

ENFORCEABLE UNDERTAKING

Between

The Commonwealth of Australia

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

and

Rapid City Pty Ltd (ACN: 053 430 121)

and

Jeffrey Herscu

Section 715 ENFORCEABLE UNDERTAKING

PARTIES

1. This enforceable undertaking (the **Undertaking**) is given to the Fair Work Ombudsman (**FWO**) by:
 - (a) Rapid City Pty Ltd (ACN: 053 430 121) trading as Health Express DFO South Wharf (the **Company**) and
 - (b) Jeffrey Herscu (**Mr Herscu**), Director, Rapid City Pty Ltdfor the purposes of section 715 of the *Fair Work Act 2009* (the **FW Act**).

BACKGROUND

2. The Company operates a take away food store selling various food, including but not limited to sandwiches, wraps and salads in a food court located at the Direct Factory Outlet (DFO) 20 Convention Centre Place, South Wharf in Melbourne, Victoria.
3. Mr Herscu admits and agrees that, at all material times, he:
 - (a) was the sole director of the Company, having been so since 29 October 2009;
 - (b) was ultimately responsible for overall direction, management and supervision of the operations at the Company in relation to engaging staff, setting and adjusting pay rates and determining wages and conditions of employment;
 - (c) was aware that employees are entitled to be paid for work performed in accordance with applicable industrial instruments and Commonwealth workplace laws; and
 - (d) by reason of the matters set out in subparagraphs (a) to (c) was responsible in a practical sense for ensuring the Company complied with its legal obligations.
4. In February 2015 and March 2015 respectively, the FWO received two (2) Requests for Assistance from Employee A and Employee B (listed in Attachment A) (together, the **Employees**) concerning the Company relating to underpayment of base rates of pay and penalty rates on weekends and Public Holidays. Employee B also had concerns relating to the underpayment of underpaid annual leave entitlements.

5. The FWO identified contraventions for the following periods:
- (a) Employee A from September 2013 to March 2015 (**Employee A's Contravention Period**), and
- (b) Employee B from June 2010 to March 2015 (**Employee B's Contravention Period**),
- (together, the **Contravention Periods**).
6. The FWO conducted an investigation into the Requests for Assistance and identified contraventions of the *Fast Food Industry Award 2010* (the **Fast Food Award**), the FW Act, *Fair Work Regulations 2009* (the **FW Regulations**).
7. Employee A was employed on a casual basis and Employee B was employed on a part time basis. The duties performed by the Employees included, but were not limited to making sandwiches and salads, serving customers and opening and closing the store. The Employees' classification under the Fast Food Award were 'Fast food employee, Level 1'.
8. The Company underpaid the Employees for the hours worked by failing to pay the correct minimum hourly rates of pay in accordance with the Fast Food Award. The underpayments arose as a result of underpaying base hourly rates of pay for time worked Monday to Friday as well as penalty rates for Saturdays, Sundays and Public Holidays. Further underpayments arose as a result of the Company not paying the Employees a special clothing allowance, Employee A not receiving a casual loading and Employee B not being paid correct annual leave and annual leaving loading entitlements.

CONTRAVENTIONS

9. The FWO has determined, the Company and Mr Herscu admits, that the Company and Mr Herscu contravened:
- (a) Section 45 of the FW Act, which states a person must not contravene a term of a modern award. Those contraventions were as follows:

Fast Food Award:

- Failing to make and keep a written part time agreement (cl. 12.2).
- Underpayment of casual loading (cl. 13.2);
- Underpayment of base hourly rate (cl. 17);
- Underpayment of special clothing allowance, (cl. 19.2(b));
- Underpayment of Saturday and Sunday penalty rates, (cl. 25.5);

- Underpayment of annual leave loading (cl. 28.3);
- Underpayment of Public Holiday penalty rates, (cl. 30.3); and

(b) Section 44 of the FW Act which states a person must not contravene a provision of the National Employment Standards (NES). Those contraventions were as follows:

- Underpayment of annual leave (s90(1)); and
- Underpayment of annual leave and leave loading upon termination (s90(2)).

(c) Section 535(1) of the FW Act 2009 which states an employer must make and keep for 7 years, employee records of the kind prescribed by the regulation in relation to each of its employees. Those contraventions were as follows:

- Failure to keep a record that specifies whether the employee's employment is full-time or part-time; and whether the employee's employment is permanent, temporary or casual; and the date on which the employee's employment began (reg. 3.32);
- Failure to keep a record that specifies the rate of remuneration paid to the employee; and the gross and net amounts paid to the employee; and any deductions made from the gross amount paid to the employee (reg. 3.33(1)); and
- Failure to keep a record that specifies the hours worked by a casual or irregular part-time employee (reg. 3.33(2)).

(d) Section 536(1) of the FW Act 2009 which provides that the records must be in the form if prescribed by the regulations to be in that form, and include any information prescribed in the regulations. Those contraventions were as follows:

- Failure to include required information – the amount of each superannuation contribution and the superannuation fund name and/or number (reg. 3.46(5)).

(e) Section 536(1) of the FW Act 2009 which states an employer must give a pay slip to each of its employees within one working day of paying an amount to the employee in relation to the performance of work.

- Failure to issue pay slips (536(1)).

COMMENCEMENT OF UNDERTAKING

10. This Undertaking comes into effect when:
- (a) the Undertaking is executed by the Company and Mr Herscu; and
 - (b) the FWO accepts the Undertaking so executed.
11. Upon the commencement of this Undertaking (the **Commencement Date**), the Company and Mr Herscu undertake to assume the obligations set out below.

ENFORCEABLE UNDERTAKINGS

12. Upon the commencement of this Undertaking and for the purposes of section 715 of the FW Act, the Company and Mr Herscu undertakes the following:

Rectify Underpayments

- (a) pay the amount of \$50,914.59 less taxation to the Employees arising from the Contraventions within 14 days of the Commencement of the Undertaking and provide evidence of payment to the FWO on the same date;

Future Workplace relations compliance

- (b) ensure that it complies at all times and in all respects with the FW Act, FW Regulations and Fast Food Award;
- (c) provide the FWO, within 21 days of the date of execution of this Undertaking, details of systems and processes already in place or to be implemented to comply with paragraph (b) above. 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;
 - (iii) keeping accurate and complete records to ensure employees receive their correct wages and entitlements;

FWO My Account Registration

- (d) within 14 days of the execution of this undertaking, register with the FWO 'My Account' portal at www.fairwork.gov.au and have completed the profile, minimum pay rates and Award options.
 - (i) within 14 days of the execution of the Undertaking provide to the FWO the Company's 'My Account' registration number;

- (ii) within 21 days of the execution of the Undertaking, at a mutually agreed time and location, demonstrate to a FWO Officer by using the 'Pay Calculator' in 'My Account' via www.fairwork.gov.au the current Fast Food Award minimum base hourly rates of pay as well as Saturday, Sunday and Public holiday rates and special clothing allowance for both casual and permanent (part time and full time) employees;

Workplace relations training

- (e) within 60 days of the execution of this Undertaking, organise and ensure training is provided to all persons who have managerial responsibility for human resource, recruitment or payroll functions (**Training**);
- (f) ensure the Training relates to compliance with applicable Commonwealth of Australia workplace laws and instruments, including but not limited to the rights and responsibilities of employers under the FW Act and the Fast Food Award;
- (g) ensure the Training is conducted by an accredited workplace trainer, such person or organisation to be approved by the FWO and paid for by the Company;
- (h) provide the training materials to be used in the Training to the FWO no later than 14 days before the Training is to be conducted;
- (i) provide evidence of attendance at the Training to the FWO within 7 days of the Training being provided (including the name and position of all attendees and the date on which the training was attended);
- (j) for a period of 3 years from the execution of this Undertaking, ensure that training is conducted in the manner prescribed in paragraphs 12 (e)-(i) 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 on behalf of the Company;

Apology

- (k) send a letter of apology (**Apology Letter**) when rectifying underpayments in the form of Attachment B and provide evidence of the apology sent to the Employees to the FWO on the same date;

Audit Activity

- (l) cause to have performed by an accounting professional (for example a Certified Practising Accountant) or an employment law specialist, at the Company's expense, audits of the Company's compliance with all Commonwealth workplace laws and instruments (**Audits**), relating to the pay and conditions of all employees of the Company during the relevant audit period, according to the following schedule:
 - (i) an Audit from 1 January 2016 to 31 March 2016 which is to be finalised by

- 15 May 2016;
- (ii) an Audit from 1 January 2017 to 31 March 2017 which is to be finalised by 15 May 2017;
 - (iii) an Audit from 1 January 2018 to 31 March 2018 which is to be finalised by 15 May 2018;
- (m) ensure that each Audit examines the the Company's compliance with any wage rates, penalty or allowance increases flowing from the Fair Work Commission Annual Wage Reviews;
 - (n) provide to the FWO, by 29 May of each Audit period, details of the methodology used to conduct the Audit and the outcomes of the Audit;
 - (o) in the event an Audit discloses contraventions of any applicable Commonwealth workplace law and/or instruments, rectify all such contraventions by 29 May of each Audit period including rectification of any and all underpayments to employees;
 - (p) provide evidence of rectification of the contraventions to the FWO by 29 May of each Audit period;

Public Notice

- (q) place a public notice in the Saturday edition of *Herald Sun* (**Public Notice**) within 28 days of the FWO publishing a Media Release on its website in respect of this Undertaking in the terms set out in Attachment C which:
 - (i) bears the name of the Company;
 - (ii) bears the logo (if any) of the Company;
 - (iii) appears within the classifieds section of the newspaper;
 - (iv) is in the form of Attachment C;
- (r) provide a copy of the Public Notice to the FWO within seven (7) days of the publication of the Public Notice;

Workplace Notice

- (s) place a notice within the workplace (**Workplace Notice**) in the terms set out in Attachment B. *C. J. J.*
 - (i) the notice is to be placed, and photographic evidence of its display provided to the FWO, within 28 days of the execution this Undertaking;
 - (ii) this notice is to be accessible to all employees and posted for a total consecutive period of at least seven (7) days;

Broader community workplace relations education

- (t) the Company undertakes to:
 - (i) make a donation of \$5,000 within 60 days of the Commencement Date to

'Western Community Legal Centre' to fund education about workplace rights under the FW Act; and

- (ii) provide proof of the payment referred to in subparagraph 12(t)(i) above to the FWO on the day of the payment being made.

NO INCONSISTENT STATEMENTS

13. The Company and Mr Herscu:

- (a) must not; and
- (b) must ensure that each of its officers, employees or agents, do not, make any statement , orally or in writing or otherwise imply anything that is inconsistent with admission or acknowledgements contained in this agreement.

ACKNOWLEDGEMENTS

14. The Company and Mr Herscu 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 the Company or Mr Herscu;
- (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 Company or Mr Herscu 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, the Company or Mr Herscu may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO.

Executed as an undertaking

EXECUTED by Rapid City Pty Ltd (ACN: 053 430 121) in accordance with section 127(1) of the *Corporations Act 2001*:


(Signature of director)

JEFFREY HERSCOV
(Name of director)

16/9/15
(Date)

in the presence of:


(Signature of witness)

LINDA HERSCOV
(Name of witness)

(Signature of director/company secretary)

(Name of director/company secretary)

(Date)

in the presence of:

(Signature of witness)

(Name of witness)

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


Steven Ronson
Executive Director
Dispute Resolution and Compliance
Delegate for the FAIR WORK OMBUDSMAN

in the presence of:


(Signature of witness)

24 SEPTEMBER 2015
(Date)

FAY PILIDOURAS
(Name of Witness)

Attachment A – The Employees

Employee A	[REDACTED]
Employee B	[REDACTED]

Attachment B – Letter of Apology

FORM OF APOLOGY LETTER TO AFFECTED EMPLOYEES

<Date>

<Employee Name>

<Employee Address>

Dear <Employee Name>

I am writing to apologise on behalf of Rapid City trading as Health Express DFO South Wharf (the **Company**) for non-compliance with Commonwealth Workplace relations laws. A recent investigation conducted by the Office of the Fair Work Ombudsman (**FWO**) determined that the Company had contravened the *Fair Work Act 2009*, *Fair Work Regulations* and *Fast Food Award* by:

- failing to pay your correct minimum rate of pay for time worked Monday to Friday;
- failing to pay your correct penalty rates for time worked on Saturdays;
- failing to pay your correct penalty rates for time worked on Sundays;
- failing to pay your correct penalty rates for time worked on Public Holidays;
- failing to pay your correct annual leave and annual leave loading (Employee B only);
- failing to pay you a special clothing allowance;
- failing to provide you with pay slips within one working day of payment of wages;
- failing to keep appropriate time and wage records;
- failing to keep appropriate employee records; and
- failing to include required information on pay records (superannuation details).

Regrettably, the investigation determined that you were affected by the above contraventions.

The Company is taking steps to remedy the contraventions, including by rectifying \$[insert amount] that you have been underpaid, and making a donation of \$5,000 to fund education about workplace rights. You will/have receive/d this payment on [insert date] and will be provided with payment advice regarding the payment.

The Company has formally admitted to the FWO that it did not comply with its 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 we have committed to a number of measures to ensure future compliance with Commonwealth workplace relations laws.

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

Should you have any questions, please contact me on [insert phone number].

Yours sincerely,

Mr Jeffrey Herscu

Director – Rapid City Pty Ltd

FORM OF PUBLIC AND WORKPLACE NOTICE

Contravention of *Fair Work Act* by Rapid City Pty Ltd (ACN: 053 430 121) trading as
Health Express DFO South Wharf

We refer to the investigation conducted by the Office of the Fair Work Ombudsman (**FWO**) into allegations that Health Express DFO South Wharf contravened the *Fair Work Act 2009* by:

- failing to pay correct minimum rate of pay for time worked Monday to Friday;
- failing to pay correct penalty rates for time worked on Saturdays;
- failing to pay correct penalty rates for time worked on Sundays;
- failing to pay correct penalty rates for time worked on Public Holidays;
- failing to pay correct annual leave and annual leave loading;
- failing to pay a special clothing allowance;
- failing to provide employees with pay slips within one working day of payment of wages;
- failing to keep appropriate time and pay records;
- failing to keep appropriate employee records; and
- failing to include required information on pay records (superannuation details).

Health Express DFO South Wharf has formally admitted to the FWO that these contraventions 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 contraventions, including by rectifying the underpayments and making a donation of \$5,000 to fund education about workplace rights.

Health Express DFO South Wharf expresses its sincere regret and apologises for the conduct which resulted in the contraventions. Furthermore, Health Express DFO South Wharf 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.

Use the following passage in Public Notices

If you worked for Health Express DFO South Wharf and have queries or questions relating to your employment, please contact **<insert details of internal contact>**. Alternatively, anyone can contact the FWO via the website at www.fairwork.gov.au or the Infoline on 13 13 94.