



Fair Work

OMBUDSMAN

ENFORCEABLE UNDERTAKING

Between

The Commonwealth of Australia

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

and

Ni Hao Chinese Restaurant Toowoomba Pty Ltd

(ABN 57 156 527 294)

*Fair Work Act 2009***Section 715 ENFORCEABLE UNDERTAKING****Parties**

1. This enforceable undertaking (**Undertaking**) is given to the Fair Work Ombudsman (**FWO**) by Ni Hao Chinese Restaurant Toowoomba Pty Ltd (ABN 57 156 527 294) (**Employer**) for the purposes of Section 715 of the Fair Work Act 2009 (**FW Act**).

Background

2. The employer operates a Chinese Restaurant at 92 Ruthven St, Toowoomba QLD 4350. The restaurant operates both dine in and take away services for lunch (11:30 am to 2:00 pm) Tuesday to Sunday and dinner (4:30 pm – 9:00pm) Monday to Sunday.
3. A Request for Assistance was received by FWO on 12 November 2014 from a current employee [REDACTED] (**the employee**).
4. In finding whether there had been a contravention of Commonwealth workplace laws in the investigation, the FWO utilised time and wages records provided by the employee and wage records provided by the employer for the employee's full period of employment (June 2013 to June 2015).
5. The investigation found that the industrial instrument covering the employer and employee is the Restaurant Industry Award 2010.

Contraventions

6. The FWO has determined, and the Employer admits, that the Employer contravened:
 - (a) Section 45 of the FW Act 2009, which states a person must not contravene a term of a modern award. Those contraventions were as follows:

Restaurant Industry Award 2010:

- Underpayment of hourly rate (cl. 20.1)
- Underpayment of overtime (cl. 33.2)
- Underpayment of split shift allowance (cl. 24.2)
- Underpayment of penalty rates Sat, Sun, P/H (cl. 34.1)
- Underpayment of evening penalty (cl. 34.2)
- Underpayment of leave loading (cl. 35.2)

- (b) Section 44 of the FW Act 2009 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))
- Failure to provide a Fair Work Information Statement (FWIS) (s125(1))

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

- Failure to record penalty rates and other monetary allowances which are separately identifiable (reg. 3.33)
- Failure to record overtime hours (reg. 3.34)

(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.

- Failure to include required information – Superannuation fund name. (reg. 3.37)

(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))

7. As a result of the contraventions listed above, the following amount of money has been repaid to the affected employee by the Employer:

(a) **\$45,803.98 gross** for the employee under the Restaurant Industry Award 2010.

Commencement of Undertaking

8. This Undertaking comes into effect when:

- (a) the Undertaking is executed by the Employer; and
- (b) the FWO accepts the Undertaking so executed.

9. Upon the commencement of this Undertaking (**Commencement Date**), the Employer undertakes to assume the obligations set out below.

Undertakings

10. For the purposes of section 715 of the FW Act:

FWO My Account Registration

- (a) Within 21 days of the Commencement Date, the Employer undertakes to;
 - (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; and

(iii) demonstrate to a FWO Officer via www.fairwork.gov.au, 'My Account' knowledge of the current Modern Award minimum rates of pay.

(b) The Employer undertakes to:

(i) Within 21 days of the Commencement Date:

1. subscribe to receive "general information" email alerts from the FWO relating to the Modern Award, available at <http://www.fairwork.gov.au/website-information/staying-up-to-date/subscribe-to-email-updates>
2. subscribe to FWO's Employer newsletter for the relevant State and industry, available at <http://www.fairwork.gov.au/about-us/news-and-media-releases/newsletter>, selecting at least the following options:
 - a. pay updates;
 - b. award updates;
 - c. holiday entitlements;
 - d. working hours and breaks; and
 - e. annual leave/sick leave.

(ii) Provide to the FWO evidence of the above subscriptions, including advising the FWO of the email address used to register.

Written Apology

(a) Provide a written apology to the affected employee within 14 days of the commencement date.

Future Workplace Relations Compliance

(a) The Employer undertakes to:

- (i) ensure compliance at all times and in all respects with applicable Commonwealth workplace laws and instruments, including but not limited to the FW Act, the FW Regulations, any Enterprise Agreement that may be in place at the time and all applicable Modern Awards, in respect of the Employer and any future businesses operated by the Employer;
- (ii) implement systems and processes to ensure ongoing compliance with the obligations referred to in paragraph 10; and

- (iii) provide to the FWO, within twenty-eight (28) days of the Commencement Date, details of systems and processes implemented in satisfaction of the undertakings in paragraphs 10 above;

Self-audits and Reporting

- (a) The Employer undertakes to:

- (i) have completed by an external accounting professional (e.g. Certified Practising Accountant), audit specialist or employment law specialist, at own expense, audits (**Audits**) of compliance with applicable Commonwealth workplace laws and instruments, including but not limited to the FW Act, Enterprise Agreement in force at that time and the Modern Award, in respect of pay rates, conditions, payslips and record keeping in relation to all of employees of the Employer during the relevant audit period, according to the following schedule:
 1. an Audit of the first complete pay cycle following 1 November 2015 which is to be finalised within 28 days of the last day of the pay cycle;
 2. an Audit of the first complete pay cycle following 1 July 2016, which is to be finalised within 28 days of the last day of the pay cycle;
- (ii) ensure that each Audit examines the Employer's compliance with any wages rate, penalty or allowance increases flowing from the Fair Work Commission Annual Wage Reviews;
- (iii) within seven (7) days of the completion of each Audit, provide the FWO with details of the methodology used to conduct the Audit and a copy of the certified audit report;
- (iv) upon request by FWO, provide within seven (7) days of receiving such request, a copy of all documents provided to the auditor for the purpose of undertaking an Audit;
- (v) in the event that an Audit discloses contraventions of any applicable Commonwealth workplace laws or instrument, rectify all such contraventions within fourteen (14) days;
- (vi) provide evidence of rectification of all contraventions disclosed by an Audit to the FWO within fourteen (14) days of rectification;

Acknowledgements

11. The employer acknowledges that:

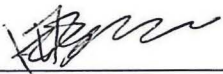
- (a) the FWO may make this Undertaking (including any attachments) available for public

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 Employer;
- (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 Employer 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 Employer may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO.

Executed as an undertaking

EXECUTED by Ni Hao Chinese Restaurant Toowoomba Pty Ltd in accordance with section 127(1) of the *Corporations Act 2001*:



(Signature of director)

N/A

(Signature of director/company secretary)

DAVID ZHOU

(Name of director)

N/A

(Name of director/company secretary)

25/09/2015

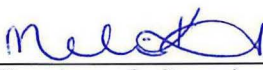
(Date)

N/A

(Date)

in the presence of:

in the presence of:



(Signature of witness)

N/A

(Signature of witness)

MEISSA KING

(Name of witness)

N/A

(Name of witness)

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



Steven Ronson

2 OCTOBER 2015

(Date)

Executive Director, Dispute Resolution and Compliance

Delegate for the FAIR WORK OMBUDSMAN

in the presence of:



(Signature of witness)

FAY PIKIOURAS

(Name of Witness)

FORM OF APOLOGY LETTER TO AFFECTED EMPLOYEE

<Date>

[REDACTED]

<Employee Address>

Dear [REDACTED]

I am writing to apologise on behalf of Ni Hao Chinese Restaurant Toowoomba Pty Ltd for non-compliance with Commonwealth Workplace relations laws. A recent investigation conducted by the Office of the Fair Work Ombudsman (**FWO**) determined that Ni Hao Chinese Restaurant Toowoomba had contravened the *Fair Work Act 2009* by:

Section 45 of the Fair Work Act 2009, which states a person must not contravene a term of a modern award, namely the Restaurant Industry Award 2010. Contraventions included underpayments of base rates of pay, weekend penalties, overtime, split shift penalty, evening penalty and annual leave loading.

Section 44 of the Fair Work Act 2009 which states a person must not contravene a provision of the National Employment Standards (NES). The Restaurant Industry Award 2010 was contravened in respect to annual leave and failure to provide each new employee with a Fair Work Information Statement.

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

Section 535(2) of the FW Act 2009 which provides that the records must be in the form if prescribed by the regulation to be in that form, and include any information prescribed in the regulation.

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.

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

Ni Hao Chinese Restaurant Toowoomba has taken steps to remedy the contraventions, including the rectification of the underpayment of entitlements, \$45,803.98 gross that you have been underpaid.

Ni Hao Chinese Restaurant Toowoomba has formally admitted to the FWO that they did not comply with their 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 Ni Hao Chinese Restaurant Toowoomba have committed to a number of measures to ensure future compliance with Commonwealth workplace relations laws.

Ni Hao Chinese Restaurant Toowoomba expresses its sincere regret and apologises to you for failing to comply with our lawful obligations.

Should you have any questions, please contact David Zhou.

Yours sincerely

David Zhou