

\$216,700 in penalties after Pizza Hut franchisee engages in sham contracting

15 June 2018

A Pizza Hut franchisee on the Gold Coast has been penalised a total of \$216,700 after exploiting an Indian delivery driver under a sham contract and using false records to try to cover it up.

Gold Coast man Dong Zhao, who owns and operates the Pizza Hut franchise outlet at Upper Coomera, has been penalised \$36,700 and his company Skyter Trade Pty Ltd has been penalised an additional \$180,000.

The penalties, imposed in the Federal Circuit Court, are the result of legal action by the Fair Work Ombudsman.

Judge Michael Jarrett imposed the penalties after Zhao and his company admitted contravening sham contracting laws when they misrepresented to a delivery driver that he was an independent contractor, not an employee.

The driver, an Indian national aged in his 20s, was in Australia as a dependent on his wife's international student visa at the time.

Zhao asked the delivery driver to provide an Australian Business Number (ABN) and then treated him as an independent contractor between November 2015 and May 2016, paying him a flat rate of no more than \$16 an hour.

However, as an employee rather than an independent contractor, the worker was entitled to receive at least \$20.36 for ordinary hours and up to \$40.72 for overtime and public holiday work under the Pizza Hut enterprise agreement that applied to the business.

He was also underpaid a per-delivery entitlement, superannuation and a uniform allowance. The driver has been back-paid in full.

The Fair Work Ombudsman formed the view that the driver was an employee of Zhao's company, rather than an independent contractor, for reasons including the level of direction, supervision and control Zhao and his company had over the driver – and because the driver was not genuinely operating his own delivery business.

Judge Jarrett found that the sham contracting contravention was "serious" and "deliberate" conduct that occurred despite Zhao having received clear advice from the franchisor not to engage in such arrangements.

Judge Jarrett said the underpayment amounts were significant to the driver.

"According to the evidence, he was the sole breadwinner for he and his wife and was responsible for their daily living expenses, rent, groceries and his wife's tuition fees," Judge Jarrett said.

"Partly as a result of being underpaid, he needed to borrow about \$1,500 from his cousin in Melbourne and about \$20,000 from his father in India, which he says was culturally shameful and embarrassing. (The driver's) evidence was that he was constantly anxious and stressed about their low bank balance and at times felt depressed and humiliated. The evidence is that (the driver) was responsible for paying all the running costs for his car that he used for all deliveries he performed for the respondents, as well as paying for replacement tyres, registration and insurance."

Fair Work Ombudsman inspectors investigated Zhao's Pizza Hut outlet in 2016 as part of an activity that involved audits of more than 30 Pizza Hut outlets and identified widespread non-compliance in the franchise network.

Zhao and his company also breached workplace laws during the investigation by failing to comply with a Notice to Produce employment records and providing false records to the Fair Work Ombudsman during its investigation.

Judge Jarrett found that Zhao had actively sought to mislead the Fair Work Ombudsman.

"The failure to keep proper records and to provide pay slips to employees is an insidious practice that is only aggravated by the creation and provision of false documents designed to conceal the employer's wrong doing," Judge Jarrett said.

"Employers and those that control them ought to be under no misapprehension that the creation and provision of false records is a serious matter and will be treated seriously by the Court."

Judge Jarrett also ordered Zhao and his company to commission retrospective and future audits of pay practices at his Pizza Hut outlet and rectify any underpayments discovered, and to display a workplace notice containing information about minimum lawful pay rates and Fair Work Ombudsman contact details.

Fair Work Ombudsman Natalie James says the case sends a message that sham contracting is serious conduct and significant consequences apply.

“We treat sham contracting particularly seriously because it can result in employees being deprived of basic minimum wages and protections,” Ms James said.

“Sham contracting is a priority for my Agency not just because of the direct impact of these arrangements on individual workers but because those adopting sham contracting as a business model are availing themselves of an unfair competitive advantage by depriving workers of their lawful minimum employment conditions and protections.”

The Fair Work Ombudsman’s 2016 compliance activity involved 34 Pizza Hut franchisees and identified widespread issues relating to the engagement of delivery drivers in the franchise network. Following the completion of all outstanding investigations arising from the compliance activity, Fair Work Inspectors identified that of 32 franchisees engaging delivery drivers, there were 28 franchisees with non-compliance issues.

As a result of the activity (www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/august-2017/20170811-ambeshwar-pizza-hut-newcastle-eu), the Fair Work Ombudsman entered into Enforceable Undertakings with four Pizza Hut franchisees (www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/pizza-hut-eus) and 11 were issued with Compliance Notices.

In a speech last year (www.fairwork.gov.au/about-us/news-and-media-releases/speeches/speeches), Ms James raised concerns about the impact that fierce competition in the pizza sector, which had been dubbed the ‘pizza wars’, was having on the pay packets of vulnerable workers employed in the sector.

In Court, Judge Jarrett noted that Zhao claimed that since buying his Pizza Hut franchise in 2013, the business had suffered a loss each year and that the business had declined in profitability since 2014 because of “Pizza Hut Head Office’s policy to push all its shops into a ‘price war’ by selling cheap pizzas below food cost; and in 2017 additional competition coming from a new Dominos Pizza in the region”.

Ms James said it was important to note that under the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017, which came into effect in September 2017, franchisors can now be held responsible for contraventions by a franchisee.

In a speech to the Franchise Advisory Centre’s (www.fairwork.gov.au/about-us/news-and-media-releases/speeches/speeches) Franchise Management Forum (www.fairwork.gov.au/about-us/news-and-media-releases/speeches/speeches) this week, Fair Work Ombudsman Natalie James launched the [Guide to promoting workplace compliance in your franchise network \(DOCX 763.1KB\)](https://www.fairwork.gov.au/ArticleDocuments/712/guide-to-promoting-workplace-compliance-in-your-franchise-network.docx.aspx) (<https://www.fairwork.gov.au/ArticleDocuments/712/guide-to-promoting-workplace-compliance-in-your-franchise-network.docx.aspx>) (PDF 369.8KB) (<https://www.fairwork.gov.au/ArticleDocuments/712/guide-to-promoting-workplace-compliance-in-your-franchise-network.pdf.aspx>) and emphasised the steps a franchisor can take to prevent workplace issues and avoid liability.

“With the new laws setting clear expectations that franchisors need to consider how to prevent exploitation of workers, the guide provides practical advice to assist franchisors to promote sustained workplace compliance in their networks,” Ms James said.

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 new laws came into effect.

Employers and employees seeking assistance can visit www.fairwork.gov.au, where information is available in 40 languages, or call the Fair Work Infoline on 13 13 94. Small business callers can opt to receive priority service via the Small Business Helpline and an interpreter service is available on 13 14 50.

Information on the website includes a detailed explanation of the difference between employees and contractors and advice about the factors to consider when determining the correct category for a worker.

The Fair Work Ombudsman last year released the ‘Record My Hours’ smartphone app (<https://www.fairwork.gov.au/how-we-will-help/how-we-help-you/record-my-hours-app>), which uses geofencing technology to provide workers with a record of 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.

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 function (<https://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.

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For TTY: 13 36 77. Ask for the Fair Work Infoline 13 13 94

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