

NOTICE OF FILING

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File Title: YING YING THAM v AUSTRALIAN CAPITAL TERRITORY & ANOR
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads "Sia Lagos".

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



Second Respondent's Amended Defence

No. VID705 of 2022

Federal Court of Australia
District Registry: Victoria
Division: Fair Work

YING YING THAM

Applicant

AUSTRALIAN CAPITAL TERRITORY and another
Respondents

PRELIMINARY

In this amended defence, unless otherwise stated or the context otherwise requires :

- (a) references to paragraphs and sub-paragraphs are references to paragraphs and sub-paragraphs in the further amended statement of claim dated ~~47 March~~ 19 May 2023 (**statement of claim**); and
- (b) the Second Respondent adopts the definitions in the statement of claim.

Part A Parties

A.1 The Applicant and Group Members

1. The Second Respondent does not plead to paragraph 1 because it does not allege a material fact.
2. As to paragraph 2, the Second Respondent:
 - a. admits sub-paragraph (e); and
 - b. otherwise does not know and therefore cannot admit the paragraph.
3. The Second Respondent does not know and therefore cannot admit paragraph 3.

Filed on behalf of (name & role of party) Calvary Health Care ACT Limited, Second Respondent
Prepared by (name of person/lawyer) Kate Plowman
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A.2 The Respondents

4. The Second Respondent does not know and therefore cannot admit paragraph 4.
5. As to paragraph 5, the Second Respondent:
 - a. admits sub-paragraphs (a) to (c); and
 - b. otherwise does not know and therefore cannot admit the paragraph.

Part B The enterprise agreements

B.1 Application and coverage

6. The Second Respondent admits paragraph 6.
7. The Second Respondent admits paragraph 7.
8. The Second Respondent admits paragraph 8.

B.2 Hours of work, rostering, and overtime

9. The Second Respondent admits paragraph 9.
10. As to paragraph 10, the Second Respondent:
 - a. admits the paragraph; and
 - b. says that each of the 2013 EA, the 2017 EA and the 2021 EA further provided or provide that the ordinary hours of work are to be performed in shifts as required with hours in excess of an average 38.00 hours per week and not remunerated or otherwise compensated being credited towards an Accrued Day Off (**ADO**) with pay.

Particulars

2013 EA, clause 18.3

2017 EA, clause 17.3

2021 EA, clause 17.3

11. The Second Respondent admits paragraph 11.
12. The Second Respondent admits paragraph 12.
13. The Second Respondent admits paragraph 13.
- 13A. In further answer to paragraphs 9 to 13, the Second Respondent says that the 2013 EA, the 2017 EA and the 2021 EA included additional terms that provided or provide that:
 - a. where a Medical Officer attends of their own volition outside of hours rostered on duty, or where a Medical Officer remains in attendance when formally released

from the obligation to perform professional duties, the employer shall not be liable to make any payment for such attendance;

Particulars

2013 EA, clause 18.8

2017 EA, clause 17.8

2021 EA, clause 17.8

- a. b. every Medical Officer will maintain an appropriate record (as specified by the employer) of duty performed including recording the time of commencing and ceasing duty for each day, which records will be provided to the supervisor/manager where the supervisor/manager so requests;

Particulars

2013 EA, clause 25.2

2017 EA, clause 24.2

2021 EA, clause 24.2

- b. c. (2021 EA only) where an employee is requested by the head of service to work additional hours and those additional hours are not rostered then the employee and the head of service will ensure that the additional hours are recorded;

Particulars

2021 EA, clause 36.1.1

- c. d. claims for payment under provisions of the agreements, including overtime payments, will be submitted for approval within 3 weeks;

Particulars

2013 EA, clause 29.3

2017 EA, clause 28.3

2021 EA, clause 29.3

- d. e. any overtime payments would be paid as soon as reasonably possibly but no later than within two pay periods of the appropriate authorisation having been received by the relevant corporate area; and

Particulars

2013 EA, clause 29.2

2017 EA, clause 28.2

2021 EA, clause 29.2

- e. f. where agreed between the manager/supervisor and the employee, the employee will be granted time off in lieu of payment for overtime;

Particulars

2013 EA, clause 37.1

2017 EA, clause 36.1

2021 EA, clause 37.1

- f. g. a Medical Officer who works authorised overtime and was not notified on or prior to his/her previous shift of the requirement to work such overtime shall be either supplied with a meal by the employer or paid a meal allowance;

Particulars

2013 EA, clause 39.1

2017 EA, clause 38.1

2021 EA, clause 39.1

- g. h. where an overtime payment is not made within two pay periods of the appropriate authorisation having been received by the relevant corporate area, and the employee requests, an offline payment for the amount owing will be made to the employee within three business days of the head of service receiving the request;

Particulars

2013 EA, clause 54.2

2017 EA, clause 53.2

2021 EA, clause 53.2

- h. i. an employee agrees to carry out all lawful and reasonable directions of the head of service according to the requirements of the work and the employee's skill, experience and competence, in accordance with this Agreement and without deskilling the employee.

Particulars

2013 EA, clause 131.1

2017 EA, clause 131.1

2021 EA, clause 137.1

- 13B. In further answer to paragraphs 9 to 13, the Second Respondent says that on the proper construction of the 2013 EA, the 2017 EA and the 2021 EA, including the additional terms pleaded in paragraph 13A above, Junior Medical Officers (including Dr Tham) were only entitled to payment of unrostered overtime pursuant to those agreements where:
- a. the Junior Medical Officer was required to perform work outside of rostered hours; and
 - b. the Junior Medical Officer either:
 - i. worked in excess of 76.00 hours within a period not exceeding 14 consecutive days (or such other ordinary hours agreed in writing), and that time did not accrue towards an ADO; or
 - ii. worked in excess of 10.00 hours in any one shift;
 - c. the overtime was authorised by the Second Respondent; and
 - d. the Junior Medical Officer made a claim for payment for the unrostered overtime within three weeks of the work being performed, which claim for payment was approved by the Second Respondent.

Particulars

The authorisation referred to in paragraph 13B.b. above could include a request from the head of service to work reasonable additional hours in excess of the Junior Medical Officer's duties.

The approval referred to in paragraph 13B.c. was to be sought by the Junior Medical Officer in accordance with the Second Respondent's Overtime Policy (as pleaded below).

B.3 Other obligations

- 13C. Dr Tham and each of the Group Members entered into a contract of employment with the Second Respondent in respect of their employment.

Particulars

The contract with Dr Tham was entirely in writing and comprised a letter from the General Manager of the Second Respondent to the Applicant dated 28 August 2020 with attached terms and conditions.

- 13D. Pursuant to terms of their respective employment contracts and the Enterprise Agreements, Dr Tham and each of the Group Members were required to comply with:
- e. a. policies of the Second Respondent, as amended from time to time; and

- f. b. lawful and reasonable directions given to them by the Second Respondent including directions about seeking approval for and claiming unrostered overtime given in policies, orientation emails and orientation power point presentations.

Particulars

- (i) In relation to the Applicant, clause Item 10 and Item 12 of the Applicant's employment contract;
- (ii) Particulars in relation to Group Members will be provided after the Group Members are known.
- (iii) 2013 EA clause 131.1; 2017 EA clause 131.1; 2021 EA clause 136.1

13E. At all times during the Relevant Period, Dr Tham and each Group Member were required under the Second Respondent's policies and procedures or, alternatively, pursuant to lawful directions given by the Second Respondent, to:

- a. seek approval for unrostered overtime as soon as practical prior to working unrostered overtime or, where it was deemed not possible to request overtime approval prior to working unrostered overtime, immediately after working the unrostered overtime; and
- b. provide full evidence of overtime claims by sending an email or a text message via SMS to Medical Administration with the minimum information required,

(the **Overtime Policy**)

Particulars

The Overtime Policy was recorded in the following written policies and lawful directions:

- (i) the written policy with the title "Junior Medical Officer Kronos Clock Punch and Unrostered Overtime Approval Process", Section 3, Section 4, Appendix 2, Appendix 3 and Appendix 4;
- (ii) the written policy with the title "Kronos Cheat Sheet";
- (iii) the following documents provided to Junior Medical Doctors at the commencement of each term:
 - a. the "Orientation" Power Point presentation;
 - b. "Housekeeping" orientation emails; and
- (iv) Verbal directions given to Dr Tham and Junior Medical Officers during Junior Medical Officer Orientation.

Further particulars may be provided following the service of evidence.

B.4 Overtime claims made and paid

13F. During the Relevant Period, the Applicant and some Group Members submitted claims for unrostered overtime which were approved and for which they were paid.

Particulars

(i) In relation to the Applicant:

Date	Amount of unrostered overtime claimed	Status
25 June 2021	39 minutes	Approved and paid
27 July 2021	30 minutes	Approved and paid
30 July 2021	30 minutes	Approved and paid
6 August 2021	1 hour	Approved and paid
10 August 2021	1 hour	Approved and paid
23 August 2021	1 hour and 45 minutes	Approved and paid
14 September 2021	1 hour	Approved and paid
22 September 2021	1 hour and 20 minutes	Approved and paid
28 September 2021	2 hours and 20 minutes	Approved and paid
29 September 2021	45 minutes	Approved and paid
1 October 2021	2 hours	Approved and paid

(ii) Particulars in relation to Group Members will be provided after the identity of Group Members is known.

Part C Duties and responsibilities of Dr Tham and Group Members

14. As to paragraph 14, the Second Respondent:

- a. admits that the duties and responsibilities of Junior Medical Officers in their employment by Calvary could include, from time to time, the tasks pleaded in sub-paragraphs (a) to (j);
- b. says that the particular duties and responsibilities of each individual Junior Medical Officer employed by Calvary at any particular time depended on a range of factors including:
 - i. the department in which the Junior Medical Officer was working;
 - ii. the clinical needs of patients within that department;
 - iii. the Junior Medical Officer's role, experience and seniority;
 - iv. the time that the Junior Medical Officer worked in the department, including whether the department was affected by COVID-19 restrictions or other unexpected events;
 - v. resourcing and availability of other staff;
 - vi. models of care;
 - vii. the technology being used within the department;
- c. does not know and therefore cannot admit the paragraph insofar as it concerns Junior Medical Officers employed by the Territory; and
- d. in respect of sub-paragraph (j) says that the Second Respondent does not know what is meant by other medical services and so does not admit the sub-paragraph.

Part D Dr Tham's claim against the Territory

15. The Second Respondent does not know and cannot admit paragraphs 15 to 137C.

Part E Dr Tham's claim against Calvary

138. As to paragraph 138, the Second Respondent:

- a. admits the paragraph;
- b. says Dr Tham also worked in the following departments of Calvary Hospital during the Relevant Period:
 - i. Emergency Department from 1 February 2021 to 2 May 2021; and
 - ii. Intensive Care Unit from 1 November 2021 to 6 February 2022;

- c. says further that in the period from 2 August 2021 to 31 October 2021, during the 2021 Cardiology Rotation, the Applicant worked in the medical assessment planning unit for one shift each fortnight.

139. [not used]

E.1 2021 MAPU Rotation – 03 May 2021 to 01 August 2021 – 2017 EA

140. The Respondent admits paragraph 140.

E.1.1 Rosters

141. The Respondent admits paragraph 141.

E.1.2 Handover

142. As to paragraph 142, the Respondent:

- a. says that it was part of Dr Tham's role to handover patients allocated to her during her shift to the doctors on the incoming shift;
- b. says that handover ordinarily occurred during a handover meeting that was scheduled in the MAPU tearoom at the start or end of each shift, from:
 - i. 8am – 8:30am on Sunday to Monday and Wednesday to Saturday;
 - ii. 7:30am – 8am on Tuesday;
 - iii. 4pm – 4:30pm Monday to Friday; and
 - iv. 9pm – 9:30pm daily;
- c. otherwise does not know and cannot admit whether Dr Tham was directed to perform particular handover duties.

143. As to paragraph 143, the Second Respondent:

- a. admits that on three occasions during the 2021 MAPU Rotation Dr Tham worked overtime to complete handovers;

Particulars

Date	Amount of unrostered overtime claimed	Status
25 June 2021	39 minutes	Approved and paid
27 July 2021	30 minutes	Approved and paid
30 July 2021	30 minutes	Approved and paid

- b. says that:
 - i. Dr Tham made a claim for, and was paid, unrostered overtime for each of the three occasions pleaded above;
 - ii. Dr Tham did not claim any unrostered overtime to complete handovers in addition to the three occasions pleaded above; and
 - c. otherwise does not know and cannot admit the paragraph.
144. As to paragraph 144, the Second Respondent:
- a. denies the paragraph;
 - b. says that by providing Dr Tham with her roster, the Second Respondent directed Dr Tham to work the hours set out in that roster.
145. The Second Respondent denies paragraph 145.
146. As to paragraph 146, the Second Respondent:
- a. refers to and repeats paragraph 143 above; and
 - b. denies the paragraph.
147. The Second Respondent does not know and cannot admit paragraph 147 as no particulars of the days and times the alleged handover overtime was performed are provided.
148. As to paragraph 148, the Second Respondent:
- a. denies the paragraph;
 - b. repeats 142 to 147 above;
 - c. says that if Dr Tham actually worked handover overtime in addition to the overtime for which she was paid (which is not admitted) then:
 - i. she was only entitled for payment for that work in the circumstances pleaded in paragraph 13B above;
 - ii. whether Dr Tham was required and authorised to work any such additional handover overtime depends on the circumstances of each alleged occasion; and
 - iii. Dr Tham has not provided any particulars of each occasion that she worked additional handover overtime, how that additional handover overtime was requested or required, or how and when she sought approval or authorisation for that additional handover overtime;

- d. further and alternatively, says that Dr Tham is not entitled to any payment for the alleged handover overtime to the extent that:
 - i. she attended of her own volition outside of hours rostered on duty, or where she remained in attendance when formally released from the obligation to perform professional duties; and/or
 - ii. she agreed with her manager/supervisor that she would be granted time off in lieu of payment for overtime; and
- e. further and alternatively, for the reasons set out in paragraphs 338 to 354, says that Dr Tham is estopped from asserting that:
 - i. she worked the additional alleged handover overtime;
 - ii. further or alternatively, the additional alleged handover overtime was required and authorised; and
 - iii. further or alternatively, she is entitled to payment for unrostered overtime.

149. As to paragraph 149, the Second Respondent:

- a. repeats paragraphs 143 and 148 above;
- b. says that:
 - i. it did pay Dr Tham, at the rates set out in clause 35.4 of the 2017 EA, in respect of handover overtime that was worked and claimed by Dr Tham; and
 - ii. it does not know and cannot admit whether Dr Tham worked any additional handover overtime; and
 - iii. to the extent that Dr Tham did work any such overtime, she is not entitled to payment for any such additional handover overtime for the reasons pleaded in paragraph 148; and
- c. otherwise denies the paragraph.

150. The Second Respondent denies paragraph 150.

E.2 2021 Cardiology Rotation – 02 August 2021 to 31 October 2021 – 2017 EA

151. The Second Respondent admits paragraph 151.

E.2.1 Rosters

152. As to paragraph 152, the Second Respondent:

a. says that:

i. ~~on 3 August 2021, Dr Tham was rostered to work from 7:30am to 4:30pm;~~
and

ii. on 18 October 2021, Dr Tham was rostered to work from 10:30am to 4:30pm;

b. refers to and repeats paragraph 138(b) above; and

c. otherwise admits the paragraph.

E.2.2 Ward round preparation

153. The Second Respondent denies paragraph 153.

154. As to paragraph 154, the Second Respondent:

a. does not know and cannot admit whether Dr Tham worked hours in excess of her rostered hours during the 2021 Cardiology Rotation to prepare for ward rounds; and

b. otherwise denies the paragraph.

155. As to paragraph 155, the Second Respondent:

a. denies the paragraph;

b. says that by providing Dr Tham with her roster, the Second Defendant directed Dr Tham to work the hours set out in that roster;

c. says further that if it was aware that Dr Tham was undertaking work to prepare for ward rounds outside of her rostered hours it would have issued her with a direction not to do so, as any such work was unnecessary.

156. The Second Respondent denies paragraph 156.

157. The Second Respondent denies paragraph 157.

158. The Second Respondent does not know and cannot admit paragraph 158 as no particulars of the days and times the alleged ward round preparation overtime was performed are provided.

159. As to paragraph 159, the Second Respondent:

a. denies the paragraph;

b. repeats paragraphs 153 to 158 above;

- c. says that if Dr Tham actually worked ward round preparation overtime (which is not admitted) then:
 - i. she was only entitled for payment for that work in the circumstances pleaded in paragraph 13B above;
 - ii. whether Dr Tham was required and authorised to work any such additional ward round preparation overtime depends on the circumstances of each alleged occasion; and
 - iii. Dr Tham has not provided any particulars of each occasion that she worked additional ward round preparation overtime, how that additional handover overtime was requested or required, or how and when she sought approval or authorisation for that additional handover overtime;
- d. further and alternatively, says that Dr Tham is not entitled to any payment for the alleged ward round preparation overtime to the extent that:
 - i. she attended of her own volition outside of hours rostered on duty, or where she remained in attendance when formally released from the obligation to perform professional duties; and/or
 - ii. she agreed with her manager/supervisor that she would be granted time off in lieu of payment for overtime; and
- e. further and alternatively, for the reasons set out in paragraphs 338 to 354, says that Dr Tham is estopped from asserting that:
 - i. she worked the alleged ward round preparation overtime;
 - ii. further or alternatively, the alleged ward round preparation overtime was required and authorised; and
 - iii. further or alternatively, she is entitled to payment for unrostered overtime.

160. As to paragraph 160, the Second Respondent:

- a. repeats paragraph 159 above;
- b. says that:
 - i. it does not know and cannot admit whether Dr Tham worked the alleged ward round preparation overtime; and
 - ii. to the extent that Dr Tham did work such overtime, she was not entitled to payment for that overtime for the reasons pleaded in paragraph 159; and
- c. otherwise denies the paragraph.

161. The Second Respondent denies paragraph 161.

E.3 Loss

162. The Second Respondent denies paragraph 162.

E.4 Section 557C

162A. As to paragraph 162A, the Second Respondent:

- a. denies the paragraph;
- b. says that, on their proper construction, each of the 2013 EA, 2017 EA and 2021 EA only required the payment of a penalty rate for overtime in the circumstances pleaded in paragraph 13B above.

162B. As to paragraph 162B, the Second Respondent:

- a. admits that, if a penalty rate or loading (however described) must be paid for overtime hours actually worked by Dr Tham, s 535 of the FW Act and reg 3.34 of the *Fair Work Regulations 2009* (Cth) required the Second Respondent to make, and keep for seven years, a record that specifies:
 - i. the number of overtime hours worked by Dr Tham during each day; and
 - ii. when Dr Tham started and ceased working overtime hours;
- b. says that the provisions pleaded in paragraph 162B.a did not require Calvary to make or keep records in respect overtime for which penalty rates were not payable to Dr Tham, including in the circumstances pleaded in paragraphs 148 and 159 above;
- c. otherwise denies the paragraph.

162C. As to paragraph 162C, the Second Respondent:

- e. a. denies the paragraph;
- d. b. says that at all material times the Second Respondent did make and keep records of the kind described in paragraph 162B, including:
 - i. records of the time at which Dr Tham signed in and out of the hospital; and
 - ii. pre-approval and approval requests from Dr Tham; ~~and~~
 - iii. ~~confirmation emails from the Second Respondent's Medical Administration department approving or authorising the overtime;~~

- e. c. says that those records do not record that Dr Tham is entitled to any overtime, in accordance with the terms of the 2013 EA, 2017 EA and 2021 EA, other than the overtime for which she has already been paid;
- f. d. further or alternatively, says if there be any error or inaccuracy in the records made and kept by the Second Respondent (which is denied), the failure of Dr Tham to comply with the requirement to obtain approval to work unrostered overtime (including pre-approval where required) in accordance with the Overtime Policy, make a claim for unrostered overtime and otherwise comply with the obligations pleaded in paragraph 13D provides a reasonable excuse for any error or inaccuracy in the records resulting in any failure to comply with the requirements of s 535 of the FW Act;
- g. e. further or alternatively, Dr Tham is estopped from alleging that the Second Respondent failed to keep a record of unrostered overtime that she worked during the Relevant Period by reason of the matters pleaded in paragraphs 338 to 354 below.

Part F Group Members' claims against the Territory

163 The Second Respondent does not plead to paragraphs 163 to 263C as they are not allegations against the Second Respondent.

Part G Group Members' claims against Calvary

264. The Second Respondent does not know and therefore cannot admit paragraph. 264.

264A. In further answer to paragraphs 265 to 275, the Second Respondent says that:

- a. the allegations in those paragraphs concern Junior Medical Officers who worked in different departments or wards of the Calvary Hospital over a period of over six years and have not been pleaded or particularised by reference to any particular Junior Medical Officer or Junior Medical Officers;
- b. the roles and responsibilities of those Junior Medical Officers varied over that time depending, amongst other matters, on the matters pleaded in paragraph 14 above;
- c. in the premises, the Second Respondent:
 - i. is not able to admit, deny or plead any material additional facts in response to many of the allegations made against it in those paragraphs; and
 - ii. pleads to those paragraphs to the extent possible but reserves its right to amend or supplement these pleadings should further pleadings or

particulars be provided after the initial trial in respect of Group Members' claims.

G.1 Admissions

265. As to paragraph 265, the Second Respondent:

- a. admits the paragraph; and
- b. says further that the practice for admitting patients to the department or ward varied depending on the department or ward and from time to time.

266. The Second Respondent does not know and cannot admit paragraph 266.

267. As to paragraph 267, the Second Respondent:

- a. denies the paragraph; and
- b. says that by providing Junior Medical Officers with their roster, the Second Defendant directed those Junior Medical Officers to work the hours set out in that roster.

268. The Second Respondent denies paragraph 268.

269. The Second Respondent denies paragraph 269.

270. The Second Respondent does not know and therefore cannot admit paragraph 270.

271. As to paragraph 271, the Second Respondent:

- a. denies the paragraph;
- b. repeats paragraphs 265 to 270 above;
- c. says that to the extent any Junior Medical Officers worked admissions overtime and had claims for that admissions overtime approved, then those overtime claims were paid;
- d. says that if any Junior Medical Officers otherwise worked admissions overtime (which is not admitted) then:
 - i. they were only entitled for payment for that work in the circumstances pleaded in paragraph 13B above;
 - ii. whether they were required and authorised to work any such admissions overtime depends on the circumstances of each alleged occasion; and
 - iii. no particulars have been provided of each occasion that they worked the alleged admission overtime, how that overtime was requested or required, or how and when they sought approval or authorisation for that additional handover overtime;

- e. further and alternatively, Junior Medical Officers are not entitled to any payment for the alleged admissions overtime to the extent that:
 - i. they attended of their own volition outside of hours rostered on duty, or where they remained in attendance when formally released from the obligation to perform professional duties; and/or
 - ii. they agreed with their manager/supervisor that they would be granted time off in lieu of payment for overtime; and
- f. further and alternatively, for the reasons set out in paragraphs 338 to 354, says that Group Members are estopped from asserting that:
 - i. they worked the alleged admissions overtime;
 - ii. further or alternatively, that the alleged admissions overtime was required or authorised; and
 - iii. further or alternatively, that they are entitled to payment for unrostered overtime.

272. As to paragraph 272, the Second Respondent:

- a. says that:
 - i. it did pay Junior Medical Officers, at the rates set out in clause 36.4 of the 2013 EA, clause 25.4 of the 2017 EA and/or clause 36.4 of the 2021 EA (as applicable), in respect of admissions overtime that was worked, claimed and approved;
 - ii. it does not know and cannot admit whether Junior Medical Officers worked any additional admissions overtime; and
 - iii. to the extent that any Junior Medical Officers did work any such overtime, they are not entitled to payment for any such additional admissions overtime for the reasons pleaded in paragraph 271; and
- b. otherwise denies the paragraph.

273. The Second Respondent denies paragraph 273.

G.2 Medical emergencies

274. As to paragraph 274, the Second Respondent:

- a. admits the paragraph; and
- b. says further that the practice for dealing with medical emergencies varied depending on the department or ward and from time to time.

275. The Second Respondent does not know and cannot admit paragraph 275.
276. As to paragraph 276, the Second Respondent:
- a. denies the paragraph; and
 - b. says that by providing Junior Medical Officers with their roster, the Second Defendant directed those Junior Medical Officers to work the hours set out in that roster.
277. The Second Respondent denies paragraph 277.
278. The Second Respondent denies paragraph 278.
279. The Second Respondent does not know and therefore cannot admit paragraph 279.
280. As to paragraph 280, the Second Respondent:
- a. denies the paragraph;
 - b. repeats paragraphs 274 to 279 above;
 - c. says that to the extent any Junior Medical Officers worked medical emergencies overtime and had claims for that medical emergencies overtime approved, then those overtime claims were paid;
 - d. says that if any Junior Medical Officers otherwise worked medical emergencies overtime (which is not admitted) then:
 - i. they were only entitled for payment for that work in the circumstances pleaded in paragraph 13B above;
 - ii. whether they were required and authorised to work any such medical emergencies overtime depends on the circumstances of each alleged occasion; and
 - iii. no particulars have been provided of each occasion that they worked the alleged medical emergencies overtime, how that overtime was requested or required, or how and when they sought approval or authorisation for that additional medical emergencies overtime;
 - e. further and alternatively, Junior Medical Officers are not entitled to any payment for the alleged medical emergencies overtime to the extent that:
 - i. they attended of their own volition outside of hours rostered on duty, or where they remained in attendance when formally released from the obligation to perform professional duties; and/or

- ii. they agreed with their manager/supervisor that they would be granted time off in lieu of payment for overtime; and
- f. further and alternatively, for the reasons set out in paragraphs 338 to 354, says that Group Members are estopped from asserting that:
 - i. they worked the alleged medical emergencies overtime;
 - ii. further or alternatively, that the alleged medical emergencies overtime was required or authorised; and
 - iii. further or alternatively, that they are entitled to payment for unrostered overtime.

281. As to paragraph 281, the Second Respondent:

- a. says that:
 - i. it did pay Junior Medical Officers, at the rates set out in clause 36.4 of the 2013 EA, clause 25.4 of the 2017 EA and/or clause 36.4 of the 2021 EA (as applicable), in respect of medical emergencies overtime that was worked, claimed and approved;
 - ii. it does not know and cannot admit whether Junior Medical Officers worked any additional medical emergencies overtime; and
 - iii. to the extent that any Junior Medical Officers did work any such overtime, they are not entitled to payment for any such additional medical emergencies overtime for the reasons pleaded in paragraph 280; and
- b. otherwise denies the paragraph.

282. The Second Respondent denies paragraph 282.

G.3 Transfers

283. As to paragraph 283, the Second Respondent:

- a. admits the paragraph; and
- b. says further that the practice for transferring or discharging of patients to other medical facilities varied depending on the department or ward and from time to time.

284. The Second Respondent does not know and cannot admit paragraph 284.

285. As to paragraph 285, the Second Respondent:

- a. denies the paragraph; and

- b. says that by providing Junior Medical Officers with their roster, the Second Defendant directed those Junior Medical Officers to work the hours set out in that roster.

286. The Second Respondent denies paragraph 286.

287. The Second Respondent denies paragraph 287.

288. The Second Respondent does not know and therefore cannot admit paragraph 288.

289. As to paragraph 289, the Second Respondent:

- a. denies the paragraph;
- b. repeats paragraphs 283 to 288 above;
- c. says that to the extent any Junior Medical Officers worked transfer overtime and had claims for that transfer overtime approved, then those overtime claims were paid;
- d. says that if any Junior Medical Officers otherwise worked transfer overtime (which is not admitted) then:
 - i. they were only entitled for payment for that work in the circumstances pleaded in paragraph 13B above;
 - ii. whether they were required and authorised to work any such transfer overtime depends on the circumstances of each alleged occasion; and
 - iii. no particulars have been provided of each occasion that they worked the alleged transfer overtime, how that overtime was requested or required, or how and when they sought approval or authorisation for that additional transfer overtime;
- e. further and alternatively, Junior Medical Officers are not entitled to any payment for the alleged transfer overtime to the extent that:
 - i. they attended of their own volition outside of hours rostered on duty, or where they remained in attendance when formally released from the obligation to perform professional duties; and/or
 - ii. they agreed with their manager/supervisor that they would be granted time off in lieu of payment for overtime; and
- f. further and alternatively, for the reasons set out in paragraphs 338 to 354, says that Group Members are estopped from asserting that:
 - i. they worked the alleged transfers overtime;

- ii. further or alternatively, that the alleged transfers overtime was required or authorised; and
- iii. further or alternatively, that they are entitled to payment for unrostered overtime.

290. As to paragraph 290, the Second Respondent:

a. says that:

- i. it did pay Junior Medical Officers, at the rates set out in clause 36.4 of the 2013 EA, clause 25.4 of the 2017 EA and/or clause 36.4 of the 2021 EA (as applicable), in respect of transfer overtime that was worked, claimed and approved;
- ii. it does not know and cannot admit whether Junior Medical Officers worked any additional transfer overtime; and
- iii. to the extent that any Junior Medical Officers did work any such overtime, they are not entitled to payment for any such additional transfer overtime for the reasons pleaded in paragraph 289; and

b. otherwise denies the paragraph.

291. The Second Respondent denies paragraph 291.

G.4 Medical records

292. As to paragraph 292, the Second Respondent:

- a. admits sub-paragraph (a);
- b. says further that the practice for undertaking medical record preparation and the type of medical records preparation required varied with each patient that presented and depending on the department or ward and from time to time; and
- c. otherwise does not know and cannot admit the paragraph.

293. The Second Respondent does not know and cannot admit paragraph 293.

294. As to paragraph 294, the Second Respondent:

- a. denies the paragraph; and
- b. says that by providing Junior Medical Officers with their roster, the Second Defendant directed those Junior Medical Officers to work the hours set out in that roster.

295. The Second Respondent denies paragraph 295.

296. The Second Respondent denies paragraph 296.

297. The Second Respondent does not know and therefore cannot admit paragraph 297.

298. As to paragraph 298, the Second Respondent:

- a. denies the paragraph;
- b. repeats paragraphs 13B and 292 to 297 above;
- c. says that to the extent any Junior Medical Officers worked medical records overtime and had claims for that medical records overtime approved, then those overtime claims were paid;
- d. says that if any Junior Medical Officers otherwise worked medical records overtime (which is not admitted) then:
 - i. they were only entitled for payment for that work in the circumstances pleaded in paragraph 13B above;
 - ii. whether they were required and authorised to work any such medical records overtime depends on the circumstances of each alleged occasion; and
 - iii. no particulars have been provided of each occasion that they worked the alleged medical records overtime, how that overtime was requested or required, or how and when they sought approval or authorisation for that additional medical records overtime;
- e. further and alternatively, Junior Medical Officers are not entitled to any payment for the alleged medical records overtime to the extent that:
 - i. they attended of their own volition outside of hours rostered on duty, or where they remained in attendance when formally released from the obligation to perform professional duties; and/or
 - ii. they agreed with their manager/supervisor that they would be granted time off in lieu of payment for overtime; and
- f. further and alternatively, for the reasons set out in paragraphs 338 to 354, says that Group Members are estopped from asserting that:
 - i. they worked the alleged medical records overtime;
 - ii. further or alternatively, that the alleged medical records overtime was required or authorised; and
 - iii. further or alternatively, that they are entitled to payment for unrostered overtime.

299. As to paragraph 299, the Second Respondent:

a. says that:

- i. it did pay Junior Medical Officers, at the rates set out in clause 36.4 of the 2013 EA, clause 25.4 of the 2017 EA and/or clause 36.4 of the 2021 EA (as applicable), in respect of medical records overtime that was worked, claimed and approved;
- ii. it does not know and cannot admit whether Junior Medical Officers worked any additional medical records overtime; and
- iii. to the extent that any Junior Medical Officers did work any such overtime, they are not entitled to payment for any such additional medical records overtime for the reasons pleaded in paragraph 298; and

b. otherwise denies the paragraph.

300. The Second Respondent denies paragraph 300.

G.5 Ward round preparation

301. The Second Respondent does not know and cannot admit paragraph 301.

302. The Second Respondent does not know and cannot admit paragraph 302.

303. As to paragraph 303, the Second Respondent:

a. denies the paragraph; and

b. says that by providing Junior Medical Officers with their roster, the Second Defendant directed those Junior Medical Officers to work the hours set out in that roster.

304. The Second Respondent denies paragraph 304.

305. The Second Respondent denies paragraph 305.

306. The Second Respondent does not know and therefore cannot admit paragraph 306.

307. As to paragraph 307, the Second Respondent:

a. denies the paragraph;

b. repeats paragraphs 301 to 306 above;

c. says that to the extent any Junior Medical Officers worked ward round preparation overtime and had claims for that ward round preparation overtime approved, then those overtime claims were paid;

- d. says that if any Junior Medical Officers otherwise worked ward round preparation overtime (which is not admitted) then:
 - i. they were only entitled for payment for that work in the circumstances pleaded in paragraph 13B above;
 - ii. whether they were required and authorised to work any such ward round preparation overtime depends on the circumstances of each alleged occasion; and
 - iii. no particulars have been provided of each occasion that they worked the alleged ward round preparation overtime, how that overtime was requested or required, or how and when they sought approval or authorisation for that additional ward round preparation overtime;
- e. further and alternatively, Junior Medical Officers are not entitled to any payment for the alleged ward round preparation overtime to the extent that:
 - i. they attended of their own volition outside of hours rostered on duty, or where they remained in attendance when formally released from the obligation to perform professional duties; and/or
 - ii. they agreed with their manager/supervisor that they would be granted time off in lieu of payment for overtime; and
- f. further and alternatively, for the reasons set out in paragraphs 338 to 354, says that Group Members are estopped from asserting that:
 - i. they worked the alleged ward round preparation overtime;
 - ii. further or alternatively, that the alleged ward round preparation overtime was required or authorised; and
 - iii. further or alternatively, that they are entitled to payment for unrostered overtime.

308. As to paragraph 308, the Second Respondent:

- a. says that:
 - i. it did pay Junior Medical Officers, at the rates set out in clause 36.4 of the 2013 EA, clause 25.4 of the 2017 EA and/or clause 36.4 of the 2021 EA (as applicable), in respect of ward round preparation overtime that was worked, claimed and approved;
 - ii. it does not know and cannot admit whether Junior Medical Officers worked any additional ward round preparation overtime; and

iii. to the extent that any Junior Medical Officers did work any such overtime, they are not entitled to payment for any such additional ward round preparation overtime for the reasons pleaded in paragraph 307; and

b. otherwise denies the paragraph.

309. The Second Respondent denies paragraph 309.

G.6 Paper rounds

310. As to paragraph 310, the Second Respondent:

a. admits the paragraph; and

b. says further that the practice for preparing for paper rounds varied depending on the department or ward and from time to time.

311. The Second Respondent does not know and cannot admit paragraph 311.

312. As to paragraph 312, the Second Respondent:

a. denies the paragraph; and

b. says that by providing Junior Medical Officers with their roster, the Second Defendant directed those Junior Medical Officers to work the hours set out in that roster.

313. The Second Respondent denies paragraph 313.

314. The Second Respondent denies paragraph 314.

315. The Second Respondent does not know and therefore cannot admit paragraph 315.

316. As to paragraph 316, the Second Respondent:

a. denies the paragraph;

b. repeats paragraphs 310 to 315 above;

c. says that to the extent any Junior Medical Officers worked paper rounds overtime and had claims for that paper rounds overtime approved, then those overtime claims were paid;

d. says that if any Junior Medical Officers otherwise worked paper rounds overtime (which is not admitted) then:

i. they were only entitled for payment for that work in the circumstances pleaded in paragraph 13B above;

- ii. whether they were required and authorised to work any such paper rounds overtime depends on the circumstances of each alleged occasion; and
 - iii. no particulars have been provided of each occasion that they worked the alleged paper rounds overtime, how that overtime was requested or required, or how and when they sought approval or authorisation for that additional paper rounds overtime;
- e. further and alternatively, Junior Medical Officers are not entitled to any payment for the alleged paper rounds overtime to the extent that:
- i. they attended of their own volition outside of hours rostered on duty, or where they remained in attendance when formally released from the obligation to perform professional duties; and/or
 - ii. they agreed with their manager/supervisor that they would be granted time off in lieu of payment for overtime; and
- f. further and alternatively, for the reasons set out in paragraphs 338 to 354, says that Group Members are estopped from asserting that:
- i. they worked the additional paper rounds overtime;
 - ii. further or alternatively, that the additional paper rounds overtime was required or authorised; and
 - iii. further or alternatively, that they are entitled to payment for unrostered overtime.

317. As to paragraph 317, the Second Respondent:

- a. says that:
- i. it did pay Junior Medical Officers, at the rates set out in clause 36.4 of the 2013 EA, clause 25.4 of the 2017 EA and/or clause 36.4 of the 2021 EA (as applicable), in respect of paper rounds overtime that was worked, claimed and approved;
 - ii. it does not know and cannot admit whether Junior Medical Officers worked any additional paper rounds overtime; and
 - iii. to the extent that any Junior Medical Officers did work any such overtime, they are not entitled to payment for any such additional paper rounds overtime for the reasons pleaded in paragraph 316; and
- b. otherwise denies the paragraph.

318. The Second Respondent denies paragraph 318.

G.7 Handover

319. As to paragraph 319, the Second Respondent:

- a. admits the paragraph; and
- b. says further that the practice for preparing for handover varied depending on the department or ward and from time to time.

320. The Second Respondent does not know and cannot admit paragraph 320.

321. As to paragraph 321, the Second Respondent:

- a. denies the paragraph; and
- b. says that by providing Junior Medical Officers with their roster, the Second Defendant directed those Junior Medical Officers to work the hours set out in that roster.

322. The Second Respondent denies paragraph 322.

323. The Second Respondent denies paragraph 323.

324. The Second Respondent does not know and therefore cannot admit paragraph 324.

325. As to paragraph 325, the Second Respondent:

- a. denies the paragraph;
- b. repeats paragraphs 319 to 324 above;
- c. says that to the extent any Junior Medical Officers worked handover overtime and had claims for that handover overtime approved, then those overtime claims were paid;
- d. says that if any Junior Medical Officers otherwise worked handover overtime (which is not admitted) then:
 - i. they were only entitled for payment for that work in the circumstances pleaded in paragraph 13B above;
 - ii. whether they were required and authorised to work any such handover overtime depends on the circumstances of each alleged occasion; and
 - iii. no particulars have been provided of each occasion that they worked the alleged handover overtime, how that overtime was requested or required, or how and when they sought approval or authorisation for that additional handover overtime;

- e. further and alternatively, Junior Medical Officers are not entitled to any payment for the alleged handover overtime to the extent that:
 - i. they attended of their own volition outside of hours rostered on duty, or where they remained in attendance when formally released from the obligation to perform professional duties; and/or
 - ii. they agreed with their manager/supervisor that they would be granted time off in lieu of payment for overtime; and
- f. further and alternatively, for the reasons set out in paragraphs 338 to 354, says that Group Members are estopped from asserting that:
 - i. they worked the alleged handover overtime;
 - ii. further or alternatively, that the alleged handover overtime was required or authorised; and
 - iii. further or alternatively, that they are entitled to payment for unrostered overtime.

326. As to paragraph 326, the Second Respondent:

- a. says that:
 - i. it did pay Junior Medical Officers, at the rates set out in clause 36.4 of the 2013 EA, clause 25.4 of the 2017 EA and/or clause 36.4 of the 2021 EA (as applicable), in respect of handover overtime that was worked, claimed and approved;
 - ii. it does not know and cannot admit whether Junior Medical Officers worked any additional handover overtime; and
 - iii. to the extent that any Junior Medical Officers did work any such overtime, they are not entitled to payment for any such additional handover overtime for the reasons pleaded in paragraph 325; and
- b. otherwise denies the paragraph.

327. The Second Respondent denies paragraph 327.

G.8 Other medical services

328. As to paragraphs 328 to 336, the Second Respondent says that:

- a. it does not know what is meant by other medical services and so does not admit the paragraphs in their entirety; and
- b. further and alternatively, for the reasons set out in paragraphs 338 to 354, says that Group Members are estopped from asserting that:
 - i. they worked the alleged other medical services overtime;
 - ii. further or alternatively, that the alleged other medical services overtime was required or authorised; and
 - iii. further or alternatively, that they are entitled to payment for unrostered overtime.

G.9 Loss

329. The Second Respondent denies paragraph 337.

G.10 Section 557C

337A. As to paragraph 337A, the Second Respondent:

- a. denies the paragraph;
- b. says that, on their proper construction, each of the 2013 EA, 2017 EA and 2021 EA only required the payment of a penalty rate for overtime in the circumstances pleaded in paragraph 13B above.

337B. As to paragraph 337B, the Second Respondent:

- e. a. admits that, if a penalty rate or loading (however described) must be paid for overtime hours actually worked by Junior Medical Officers, s 535 of the FW Act and reg 3.34 of the *Fair Work Regulations 2009* (Cth) required the Second Respondent to make, and keep for seven years, a record that specifies:
 - i. the number of overtime hours worked by Junior Medical Officers during each day; and
 - ii. when Junior Medical Officers started and ceased working overtime hours;
- e. b. says that the provisions pleaded in paragraph 337B did not require the Second Respondent to make or keep records in respect overtime for which penalty rates were not payable to Junior Medical Officers;
- f. c. otherwise denies the paragraph.

337C. As to paragraph 337C, the Second Respondent:

- €. a. denies the paragraph;
- £. b. says that at all material times the Second Respondent did make and keep records of the kind described in paragraph 337C, including:
 - i. records of the time at which Junior Medical Officers signed in and out of the hospital;
 - ii. pre-approval and approval requests from Junior Medical Officers; and
 - iii. confirmation emails from the Second Respondent's Medical Administration department approving or authorising the overtime;
- Ⓔ. c. says that those records do not record that Junior Medical Officers are entitled to any overtime, in accordance with the terms of the 2013 EA, 2017 EA and 2021 EA, other than the overtime for which she has already been paid;
- Ⓕ. d. further or alternatively, says if there be any error or inaccuracy in the records made and kept by the Second Respondent (which is denied), the failure of Junior Medical Officers to comply with the requirement to obtain approval to work unrostered overtime (including pre-approval where required), make a claim for unrostered overtime and otherwise comply with the obligations pleaded in paragraph 13D provides a reasonable excuse for any error or inaccuracy in the records resulting in any failure to comply with the requirements of s 535 of the FW Act;
- Ⓖ. e. further or alternatively, each Junior Medical Officer is estopped from alleging that the Second Respondent failed to keep a record of unrostered overtime that they worked during the Relevant Period by reason of the matters pleaded in paragraphs 338 to 354 below.

Part H Estoppel by conduct

H.1 Background to the estoppel

338. The Second Respondent repeats paragraphs 13A to 13F above.

339. By reason of paragraphs 13A to 13F above, the Applicant and Group Members were:

- a. aware of their ordinary hours;
- b. aware of the requirement to obtain approval to work unrostered overtime (including pre-approval where required) and the process for doing so;

- c. aware of the requirement to make a claim for unrostered overtime and the process for doing so; and
- d. capable of complying with those requirements.

340. By:

- a. engaging in the conduct pleaded in paragraph 13F above;
- b. further or alternatively, not seeking approval, or claiming payment, for any unrostered overtime in addition to the overtime pleaded in paragraph 13F above,

Dr Tham and the Group Members each represented to the Second Respondent that:

- i. the hours that they had worked were those specified in their roster and claimed as overtime;
- ii. if they had been required and authorised to work hours in addition to the rostered hours to perform their employment duties and responsibilities (including those pleaded in paragraph 14) then they would submit a request for approval for unrostered overtime as soon as practical and/or within three weeks after working the unrostered overtime; and
- iii. if they remained in attendance at Calvary Hospital before or after their rostered shift but did not submit a request for approval for any overtime, then such attendance before or after their rostered shift was of their own volition or was after they had been formally released from the obligation to perform professional duties,

(the **JMO Work Hours Representations**).

Particulars

The JMO Work Hours Representations were partly express and partly implied.

Where Dr Tham and Group Members sought approval, or made claims for payment, for unrostered overtime in respect of any relevant pay period (as pleaded in paragraph 13F above), this was an express representation that the overtime claimed was the only overtime worked during that pay period. The further representations pleaded are implied from the making of that representation in the circumstances pleaded in paragraphs 13A to 13E and 339 above.

Where Dr Tham and Group Members did not seek approval, or make claims for payment, for any unrostered overtime in respect of any relevant pay period, this was an implied representation that no overtime had been

worked during that pay period. The further representations pleaded are implied from the fact that no such approval or claim was made in the circumstances pleaded in paragraphs 13A to 13E and 339.

H.2 Common law estoppel

H.2.1 *Second Respondent's assumptions*

341. At all times during the Relevant Period, the Second Respondent adopted each of the following assumptions:

- a. the hours that Dr Tham and the Group Members worked were those specified in their roster and claimed as overtime;
- b. if Dr Tham or the Group Members had been required and authorised to work hours in addition to the rostered hours to perform their employment duties and responsibilities (including those pleaded in paragraph 14) then Dr Tham or the Group Member (as applicable) would submit a request for approval for unrostered overtime as soon as practical and/or within three weeks after working the unrostered overtime;
- c. if Dr Tham or the Group Members remained in attendance at Calvary Hospital before or after their rostered shift but did not submit a request for approval for any overtime, then such attendance before or after their rostered shift was of their own volition or was after they had been formally released from the obligation to perform professional duties;
- d. the Second Respondent was not obliged to pay overtime to Dr Tham or the Group Members unless the overtime was approved and claimed within three weeks of the overtime being worked,

(the **JMO Work Hours Assumptions**).

342. The Second Respondent adopted the JMO Work Hours Assumptions as the basis for:

- a. paying Dr Tham and the Group Members their salary and entitlements in accordance with their contracts of employment and the 2013 EA, the 2017 EA and the 2021 EA (as applicable);
- b. recording and confirming unrostered overtime worked by Junior Medical Officers (including, without limitation, for the purposes of s 535 of the FW Act and reg 3.34 of the *Fair Work Regulations*);
- c. setting the rosters for Junior Medical Officers and determining the number of Junior Medical Officers and other staff to roster on for each shift;

- d. planning models of care and operational directions in respect of the delivery of medical services at Calvary Hospital, including issuing directions to Junior Medical to work or not work unrostered overtime or perform or not perform particular activities; and
- e. accounting for the cost, or likely cost, of any unrostered overtime other than paid unrostered overtime for the purpose of obtaining and allocating funds for the operation of Calvary Hospital.

H.2.2 Relevant convention

- 343. The JMO Work Hours Assumptions were assumptions as to legal relationship between the Second Respondent and each of Dr Tham and the Group Members.
- 344. The JMO Work Hours Assumptions were also adopted by each of Dr Tham and the Group Members.

Particulars

Dr Tham and the Group Members' adoption of the JMO Work Hours Assumptions can be inferred or evidenced by their:

- (i) engaging in the conduct pleaded in paragraph 13F above;
- (ii) further or alternatively, not seeking approval, or claiming payment, for unrostered overtime other than the unrostered overtime pleaded in paragraph 13F above.

Further particulars may be provided following discovery and the service of evidence.

- 345. The JMO Work Hours Assumptions formed the conventional basis upon which the Second Respondent and each of Dr Tham and the Group Members conducted their employment relationship.

Particulars

The convention can be inferred or evidence by:

- (i) the Second Respondent's acts and omissions as pleaded at paragraph 342 above;
- (ii) Dr Tham and the Group Members conduct as pleaded and particularised at paragraph 344 above;
- (iii) the terms of the Second Respondent's policies and procedures, and its lawful directions, as pleaded at paragraph 13E above, which

policies, procedures and directions were communicated to Dr Tham and each of the Group Members.

Further particulars may be provided following discovery and the service of evidence.

346. The Second Respondent and each of Dr Tham and the Group Members knew or intended that the other act on the basis of the JMO Work Hours Assumptions.

Particulars

The Second Respondent refers to and repeats the pleadings and particulars at paragraphs 339, 340 and 344 above.

H.2.3 Further conduct inducing assumption

347. Further or alternatively, Dr Tham and the Group Members:

- a. knew, or ought reasonably to have known, of the JMO Work Hours Assumptions;
- b. knew, or ought reasonably to have known, that, to the extent that they had worked unrostered overtime and had not made a request for approval or payment of that overtime, the JMO Work Hour Assumptions were incorrect and the Second Respondent laboured under a mistake in this respect; and
- c. refrained from correcting the Second Respondent's mistake in circumstances where they had a duty to do so and, further or alternatively, the circumstances called for them to correct the Second Respondent's mistake.

Particulars

- (i) Dr Tham and the Group Members' knowledge of the matters pleaded in paragraph (a) and (b) can be inferred from matters pleaded and particularised at paragraphs 13E, 13F and 339 above.
- (ii) Dr Tham and the Group Members' duty to correct the Second Respondents' mistake as pleaded in paragraph (c) arises from the terms of the 2013 EA, 2017 EA and 2021 EA (as applicable) and the terms of their contracts of employment requiring Dr Tham and the Group Members to seek approval for and claim unrostered overtime, as pleaded at paragraphs 13D to 13F above.
- (iii) The circumstances pleaded in paragraph (c) above are those identified in particular (ii) above and the fact that it is impractical, if not impossible, for the Second Respondent to verify the amount of unrostered overtime worked by Dr Tham and the Group Members

after the fact circumstances where no claim for approval was made at the time.

348. Further or alternatively, by making the JMO Work Hours Representations, Dr Tham and the Group Members induced the Second Respondent to make the JMO Work Hours Assumptions and the JMO Work Hours Assumptions were founded on those representations.

H.2.3 Material disadvantage

349. If Dr Tham and the Group Members depart from the JMO Work Hours Assumptions, the Second Respondent will be in a position of material disadvantage because it:

- a. was not aware of, and did not investigate or verify contemporaneously, any assertion that Dr Tham or Group Members had purportedly attended at work outside their ordinary hours of work other than during the periods of rostered overtime and paid unrostered overtime;
- b. did not create or retain documents, other than as required by law, that would enable it to investigate or verify the hours worked by Dr Tham or Group Members, and had no opportunity to do so at a time proximate to when those hours are claimed to have been worked;
- c. was not aware of, and did not make any payment to Dr Tham or Group Members in relation to, any purported attendance at work outside their ordinary hours of work other than during the periods of rostered overtime and paid unrostered overtime;
- d. did not take steps that were available to it to reduce any such time being worked by Dr Tham and Group Members; and
- e. did not take into account the cost, or likely cost, of any unrostered overtime other than paid unrostered overtime for the purpose of the Second Respondent obtaining and allocating funds for the operation of Calvary Hospital.

Particulars of (d)

- (i) The steps that would have been available to the Second Respondent included:
 - i. changing roster arrangements to reduce the possibility of unrostered overtime arising;
 - ii. changing models of care and making operational changes in the delivery of health services, to address the causes of unrostered overtime;

- iii. employing or rostering more medical officers;
 - iv. reallocating responsibility for some activities or functions to more senior doctors or other personnel;
 - v. issuing directions in relation to working or not working unrostered overtime or performing or not performing particular activities, including changing approval processes;
 - vi. planning, forecasting or budgeting for the unrostered overtime to ensure that the Second Respondent could meet any liability for unrostered overtime;
- (ii) if the Second Respondent had been informed that Dr Tham or Group Member was working outside their ordinary hours of work other than for rostered overtime, telling them not to attend or to leave work;
 - (iii) if the Second Respondent had been informed that Dr Tham or Group Member had worked outside their ordinary hours of work other than for rostered overtime, telling them not to do so in the future.

Which steps would have been taken by the Second Respondent in respect of Dr Tham and each Group Member, and when, will vary depending on the particular circumstances in which it is alleged that Dr Tham and each Group Member worked unrostered overtime for which they were not paid, which have not been pleaded or particularised.

Generally, those steps would have been taken by the Second Respondent:

- (iv) upon Dr Tham or the relevant Group Member informing the Second Respondent that they were working or had worked outside their ordinary hours of work other than for rostered overtime, or otherwise corrected the assumptions, by seeking approval for unrostered overtime or otherwise;
- (v) further or alternatively, upon the Second Respondent identifying a pattern of Dr Tham or a Group Member working outside their ordinary hours of work other than for rostered overtime. Each individual's failure to correct the unapproved or unclaimed time assumptions, on each occasion on which they failed to do so, made a material contribution to this pattern being unknown to the Second Respondent.

Particulars of (e)

The relevant processes included:

- (i) the process for obtaining funding from the Territory, where the amount of that funding is based on (among other things) evidence of past costs; and
- (ii) budgeting and financial forecasting processes, by which the Second Respondent allocates resources based on past costs.

350. Further or alternatively, the Second Respondent would suffer a detriment if Dr Tham and Group Members were permitted to depart from any of the JMO Work Hour Assumptions and Dr Tham and the Group Members are entitled to be paid for any further overtime (which is denied) as:

- a. the Second Respondent has lost the opportunity to investigate or verify any claims for unrostered overtime other than paid unrostered overtime at a time when records and recollections were available, and thereby to decline any claim that was not properly made;
- b. further or alternatively, the Second Respondent has incurred and will incur costs seeking to verify any unrostered overtime now claimed;
- c. further or alternatively, the Second Respondent has lost the opportunity to avoid all or some of the unrostered overtime by taking the steps referred to in subparagraph 349.d; and.
- d. further or alternatively, the Second Respondent lost the opportunity to obtain further funding or otherwise allocate its financial resources to accommodate the unrostered overtime.

Particulars

The detriment to the Second Respondent in respect of Dr Tham and each Group Member, including when it arose, will vary depending on the particular circumstances in which it is alleged that Dr Tham and each Group Member worked unrostered overtime for which they were not paid, which have not been pleaded or particularised.

Generally, the detriment would have arisen:

- (i) from the first time Dr Tham or a Group Member failed to correct the assumptions when they should have done;
- (ii) further or alternatively, from the first time a pattern would have been established of Dr Tham or Group Member working outside ordinary hours other than rostered overtime. Each individual's failure to correct the unapproved or unclaimed time assumptions, on each occasion on which they failed to do so, made a material contribution to this pattern being unknown to the Second Respondent.

H.2.4 Estoppel

351. In the premises, it is unjust and inadmissible for Dr Tham and the Group Members to depart from the JMO Work Hours Assumptions and they are estopped from doing so.

H.3 Equitable estoppel

352. Further or alternatively, by reason of the matters pleaded in paragraphs 338 to 350 above:

- a. the Second Respondent adopted the JMO Work Hours Assumptions;
- b. Dr Tham and the Group Members induced or acquiesced in the Second Respondent's adoption of the JMO Work Hours Assumptions, including by making the JMO Work Hours Representations;
- c. the Second Respondent acted in reliance on the JMO Work Hours Assumptions;
- d. Dr Tham and the Group Members knew or intended that the Second Respondent acted in reliance on the JMO Work Hours Assumptions; and
- e. the Second Respondent will suffer detriment if Dr Tham and the Group Members do not fulfil the JMO Work Hour Assumptions.

353. In the premises, it is unconscionable for Tham and the Group Members to depart from the JMO Work Hours Assumptions and they are estopped from doing so.

H.4 Operation of the estoppel

354. By reason of the matters pleaded in paragraphs 338 to 353, Dr Tham and the Group Members are estopped from alleging in these proceedings that:

- a. the JMO Work Hours Assumptions are incorrect;
- b. that they were required or authorised by the Second Respondent to be, in attendance at Calvary Hospital to carry out functions that they had been called upon to perform on behalf of the Second Respondent during any time other than rostered overtime or paid unrostered overtime;
- c. further or alternatively, that any attendance at a hospital during any such time was not of their own volition; and
- d. further or alternatively, that they worked any hours beyond those specified in their roster and otherwise the subject of approved unrostered overtime; and
- e. further or alternatively, that the Second Respondent has failed to keep adequate records of overtime worked (including, without limitation, for the purposes of s 535 of the *FW Act* and reg 3.34 of the *Fair Work Regulations*).

Part I Relief sought

355. The Second Respondent denies that the Applicant and Group Members are entitled to any of the relief sought.
356. In further answer to Dr Tham's claim for pre-judgment interest under s 547 of the FW Act, the Second Respondent says that if it is liable to pay compensation to Dr Tham or the Group Members (which is denied) then good cause has been shown that the order should not include interest as:
- a. Dr Tham and the Group Members were obliged to seek approval for and claim payment for unrostered overtime at or around the time it was worked;
 - b. further or alternatively, had approval been sought and payment claimed then the unrostered overtime would have been paid by the Second Respondent shortly after the claim was made and/or the Second Respondent would have taken steps to avoid further unrostered overtime being worked;
 - c. further or alternatively, it is practically difficult to calculate the amount of interest on any unpaid unrostered overtime.
357. In further to Dr Tham's claim for pecuniary penalties under s 546 of the FW Act, the Second Respondent says that if it contravened s 50 of the FW Act (which is denied) then the Court should not impose a pecuniary penalty for any such contravention, including because:
- a. Dr Tham and the Group Members had a contractual obligation to seek approval for and claim payment for unrostered overtime;
 - b. the contraventions were not deliberate and the Second Respondent had a genuine and bona fide belief, based on the information provided to it and its understanding of its obligations under the 2013 EA, 2017 EA and 2021 EA, that it was not required to pay any further amounts to Dr Tham and the Group Members in respect of unapproved and unclaimed overtime.

Date: 8 June 2023



Signed by Kate Plowman
Lawyer for the Second Respondent

This pleading was prepared by Kate Plowman, lawyer, and settled by Jerome Entwisle of counsel.

Certificate of lawyer

I, Kate Plowman certify to the Court that, in relation to the defence filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 8 June 2023



Signed by Kate Plowman
Lawyer for the Second Respondent