

Marine company used training program to disguise underpayment of Fijian workers, rules Court

24 April 2015

A businessman who underpaid two Fijian workers in Adelaide thousands of dollars through a purported 'training program' has been fined \$8000.

The Federal Court imposed the penalty against Captain Brett Barry Devine, the former director and majority-owner of Sydney-based marine salvage company Devine Marine Group Pty Ltd, now in liquidation.

The fine, which the Court ordered be paid to the two Fijian men to partially rectify their underpayments, follows legal action by the Fair Work Ombudsman.

The Fair Work Ombudsman identified the underpayments after investigating a referral from a South Australian Government agency.

The Fair Work Ombudsman initiated legal proceedings after Captain Devine and his company refused to back-pay the workers their outstanding entitlements.

Captain Devine recruited the two men from Fiji and brought them to Australia on 456 Short Stay Business Visas.

They each completed three months' employment with Devine Marine in 2011, working up to 12 hours a day, seven days a week.

Their duties included painting, welding and labouring on a barge at the Port Adelaide docks and were paid a flat rate of \$100 a day.

Under Australia's Manufacturing and Associated Industries and Occupations Award they should have been paid almost \$16 an hour on weekdays and up to \$31 an hour on weekends.

Justice Richard White found that the workers had been underpaid amounts of at least \$7826 and \$7526 each over the three months.

Justice White also found that Captain Devine was aware the workers were covered by the Award, but "sought to disguise their employment as participation in a training program as a means of saving costs".

Justice White said Captain Devine had instigated a deliberate strategy "to avoid Devine Marine Group having to pay the rates which would otherwise be applicable to the performance of that work by local employees".

This included arranging for the workers to be provided with 'certificates of training' from the Adelaide Nautical College and instructing the workers to describe themselves as trainees if anyone asked about their status.

The Court heard evidence that on one occasion, Captain Devine told one of the employees that if he did not work harder, he would terminate the arrangement and inform the Department of Immigration and Border Protection (DIBP), resulting in his visa being cancelled.

Justice White found that Captain Devine had taken advantage of the workers' lack of awareness of their workplace entitlements in Australia.

Justice White said the penalty imposed should "indicate to employers generally that workplace obligations cannot be avoided simply by disguising an employment relationship as something else".

The Fair Work Ombudsman also alleged that Adelaide Nautical College principal Arthur Boucaut-Jones breached workplace law, however the Court dismissed those allegations.

Acting Fair Work Ombudsman Michael Campbell says the Court has delivered a clear message to those who seek to deliberately exploit foreign labour that it will not be tolerated.

"Those who think they can exploit overseas workers in Australia to cut business costs need to think again," Mr Campbell said.

"Underpaying vulnerable visa-holders who may have little or no English and limited understanding of their rights here is particularly serious conduct and it will be dealt with accordingly."

Mr Campbell said the Fair Work Ombudsman was now receiving more requests for assistance from visa holders working in Australia than ever before.

“One in 10 requests for assistance comes from a visa-holder. That is significant and a trend that is concerning us greatly,” he said.

Last financial year, the Fair Work Ombudsman recovered \$1.103 million in underpaid wages and entitlements for almost 700 workers who identified as visa-holders.

In the first nine months of this financial year, the Agency has already recouped \$1.281 million for 345 underpaid visa-holders.

The Fair Work Ombudsman established an Overseas Workers’ Team in 2012 in recognition that overseas workers can be vulnerable to exploitation or require specialist assistance.

In 2013, the Fair Work Ombudsman released the findings of a major report which found that growing numbers of Australian employers are using unpaid work schemes as an alternative to hiring paid staff.

Mr Campbell said employers need to be aware that they are at risk of breaching workplace laws if they use unpaid work schemes as a source of free or cheap labor.

“When a worker moves beyond merely learning and observing and starts assisting with business outputs and productivity, workplace laws dictate that the worker must be paid minimum employee entitlements,” he said.

The Fair Work Ombudsman has developed a range of resources – available on our [unpaid work page \(www.fairwork.gov.au/pay/unpaid-work\)](http://www.fairwork.gov.au/pay/unpaid-work) - 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, as well as details of the research report into the issues.

The Fair Work Ombudsman can assist employers and employees alike with accurate, reliable information that is easy to access, understand and apply.

Employers and employees seeking advice and assistance can visit www.fairwork.gov.au or contact the Fair Work Infoline on 13 13 94. Overseas workers can call 13 14 50 if they need an interpreter.

Information on the website to assist people from culturally and linguistically diverse backgrounds has been translated into 27 languages.

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