

Former Brisbane Coffee Club franchisee penalised over unlawful cash-back payment

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The Fair Work Ombudsman has secured more than \$180,000 in penalties against a former Coffee Club café franchisee in Brisbane for contraventions including requiring an overseas worker on a 457 skilled worker visa to pay back \$18,000 of his wages through an unlawful cash-back payment.

The penalties have been imposed after Brisbane man Saandeep Chokhani – who, with his wife, formerly owned and ran the Coffee Club franchise at the Nundah Village Shopping Centre – required an overseas worker to repay \$18,000 of his wages by threatening to take steps to cancel the worker’s 457 skilled worker visa if he refused.

Mr Chokhani has been penalised \$30,000 and a company he and his wife are the directors of, Gaura Nitai Pty Ltd, has been penalised a further \$150,900, in the Federal Circuit Court.

The worker is an Indian national in his late 20s who was sponsored by Gaura Nitai to work as a cook at the Nundah Coffee Club outlet on a 457 visa.

In his penalty judgment, Judge Michael Jarrett said: “The exploitation of workers from other countries who are inspired to live and work in Australia with the hope of achieving permanent residency needs to be discouraged, in the strongest of terms whenever it is apparent that it has occurred. This is one of those cases.”

The worker’s contract stated he was to be paid an annual salary of \$53,900 on a weekly basis - but he endured long periods without receiving any wages at all.

After failing to pay the worker any wages for a four-month period from July to November 2014 and a one-month period in February-March 2015, Chokhani and Gaura Nitai paid the worker \$19,334 by electronic transfer on 22 April 2015.

Judge Jarrett found that Chokhani then told the worker to withdraw \$18,000 in cash and repay it to him or Chokhani would take steps to cancel his 457 visa.

The worker withdrew \$18,000 in cash the same day and repaid it to Chokhani.

“(The worker) was in a bind,” Judge Jarrett said.

“He could not leave his employment because if he did so he would breach a condition of his visa and his ability to remain in Australia would be seriously compromised. He was effectively working for nothing.”

The worker lodged a request for assistance with the Fair Work Ombudsman only after his employment was terminated without notice in November 2015.

When Fair Work inspectors investigated, they found that because of the unlawful cash-back payment, the worker had been underpaid his minimum hourly rates, casual loading, annual leave entitlements, overtime rates, payment in lieu of notice of termination and penalty rates for weekend and public holiday work.

The unlawful cash-back payment and the underpayment of contractual entitlements led to the worker being short-changed a total of \$23,546 between September, 2013 and November, 2015. The worker was back-paid in full earlier this year.

The worker told the Court that the exploitation had led to him incurring credit card debt and needing to borrow money from family and friends.

Judge Jarrett described the requirement placed on the worker to pay-back his wages as “especially egregious”, saying it was “an inappropriate and grotesque exploitation of the power imbalance that existed between (Chokhani) and (the worker)”.

“The respondents’ conduct was deliberately exploitative of (the worker’s) position being, as he was, dependent upon (Gaura Nitai’s) ongoing sponsorship so as not to jeopardise his 457 visa”, Judge Jarrett said.

Fair Work Ombudsman Natalie James says the penalties imposed send a message about the seriousness of exploiting the vulnerability of visa holders.

“We will do everything within our power to pursue any employer who thinks they can exploit the power imbalance they have over migrant workers they employ,” Ms James said.

“Any unscrupulous employer tempted to engage in this sort of conduct should think again because there are serious consequences for this type of behaviour.”

At the time of the investigation, the Fair Work Ombudsman previously had a proactive compliance deed in place with the owners of the Coffee Club Franchise, Minor DKL Food Group (MDKL). Ms James commended the company’s cooperation through the course of the investigation and its approach to ensuring compliance in its network.

Chokhani and Gaura Nitai ceased operating the Nundah Coffee Club outlet in May 2017.

Ms James says exploitation of workers with franchise chains continued to be a concern for the Fair Work Ombudsman and she welcomed the Government’s proposed new laws relating to underpayments within franchise networks.

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 will go some way to giving the Fair Work Ombudsman the tools to combat the most serious worker exploitation.

Ms James says she has also been concerned about the use of cash-back arrangements in a number of matters.

The Fair Work Ombudsman recently commenced legal action against the operator of a Sydney café (<http://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/february-2017/20170215-robit-nominees-litigation-mr>) for allegedly requiring an overseas worker to unlawfully pay-back thousands of dollars of her wages.

The Federal Circuit Court recently ordered record penalties of \$532,000 (www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/february-2017/20170208-rubee-penalty) against an Albury café owner and his business in a case involving two Indian workers who were coerced into paying back large portions of their wage to their employer. The workers were threatened with violence and deportation if they refused.

The Fair Work Ombudsman is also currently pursuing legal action in a matter in which an overseas worker employed as a cook on the Gold Coast was allegedly required to pay-back more than \$21,000 of her wages to her employer (www.fairwork.gov.au/about-us/news-and-media-releases/archived-media-releases/2016-media-releases/july-2016/20160722-ausinko-litigation) in a cashback scheme.

“It is hard to see a legitimate reason why an employer would require employees to be regularly paying back significant parts of their wage, and I am concerned that cashback schemes are being utilised by unscrupulous operators in an attempt to get around record keeping laws and disguise serious underpayment of wages,” Ms James said.

“We welcome the Government’s commitment to strengthen laws to explicitly cover cash back arrangements.”

In the 2015-16 financial year, 38 of the Fair Work Ombudsman’s 50 litigations (76 per cent) involved a visa holder, and more than \$3 million was recovered for all visa-holders.

Employers and employees seeking assistance can visit www.fairwork.gov.au or contact the Fair Work Infoline on 13 13 94. An interpreter service is available by calling 13 14 50 and information and helpful materials on the website is translated into 30 different languages.

Follow Fair Work Ombudsman Natalie James on Twitter [@NatJamesFWO](https://twitter.com/NatJamesFWO) (<http://twitter.com/NatJamesFWO>) , the Fair Work Ombudsman [@fairwork_gov_au](https://twitter.com/fairwork_gov_au) (http://twitter.com/fairwork_gov_au) or find us on Facebook www.facebook.com/fairwork.gov.au (<http://www.facebook.com/fairwork.gov.au>) .

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Editor’s note: The current operators of the Coffee Club outlet in Nundah have no involvement in any of the conduct referred to in this media release. The proactive compliance deed between the Fair Work Ombudsman and MDKL expired in 2017. Discussions regarding a new deed are underway.

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