

NOTICE OF FILING

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Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32
File Number: SAD156/2020
File Title: CRAIG SCHONEWEISS v THE FOURTH FORCE PTY LTD (ACN 084 438 773) & ANOR
Registry: SOUTH AUSTRALIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 18/02/2021 8:44:58 AM ACDT

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

Registrar

Important Information

As required by the Court's Rules, 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 and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Defence

No. of 20

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

Craig Schoneweiss

Applicant

The Fourth Force Pty Ltd (ACN 084 438 773)

First Respondent

and

Dramet Pty Ltd (CAN 109 544 425)

Second Respondent

PRELIMINARY

- (a) Have adopted definitions and headings as contained in the Applicant's Statement of Claim;
- (b) Despite adopting definitions from the Statement of Claim, do not admit to any factual assertions contained therein, or in any way implied by the Statement of Claim.

THE RESPONDENTS

In answer to the matters alleged by the Plaintiff in the Statement of Claim (**SOC**), the Respondents:

1. Admit to paragraph 1.
2. Admit to paragraph 2.

SUPERMARKETS OPERATED BY THE RESPONDENTS

3. In response to paragraph 3:
 - a. Admit that the First Respondent operated retail supermarkets identified in Schedule B to the SOC, save for the following:
 - i. The *Ardrossan Foodland* and *Drakes Ardrossan*, as being located at 6-8 Fifth Street, Ardrossan SA 5571 are the same store, not two stores; and

- ii. Beverley Storage Solutions, located at 15 Alfred Avenue, Beverley SA 5009 is not a retail supermarket and is not a business or enterprise covered by the *General Retail Industry Award 2020 (GRIA)*.

4. In response to paragraph 4:

- a. Admit that the Second Respondent operated retail supermarkets identified in Schedule C of the SOC, save for the following:

- i. *Angle Vale Foodland IGA* and *Drakes Angle Vale*, located at Shop 1 121-129 Heaslip Road, Angle Vale SA 5117 are the same store. Not two stores.

REPRESENTATIVE PROCEEDINGS

- 5. In response to paragraph 5, the Respondents acknowledge the SOC as being brought as a representative proceeding but do not plead to it as no allegation is contained therein.

APPLICANT'S EMPLOYMENT – EMPLOYMENT PERIODS

- 6. Admit to paragraph 6.
- 7. Admit to paragraph 7.
- 8. Admit to paragraph 8.
- 9. Admit to paragraph 9.
- 10. Admit to paragraph 10, and state further that the First and Second Respondents are related entities for the purpose of the Corporations Act 2009 and the Applicant's employment benefits continued unaffected by his move to Queensland.
- 11. Admit to paragraph 11, and state further that the amount the Applicant was paid by way of salary was in addition to the amount of \$3,000 paid to him by the Respondents for moving and relocation expenses.
- 12. Admit to paragraph 12.
- 13. Admit to paragraph 13.
- 14. Admit that the Applicant resigned his employment with the Second Respondent as pleaded, however, further state:
 - a. The resignation of the Applicant occurred by way of letter dated "3/10/18" (**Resignation Letter**);
 - b. The Resignation Letter was provided to the Second Respondent on or around 3 September 2018;

- c. The Applicant's final day of employment was 29 September 2018;
- d. The Second Respondent understood the Resignation Letter to be incorrectly dated by the Applicant.

APPLICANT'S EMPLOYMENT DUTIES AND AWARD COVERAGE

- 15. In response to paragraph 15, the Respondents deny the following were part of the Applicant's duties as Grocery Manager:
 - a. *Investment buying*
 - b. *Decision making in relation to deleting lines at store level if having issues;*
 - c. *Profit and loss of grocery department;*
- 16. In response to paragraph 16, the Respondents deny the following were part of the Applicant's duties as Assistant Store Manager:
 - a. *Accountability alongside the store manager;*
 - b. *Store wages and wastage;*
 - c. *Investigating departments making a loss;*
 - d. *Assisting refits;*
 - e. *Terminating staff employment where necessary;*
 - f. *Return to work programs;*
 - g. *Store banking (financials and transactions).*
- 17. In response to paragraph 17, the Respondents admit that the Applicant was covered by the GRIA and classified as a Retail Employee Level 6.

APPLICANT'S REGULAR HOURS OF WORK

- 18. Admit to paragraph 18.
- 19. Admit to paragraph 19.
- 20. Admit to paragraph 20.
- 21. Deny paragraph 21.
- 22. In response to paragraph 22, the Respondents:
 - a. Admit to the regular patterns of rostered hours as identified in the SOC;
 - b. Deny the actual hours worked as pleaded in the SOC, and further state:
 - i. The First Respondent did not require or expect the Applicant, or any employee, to attend or undertake any duties prior to, or following, the

commencement or conclusion of their rostered hours, unless a specific request to work additional hours had been made in accordance with the GRIA;

- ii. The requirement to take a 60 minute break was introduced by the First Respondent on or around 17 August 2015. Prior to this date employees were entitled to a 30 minute break;
- iii. Employees, including the Applicant, were required to use the time clock system to record instances in which they did not receive a 60 minute break. The Applicant did not record a break of less than 60 minutes on any occasion following 17 August 2015 during his employment with the First Respondent.

23. In response to paragraph 23, the Respondents:

- a. plead the detail in paragraph 22 above, save that references to the First Respondent are replaced with references to the Second Respondent;
- b. state that from 1 July 2017 senior employees of the Respondents were no longer required by the Respondents to use the time clock system for recording time. This change was the result of a specific request from the store management staff collectively to not be required to “clock in and out”. The Respondents conducted an internal poll and store management staff stated during that process that their seniority meant they should not be required to clock in and out, but, rather, should be allowed to work the hours required without recording.

24. In response to paragraph 24, the Respondents:

- a. Admit the Applicant was on occasion rostered to work, and did work, a late shift;
- b. Deny the actual hours worked as contained in the SOC and replead paragraph 22(b).

25. Deny paragraph 25 and re-plead the detail of paragraph 22(b) above.

26. In response to paragraph 26, the Respondents:

- a. Admit that on occasion the Applicant worked a rostered weekday shift on a weekend day;
- b. Deny that the Applicant had a break of 30 minutes, rather than 60 minutes, as pleaded in sub-paragraphs (c) and (d) of paragraph 26.

27. Deny paragraph 27.

28. Deny paragraph 28.

29. Deny paragraph 29 and again state:

- a. The Respondents did not require or expect the Applicant, or any employee, to attend or undertake any duties prior to, or following, the commencement or conclusion of their rostered hours, unless a specific request to work additional hours had been made in accordance with the GRIA.

APPLICANT'S ADDITIONAL HOURS OF WORK

30. Admit to paragraph 30.

31. Admit to paragraph 31.

32. Deny paragraph 32, and further state:

- a. The Respondents did not direct or require any employees to work additional shifts beyond their rostered shifts to cover the absence of other staff;
- b. Relevant staff were asked if they were willing and able to work additional shifts to cover staff absences on a needs basis. At all times the staff were consistently informed that there was no requirement for them to accept such additional shifts.

33. Deny paragraph 33, and state further:

- a. The Applicant was at no time designated "on-call" to attend the supermarket for alarm call outs or equipment breakdowns;
- b. When an alarm is set off, or equipment breaks down, any number of staff, including the General Manager, may be contacted. A list of possible contacts is utilised to alert staff that an alarm has been set off. This list includes the senior staff at the relevant store. The person calling to notify of the alarm will make his/her way down the list of contacts until a person attends;
- c. Any staff attending after hours call outs were required to 'clock in and out' to recognise such an attendance, or otherwise record the time of their attendance and produce it to the Respondents;
- d. The Respondents have no knowledge or record of the Applicant having attended a call out. In the event that the Applicant did attend call outs, no recording of such an attendance was made;
- e. The Respondents deny the frequency of any such callouts as pleaded in the SOC.

34. Deny paragraph 34.

35. Admit to paragraph 35.

APPLICANT'S ENTITLEMENT TO ALLOWANCES

36. Deny paragraph 36, and further state:
- a. The Respondents do not have a system of 'acting up';
 - b. When a store manager takes leave, another employee at the same level of seniority from a different location is brought in to perform the role of store manager;
37. Deny paragraph 37, and further state:
- a. In instances when the Store Manager was absent due to temporary illness, or when the Applicant was rostered to work a Saturday and the Store Manager was not, the Applicant continued to work his ordinary duties only. Duties at the higher level that fall within the responsibility of the Store Manager were left for the Store Manager's return to work.
38. Deny paragraph 38.
39. Deny paragraph 39 and re-plead the detail of paragraph 36(a) above.
40. In response to paragraph 40, the Respondents:
- a. Admit that the Applicant stayed back on occasion to work later than his rostered hours with less than 24 hours' notice;
 - b. State that the remuneration paid to the Applicant was as compensation for all hours worked, including additional hours, and any above Award payments made can be off-set against the Overtime Without Meal entitlement.

Particulars

Clauses 3 and 6 of the Applicant's employment contract for the Hallett Cove period, and Clauses 3 and 7 of the Applicant's employment contract for the Parkinson period.

41. In response to paragraph 41, the Respondents:
- a. Admit that on occasion(s) when the Applicant remained working late beyond his rostered hours without 24 hours' notice he was not provided a meal by the Respondents;
 - b. Deny that the Applicant was entitled to additional payment for the reasons pleaded at paragraph 40 above.
42. Deny paragraph 42.
43. Admit to paragraph 43.

44. Admit to paragraph 44 only to the extent that it applied to instances in which the Applicant was the most senior staff member rostered for a particular shift.
45. Admit to paragraph 45 only to instances in which the Applicant was the most senior person rostered for a particular shift.
46. In response to paragraph 46, the Respondents:
 - a. Admit to requiring between two and five staff at each store be first aid trained;
 - b. Deny each was appointed to perform first aid duty when at work;
 - c. State that only the most senior person at each store was performing first aid duty when at work. For example, when the store manager was working and the Assistant Store Manager is also working, only the Store Manager is considered appointed to perform first aid duty.
47. In response to paragraph 47, the Respondents:
 - a. Deny the Applicant was required to assist in undertaking cold work for an average of 2.5 hours per week;
 - b. Admit the Applicant did on occasion assist with loading/unloading products from refrigerated display cabinets.
48. Denies paragraph 48, save for the position of "Dairy Manager".

REMUNERATION RECEIVED BY THE APPLICANT

49. Admit to paragraph 49.
50. Admit to paragraph 50.
51. Admit to paragraph 51.
52. Admit to paragraph 52.
53. Admit to paragraph 53.
54. Admit to paragraph 54.
55. Admit to paragraph 55.
56. Admit to paragraph 56.
57. Admit to paragraph 57.
58. Admit to paragraph 58.
59. Admit to paragraph 59.
60. Admit to paragraph 60.
61. Admit to paragraph 61.

62. Admit to paragraph 62.
63. In response to paragraph 63, the Respondents:
- a. Admit the Applicant was paid his ordinary weekly pay, additional Saturday Pay and Additional Sunday Pay as total remuneration for his duties;
 - b. Deny the Applicant was entitled any payment for cold work.
64. In response to paragraph 64, the Respondents:
- a. Admit the Applicant was paid his ordinary weekly pay, additional Saturday Pay and Additional Sunday Pay as total remuneration for his duties;
 - b. Deny the Applicant was entitled to any payment for cold work, or any higher duties.

THE APPLICANT'S AWARD ENTITLEMENTS AND THE FIRST AND SECOND RESPONDENT'S CONTRAVENTIONS

65. In response to paragraph 65, the Respondents:
- a. Admit the Applicant was not paid any Penalty Rate Entitlements (as defined in the SOC);
 - b. Admit the Applicant was not paid any Overtime Entitlements (as defined in the SOC);
 - c. Admit the Applicant was not paid any Allowance Entitlements (as defined in the SOC), however, further state:
 - i. The Applicant's remuneration was paid as compensation for hours worked, and any above Award payments made are to be off-set against Award entitlements relating to hours of work, being those described in the SOC as '*Penalty Rate Entitlements*', '*Overtime Entitlements*' '*Overtime Without Meal Entitlements*'.
 - ii. The Applicant was not entitled to any Cold Work Allowance as he was not during any relevant period principally employed to enter cold chambers or stock/refill refrigerated storage areas;
 - iii. The Applicant was not entitled to any Higher Duties allowance.
66. In response to paragraph 66, the Respondents:
- a. Deny the amounts paid to the Applicant for the Hallett Cove period were insufficient to discharge its Award obligations;
 - b. and further state:

- i. the amounts paid to the Applicant above minimum Award rates are to be offset against any entitlements relating to hours of work as contained in the Award and identified in the SOC.

67. In response to paragraph 67, the Respondents:

- a. Deny failing to comply with their obligations under the GRIA;
- b. alternatively:

- i. plead the terms of the Applicant's employment contracts to seek to offset the payments made above Award minimum standards against entitlements applicable to the Applicant relating to the hours of work.

68. Deny paragraph 68.

69. Deny paragraph 69.

70. In response to paragraph 71, the Respondents:

- a. Plead the terms of paragraph 66 above, save for references to the Hallett Cove Period are read as references to the Parkinson Period;

71. In response to paragraph 71, the Respondents:

- a. Plead the terms of paragraph 67 above.

72. Deny paragraph 72.

73. Deny paragraph 73.

74. Admit paragraph 74.

75. Admit to paragraph 75.

76. Admit to paragraph 76.

77. Admit to paragraph 77.

78. Admit to paragraph 78.

79. Admit to paragraph 79.

80. Admit to paragraph 80.

81. Admit to paragraph 81.

82. Admit to paragraph 82.

83. Admit to paragraph 83.

84. Deny paragraph 84, and further state:

- a. All deductions made in relation to uniform were expressly authorised in writing by the Applicant, and any other staff members;
 - b. The uniform items for which deductions were made were not necessary or required;
 - c. The Applicant, and others, opted to accept these uniform items and provided authority in writing for the deductions to be made.
85. Deny paragraph 85.
86. Deny paragraph 86
87. In response to paragraph 87, the Respondents:
- a. Admit to the Applicant suffering loss by virtue of the Leave Loading Contraventions;
 - b. Deny the Underpayment Contraventions and Deduction Contravention or that the Applicant has suffered any loss relating to these claims.
88. Deny paragraph 88. As the Applicant was not entitled to additional payment for overtime the Respondents were not obliged to keep such records pursuant to Fair Work Regulation 3.34.
89. Admit to paragraph 89.
90. Admit to paragraph 90.
91. Admit to paragraph 91, and further state:
- a. During the first half of 2017, the Respondents were requested by the store senior staff (collectively) to cease using the Kronos site attendance record keeping system. That is, senior store staff did not want to have to “clock on and off” each day;
 - b. The senior store staff advised the Respondents that they collectively felt it undermined their seniority and felt as though they were being “micro-managed” by being required to clock on and off;
 - c. The Respondents conducted a poll of the senior store staff to ensure that this was a common feeling amongst the collective group and to seek the senior staffs’ preference for future time recording arrangements;
 - d. The determination to cease senior store staff using the Kronos system was specifically at the request of the affected staff.
 - e. As the senior store staff were not entitled, by the terms of their employment contracts, to additional payment for overtime hours worked, the Respondents

were not required to keep such records in accordance with Fair Work Regulation 3.34.

- 92. Deny paragraph 92. As the Applicant was not entitled to additional payment for overtime the Respondents were not obliged to keep such records pursuant to Fair Work Regulation 3.34.
- 93. Deny paragraph 93.
- 94. In response to paragraph 94, the Respondents do not plead as no allegation is contained therein.

GROUP MEMBERS' CLAIMS

- 95. Admit to paragraph 95.
- 96. In response to paragraph 96, the Respondents:
 - a. Admit to sub-paragraph (a);
 - b. Admit to sub-paragraph (b);
 - c. Admit to sub-paragraph (c);
 - d. Deny sub-paragraph (d) to the extent that *Assistant Department Managers, Nightfill Managers, some Department Managers* (depending on the particular store), are not classified as either Level 6 or Level 8 under the GRIA, but rather may be classified at lower levels.
 - e. Deny sub-paragraph (e) for the reasons identified in paragraphs 15 and 16 above.
- 97. In response to paragraph 97, the Respondents:
 - a. Admit to sub-paragraph (a);
 - b. Deny any additional work outside of rostered hours was performed pursuant to a common or general practice as pleaded in the SOC.
- 98. In response to paragraph 98, the Respondents:
 - a. State that Group Members were subject to contracts of employment with annualised salary on substantially the same terms as the Applicant;
 - b. any payments made over minimum Award standards are to be offset against hours of work entitlements.
- 99. In response to paragraph 99, the Respondents deny there was any common or general practice as pleaded in the SOC, and repeats that in the event that any Group Members are found to have been entitled to the Penalty Rate Entitlements (as defined in the

SOC), any payments made over minimum Award standards are to be offset against those entitlements.

100. In response to paragraph 100, the Respondents again plead the details of paragraph 99 above.
101. In response to paragraph 101, the Respondents deny that the Group Members were entitled to the Allowance Entitlements (as defined in the SOC), save for occasions in which the first aid allowance was payable to the most senior person rostered for any given shift, and the Dairy Manager for Cold Work Allowance, which was paid.
102. In response to paragraph 102, the Respondents re-plead paragraph 101 above, and further:
 - a. Admit Group Members were not paid a first aid allowance when rostered as the most senior first aid trained employee on shift.
103. Admit to paragraph 103.
104. Admit to paragraph 104.
105. Admit to paragraph 105.
106. Admit to paragraph 106.
107. Admit to paragraph 107 to the extent that Group Members were entitled to Leave Loading Entitlements and applicable Allowances . The Respondents deny Overtime Entitlements and Penalty Rate Entitlements were applicable pursuant to the terms of the Group Members' respective employment contracts.
108. Admit to paragraph 108 to the extent that it relates to applicable allowances not paid.
109. Admit to paragraph 109.
110. Admit to paragraph 110 to the extent of applicable Allowance Entitlements and Leave Loading Entitlements.
111. Admit to paragraph 111 except for the reference to a requirement as there was no requirement to wear the uniforms.
112. Deny paragraph 112 for the reasons outlined in paragraph 84 above.
113. Deny paragraph 113.
114. Deny paragraph 114. As the Group Members were not entitled to additional payment for overtime the Respondents were not obliged to keep such records pursuant to Fair Work Regulation 3.34.
115. Admit to paragraph 115.

116. Deny paragraph 116.

117. Acknowledge but do not plead to paragraph 117 as no allegation is contained therein.

COMMON ISSUES

118. Do not plead to paragraph 118 as no allegation is contained within it, and will otherwise address the questions of law or fact common to the claim of Group Members at the appropriate time.

REMEDIES

119. Oppose the remedy sought.

Date: 16 February 2021



Signed by Adam Crichton
Lawyer for the Respondents

This pleading was prepared by Adam Crichton, lawyer

Certificate of lawyer

I Adam Crichton 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: 16 February 2021



Signed by Adam Crichton
Lawyer for the Respondent