

employer did not pay the worker at all for three weeks of casual work. The YWLS sought a pecuniary penalty under the legislation and the employer was ordered to pay an additional \$15,000. The imposition of such a large penalty (in proportion to the underpayment) shows that the courts take these breaches seriously and will impose penalties on employers where there are deliberate, persistent or significant breaches.

In the 2014-2015 financial year the Fair Work Ombudsman (FWO) reported the majority of actions it commenced involved wages and conditions and almost all of these concerned allegations of underpayment of minimum wages.² The FWO also reported they commenced litigation in 50 pecuniary penalty matters and were successful in having 33 penalties totalling \$2,380,638 imposed.

In order for employers to take their obligations seriously and pay workers their minimum entitlements, there needs to be more resources directed to prosecuting breaches of the civil remedy provisions in the *Fair Work Act 2009* (Cth). Imposing significant penalties on employers who

underpay their workers should deter other employers from breaching the law. More prosecutions, media coverage, education and community awareness will assist in stopping the continued exploitation of workers. **B**

(Endnotes)

- 1 Shepherd, Tory, "Fair Work Ombudsman assessing 'intelligence' regarding employment conditions at 'On The Run'", *The Advertiser*, 4 September 2015.
- 2 Fair Work Ombudsman Annual Report 2014-2015, (available online at: <https://www.fairwork.gov.au/about-us/reports-and-submissions/annual-reports>).

TIPS FOR YOUNG WORKERS ON DETECTING AND ENFORCING UNDERPAYMENTS

- Find out which industrial instrument covers your employment. It is likely to be a modern award. Read the modern award and check your minimum pay rates. Consider whether you are entitled to any penalty rates for weekend work, or early or late shifts. The Fair Work Ombudsman can assist with finding which instrument covers your employment (www.fairwork.gov.au).
- Keep all copies of documentation associated with your employment. For example, keep pay slips and a copy of your employment contract if you have one. Record the hours you have worked in a diary and keep copies of time books or rosters. If you get paid in cash make sure you keep a record of what was paid to you and when. If you have been underpaid you will need these records to calculate what you are owed and to prove you have been underpaid.
- You have six years from the date you were underpaid in which to make a claim for underpayment of wages. If you suspect you have been underpaid call the Young Workers' Legal Service for advice on how to pursue the matter (www.ywls.org.au).
- For ongoing support, advice and potential representation in the workplace workers can join their trade union. There is a union for every worker in Australia. Australian Unions can help you find the right one (www.australianunions.org.au).

LETTER TO THE EDITOR

Client Capacity Guidelines

Dear Editor,

The article "Dealing with difficult clients" (Bulletin November 2015, vol 37 (10) at 28) warns practitioners about taking instructions from emotionally distressed clients or clients with mental illness and advises practitioners not to proceed if receiving unclear or conflicting instructions. It suggests that in some cases "it may be appropriate to consider advising the client to seek medical / psychological help" which "may require the involvement of family or a support person".

The Law Society's Client Capacity Guidelines (the Guidelines) published in 2012 provide a statement of principles with guidelines to encourage practitioners to respond in a practical and ethical way to unproved but possible incapacity.

Central to the Guidelines are the presumption of capacity at common law and the principles that capacity is decision specific and time specific. Apparent limitations on a client's ability to understand or communicate information do not necessarily signal incapacity to instruct and doubt about capacity should not be expected or assumed. The Guidelines provide practical ways to achieve effective communication which if followed will ensure that it will be rare that instructions cannot be taken.

The Guidelines address the difficult question of psychological or psychiatric assessment and remind the practitioner that there may be unwanted consequences for the client. The practitioner should never act upon their own assessment of the client's best interests.

The Guidelines also address involvement of family members or support persons and affirm the paramountcy of that the client's own instructions. Whilst dealing with clients with capacity issues can be challenging it is important to remember that the practitioner's duty is to the client and bringing others into that relationship could be a breach of that duty. The Guidelines provide detailed guidance on how to manage this difficult situation.

Where there are unproved doubts about a client's capacity to give instructions the Guidelines support every effort of the practitioner to protect the dignity of the client, to offer justice and to enhance autonomy.

Jennifer Corkhill
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