
Fair Work Act 2009

Section 715

ENFORCEABLE UNDERTAKING

PARTIES

1. This enforceable undertaking (**Undertaking**) is given to the Fair Work Ombudsman (**FWO**) by Sing Ky Pty Ltd (ACN: 095 792 260) (**Sing Ky**) for the purposes of section 715 of the *Fair Work Act 2009 (Cth)* (**FW Act**).
2. This Undertaking comes into effect when:
 - (a) the Undertaking is executed by Sing Ky; and
 - (b) the FWO accepts the Undertaking so executed.

BACKGROUND

3. Sing Ky trades as Ding Hao and operates as a Chinese licensed restaurant business located on Gouger Street, Adelaide.
4. On 11 December 2012, the FWO issued a Penalty Infringement Notice to Sing Ky in relation to record-keeping and pay slip contraventions.
5. In late 2013, the FWO commenced an investigation (**Investigation**) after it conducted a follow-up site visit to Ding Hao to assess employment records, wages and pay slips.
6. The investigation determined contraventions in relation to 31 employees (**the Employees**).

INDUSTRIAL INSTRUMENT COVERAGE

7. At all material times, Sing Ky was bound by the terms of the *Restaurant Industry Award 2010 (Modern Award)* and was required to pay the phased rates of pay calculated with reference to the transitional minimum wage instrument, namely the Australian Pay and Classification Scale (**APCS**) derived from the pre-modern *Cafes and Restaurants (South Australia) Award (Restaurant PMA)*.
8. Based on their particular duties, the Employees were properly classified as, variously, 'Grade 1 – Food and Beverage Attendant', 'Grade 2 – Food and Beverage Attendant', 'Grade 1 – Kitchen Attendant' or 'Grade 1 – Cook'.
9. The Investigation determined that Sing Ky did not pay the Employees:
 - (a) the required minimum rate of pay for their particular classification for every hour that they worked;

- (b) the required casual loading for every hour that they worked;
 - (c) the required overtime rates for additional ordinary hours worked;
 - (d) split shift allowances; and
 - (e) the required penalty rates for work performed on Saturdays, Sundays and Public Holidays.
10. The underpayments arose as a result of Sing Ky paying flat rates of pay to the Employees for all hours worked including those hours worked on Saturdays, Sundays and Public Holidays. In the case of each employee, the flat rate of pay was lower than the applicable minimum hourly rate for the Employee's classification.
11. The Investigation concluded that during the Relevant Period, Sing Ky underpaid the Employees a total of **\$69,266.74** which is yet to be rectified.

CONTRAVENTIONS

12. The FWO has determined, and Sing Ky admits, that Sing Ky contravened section 45 of the FW Act by failing to comply with the following provisions of the Modern Award:
- (a) clause 20 by failing to pay the Employees the minimum rate of pay contained in the Modern Award;
 - (b) clause 13 by failing to pay the casual Employees the applicable casual loading in addition to their ordinary hourly rate;
 - (c) clause 24.2 by failing to pay the full time and part time Employees who had a broken work day a split shift allowance;
 - (d) clause 34 by failing to pay the Employees an additional penalty for any work performed on Saturdays, Sundays and Public Holidays; and
 - (e) clause 33 by failing to pay the Employees an additional overtime rate for any work done outside of the spread of hours.
13. The FWO has also determined, and Sing Ky admits, they contravened section 535 by failing to make, and keep for 7 years, employee records of the kind prescribed by the *Fair Work Act Regulations 2009* (Cth) (**Regulations**) and 536 by failing to give a pay slip that complies with the Regulations to each of its employees within one working day of paying an amount to the employee in relation to the performance of work.

UNDERTAKINGS

14. For the purposes of this Undertaking and for the purpose of section 715 of the FW Act, Sing Ky undertakes to:

Rectify Underpayments

- (a) within 60 days of the execution of this Undertaking, rectify the Contraventions identified in the Letter of Findings. The total underpayment arising from the Contraventions identified is **\$69,266.74** (gross).

- (b) provide proof of such payment to the FWO no later than 7 days after the payment is made;
- (c) if the underpaid Employee(s) cannot be located, within 60 days of the execution of this Undertaking, pay such Employee(s) share of the underpayment into the consolidated revenue of the Commonwealth of Australia (through the FWO) on behalf of the relevant underpaid Employee(s), in accordance with section 559 of the FW Act;

Future Workplace Relations Compliance

- (d) ensure ongoing compliance with Commonwealth workplace laws and instruments, including but not limited to the Modern Award and the FW Act;
- (e) provide the FWO, within 28 days of the date of the execution of this Undertaking, details of systems and processes already in place or to be implemented to comply with the undertaking in the above subsection. Without limitation, such systems and processes will include systems and processes relating to:
 - (i) ensuring employees receive the correct minimum rates of pay and entitlements, such as penalty rates and overtime rates;
 - (ii) issuing pay slips to employees within 1 working day of payment; and
 - (iii) keeping accurate and complete records to ensure employees receive their correct wages and entitlements.

Workplace Notice

- (f) place a notice within the workplace which is accessible to all employees (**Workplace Notice**) within 28 days of the execution of this Undertaking in the terms also set out in Attachment A;
- (g) ensure the Workplace Notice is printed in at least A3 size and clearly displayed along with a copy of this Undertaking for a period of at least 30 days in a manner which is reasonably capable of drawing the Workplace Notice and this Undertaking to the general attention of all staff (for example, by placement on a staff noticeboard); and
- (h) provide to the FWO a copy of the Workplace Notice and written details of how the Workplace Notice has been displayed within 7 days of display of the notice;

Apology

- (i) send an apology to the Employees when rectifying underpayments in the terms set out in Attachment B (**Apology**);
- (j) provide a copy of the Apology to the FWO within 7 days of making such payments;

Workplace Relations Training

- (k) Sing Ky Directors to attend Workplace Training within 90 days of the execution of this Undertaking. Sing Ky Directors will take reasonable steps to ensure all persons who have managerial responsibility for human resources, recruitment or payroll functions and who are engaged directly or indirectly by or perform work for Sing Ky, are made aware of Sing Ky's obligations under Commonwealth workplace laws (**Training**);
- (l) provide training material to participants in the Training including material on:
 - (i) compliance with the FW Act, the *Fair Work Regulations 2009* and the Modern Award;
 - (ii) employer obligations in respect to employee record keeping and pay slips;
 - (iii) options available to persons to make complaints and FWO contact information; and
 - (iv) access to FWO resources to calculate rates of pay;
- (m) ensure the Training is conducted by an accredited workplace trainer from a Registered Training Organisation; such person or organisation is to be approved by the FWO and paid for by Sing Ky;
- (n) provide the training materials to be used in the Training to the FWO within 14 days of receipt;
- (o) provide evidence of attendance at the Training to the FWO within 30 days of the Training being provided (including the name and position of all attendees and the date on which the Training was attended);
- (p) for a period of 3 years from the execution of this Undertaking, ensure that training is conducted in the manner prescribed in paragraphs 12(k) - (o) above in relation to any new or existing employees or contractors who, after the commencement of this Undertaking, acquire managerial responsibilities that include human resources, recruitment or payroll functions.

Audit Activity and Reporting to FWO

- (q) undertake to cause to have performed, at its expense, for three years immediately following the execution of this Undertaking, audits of its compliance with Commonwealth workplace laws and instruments (including but not limited to the FW Act and Modern Award), relating to the pay and conditions of all employees employed during each audit period, on the following basis:
 - (i) each audit to be performed by an external accredited accounting professional (eg. Certified Practising Accountant), an external audit specialist or an external employment law speciality;
 - (ii) audits to be conducted on a six-monthly basis for the first year and on a yearly basis thereafter for a 3 year period (ie. a total of 4 audits), the first audit period to include a sample fortnight within the first six months immediately following the commencement date of the Undertaking;

- (iii) each audit to cover one fortnight for each employee performing work within the relevant audit period including the relevant pay slips and time records;
- (r) Sing Ky further undertakes to:
 - (i) provide a copy of each audit report to the FWO within 7 days of its completion;
 - (ii) in the event that any such audit discloses contravention(s) of Commonwealth workplace laws and instruments, rectify all such contraventions within 28 days of completion of the relevant audit (including, where relevant, by rectifying any and all underpayments arising from such contravention(s));
 - (iii) provide to the FWO evidence of any rectification payments made by it in accordance with the undertaking given at (ii) above within 7 days of such rectification occurring.

ACKNOWLEDGEMENTS

15. Sing Ky acknowledge that:

- (a) the FWO may make this Undertaking (including any attachments) available for public inspection, including by posting it to its website at www.fairwork.gov.au (subject to the FWO taking any necessary steps to redact the names of individuals not party to the Undertaking);
- (b) the FWO may release a copy of this Undertaking pursuant to any relevant request under the *Freedom of Information Act 1982* (Cth);
- (c) the FWO may issue a media release in relation to this Undertaking and from time to time, publicly refer to the Undertaking and its terms;
- (d) the admissions made in this Undertaking may be relied upon by the FWO in respect of any future decision about enforcement action to be taken in relation to any future non-compliance with Commonwealth workplace relations obligations by Sing Ky;
- (e) consistent with the Note to section 715(4) of the FW Act, this Undertaking in no way derogates from the rights and remedies available to any other person arising from the conduct set out in this Undertaking;
- (f) if the FWO considers that Sing Ky has materially contravened any of the terms of this Undertaking, the FWO may apply to any of the Courts set out in section 715(6) of the FW Act for orders under section 715(7) of the FW Act; and
- (g) consistent with section 715(3) of the FW Act, Sing Ky may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO;
- (h) the FWO reserves the right to rely on the terms of this Undertaking and the admissions made herein in respect of any future proceedings brought by the FWO against Sing Ky in relation to any future contraventions of Commonwealth workplace laws;
- (i) Sing Ky must not and must take all reasonable action to ensure that its officers, agents and employees do not, make any statements, orally or in writing or otherwise, which conveys or implies or reasonably conveys or implies anything inconsistent with the admissions and acknowledgments contained in this Undertaking;

- (j) No assertion or matter in this Undertaking may be relied upon as an admission by any other person to support a cause of action in any other civil penalty proceeding. However, this term does not prevent any matter in this Undertaking being relied upon in future proceedings in order to inform a relevant Court or tribunal of the details of the conduct that was the evidentiary foundation for Sing Ky entering into this Undertaking.

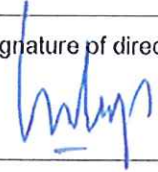
EXECUTED AS AN UNDERTAKING

EXECUTED by Sing Ky Pty Ltd ((ACN: 095 792 260) in accordance with section 127(1) of the *Corporations Act 2001*:

(Signature of director)

(Name of director)

(Date)



SING KY

1/8/14

In the presence of:

(Signature of witness)

(Signature of witness)

ERWIN HARGANTA

(Name of witness)

ACCEPTED by the Fair Work Ombudsman pursuant to section 715(2) of the *Fair Work Act 2009* on:

(Signature of Steven Ronson)

Steven Ronson
Executive Director
Dispute Resolution and Compliance

(Date)

4 AUGUST 2014

as delegate for the Fair Work Ombudsman
subject to the instrument of delegation made
pursuant to section 683 of the FW Act and
executed by Natalie James on 30 January 2013.

in the presence of:

(Signature of witness)

(Signature of witness)

Brodie Smith

(Name of Witness)

Attachment A – Form of Public and Workplace Notice

Contraventions of *Fair Work Act 2009* and the *Restaurant Industry Award 2010* by Sing Ky Pty Ltd.

We refer to the investigation conducted by the Office of the Fair Work Ombudsman (FWO) into allegations that:

- Sing Ky Pty Ltd, trading as Ding Hao (Ding Hao);

contravened the *Fair Work Act 2009* and the *Restaurant Industry Award 2010*.

Ding Hao owns and operates a restaurant business located in Adelaide, South Australia.

The FWO has determined that Ding Hao admits they contravened the *Fair Work Act 2009* and *Restaurant Industry Award 2010* in the period 30 December 2012 to 15 September 2013 by:

- failing to pay employees the minimum rate of pay contained in the *Restaurant Industry Award 2010*;
- failing to pay casual employees the applicable casual loading in addition to their ordinary hourly rate;
- failing to pay employees an additional penalty for any work performed on Saturdays, Sundays and public holidays;
- failing to pay employees overtime payments for work performed outside the spread of ordinary hours; and
- failing to pay employees split shift allowance for full time and part time employees who have a broken work day.

Sing Ky Pty Ltd have formally and publicly admitted that they committed these contraventions and have entered into an Enforceable Undertaking with the FWO (available at www.fairwork.gov.au) committing to a number of measures to remedy the contraventions and ensure future compliance. These measures include rectifying the underpayments to relevant employees, changing workplace practices and undertaking compliance training.

Sing Ky Pty Ltd expresses its sincere regret and apologises for the conduct which resulted in the contraventions. Furthermore, Sing Ky Pty Ltd gives a commitment that such conduct will not occur again and that it will comply with all requirements of the Commonwealth workplace relations laws in the future.

If you work or previously worked for Sing Ky Pty Ltd and have queries or questions relating to your employment, please contact Mr Sing Ip. Alternatively, anyone can contact the FWO via the website at www.fairwork.gov.au or the Infoline on 13 13 94.

Yours sincerely,

Mr Sing Ip
Director
Sing Ky Pty Ltd

Attachment B – Letter of Apology

[Date]

[Employee Name]

[Employee Address]

Dear [Employee Name]

I am writing to apologise on behalf of Sing Ky Pty Ltd for non-compliance with Commonwealth Workplace relations laws. A recent investigation conducted by the Office of the Fair Work Ombudsman (FWO) determined that Sing Ky Pty Ltd had contravened the *Fair Work Act 2009* (Cth) and the *Restaurant Industry Award 2010* by:

- failing to pay employees the minimum rate of pay contained in the *Restaurant Industry Award 2010*;
- failing to pay casual employees the applicable casual loading in addition to their ordinary hourly rate;
- failing to pay employees an additional penalty for any work performed on Saturdays, Sundays and public holidays;
- failing to pay employees overtime payments for work performed outside the spread of ordinary hours; and
- failing to pay employees split shift allowance for full time and part time employees who have a broken work day.

Regrettably, the investigation determined that you were affected by the above contraventions. Sing Ky Pty Ltd is taking steps to remedy the contraventions, including committing to future workplace relations training and by rectifying \$[insert amount] that you have been underpaid and changing workplace practices.

You **will/have receive/d** this payment on [insert date] and will be provided with payment advice (pay slip) regarding payment.

Sing Ky Pty Ltd has formally admitted to the FWO that Sing Ky Pty Ltd did not comply with its obligations under Commonwealth workplace relations laws and has entered into an Enforceable Undertaking with the FWO, a copy of which is available from the FWO website at www.fairwork.gov.au.

As part of the Enforceable Undertaking, Sing Ky Pty Ltd has committed to a number of measures to ensure future compliance with Commonwealth workplace relations laws.

Sing Ky Pty Ltd expresses its sincere regret and apologises to you for failing to comply with their lawful obligations.

Should you have any questions, please contact Mr Sing Ip on [insert contact details].

Yours sincerely

Mr Sing Ip
Director
Sing Ky Pty Ltd