

Court imposes \$118,800 penalty for underpayment of Chinese massage therapists

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A federal judge has sounded a warning to massage shops that flouting minimum pay rates will not be tolerated.

The warning follows the underpayment of two Chinese massage therapists by tens of thousands of dollars.

Judge John O'Sullivan has imposed penalties totalling \$118,800 against the operators of the Melbourne massage shops where they worked.

Lu's Healthcare Pty Ltd has been penalised \$112,860 and director Kun Wang a further \$5940 following legal action by the Fair Work Ombudsman.

A male therapist in his 20s was short-changed \$33,000 and a 19-year-old female therapist with limited English was underpaid \$21,000.

They were each paid a percentage of each massage they performed.

However, they should have been paid the minimum wage under the Health Professionals and Support Services Award.

The workers also had money unlawfully deducted from their wages.

Lu's Healthcare, which operates massage shops in Melbourne's CBD and Richmond, arbitrarily deducted certain amounts from its workers' take home-pay under an in-house Code of Conduct.

Fines of up to \$100 applied for being late to work or absent without notice.

For "a lack of passion or good hospitality", therapists could be fined \$50 – and for talking or speaking on the phone during a massage, they could lose their jobs.

Under a "disturbance of the work environment category", employees could be fined \$20 for "noise making and playing around" and sleeping or lying on massage tables.

The punishment for "resistance to hard work" was being "put back into apprenticeship again".

The Code also stated that "employees with other problems will undergo serious punishment".

It was discovered when the Fair Work Ombudsman investigated requests for assistance from the two underpaid employees.

Their underpayments were only reimbursed after the Fair Work Ombudsman commenced legal proceedings and almost 18 months after they occurred.

Delivering his decision in the Federal Circuit Court, Judge Sullivan, quoted from *FWO v Lycamobile Pty Ltd* (2013) FCCA 2132, noting: "It does not escape my attention that, in terms of cash flow, the delay in paying basic remuneration to employees engaged in what can only be described as basic employment leads to a very strong inference that the hardship occasioned to those employees would have been greater than might otherwise be expected for higher paid employees, who one would expect to be better financially resourced."

And, referencing *FWO v MacLean Bay Pty Ltd (No 2)* (2012) FCA 557, Judge Sullivan observed: "It is important to ensure that the protections provided by the (Fair Work) Act to employees are real and effective and properly enforced. The need for general deterrence cannot be understated. Rights are a mere shell unless they are respected.

"It is vital to recognise the importance of maintaining a level playing field for all employers in an industry, with respect to wage costs. Those employers who fail to comply with minimum obligations gain an unfair competitive advantage over those employers who do comply with their workplace obligations.

"Ordering penalties at a meaningful level allows the Court to show that there are serious consequences for failing to comply with workplace laws. Failing to impose a substantial penalty will remove the incentive for this employer and other employers to change their practices."

Fair Work Ombudsman Natalie James says the Court penalties should serve as yet another reminder to employers who flout their workplace obligations that there will be financial penalties if they are caught.

"Minimum wage rates apply to everyone - including visa-holders - and they are not negotiable," she said.

Ms James says the Fair Work Ombudsman has received intelligence that the business model identified at Lu's Healthcare is relatively common across massage businesses.

Employees, in many cases international students or overseas workers in Australia on the 417 backpacker working holiday visa, are typically paid 50 per cent of the cost of the massage, with no remuneration for periods they spend at the business without clients.

Since 2009, the Fair Work Ombudsman has conducted pro-active auditing of massage shops in Adelaide, Darwin, Newcastle, Coffs Harbour, Hobart and on the Gold Coast.

Findings included underpayment of wages, non-payment of wages, failure by employers to issue-pay slips or keep proper employment records and possible sham contracting arrangements.

Ms James encouraged employers who had any uncertainty about whether their workplace practices were appropriate to visit the Fair Work Ombudsman website at www.fairwork.gov.au or call the Fair Work Infoline on 13 13 94 for advice.

An interpreter service is available by calling 13 14 50, and information on the website is translated into 27 languages.

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