



Australian Government

Fair Work

OMBUDSMAN

ENFORCEABLE UNDERTAKING

Between

The Commonwealth of Australia

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

KABY HOLDINGS PTY LTD (ACN 159369570)

and

Ben York Hung Yau

ENFORCEABLE UNDERTAKING

PARTIES

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

(a) Kaby Holdings Pty Ltd (ACN 159369570) (**Kaby Holdings**); and

(b) Mr Ben York Hung Yau (**Mr Yau**)

pursuant to section 715 of the *Fair Work Act 2009* (Cth) (**FW Act**).

COMMENCEMENT OF UNDERTAKING

2. This Undertaking comes into effect when:

(a) the Undertaking is executed by Kaby Holdings and Mr Yau; and

(b) the FWO accepts the Undertaking so executed (as evidence by the FWO's endorsement below).

3. Upon the commencement of this Undertaking (the **Commencement Date**), Kaby Holdings and Mr Yau undertake to assume the obligations set out at paragraph 17.

BACKGROUND:

4. Kaby Holdings operated an authentic Japanese ramen restaurant located on George Street, Sydney, in New South Wales, trading as Tenkomori Ramen House (the **Restaurant**).

5. Mr Yau admits and agrees that, at all material times, he:

(a) was principally responsible for the direction and management of business operations;

(b) was the person who set the pay rate for the Employee; and

(c) by reason of the matters set out in subparagraphs (a) to (b) was responsible in a practical sense for ensuring the Company complied with its legal obligations.

6. The FWO commenced an investigation in February 2015, (the **Investigation**) after it received a Request for Assistance (**RFA**) regarding allegations of underpayments by the Restaurant to its former employee identified in Schedule A (the **Employee**).

7. The Restaurant employed the Employee between 31 August 2014 and 17 November 2014 (the **Employment Period**).
8. During the Employment Period, the Employee's terms and conditions of employment were governed by the FW Act and the *Restaurant Industry Award 2010* (the **Modern Award**).
9. The Investigation determined that the Employee was employed on a full time basis.
10. The Employee's duties in the Restaurant included taking orders, delivering of food to the tables, clearing tables, general cleaning duties, food preparation and cooking duties. The FWO determined the Employee was classified as Level 2 in the Modern Award. The definition of a Level 2 classification in the Modern Award includes a Food and Beverage Attendant Grade 2 and Cook Grade 1 which provides for the same rate of pay (Level 2). The definition of a Food and Beverage Attendant Grade 2 and Cook Grade 1 is consistent with the duties performed by the Employee.
11. At all relevant times, the Restaurant paid the Employee a flat rate of pay for all hours worked, including evening work, weekends and public holidays.
12. The FWO has determined the Restaurant failed to pay the Employee the following entitlements:
 - (a) the required minimum rate of pay for every hour the Employee worked;
 - (b) the required shift loading for work performed on evenings; and
 - (c) the required penalty rates for work performed on Saturdays, Sundays and Public Holidays.
13. The FWO determined that Kaby Holdings failed to pay the Employee the following entitlements applicable to an Employee of full time status:
 - (a) the required overtime rates for additional hours worked in excess of ordinary hours;
 - (b) the payment of annual leave upon the Employee's termination of employment;
 - (c) the payment of annual leave loading on any accrued annual leave upon the Employee's termination

14. The FWO determined that during the course of the Employment Period, the Restaurant and Mr Yau underpaid the Employee an aggregate total of \$3,049.41 (gross) (Underpayment).

CONTRAVENTIONS

15. The FWO has determined, and Kaby Holdings and Mr Yau admits, that on the basis of the factual matters outlined above, Kaby Holdings 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:

- Underpayment of base hourly rate (cl. 20.1);
- Underpayment of evening penalty rates (cl. 34.2 (i));
- Underpayment of Saturday, Sunday and Public Holiday penalty rates, (cl. 34);
- Underpayment of annual leave loading upon termination (cl. 35.2(b))

(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 upon termination (s90(2)).

16. The FWO has determined and Mr Yau admits, that he was involved in the contraventions listed above within the meaning of section 550(a) and (c) of the FW Act.

ENFORCEABLE UNDERTAKING

17. Upon the commencement of this Undertaking and for the purposes of section 715 of the FW Act, Kaby Holdings and Mr Yau (both in his role at Kaby Holdings and as a director of other entities where specified in the following paragraphs) undertakes the following:

Rectify the underpayments

- (a) Within 14 days of the execution of this Undertaking, rectify the contraventions identified in the Letter of Findings through payment of the total underpayment of \$3,049.41 (gross) to the Employee.

- (b) Provide proof of such payment to the FWO on the day the payment is made.

Future Workplace relations compliance

- (c) Take all reasonable steps to ensure that any entities in which Mr Yau holds the role of Director including Kaby Holdings comply at all times, and in respects with applicable Commonwealth workplace laws and instruments, including but not limited to the Modern Award, FW Act and *Fair Work Regulations 2009* by developing systems and processes to promote ongoing compliance with those requirements.

FWO My Account Registration

- (d) Within 7 days of the execution 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 (Kaby Holdings) 'My Account' registration number.
 - (ii) Within 21 days of the execution of the Undertaking, at a mutually agreed time and location, demonstrate to an FWO Fair Work Inspector via www.fairwork.gov.au 'My Account' current (*Restaurant Industry Award 2010*) minimum pay rates and relevant penalty rates ie Saturday, Sunday Shift and Public Holiday Penalty rates

Apology

- (e) Send a letter of apology (**Apology Letter**) to the Employee in the form of **Attachment B** to this undertaking within 14 days of the execution of this Undertaking
- (f) On the day of the Apology Letter being sent, provide proof to the FWO

Audit activity

- (g) Cause to have performed by an accounting professional (for example a Certified Practising Accountant) or an employment law specialist, at Kaby Holding's expense, audits of its compliance with all Commonwealth workplace laws and instruments (**Audits**), relating to the pay and conditions of all employees according to the following schedule:

- (i) an Audit of the first complete pay cycle following 1 January 2016, which is to be finalised within 28 days of the last day of the pay cycle;
- (h) Provide to the FWO, by 28 February of each Audit period, details of the methodology used to conduct the Audit and the outcomes of the Audit;
- (i) In the event an Audit discloses contraventions of any applicable Commonwealth workplace law and/or instruments, rectify all such contraventions within 14 days of the Audit being provided to Kaby Holdings including rectification of any and all underpayments to employees;
- (j) Provide evidence of rectification of the contraventions to the FWO within 14 days of the Audit being provided to Kaby Holdings.

Public Notice

- (k) Place a public notice in the Saturday edition of the Sydney Morning Herald (**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 A which:
 - a. Bears the name of Kaby Holdings;
 - b. Appears within the first 10 pages of the Sydney Morning Herald;
 - c. Must be in the size of 8cm x 10cm; and
 - d. Is in the form of **Attachment C**

Provide a copy of the Public Notice to the FWO on the day of publication of the Public Notice;

Subsidiary Companies and Transferees

- (l) Kaby Holdings and Mr Yau undertakes to take all reasonable steps to:
 - (i) Ensure that all Associated Entities of Kaby Holdings conducting a restaurant business (within the meaning of section 50AAA of the *Corporations Act 2001* (Cth)) comply at all times and in all respects with applicable Commonwealth workplace laws and instruments, including but not limited to the Modern Award and the FW Act;
 - (ii) Monitor the compliance by its Associated Entities with applicable Commonwealth workplace laws and instruments and take all

reasonable steps to ensure that any identified contraventions of such laws or instruments are rectified by the relevant Associated Entity;

(m) In the event that Kaby Holdings sells or otherwise transfers some or all of its business to another entity (**Transferee**) (whether an Associated Entity or otherwise) within 18 months of the Commencement Date, to:

- (i) provide a copy of this Undertaking to the Transferee prior to the sale or transfer; and
- (ii) provide to the FWO, within 7 days of the sale or transfer of business details of the sale or transfer, including the identity of the Transferee and the business functions or operations that have been sold or transferred

NO INCONSISTENT STATEMENTS

18. Kaby Holdings and Mr Yau:

- (i) must not; and
- (ii) 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


19. Kaby Holdings and Mr Yau acknowledges that:

- a) This Enforceable Undertaking is given by it and accepted by the FWO pursuant to section 715 of the FW Act;
- b) The FWO may;
 - (i) make this Enforceable Undertaking (and any of the Attachments hereto) available for public inspection, including by posting it on the FWO internet site at www.fairwork.gov.au;
 - (ii) release a copy of this Enforceable Undertaking (and any of the Attachments hereto) pursuant to any relevant request under the *Freedom of Information Act 1982* (Cth);

- (iii) issue a media release in relation to this Enforceable Undertaking;
 - (iv) from time to time, publicly refer to the Enforceable Undertaking (and any of the Attachments hereto) and its terms; and
 - (v) rely upon the admissions made by Kaby Holdings and Mr Yau set out in paragraphs 15 and 16 above in respect of decision making concerning any future non-compliance with Kaby Holdings and Mr Yau's workplace relations obligations.
 - c) Consistent with the Note to section 715(4) of the FW Act, this Enforceable Undertaking in no way derogates from the rights and remedies available to any other person arising from the conduct set out herein; and
 - d) If Kaby Holdings and Mr Yau contravenes any of the terms of this Enforceable Undertaking:
 - (i) 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
 - (ii) This Enforceable Undertaking may be provided to the Court as evidence of the admissions made by Kaby Holdings and Mr Yau in paragraphs 15 and 16 above, and also in respect of the question of costs.
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Executed as an undertaking

EXECUTED by KABY HOLDINGS PTY LTD (ACN 159369570) in accordance with section 127(1) of the *Corporations Act 2001*:


(Signature of director)

BEN YAU
(Name of director)

20-09-15
(Date)

in the presence of:

+ Ch. Kassrimool
(Signature of witness)

CHOMPUNOOT KASSRIMOOL
(Name of witness)


(Signature of director/company secretary)

BEN YAU
(Name of director/company secretary)


20-09-15
(Date)

in the presence of:

+ Ch. Kassrimool
(Signature of witness)

CHOMPUNOOT KASSRIMOOL
(Name of witness)

EXECUTED by Mr Ben York Hung Yau:


(Signature of Ben York Hung Yau)

(Date)

in the presence of:

+ Ch. Kassrimool
(Signature of witness)

CHOMPUNOOT KASSRIMOOL
(Name of witness)

20-09-15
(Date)

(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:

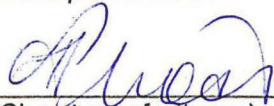


Steven Ronson
Executive Director
Dispute Resolution and Compliance

29 SEPTEMBER 2015

(Date)

in the presence of:



(Signature of witness)

FAY PILIOURAS

(Name of Witness)

Attachment C – Form of Public Notice

FORM OF PUBLIC NOTICE

Contravention of *Fair Work Act* by KABY HOLDINGS PTY LTD (ACN 159369570)

We refer to the investigation conducted by the Office of the Fair Work Ombudsman (FWO) into allegations that Kaby Holdings Pty Ltd contravened the *Fair Work Act 2009* by:

- failing to pay the correct minimum hourly rate of pay for time worked Monday to Friday;
- failing to pay the required shift loading for work performed on evenings;
- failing to pay the required penalty rates for work performed on Saturdays, Sundays and Public Holidays.
- failing to pay the required overtime rates for additional hours worked in excess of ordinary hours; and
- failing to pay the payment of annual leave and annual leave loading upon termination of employment.

Kaby Holdings Pty Ltd 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.

Kaby Holdings Pty Ltd expresses its sincere regret and apologises for the conduct which resulted in the contraventions. Furthermore, Kaby Holdings 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.

Use the following passage in Public Notices

If you worked for Kaby Holdings Pty Ltd 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.

Schedule A – Employee name

A.1 [REDACTED]
