

NOTICE OF FILING

Details 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.



Reply
to the Amended Defence of the Second 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 Second Respondent dated 8 June 2023 and otherwise replies as follows:

1. To the allegations in paragraph 10(b) 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 paragraph 10(b), and otherwise denies the allegations in paragraph 10(b) of the Amended Defence.
2. To the allegations in paragraph 13A of the Amended Defence, the Applicant admits that the Agreements contained the clauses identified in the particulars to paragraphs 13A(a) to (i), and otherwise denies the allegations in paragraph 13A of the Amended Defence.

Filed on behalf of:	Dr Ying Ying Tham (the Applicant)		
Prepared by:	Andrew Grech		
Law firm:	Gordon Legal		
Tel:	(03) 9603 3000	Fax:	(03) 9603 3050
Email:	agrech@gordonlegal.com.au		
Address for service:	Level 22, 181 William Street, Melbourne VIC 3000		

3. To the allegations in paragraph 13B of the Amended Defence, 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 the Agreements and any overtime policy of the Second 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 the Agreements and the terms of any employment contract between the Applicant and Group Members, and the Second 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 the Agreements and any overtime policy of the Second Respondent, and the terms of any direction or advice given to the Applicant and Group Members by the Second 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.
4. To the allegations in paragraph 13C of the Amended Defence, the Applicant admits that she was employed pursuant to a contract of employment dated 28 August 2020, and otherwise denies the allegations in paragraph 13C of the Amended Defence.
5. To the allegations in paragraph 13D of the Amended Defence, the Applicant:
 - (a) admits that her contract of employment identified in paragraph 13C of the Amended Defence stated at clause 10 that *"As a Calvary employee you are to be aware of, and comply with, its policies and procedures which are available to you online. These policies and procedures may be amended from time to time"*

(a link was then provided), and stated at clause 12 that “*To meet Calvary’s Mission of ‘Being for Others’ you are required to: ... follow all reasonable and lawful directions given to you by the employer, including complying with policies and procedures as referenced in these terms and conditions*”;

- (b) admits that the Agreements contained the clauses identified in the particulars to paragraph 13D of the Amended Defence;
 - (c) otherwise denies the allegations in paragraph 13D of the Amended Defence.
6. To the allegations in paragraph 13E, the Applicant refers to and repeats paragraph 3 above, and otherwise denies the allegations in paragraph 13E of the Amended Defence.
7. To the allegations in paragraph 13F, the Applicant:
- (a) admits that she made claims for unrostered overtime on the dates set out in the particulars to paragraph 13F of the Amended Defence;
 - (b) does not know and so cannot admit the amounts claimed set out in the particulars to paragraph 13F of the Amended Defence;
 - (c) otherwise denies the allegations in paragraph 13F of the Amended Defence.
8. To the allegations in paragraph 142(b)(iii), the Applicant admits that handover was scheduled to take place at 4.00pm, and refers to and repeats the particulars to paragraph 143 of the Further Amended Statement of Claim.
9. To the allegations in paragraphs 148(e), 159(e) and the whole of Part H of the Amended Defence (Estoppel), the Applicant refers to and repeats paragraph 3 above and says further that, as pleaded in the Further Amended Statement of Claim, the Second 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 conduct of the Applicant and Group Members cannot have amounted to a representation as pleaded at paragraph 340 of the Amended Defence;
 - (ii) the Second Respondent cannot have made the assumption pleaded in paragraph 342 of the Amended Defence;
 - (iii) the Second Respondent cannot have acted in reliance on any such assumption or representation, as pleaded at paragraphs 342 and 349 of the Amended Defence, or in any event any such reliance cannot have been reasonable, as pleaded at paragraph 345, 346 and 349 of the Amended Defence;
 - (iv) the Second Respondent's failure to take steps as pleaded at paragraphs 349 and 350 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.

10. Further, as to the allegations in paragraph 350, the Applicant says that the Second Respondent has had the benefit of the work performed during unrostered overtime by the Applicant and Group Members.

Date: 9 June 2023



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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