



Australian Government

Fair Work

OMBUDSMAN

ENFORCEABLE UNDERTAKING

Between

The Commonwealth of Australia

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

and

Haru Pty Ltd trading as Bistro Cheers Japanese Family Restaurant (ACN: 112 978 971)

and

Kennosuke Saito

Section 715 ENFORCEABLE UNDERTAKING

Parties

1. This enforceable undertaking (**Undertaking**) is given to the Fair Work Ombudsman (**FWO**) by:
 - a) Haru Pty Ltd trading as Bistro Cheers Japanese Family Restaurant (**Employer**); and
 - b) Kennosuke Saito, Director of the Employer (**Mr Saito**)for the purpose of Section 715 of the *Fair Work Act 2009* (**FW Act**).

Background

2. The Employer operates a restaurant in Nobbys Beach in Queensland. The current owners took control of the business on 27 April 2015 following a transfer of business.
3. Mr Saito admits and agrees that, at all material times, he:
 - (a) was a director of the Employer, having been so since 27 April 2015;
 - (b) was ultimately responsible for overall direction, management and supervision of the operations at the Employer in relation to engaging staff, setting and adjusting pay rates and determining wages and conditions of employment; and
 - (c) by reason of the matters set out in subparagraphs (a) and (b) was responsible in a practical sense for ensuring the Employer complied with its legal obligations.
4. During the period from 4 May 2015 to 24 January 2016 (**Employment Period**), the Employer engaged 12 employees as listed in **Attachment A (Employees)** to undertake cooking, kitchen hand, customer service and/or waiting duties.
5. The terms and conditions of the employment of the Employees were governed by the FW Act, the *Fair Work Regulations 2009* (**FW Reg**) and the *Restaurant Industry Award 2010* (MA000119) (**the Award**).
6. The FWO commenced an audit of the Employer's compliance with Commonwealth workplace laws during the Employment Period as part of FWO's Gold Coast Restaurant and Fast Food Local Activity.
7. As a result of the audit, the FWO determined that:
 - (a) The Employees were classified under the Award at the levels detailed in Attachment A.
 - (b) The Employees were employed under the Award as either part-time or casual employees as detailed in Attachment A.
 - (c) The Employees were entitled to be paid the minimum wage rate assigned to their respective classification level under the Award. This table sets out the minimum rates relevant to each classification level during the Employment Period:

| Minimum Wages – Adults | | |
|---------------------------|--|--|
| Classification | From first pay period on or after 01/07/2014 | From first pay period on or after 01/07/2015 |
| Introductory Level | \$16.87 | \$17.29 |
| Kitchen Attendant Grade 1 | \$17.35 | \$17.79 |

| | | |
|--------------------------------------|---------|---------|
| Food & Beverage Attendant Grade 2 | \$18.02 | \$18.47 |
|--------------------------------------|---------|---------|

- (d) Employees employed under the Award's casual employment provisions (**Casual Employees**) were entitled to be paid a casual loading of 25%. This table sets out relevant casual loadings and minimum casual hourly rates during the Employment Period:

| Casual Rates | | | | |
|---|---|-----------------------|---|--------------------------|
| | From first pay period on or after 01/07/2014 | | From first pay period on or after 01/07/2015 | |
| Classification | Casual Loading | Casual Hourly Rate | Casual Loading | Casual Hourly Rate |
| Introductory Level | \$4.22 | \$21.09 | \$4.32 | \$21.61 |
| Kitchen Attendant Grade 1 | \$4.34 | \$21.69 | \$4.45 | \$22.24 |
| Food & Beverage Attendant Grade 2 | \$4.51 | \$22.53 | \$4.62 | \$23.09 |

- (e) Casual Employees who performed work on Saturdays and / or Sundays during the Employment Period were entitled to be paid the following penalty rates:

| Saturday / Sunday Rates | | |
|--------------------------------------|---|---|
| Classification | From first pay period on or after 01/07/2014 | From first pay period on or after 01/07/2015 |
| Introductory Level | \$25.31 | \$25.94 |
| Kitchen Attendant Grade 1 | \$26.03 | \$26.69 |
| Food & Beverage Attendant Grade 2 | \$27.03 | \$27.71 |

- (f) Casual Employees who performed work on public holidays during the Employment Period were entitled to be paid the following penalty rates:

| Classification | From first pay period on or after 01/07/2014 | From first pay period on or after 01/07/2015 |
|--------------------------------------|---|---|
| Introductory Level | \$42.18 | \$43.23 |
| Kitchen Attendant Grade 1 | \$43.38 | \$44.48 |
| Food & Beverage Attendant Grade 2 | \$45.05 | \$46.18 |

- (g) The Employer paid the Employees flat hourly rates of between \$13.00 and \$18.00 for all hours worked during the Employment Period, including for work performed on weekends and public holidays.
- (h) The Employer made unauthorised deductions from the Employees' wages, including deductions of:
 - (i) Superannuation entitlements; and
 - (ii) A 'Deposit' amount of \$3.00 per hour worked for six of the Employees which was held by the Employer on the terms outlined in their Contracts of Employment;
 which resulted in the Employees not being paid in full for the work performed.
- 8. As a result of the audit, the FWO has also determined that the Employer:
 - (a) failed to agree in writing on a regular pattern of work with a part-time employee; and
 - (b) failed to make and keep employee records as prescribed by FW Regs.
- 9. The FWO was unable to complete assessments for 3 employees as indicated in **Attachment A** due to insufficient evidence of hours worked and/or wages paid to these employees during the Employment Period.
- 10. The FWO has determined that during the Employment Period the Employer underpaid 10 of the Employees an aggregate amount of **\$24,696.33 (gross)**.
- 11. The Employer acknowledged that, during the Employment Period, it had underpaid the Employees the amount determined by the FWO in paragraph 10 above in respect of casual loading, minimum wages, penalty rates and failure to pay full amounts payable to the Employees, as identified in paragraph 7 above, and has rectified the underpayments by paying the Employees the amounts as set out in Attachment A.

Contraventions

- 12. The FWO has determined, and the Employer admits, that the Employer contravened the following sections of the FW Act and the Award:
 - (a) Section 45 of the FW Act, by failing to comply with the following provisions of the Award:
 - (i) Clause 12.3 by failing to agree in writing on a regular pattern of work with a part-time employee;
 - (ii) Clause 13.1 by failing to pay the casual loading to casual employees;
 - (iii) Clause 20.1 by failing to pay minimum wages to adult employees;
 - (iv) Clause 34.1 by failing to pay penalty rates for work performed on weekends and public holidays.
 - (b) Section 323(1)(a) of the FW Act by failing to pay employees the full amounts payable to the employee in relation to the performance of work.
 - (c) Section 535(1) of the FW Act by failing to make and keep employee records as prescribed by FW Reg Regulation 3.33(1) (pay records), FW Reg Regulation 3.33(2) (records of hours worked) and FW Reg Regulation 3.36 (leave records);
 - (d) Section 536(2)(b) of the FW Act by failing to issue payslips containing all information prescribed by FW Reg Regulation 3.46(5).

(collectively, the **Contraventions**).

Commencement of Undertaking

13. This Undertaking comes into effect when:
- (a) the Undertaking is executed by the Employer and by Kennosuke Saito; and
 - (b) the FWO accepts the Undertaking so executed.
14. Upon the commencement of this Undertaking, the Employer and Kennosuke Saito undertake to assume the obligations set out below.

Undertakings

15. For the purposes of section 715 of the FW Act, the Employer undertakes to:

FWO MyAccount Registration

- (a) Within 28 days of the execution of this Undertaking:
 - i. register with the FWO 'My Account' portal at www.fairwork.gov.au and complete the profile, minimum pay rates and Award options;
 - ii. provide to the FWO the 'My Account' registration number;
 - iii. at a mutually agreed time and location, demonstrate to a FWO officer My Account knowledge of the current Award minimum pay rates including rates for working weekends and public holidays.
 - iv. subscribe to receive email alerts from the FWO relating to the Award, available at <http://www.fairwork.gov.au/website-information/staying-up-to-date/subscribe-to-email-updates>
 - v. subscribe to FWO's Employer newsletter for the relevant State <https://www.fairwork.gov.au/about-us/news-and-media-releases/newsletter>, selecting at least the following options:
 - pay updates;
 - award updates;
 - public holiday entitlements;
 - working hours and breaks;
 - vi. Provide to the FWO evidence of the above subscriptions, including advising the FWO of the email address used to register.

Future Workplace Relations Compliance

- (b) Ensure the Employer complies at all times and in all respects with the FW Act, FW Regs and the Award;
- (c) Provide the FWO, by the 3 January 2017, details of systems and processes already in place or to be implemented to comply with paragraph (c) above. Without limitation, such systems and processes relating to:
 - i. Ensuring employees receive the correct minimum rates of pay and entitlements, such as casual loading and penalty rates for weekend work and public holidays;
 - ii. Agree in writing on a regular pattern of work with each part-time employee;
 - iii. Paying each employee the full amounts payable to the employee in relation to the performance of work.

- iv. Keeping accurate and complete records as required by the FW Regs;
- v. Issuing payslips containing the required information.

Broader Community workplace relations education

- (d) Make a donation of two thousand five hundred dollars (\$2,500.00) to the Queensland Working Women's Service Inc. (ABN 32 927 953 573) and provide proof of the payment to the FWO by 16 December 2016.

Self-Audit and Reporting Activity

- (e) By 30 June 2017 have completed by an external accounting professional (e.g. a Certified Practising Accountant), audit specialist or employment law specialist (at the expense of the Employer) an audit of its compliance with the FW Act, the FW Regs and the Award. Specifically:
 - i. The Employer must demonstrate compliance with the Award, including, but not limited to, Clauses 12.3, 13.1, 20.1 and 34.1;
 - ii. The Employer must demonstrate compliance with Section 323(1)(a) of the FW Act;
 - iii. The Employer must demonstrate compliance with their record keeping and pay slip obligations under the FW Act and FW Regs;
 - iv. The audit covering all employees is to be conducted for a period of two (2) full pay periods of which at least one pay period must include a Public Holiday occurring in 2017; and
 - v. The Employer must provide a copy of the audit report to the FWO by 7 July 2017.
- (f) To make available to the FWO if requested the records used to conduct the audit; and
- (g) Provide evidence of rectification of any contraventions disclosed by the audit to the FWO by 31 July 2017.

Acknowledgements

16. The Employer and Kennosuke Saito acknowledge that:

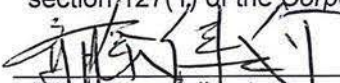
- (a) the FWO may make this Undertaking (including any attachments) available for public inspection, including by posting it to its website at www.fairwork.gov.au (subject to the FWO taking any necessary steps to redact the names of individuals not party to the Undertaking);
- (b) the FWO may release 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 Haru Pty Ltd trading as Bistro Cheers Japanese Family Restaurant;
- (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 Haru Pty Ltd trading as Bistro Cheers Japanese Family Restaurant 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, Haru Pty Ltd trading as Bistro Cheers Japanese Family Restaurant may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO.

Executed as an undertaking

EXECUTED by Haru Pty Ltd trading as
Bistro Cheers Japanese Family Restaurant
in accordance with
section 127(1) of the *Corporations Act 2001*:


(Signature of director/secretary)

Kennosuke Saito

(Name of director)

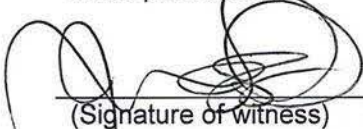
28.10.2016
(Date)

Executed by Kennosuke Saito


(Signature of Kennosuke Saito)

28.10.2016
(Date)

in the presence of:


(Signature of witness)

Jane Mackie
(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 - DRC

2 November 2016.
(Date)

Delegate for the FAIR WORK OMBUDSMAN

in the presence of:


(Signature of witness)

LISA-MARIE OLIVER
(Name of Witness)

Attachment A - List of Employees

| Employee | Employment Category | Job | Classification | Period of Assessment |
|---------------|---------------------|--------------|---------------------------|----------------------|
| * [REDACTED] | Casual | Waitress | Introductory Level | 11/05/15 to 10/08/15 |
| | | | F & B Attendant Grade 2 | 11/08/15 to 24/01/16 |
| [REDACTED] | Casual | Waitress | Introductory Level | 02/07/15 to 01/10/15 |
| | | | F& B Attendant Grade 2 | 02/10/15 to 24/01/16 |
| [REDACTED] | Casual | Waiter | Introductory Level | 04/05/15 to 12/07/15 |
| [REDACTED] | Casual | Waitress | Introductory Level | 06/05/15 to 31/07/15 |
| [REDACTED] | Casual | Waitress | Introductory Level | 20/08/15 to 16/11/15 |
| [REDACTED] | Casual | Kitchen hand | Introductory Level | 04/05/15 to 02/08/15 |
| [REDACTED] | Casual | Kitchen hand | Introductory Level | 21/07/15 to 20/10/15 |
| | | | Kitchen Attendant Grade 1 | 21/10/15 to 24/01/16 |
| [REDACTED] | Casual | Kitchen hand | Introductory Level | 25/11/15 to 24/01/16 |
| [REDACTED] | Casual | Kitchen hand | Introductory Level | 30/07/15 to 29/10/15 |
| | | | Kitchen Attendant Grade 1 | 30/10/15 to 24/01/15 |
| [REDACTED] | Casual | Kitchen hand | Introductory Level | 30/06/15 to 29/09/15 |
| | | | Kitchen Attendant Grade 1 | 30/09/15 to 22/11/15 |
| ** [REDACTED] | Casual | Cook | Cook Grade 5, Level 6 | 04/05/15 to 15/08/15 |
| ** [REDACTED] | Part time | Kitchen hand | Kitchen Attendant Grade 1 | 04/05/15 to 07/06/15 |

* FWO was unable to complete assessment for the periods 29/06/15 to 23/08/15 and 07/09/15 to 24/01/16 due to insufficient records of hours worked.

**FWO was unable to undertake assessments for these employees due to insufficient records of hours worked and wages paid.

Attachment B – List of Underpayments to Employees

| Employee | Total Gross Underpayments |
|---|---------------------------|
| | \$503.39 |
| | \$3,556.20 |
| | \$913.60 |
| | \$394.09 |
| | \$2,196.37 |
| | \$1,817.20 |
| | \$5,466.87 |
| | \$2,211.33 |
| | \$3,612.23 |
| | \$4,025.05 |
| Total underpayments for 10 employees | \$24,696.33 |