

GPO Box 9887 Sydney NSW 2001

16 October 2015

Directors
The Press Club Restaurant and Bar Pty Ltd (ABN 27 116 746 439)
Trading as The Press Club
c/o **s.22 - Irrelevant to request**
72 Flinders Street
MELBOURNE VIC 3000

Reference number: MAT-0014-9899

LETTER OF CAUTION

Dear **s.22 - Irrelevant to request**

I refer to the recent subclass 457 visa monitoring and employee entitlements audit activity conducted on The Press Club Restaurant and Bar Pty Ltd, trading as The Press Club (**The Press Club**) by the Fair Work Ombudsman (**FWO**).

The FWO is the statutory office holder responsible for ensuring compliance with the *Fair Work Act 2009* (**FW Act**), and other relevant Commonwealth workplace laws.

A Letter of Caution is used to identify employers, encourage voluntary compliance and to ensure the activities of these employers are monitored in the event of subsequent non-compliance.

BACKGROUND TO AUDIT

The FWO performed an audit of records for employees sponsored by The Press Club on a subclass 457 visa during the periods between 17 November 2014 and 30 November 2014 (**Contravention Period 1**) and between 19 January 2015 and 1 February 2015 (**Contravention Period 2**) [collectively, the **Audit Period**]. The sponsored employees assessed in the audit were:

- a) **s.22 - Irrelevant to request**
- b) **s.22 - Irrelevant to request**
- c) **s.22 - Irrelevant to request**
- d) **s.22 - Irrelevant to request**
- e) **s.22** (collectively, the **Employees**).

In forming a reasonable belief the FWO has determined that:

1. The Press Club is, and was at all relevant times, an employer within the jurisdiction of the FW Act.
2. During the Audit Period, The Press Club operated a restaurant operated a restaurant as defined by the *Restaurant Industry Award 2010* (the **Restaurant Award**).
3. During the Audit Period, the terms and conditions of the Employees' employment were governed by the FW Act, Fair Work Regulations (*FW Regulations*) and the Restaurant Award.

ALLEGED CONTRAVENTIONS

In considering whether there has been a contravention of Commonwealth workplace laws the FWO has relied upon:

1. Time and wage records and contracts of employment provided by The Press Club in response to a Notice to Produce served on 26 May 2015.

THE FAIR WORK OMBUDSMAN'S VIEW

The FWO has formed the view that the following contraventions have occurred during the Audit Period:

Underpayment of Restaurant Award entitlements

Clause 28.1(a) of the Restaurant Award provides an alternative for an employee to be paid by the week. An employee can be paid a rate equivalent to an annual salary of at least 25% or more above the weekly rate prescribed in clause 20 – Minimum wages, multiplied by 52 for the work being performed.

In such cases, there is no requirement under clauses 24.2, 33 – Overtime, 34.1 and 34.2 to pay overtime and penalty rates in addition to the weekly wage, provided that the salary paid over a year was sufficient to cover what the employee would have been entitled to if all award overtime and penalty rate payment obligations had been complied with.

During the Audit Period, s.22 - Irrelevant to request salary was assessed as insufficient to cover his minimum weekly entitlements under the Restaurant Award. A summary s.22 classification of employment and summary of the underpayments identified is outlined in Appendix A.

The FWO recognises that over the course of a year, there may be no overall financial disadvantage to the employee as a full annual calculation was not conducted by the FWO. However, given that underpayments were detected during the Audit Period, the findings indicate a potential contravention of clause 28.1(a) of the Restaurant Award for worked performed outside the Audit Period.

REQUIRED ACTIONS

1. The Press Club is required to undertake annual reconciliations of all employees paid under an annualised salary arrangement as per clause 28.2 of the Restaurant Award and to rectify any underpayments that have occurred.

Please advise the FWO in writing of the steps The Press Club has taken to comply with the required actions by close of business **Friday 30 October 2015**.

If back-payments are made to any employees, please provide the FWO with evidence of these payments within seven days of the payments being made.

FWO LITIGATION POLICY

On 3 December 2013 the FWO Executive Board endorsed *Guidance Note 1 – FWO Litigation Policy (4th edition)*. A copy of the policy can be located at:
www.fairwork.gov.au.

Any decision to commence civil proceedings requires that a two-stage test be satisfied:

- First, there must be sufficient evidence to prosecute the case; and

- Secondly, it must be evident from the facts of the case, and all the surrounding circumstances, that commencing civil proceedings is in the public interest.

The FWO has formed the view that it is not in the public interest to commence civil proceedings in the present case, but that, more appropriately, a Letter of Caution should be issued to The Press Club as an alternative way to bring about voluntary compliance in the future.

FORMAL CAUTION

If the FWO becomes aware of any further contraventions, the fact that The Press Club has already been issued with a Letter of Caution will be a factor the FWO will take into account in deciding whether it is in the public interest to commence civil proceedings in respect of those further contraventions.

Further, the FWO may tender a copy of this Letter of Caution (and, if appropriate, the material that was relied upon in reaching this view) to the court in future proceedings, including in relation to any future determination to be made about what penalty, if any, should be imposed on The Press Club.

The FWO welcomes feedback about your interaction with the agency and invites you to send feedback to yourfeedback@fwo.gov.au.

CONTACT DETAILS

Alternatively you can send feedback by post to:

**Review Team
Fair Work Ombudsman
GPO Box 9887
MELBOURNE VIC 3001**

Should you wish to discuss this letter or clarify any of the issues raised please contact Fair Work Inspector **s.47E** on **s.47E** or by email at: **s.47E - Certain Operations of Agencies** or me on **s.47E** or by email to **s.47E - Certain Operations of Agencies**

Yours sincerely



**Brodie Smith
Director Overseas Workers Team (A/g)
Fair Work Ombudsman**

PAY RATES INFORMATION

From 1 July 2014, Modern Award rates apply in full. Correct pay and penalty rates can be obtained by visiting www.fairwork.gov.au and using our online application Pay and Conditions Tool (PACT).



Australian Government

Fair Work

OMBUDSMAN

APPENDIX A – CLASSIFICATION AND IDENTIFIED CONTRAVENTIONS

s.22

Classification

- a) was employed by The Press Club as a full-time **s.22 - Irrelevant to request** who had complete autonomy in the **s.22** section. Duties included, but were not limited to, **s.22 - Irrelevant to request**
- b) was offered (in August 2012) a base salary on commencement of \$51,400.00 per annum and contracted to work hours as directed by manager plus reasonable additional hours as required;
- c) was classified as a "Level 6 Cook Grade 5 (tradesperson)" (clause B.3.8 of the Restaurant Award);
- d) was paid a salary by the Company of \$988.47 gross per week during Contravention Period 1 and \$1038.47 gross per week in Contravention Period 2; and
- e) worked between 38 and 47.5 hours per week during the Audit Period.

Identified Contraventions

Overtime – 00:00 Saturday to 00:00 Sunday

Pursuant to clauses 33.1 (a) and 33.2 (c) of the Restaurant Award, The Press Club was required to pay a full-time employee working hours outside of the spread of hours or rostered hours set out in clause 31, 200% of the employee's ordinary base rate of pay for all time worked. During the Audit Period, **s.22**

- a) was entitled to be paid no less than \$42.86 per hour for all overtime hours worked between 00:00 Saturday and 00:00 Sunday;
- b) worked a total of 1.1 hours of overtime hours between 00:00 Saturday and 00:00 Sunday;
- c) was entitled to be paid \$47.15 in respect of those hours;
- d) received payment of \$41.70 in respect of those hours; and
- e) was underpaid \$5.45 in respect of this entitlement.

The Press Club therefore contravened clauses 33.1 (a) and 33.2 (c) of the Restaurant Award by failing to pay **s.22** the minimum hourly rate of pay for overtime hours worked between 00:00 Saturday and 00:00 Sunday.

Split Shift Allowance

Pursuant to clause 24.2 of the Restaurant Award, The Press Club was required to pay a full-time employee who had a broken work day an additional allowance of 0.5% of the weekly standard rate (minimum weekly wage for a Level 4 classification (Cook grade 3 (tradesperson)) in clause 20.1)) for each separate work period of two hours or more. During the Audit Period, **s.22**

- a) was entitled to be paid no less than \$3.73 split shift allowance on each occasion where the time between periods of work in a exceeded 2 hours or more;
- b) worked a total of 10 shifts that attracted the split shift allowance;
- c) was entitled to be paid \$38.20 in respect of split shifts;
- d) received payment of \$0.00 in respect of those shifts; and
- e) was underpaid \$38.20 in respect of this entitlement.

The Press Club therefore contravened clauses 24.2 of the Restaurant Award by failing to pay s.22 the split shift allowance.

Released under the
Freedom of Information Act
by the Fair Work Ombudsman

The Press Club
Restaurant and Bar
Pty Ltd

Suite 5, Level 8, 20 Collins Street
Melbourne
Victoria 3000

s.47G - Business Information

The Press Club Restaurant and Bar Pty Ltd

ABN: 27116746439

Dated: 30/10/2015

Dear s.47E

Thank you for sending through the letter and your advice given to our accounts department.

The Company values its people and acknowledges that our people are core strength of the business. As directors of the company we want to ensure the Company is taking all reasonable steps to look after our staff, making sure we provide a safe and enjoyable environment for work.

Following the recent Audit by FWO, we acknowledge "The Letter of Caution" and propose following steps in making sure we are compliant with all required obligations of the award. We take this caution letter seriously and want to take this opportunity to identify gaps in our internal control procedures and improve our processes.

KEY STEPS

1. Conduct/Perform Annual reconciliation as per clause 28.2 of the Restaurant Industry Award (2010) for all Annualised salary employee including 457 visa holder and all other Australian and Permanent Residents etc.
2. Set up Calendar for each employee on their anniversary day (based on starting date). Audits are to be conducted annually to ensure employees' salary are paid correctly.
3. Keep all records relating to starting and finishing times of all annualised salary employees.
4. Ensure all employees clock in and clock off each shift including all breaks. Managers on duty are to ensure all employees have break and clock in and clock off as well.
5. We will carry out a reconciliation at a set date for each employee each year comparing the employee's ordinary wage under the award and the actual payment.
6. If the employee's annual reconciliation reveals a shortfall in the employee's wages, the company will pay to the employee the difference between the wages earned under the award and the actual amount paid.
7. Maintain a log of time in lieu.

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Pty Ltd

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Melbourne
Victoria 3000

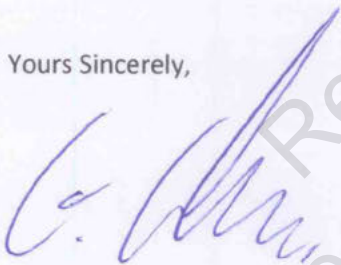
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The Press Club Restaurant and Bar Pty Ltd

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Yours Sincerely,



George Calombaris

Director

The Press Club Restaurant and Bar Pty Ltd

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