

## Penalties for blatant contraventions in popular Perth restaurant chain

1 June 2017

The operator of a popular Perth restaurant chain has been penalised in Court for record-keeping practices that were so poor they prevented the Fair Work Ombudsman from determining the full extent of underpayments of vulnerable overseas workers.

Tram Hoang Han, who controls the Han's Café franchise, has been penalised \$7500 and two companies of which she is currently the sole director – Han Investments Pty Ltd and Han's Café Pty Ltd – have each been penalised a further \$15,000.

The total \$37,500 in penalties, imposed in the Federal Court, are the result of legal action by the Fair Work Ombudsman.

The legal action related to Han's Café outlets Ms Han formerly ran at Forrest Chase in the CBD and Subiaco, Hillarys and Midland.

The Fair Work Ombudsman audited several Han's Café outlets in 2014 during the third and final wave of its three-year National Hospitality Industry Campaign.

The Fair Work Ombudsman had previously advised Ms Han about the need to comply with minimum Award pay rates when investigating a request for assistance from an employee - and the 2014 audits raised concerns that Ms Han's outlets had a standard practice to pay low, flat rates and failed to pay penalties for weekend, overtime and evening work.

The Fair Work Ombudsman's 2014 audit was able to calculate that 100 employees across four Han's Café restaurants had been underpaid \$30,440 as a result of being short-changed their minimum hourly rate. This money was back-paid to the workers – including international students, 417 working holiday visa-holders and 457 skilled worker visa-holders – in 2015.

However, the practices for keeping time-and-wages records at the outlets were so poor that they hindered the Fair Work Ombudsman from quantifying the full extent of the underpaid wages and entitlements, including penalty rates and overtime. When inspectors returned to check on corrective action in October 2015, Ms Han told Fair Work inspectors she was only keeping timesheets for one week.

Under workplace laws, employers must keep staff records for seven years.

In his judgment, Justice Michael Barker described the record-keeping contraventions as "serious".

"This is an area of employment where, unless record-keeping obligations are met, the ability of a regulator, and indeed individual employees, to identify an employer's breach of employment obligations is made difficult, if not on occasion impossible – as indeed this case emphasises," Justice Barker said.

"The record keeping obligations are directed at ensuring the creation of records as a critical tool in the assessment of compliance with workplace laws. Unless an employer complies with the law, and makes and keeps employment records, an effective safety net for employees is difficult to maintain. The result is that employees are more vulnerable to exploitation. The job of the Fair Work Ombudsman, as regulator, in detecting and protecting employees' workplace entitlements is reduced in effectiveness."

Justice Barker said the conduct "should not be seen as mere contraventions of some lower order".

"The failure to maintain records truly strikes at the very foundation of the regulatory scheme which is designed to ensure that employees are paid their legal entitlements," Justice Barker said.

"As the Fair Work Ombudsman submits, the failure will be considered particularly egregious where employees are in a class of uninformed or poorly informed people, or where they are transient workers dependent on the ongoing support of their employer for their work, as indeed the evidence shows is the case here."

Justice Barker found there was little evidence of contrition or corrective action.

"The need to implement processes within the businesses to ensure that records were properly kept had been lacking for some time, and were not changed even when questions were asked," Justice Barker said.

Justice Barker found there was a need to impose penalties that deterred Ms Han and the companies from further contraventions.

“The respondents, while continuing to experience business difficulties, need to fully appreciate that the workplace laws have to be complied and are not to be bent or relaxed simply because a particular employer considers that its business will suffer financially if they comply,” Justice Barker said.

“In the circumstances of this particular case, I am not satisfied that the respondents have simply made an error which is unlikely ever to be repeated.”

Justice Barker found there was also a need to deter others from similar contraventions.

“There is also a clear need for general deterrence so that a message is sent clearly and loudly to businesses operating in the restaurant industry that the record keeping laws are of fundamental importance and must be complied; and that if they are not complied with, those businesses, and those persons who are accessories to contraventions, will be visited with penalties that show that penalties are not merely a cost of doing business,” Justice Barker said.

In addition to the penalties, the Fair Work Ombudsman secured Court Orders requiring the two companies to use the educational self-help tools available for employers at [www.fairwork.gov.au](http://www.fairwork.gov.au) - including registering with the My Account service.

Fair Work Ombudsman operational work relating to Han’s Café outlets in Perth remains ongoing and further enforcement action is possible.

Fair Work Ombudsman Natalie James says the Court’s decision sends a message that blatant non-compliance with basic record-keeping is a serious matter.

In a speech last month, Ms James raised concerns that penalties are creating an incentive for unprincipled employers to breach record keeping laws and her Agency was seeing more and more cases where the records of some employers were either non-existent or so poor that it was impossible for Fair Work inspectors to calculate what employees were owed

In April this year, Ms James made a submission to a Senate Inquiry supporting the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017. Ms James stated that the package of measures contained in the Bill, including proposed penalty increases for record keeping breaches will go some way to giving the Fair Work Ombudsman the tools to combat the most serious worker exploitation.

Ms James also says that the hospitality sector, in particular the take-away food sub-sector, will remain a “priority” industry earmarked for ongoing education and support.

“The Fair Work Ombudsman is striving to build a culture of compliance where businesses understand and comply with their lawful obligations and do not inadvertently or deliberately undercut their competitors by paying black market wage rates,” she said.

“We are committed to helping employers to understand and comply with workplace laws, but operators also needed to make an effort to get the basics right in the first place.”

Ms James urged hospitality businesses to use the online tools and resources available to them free of charge on the Fair Work Ombudsman’s website.

Employers and employees seeking assistance can visit [www.fairwork.gov.au](http://www.fairwork.gov.au) or call the Fair Work Infoline on 13 13 94. An interpreter service is available on 13 14 50.

Resources on the website include templates for time-and-wages sheets and pay slips, and a Pay and Conditions Tool (PACT) that employers can use to determine the pay rates applicable to their employees, including base pay rates, allowances, overtime and penalty rates.

The Fair Work Ombudsman has recently updated and expanded the translated information available on its website. Information is now available in 30 languages. The translated content includes videos and topic based information about pay, leave and ending employment.

The Fair Work Ombudsman has released the ‘Record My Hours’ app aimed at tackling the persistent problem of underpayment of young workers and migrant workers around the country. The app, which equips workers with a record of the time they spend at their workplace by using geofencing technology to register when they arrive at work and when they leave, is available for download from iTunes or Google Play stores.

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