at the above address.

To help you to do this, I have attached a 'Record of payments made to employees' form. Please complete and return the form together with proof of payment, such as:

- a copy of bank electronic funds transfer receipt(s)
- a copy of cheque(s) or letter(s) signed by the employee

You must advise me in writing of actions taken to comply by 5pm on Wednesday 7 November 2018.

Please note that you may be liable to a civil remedy for giving false or misleading information or producing false or misleading documents. It is also a serious offence under the *Criminal Code* (Cth).

Enforcement action

It is important for you to note the FWO may take enforcement action. Efforts by the Company to correct the contraventions set out above will be considered in deciding whether or not to start enforcement action.

Enforcement action can include taking the Company to court to:

- recover outstanding amounts owed to employees

- seek financial penalties and/or other orders for non-compliance with Commonwealth workplace laws.

We can also start legal action against individuals and/or other businesses involved in contraventions of Commonwealth workplace laws.

Possible maximum penalties for each contravention are \$63,000 for a body corporate and \$12,600 for an individual.

Disagreeing with the findings

If you don't agree with the findings please write to me by **5pm on Wednesday 7 November 2018**, with details of each finding disputed and evidence to support your claims. I will review any additional evidence you provide.

If you need more information or would like to talk to me about these findings, please contact me on [REDACTED], by email at [REDACTED] or by post to the address above. Please quote the reference number MAT-0019-0477.

Yours sincerely

[REDACTED]

[REDACTED]
Fair Work Inspector
Fair Work Ombudsman



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APPENDIX A

Details of contraventions

1. Audi Enterprises Pty Ltd trading as Audi Repair & Service Centre (**Company**) is covered by the *Fair Work Act 2009* (**Act**).

Mr Maxim Zintchenko was engaged by the Company between July 2011 and 24 May 2017 (**Relevant Period**) and was incorrectly engaged as an independent contractor instead of an employee on a full-time basis.

From 1 July 2010, Mr Zintchenko's minimum pay and conditions were covered by the Road Transport and Distribution Award 2010 (**Modern Award**). Please note that in certain circumstances the rates of pay and penalty rates contained in the Modern Award are subject to transitional provisions.

Mr Zintchenko's classification under the Modern Award was as a Level 1 courier driver. This is because Mr Zintchenko carried out duties such as: (a) loading and unloading parcels and packages into and out of a Company van; (b) and driving the Company van to deliver parcels and packages in a designated geographical area within Victoria.

I have found that the following contraventions have occurred during the Relevant Period:

- 1. Contravention of Section 45 of the FW Act for contravening a Modern Award**

This section states that a person must not contravene a term of a Modern Award.

For the reasons stated in contravention 2 below, the FWO has found that the Company contravened Section 45 of the FW Act for failing to provide Mr Zintchenko with the relevant entitlements under the Road Transport & Distribution Award 2010.

The Company contravened the following terms of the Road Transport & Distribution Award:

- a) Clause 21.2 – Employer contributions**

The Company failed to make such superannuation contributions to a superannuation fund for the benefit of an employee as will avoid the employer being required to pay the superannuation guarantee charge under superannuation legislation with respect to that employee.

The Company failed to pay Mr Zintchenko superannuation payments for the entirety of the Relevant Period. The FWO has therefore formed the view that the Company contravened this term.

- b) Clause 22.3 – Ordinary hours**

This clause states that the ordinary hours of work must not exceed eight hours per day and must be worked continuously (except for meal breaks) between the hours of 5:30am and 6:30pm.

At paragraph 19 of the Fair Work Commission's decision [2018] FWC 1097 in *Maxim Zintchenko v Audi Enterprises Pty Ltd T/A Audi Repair & Service Centre (U2017/6360)* (**FWC Decision**), it states that Mr Zintchenko worked from 6:45am until 6pm from Monday to Friday for a period of 11 years. Paragraph 18 of the FWC decision provides that Mr Zintchenko's working hours were uncontested by the Company.

The FWO has therefore formed the view that the Company has breached this term.

c) Clause 27.1 – Overtime

The Company failed to pay Mr Zintchenko time and a half for all work done outside ordinary hours for the first two hours and double time thereafter.

At paragraph 19 of the Fair Work Commission's decision [2018] FWC 1097 in *Maxim Zintchenko v Audi Enterprises Pty Ltd T/A Audi Repair & Service Centre (U2017/6360)*, it states that Mr Zintchenko worked from 6:45am until 6pm from Monday to Friday. Mr Zintchenko should have received time and a half daily, between the hours of 2:45pm and 6pm.

The FWO has therefore formed the view that the Company has breached this term.

2. Contravention of Section 357 of the FW Act for misrepresenting employment as independent contracting arrangement

This section states that a person that employs an individual must not represent to the individual that the contract of employment under which the individual is or would be employed by the employer, is a contract for services under which the individual performs work as an independent contractor.

At paragraph 27 of the Fair Work Commission's decision in *Maxim Zintchenko v Audi Enterprises Pty Ltd T/A Audi Repair & Service Centre (U2017/6360)*, Commissioner Cirkovic found that, the Company had wrongfully engaged Mr Zintchenko as an independent contractor instead of as an employee. Based on the findings of the Fair Work Commission and guided by the information provided at the Commission for the purposes of conducting a multi-factor test, the FWO has formed the view that the Company has breached this Section.

3. Contravention of Section 405 of the FW Act for failure to comply with a Fair Work Commission Order (Order)

This section states that a person to whom an Order under Part 4-1 applies must not contravene a term of the order. The Fair Work Commission issued an Order against the Company on 13 July 2018 for unfairly dismissing Mr Zintchenko and Mr Alik Caine in contravention of section 394 of the FW Act. The Fair Work Commission ordered that:

- a) The Company is to pay Mr Alik Caine, within 7 days of the Order, in the amount of \$3,990 gross, plus 9.5% superannuation, less taxation as required by law; and
- b) The Company is to pay Mr Maxim Zintchenko, within 7 days of the Order, in the amount of \$3,990 gross, plus 9.5% superannuation, less taxation as required by law.

The Company failed to comply with the Order within 7 days, and has not complied with the Order to date.

4. Contravention of Subsection 44(1) of the FW Act for failure to comply with a provision of the National Employment Standard in relation to annual leave

The National Employment Standard states that an employer is required to pay an employee 4 weeks of paid annual leave for each year of service with his or her employer.

For the reasons set out in contravention 2 above, the FWO has formed the view that the Company breached this Subsection.

5. Contravention of Subsection 44(1) of the FW Act for failure to comply with a provision of the National Employment Standard in relation to personal leave

The National Employment Standard states that an employer is required to pay an employee 10 days of paid personal/carer's leave for each year of service with his or her employer.

For the reasons set out in contravention 2 above, the FWO has formed the view that the Company breached this subsection.

6. Contravention of Subsection 535(1) of the FW Act for failure comply with employer obligations in relation to employee records

This subsection states that an employer must make, and keep for 7 years, employee records of the kind prescribed by the regulations in relation to each of its employees.

For the reasons stated in contravention 2 above, the FWO has formed the view that the Company breached this Subsection.

7. Contravention of Subsection 536(1) of the FW Act for failure to comply with employer obligations in relation to pay slips

This subsection states that an employer must give a pay slip to each of its employees within one working day of paying an amount to an employee in relation to the performance of work.

For the reasons stated in contravention 2 above, the FWO has formed the view that the Company breached this Subsection.

Our role and helpful resources

For information about how we deal with workplace disputes see our Compliance and enforcement policy, available at www.fairwork.gov.au.

Our website also has tools to help you understand and comply with your obligations. These include:

- [Pay and Conditions Tool \(PACT\)](#) to accurately calculate pay, leave and other entitlements
- [My Account](#) to save all your information in one place and get priority support when you need it
- [Templates and checklists](#) to make record keeping easy
- [Online learning centre to learn the basics and get new skills](#)



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APPENDIX B

To assist you with your calculations, please find attached details of the applicable pay rates as calculated via Pay and Conditions Tool (PACT).

Road Transport & Distribution Award 2010	Weekly	Hourly	Applicable Version
Level 1	\$761.70	\$20.04	27 Jul 2018

The rate used to calculate annual leave for the purposes of back-payment is the rate that applies at the time calculations are conducted. The Fair Work Ombudsman selected the Assessment Period of 24 January 2014 to 24 May 2017 for the purposes of calculating annual leave. Therefore, Mr Zintchenko is entitled to 506 hours and 38 minutes of annual leave during the Assessment Period.

The Company is required to back-pay Mr Zintchenko at the rate of \$20.04 per hour. This equates to a total of \$10,152.86 (**gross**) plus 17.5% annual leave loading.

	From 24 January 2014 to 24 May 2017	Amount
Hours of annual leave entitlement	506 hours and 38 minutes	\$10,152.86
Annual leave loading applicable	17.5% of hours annual leave entitlement	\$1,776.75
	TOTAL:	\$11,929.61 (gross)