

Low penalties mean workers pay for dodgy record keeping

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Low penalties are creating an incentive for unprincipled employers to breach record keeping laws, according to Fair Work Ombudsman Natalie James.

Speaking in Canberra yesterday, Ms James said 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.

Ms James highlighted a recent case where a blueberry farmer's records consisted of only first names and the number of buckets his workers had harvested.

"We know employees were paid \$6 per bucket but we were not able to identify the workers, let alone assess the hours they had worked and what they were owed," Ms James said.

"In this case the court awarded 75% of the maximum penalties available against the company for record-keeping contraventions, totalling \$13,005. But, despite there being clear signs that some 60 casual and mostly 417 visa workers had been underpaid, a lack of evidence meant we were unable to establish the quantum of the underpayments.

"The comparatively low penalties that currently apply for record keeping contraventions arguably create a perverse incentive. An incentive to not keep accurate records to conceal underpayment of wages," Ms James said.

Ms James said Fair Work Inspectors went to great lengths to try to reconstruct workers' records but in the absence of reliable evidence, some unscrupulous employers continue to get away with record keeping contraventions and possibly even profit from their unlawful behaviour.

"Unless workers have meticulously kept their own records of their hours of work, it becomes very difficult to assess whether underpayments have arisen and to be able to prove the quantum to the satisfaction of a court," Ms James said.

"In such cases, my Inspectors resort to creative methods of accessing other evidence from objective or neutral sources to attempt to piece together a person's hours of work.

"They've trawled through CCTV footage, cash register log-in records, public transport tap on and tap off records, text message exchanges and security and visitor logs.

"They've translated employee's personal diaries into English.

"They've camped out the front of retail stores to personally witness when employees are entering and leaving work. Yet unfortunately we still put a number of cases to court where we have been unable to calculate an underpayment," Ms James said.

An analysis of litigations initiated by the Fair Work Ombudsman reveals:

- 26 of the 50 litigations filed in 2015/16 involving alleged record-keeping contraventions
- In 16 (62 per cent) of these litigations the agency could not accurately calculate underpayments owed to workers
- 265 workers were affected in these cases.
- So far in 2016/17 there have been 17 litigations involving alleged record-keeping contraventions
- In 15 (88 per cent) of these litigations the agency could not accurately calculate underpayments owed to workers.
- 463 workers have been affected in these cases to date.

In March the Fair Work Ombudsman launched a new tool to make it easier for workers to keep an accurate diary of the hours they work. The new smartphone app, Record My Hours, has since been downloaded nearly 9000 times.

Ms James said the app was available for free from the Google Play and Apple App stores or from <https://www.fairwork.gov.au/how-we-will-help/how-we-help-you/record-my-hours-app> (www.fairwork.gov.au/how-we-will-help/how-we-help-you/record-my-hours-app) .

Employers and employees seeking assistance can visit www.fairwork.gov.au or call the Fair Work Infoline on 13 13 94. An interpreter service is available on 13 14 50 and the website contains materials translated into 27 different languages.

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