NOTICE OF FILING

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Details of Filing

Document Lodged:	Defence - Form 33 - Rule 16.32
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

Dated: 15/02/2022 3:17:01 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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Amended Defence to the Second Further Amended Statement of Claim

No. NSD2168 of 2019

Federal Court of Australia

District Registry: New South Wales

Division: Fair Work

Raymond Boulos

Applicant

M.R.V.L Investments Pty Ltd (as trustee for the Hemmes Administration Trust) ACN 000 620 888

Respondent

The respondent pleads as follows to the Second Further Amended Statement of Claim filed on 10 December 2021 (**Claim**).

1. The respondent admits paragraph 1 of the Claim.

1A. The respondent admits paragraph 1A of the Claim.

2. The respondent admits paragraph 2 of the Claim.

The Merivale Agreement

3. The respondent admits paragraph 3 of the Claim.

4. The respondent admits paragraph 4 of the Claim.

5. As to paragraph 5 of the Claim, the respondent:

   (a) says in accordance with s 346E(2) of the *Workplace Relations Act 1996* (Cth) as in force at 4 July 2007 including 21 December 2007 (**Pre-reform Act**), the Workplace Authority Director was required to decide if a collective agreement passed the fairness test if the collective agreement was lodged on or after 7 May 2007, and on the date of lodgement there was an applicable award which

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contained protected award conditions, one or more of which had been modified by the collective agreement;

(b) says if by operation of s 346E(2) of the Pre-reform Act the Workplace Authority Director was required to decide if an agreement passed the fairness test, s 346J of the Pre-reform Act required the Workplace Authority Director to give written notice to the employer of its determination to apply the fairness test;

(c) says on 29 September 2008, the Workplace Authority notified the respondent that the fairness test would be applied to the *Merivale Employee Collective Agreement 2007* (**Merivale Agreement**); and

(d) otherwise admits the paragraph.

6. As to paragraph 6 of the Claim, the respondent:

(a) says that the letter to the respondent dated 15 December 2008 (**Original Notice**) also notified the respondent that the Merivale Agreement must be amended within 14 days and contained a draft undertaking proposing three options to vary the agreement to pass the fairness test; and

(b) otherwise admits the paragraph.

7. As to paragraph 7 of the Claim, the respondent says that:

(a) on 29 December 2008, through its solicitors, Harmers Workplace Lawyers (**Harmers**), it lodged an undertaking which varied the Merivale Agreement (**First Undertaking**);

(b) that lodgement was in accordance with s 346R(2)(b) of Pre-reform Act;

(c) in accordance with s 346T(2) of the Pre-reform Act, a variation of a collective agreement by way of an undertaking comes into operation when the undertaking is given to the Workplace Authority Director;

(d) the effect of s 346T(2) was that the Merivale Agreement, as varied by the First Undertaking, began to operate on 29 December 2008; and

(e) otherwise does not admit the paragraph.

8. The respondent denies paragraph 8 of the Claim and says:

(a) in March 2008, the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth) (**Transitional Act**) came into force;

(b) cl 2 of Sch 7B to the Transitional Act preserved, among other provisions, Division 5A of Part 8 of the Pre-reform Act, subject to Sch 7B;

(c) pursuant to cl 3 of Sch 7B to the Transitional Act, cl 2 did not apply in relation to a variation of a pre-transition collective agreement unless the variation was lodged with the Workplace Authority Director before the commencement of Sch 7B or was made before that commencement and was lodged in accordance with s 377 of the Pre-reform Act within 14 days of that commencement;

(d) cl 3 of Sch 7B to the Transitional Act did not include variation of an agreement by way of an undertaking, in response to a decision by the Workplace Authority Director that the agreement did not meet the fairness test, which included the First Undertaking; and

(e) the Merivale Agreement, as varied by the First Undertaking, began to operate on 29 December 2008 in accordance with s 346T(2) of the Pre-reform Act which was preserved by cl 2 of Sch 7B to the Transitional Act.

9. The respondent denies paragraph 9 of the Claim and:

(a) repeats and relies on paragraph 8 above; and

(b) says that the respondent lodged the variation of the Merivale Agreement within the relevant period, being 14 days, such that s 346R(3)(a) of the Pre-reform Act was not engaged.

10. As to paragraph 10 of the Claim, the respondent says:

(a) on 30 January 2009, the Workplace Authority Director wrote to the respondent notifying the respondent that the Merivale Agreement as varied by the First Undertaking did not pass the fairness test and stopped operating (**Second Notice**);

(b) on 4 February 2009, Harmers wrote to the Workplace Authority seeking reasons for the assessment that the Merivale Agreement did not pass the fairness test, a meeting with the Workplace Authority and a reassessment of the outcomes conveyed in the Original Notice and Second Notice;

(c) on 20 February 2009, the Workplace Ombudsman wrote to the respondent regarding compensation payable to the employees of the respondent given that the Merivale Agreement had not passed the fairness test, seeking evidence in relation to employees who performed work under the agreement and a declaration summarising compensation payments provided to employees be provided by 6 March 2009;

(d) on 4 March 2009, Harmers wrote to the Workplace Authority Director referring to the correspondence from the Workplace Ombudsman on 20 February 2009 and seeking a response to Harmers' correspondence of 4 February 2009;

(e) on 4 March 2009, Harmers wrote to the Workplace Ombudsman and confirmed the respondent could not collate the information requested by the Workplace Ombudsman by 6 March 2009, but would collate and convey the information to the Workplace Ombudsman as soon as possible, and noted that the respondent intended to pursue a meeting with the Workplace Authority regarding the decision that the agreement did not pass the fairness test;

(f) on 26 March 2009, a representative of the Workplace Authority called Harmers, provided the reference number 2606, advised that Harmers' correspondence was with the Reconsideration Team and that providing the reference number to the Workplace Ombudsman should be enough to put the Workplace Ombudsman's investigation on hold;

(g) on 27 March 2009, Harmers wrote to the Workplace Authority requesting a meeting with an appropriate representative of the Workplace Authority to discuss the Second Notice being reversed and setting out the reasons for the request;

(h) on 4 June 2009, the Acting Workplace Authority Director wrote to Harmers notifying it that the First Undertaking was not sufficient to pass the fairness test, rescinding the "original notice" advising that the Merivale Agreement did not pass the fairness test (which was a reference to the Original Notice), and indicating that the advice on how the Merivale Agreement could be varied to meet the test would remain the same but a new notice would be issued providing the respondent with the opportunity to undertake to vary the Merivale Agreement;

(i) on 10 June 2009, the Workplace Authority Director wrote to the respondent and notified it that the collective agreement lodged on 21 December 2007 (being the Merivale Agreement) did not pass the fairness test, that the agreement must be amended within 14 days and provided a draft undertaking proposing three

options to vary the agreement to ensure it would pass the fairness test (**Third Notice**);

(j) on 11 June 2009, Harmers wrote to the Workplace Authority enclosing a completed version of the undertaking in the form that had been provided by the Workplace Authority in the Third Notice (**Second Undertaking**);

(k) on 12 June 2009, the Workplace Authority wrote to the respondent and notified it that the collective agreement (being the Merivale Agreement) as varied by the Second Undertaking passed the fairness test;

(l) on 15 June 2009, Harmers wrote to the Workplace Authority seeking that the Workplace Authority consider three options in relation to backpaying employees covered by the Merivale Agreement for the period 21 December 2007 to 11 June 2009, based on the difference between what employees working under the Merivale Agreement had been paid, and what they would have been paid under the appropriate award or awards;

(m) on 29 June 2009, the Workplace Authority wrote to Harmers confirming that it had referred Harmers' correspondence of 15 June 2009 to the Workplace Ombudsman for further consideration;

(n) on 1 July 2009, the Fair Work Ombudsman (**FWO**) assumed the compliance and enforcement functions of the Workplace Ombudsman pursuant to s 682 of the *Fair Work Act 2009* (Cth) (**FW Act**);

(o) on 3 August 2009, Harmers wrote to the Workplace Authority setting out deficiencies and failures in the conduct of the Workplace Authority in relation to the fairness test of the Merivale Agreement and seeking that the Workplace Authority take action to rectify the effect of those errors on the respondent and ask the FWO to put its investigation on hold in the interim;

(p) on 7 August 2009, the respondent met with the FWO on a without prejudice basis and it was agreed that the respondent would provide to the FWO records on a fortnightly basis, and the FWO would provide sample calculations to the respondent;

(q) on 12 August 2009, the Workplace Authority wrote to Harmers and confirmed it considered that the Workplace Authority had discharged its legislative requirements as prescribed by the *Workplace Relations Act 1996* (Cth) and the responsibility for matters concerning backpay lay with the FWO;

(r) on 24 August 2009 and 7 September 2009, the respondent provided records to the FWO as agreed;

(s) on 17 September 2009, the respondent met with the FWO and the FWO requested that the respondent cease providing records and conduct the calculations itself based on sample calculations to be provided by the FWO;

(t) on 25 September 2009, the FWO wrote to the respondent and:

(i) confirmed that, based on a sample of employees, the FWO had identified a prima facie contravention of a Commonwealth workplace law, being a failure to pay casual employees compensation for the fairness test period from 21 December 2007 to 11 June 2009 calculated with reference to the *Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1998* (**Former Award**);

(ii) required the respondent to respond in writing to the preliminary findings and the methodology used in calculating the underpayments; and

(iii) informed the respondent that it could rectify the contravention by identifying all instances of compensation payable, to all employees, and paying the amounts outstanding, minus any relevant taxation;

(u) the respondent calculated and paid compensation to all employees by 30 April 2010.

10A. In the premises of paragraphs 10(h) to 10(k) pleaded above, the Original Notice was validly rescinded on 4 June 2009 and the Merivale Agreement as varied by the Second Undertaking had lawful effect and lawfully operated.

10AA. Further or alternatively to paragraph 10A, the respondent genuinely believed that the Merivale Agreement as varied by the Second Undertaking had lawful effect and lawfully operated.

10B. Further or alternatively to paragraphs 10A and 10AA, the respondent says that:

(a) pursuant to s 33(1) of the *Acts Interpretation Act 1901* as in force at 9 June 2009 (**AI Act**), where an Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires;

(b) s 33(1) of the AI Act includes the power to rescind a decision;

(c) by reason of s 33(1) of the AI Act, the Workplace Authority Director had the power to and did rescind the Original Notice, alternatively, the decision recorded in the Original Notice;

(d) in the premises of paragraphs 10(h) to 10(k) above, the Original Notice was lawfully rescinded on 4 June 2009 and the Merivale Agreement as varied by the Second Undertaking had lawful effect and lawfully operated.

10C. Further or alternatively to paragraphs 10A, 10AA and 10B, the respondent says that:

(a) under s 33(3) of the AI Act, where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) the power shall, unless the contrary intention appears, be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument;

(b) the Original Notice issued by the Workplace Authority was an instrument for the purposes of s 33(3) of the AI Act;

(c) in the premises of paragraphs 10(h) to 10(k) above and by reason of s 33(3) of the AI Act, the Workplace Authority Director had a power to rescind the Original Notice and did validly rescind the Original Notice on 4 June 2009 such that the Merivale Agreement as varied by the Second Undertaking had lawful effect and lawfully operated.

10D. Further or alternatively to paragraphs 10A, 10AA, 10B and 10C, if the Merivale Agreement ceased to operate on 30 January 2009, or at any time prior to 4 March 2019, which is denied, then the respondent says:

(a) in reliance on the Merivale Agreement as varied by the Second Undertaking having lawful effect and lawfully operating, from 10 June 2009 it took steps in the manner in which it operated its business which it would not have taken if it had been aware that the Former Award applied from 2007 and the *Hospitality Industry (General) Award 2010* (**Award**) applied from 1 January 2010, which included:

(i) rostering for trading on weekends and public holidays, or trading more regularly on weekends and public holidays, in circumstances where provisions of the Former Award and Award regarding minimum wages, casual or part-time loadings, Saturday, Sunday, public holiday, evening or

other penalties and shift allowances/penalties and overtime would otherwise be applicable;

(ii) rostering focusing, or more heavily focusing, on trading as a specialty food focused business in various venues which traded on weekends than it otherwise would have;

(iii) by reason of paragraph 10D(a)(ii) above, recruiting more international chefs on working visas, and local chefs, than it otherwise would have and thereby committing to greater expenditure that it otherwise would have;

(iv) [INTENTIONALLY BLANK]

(b) in reliance on the Merivale Agreement as varied by the Second Undertaking having lawful effect and lawfully operating, from 10 June 2009 the respondent, did not take steps which it would have otherwise taken if it had been aware that compensation would have been payable on the basis that the Former Award applied from 2007 and the Award applied from 1 January 2010, which included the following steps which were not taken:

(i) rostering employees on public holidays and Sundays with a view to covering the costs of doing so by charging customers a surcharge on public holidays and Sundays;

(ii) maintaining certain payroll and employee records which would have been required to be maintained to comply with the Former Award and the Award (but which were not required to be maintained to comply with the Merivale Agreement);

(iii) engaging a higher proportion of casual employees instead of engaging a higher proportion of full time and part time employees;

(iv) arranging rosters in a way which would involve lower costs to the respondent having regard to the working hours and meal break provisions under the Former Award and the Award;

(v) [INTENTIONALLY BLANK];

(vi) implementing changes to ensure its service model operated in a leaner, more efficient way, which include but are not limited to:

(a) reducing the number of employees and/or the total hours worked in areas to service customers;

(b) outsourcing work that was performed by employees under the Merivale Agreement;

(c) using technology and alternative systems and processes more prominently as a means of increasing efficiency and reducing the cost of hiring employees; and

(d) broadening of job descriptions and role design;

(vii) further particulars may be provided prior to trial.

(c) in reliance on the Merivale Agreement as varied by the Second Undertaking having lawful effect and lawfully operating, from 10 June 2009, a number of employees or former employees were paid at rates which are greater than they otherwise would have been paid under the terms of the Former Award or the Award;

(d) a significant proportion of former employees of the respondent are no longer contactable by the respondent;

(e) since the Merivale Agreement was lodged on 21 December 2007, there has been a high turnover of full-time employees and an even higher turnover of causal employees, and less than 3% of the initial 870 employees of the respondent as at 21 December 2007 remain employed by the respondent;

(f) the respondent paid back pay to employees as pleaded at paragraph 10(u) above;

(g) the Merivale Agreement was terminated by the Fair Work Commission by order dated 21 January 2019 taking effect as and from 4 March 2019 (2019 FWCA 293) and the Award has applied to the respondent and employees previously covered by the Merivale Agreement since that date;

(h) the Workplace Authority has ceased to exist since 1 July 2009;

(i) at all relevant times the respondent gave effect to s 206 of the FW Act which requires an employer to pay employees to whom an enterprise agreement applies at least the same base rate of pay that would be payable to the employee under any award that is in operation and covers the employee;

(j) in the premises of the facts pleaded at paragraphs 10D(a) and 10D(b) above, the Court ought not exercise its discretion to issue:

(i) a declaration that the Merivale Agreement (including as varied by the Second Undertaking) did not lawfully operate at any time from 30 January 2009 and/or that the rescission of the Original Notice was made without jurisdiction; or

(ii) an order quashing or setting aside the Merivale Agreement (including as varied by the Second Undertaking) and/or that the rescission of the Original Notice was made without jurisdiction; or

(iii) a declaration that throughout the period of 6 years ending on the date of filing the originating application the Award covered and applied to the applicant and each group member in respect of his or her employment by the respondent,

nor should the Court grant any other relief (whether under ss 545-546 of the Fair Work Act or otherwise) based upon any finding that the Merivale Agreement as varied by the Second Undertaking did not have lawful effect or did not lawfully operate in the period to 4 March 2019.

10E. Further or in the alternative to paragraph 10D, the respondent says:

(a) from at least 10 June 2009, group members have been in a position to assert that they are entitled to:

(i) a declaration that Merivale Agreement (including as varied by the Second Undertaking) did not lawfully operate at any time from 30 January 2009 and/or that the rescission of the Original Notice was made without jurisdiction; or

(ii) an order quashing or setting aside the Merivale Agreement (including as varied by the Second Undertaking) and/or the rescission of the Original Notice; or

(iii) a declaration that throughout the period of 6 years ending on the date of filing the originating application the Award covered and applied to the respondent, the applicant and each group member in respect of his or her employment by the respondent;

(b) from at least 15 September 2016, being the date that the applicant commenced employment with the respondent, the applicant has been in a position to seek some or all of the relief at paragraph 10E(a) above;

(c) no such relief was sought, in the case of the declaration at paragraph 10E(a)(iii) above, until 24 December 2019 when the applicant commenced these proceedings and, in the case of the relief at paragraphs 10E(a)(i) and 10E(a)(ii) above, until 25 November 2021 when the applicant's Further Amended Originating Application was filed;

(d) in the premises of paragraphs 10E(a) to 10E(c) above, further or alternatively, in the premises of those paragraphs combined with some or all of those pleaded in paragraphs 10 and/or 10D above, the Court ought not exercise its discretion to issue:

(i) a declaration that the Merivale Agreement (including as varied by the Second Undertaking) did not lawfully operate at any time from 30 January 2009 and/or that the rescission of the Original Notice was made without jurisdiction; or

(ii) an order quashing or setting aside the Merivale Agreement (including as varied by the Second Undertaking) and/or the rescission of the Original Notice; or

(iii) a declaration that throughout the period of 6 years ending on the date of filing the originating application the Award covered and applied to the applicant and each group member in respect of his or her employment by the respondent,

nor should the Court grant any other relief (whether under ss 545-546 of the Fair Work Act or otherwise) based upon any finding that the Merivale Agreement as varied by the Second Undertaking did not have lawful effect or did not lawfully operate in the period to 4 March 2019.

10F. Further or in the alternative to paragraph 10D, the respondent says that:

(a) the rescission of the Original Notice, alternatively, the Merivale Agreement (including as varied by the Second Undertaking), should be taken to have operative effect unless and until set aside by a Court and, unless set aside by a Court, the Merivale Agreement as varied by the Second Undertaking had lawful effect and lawfully operated from 10 June 2009 until 4 March 2019;

(b) [INTENTIONALLY BLANK];

(c) in the premises of paragraphs 10A to 10E and 10F(b), the Court ought not exercise its discretion to issue:

(i) a declaration that the Merivale Agreement (including as varied by the Second Undertaking) did not lawfully operate at any time from 30 January 2009 and/or that the rescission of the Original Notice was made without jurisdiction; or

(ii) an order quashing or setting aside the Merivale Agreement (including as varied by the Second Undertaking) and/or the rescission of the Original Notice; or

(iii) a declaration that throughout the period of 6 years ending on the date of filing the originating application the Award covered and applied to the applicant and each group member in respect of his or her employment by the respondent,

nor should the Court grant any other relief (whether under ss 545-546 of the Fair Work Act or otherwise) based upon any finding that the Merivale Agreement as varied by the Second Undertaking did not have lawful effect or did not lawfully operate in the period to 4 March 2019.

11. As to paragraph 11 of the Claim, the respondent denies the paragraph and repeats and relies on the facts pleaded in paragraphs 10 to 10F above.

12. The respondent admits paragraph 12 of the Claim.

13. As to paragraph 13 of the Claim, the respondent:

(a) admits subparagraph (1);

(b) admits subparagraph (2);

(c) says further that under s 57 of the FW Act, a modern award does not apply to an employee in relation to particular employment at a time when an enterprise agreement applies to the employee in relation to that employment;

(d) says further that under item 28 of Sch 3 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), while an agreement-based

transitional instrument such as a workplace agreement applies to an employee, a modern award does not apply to the employee.

13A. As to paragraph 13A of the Claim, the respondent:

(a) refers to and repeats paragraphs 10A to 10F and 13(c) and (d) above; and

(b) otherwise denies the paragraph.

13B. The respondent refers to and repeats paragraphs 10A to 10F and 13(c) and (d) above and otherwise denies paragraph 13B of the Claim.

13C. The respondent refers to and repeats paragraphs 10A to 10F and 13(c) and (d) above and otherwise denies paragraph 13C of the Claim.

13D. The respondent refers to and repeats paragraphs 10A to 10F above and otherwise denies paragraph 13D of the Claim.

13E. The respondent refers to and repeats paragraphs 10A to 10F above and otherwise denies paragraph 13E of the Claim.

14. The respondent does not admit paragraph 14 of the Claim.

15. The respondent admits paragraph 15 of the Claim but relies on all the terms of the Merivale Letter of Offer, as defined in the Claim (**Merivale Letter of Offer**), for their full force and effect.

16. The respondent admits paragraph 16 of the Claim but relies on all the terms of the Merivale Letter of Offer for their full force and effect and refers to and relies on the matters pleaded in paragraph 81 below.

17. The respondent denies paragraph 17 of the Claim to the extent that it is alleged that Felix was a venue of an employer in the Hospitality Industry as defined in the Claim, prior to 4 March 2019, as the Award did not cover the respondent in accordance with clause 4.4 of the Award, because an enterprise instrument applied to the respondent, and for the reasons set out in paragraphs 10 to 10F and 13(c) to 13(d) above. The respondent otherwise admits paragraph 17 of the Claim.

18. As to paragraph 18 of the Claim, the respondent:

(a) repeats and relies upon paragraphs 10 to 10F and 13(c) to 13(d) above; and

(b) denies the paragraph.

19. As to paragraph 19 of the Claim, the respondent:

    (a) admits subparagraph (1);

    (b) denies subparagraph (2) and says the applicant's first shift was on 5 October 2016; and

    (c) admits subparagraph (3).

20. As to paragraph 20 of the Claim, the respondent:

    (a) repeats and relies upon paragraphs 10 to 10F, 11 and 13(c) to 13(d) above; and

    (b) denies the paragraph.

21. The respondent admits paragraph 21 of the Claim.

22. The respondent admits paragraph 22 of the Claim but relies on all the terms of the Award for their full force and effect including but not limited to:

    (a) clauses 2.2 of the Award which provides that the monetary obligations imposed on employers by the Award may be absorbed into overaward payments and that nothing in the Award requires an employer to maintain or increase any overaward payment; and

    (b) clause 2.3 and Schedules A to C which contain transitional arrangements which specify when particular parts of the Award come into effect including provisions regarding minimum wages and piecework rates, casual or part-time loadings, Saturday, Sunday, public holiday, evening or other penalties and shift allowances/penalties.

23. As to paragraph 23 of the Claim, the respondent:

    (a) admits that rosters were posted in the pastry area of the kitchen, and says rosters were posted on Wednesdays or Thursdays, and always before close of business on Friday, and otherwise denies subparagraph (1);

    (b) repeat paragraph 23(a) above and denies subparagraph (2);

    (c) admits subparagraph (3); and

    (d) denies subparagraph (4).

Ordinary hours and ordinary rate

24. The respondent admits paragraph 24 of the Claim but relies on all the terms of the Award for their full force and effect.

25. As to paragraph 25 of the Claim, the respondent:

    (a) says that by reason of the facts pleaded at paragraphs 10 to 10F, 11, 13(c) to 13(d) and 20(a) above the Award did not apply;

    (b) says the applicant's hours of work were arranged in accordance with cll 7 and 8 of the Merivale Agreement; and

    (c) otherwise admits the paragraph.

26. As to paragraph 26 of the Claim, the respondent:

    (a) repeats paragraph 20; and

    (b) denies the paragraph.

27. As to paragraph 27 of the Claim, the respondent:

    (a) says the applicant's use of the word "regularly" is vague and embarrassing and otherwise denies subparagraph (1);

    (b) denies subparagraph (2); and

    (c) admits subparagraph (3).

28. The respondent denies paragraph 28 of the Claim.

Award minimum wages

29. As to paragraph 29 of the Claim, the respondent:

    (a) repeats and relies upon the matters referred to in paragraph 22(b) above;

    (b) says that clause 20 of the Award and Schedule D only applied to the extent that the Award applied to employees in those classifications as a matter of law;

    (c) repeats and relies upon paragraphs 10 to 10F, 11 and 13(c) to 13(d) above; and

    (d) denies the paragraph.

30. The respondent admits paragraph 30 of the Claim.

31. The respondent admits paragraph 31 of the Claim.

32. The respondent admits paragraph 32 of the Claim.

Award penalties

33. The respondent admits paragraph 33 of the Claim but relies on all the terms of the Award for their full force and effect.

34. The respondent denies paragraph 34 of the Claim.

35. As to paragraph 35 of the Claim, the respondent:

    (a) says the applicant's use of the word "regularly" is vague and embarrassing; and

    (b) otherwise does not admit the paragraph.

36. As to paragraph 36 of the Claim, the respondent:

    (a) says that by reason of the facts pleaded at paragraphs 10 to 10F, 11, 13(c) to 13(d) and 20(a) above the Award did not apply;

    (b) says the Merivale Agreement applied;

    (c) says penalties were payable in accordance with cll 7.2 and 7.3 of the Merivale Agreement; and

    (d) denies the paragraph.

37. [INTENTIONALLY BLANK]

38. [INTENTIONALLY BLANK]

Award Saturday rate

39. The respondent admits paragraph 39 of the Claim.

40. The respondent denies paragraph 40 of the Claim.

41. As to paragraph 41 of the Claim, the respondent:

    (a) says the applicant's use of the word "regularly" is vague and embarrassing; and

(b) otherwise does not admit the paragraph.

42. As to paragraph 42 of the Claim, the respondent:

(a) says that by reason of the facts pleaded at paragraphs 10 to 10F, 11, 13(c) to 13(d) and 20(a) above the Award did not apply;

(b) says the Merivale Agreement applied;

(c) says weekend penalties were payable in accordance with cll 9.5 and 9.6 of the Merivale Agreement; and

(d) denies the paragraph.

43. [INTENTIONALLY BLANK]

44. [INTENTIONALLY BLANK]

Sunday award rate

45. The respondent admits paragraph 45 of the Claim.

46. As to paragraph 46 of the Claim, the respondent:

(a) admits the paragraph to the extent that the rates set out in that paragraph are the rates payable under the Award for an employee at the level 4 pay grade performing work on a Sunday;

(b) says that by reason of the facts pleaded at paragraphs 10 to 10F, 11, 13(c) to 13(d) and 20(a) above the Award did not apply; and

(c) otherwise denies the paragraph.

47. As to paragraph 47 of the Claim, the respondent:

(a) says the applicant's use of the word "regularly" is vague and embarrassing; and

(b) otherwise does not admit the paragraph.

48. As to paragraph 48 of the Claim, the respondent:

(a) says that by reason of the facts pleaded at paragraphs 10 to 10F, 11, 13(c) to 13(d) and 20(a) above the Award did not apply;

(b) says the Merivale Agreement applied;

(c) says weekend penalties were payable in accordance with cll 9.5 and 9.6 of the Merivale Agreement; and

(d) denies the paragraph.

49. [INTENTIONALLY BLANK]

50. [INTENTIONALLY BLANK]

Award overtime rates

51. The respondent admits paragraph 51 of the Claim.

52. As to paragraph 52 of the Claim, the respondent repeats and relies on the facts pleaded at paragraphs 24 to 28 above.

53. The respondent admits paragraph 53 of the Claim.

54. The respondent admits paragraph 54 of the Claim..

55. As to paragraph 55 of the Claim, the respondent:

(a) says that by reason of the facts pleaded at paragraphs 10 to 10F, 11, 13(c) to 13(d) and 20(a) above the Award did not apply;

(b) says the Merivale Agreement applied;

(c) penalties were payable in accordance with cll 7.2 and 7.3 of the Merivale Agreement; and

(d) denies the paragraph.

56. [INTENTIONALLY BLANK]

57. [INTENTIONALLY BLANK]

Award public holiday rate

58. The respondent does not admit paragraph 58 of the Claim.

59. As to paragraph 59 of the Claim, the respondent:

(a) admits the paragraph to the extent that the rates set out in that paragraph are the rates payable under the Award for an employee at the level 4 pay grade performing work on a public holiday;

(b) says that by reason of the facts pleaded at paragraphs 10 to 10F, 11, 13(c) to 13(d) and 20(a) above the Award did not apply in the circumstances; and

(c) otherwise denies the paragraph.

60. The respondent does not admit paragraph 60 of the Claim.

61. As to paragraph 61 of the Claim, the respondent:

(a) says that by reason of the facts pleaded at paragraphs 10 to 10F, 11, 13(c) to 13(d) and 20(a) above the Award did not apply;

(b) says the Merivale Agreement applied;

(c) public holiday penalties were payable in accordance with cll 9.5 and 9.6 of the Merivale Agreement; and

(d) denies the paragraph.

62. [INTENTIONALLY BLANK]

63. [INTENTIONALLY BLANK]

64. [INTENTIONALLY BLANK]

65. [INTENTIONALLY BLANK]

66. [INTENTIONALLY BLANK]

The Alleged Contraventions

66A. As to paragraph 66A of the Claim, the respondent:

(a) says that clause 13.5 of the Award (which was numbered clause 13.3 in versions of the Award prior to 1 January 2018) provided that a casual employee must be paid at the termination of each engagement, but may agree to be paid weekly or fortnightly;

(b) says that clause 26.2 of the Award provided that by agreement between the employer and the employee wages may be paid either weekly or fortnightly by one of cash, cheque or payment into the employee's bank account by electronic funds transfer, without cost to the employee; and

(c) otherwise denies the paragraph.

66B. As to paragraph 66B of the Claim, the respondent:

(a) refers to and repeats paragraphs 10A to 10F above;

(b) says that it paid the applicant in accordance with the Merivale Letter of Offer; and

(c) otherwise denies the paragraph.

66C. As to paragraph 66C of the Claim, the respondent:

(a) refers to and repeats paragraphs 66B(a) and (b) above;

(b) says that the amounts paid to the applicant in accordance with the Merivale Letter of Offer were less than the amounts that would have been payable to him under the Award for the work performed in the previous week; and

(c) otherwise denies the paragraph.

66D. The respondent denies paragraph 66D of the Claim.

67. The respondent denies paragraph 67 of the Claim.

Alternative claim

68. As to paragraph 68 of the Claim, the respondent:

(a) says that by reason of the facts pleaded at paragraphs 10(h) to 10(k) above, the Merivale Agreement as varied by the Second Undertaking lawfully operated and had legal effect;

(b) says that the paragraph does not make any allegation in respect of group members and that the respondent does not apprehend the reference to "employees" to be a reference to group members in circumstances where there is no allegation in the Claim that group members are or were ever employees of the respondent; and

(c) otherwise denies the paragraph.

69. As to paragraph 69 of the Claim, the respondent:

(a) repeats paragraph 68 above; and

(b) does not know and cannot admit paragraph 69 of the Claim.

70. As to paragraph 70 of the Claim, the respondent:

    (a) repeats paragraph 68 above;

    (b) says that the Australian Fair Pay and Conditions Standard ceased to exist under the FW Act from 1 January 2010, did not apply from that time and therefore did not apply to the applicant; and

    (c) otherwise admits paragraph 70.

71. As to paragraph 71 of the Claim, the respondent:

    (a) repeats paragraph 68 above; and

    (b) otherwise admits paragraph 71.

72. As to paragraph 72 of the Claim, the respondent:

    (a) repeats paragraph 68 above;

    (b) admits the paragraph to the extent that cl 7.4 of the Merivale Agreement provides that employees may request or agree to work additional hours and be paid their ordinary hourly rate;

    (c) says cl 7.4 also provides an example, being an employee requesting to work additional hours at the ordinary rate during university holidays when the employee wants to earn more money and would otherwise be limited to working ordinary hours;

    (d) says that cl 7.4 required a request or agreement to work additional hours and payment in respect of those additional hours;

    (e) says the applicant did not request or agree to work additional hours and be paid at his ordinary hourly rate;

    (f) in the alternative to paragraphs 72(c) to 72(d), says that, properly construed, the application of cl 7.4 was limited by the example provided such that it did not contemplate the ongoing practice of working additional hours; and

    (g) otherwise denies the paragraph.

73. The respondent denies paragraph 73 of the Claim.

74. The respondent denies paragraph 74 of the Claim.

75. As to paragraph 75 of the Claim, the respondent:

(a) repeats and relies on paragraphs 70 and 72 above;

(b) denies that it was obliged to pay the applicant the Merivale Agreement Ordinary Rate, as defined in the Claim for additional hours worked by him;

(c) says that cl. 7.2 of the Merivale Agreement provides all time worked outside ordinary hours shall be additional hours;

(d) says that pursuant to clause 5.3 of the Merivale Letter of Offer, Mr Boulos agreed that his weekly ordinary hours of work were averaged over a period of up to 52 weeks;

(e) says that pursuant to 5.4 of the Merivale Letter of Offer, due to the nature of the respondent's business and Mr Boulos' position, Mr Boulos agreed it was reasonable for him to work any additional hours necessary to achieve the efficient and effective performance of his duties;

(f) says that pursuant to cl 6.3 of the Merivale Letter of Offer, the applicant's base salary covered all monetary amounts (including wages, overtime, allowances, penalties and loadings) that the respondent might otherwise have had to pay arising under any law and/or industrial instrument (including any award and/or enterprise agreement, including the Merivale Agreement) that from time to time might have applied to the applicant's employment and compensated the applicant for all hours worked;

(g) says that pursuant to cl 6.4 of the Merivale Letter of Offer, the applicant expressly agreed that any pay he received greater than the entitlement he would have receive under the Merivale Agreement satisfied any other legal entitlements where the applicant received less than the minimum amount under the Merivale Agreement;

(h) says that pursuant to cl 6.5 of the Merivale Letter of Offer, any pay received by the applicant in excess of entitlements or benefits under the Merivale Agreement in any month may be offset against any underpayment under any other of the Merivale Agreement in any other week or month;

(i) [INTENTIONALLY BLANK]

(j) by reason of cll 5.3, 5.4, 6.3, 6.4 and 6.5 of the Merivale Letter of Offer and clauses 7.1 and 7.2 of the Merivale Agreement, the respondent was entitled to and did set off any overpayment against the applicant's entitlements under the Merivale Agreement.

76. The respondent denies paragraph 76 of the Claim.

77. The respondent denies paragraph 77 of the Claim.

Loss or damage

78. The respondent denies paragraph 78 of the Claim.

The group members' claims

78A. The respondent denies that the Award applied to the respondent prior to 4 March 2019 for the reasons set out in paragraphs 10A to 10F, ~~and~~ 13(c), ~~and~~ 13(d) and 17 above and otherwise does not know and therefore does not admit paragraph 78A of the Claim.

78B. The respondent does not know and therefore does not admit paragraph 78B of the Claim.

78C. The respondent denies that the Award applied to the respondent prior to 4 March 2019 for the reasons set out in paragraphs 10A to 10F, ~~and~~ 13(c), ~~and~~ 13(d) and 17 above and otherwise does not admit paragraph 78C of the Claim.

78D. The respondent refers to and repeats paragraph 13A above and otherwise denies the paragraph.

78E. The respondent refers to and repeats repeats paragraphs 10A to 10F, ~~and~~ 13(c), ~~and~~ 13(d) and 17 above and otherwise denies paragraph 78E of the Claim.

78F. The respondent refers to and repeats paragraph 66B above and otherwise denies paragraph 78F of the Claim.

79. As to paragraph 79 of the Claim, the respondent:

(a) refers to and repeats paragraph 78A to 78F above; and

(b) otherwise denies the paragraph.

79A. As to paragraph 79A of the Claim, the respondent:

(a) refers to and repeats paragraph 66A and 78A to 78F above; and

(b) otherwise denies the paragraph.

79B. The respondent denies paragraph 79B of the Claim.

79C. The respondent denies paragraph 79C of the Claim.

79D. The respondent denies paragraph 79D of the Claim.

79E. The respondent denies paragraph 79E of the Claim.

80. As to paragraph 80 of the Claim, the respondent:

(a) [INTENTIONALLY BLANK]

(b) repeats and relies on the facts pleaded at paragraph 72 above insofar as they apply, or may apply, to group members; and

(c) otherwise denies the paragraph.

81. As to paragraph 81 of the Claim, the respondent:

(a) refers to and relies on paragraphs 78A and 79A above;

(b) refers and relies on paragraphs (c) to 75(j) above insofar as they apply, or may apply, to group members; and

(c) otherwise denies the paragraph.

81A. The respondent further says:

(a) any employment agreements of group members contained terms substantially as contained in clauses 6.3-6.5 of the Merivale Letter of Offer (**Equivalent Terms**);

(b) any group members who were employees of the respondent were, or certain of them were, paid in excess of the entitlements or benefits payable under the Instruments, including the Merivale Agreement; and

(c) by reason of the Equivalent Terms, the respondent was entitled to and did set off that overpayment against any such group members' entitlements under any Instruments, including the Merivale Agreement.

81B. The respondent further says:

(a) the applicant and certain of some group members who were employees of the respondent were paid on an annualised salary basis;

(b) in respect of certain of such employees, their total annualised salary remunerated such group members for the amount that would otherwise be payable under the Merivale Agreement for hours worked between 38-55 in a week, or provided more remuneration than that amount;

(c) by reason of the facts pleaded above at paragraph 81A(a) to 81A(b), the applicant and such group members have suffered no loss or damage;

(d) further or in the alternative, the respondent is entitled to set off that part of the applicant and such group member's salaries which exceeds amounts claimed to be payable under the Merivale Agreement;

(e) further and/or in the alternative, in the premises of paragraphs 81A(a) to 81A(b) above, the applicant and such group members have not established that they have suffered any loss which may be compensated under s 545 of the FW Act or otherwise; and

(f) otherwise does not admit the paragraph.

82. The respondent denies paragraph 82 of the Claim.

Claims made by the applicant and group members

82A. As to paragraph 82A of the Claim, the respondent denies that it had a system of calculating moneys to be paid to its employees without reference to the Award after 4 March 2019, and otherwise admits the paragraph.

82B. As to to paragraph 82B of the Claim, the respondent:

(a) admits that since at least 1 January 2010 it authorised sums to be paid to its employees (including the Applicant and Group Members); and

(b) otherwise denies the paragraph.

82C. The respondent admits the matters the subject of particular B to paragraph 82C of the Claim but otherwise does not admit paragraph 82C of the Claim.

82CA. The respondent denies paragraph 82CA of the Claim.

82D. The respondent denies paragraph 82D of the Claim.

82E. The respondent denies paragraph 82E of the Claim.

Remedies

83. The respondent denies that the applicant and group members are entitled to the relief set out in the Originating Application, or any relief at all.

Date: 14 February 2022 ~~15 December 2021~~

Signed by Ruveni Kelleher
Lawyer for the Respondent

This pleading was prepared by Ruveni Kelleher, Lawyer for the Respondent

Certificate of lawyer

I Ruveni Kelleher 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: 14 February 2022 ~~15 December 2021~~

Signed by Ruveni Kelleher
Lawyer for the Respondent