

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



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.

Rule 15.0

Second Respondent's Statement of Cross Claim



No. VID705 of 2022

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

YING YING THAM

Applicant

AUSTRALIAN CAPITAL TERRITORY and another
Respondents

Calvary Health Care ACT Limited (ACN 105 304 989)

Cross-Claimant

YING YING THAM

Cross-Respondent

PRELIMINARY

In this defence, unless otherwise stated or the context otherwise requires the Second Respondent adopts the definitions in the statement of claim and its defence to the statement claim filed on 4 May 2023 (**defence**). To the extent any term is defined differently in the statement of claim and the defence, the definition in the defence is adopted in this statement of cross-claim.

STATEMENT OF CROSS-CLAIM

If, which is denied, the Second Respondent and Cross-Claimant (the **Second Respondent**) is liable to pay compensation to or pecuniary penalties by reason of the allegations made by the Cross-Respondent (**Dr Tham**), then solely for the purposes of this cross-claim and without admission, the Second Respondent pleads against Dr Tham as follows:

Filed on behalf of (name & role of party) Calvary Health Care ACT Limited, Second Respondent
Prepared by (name of person/lawyer) Kate Plowman
Law firm (if applicable) MinterEllison
Tel (02) 9921 8580 Fax _____
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(include state and postcode)

[Form approved 01/08/2011]

Relevant parts of defence

1. Paragraphs 2(e), 5, 6 to 14, and 151 to 162C of the statement of claim are repeated.
2. Paragraphs 13A and 13C to 13F of the Second Respondent's defence are repeated.

Breach of contract

3. At all material times, Dr Tham had a contractual obligation to the Second Respondent to 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.

Particulars

The obligation pleaded arose from the terms of Dr Tham's contract of employment requiring her to comply with the Second Respondent's policies and lawful directions, which policies and lawful directions included this requirement as pleaded at paragraphs 13D and 13E of the defence.

4. To the extent that Dr Tham worked unrostered overtime in addition to the approved overtime for which she was paid (**Unapproved Unrostered Overtime**) (which is not admitted), then Dr Tham:
 - a. did not seek approval for that overtime either before or after working the overtime;
 - b. accordingly, has breached the terms of her contract with the Second Respondent.
5. Had Dr Tham sought approval for the Unapproved Unrostered Overtime in accordance with her contractual obligations, the Second Respondent:
 - a. would have approved and paid the Unapproved Unrostered Overtime to the extent the overtime was actually worked and was required to perform Dr Tham's role and responsibilities;
 - b. further or alternatively, taken steps to avoid Dr Tham working any further Unapproved Unrostered Overtime in the future.

Particulars

The pleadings and particulars at paragraphs 342, 349 and 350 of the defence are repeated.

6. The Second Respondent has suffered loss by reason of Dr Tham's breach of contract.

Particulars

The Second Respondent's loss includes:

- (i) any interest payable under s 547 of the FW Act in respect of any failure to pay Dr Tham in respect of Unapproved Unrostered Overtime;
- (ii) any penalties payable under s 546 of the FW Act in respect of any failure to pay Dr Tham in respect of Unapproved Unrostered Overtime; and
- (iii) loss of the opportunity to avoid incurring further liabilities or penalties for Dr Tham's Unapproved Unrostered Overtime by taking the steps pleaded in paragraph 5.b above.

7. In the premises, the Second Respondent is entitled to damages for the loss it has suffered by reason of Dr Tham's breach of contract.

Contravention of EAs

8. Pursuant to s 50 of the FW Act, Dr Tham was required not to contravene a term of the 2017 EA and the 2021 EA.
9. Each of the 2017 EA and 2021 EA required Dr Tham:
- a. to maintain an appropriate record (as specified by the employer) of duty performed including recording the time of commencing and ceasing duty for each day; and
 - b. claim payment for any overtime within three weeks.

Particulars

2017 EA, clause 24.2, 28.3.

2021 EA, clause 24.2, 29.3.

10. At all relevant times, the appropriate record specified by the Second Respondent for the purposes of the 2017 EA and the 2021 EA was:
- a. in respect of ordinary hours and rostered overtime, the Kronos system; and
 - b. in respect of unrostered overtime, a request for approval by email or SMS containing:
 - i. the medical officer's name;
 - ii. the medical officer's position;
 - iii. the unrostered overtime hours proposed/worked; and
 - iv. the justification (i.e. the reason and reference for relevant patients).

Particulars

The records were specified by the Second Respondent in the Junior Medical Officer Kronos Clock Punch and Unrostered Overtime Approval Process, and otherwise through the policies and directions particularised at paragraph 13E of the defence.

11. To the extent that Dr Tham worked Unapproved Unrostered Overtime, then Dr Tham:
 - a. did not:
 - i. maintain an appropriate record (as specified by the employer) of duty performed including recording the time of commencing and ceasing duty for each day;
 - ii. further or alternatively, claim payment for any such overtime within three weeks; and
 - b. accordingly, has contravened the terms of the 2017 EA and 2021 EA (and thereby s 50 of the FW Act).
12. Had Dr Tham complied with the terms of the 2017 EA and 2021 EA (and thereby s 50 of the FW Act), then the Second Respondent:
 - a. would have approved and paid the Unapproved Unrostered Overtime to the extent the overtime was actually worked and was required to perform Dr Tham's role and responsibilities;
 - b. further or alternatively, taken steps to avoid Dr Tham working any further Unapproved Unrostered Overtime in the future.

Particulars

The pleadings and particulars at paragraphs 342, 349 and 350 of the defence are repeated.

13. The Second Respondent has suffered loss by reason of Dr Tham's contraventions of the 2017 EA and 2021 EA (and thereby s 50 of the FW Act).

Particulars

The Second Respondent's loss includes:

- (iv) any interest payable under s 547 of the FW Act in respect of any failure to pay Dr Tham in respect of Unapproved Unrostered Overtime;

- (v) any penalties payable under s 546 of the FW Act in respect of any failure to pay Dr Tham in respect of Unapproved Unrostered Overtime; and
- (vi) loss of the opportunity to avoid incurring further liabilities or penalties for Dr Tham's Unapproved Unrostered Overtime by taking the steps pleaded in paragraph 12.b above.

14. In the premises, the Second Respondent seeks an order under s 545 of the FW Act compensating it for the loss it has suffered by reason of Dr Tham's contraventions.

Date: 4 May 2023



Signed by Kate Plowman
Lawyer for the Second Respondent

This pleading was prepared by Jerome Entwisle of counsel.

Certificate of lawyer

I, Kate Plowman certify to the Court that, in relation to the cross-claim filed on behalf of the Second 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: 4 May 2023



Signed by Kate Plowman
Lawyer for the Second Respondent