

Court action over restaurant's response to employee's request for long service leave

9 October 2012

Note: Reference to prosecution in this media release is a general reference to the FWO commencing proceedings for the imposition of civil penalties and should not be taken to be a reference to criminal proceedings.

The Fair Work Ombudsman has initiated its first age discrimination prosecution.

Facing the Federal Magistrates Court in Brisbane is Theravanish Investments Pty Ltd and its joint directors and equal shareholders, Nopporn Theravanish and Michael Theravanish.

They currently operate three restaurants - Chiangmai Thai at Broadbeach, Chiangmai Thai Sierra Grand at Broadbeach and Chiangmai Thai Surfers Paradise - and previously operated Chiangmai Thai at Nobby Beach and another Thai restaurant at Robina.

The Fair Work Ombudsman's litigation relates to an employee who began working at the Robina restaurant in late 1996 and subsequently worked for periods of time at all of the restaurants, except the Sierra Grand, until September, 2011.

His duties variously included opening and closing the restaurants, greeting and assisting customers, cashier on occasions, answering phones and taking bookings, serving dishes, clearing plates, setting tables, taking orders and supervising other staff.

A Statement of Claim filed with the Court alleges that in October, 2010, the employee asked Nopporn Theravanish for long service leave, and that she allegedly asked him if he was going to retire.

The employee allegedly responded that he was not going to retire and that long service leave had "nothing to do with retirement".

In January, 2011, after asking about his request again, the employee and Nopporn Theravanish allegedly verbally agreed that he would take 13 weeks' long service leave from April 17 to July 19, 2011.

Prior to his due date to return to work, it is alleged the employee telephoned the manager of Chiangmai Thai Surfers Paradise to ascertain his rostered hours for the week commencing 18 July - but was told to speak instead to Nopporn Theravanish.

It is alleged that on his due date back at work, Nopporn Theravanish told the employee she had to move his employment status to part-time, but did not respond when asked why.

Three days later on July 22, Nopporn Theravanish allegedly told the employee that Chiangmai Thai Surfers Paradise was not busy enough for him to be employed full time and that he had refused to undertake training courses required for him to remain in full time employment.

Nopporn Theravanish allegedly did not provide any details when asked about what training had been required nor advise what days, hours or rates of pay he would receive under his new status of part-time employment.

On August 16, Michael Theravanish allegedly wrote to the employee advising that his employment would terminate on September 5 because it was company policy not to employ staff after they turned 65 and the employee would turn 65 on September 5.

A subsequent letter allegedly confirmed the employee's termination on September 5 by reason of his turning 65 and advised that the company did not wish to enter into any further correspondence with the employee.

The Fair Work Ombudsman alleges that the Fair Work Act has been contravened by a number of actions:

- Dismissing the employee,
- Unilaterally changing the employee's employment status from full time to part time,
- Failing to roster the employee,
- Advising the employee in writing that his employment would terminate on his 65th birthday, and
- Refusing to communicate with the employee about his ongoing employment.

The Fair Work Ombudsman alleges the employee has suffered economic and non-economic loss and damage, including stress,

anxiety, hurt, humiliation and inconvenience.

The Agency is seeking penalties against the company and Nopporn and Michael Theravanish and a Court Order for compensation for the employee.

Theravanish Investments Pty Ltd faces a maximum penalty of \$33,000 per breach and Nopporn and Michael Theravanish each face maximum penalties of \$6600 per breach.

Employers or employees seeking assistance should contact the Fair Work Infoline on 13 13 94 or visit www.fairwork.gov.au. A free interpreter service is available on 13 14 50.

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