



Fair Work OMBUDSMAN

ENFORCEABLE UNDERTAKING

Between

The Commonwealth of Australia

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

and

Mario Tamer

and

Mirna Tamer

(in partnership as M Tamer & M Tamer t/as Fancy Fruits (ABN: 99 657 460 799))

Section 715 ENFORCEABLE UNDERTAKING

Parties

1. This enforceable undertaking (**Undertaking**) is given to the Commonwealth of Australia (as represented by the Fair Work Ombudsman (FWO)), pursuant to section 715 of the *Fair Work Act 2009* (Cth) (FW Act), by:
 - (a) Mario Tamer (Mr Tamer); and
 - (b) Mirna Tamer (Mrs Tamer),in partnership as M Tamer & M Tamer, trading as Fancy Fruits (ABN: 99 657 460 799) (Partnership).

Background

2. Until 28 November 2014, the Partnership operated a retail fruit store in Thirroul, NSW, known as Fancy Fruits (**Fancy Fruits**).
3. In September 2014, the FWO commenced an investigation (**Investigation**) of the Partnership after it received complaints regarding allegations of underpayment of wages from former Fancy Fruits employees [REDACTED] and [REDACTED].
4. As a result of information gathered during the Investigation, the FWO commenced an audit (**Audit**) of all wage records provided by Mr and Mrs Tamer for their employees employed during the period between 1 September 2014 and 30 September 2014. The records produced related to the employment of former Fancy Fruits employees [REDACTED]; [REDACTED] and [REDACTED] (together with [REDACTED] and [REDACTED], the "Affected Employees").
5. The relevant periods considered by the FWO during its Investigation and Audit, for the purposes of this Undertaking, are as follows:
 - (a) [REDACTED]: from 13 September 2013 to 27 September 2013;
 - (b) [REDACTED]: from 29 July 2013 to 29 September 2014;
 - (c) [REDACTED]: from 26 May 2014 to 27 October 2014;
 - (d) [REDACTED]: from 8 May 2014 to 19 May 2014; and
 - (e) [REDACTED]: from 25 August 2014 to 27 October 2014,(together, the "Relevant Periods").
6. During the Relevant Periods, the Affected Employees' terms and conditions of employment were governed by the General Retail Industry Award 2010 (**Retail Award**). Transitional rates of pay in the Award were calculated by reference to the Shop Employees (State) Award.
7. The Affected Employees were employed on a casual basis. Their duties included the basic functions of retail sales including sale of goods, receipt of monies, operation of a cash register and preparing goods for sale. The Affected Employees' classification during the Relevant Periods was Retail Employee Level 1. [REDACTED] was 17 years of age at all material times.
8. The Partnership paid the Affected Employees for work performed during the Relevant Periods at rates of pay that were less than their minimum entitlements under the Retail Award by failing to pay the applicable minimum adult and junior hourly rates of pay and the applicable casual loading.

9. The total underpayment to the Affected Employees during the Relevant Periods is \$4,435.29 gross (**Underpayments**), attributable to each of the Affected Employees as follows:
- (a) [REDACTED]: \$344.12, less applicable taxation;
 - (b) [REDACTED]: \$1,502.94, less applicable taxation;
 - (c) [REDACTED]: \$1,552.96, less applicable taxation;
 - (d) [REDACTED]: \$250.27, less applicable taxation; and
 - (e) [REDACTED]: \$785.00, less applicable taxation.
10. In addition to the Underpayments, the Partnership also failed to:
- (a) make and keep employee records of the prescribed kind in respect of each of the Affected Employees; and
 - (b) give the Affected Employees a pay slip within the required time.

Contraventions

11. The FWO has determined, and Mr and Mrs Tamer admit, that in respect of the Relevant Periods, they contravened:
- (a) section 45 of the FW Act, by failing to comply with the following provisions of the Retail Award:
 - (i) clause 13.2 and clause A.5.4 of Schedule A – casual loading (in respect of the Affected Employees);
 - (ii) clause 17 and clause A.3.6 of Schedule A – minimum weekly wages (in respect of [REDACTED]); and
 - (iii) clause 18 and clause A.3.6 of Schedule A – junior rates (in respect of [REDACTED]);
 - (b) section 535(1) of the FW Act, by failing to make, and keep for 7 years, employee records of the kind prescribed by the *Fair Work Regulations 2009* (Cth) in relation to each of the Affected Employees; and
 - (c) section 536(1) of the FW Act, by failing to give a pay slip to each of the Affected Employees within one working day of paying them an amount in relation to the performance of work.
12. Mr and Mrs Tamer acknowledge and regret the contraventions, and have from the time the contraventions were determined, expressed appreciation for the education provided by the FWO and a desire to make good any underpayments.
13. Mr and Mrs Tamer now understand that not paying staff for training is a contravention of the FW Act, and are committed to ensuring that both they, and other employers, take steps to ascertain and understand their obligations to pay staff for all hours worked.

Commencement of Undertaking

14. This Undertaking comes into effect when:
- (a) the Undertaking is executed by each of Mr and Mrs Tamer; and
 - (b) the FWO accepts the Undertaking so executed (as evidenced by the FWO's endorsement below).

15. Upon the commencement of this Undertaking, each of Mr and Mrs Tamer undertake to assume the obligations set out below.

Undertakings

Rectify the Underpayments

16. For the purposes of section 715 of the FW Act, Mr and Mrs Tamer undertake to:
- (a) pay, within 14 days of exchange of executed counterparts of these undertakings, to each of the Affected Employees the outstanding underpayments owed to each of them, as set out in paragraph 9 of this Undertaking; and
 - (b) within 7 days of each payment being made to an Affected Employee, provide reasonable evidence to the FWO that the payment has been made.

Future workplace relations compliance and training

17. For the purposes of section 715 of the FW Act, Mr and Mrs Tamer undertake, in the event that both or either of them are involved in employing an employee or employees in the future, in their own names, in partnership or in some other capacity, to:
- (a) ensure compliance at all times and in all respects with applicable Commonwealth workplace laws and instruments, including the Retail Award and the FW Act;
 - (b) develop systems and processes to promote ongoing compliance with applicable Commonwealth workplace laws and instruments, including the Retail Award and the FW Act;
 - (c) complete education courses designed for employers available on the FWO online learning centre via www.fairwork.gov.au or its successors; and
 - (d) provide to the FWO, within 90 days of first employing an employee, written details of the steps taken to satisfy their undertakings in paragraphs 16(a) to 16(c) above.
18. For the purposes of section 715 of the FW Act, Mr and Mrs Tamer undertake, in the event that both or either of them are involved in employing an employee or employees in the future, in their own names, in partnership or in some other capacity, that within 14 days of said employment, they will register with the FWO "My Account" portal at www.fairwork.gov.au, and complete the profile and the minimum rates of pay and Award options.

Retrospective Audit and Reporting

19. For the purposes of section 715 of the FW Act, Mr Tamer and Mrs Tamer undertake to:
- (a) cause to have performed at their own expense, an audit of the Partnership's compliance with applicable Commonwealth workplace laws and instruments, including but not limited to the Retail Award and the FW Act, in respect of the pay and conditions of all employees at Fancy Fruits for the period from 1 January 2014 to 31 August 2014 (**Retrospective Audit**) on the following basis:
 - (i) the Retrospective Audit will be performed by an accounting professional (for example, a Certified Practising Accountant), an external audit specialist or an accredited employment law specialist; and
 - (ii) the Retrospective Audit will cover all pay periods for all employees performing work at Fancy Fruits during the audit period;
 - (b) provide to the FWO, by no later than 15 May 2015, details of the methodology used to conduct the Retrospective Audit and a report on the outcomes of the Retrospective Audit certified as correct by a Certified Practising Accountant,

audit specialist or accredited employment law specialist;

- (c) in the event the Retrospective Audit discloses contraventions by the Partnership of any applicable Commonwealth workplace law or instrument, rectify all such contraventions by 28 May 2015 (including, where relevant, by rectifying any and all underpayments arising from such contraventions);
- (d) by 28 May 2015, provide reasonable evidence to the FWO that any payments required in accordance with paragraph 19(c) above have been made;
- (e) take reasonable steps to locate former employees entitled to a rectification payment in accordance with paragraph 19(c) above who could not be located by 28 May 2015, including by attempting to contact each employee by telephone or in writing on existing or any new contact details obtained to:
 - (i) advise them they are owed money; and
 - (ii) explain the process for claiming the money owed to them;
- (f) by 29 June 2015:
 - (i) report to the FWO on the attempts to locate former employees taken pursuant to paragraph 19(e), and the payments made to any former employees located and paid;
 - (ii) pay to the Commonwealth of Australia (through the Office of the Fair Work Ombudsman) pursuant to section 559(1) of the FW Act, and in discharge of any liability to pay rectification amounts as required under paragraph 19(c), any amounts owed to former employees who could not be located and paid within the specified period, to be held on trust for those persons; and
 - (iii) provide the FWO with a report on any persons who could not be located, together with details of the amount owed to them and their last known contact details.

Public Notice

20. For the purposes of section 715 of the FW Act, within 28 days of these undertakings being executed, Mr and Mrs Tamer undertake to publish a notice in the local news section of the relevant edition of the Illawarra Mercury which measures at least 15cm high x 7.4cm wide in the form annexed and marked A.

Acknowledgements

21. Mr and Mrs Tamer 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 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 and Mrs Tamer;
 - (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 the Partnership, Mr and Mrs Tamer have 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;
- (g) consistent with section 715(3) of the FW Act, Mr and Mrs Tamer may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO; and
- (h) Mr and Mrs Tamer must not, and must ensure that their respective employees or agents do not, make any statement, orally or in writing, or otherwise, which reasonably conveys or implies anything inconsistent with the acknowledgements contained in this Undertaking.

Executed as an undertaking

EXECUTED by Mario Tamer:

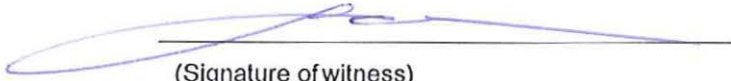


(Signature)

18/3/2015

(Date)

in the presence of:



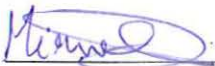
(Signature of witness)

in the presence of:

James Welch

(Name of witness)

EXECUTED by Mirna Tamer:

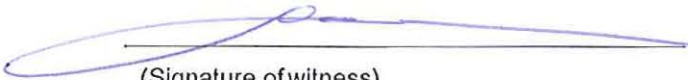


(Signature)

18/3/2015

(Date)

in the presence of:



(Signature of witness)

in the presence of:

James Welch

(Name of witness)

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



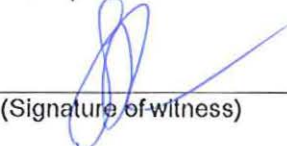
Executive Director - Dispute Resolution and Compliance

25 MARCH 2015

(Date)

(an authorised delegate pursuant to an instrument of delegation made pursuant to section 683 of the FW Act)

in the presence of:



(Signature of witness)

25 March 2015.

(Name of Witness)

Appendix A - Form of Public Notice

During a recent audit of Mario Tamer and Mirna Tamer formerly trading as Fancy Fruits, the Fair Work Ombudsman (FWO) identified contraventions of Commonwealth workplace laws including contraventions relating to minimum rates of pay and record keeping. Fancy Fruits expresses regret for the 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. Fancy Fruits desires to comply with Commonwealth workplace laws, and in partnership with the FWO, wishes to assist Illawarra small businesses by publishing this notice.

Employment Relationships

Unpaid trials must be limited to what is reasonably required of a prospective employee to demonstrate that they have the necessary skill and competence to perform the duties of a role. The purpose of a trial is not to conduct training. For most, an unpaid trial should be limited to only one (1) or two (2) hours on a single day. Additional time will likely create an employment relationship.

Employment Records and Payslips

Section 535 and 536 of the *Fair Work Act* require employers to make and keep for 7 years employee records for each employee. This extends to prospective employees, including employees who may be initially engaged for an unpaid trial. The requirements are set out in regulations 3.31-3.46 of the *Fair Work Regulations*: see http://www.austlii.edu.au/au/legis/cth/consol_reg/fw_r2009223/

Awards and Rates of Pay

Employers must apply the correct Award and rate of pay to each employee, (casual and permanent). This includes allowances and loadings. A contravention is an offence against the *Fair Work Act*.

Further Information

If you are unsure as to whether you are meeting your legal requirements as an employer, please call the FWO on 13 13 94, or visit their website at www.fairwork.gov.au.

Fancy Fruits can be contacted care of Mirna Tamer on 0408 135 251.