

NOTICE OF FILING

Details of Filing

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File Number: VID705/2022
File Title: YING YING THAM v AUSTRALIAN CAPITAL TERRITORY & ANOR
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



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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.



Reply
to the Amended Defence of the First Respondent

VID 705 of 2022

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

Ying Ying Tham

Applicant

Australian Capital Territory

First Respondent

Calvary Health

Second Respondent

Save for any admissions, the Applicant joins issue with the Amended Defence of the First Respondent dated 25 May 2023 and otherwise replies as follows:

1. To the allegations in paragraph 2(a) of the Amended Defence, the Applicant admits that she was employed pursuant to the contracts of employment identified in paragraph 2(b), and otherwise denies the allegations in paragraph 2(a) of the Amended Defence.
2. To the allegations in paragraph 2(b) of the Amended Defence, the Applicant admits that each of her contracts of employment identified in paragraph 2(a) of the Amended Defence stated that “*The terms and conditions of your employment are set out in the current ACT Public Service Medical Practitioners Enterprise Agreement, Public Sector Management Act 1994 and Standards and are those relating to temporary employees*”, and otherwise denies the allegations in paragraph 2(b) of the Amended Defence.

Filed on behalf of:	Dr Ying Ying Tham (the Applicant)		
Prepared by:	Andrew Grech		
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3. To the allegations in paragraph 2(c) of the Amended Defence, the Applicant admits that clause 131.1 of the 2013 EA, clause 131.1 of the 2017 EA, and clause 137.1 of the 2021 EA provided that “*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*”, and otherwise denies the allegations in paragraph 2(c) of the Amended Defence.
4. The Applicant admits the allegations in paragraph 2(d) of the Amended Defence.
5. To the allegations in paragraphs 10(a) to (i) of the Amended Defence, the Applicant admits that the 2013 EA, the 2017 EA and the 2021 EA (**the Agreements**) contained the clauses identified in the particulars to paragraphs 10(a) to (i), and otherwise denies the allegations in paragraph 2(c) of the Amended Defence.
6. The Applicant does not know, and so cannot admit the allegations in paragraph 15(b) of the Amended Defence, as the First Respondent has refused to provide the secondment agreement between the Territory and Southern NSW Local Health District.
7. To the allegations in paragraph 20(c) of the Amended Defence, the Applicant joins issue and says further that she did not attend a formal orientation or induction at the commencement of her employment by the Territory, as none was provided to her.
8. The Applicant denies the allegations in paragraph 20(e) of the Amended Defence and says further that the Applicant’s employment contracts described in paragraph 2(b) of the Amended Defence do not contain any reference to the Overtime Policy or any overtime policy.
9. To the allegations in paragraph 20(f), the Applicant refers to paragraph 7 above, and:
 - (a) admits that on 22 September 2020, she was provided with the FAQ referred to in the particulars to paragraph 20(f);
 - (b) says that the departments or units in which she worked did not have a uniform approach to unrostered overtime;
 - (c) otherwise denies the allegations in paragraph 20(f) of the Amended Defence.

10. To the allegations in paragraphs 20(g), 23(b), 26(a), 32(b), 35(a), 41(b), 44(a), 63(b), 66(a), 72(b), 75(a), 83(b), 86(a), 92(b), 95(a), 103(b), 106(a), 114(b), 117(a), 123(b), 126(a), 132(b) and 135(a), the Applicant admits that she made some claims for unrostered overtime during her employment by the Territory, and otherwise denies the allegations in paragraphs 20(g), 23(b), 26(a), 32(b), 35(a), 41(b), 44(a), 63(b), 66(a), 72(b), 75(a), 83(b), 86(a), 92(b), 95(a), 103(b), 106(a), 114(b), 117(a), 123(b), 126(a), 132(b) and 135(a).
11. To the allegations in Part D of the Amended Defence regarding the Overtime Policy of the First Respondent, the Applicant joins issue and says that:
 - (a) clause 36.1 of the 2013 EA, clause 35 of the 2017 EA and clause 36 of the 2021 EA do not, on their proper construction, impose any additional condition on the Applicant or any Group Member's right to be paid for overtime, other than as set out in those clauses;
 - (b) to the extent there is any conflict between the terms of clause 36 of the 2013 EA, clause 35 of the 2017 EA and clause 36 of the 2021 EA and any overtime policy of the First Respondent concerning an employee's entitlement to be paid for working overtime pursuant to a requirement or request to work reasonable additional hours, the terms of the Agreements prevail;
 - (c) to the extent there is any conflict between the terms of clause 36 of the 2013 EA, clause 35 of the 2017 EA and clause 36 of the 2021 EA and the terms of any employment contract between the Applicant and Group Members, and the First Respondent, concerning an employee's entitlement to be paid for working overtime pursuant to a requirement or request to work reasonable additional hours, the terms of the Agreements prevail;
 - (d) to the extent there is any conflict between the terms of clause 36 of the 2013 EA, clause 35 of the 2017 EA and clause 36 of the 2021 EA and any overtime policy of the First Respondent, and the terms of any direction or advice given to the Applicant and Group Members by the First Respondent an employee's entitlement to be paid for working overtime pursuant to a requirement or request to work reasonable additional hours, the terms of the Agreements prevail.

12. To the allegations in paragraph 339 of the Amended Defence, the Applicant joins issue and refers to and repeats paragraphs 8, and 11(b), (c) and (d) above.
13. To the whole of the allegations in Part F of the Amended Defence (Estoppel), the Applicant refers to and repeat paragraph 11 above and says further, as pleaded in the Further Amended Statement of Claim, that the First Respondent:
 - (a) directed the Applicant and Group Members to perform the work pleaded;
 - (b) knew that the Applicant and Group Members could not perform that work during rostered hours;
 - (c) knew that the Applicant and Group Members worked overtime to perform that work; and
 - (d) did not direct them not to do such overtime; and as a result:
 - (i) the First Respondent cannot have made the assumption pleaded in paragraph 344 of the Amended Defence;
 - (ii) the conduct of the Applicant and Group Members cannot have amounted to a representation as pleaded at paragraph 345 of the Amended Defence;
 - (iii) the First Respondent cannot have acted in reliance on any such assumption or representation, as pleaded at paragraph 346 of the Amended Defence, or in any event any such reliance cannot have been reasonable, as pleaded at paragraph 347 of the Amended Defence;
 - (iv) the First Respondent's failure to take steps as pleaded at paragraphs 346(d) cannot be explained by any such assumption or representation.
 - (e) in any event, estoppel is unavailable as a matter of law to defeat a claim of contravention of section 50 of the FW Act.
14. Further, as to the allegations in paragraphs 348, the Applicant says that the First Respondent has had the benefit of the work performed during unrostered overtime by the Applicant and Group Members.

Date: 9 June 2023

A handwritten signature in blue ink, appearing to read "Andrew Grech". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

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Signed by Andrew Grech
Lawyer for the Applicant

This pleading was prepared by C W Dowling SC and K Burke of counsel

Certificate of lawyer

I, Andrew Grech, certify to the Court that, in relation to the Reply filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 9 June 2023



Signed by Andrew Grech
Lawyer for the Applicant