

ENFORCEABLE UNDERTAKING

Between

The Commonwealth of Australia

(as represented by the Office of the Fair Work Ombudsman)

and

Mark D Connelley – trading as EFM Windsor and EFM Launceston (ABN 31 551 219 021)

Section 715 ENFORCEABLE UNDERTAKING

Parties

1. This enforceable undertaking (**Undertaking**) is given to the Fair Work Ombudsman (**FWO**) by Mark D Connelley trading as EFM Windsor and EFM Launceston (ABN 31 551 219 021) (**Mr Connelley**) for the purposes of section 715 of the *Fair Work Act 2009* (**FW Act**).

Background

2. Mr Connelley operates two EFM Health Club franchise businesses, EFM Windsor and EFM Launceston, which provide a gym environment with 'fitness coaches'.
3. Mr Connelley employed [REDACTED] (the **Employee**) on a casual basis as a fitness coach from on or about 1 July 2012.
4. On 18 July 2014, the Employee advised Mr Connelley via text message that he believed he had been underpaid by Mr Connelley.
5. On 26 August 2014, the Employee sent a letter of demand to Mr Connelley, which required the alleged underpayment to be rectified within 7 days (the **Demand**).
6. On 1 September 2014, the Employee followed up on the Demand by sending Mr Connelley a text message asking about his response to the Demand.
7. Later on 1 September 2014, Mr Connelley responded via text message stating that "All info is with Fair trade and my Lawyers. Prior to an outcome, you will not be required at EFM health clubs for work or be in contact with any staff, members or discuss in public. Regards Mark Connelley".
8. The Employee was not provided with any work by Mr Connelley from 1 September 2014 to 27 October 2014 (**Stand Down Period**). In the 6 months prior to the Stand Down Period, the Employee performed an average of 9.03 hours' work per week for Mr Connelley.
9. On 27 October 2014, Mr Connelley advised the Employee that he was rostered to work again on 29 October 2014.

Contraventions

10. The FWO has determined, and Mr Connelley admits, that Mr Connelley has contravened section 340(1)(a)(ii) of the FW Act by taking adverse action against the Employee in the following circumstances:
 - (a) the Employee had a workplace right, in that he was able to make an inquiry or complaint in relation to his employment (the **Workplace Right**);
 - (b) the Employee exercised the Workplace Right by inquiring with Mr Connelley about his wages and by issuing the Demand to Mr Connelley, as described in paragraphs 4 to 6 above;
 - (c) because the Employee exercised the Workplace Right, Mr Connelley did not provide the Employee with any work during the period of 1 September 2014 to 27 October 2014, which was adverse action within the meaning of Item 1(b) of section 342(1) of the FW Act.

Commencement of Undertaking

11. This Undertaking comes into effect (the **Commencement Date**) when:
 - (a) the Undertaking is executed by Mr Connelley; and

- (b) the FWO accepts the Undertaking so executed.
12. Upon the commencement of this Undertaking and for the purposes of section 715 of the FW Act, Mr Connelly undertakes to assume the obligations set out below.

Undertakings

13. Mr Connelley undertakes to:

Compensation

- (a) within 6 months of the Commencement Date, pay compensation of \$2179.24 to the Employee for earnings lost during the Stand Down Period;
- (b) payments are to be made in accordance with a payment plan as follows;
- \$400 paid by 30 May;
 - \$400 paid by 30 June
 - \$400 paid by 30 July
 - \$400 paid by 30 August
 - \$400 paid by 30 September
 - \$179.24 paid by 30 October
- (c) within 5 days of paying each compensation instalment to the Employee, provide proof of payment to the FWO;

Public notice

- (d) within 28 days of the Commencement Date, place a public notice in the Saturday edition of The Examiner newspaper in Launceston in the form of **Attachment A** to this Undertaking (**Public Notice**);
- (e) within 7 days of the publication of the Public Notice, provide reasonable evidence of publication to the FWO;

Workplace Notice

- (f) within 28 days of the Commencement Date, cause to be displayed at EFM Launceston and EFM Windsor a notice in the form of **Attachment A** to this Undertaking (**Workplace Notice**);
- (g) ensure that the Workplace Notice is printed in at least A3 size and displayed:
- (i) for a period of at least 28 days;
 - (ii) in a location to which all employees who work at the EFM clubs have access;
 - (iii) in a manner which is reasonably capable of drawing the Workplace Notice to the attention of employees (for example, by placement on a staff noticeboard);
- (h) within 7 days of the placement of the Workplace Notice, provide a copy of the Workplace Notice and reasonable evidence of its display to the FWO;

Apology

- (i) within 7 days of the Commencement Date, send a letter of apology in the form of **Attachment B** to this Undertaking (**Apology**) to the Employee;
- (j) within 7 days of sending the Apology, provide a copy of the Apology to the FWO;

Future Compliance and FWO “My Account” registration

- (k) in respect of the businesses EFM Windsor and EFM Launceston, and in respect of any business(es) operated by Mr Connelley in the future (whether as a sole trader or through a partnership, company or any other business structure), ensure compliance at all times and in all respects with applicable Commonwealth workplace laws and regulations, including but not limited to compliance with the FW Act and applicable industrial instruments;
- (l) within 7 days of the Commencement Date, register with the FWO ‘My Account’ portal at www.fairwork.gov.au and complete the profile, minimum rates and Awards options applicable to EFM Windsor and EFM Launceston;
- (m) within 7 days of registration, provide the FWO with the relevant ‘My Account’ registration number;
- (n) within 28 days of the Commencement Date, undertake the course “Hiring employees” through the FWO’s online learning centre (accessible at www.fairwork.gov.au/how-we-will-help/online-learning-centre) and provide evidence to the FWO of successful completion;
- (o) in the event that in the 3 years following the Commencement Date Mr Connelley commences operating any business other than EFM Windsor and EFM Launceston (whether as a sole trader or through a partnership, company or any other business structure):
 - (i) within 7 days of commencing to operate such a business, register with the FWO ‘My Account’ portal at www.fairwork.gov.au and complete the profile, minimum rates and Awards options applicable the business; and
 - (ii) within 7 days of registration, provide the FWO with the relevant ‘My Account’ registration number.

Complaint procedure

- (p) within three months of the Commencement Date, develop and implement in respect of EFM Windsor and EFM Launceston a workplace grievance and complaints procedure (**Complaint Procedure**), such Complaint Procedure to:
 - (i) be documented in writing,
 - (ii) include the following details:
 1. what kind of grievances and complaints will be dealt with under the Complaint Procedure;
 2. how and to whom complaints should be notified and what information an employee should provide;
 3. who is responsible for managing complaints;
 4. how complaints will be handled and/or investigated;
 5. time frames for investigating and responding to complaints;
 6. the FWO’s website address and a statement to the effect that employees can seek further information and assistance from the FWO;
 - (iii) be consistent with the obligations and protections under the FW Act;
 - (iv) be advertised to all employees of EFM Windsor and EFM Launceston in a manner that is reasonably capable of bringing it to their attention, for example by emailing or handing a copy to each employee and placing a copy in a common area such as a staff recreation room;
- (q) within 14 days of implementing the Complaint Procedure, provide FWO with a copy of it

and reasonable evidence of how it was advertised to employees;

- (r) for a period of two years after the implementation of the Complaint Procedure, report in writing to the FWO every 6 months detailing:
 - (i) the number and nature of any complaints received by Mr Connelley from employees;
 - (ii) how those complaints were dealt with under the Complaints Procedure; and
 - (iii) the outcome of the complaints.

Acknowledgements

14. Mr Connelley acknowledges 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 the 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 Mr Connelley;
- (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 Mr Connelley has contravened any of the terms of this 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;
- (g) consistent with section 715(3) of the FW Act, Mr Connelley may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO.

15. 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 Mr Connelley in relation to any future contraventions of Commonwealth workplace laws;

16. Mr Connelley agrees that he must not, and must ensure that his agents and employees do not, make any statements, orally or in writing or otherwise, which convey or imply or reasonably convey or imply anything inconsistent with the admissions and acknowledgements contained in this Undertaking.

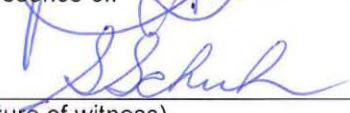
Executed as an undertaking

EXECUTED by Mark D Connelley:


Mark D Connelley


27/4/15
(Date)

in the presence of:


(Signature of witness)

SHERYL-LEE SCHUH
(Name of witness)


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


[Insert name and role of Delegate]

6 MAY 2015
(Date)

Delegate for the FAIR WORK OMBUDSMAN

in the presence of:


(Signature of witness)

PIA MORGAN
(Name of Witness)

Attachment A – Form of Public and Workplace Notice

Contravention of Fair Work Act by Mark D Connelley trading as EFM Windsor and EFM Launceston

I refer to the investigation conducted by the Office of the Fair Work Ombudsman (FWO) into allegations that Mark D Connelley contravened section 340(1)(a)(ii) of the *Fair Work Act 2009* by standing down an employee because the employee exercised his workplace right to make a complaint or inquiry in relation to his employment (by making a claim regarding his rate of pay).

Mr Connelley has formally admitted to FWO that this contravention occurred and has entered into an Enforceable Undertaking with the FWO (available at www.fairwork.gov.au) committing to a number of measures to remedy the contravention, including paying compensation to the affected employee.

Mr Connelley expresses his sincere regret and apologises for the conduct which resulted in the contravention. Furthermore, Mr Connelley gives a commitment that such conduct will not occur again and that he will comply with all requirements of the Commonwealth workplace relations laws in the future. In particular, Mr Connelley will be implementing a complaints handling procedure within his businesses to ensure the lawful resolution of employee enquiries in future.

Attachment B – Letter of Apology

<Print on your business letterhead>

<Date>

Private and confidential

[REDACTED]
[REDACTED]
[REDACTED]

Dear [REDACTED]

Apology

I am writing to apologise for my non-compliance with Commonwealth Workplace relations laws. A recent investigation conducted by the Office of the Fair Work Ombudsman (FWO) determined that I contravened section 340(1)(a)(ii) of the *Fair Work Act 2009*.

On 1 September 2014, I stood you down from your employment with me after you made a complaint about an alleged underpayment of wages and asked that I rectify it. I did not provide you with any work for the period from 1 September 2014 to 27 October 2014 (**Stand Down Period**), because you exercised your workplace right to make a complaint or inquiry.

Regrettably, because of the above contravention you were financially disadvantaged because you did not receive wages that you would have otherwise been likely to receive during the Stand Down Period.

I am taking steps to remedy the contravention, including paying you compensation of \$2179.24 which represents the average of wages you would have received over the Stand Down Period.

I have formally admitted to the FWO that I did not comply with my obligations under Commonwealth workplace relations laws and have 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, I have committed to a number of measures to ensure future compliance with Commonwealth workplace relations laws.

I express my sincere regret and apologise to you for failing to comply with my lawful obligations.

Should you have any questions, please contact me on [REDACTED] or at [REDACTED]

Yours sincerely

Mark Connelley