

# THINGS AREN'T ALWAYS AS THEY SEEM

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## 'CASH-BACK' SCHEMES DON'T CUT IT WHEN IT COMES TO WORKPLACE AND MIGRATION LAW COMPLIANCE

An Albury based restaurant and its sole director have been prosecuted by the Fair Work Ombudsman for conduct towards Australian and visa workers and deliberate actions to cover up blatant breaches of the *Fair Work Act 2009 (Cth) (FW Act)* [1].

The restaurant specifically advertised for visa workers to apply for vacant positions and promised to sponsor successful candidates. Mr. Francis and Mr. Badhan, both Indian nationals, were successfully sponsored by the restaurant after completing unpaid work trials.

Everything seemed to be in order, the employer:

- had in place written employment contracts that provided Mr. Francis and Mr. Badhan terms and conditions of employment that complied with the *Restaurant industry Award 2010 (Award)* and satisfied the Department of Immigration and Border Protection that the employer would meet its sponsorship obligations
- created and maintained employment records for its employees
- paid its employees, including Mr. Francis and Mr. Badhan, weekly wages in accordance with their contracts and the minimum Award provisions.

But of course, things aren't always as they seem.

Despite an outward appearance of compliance, the employer and its sole director created a deliberate strategy of deceit to avoid its Award, FW Act and sponsorship obligations towards vulnerable employees. The deliberate strategy included a 'repayment scheme' which:

- required employees to repay significant portions of their wages to the employer. If employees refused, they were threatened with deportation and violence and were in some instances dragged to the nearest ATM to withdraw and hand back the required amounts. Over approximately seven months, Mr. Francis was required to hand back AUD11,050 in wages and Mr. Badhan was required to give back AUD10,680
- was devised to conceal the reality of the amount that Mr. Francis and Mr. Badhan were actually paid for their work which, after 'repayments,' was approximately AUD6 per hour.

The employer and its sole director created and provided false and misleading records to the Fair Work Ombudsman, including time and wage records which were created specifically to disguise the underpayments. The employer also continued to demand visa workers 'repay' significant portions of their wages during the course of the Fair Work Ombudsman's investigation.

The total underpayments by the employer were in the vicinity of AUD87,000. The additional breaches of the FW Act towards Australian employees and visa workers were numerous and included:

- a requirement to spend part of an employee's wages (i.e. hand it back to the employer) which was unreasonable in the circumstances
- failing to pay the Award minimum rates and terms and conditions
- failing to pay and accrue annual leave and personal/carer's leave
- failing to keep employee records that were not, to its knowledge, false or misleading
- failing to provide payslips as required by the FW Act.

The Fair Work Ombudsman was particularly persuaded by the deliberateness of the contraventions and in particular the obvious exploitation of the power imbalance between the visa workers and the employer in order to achieve financial gain.

The Court acknowledged that the Award and FW Act are designed not only to provide minimum terms and conditions of employment to employees but also to create an even playing field for employers in terms of employment costs. The sponsorship obligations are also designed to ensure that visa workers are employed on terms and conditions no less favourable than Australian employees. The employer's actions in this case undermined both of these objectives.

In deciding an appropriate penalty, the Court sent these important messages:

- there is a single set of workplace protections in Australia that provide a safety net for all employees, regardless of visa status
- the hospitality industry, notorious for non-compliance with safety net provisions, must take immediate steps to properly understand and comply with safety net entitlements.

In addition to orders to repay the underpaid (and 'cash-back') amounts, the restaurant and sole director were ordered to pay pecuniary penalties of AUD532,900. The significant and record-breaking penalties ordered in this case reflect the deliberate breaches of very basic and fundamental workplace and immigration law requirements.

Amendments to the FW Act which will commence later this year will further penalise employers and individuals who engage in threatening or coercive conduct in relation to temporary overseas workers (including through the use of 'cash back' schemes) by introducing new criminal offences carrying penalties of up to two years' imprisonment and/or significant financial penalties for corporate entities.

An amended Fair Work Information Statement will also be published under the amendments which highlight the rights of overseas workers to seek redress for contraventions of workplace laws. The amended Fair Work Information Statement will need to be provided to all new employees, including visa holders.

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[1] *Fair Work Ombudsman v Rubee Enterprises Pty Ltd & Anor* [FCCA 3465] (2 December 2016)

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