

NOTICE OF FILING

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Details of Filing

Document Lodged:	Statement of Claim - Form 17 - Rule 8.06(1)(a)
File Number:	NSD2168/2019
File Title:	RAYMOND BOULOS v M.R.V.L. INVESTMENTS PTY LTD ACN 000 620 888
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading "Sia Lagos".

Dated: 13/12/2021 2:52:24 PM AEDT

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.

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**Second Further Amended
Statement of claim**

NSD 2168 of 2019

Federal Court of Australia
New South Wales District Registry
Fair Work Division

Raymond Boulos
Applicant

M.R.V.L. Investments Pty Ltd (ACN 000 620 888)
Respondent

Parties and Group Members

1. The Respondent ("**MRVL**") was at all times during the period of 6 years ending on the day of filing of the Originating Application (24 December 2019) herein the (the "**Claims Period**"):
 - (1) a company registered under the Corporations Act 2001 (Cth) and liable to be sued in its own name;
 - (2) a constitutional corporation within the meaning of that phrase in the *Fair Work Act 2009* (Cth) ("**FW Act**"); and
 - (3) in so far as it employed, or usually employed, an individual "a national system employer" within the meaning of that phrase in ss12 and 14 of the FW Act.
- 1A The Applicant brings these proceedings on his own behalf and, pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth), on behalf of the group members defined in the Amended Originating Application (**Group Members**).
2. The Applicant ("**Mr Boulos**") in so far as he was in the Claims Period employed or usually employed by MRVL, a "national system employee" within the meaning of that expression in ss12 and 13 FW Act.

Filed on behalf of Raymond Boulos, Applicant
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[Form approved 01/08/2011]

The Merivale Agreement

3. On 21 December 2007

(1) MRVL lodged, or caused to be lodged, with the Workplace Authority Director (the "**Director**") a document entitling itself as the "Merivale Employee Collective Agreement 2007" (the "**Merivale Agreement**"),

(2) as an "employee collective agreement" made in accordance with the *Workplace Relations Act 1996* (the "**WRA**"),

and that agreement thereupon came into operation.

4. The Merivale Agreement described its effect as being that it applied to all employees of MRVL employed on or after 9 December 2007.

5. The Merivale Agreement was one which, having regard to its terms, upon lodgement, required the Director to decide whether it was satisfied that the Merivale Agreement passed the fairness test prescribed in and for the purposes of Division 5A of Part 8 of the WRA ("**The Fairness Test**").

6. By letter dated 15 December 2008 to MRVL the Director

(1) notified MRVL that it had decided the Merivale Agreement did not pass The Fairness Test, and

(2) invited MRVL to vary the Merivale Agreement by lodging an undertaking.

7. On 29 December 2008 MRVL, by a letter from its solicitors, Harmers Workplace Lawyers dated that day, lodged with the Director, an undertaking by MRVL purporting to vary the Merivale Agreement as provided for in that undertaking (the "**Undertaking**").

8. As at 29 December 2008, the Merivale Agreement could not be, and was not, varied by the lodgement of the Undertaking.

WRA

Sch 7B cl. 3

9. In the premises pleaded in 3 to 8 above the Merivale Agreement ceased to operate on and from the end of 29 December 2008

s.346R(3)(a)

WRA

10. Alternatively to 8 above, by letter dated 30 January 2009 to MRVL the Director, among other things, notified MRVL that the Merivale Agreement (as varied by the Undertaking)

(1) did not pass the Fairness Test, and

(2) had that day ceased operating.

11. On 30 January 2009, in the premises pleaded in 3 to 7 and 10 above, the Merivale Agreement ceased to operate that day.

s.346U(c)

WRA

The Award

12. The Hospitality Industry (General) Award 2010 (the "**Award**")

(1) commenced on 1 January 2010; and

(2) remained in force as at the date of filing of the Originating Application herein.

13. Throughout the period of 6 years ending on the date of filing of the Originating Application herein, namely 25 December 2013 to 24 December 2019, (the "**Claims Period**"), the Award:

(1) covered and applied to

(a) employers in the "Hospitality Industry" in Australia within the meaning of that term in cl. 4.2 of the Award (the "**Hospitality Industry**"); and

(b) their employees in classifications within Schedule D (as numbered at the relevant time) to the Award "Classifications Definitions" (an/the "**Award Classification/s**");

and

(2) covered and applied to

(a) employers which supplied labour on an "on-hire" basis (within the meaning of that expression in cl. 3 of the Award) in the Hospitality Industry in respect of "on-hire" employees in classifications covered by the Award, and

(b) those on-hire employees while engaged in the performance of work for a business in the Hospitality Industry.

cll.4.1 & 4.6

Award

- 13A At all material times, MRVL supplied labour on an on-hire basis in the Hospitality Industry, and was covered by the Award.

- 13B At all material times, no agreement-based transitional instrument applied to MRVL within the meaning of sch 3 item 28 of the *Fair Work (Transitional Provisions and Consequential Amendments) 2009* (Cth) (**TPCA Act**).

Particulars

- A. On 21 December 2007, MRVL lodged the Merivale Agreement with the Workplace Authority Director (**Director**), and pursuant to s 347(1) of the WRA it came into operation on that date.
 - B. On 15 December 2008, the Director notified MRVL that the Merivale Agreement did not pass the fairness test, but because MRVL lodged a written undertaking varying the Merivale Agreement on 29 December 2012 (within the relevant period under the WRA), pursuant to ss 346R(4), 346T(3) of the WRA the Merivale Agreement as varied continued to operate nonetheless.
 - C. On 30 January 2009, the Director decided that the Merivale Agreement as varied did not pass the fairness test, so pursuant to ss 346W(a), 346ZB of the WRA the Merivale Agreement as varied ceased to operate on that date, and could never operate again.
 - D. On 11 June 2009, MRVL lodged a second undertaking with the Director. However, by operation of ss 346R(1)(a), 346(2)(b), 346(3) of the WRA, this undertaking was not capable of reviving the Merivale Agreement, or constituting a variation to any revived agreement.
 - E. In the premises, after 30 January 2009, by operation of s 351 of the WRA, no agreement made under the WRA bound MRVL in respect of its employees.
 - F. In the premises, after 30 January 2009, no agreement-based transitional instrument applied to MRVL in respect of its employees, within the meaning of TPCA Act sch 3 item 28.
- 13C In the premises, from 1 January 2010 to the end of the Claims Period, the Award applied to MRVL within the meaning of s 47 of the FW Act.
- 13D Further or in the alternative, insofar as on 4 June 2009 the Director purported to make a decision rescinding the notification of 15 December 2008 as set out in paragraph 13B particular B above (**Rescission Decision**), the decision was made without jurisdiction was of no lawful effect.
- 13E By reason of the matters set out in paragraph 13B particular C and paragraph 13D above, on and from 30 January 2009, the Merivale Agreement was of no lawful effect.

Mr Boulos's employment

14. By 15 September 2016, the Applicant was, for the purposes of the Award Classifications, of "Cook (tradesperson)" a trade qualified pastry chef.
 15. By a letter dated 15 September 2016 MRVL made an offer of employment to the Applicant (the "**Merivale Letter of Offer**") to work:
 - (1) on a full-time basis;
 - (2) as a Pastry Commis Chef;
 - (3) at "Felix",
(the "**Position**").
 16. The Merivale Letter of Offer among other things stated that:
 - (1) Mr Boulos was to work under the supervision and control of the Head Chef at Felix;
 - (2) his "Base Salary" was to be \$48,000 per annum;
 - (3) his "Weekly Ordinary Hours" were to be "38 hours"; and
 - (4) his employer was to be MRVL Investments Pty Ltd ATF the Hemmes Administration Trust (Merivale)".
 17. Felix was throughout the Claims Period, a venue in the Hospitality Industry which was operated by a client of MRVL, Hemmes Trading Pty Ltd (HT).
 18. In the circumstances pleaded in 1 – 2, 12 – 15, and 17 above the offer of the Position was an offer for the doing of work within an Award Classification; viz "Cook (tradesperson) grade 3".
- Award
cl. D2.2 (as numbered at the relevant time)
19. Mr Boulos:
 - (1) accepted the offer in the Merivale Letter of Offer on 15 September 2016;
 - (2) commenced work in the Position on 2 October 2016; and
 - (3) continued employment in the Position until the conclusion of the shift commenced by him on 17 March 2017.
 20. In the premises pleaded in 13A-C, 17 and 19 above, the Award covered and applied to
 - (1) MRVL; and
 - (2) Mr Boulos,

in respect of the entirety of the latter's employment in the Position (the "**Boulos Employment Period**").

21. At all material times, cl 10.1 of the Award provided:

"Employees under this award will be employed in one of the following categories:

(a) full-time;

(b) part-time; or

(c) casual."

22. At all material times, cl 11 of the Award provided:

"A full-time employee is an employee who is engaged to work an average of 38 ordinary hours per week."

23. Mr Boulos worked at Felix during Mr Boulos' Employment Period in accordance with a roster or rosters which:

(1) were usually prepared and displayed in the pastry area of the kitchen in Felix each Sunday night;

(2) set pre-determined hours of work for the week commencing the following day;

(3) specified the days, times and hours which Mr Boulos was required to work during the day or at night;

(4) included shifts and broken-shifts that required Mr Boulos to work an average of 55 hours or more per week.

(a/the "**Boulos Roster/s**").

Particulars

The Boulos Rosters were normally prepared by the Head Chef, Nathan Johnson. Further particulars will be provided following discovery.

Ordinary Hours and Ordinary Rate

24. At all material times, cl 29.1 of the Award:

(1) set out the alternative ways in which an average of 38 hours per week might be worked;

(2) required that the arrangement for working an average of 38 hours per week be agreed between the employer and the employee from among those alternatives; and

(3) required that any such arrangement meet conditions including:

- (a) a minimum of six hours and a maximum of eleven and a half hours may be worked on any one day. The daily minimum and maximum hours are exclusive of meal break interval;

Particulars

Subclause 29.1(b)(i)

- (b) an employee cannot be rostered to work for more than 10 hours per day on more than three consecutive days without a break of at least 48 hours immediately following;

Particulars

Subclause 29.1(b)(ii)

- (c) no more than eight days of more than 10 hours may be worked in a four week period.

Particulars

Subclause 29.1(b)(iii)

25. In the Boulos Employment Period, notwithstanding the requirements of the Award pleaded in 24(2) and (3) above, no arrangement in conformity with the requirements pleaded in 24(2) above or alternatively 24(3) above was made between MRVL and Mr Boulos for the working by him of an average 38 hours per week.
26. In the premises pleaded in 24 and 25 above Mr Boulos' maximum hours of work (before overtime) in any week worked by him was 38.
- s.62(1) FW Act
27. Mr Boulos was rostered to work and did work:
- (1) hours that regularly exceeded eleven and a half hours per day (exclusive of meal breaks);
 - (2) more than 10 hours per day on more than three consecutive days without a break of at least 48 hours immediately following;
 - (3) more than 10 hours per day on more than eight days in a four week period.
28. In respect of each failure whereby a roster required Mr Boulos to work
- (1) more than 38 hours per week, or
 - (2) in one or other or more of the ways pleaded in 27 above,

MRVL, by reason of that conduct, contravened clause 29.1 of the Award.

Award Minimum Wages

29. At all material times the minimum weekly and minimum hourly wage rates for adult employees within classifications in Schedule D of the Award, were set out in clause 20 of the Award "Minimum Wages".
30. By operation of cl. 20.1 of the Award, the Award Classification of "Cook (tradesperson) grade 3" was to be paid the "Level 4" grade of pay.
31. In respect of a Level 4 pay grade, the minimum weekly wage and hourly minimum wage from time to time payable under the Award in the Boulos Employment Period were as set out below:

Period to	Minimum weekly wage	Minimum hourly wage
1 July 2016	\$783.30	\$20.61
1 July 2017	\$809.10	\$21.29

32. At all material times the minimum hourly wage rate in clause 20.1 of the Award was the 'ordinary hourly rate' for the purposes of the Award.

Particulars

See definition in clause 3.1

Award

Penalties

33. At all material times, cl 32.3 of the Award provided that Employees will be entitled to the following additional penalty for work performed at the following times:
 - (1) Monday–Friday - 7:00 pm to midnight: 10% of the standard hourly rate per hour or any part of an hour for such time worked within the said hours;
 - (2) Monday–Friday – midnight to 7:00 am: 15% of the standard hourly rate per hour or any part of an hour for such time worked within the said hours.

(the **Penalty Rates**)

34. In respect of Mr Boulos the 'standard hourly rate' for the purpose of clause 32.3 of the Award was the minimum hourly wage for a Level 4 pay grade under the Award.

Particulars

See definition of 'standard hourly rate in clause 3

35. Mr Boulos was regularly rostered to work at Felix in the period between 7pm and midnight, Monday to Friday.
36. By reason of the matters pleaded in paragraphs 34 and 35 above, MRVL was required to pay Mr Boulos the Penalty Rates in accordance with clause 32.3 of the Award for the hours referred to in paragraph 35 26 above.
37. [Deleted].
38. [Deleted].

Award

Saturday Rate

39. At all material times, cl 32.1 of the Award provided that an employee performing work on Saturdays was to be paid 125% of the minimum wage rate in clause 20 for the relevant pay grade.
40. In respect of Mr Boulos the rates pleaded in 40 were those for a Level 4 pay grade under the Award and in the Boulos Employment Period were as set out in the table below.

Period to	Saturday Hourly Rate
1 July 2016	\$25.75
1 July 2017	\$26.61

(the “Saturday Rates”).

41. During the Boulos Employment Period, Mr Boulos regularly worked rostered hours at Felix on Saturdays.

Particulars

The rostered shifts were primarily
Thursday through to Monday,
with Tuesday and Wednesday rostered off

42. By reason of the matters pleaded in paragraph 39 and 41 above MRVL was required to pay Mr Boulos the Saturday Rates for the hours worked by him on Saturdays as referred to in paragraph 41 above.
43. [Deleted].
44. [Deleted].

Award

Sunday Rate

45. Clause 32.1 of the Award provided that an employee performing work in a Sunday:
- (a) up to and including 30 June 2017 would be paid 175% of the minimum wage rate in clause 20 of the Award;
 - (b) between 1 July 2017 to 30 June 2018, would be paid 170% of the minimum wage rate in clause 20 of the Award,
for the relevant pay grade.
46. In the Boulos Employment Period the rates pleaded in paragraph 45 under the Award for a Level 4 paygrade were as set out below:

Period to	Saturday Hourly Rate
1 July 2016	\$36.06
1 July 2017	\$36.19

(the "**Sunday Rates**").

47. During the Boulos' Employment Period, Mr Boulos regularly worked rostered hours at Felix on a Sunday.

Particulars

The rostered shifts were primarily Thursday through to
Monday, with Tuesday and Wednesday rostered off

48. By reason of the matters pleaded in paragraphs 45 and 47 above, MRVL was required to pay Mr Boulos the Sunday Rates for the hours worked by him on a Sunday as referred to in paragraph 47 above.
49. [Deleted].
50. [Deleted].

Award

Overtime Rate

51. At all material times, cl 33.2(a) of the Award provided that:
- "A full time employee is paid at overtime rates for any work done outside of the hours set out in clause 29 – Ordinary Hours of work".
52. Mr Boulos repeats paragraphs 24 to 28 above.

53. At all material times, cl 33.3(a) of the Award provided for overtime rates, depending upon the time at which the overtime was worked on:

(1) Midnight Friday

and midnight Sunday: at the rate 200% of their ordinary rate; and

(2) Monday to midnight Friday: at the rate 150% of their 'ordinary hourly rate' for the first two hours of overtime, and 200% of their 'ordinary hourly rate' for the rest of the overtime.

(the **Overtime Rates**)

54. During Mr Boulos' Employment Period, Mr Boulos worked at Felix in excess of, or outside, the ordinary hours in clause 29 of the Award (the **Ordinary Hours**).

Particulars

Particulars of the overtime hours worked will be provided following discovery

55. By reason of the matters pleaded in 51 and 54 above, MRVL was required to pay Mr Boulos at Overtime Rates for each Ordinary Hour worked by him as referred to in paragraph 54 above.

56. [Deleted].

57. [Deleted].

Award Public

Holiday Rate

58. At all material times cl 32.1 of the Award provided that an employee performing work on public holidays would be paid 225% of the minimum wage in clause 20 of the Award for the relevant pay grade.
59. In the Boulos Employment Period the Public Holiday Rates under the Award for a Level 4 pay grade were:

Period to	Saturday Hourly Rate
1 July 2016	\$46.37
1 July 2017	\$47.90

(the **Public Holiday Rates**).

60. During the Boulos Employment Period, Mr Boulos was rostered to work hours on various public holidays:

Particulars

Particulars of the hours worked on a public holiday will be provided upon the completion of discovery.

61. By reason of the matters pleaded in paragraphs 58 and 60 above, MRVL was required to pay Mr Boulos the Public Holiday Rates for any hours worked by him as referred to in paragraph 51 above.
62. [Deleted].
63. [Deleted].

Employer Award

Superannuation contributions

64. [Deleted].
65. [Deleted].
66. [Deleted].

The Contraventions

- 66A At all material times, the Award contained a term entitling the Applicant to be paid a weekly sum representing the moneys payable to him or her under the Award for work performed in the week prior to payment.

Particulars

Weekly payments could be agreed pursuant to Award cl 13.5 and 26.2 (according the clause numbering during the Claims Period). The Applicant agreed in his written contract of employment to be paid weekly.

- 66B Each week, MRVL paid the Applicant wages calculated in accordance with his contract of employment, rather than being calculated by reference to the sums to which he was entitled under the Award.
- 66C The wages paid to the Applicant in each week in his employment were insufficient to satisfy the moneys owing to him under the Award for work performed in the previous week.

Particulars

- A. The Applicant was paid \$923.08 per week in wages.
- B. His entitlements under the Award are pleaded in paragraphs 29-61 above. Further particulars may be given after discovery.
- 66D In the premises, MRVL failed to comply with one or more terms of the Award in each week of the Applicant's employment.

67. In respect of the failure pleaded in paragraph 66D above: MRVL contravened s.45 of the FW Act.

Alternative claim:

- the Merivale Employee

Collective Agreement 2007

68. In the alternative to the matters alleged in paragraphs 12, 13, 18, 20, 21, 21 and 24 to 67 above, at all material times during the Boulos Employment Period an enterprise agreement, known as the Merivale Employee Collective Agreement 2007 (the **Merivale Agreement**):
- (1) made in accordance with the *Workplace Relations Act 1996* (Cth); and
 - (2) received by the Workplace Authority Director on 21 December 2007,
- covered and applied to MRVL and all of its employees (including Mr Boulos) employed after 9 December 2007;
69. The Merivale Agreement:
- (1) applied to the exclusion of the Award; and
 - (2) Mr Boulos was by operation of clause 6 of the Merivale Agreement classified for its purposes as a Level 4 employee.
70. Clause 9.1 of the Merivale Agreement provided that the ordinary rate of pay for each hour worked were those set out in Schedule A of the Merivale Agreement, adjusted in line with changes to the Australian Fair Pay and Conditions Standard as made from time to time (the **Merivale Agreement Ordinary Rate**).
71. Clause 7.1 of the Merivale Agreement provided that:
- "With the exception of working reasonable additional hours outlined in clause 7.2, 7.3 and 7.4, the ordinary hours of work for Employees will not exceed 38 hours per week on average over 52 weeks."*
72. Clause 7.4 of the Merivale Agreement permitted MRVL and Mr Boulos to agree that Mr Boulos would work additional hours (exceeding 38 hours per week on average over 52 weeks) and be paid at the Merivale Agreement Ordinary Rate for such additional hours.
73. Mr Boulos agreed with MRVL to work, and in fact worked, additional hours in accordance with a roster or rosters as pleaded in paragraph 14(d) above.

Particulars

Mr Boulos relies upon the particulars in paragraph 14

74. By reason of the matters pleaded in paragraphs 69, 71, 72 and 73 above, MRVL was bound to pay Mr Boulos at the Merivale Agreement Ordinary rate for the additional hours that he worked in accordance with the Boulos Rosters.

Particulars

Mr Boulos relies upon the leave unloaded rates
for Level 4 permanent employees (20 years and over)
in Part 2 of Schedule A of the Merivale Agreement

75. MRVL did not pay Mr Boulos the Merivale Agreement Ordinary Rate for any additional hours worked by him in accordance with the Boulos Rosters (except on occasions where he was required to work, and in fact worked, in excess of 55 hours in that week, in which case he was paid only for the number of hours worked which exceeded 55 hours in that week).
76. In respect of each failure to pay alleged in paragraph 65 above MRVL, by reason of that conduct, contravened clause 7.4 of the Merivale Agreement.
77. By reason of MRVL's conduct pleaded in paragraphs 72, 73 and 75 above, MRVL contravened s.50 of the FW Act.

Loss or damage

78. The contraventions of s.45, or alternatively s.50, of the FW Act by MRVL with respect to Mr Boulos pleaded in paragraphs 67 and 76 above caused Mr Boulos loss or damage.

Particulars

Mr Boulos will provide particulars upon the completion of discovery.

The Group

Members' claims

A. Employment

- 78A Each Group Member worked for one hour or more (his or her **Employment**) in the Claims Period;
- (a) as an employee of MRVL;
 - (b) on-hired to a client of MRVL and working under the general guidance and instruction of the client or its representative;
 - (c) in the Hospitality Industry;
 - (d) in a role covered by the classifications contained in the Award; and
 - (e) in circumstances which did not fall into any of the exclusions to Award coverage set out in clause 4.4 of the Award.

Particulars

Particulars may be given after determination of the common questions and completion of discovery.

B. Application of Award

- 78B Each Group Member was a national system employee (within the meaning of the FW Act) in his or her Employment with MRVL.
- 78C Each Group Member was covered by the Award (within the meaning of s 48 of the FW Act) in his or her Employment with MRVL.
- 78D At all material times, MRVL was an on-hire employer in the Hospitality Industry and was covered by the Award within the meaning of s 48 of the FW Act.
- 78E At all material times, the Award applied within the meaning of s 47 of the FW Act, and notwithstanding sch 3 item 28 of the TPCA Act, to MRVL and to each Group Member in his or her Employment with MRVL.
- 78F Each week, MRVL paid the Applicant wages calculated in accordance with his contract of employment, rather than being calculated by reference to the sums to which he was entitled under the Award.

C. Underpayments

- 79. In respect of each Group Member's Employment, each week MRVL paid him or her wages calculated in accordance with his or her contract of employment, rather than wages calculated by reference to the sums to which he or she was entitled under the Award.

Particulars

Particulars may be given after determination of the common questions and completion of discovery.

- 79A At all material times during his or her Employment, the Award contained a term entitling each Group Member to be paid, weekly, a sum representing the moneys payable to him or her under the Award for work performed in the week prior to payment.

Particulars

- A. Weekly payments could be agreed pursuant to Award cl 13.5 and 26.2 (according the clause numbering during the Claims Period). Each Group Member agreed in his or her written contract of employment to be paid weekly.
 - B. The sums payable to the employees were to be calculated by reference to all of the other relevant provisions of the Award.
- 79B The wages paid to each Group Member each week in his or her Employment were insufficient to satisfy the sums due to him or her under the Award for work performed in the previous week.
- 79C In the premises, MRVL contravened a term of the Award in the Claims Period.
- 79D In the premises, MRVL contravened s 45 of the FW Act in the Claims Period.
- 79C. The contraventions caused each Group Member loss and damage.

Particulars

Particulars may be given after determination of the common questions and completion of discovery.

80. Alternatively to paragraphs 79 to 79C above in respect of those Group Members who were employed
- (1) on the basis of the Merivale Agreement.
 - (2) whose weekly ordinary hours were stated in their employment agreement as being 38 hours, and
 - (3) who were rostered to, and did, work additional hours (exceeding 38 hours per week on average over 52 weeks),
- MRVL, by cl. 7.4 of the Merivale Agreement was required to pay for each additional hour worked
- (4) at the end of the pay period in which any additional hours were worked, at
 - (5) the Group Member's ordinary hourly rate of pay.
81. MRVL did not at the end of any pay period pay a Group Member for any additional hours worked in that pay period (except when the number of additional hours worked exceeded 55 hours in any week and only for that number of additional hours worked in that week which exceeded 55).
82. In respect of each failure to pay pleaded in paragraph 81 above MRVL contravened the Merivale Agreement and thereby contravened s 50 of the FW Act.

Claims made by the Applicant and Group Members

System of underpayments

- 82A Since at least 1 January 2010, MRVL had a system of calculating the moneys to be paid to its employees without reference to the Award.
- 82B Since at least 1 January 2010, MRVL expressly authorised, the sums to be paid to its employees (including to the Applicant and Group Members).

Particulars

To be inferred from the fact that payslips were issued under its name.

- 82C Since at least 1 January 2010, MRVL tacitly or impliedly authorised, the times at which its employees were to perform work.

Particulars

A. MRVL placed its employees at the disposal of HT (a related company) on the basis that HT would determine the allocation of shifts (for casuals) and overtime (for permanents).

B. Information on employees' working time was available in rosters and electronic sign-in data, which information was held by, or at least available to, MRVL.

- 82CA By reason of the matters pleaded at paragraphs 82A-82C above, since at least 1 January 2010, MRVL has tacitly or impliedly authorised contraventions of s 45 of the FW Act.
- 82D In the premises, since at least 1 January 2010:
- (a) pursuant to s 557B of the FW Act, MRVL has knowingly contravened s 45 of the FW Act, within the meaning of s 557A(1)(a) of the FW Act; and
 - (b) its conduct in so contravening has been part of a systematic pattern of conduct, within the meaning of s 557A(1)(b) of the FW Act.

Particulars

The Applicant relies on paragraphs 82A to 82C above, and all of the other relevant circumstances, including that:

- A. All contraventions occurred because MRVL believed that the Award did not apply to it.
- B. From 2018, MRVL was aware of on-camera complaints alleging unfairness and lack of penalty rates made by Myf Nizette, Maddie Lucre and Mackenzie Waugh to the ACB's 7.30 Report, aired on 12 November 2018 (the 7.30 Report). The

7.30 Report showed undated correspondence regarding employees' complaints from Kate Tones, who is described as the 'Merivale Group's People Experience Manager', which stated that "[i]t is simply incorrect that the [Merivale Agreement] provides for a 10% higher rate for weekend work or a 40% higher rate for public holidays ... [and] the [Merivale Agreement] does provide for specified minimum dollar rates for ordinary time, weekends and public holidays...".

- C. MRVL failed to keep records which would permit a person inspecting the record to properly ascertain the employee's entitlements under the Award, contrary to Fair Work Regulations 2009 (Cth) r 3.33(3) and 3.34, and in contravention of s 535(1) of the FW Act.

Serious contravention

- 82E By reason of the matters pleaded in paragraph 82D, on and from the commencement of s 557A of the FW Act on 15 September 2017 to the end of the Claims Period, the contravention of s 45 of the FW Act was a serious contravention, within the meaning of s 557A(1) of the FW Act.

Remedies

83. Mr Boulos claims on his own behalf and on behalf of the Group Members the relief set out in the Originating Application.

This Second Further Amended Statement of Claim was prepared by Dr K P Hanscombe QC and J Fetter, of counsel.

Date: August 2021 10 December 2021



Signed by Rory Markham
Lawyer for the Applicant

Certificate of lawyer

I Rory Markham certify to the Court that, in relation to the second further amended statement of claim 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: ~~1 October 2021~~ 10 December 2021



Signed by Rory Markham
Lawyer for the Applicant