

HR manager among those penalised almost \$400,000 for “systematic” exploitation at restaurant

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The Fair Work Ombudsman has secured almost \$400,000 in penalties against a company and three individuals – including an HR manager – for systematically exploiting overseas workers at a Chinese restaurant in NSW and fabricating records to try to cover it up.

The penalties have been imposed in the Federal Court after 85 employees at the New Shanghai Charlestown restaurant at Charlestown were underpaid a total of \$583,688 over a 16-month period in 2013-2014.

Justice Robert Bromwich has imposed a \$54,672 penalty against the mastermind of the exploitation, restaurant owner Zhong Yuan “John” Chen, and penalised his company NSH North Pty Ltd a further \$301,920.

Justice Bromwich imposed a \$18,496 penalty against restaurant manager Jin Xu for her involvement in the exploitation – and in addition, imposed a \$21,760 penalty against the restaurant’s HR manager Ting “Sarah” Zhu, dismissing her argument that her culpability was greatly reduced because she had been following her boss’s orders.

The penalties are the result of an investigation and legal action by the Fair Work Ombudsman. Fair Work inspectors found that many workers at the restaurant – mostly visa holders from Asia – were paid as little as \$10 an hour.

Under the Restaurant Industry Award at the time, most were entitled to be paid more than \$20 an hour for ordinary hours and between \$24 and \$45 an hour for weekend, public holiday and overtime work. One employee was underpaid more than \$33,000.

When the Fair Work Ombudsman began its investigation, NSH North provided fabricated records to inspectors that purported to show staff had been paid correctly.

The company later provided the true employment records, only after the issue was raised with them by the Fair Work Inspector and a further Notice to Produce issued, showing the unlawfully low, flat rates the employees were actually paid.

Justice Bromwich found that the contraventions involved “serious and premeditated conduct” and “encompassed a widespread, systematic and prolonged failure to accord employees their basic entitlements”.

NSH North has rectified more than \$450,000 of the underpayments and is attempting to locate the employees who have not yet been back-paid. For any employees who cannot be located, the company will pay the amounts owing to the Commonwealth to be held in trust for the employees.

NSH North, Chen, Xu and Zhu all admitted in Court that they were involved in deliberately underpaying the workers and making use of fabricated records.

However, Zhu, whose duties included processing payroll and arranging staff wage payments, submitted that her culpability was reduced due to the fact she was at all times acting under the direction of Chen.

At the time of the underpayments, Zhu was being sponsored by a related company, NSH Restaurants Pty Ltd, on a 457 skilled worker visa and was being paid an annual salary of \$100,000.

Justice Bromwich rejected Zhu’s submission, finding she had “acted in her own interests” in choosing to be a knowing participant in the underpayments and in taking an active role in the creation of false records.

“There is nothing wrong with sending the message that an employee should indeed resign if that is the only alternative to continuing to participate knowingly in illegal activity, ideally coupled with reporting the conduct, in a case such as this, to the FWO,” Justice Bromwich said.

Zhu argued in Court that her position as a 457 visa holder with familial and cultural pressures of loyalty to Chen made her vulnerable and should be a mitigating factor.

“In no sense was Ms Sarah Zhu a victim of the conduct. If this aspect of Ms Sarah Zhu’s circumstances is really mitigation at all, it cannot be given much weight. That is so both as a matter of public policy in requiring individuals to put compliance with the law ahead of their personal interests, and having regard to Ms Sarah Zhu’s knowledge that the law was being disobeyed for the entire

period of over 16 months. Moreover, she took an active role in the attempt to thwart the FWO investigation,” Justice Bromwich said.

Acting Fair Work Ombudsman Kristen Hannah says the outcome of the matter sends a clear message that the Fair Work Ombudsman is committed to using accessory liability laws to hold individuals involved in exploiting vulnerable workers to account.

“Rogue business owners and managers who think they can run operations based on exploitation of vulnerable workers and then try to hide behind corporate structures or flimsy excuses are playing with fire,” Ms Hannah said.

“We are committed to actively seeking them out, dismantling their unlawful business models, making sure the public are aware of the actions and ensuring they are penalised for their conduct. Business models based on exploitation of employees to gain an unfair commercial advantage are unacceptable.

“Where we find blatant exploitative conduct, we will do everything within our power to ensure that all accessories to that conduct are held to account.

“This includes taking action against not only business owners and directors – but also any HR practitioners, accountants, industrial relations specialists and any other professionals involved in knowingly facilitating exploitation of employees.

“HR managers and other specialists must explain the requirements to their clients, make it clear when they are in danger of breaking them and not become involved in breaches of the law themselves,” Ms Hannah said.

The Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 has now come into effect, increasing the maximum penalties for conduct including deliberate exploitation of workers and false records.

“The maximum penalties available for serious exploitative conduct that occurs today or in the future are now significantly higher than were available to be imposed in matters such as this one - and we will not hesitate to seek maximum penalties from the courts when it is in the public interest,” she said.

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