

Migrant workers allegedly paid no wages for a year's work under 'work experience' scheme

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The Fair Work Ombudsman has commenced legal action against a Sydney childcare operator that allegedly failed to pay two migrant workers any wages for a year of work under the guise of an 'unpaid work experience' scheme.

Facing the Federal Circuit Court are Sydney man Jan Shang, who owns and operates the Joys Child Care centre in Parramatta, and his company Joys Child Care Limited.

The Fair Work Ombudsman alleges two childcare workers were paid nothing despite being entitled to a total of \$54,752 in wages, public holiday and annual leave entitlements for a year's work they performed at Joys Child Care between February 2016 and February 2017.

Both workers are females who are originally from China. One is a permanent resident of Australia, while the other was a visa-holder when she worked for Joys Child Care.

They performed general childcare duties at Joys Child Care, which offers long day-care and educational programs in Chinese and English languages for children up to the age of six.

The Fair Work Ombudsman alleges that in return for unpaid work, Mr Shang and his company purported to pay for the two workers' enrolment in a Diploma in Early Childhood Education at a training institute and provide the workers with practical experience and training to meet the work experience component of the Diploma.

The Fair Work Ombudsman considers several weeks of initial unpaid work performed by the two workers to have been part of a vocational placement that was a legitimate part of their Diploma.

However, the Fair Work Ombudsman alleges that the work the two workers performed at Joys Child Care went well beyond the work experience hours required under the course – and that the workers were lawfully entitled to be paid for the work performed when they were not undertaking a vocational placement.

The workers lodged requests for assistance with the Fair Work Ombudsman last year after their employment with Joys Child Care ended.

The Fair Work Ombudsman investigated and determined that because the two workers had performed productive work for Joys Child Care under little or no supervision, they had been employees of the company when they were not undertaking the vocational placement.

As such, the Fair Work Ombudsman alleges workers were entitled to the applicable minimum wage rates and annual leave entitlements under the Children's Services Award 2010 .

It is alleged that one of the workers, aged 42, was a full-time employee and was entitled to have been paid \$35,062 and the other, aged 25, was a part-time employee and was entitled to \$19,690.

In November last year, the Fair Work Ombudsman issued Mr Shang and his company two compliance notices requiring them to back-pay the workers in-full within 14 days.

Under the Fair Work Act, business operators must adhere to Compliance Notices or make a Court application for a review if they are seeking to challenge a Compliance Notice.

It is alleged Mr Shang and his company committed a breach of the Fair Work Act by failing to comply with the Compliance Notices.

Mr Shang faces a maximum penalty of \$6300 and Joys Child Care Limited faces a maximum penalty of \$31,500.

The Fair Work Ombudsman is also seeking Court Orders for Mr Shang and his company to back-pay the employees in full and for Mr Shang to register with the My Account service at www.fairwork.gov.au and complete the education courses for employers in the Online Learning Centre.

A directions hearing is scheduled for the Federal Circuit Court in Sydney for June 18.

Due to Joys Child Care failing to keep a record of the hours of work performed by workers, the Fair Work Ombudsman relied on the full-time worker's own timetable of the days and hours she had worked for the basis of determining the wages owing to her.

For the part-time worker, who had travelled to and from Joys Child Care by public transport, the Fair Work Ombudsman relied on the worker's Opal card transactions which showed times arriving and departing from Parramatta.

The lack of records prevented the Fair Work Ombudsman from determining the hours worked and wages owing to several other Joys Child Care workers, including five who had lodged requests for assistance with the Fair Work Ombudsman.

Fair Work Ombudsman Natalie James says a decision was made to commence legal action because workers had allegedly been denied basic lawful entitlements and the employer had refused to co-operate and resolve the matter outside of the courts by complying with the Compliance Notices.

Ms James says employers who try to use unpaid work schemes as a source of free or cheap labour are at high risk of breaching workplace laws.

"Legitimate internship and work placements can be a genuine way for people to further their learning or gain skills that assist in finding employment," Ms James said.

"The system allows for unpaid work in some circumstances – for example, where they are part of an approved program. But the law prohibits the exploitation of workers by characterising them as 'interns' or as doing 'work experience' when those individuals are fulfilling the role of an employee. Such workers must be paid minimum employee entitlements."

Ms James says business operators should be aware that the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 has also introduced significantly higher penalties for a range of contraventions.

Penalties of up to \$630,000 per contravention for a company and \$126,000 per contravention for an individual now apply in relation to serious exploitation of workers.

Penalties for serious record-keeping breaches have also increased.

"A reverse onus of proof can also now apply, meaning that employers who don't meet record-keeping or pay slip obligations and can't give a reasonable excuse will need to disprove allegations of underpayments made in a court," Ms James said.

"If you have failed in your obligations to keep records - obligations the courts have held to be 'the bedrock of compliance' - any records kept by employees will be the first reference point for the Fair Work Ombudsman and the Court."

The new laws and penalties apply to conduct that has occurred since the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 came into effect in September 2017.

The Fair Work Ombudsman last year released the 'Record My Hours' smartphone app (www.fairwork.gov.au/tools-and-resources/record-my-hours-app), which uses geofencing technology to provide workers with a record of the time they spend at their workplace. The app can be downloaded from the App Store and Google Play.

"We see far too many examples of records that are either deliberately misleading or sub-standard and the app is a valuable back-up for workers when employers failed to meet their record-keeping obligations," Ms James said.

Employers and employees can seek assistance at www.fairwork.gov.au or contact the Fair Work Infoline on 13 13 94. Small business callers can opt to receive priority service via the Small Business Helpline and a free interpreter service is available on 13 14 50.

The Fair Work Ombudsman has also recently launched a Small Business Showcase - www.fairwork.gov.au/smallbizshowcase (<http://www.fairwork.gov.au/smallbizshowcase>) - which is a virtual hub providing a wealth of resources for small businesses seeking information about their workplace obligations.

Resources available include the Pay and Conditions Tool (PACT), which provides advice about pay, shift, leave and redundancy entitlements and there are templates for pay slips and time-and-wages records.

The Fair Work Ombudsman's popular [Anonymous Report](http://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/july-2017/20170731-migrant-worker-anon-report-tool) function (www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/july-2017/20170731-migrant-worker-anon-report-tool), available in 16 languages other than English, allows visa-holders to report workplace concerns anonymously to the agency in their own language.

The Fair Work Ombudsman recently published an [open letter](http://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/september-2017/20170925-international-students-release) (www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/september-2017/20170925-international-students-release) to international students to encourage them to seek free help from the agency if they experience any issues while working in Australia.

"We are seeking to raise awareness among international students that in line with an agreement between the Fair Work Ombudsman and the Department of Immigration and Border Protection, you can seek our assistance without fear of your visa being cancelled, even if you've worked more hours than you should have under your visa," Ms James said.

The Fair Work Ombudsman has developed a range of resources – available at www.fairwork.gov.au/unpaidwork (<http://www.fairwork.gov.au/unpaidwork>) – for employers, employees and higher education institutions to promote a clear understanding in the community about what constitutes legitimate unpaid arrangements and vocational arrangements under the Fair Work Act.

They include fact sheets on topics including unpaid internships and work experience, unpaid trials, and vocational (student) placements. There is industry-specific information for the print and broadcast media, professional services, hair and beauty and hospitality sectors. The unpaid work research report commissioned by the FWO is also available.

“With the range of resources available for employers, there is no excuse for mistakes or ignorance about their obligations to pay workers,” Ms James said.

Last year, the Fair Work Ombudsman [began court action \(www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/june-2017/20170601-her-fashion-box-litigation\)](http://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/june-2017/20170601-her-fashion-box-litigation) against a fashion industry start-up that appeared on the reality show ‘Shark Tank’ for allegedly running an unlawful unpaid internship program and underpaying three workers more than \$40,000.

In 2016, [Fair Work Ombudsman litigation \(www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/june-2016/20160604-aimg-bq-penalty\)](http://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/june-2016/20160604-aimg-bq-penalty) resulted in the Federal Circuit Court imposing \$272,850 in penalties against Sydney-based media company AIMG BQ Pty Ltd to send a “serious message” not to disguise employment relationships as unpaid internships.

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