

Fair Work Act 2009

Section 715 ENFORCEABLE UNDERTAKING

Parties

1. This enforceable undertaking (**Undertaking**) is given to the Fair Work Ombudsman (**FWO**) by:

CAB Catering Pty. Ltd (ABN 69 162 194 019) (**CAB**) for the purposes of section 715 of the *Fair Work Act 2009 (FW Act)*.

Background

2. CAB provides canteen services in New South Wales and Victoria.
3. CAB was incorporated on 24 January 2013. The current Director and Secretary is Jeremy Hayden Mickle.
4. CAB employs a total of six employees in New South Wales performing canteen duties at three New South Wales leased school canteens. CAB also employs three employees in Victoria.
5. On 6 January 2015, the FWO commenced an audit of JAD Food Holdings Pty Ltd (**JAD**) as part of an Inquiry into the employment practices of canteen operators who had entered into leasing arrangements with the New South Wales Department of Education and Communities (**DEC**) to provide canteen services to public schools.
6. As a result of the audit the FWO found that:
 - (a) CAB has no direct commercial relationship with the DEC. The DEC awarded three leasing contracts to JAD. All canteen workers are engaged through CAB and provide services to JAD.
 - (b) The employees perform various duties related to the operation of school canteens including the preparation of food, the receipt of orders and the serving of meals.
 - (c) There is an unwritten agreement with the employees that they will not work during periods of school holidays.
 - (d) The employees are paid out their accrued annual leave entitlements each school holiday period.
 - (e) The terms and conditions of CAB's employees are governed by the Fast Food Industry Award 2010 (MA000003) (**Fast Food Award**).
 - (f) CAB's employees were engaged in the following classifications of the Fast Food Award:
 - (i) *Fast Food Employee Level 1 – "Canteen Assistant"*
 - (ii) *Fast Food Employee Level 2 – "Canteen Supervisor"*
 - (iii) *Fast Food Employee Level 3 – "Canteen Manager"*
7. The Employees were employed on a part time basis during the period of 2 February to 1 May 2015 (**audit period**) set out in **Attachment D** to the Undertaking.
8. An assessment of the records provided for the audit period, highlighted a number of contraventions of the FW Act and the Fast Food Award involving CAB employees.

Contraventions

9. The FWO has determined, and CAB admits, that CAB contravened section 44 of the FW Act by failing to comply with the following provision of the National Employment Standards:
 - (a) Section 88 by requiring employees to use their accrued annual leave entitlement each school holiday period;
10. The FWO has determined, and CAB admits, that CAB contravened section 45 of the FW Act by failing to comply with the following provisions of the Fast Food Award:
 - (a) Clause 12.2 by failing to agree in writing with an employee on a regular pattern of work at the time of first being employed;
 - (b) Clause 12.7 by failing to pay the appropriate overtime rate where hours worked were in excess of hours as agreed under clause 12.2;
 - (c) Clause 17 by failing to pay the applicable minimum rates of pay;

Commencement of Undertaking

11. This Undertaking comes into effect when:
 - (a) the Undertaking is executed by CAB; and
 - (b) the FWO accepts the Undertaking so executed.
12. Upon the commencement of this Undertaking, CAB undertakes to assume the obligations set out below.

Undertakings

13. For the purposes of section 715 of the FW Act, CAB undertakes to:

Rectify the underpayments

- (a) Within twenty eight days of execution of this Undertaking, pay the amount of \$1,718.72 less taxation to the Employees who were underpaid as a result of the Contraventions referred to in paragraph 10(b) and 10(c), according to the amounts set out in Attachment D;
- (b) Provide evidence of rectification in relation to paragraph 13(a) above to the FWO within fourteen days of the payments being made;

Recordkeeping

- (c) Ensure the regular pattern of work document for new part time employees engaged by CAB is created at the time of first being employed.
- (d) Ensure that all time worked in excess of the hours as agreed in the regular pattern of work is treated as overtime and attract the applicable overtime and penalty rates.
- (e) Within fourteen days of execution of this Undertaking create a written record for each part time employee which reflects that their regular pattern of work document only applies during the NSW Government Schools Term Periods;
- (f) This record must specify that the part time employee will not be required to work during scheduled NSW school holiday breaks, nor will they be entitled to payment during these periods;
- (g) Within twenty eight days of the execution of this Undertaking, provide the FWO with a copy of the written records referred to in paragraph 13(e);

Annual Leave

- (h) Cease the practice of paying employees their accrued annual leave entitlement at the end of each school holiday period;
- (i) Ensure that paid annual leave is taken in a period agreed between the employees and CAB;

Self-audit

- (j) Conduct a self-audit within twenty eight days of execution of this Undertaking to identify any contraventions of relevant Commonwealth of Australia Workplace Relations Laws for the employees currently and previously employed by CAB from the pay period commencing 1 July 2014 including entitlements to minimum rates of pay and payment of overtime in excess of agreed hours.
- (k) Pay to the Affected Employees referred to in 13(j), within fifty six days of the execution of this Undertaking, the outstanding amounts as calculated on the correct rates of pay from the period commencing 1 July 2014;
- (l) Within seven days of each payment being made to an Affected Employee as per paragraph 13(k), provide the methodology of the calculations and reasonable evidence to the FWO that these Payment/s have been made;
- (m) If an affected Employee cannot be located, within one month of the payment falling due, pay any outstanding amount into the consolidated revenue of the Commonwealth of Australia (through the FWO), in accordance with section 559 of the FW Act, to be held on trust for the relevant Employee;

Apology

- (n) Prepare a letter apologising for the Contraventions to all Affected Employees in the form of Attachment A to this Undertaking (**Apology Letters**) and distribute it to each employee within forty two days of the execution of this Undertaking. Within seven days of distribution of the Apology Letters, submit a sample copy of an Apology Letter to the FWO and written details of when each Apology Letter was provided to each Affected Employee;

Future workplace relations compliance

- (o) Ensure compliance at all times and in all respects with applicable Commonwealth of Australia Workplace Relations Laws and instruments, including but not limited to the Fast Food Award and the FW Act 2009, by developing systems and processes to ensure ongoing compliance with those requirements;
- (p) Provide to the FWO, within twenty eight days of the execution of this Undertaking, written detail of the systems and processes implemented in satisfaction of the Undertaking in paragraph 13(o) above designed to ensure such ongoing compliance;

Workplace relations training

- (q) Within three months of the execution of this Undertaking, organise and ensure training for all persons engaged by CAB who have managerial responsibility for human resources, recruitment/termination or payroll functions (**Training**);
- (r) Within three months of the execution of this Undertaking, provide the FWO with written details of Training undertaken including names of the courses, dates Training was undertaken, and names of participants. Ensure the Training relates to compliance with all applicable Commonwealth of Australia Workplace Relations Laws and instruments, including but not limited to the rights and responsibilities of employers under the FW Act and the Fast Food Award;
- (s) In addition to any external Training, within three months of the execution of this Undertaking ensure persons referred to in paragraph 13(q) review relevant education material available on the FWO website and as a minimum, complete educational activities as set out in Attachment B and ensure a copy of Attachment B completed is

provided to the FWO Ensure within fourteen days of the execution of this Undertaking, CAB has actioned the following activities with the FWO website;

- i. Register for "My Account";
 - ii. subscribe to the bi-monthly employment newsletter;
 - iii. subscribe to the pay rate update alert RSS feed for the Fast Food Award
- (t) Provide to the FWO a completed Attachment C within seven days of completion of the activities outlined in paragraph 13(t) above.

Future audits

- (u) Cause to have performed by an accounting professional (for example, a Certified Practising Accountant) or an employment law specialist, at CAB's expense, audits of CAB's compliance with all applicable Commonwealth of Australia Workplace Relations Laws and instruments, including but not limited to the Fast Food Award and the FW Act, relating to pay and conditions of all employees of CAB (**Audit**), for each year in a two year period as follows:
- i. The Audit for the financial year 2016 is to be finalised by 30 August 2016;
 - ii. The Audit for the financial year 2017 is to be finalised by 30 August 2017;
- (v) Provide to the FWO, at least fourteen days prior to the commencement of an Audit being undertaken, the methodology to be used for the purpose of the Audit for approval by the FWO;
- (w) Provide to the FWO, within fourteen days of each finalised Audit, details of the methodology used to conduct the Audit and the outcomes of the Audit;
- (x) In the event an Audit discloses contraventions of any applicable Commonwealth of Australia Workplace Relations Laws and instruments, rectify all such contraventions within fourteen days of the finalised Audit including rectification of any and all underpayments to employees;
- (y) Provide evidence of rectification in relation to paragraph 13(y) above to the FWO within fourteen days of the finalised Audit.

Future complaints

- (z) Where contacted by current or former employees not covered by this Undertaking alleging that their lawful entitlements have not been met, CAB agrees to:
- iii. Notify the FWO within seven days of receiving the allegation;
 - iv. Take all reasonable steps to ascertain whether a contravention/s of the FW Act has occurred, and where such contravention/s have been found and take immediate steps to rectify the contravention/s;
 - v. Within seven days of resolving the allegation, provide the FWO with evidence that any identified underpayments have been paid and evidence that other issues identified have been resolved; and
 - vi. Should a decision be made not to rectify an issue raised by an allegation, notify the FWO within 7 days of this decision the reasons for not rectifying.

Acknowledgements

CAB 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.fwo.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 of Australia Workplace Relations obligations by CAB;
- (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 CAB has 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, CAB may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO.

Executed as an undertaking

EXECUTED by CAB Catering Pty. Ltd (CAN 162 094 019) in accordance with section 127(1) of the Corporations Act 2001:


(Signature of director)

(Signature of director/company secretary)

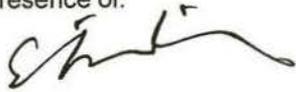
Jeremy Mickel
(Name of director)

(Name of director/company secretary)

25/06/2015
(Date)

(Date)

in the presence of:



in the presence of:

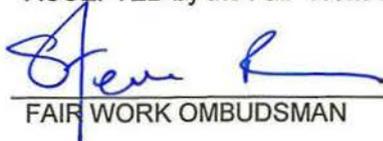
(Signature of witness)

(Signature of witness)

G. SATANIS
(Name of witness)

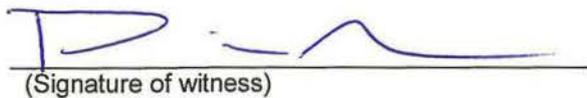
(Name of witness)

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


FAIR WORK OMBUDSMAN

1 JULY 2015
(Date)

in the presence of:


(Signature of witness)

PIA MORGAN
(Name of Witness)

Attachment A – Letter of Apology

FORM OF APOLOGY LETTER TO AFFECTED EMPLOYEES

Date

Employee Name and address

Dear _____

The purpose of this letter is to apologise on behalf of CAB Catering Pty. Ltd. (CAB) for non-compliance with Commonwealth of Australia Workplace Relations Laws. A recent investigation conducted by the Office of the Fair Work Ombudsman (FWO) determined that CAB had contravened the Fair Work Act 2009 (FW Act) by failing to pay its employees the following entitlements under the Fast Food Industry Award 2010 (the Fast Food Award):

- minimum rates of pay;
- overtime in excess of written agreed pattern of hours;
- annual leave

Regrettably, the investigation determined that you were affected by the above contraventions. CAB is taking steps to remedy the contraventions, including by rectifying \$_____ that you have been underpaid.

You will/have receive/d this payment on (date) and will be provided with payment advice (payslip) regarding the payment.

With regard to your annual leave entitlement, CAB will cease the practice of paying you your accrued annual leave entitlement each school holiday period. Instead you and CAB will agree when and for how long paid annual leave will be taken.

CAB has formally admitted to the FWO that it did not comply with its obligations under Commonwealth of Australia Workplace Relations Laws and have entered into an Enforceable Undertaking under the FW Act with the FWO, a copy of which is available from the FWO website at www.fairwork.gov.au.

As part of the Enforceable Undertaking, CAB has committed to a number of measures to ensure future compliance with Commonwealth of Australia Workplace Relations laws.

CAB expresses its sincere regret and apologises to you for failing to comply with our lawful obligations.

Should you have any questions, please contact Michael Barlow, Manager on _____.

Yours sincerely

CAB Catering Pty. Ltd.

Attachment B

TRAINING RESOURCES UTILISED FROM THE FAIR WORK OMBUDSMAN WEBSITE

I, _____ have undertaken the following tools:

Completed online courses* including:

- Difficult conversations in the workplace – manager course date completed: _____
- Hiring employees date completed: _____
- Managing performance date completed: _____

** Please provide printout of the Statement/Certificate of Attainment for each course completed*

Viewed Videos including:

- Welcome to fairwork.gov.au date completed: _____
- Finding information for your industry date completed: _____
- My account date completed: _____
- Introduction to the Pay and Conditions Tool date completed: _____
- PACT – Penalty rates date completed: _____

Read Factsheets including:

- Role of the Fair Work Ombudsman date completed: _____
- Annual Leave date completed: _____
- Public holidays date completed: _____

Read information on the following:

- **Pay Overview**
 - Minimum wages Page Ref No. _____ date completed: _____
 - Penalty rates & allowances Page Ref No. _____ date completed: _____

- **Leave Overview**
 - Annual leave Page Ref No. _____ date completed: _____
 - Sick & carer's leave Page Ref No. _____ date completed: _____

- **Ending Employment Overview**

- Notice & final pay Page Ref No. _____ date completed: _____
- Unfair dismissal Page Ref No. _____ date completed: _____

- **Employee Entitlements Overview**

- Types of employees Page Ref No. _____ date completed: _____
- National Employment Standards Page Ref No. _____ date completed: _____

- **Awards & Agreements Overview**

- Awards Page Ref No. _____ date completed: _____

Date and signature

Attachment C

FAIR WORK OMBUDSMAN WEBSITE – SUBSCRIPTIONS

I, _____, on behalf of CAB have undertaken the following activities:

- Registered for "My Account"
- Subscribed to the bi-monthly employer newsletter
- Subscribed to the pay rate update alert RSS feed for the following Awards:
 - Fast Food Industry Award 2010

Attachment D – Employees and amounts owed

Employees	Amount Owed	Assessment Period
██████████	\$357.31 (less taxation)	2 February to 1 May 2015
██████████	\$168.09 (less taxation)	2 February to 1 May 2015
██████████	\$267.11 (less taxation)	2 February to 1 May 2015
██████████	\$355.84 (less taxation)	2 February to 1 May 2015
██████████	\$542.41 (less taxation)	2 February to 1 May 2015
██████████	\$27.96 (less taxation)	2 February to 1 May 2015
TOTAL	\$1,718.72 (less taxation)	