More than $200k in penalties in FWO's first racial discrimination case

28 May 2018

The Fair Work Ombudsman's first racial discrimination litigation has resulted in penalties of $211,104 against the former operators of a Tasmanian hotel after they deliberately exploited two Malaysian employees of Chinese descent.

NSW man Chang Yen Chang - who owned and operated the Scamander Beach Resort Hotel on Tasmania's east coast until 2014 - has been penalised $35,099 in the Federal Circuit Court.

In addition, Chang's company Yenida Pty Ltd has been penalised a further $176,005.

During the litigation, the Fair Work Ombudsman successfully proved in Court that Chang and his company breached the racial discrimination provisions of the Fair Work Act by treating the two Malaysian employees, who are husband-and-wife, differently to Australian staff by underpaying them a total of more than $28,000, requiring them to work extra hours and failing to record their hours of work.

Fair Work Ombudsman Natalie James today said: "This is the first time the Fair Work Ombudsman has taken legal action against an employer for racially discriminating against employees".

"This employer knew that all staff were lawfully entitled to minimum Award pay rates but chose to pay the Malaysian couple significantly less than Australian staff because of their race, which is unlawful and completely unacceptable," Ms James said.

"It is an uncomfortable truth that racial discrimination is a driver behind some of the exploitation of migrant workers in this country.

"The Court's ruling in this matter sends a message that singling out migrant workers for exploitation is serious unlawful conduct and significant penalties apply.

"All workers in Australia are entitled to our minimum wages, irrespective of their background, language skills or visa status.

"We are actively seeking to dispel the myth that it's OK to pay overseas workers a 'going rate' that undercuts the lawful minimum wage rates that apply in Australia."

"Our success in this case is a warning to any employer tempted to make employment decisions based on race: the Fair Work Ombudsman can and will seek penalties for discrimination as well as pursuing any unpaid entitlements, and we will do so via court action if necessary."

The Fair Work Ombudsman commenced its legal action in 2015.

At a four-day contested hearing last year regarding the discrimination contraventions, the Fair Work Ombudsman presented evidence to establish that the husband-and-wife's Malaysian national extraction and Chinese race was a "substantial and operative reason" Chang and his company had discriminated against them by paying them significantly less than Australian employees and requiring them to work extra hours.

The Fair Work Ombudsman presented evidence that in the context of the Chinese cultural connection Chang shared with the couple, he had referred to them as "family" to put pressure on them to work hard for him.

Chang claimed this was not the case but Judge Barbara Baker said she did not accept Chang's denials.

Judge Baker found that Chang and his company "made a deliberate decision to treat (the Malaysian couple) differently to other employees".

"Mr Chang was well aware of his obligations to pay them their entitlements under the relevant awards," Judge Baker said. "They were taken advantage of, coming from Malaysia and being of Chinese descent."

Judge Baker found that Chang "decided to recruit employees from Malaysia, in part because he knew a Malaysian would accept working six days a week and he knew that it was usual in Malaysia to work six or seven days".

The Malaysian husband was recruited through an advertisement in a Malaysian newspaper in 2007 and Chang's company sponsored him on a 457 skilled worker visa to work as head chef in the hotel's restaurant until 2014.

The husband was required to work six days per week, working a total of between 33 and 57 hours over the course of a week, often starting work when the restaurant opened for lunch and finishing after it closed for dinner.

Between 2010 and 2014, he was paid an annual salary of $45,240 to $46,280, which was not sufficient to cover the penalty rates he was entitled to for weekend, public holiday, evening and overtime work - resulting in a total underpayment of $20,550.

Judge Baker said she “did not accept Mr Chang’s denial that there was no connection between (the husband) coming from Malaysia and accepting working long hours on six days per week”.

“(The husband) negotiated his terms and conditions of employment and accepted the terms without an understanding of workplace laws in Australia,” Judge Baker said.

The man’s wife was on a spousal visa connected to her husband’s visa and was employed as a kitchen-hand in the restaurant between September 2009 and January 2010.

She was required to work between 35 and 51 hours per week and was paid a flat rate of between $446 and $594 per week - only about half of what she was entitled to - leading to an underpayment of $8775 over a period of just four months.

The wife gave evidence that she quit after finding the workload too much.

Judge Baker found that Chang calculated the wife’s salary based on an award rate for 24 hours work per week, even though he knew the wife worked significantly more hours.

Judge Baker found that the evidence demonstrated Chang was aware of the wife’s vulnerability. Judge Baker said she “did not accept Mr Chang’s evidence that he would have treated an Australian employee in the same way as (the wife)”.

In contrast to the treatment of the Malaysian couple, Chang and his company required Australian employees to work five or fewer days per week and paid them minimum hourly rates, penalty rates and loadings, largely in accordance with the Hospitality Industry (General) Award 2010.

However, the incorrect application of some provisions in the Award resulted in 15 Australian employees being underpaid a total of $26,488 – an average of $1765 each.

The Malaysian couple and all Australian employees have been back-paid in full.

Judge Baker also said that the failure to keep records of the hours worked by the Malaysian couple “demonstrates a complete disregard of Yenida’s obligations to them”.

The Malaysian couple told the Fair Work Ombudsman they had been reluctant to complain about the way they were treated because they were worried it would affect their visas and applications for permanent residency.

Judge Baker found the husband was “vulnerable and dependent” on his employment with Yenida to remain in Australia.

However, after the couple became permanent Australian residents in 2013 and the husband ceased working for Chang’s company in 2014, they lodged requests for assistance with the Fair Work Ombudsman and an investigation was commenced.

At the time of the penalty hearing in December last year, Chang was a manager of the Motel Parkhaven, owned by his parents, at Goulburn in NSW.

Judge Baker found that “Mr Chang has the capacity to be involved in contraventions in the future, so there is a need for a penalty to be set which will be sufficient in deterring him from further contraventions”.

Judge Baker said the penalties imposed should deter hospitality industry employers from underpayment and record-keeping contraventions.

“I also accept the submission of the FWO that general deterrence has an ‘important role’ to play in the area of anti-discrimination, ‘in part because discrimination is often difficult to prove even when the adverse action or the effect of the discrimination is obvious’,” Judge Baker said.

Under the Fair Work Act, since 2009 the Fair Work Ombudsman has had jurisdiction to investigate discrimination against employees on the grounds of pregnancy, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer responsibilities, religion, political opinion, national extraction or social origin.

Requests for assistance from employees in relation to alleged discrimination in the workplace can have a range of outcomes, including inspectors assisting the employer to take voluntary action to resolve the issue to the satisfaction of the relevant employee, inspectors determining the allegation is not sustained or the matter being handled by another body.

Ms James says the Fair Work Ombudsman also has the power to take enforcement action if there is clear evidence of a contravention.

“Taking these matters to Court is difficult and resource intensive but there is a strong public interest in doing so,” Ms James said.

Ms James says it is concerning that the case is another example of a business operator from a culturally and linguistically diverse background underpaying workers from his own ethnic background.

“This case is another chance to make it clear that lawful minimum rates apply to all employees in Australia and they are not negotiable,” she said.

Ms James says it is also concerning that the matter was the latest of a string of cases in which the Fair Work Ombudsman has secured penalties in Court against hospitality industry employers for serious non-compliance issues.

“Despite hospitality industry workers making up 7.2 per cent of the labour market, legal actions against hospitality employers account for almost one-third of our litigation activity,” she said.

Ms James says business operators should be aware that the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 has introduced significantly higher penalties for a range of contraventions, including serious record-keeping breaches.

“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 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 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.

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.

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 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.

Information on the website also includes fact sheets on workplace discrimination and workplace rights and entitlements for 457 visa holders.

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Media inquiries:

Ryan Pedler, Director - Media
Mobile: 0411 430 902
ryan.pedler@fwo.gov.au (mailto:ryan.pedler@fwo.gov.au)

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Fair Work Online: www.fairwork.gov.au
Fair Work Infoline: 13 13 94
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