

Court rejects restaurant's bizarre demand to rectify underpayment of casual employee

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When a Bendigo restaurant was asked to back-pay a casual employee it had short-changed, it refused to do so unless the worker provided a statement that she had been “kidnapped” and “forced to work against her will”.

The bizarre request was not acceptable to the Fair Work Ombudsman, and after several failed attempts to have the restaurant back-pay the 26-year-old \$5000 it owed her – put the matter before the Federal Circuit Court.

The conduct of the restaurant's owner-operators has not impressed Judge Grant Riethmuller, who has responded by handing down a \$15,500 penalty.

Eltham man David Peter Anderson, who operates the Curry Garden Indian Restaurant in Bendigo, has been fined \$3000 and the company he and his wife own, Sona Peaks Pty Ltd, a further \$12,500.

After being employed at the restaurant in May, 2012, the worker was paid a flat rate of just \$12.50 an hour, later increasing to \$15.50 an hour.

Under the Restaurant Industry Award, the employee should have been paid \$16.57 an hour for normal hours and up to \$34.11 for weekend and public holiday work.

Consequently, she was underpaid just over \$5000 during her period of employment until December, 2012.

In his decision, Judge Riethmuller found that the Fair Work Ombudsman attempted to deal with the underpayment simply by way of a contravention letter requesting it be rectified.

However, Anderson declined, advising that he would not back-pay the employee unless she provided a statement that she was kidnapped and forced to work at the restaurant against her will.

Not surprisingly, the Fair Work inspector advised that such bizarre conditions would not be met,” Judge Riethmuller noted.

The Court also observed that Anderson refused to respond to a Compliance Notice sent to him by registered mail in May, 2013.

Judge Riethmuller found that Anderson responded by “claiming that the employee had agreed with the rates that were paid and not complained about the rates”.

Under the Fair Work Act, employers must comply with Compliance Notices issued by Fair Work inspectors unless they have a reasonable excuse, or make a Court application to challenge the Notice.

Anderson only agreed to reimburse the employee after the Fair Work Ombudsman commenced legal action.

Judge Riethmuller found that Anderson had shown no remorse for what he described as “deliberate” breaches of workplace laws.

He labelled Anderson's decision to ignore the Fair Work Ombudsman's Compliance Notice as “extraordinary”.

“A system of workplace laws has been enacted in Australia to provide for minimum pay and conditions for all employees,” Judge Riethmuller said.

Further, Judge Riethmuller said that while Anderson and Sona Peaks had made admissions which indicated an acceptance of wrongdoing, it seemed the admissions were “more an acceptance of liability rather than an acknowledgement of the inappropriateness of the conduct”.

He said there was a need to impose a penalty to “recognise the importance of general deterrence, particularly given that this contravention occurred in an industry where rates of non-compliance with the minimum obligations to employees are high.”

Fair Work Ombudsman Natalie James says inspectors made extensive efforts to resolve the matter without commencing legal action, but were unable to secure sufficient co-operation.

“This case demonstrates that employers who refuse to co-operate and promptly rectify underpayments can face a significant fine on top of the requirement to back-pay employees in full,” Ms James said.

“Successful litigations such as this also benefit employers who are complying with workplace laws, because it helps them to compete on a level playing field.”

Ms James says the matter also serves as a reminder that it is not possible to ‘contract-out’ of minimum pay laws by asking employees to accept a lower rate.

She says the Fair Work Ombudsman can assist employers with accurate, reliable information and encouraged businesses to access the Agency’s free tools and resources.

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

Note: The Fair Work Ombudsman commenced further legal action against Sona Peaks and Anderson late last year for allegedly underpaying nine casual and part-time restaurant employees almost \$11,000 between October, 2012 and September, 2013. The matter is still before the Court.

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