

## Judgment confirms Compliance Notice and \$77,000 for Indian worker

23 March 2017

The Fair Work Ombudsman has won judicial support for the first review of a compliance notice. The compliance notice was issued on a religious organisation in Melbourne, which was found to have underpaid an overseas worker almost \$80,000.

The case involves an Indian man, aged in his 40s, who was sponsored by the Hindu Society of Victoria on a 428 religious worker visa to come to Australia to work at its Melbourne temple, located at Carrum Downs.

The worker was employed by the Hindu Society of Victoria at the temple from June 2011 until November 2012, when he severely injured his hand on a flour-grinder while performing cooking duties in the temple's canteen.

After the worker subsequently lodged an underpayment allegation, the Fair Work Ombudsman investigated and determined the worker had performed a significant amount of work in the temple's canteen for which he was entitled to have been paid the minimum entitlements for a grade one cook under the Restaurant Industry Award.

This included minimum hourly rates of more than \$16.50 and \$17 an hour, plus penalty rates of between \$20.71 and \$41.43 an hour for weekend, public holiday and overtime work.

However, the Fair Work Ombudsman determined that the Hindu Society of Victoria had paid the worker less than \$15 an hour for 2823.5 hours of work and nothing at all for a further 2014.5 hours of work.

The Fair Work Ombudsman issued the organisation a Compliance Notice requiring it to back-pay the worker a total of \$77,754.

The Hindu Society of Victoria lodged an application in the Federal Circuit Court challenging the Notice. This is the first time an employer's application to review a Compliance Notice in Court has proceeded to determination.

In a significant interlocutory ruling during the course of the case, Judge Grant Riethmuller found that when contesting a Compliance Notice in Court, the employer bares the onus of proving they have paid employees correctly.

"The employer is uniquely positioned with respect to the production of evidence to demonstrate that the allegations in the compliance notice are not correct," Judge Riethmuller said.

"In the event that the employer is keeping records as required under the regulations, one would expect that these would be relatively easy matters to prove."

In the substantive hearing, the Hindu Society of Victoria submitted that the Fair Work Ombudsman's assessment was wrong and the Restaurant Industry Award did not apply - but Judge Riethmuller has now dismissed the argument, which means the Hindu Society of Victoria must now back-pay the employee according to the Compliance Notice.

In his judgment, Judge Riethmuller noted that the annual gross revenue of the temple's canteen was more than \$280,000 during the Indian worker's employment and had subsequently increased to more than \$600,000.

"The takings of the canteen and the extent of its work (particularly with catering) makes it clear that the canteen had significantly outgrown a purely religious service," he said.

Fair Work Ombudsman Natalie James says that the Agency will continue to use Compliance Notices to secure back-payment for underpaid employees outside of the Courts, saving significant resources.

"Compliance Notices will continue to be an efficient and effective tool precisely because they enable us to secure back-payment for underpaid employees without the cost to the public purse associated with appearing in Court," Ms James said.

The Fair Work Ombudsman identifies more than \$20 million in underpayments at thousands of Australian businesses each year.

The large majority of these cases are resolved through the Fair Work Ombudsman working co-operatively with employers to assist them to voluntarily back-pay employees and put processes in place to ensure ongoing compliance.

However, in a minority of cases in which employers refuse to co-operate, Fair Work Inspectors have the power to issue a Compliance Notice demanding back-payment within a short time frame, such as 14 or 28 days.

Ms James says: "We will continue to issue Compliance Notices in situations where, after careful consideration of available evidence, we are satisfied that an employee has been underpaid – but the employer is refusing to co-operate and back-pay the employee.

"We respect the right of any employer who believes we have erred to contest a Compliance Notice in Court – but employers pursuing this avenue should note that they must be ready to present evidence to prove they have paid employees correctly."

Ms James says employers should also note that simply ignoring a Compliance Notice is a contravention of the Fair Work Act and can result in an employer facing a penalty, in addition to having to comply with the Compliance Notice and back-pay employees in full.

Late last year, a Sydney cleaning operator was penalised more than \$11,000 in Court for refusing to comply with a Compliance Notice issued by the Fair Work Ombudsman requiring it to back-pay two international students less than \$3000 (see: [Cleaning operator penalised for refusing to back-pay international students \(www.fairwork.gov.au/about-us/news-and-media-releases/archived-media-releases/2016-media-releases/november-2016/20161102-green-clean-penalty\)](http://www.fairwork.gov.au/about-us/news-and-media-releases/archived-media-releases/2016-media-releases/november-2016/20161102-green-clean-penalty) ).

Employers and employees seeking assistance can visit [www.fairwork.gov.au](http://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 on the website is translated into 27 different languages.

Resources available on the website include templates for pay slips and time-and-wages sheets and the Pay and Conditions Tool (PACT), which provides advice about pay and other entitlements.

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Page reference No: 7106

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Fair Work Infoline: 13 13 94

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