

NOTICE OF FILING

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File Title: LAWRENCE RIDGE v HAYS SPECIALIST RECRUITMENT
(AUSTRALIA) PTY LIMITED
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



Defence

No. VID 1661 of 2018

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

Lawrence Ridge

Applicant

Hays Specialist Recruitment (Australia) Pty Limited (ACN 001 407 281)

Respondent

In answer to the Amended Statement of Claim (**ASOC**) filed by the Applicant on 5 August 2022 and which took effect on 29 September 2022, the Respondent pleads as follows.

In this Defence:

- defined terms used in the ASOC are used for ease of reference only and without any admission as to the accuracy of the term or its definition in the ASOC; and
- headings used in the ASOC are reproduced for ease of reference only and without any admission as to their accuracy.

A. PARTIES AND BACKGROUND

1. As to paragraph 1:

(a) it admits paragraph 1(a);

(b) as to paragraph 1(b):

(i) it says the Applicant was employed in the period from 17 March 2014 to 27 October 2017 (**Applicant's Termination Date**) and worked as a

3474-1642-1662v1

Filed on behalf of (name & role of party)	Hays Specialist Recruitment (Australia) Pty Limited, Respondent
Prepared by (name of person/lawyer)	Brad Woodhouse; Philippa Munton
Law firm (if applicable)	Corrs Chambers Westgarth
Tel	02 9210 6859
Fax	02 9210 6611
Email	brad.woodhouse@corrs.com.au ; philippa.munton@corrs.com.au
Address for service (include state and postcode)	Level 9, 8;12 Chifley Square, Sydney, NSW 2000

Control Room Operator at Blackwater, a black coal mine in Queensland;
and

- (ii) it otherwise denies the paragraph; and
- (c) as to paragraph 1(c):
 - (i) it admits that the Applicant purports to bring this proceeding pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) on his own behalf and on behalf of the persons described in paragraph 1(c);
 - (ii) it says that, in this Defence, it uses the term Group Member as it is defined in that paragraph, without any admission as to the accuracy of that definition; and
 - (iii) it otherwise does not know and therefore cannot otherwise admit the paragraph.

2. It admits paragraph 2.

3. It does not know and therefore cannot admit paragraph 3.

B. THE AWARD

4. [Not used]

5. [Not used]

6. As to paragraph 6, save that the term “material times” is not defined and it does not know all of the times alleged to be material to the allegations in paragraph 6:

- (a) it says that the terms of the Award varied during the Relevant Period, and that it will refer at trial to the full terms and effect of the Award as in force from time to time;
- (b) it denies that, properly construed, clause 10.1 of the Award prohibited an employer from engaging a Production Employee as a casual employee;
- (c) it admits that, during the Relevant Period, the Award provided that employees (as defined in the Award), other than casual employees, who:
 - (i) are seven day roster employees (as defined in the Award); or

- (ii) work a roster which requires ordinary shifts on public holidays and not less than 272 ordinary hours per year on Sundays,

are entitled to 210 hours (6 weeks) of annual leave, accrued at the rate of 4.0385 hours for each completed week of employment;

Particulars

Clauses 24.1 to 24.3, previously clauses 25.1 to 25.3, of the Award deal with annual leave entitlements and accruals.

- (d) it admits that, during the Relevant Period, the Award provided that in the case of termination of employment, an employee (other than a casual employee) must be paid for all annual leave entitlements and annual leave accrued in accordance with the Award, at the employee's base rate of pay (as defined in the Award); and

Particulars

Clause 33.4(a), previously clause 13.4(a), previously clause 13.5(a), of the Award deals with payment of annual leave on termination of employment.

Clause 2, previously clause 3.1, of the Award defines "base rate of pay" as the rate of pay payable to an employee for their ordinary hours of work, but not including any of the following:

- loadings;
- monetary allowances;
- overtime or penalty rates; and
- any other separately identifiable amount.

- (e) it otherwise denies paragraph 6.

C. EMPLOYMENT BY HAYS

C.1 The Applicant's employment

7. As to paragraph 7:

- (a) as to paragraph 7(a), it repeats paragraph 1(b)(i) above and otherwise denies the paragraph;
- (b) it admits paragraph 7(b);
- (c) as to paragraph 7(c):
 - (i) it says that:
 - (A) rosters were issued by BMA, the operator of Blackwater, not the Respondent; and
 - (B) as at the date of this Defence the Respondent has been unable to ascertain whether, for the duration of the Applicant's employment:
 - (1) the Applicant worked on the B or C crew roster (or some combination); or
 - (2) such rosters had shifts on all seven days of the week; and
 - (ii) consequently, it does not know and therefore cannot admit the paragraph;
- (d) as to paragraph 7(d), it repeats paragraph 7(c) above and says that it does not know and therefore cannot admit the paragraph;
- (e) it says that it employed the Applicant as a casual employee pursuant to an agreement entered into by the Applicant and Respondent on 5 March 2014 (**Agreement**), which, *inter alia* and subject to reference at trial to its full terms and effect, included the following express terms:
 - (i) the Respondent would offer the Applicant Assignments (as defined in the Agreement) as a temporary worker on an as required basis (clause 2.1);
 - (ii) the terms of the Agreement were to apply to any Assignment offered by the Respondent and accepted by the Applicant (clause 2.2);
 - (iii) each Assignment constituted a separate and distinct engagement with the Respondent, and was not to be regarded as continuous with any previous Assignment the Applicant had performed (clause 2.3);
 - (iv) the Applicant acknowledged and agreed that:

- (A) the nature of his engagement as a temporary worker meant that there may be periods when no suitable work was available for him;
 - (B) the Respondent was under no obligation to offer the Applicant any Assignments; and
 - (C) the Respondent had no liability to the Applicant for any payment of wages, salary, leave entitlements or otherwise, should the Respondent not offer the Applicant any Assignment or for periods where the Applicant was not performing any assignment (clause 3.1);
- (v) the Respondent did not guarantee the duration or length of any Assignment offered to the Applicant (clause 3.2);
- (vi) the period of any Assignment performed by the Applicant could only be extended if the Respondent had given its prior approval (clause 3.3);
- (vii) when performing Assignments, the Applicant understood and agreed that he was engaged and paid as a casual, and that casual work was irregular and uncertain, and may vary from day to day and week to week (clause 3.6);
- (viii) the Respondent's hourly rate included a casual loading which compensated him for the benefits of permanent employment including annual leave, and the Applicant understood and agreed that he was not entitled to any separate or additional payment for these entitlements (clause 3.6);
- (ix) the Applicant understood and agreed that:
- (A) where the Respondent paid him above the minimum terms and conditions of an applicable modern award, the monetary obligations imposed on the Respondent under that modern award may be absorbed into those over-award payments;
 - (B) except as specifically provided for in the Agreement or an Assignment Letter, the remuneration that the Applicant received each weekly period that was greater than an entitlement he would

otherwise have under any modern award or law satisfied and may be offset against that entitlement (clause 4.3);

- (x) the Respondent may without notice, without reason, and without liability (except for remuneration for hours already worked on the Assignment) instruct the Applicant to cease working on an Assignment at any time during the Assignment (clause 7.1);
- (xi) the Applicant agreed that he would not make any claim against the Respondent or the Client if he was not required to complete an Assignment except in respect of remuneration for hours already worked on the Assignment (clause 7.2);
- (f) by reason of the matters alleged in paragraph 7(e) above, the Applicant was a casual employee within the meaning of:
 - (i) section 15A of the *Fair Work Act 2009* (Cth) (**FW Act**); and
 - (ii) clause 10.4 of the Award; and
- (g) it otherwise denies paragraph 7.

Particulars

The Agreement was in writing and contained in a document titled "Terms of Engagement – Australia" signed by the Applicant on 5 March 2014.

7A. It admits paragraph 7A.

7B. As to paragraph 7B:

- (a) it denies paragraph 7B(a) and says that as at the Termination Date, the Applicant's hourly rate of pay was \$52.00 which comprised:
 - (i) a base rate of pay of \$24.53 (referable to the base of pay applicable to the Applicant, as a Mineworker, under the Award);

Particulars

Clause A.4 in Schedule A to the Award as at the Applicant's Termination Date provided that the "basic weekly 35 hour rate" for a Mineworker was \$858.60, which was equivalent to \$24.53 per hour.

- (ii) a casual loading of \$6.14 (being 25% of the base rate of pay described in 7B(a)(i) above and which was referable to the casual loading applicable to the Applicant under the Award and the Agreement); and

Particulars

Clause 10.4 of the Award provided that a casual employee, for working ordinary hours, will be paid 1/35th of the appropriate weekly rate, plus 25% instead of leave entitlements under the Award.

Clause 3.6 of the Agreement provided that the Applicant's hourly rate includes a casual loading which compensates him for the benefits of permanent employment including annual leave, and that the Applicant understands and agrees that he is not entitled to any separate or additional payment for these entitlements.

- (iii) an over Award payment of \$21.33; and

- (b) it admits paragraph 7B(b).

7C. Further to paragraph 7B above, during the Applicant's Employment Period, the Applicant was paid an hourly rate of pay which comprised:

- (a) a base rate of pay (referable to the base rate of pay applicable to the Applicant under the Award as varied from time to time);

Particulars

"Base rate of pay" was defined in clause 3.1 of the Award and minimum base rates were set out in clause A.4 of Schedule A to the Award as varied from time to time.

- (b) a casual loading of 25% of the base rate of pay described in 7C(a) above and which was referable to the casual loading applicable to the Applicant under the Award, as varied from time to time, and under the Agreement; and

Particulars

Clause 10.4 of the Award provided that a casual employee, for working ordinary hours, will be paid 1/35th of the appropriate weekly rate, plus 25% instead of leave entitlements under the Award.

Clause 3.6 of the Agreement provided that the Applicant's hourly rate includes a casual loading which compensates him for the benefits of permanent employment including annual leave, and that the Applicant understands and agrees that he is not entitled to any separate or additional payment for these entitlements.

- (c) an over Award payment (**Applicant Over Award Payment**).

Particulars

During the Applicant's Employment Period, these amounts were as follows.

Time period	Base rate of pay	Casual loading	Applicant Over Award Payment	Total
17 March 2014 to 30 June 2014	\$21.97	\$5.49	\$24.54	\$52.00
1 July 2014 to 30 June 2015	\$22.63	\$5.66	\$23.71	\$52.00
1 July 2015 to 30 June 2016	\$23.19	\$5.80	\$23.01	\$52.00
1 July 2016 to 30 June 2017	\$23.75	\$5.94	\$22.31	\$52.00
1 July 2017 to Applicant's Termination Date	\$24.53	\$6.14	\$21.33	\$52.00

8. [Not used]

9. It denies paragraph 9 and says further that:

- (a) it repeats paragraphs 7(e) and (f), 7B and 7C above and says that during the Applicant's Employment Period, the Applicant was engaged and paid as a casual employee pursuant to the Agreement, the Award and the FW Act;

Particulars

Section 15A of the FW Act defined a casual employee.

Clause 10.4(a) of the Award provided that a casual employee is one engaged and paid as such.

Clause 3.6 of the Agreement provided that when performing Assignments, he understood and agreed that he was engaged and paid as a casual, and his hourly rate included a casual loading which compensated him for the benefits of permanent employment including annual leave, and that he understood and agreed that he was not entitled to any separate or additional payment for those entitlements.

- (b) pursuant to clause 25.3 of the Award and section 87 of the FW Act, during the Applicant's Employment Period, as a casual employee, the Applicant had no entitlement to annual leave and did not accrue annual leave; and

Particulars

Clause 25.3 of the Award provided that casual employees do not accrue annual leave.

Section 87 of the FW Act provided that a casual employee is not entitled to annual leave.

- (c) it repeats paragraph 7B(a)(ii) and 7C(b) above and says that pursuant to the Award and the Agreement, during the Applicant's Employment Period, the Applicant was paid a casual loading which compensated him for the absence of any annual leave entitlement.

- 9A. It admits paragraph 9A and says further that as a casual employee, during the Applicant's Employment Period, the Applicant was not entitled to take any period of paid annual leave.

C.2 Group Members' employment

- 10. As to paragraph 10:

- (a) it admits paragraph 10(a), by reason of the definition of Group Member in paragraph 1(c) of the ASOC;

- (b) it admits paragraph 10(b), by reason of the definition of Group Member in paragraph 1(c) of the ASOC;
- (c) it does not know and therefore cannot admit paragraph 10(c) without a proper pleading and particularisation of each Group Member's claims;
- (d) it does not know and therefore cannot admit paragraph 10(d) without a proper pleading and particularisation of each Group Member's claims;
- (e) it admits paragraph 10(e), by reason of the definition of Group Member in paragraph 1(c) of the ASOC; and
- (f) it says that further pleas by way of defence that may be available to it in respect of a Group Member's claims cannot be determined until after the Group Member's claims have been properly pleaded and particularised.

10A. It admits paragraph 10A, by reason of the definition of Group Member in paragraph 1(c) of the ASOC.

11. [Not used]

12. It denies paragraph 12 and repeats paragraph 10(f) above, save to say that after 1 April 2019 some Group Members were employed on a non-casual basis and accrued annual leave in the period in which they were employed on that basis.

12A. As to paragraph 12A:

- (a) it repeats paragraph 12 above;
- (b) it says that as casual employees, Group Members were not entitled to take any period of paid annual leave; and
- (c) it otherwise does not know and therefore cannot admit paragraph 12A.

D. CONTRAVENING CONDUCT IN RELATION TO APPLICANT

[13-34 not used]

D.1 Accrued Annual Leave

35. [Not used]

36. It denies paragraph 36 and repeats paragraph 9 above.

37. It denies paragraph 37 and:

- (a) repeats paragraphs 7B(a)(ii), 7C(b), 9 and 36 above; and
- (b) says further that as a casual employee, the Applicant did not have any Annual Leave Entitlement.

38. As to paragraph 38:

- (a) it repeats paragraphs 7B(a)(ii), 7C(b), 9, 36 and 37 above;
- (b) it says further that as the Applicant did not have any Annual Leave Entitlement, no such Entitlement was paid; and
- (c) it otherwise denies paragraph 38.

38A. It denies paragraph 38A and repeats paragraphs 7B(a)(ii), 7C(b), 9, 36, 37 and 38 above.

D.2 Mode of engagement

38B. It denies paragraph 38B and repeats paragraph 6(b) above.

[39-41 not used]

F. CONTRAVENING CONDUCT IN RELATION TO GROUP MEMBERS

F.1 Group Members' Award Entitlements

42. It denies paragraph 42 and repeats paragraphs 10 and 12 above.

43. As to paragraph 43:

- (a) it admits it did not pay the Group Members any Annual Leave Entitlement, or any monies on account of any such entitlement, on each Group Member's Termination Date or at any time thereafter, in respect of any period they were employed by Hays pursuant to a contract describing the Group Member's employment as 'casual';
- (b) it repeats paragraphs 10, 12 and 42 above and says further that as no entitlement to annual leave existed for any period they were employed by Hays pursuant to a contract describing the Group Member's employment as 'casual', no monies were payable to Group Members on account of any such entitlement at any time;

- (c) it further repeats paragraph 12 above and says that after 1 April 2019 some Group Members were employed on a non-casual basis and accrued annual leave in the period in which they were employed on that basis, and if their employment then terminated, they were paid any untaken annual leave accrued in that period on termination; and
- (d) it otherwise denies paragraph 42.

F.2 Mode of engagement

43A. It denies paragraph 43A and repeats paragraph 6(b) above.

[44-46 not used]

G. CONTRAVENTIONS OF THE FW Act

G.1 Applicant

47. It denies paragraph 47.

48. [not used]

48A. It denies paragraph 48A, and says further that if the Applicant had not been engaged by the Respondent as a casual employee, then either:

- (a) the Applicant would not have been engaged by the Respondent at all; or
- (b) if the Applicant had been engaged by the Respondent other than as a casual employee, he would have been paid at a lower rate of pay which did not include a casual loading, the level of which rate of pay would have depended on the individual circumstances applicable to the Applicant from time to time.

G.2 Group Members

49. It denies paragraph 49 and repeats paragraph 10(f) above.

H. LOSS OR DAMAGE

50. It denies paragraph 50.

51. It denies paragraph 51 and repeats paragraph 10(f) above.

I. REMEDIES

52. It denies that the Applicant and Group Members are entitled to the relief set out in the Amended Originating Application or any relief.

J. FURTHER DEFENCES

J.1 Statutory 'set-off'

53. Alternatively, if (which is denied) the Applicant was not a casual employee and the Respondent was obliged to pay to the Applicant any Annual Leave Entitlement or monies on account of any such entitlement under the Award, by reason of the matters pleaded in paragraphs 7(e) and (f), 7B, 7C and 9 above, and pursuant to section 545A of the FW Act:

- (a) the Applicant was employed by the Respondent in circumstances where the employment was described as casual employment;
- (b) the Respondent paid the Applicant an identifiable amount (a casual loading) to compensate the Applicant for not having one or more relevant entitlements, including paid annual leave, during the Applicant's Employment Period;
- (c) during the Applicant's Employment Period, the Applicant was not a casual employee within the meaning of section 15A of the FW Act;
- (d) the Applicant has made a claim to be paid an Annual Leave Entitlement or monies on account of any such entitlement with respect to the Applicant's Employment Period; and
- (e) accordingly, the Court must reduce any amount payable to the Applicant with respect to an Annual Leave Entitlement or monies on account of any such entitlement by an amount equal to the amount paid to the Applicant as a casual loading during the Applicant's Employment Period.

J.2 Contractual 'set off'

54. Alternatively, if (which is denied) it was obliged to pay to the Applicant any Annual Leave Entitlement or monies on account of any such entitlement under the Award:
- (a) it has, by the amounts already paid to the Applicant described at paragraphs 7B(a)(ii) and (iii) and 7C(b) and (c) above, satisfied any such obligation to pay to the Applicant any Annual Leave Entitlement payable or any monies payable on account of any such entitlement; and

- (b) further or alternatively, by operation of either or both of clauses 3.6 and 4.3 of the Agreement or otherwise, it is entitled to set off, and hereby sets off, the amounts it has already paid to the Applicant described at paragraphs 7B(a)(ii) and (iii) and 7C(b) and (c) above against any Annual Leave Entitlement payable or any monies payable on account of any such entitlement.

Particulars

Clause 3.6 provided that the Applicant's hourly rate includes a casual loading which compensated him for the benefits of permanent employment including annual leave, and the Applicant understood and agreed that he was not entitled to any separate or additional payment for those entitlements.

Clause 4.3 of the Agreement provided that where the Respondent paid the Applicant above the minimum terms and conditions of the Award, the monetary obligations imposed on the Respondent under that Award may be absorbed into those over-award payments and that the remuneration the Applicant received each weekly period (upon submission and approval of a timesheet) that was greater than an entitlement he would otherwise have under any modern award or law satisfied and may be offset against that entitlement.

J.3 Application of section 545(2) of the FW Act

55. Alternatively, if the Court concludes that any amount paid by the Respondent to the Applicant, pursuant to the Agreement or otherwise, over and above the minimum rate of pay in the Award cannot at law be set-off against, satisfied by or absorbed into any amount payable to the Applicant under the Award, then:
- (a) the Court ought in any event exercise its discretion pursuant to section 545(2)(b) of the FW Act to reduce any compensation otherwise payable to the Applicant by the amount paid to the Applicant over and above what was payable under the Award; and
- (b) it would not be appropriate, within the meaning of section 545 of the FW Act, to make an order for compensation in the Applicant's favour in circumstances where such an order failed to accord with the compensatory and remedial purposes of section 545 by failing to take into account the total amounts paid to

the Applicant during his employment period, including amounts paid over and above what was payable under the Award.

J.4 Group Members

56. Further pleas by way of defence that may be available to the Respondent in respect of a Group Member's claims cannot be determined until after the Group Member's claims have been properly pleaded and particularised.

Date: 28 October 2022



Signed by Bradley Bruce Woodhouse
Lawyer for the Respondent

This pleading was prepared by Jonathan Kirkwood and Catherine Pase of counsel.

Certificate of lawyer

I Bradley Bruce Woodhouse 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: 28 October 2022

A handwritten signature in blue ink, appearing to read 'B. Woodhouse', written over a light blue horizontal line.

Signed by Bradley Bruce Woodhouse
Lawyer for the Respondent