

Amended Originating application starting a representative proceeding under Part IVA of the Federal Court of Australia Act 1976

No. VID 1662 of 2018

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

Tania Kelehear

Applicant

Stellar Personnel Brisbane Pty Limited (ACN 158 542 191) (and another named in the Schedule of Parties)

First Respondent

To the Respondents

The Applicant applies for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place:

Date:

.....
Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of (name & role of party) Tania Kelehear, Applicant

Prepared by (name of person/lawyer) Rory Markham, Lawyer

Law firm (if applicable) Adero Law

Tel (02) 6189 1022 Fax _____

Email rory.markham@aderolaw.com.au

Address for service 5 Torrens Street, 3 Hobart Place
(include state and postcode) Braddon Canberra ACT 2601 2612

Details of claim

On the grounds stated in the accompanying Amended Statement of Claim (and adopting the terms defined therein), the Applicant claims on her own behalf and on behalf of each of the Group Members:

Declarations

1. A declaration that the Applicant was employed by Stellar Personnel.
2. A declaration that throughout the Relevant Period, each of the Group Members were employed by Stellar Personnel.
3. A declaration that the Applicant was entitled to accrue and be paid the Award entitlements referred to in the Amended Statement of Claim by Stellar Personnel.
4. A declaration that the Award Group Members were entitled to accrue and (in the case of Departed GMs, be paid) the Award entitlements referred to in the Amended Statement of Claim by Stellar Personnel.
- ~~1. A declaration that throughout the Applicant's Award Period, the Applicant was employed by Stellar Personnel as a full-time employee within the meaning of cl 10.2 of the Award.~~
- ~~2. A declaration that throughout the Group Award Period, each of the Group Members referred to in paragraph 2 of the Statement of Claim were employed by Stellar Personnel to work at the Mines as full-time employees within the meaning of cl 10.2 of the Award (for so long as they worked pursuant to the Group Members' Rosters).~~
- ~~3. A declaration that the Applicant was entitled to be paid the Award entitlements referred to in Part D of the Statement of Claim by Stellar Personnel.~~
- ~~4. A declaration that the Award Group Members were entitled to be provided the Group Members' Award Entitlements by Stellar Personnel.~~
5. Alternatively to paragraphs 1 to 4 above, identical declarations naming Stellar Recruitment as the applicable employer.
- ~~6. A declaration that Stellar Recruitment (or alternatively, Stellar Personnel), has contravened s 550(2)(c) of the FWA in respect of the Applicant's Award entitlements referred to in Part D of the Statement of Claim and the Group Members' Award Entitlements.~~
- ~~7. A declaration that Mr McCambridge has contravened s 550(2)(c) of the FWA in respect of Stellar Personnel's (or alternatively, Stellar Recruitment's) failure to pay the Applicant's Award entitlements referred to in Part D of the Statement of Claim and the Group Members' Award Entitlements.~~

Orders compensating the Applicant and Group Members

6. In respect of each of Stellar Personnel's contraventions of s 45 of the FWA as the employer, ~~or alternatively as an accessory:~~
- (a) orders pursuant to s 545(1) of the FWA that Stellar Personnel pay or provide to the Applicant and each Group Member their Annual Leave entitlements under the Award;
 - (b) further or in the alternative, orders pursuant to s 545(2)(b) of the FWA that Stellar Personnel pay to the Applicant and each Group Member compensation for the loss they have suffered because of its contraventions;
 - (c) further or in the alternative, orders pursuant to s 546(1) and s 546(3) of the FWA that:
 - (i) Stellar Personnel pay pecuniary penalties to the Applicant ~~for each of the contraventions relating to her and Group Members;~~
 - (ii) Stellar Personnel pay pecuniary penalties to each of the Group Members for each of its contraventions relating to each of them, to the extent that such contraventions do not, for the purposes of s 557(1) of the FWA, form part of the same course of conduct by Stellar Personnel as that in respect of which pecuniary penalties are payable to the Applicant;
 - (d) pursuant to s 547 of the FWA, interest up to judgment on the ~~above~~ amounts in (a) and (b).
7. In respect of each of Stellar Recruitment's contraventions of s 45 of the FWA as employer:
- (a) orders pursuant to s 545(1) of the FWA that Stellar Recruitment pay or provide to the Applicant and each Group Member their Annual Leave entitlements under the Award;
 - (b) further or in the alternative, orders pursuant to s 545(2)(b) of the FWA that Stellar Recruitment pay to the Applicant and each Group Member compensation for the loss they have suffered because of its contraventions;
 - (c) further or in the alternative, orders pursuant to s 546(1) and s 546(3) of the FWA that:
 - (i) Stellar Recruitment pay pecuniary penalties to the Applicant ~~for each of the contraventions relating to her and Group Members;~~

- (ii) Stellar Recruitment pay pecuniary penalties to each of the Group Members for each of its contraventions relating to each of them, to the extent that such contraventions do not, for the purposes of s 557(1) of the FWA, form part of the same course of conduct by Stellar Recruitment as that in respect of which pecuniary penalties are payable to the Applicant;
- (d) further, orders pursuant to s 547 of the FWA, interest up to judgment on the ~~above~~ amounts in (a) and (b).

Questions common to claims of group members

The questions of law or fact common to the claims of the Applicant and Group Members are:

1. Whether the Applicant and Group Members were employed by Stellar Personnel or Stellar Recruitment.
2. Whether the Applicant and each of the Group Members employed by Stellar Personnel, or alternatively Stellar Recruitment had, at the end of their employments, accrued Annual Leave entitlements.
3. Whether Stellar Personnel, or alternatively Stellar Recruitment, failed to pay Annual Leave entitlements to the Applicant and each of the Group Members when their employments ended during the Relevant Period.
4. Whether, by reason of those failures, Stellar Personnel, or alternatively Stellar Recruitment, contravened s 45 of the FWA.
5. Whether the Award prohibited the engagement of the Applicant and each of the Group Members as casual employees.
- ~~1. Whether the Applicant and each of the Group Members employed by Stellar Personnel or alternatively Stellar recruitment during the Relevant Period were full-time employees within the meaning of cl 10.2 of the Award.~~
- ~~2. Alternatively to question 1, whether the Applicant and each of the Group Members:

 - ~~(a) worked at the mines during the Relevant Period in accordance with long-term pre-determined rosters which specified the days, times and hours which the Applicant and the Group Members must work.~~
 - ~~(b) during the Relevant Period were required to work an average of at least 35 ordinary hours per week.~~~~

- ~~(c) — were coal mining employees within the meaning of cl 4.1(b)(ii) of the Award, and accordingly covered by the Award.~~
- ~~(d) — were employed by Stellar Recruitment or alternatively Stellar Personnel in the black coal industry within the meaning of cl 4.2 and 4.3 of the Award.~~
- ~~(e) — were during the Relevant Period in a classification or class of work in Schedule A — Production and Engineering Employees (“**Schedule A Employees**”) of the Award.~~
- ~~3. — Alternatively to question 1, and if the answer to question 2 is yes, whether Schedule A Employees are capable of being casual employees within the meaning of the Award.~~
- ~~4. — Whether Stellar Recruitment (or alternatively, Stellar Personnel), knew (or was wilfully blind) during the Relevant Period:~~
- ~~(a) — That the work being performed by the Applicant and Group Members was governed by an award;~~
- ~~(b) — That the award prescribed minimum amounts of pay or entitlements to penalty rates, overtime, annual leave or other allowances; and~~
- ~~(c) — The rates the Applicant and Group Members were being paid?~~
- ~~5. — Whether Stellar Personnel (or alternatively, Stellar Recruitment), had an association with, implication in, or practical connection with the contravening conduct at paragraphs 21, 23, 27, 29, 33, 35, 39, 41, 46, 47, 51, 53, 58, 60, 62 and 63 of the Statement of Claim.~~
- ~~6. — Whether Shaun McCambridge, knew (or was wilfully blind) during the Relevant Period:~~
- ~~(a) — That the work being performed by the Applicant and Group members was governed by an award;~~
- ~~(b) — That the award prescribed minimum amounts of pay or entitlements to penalty rates, overtime, annual leave or other allowances; and~~
- ~~— (c) — The rates the Applicant and Group Members were being paid.~~
- ~~7. — Whether Mr McCambridge, had an association with, implication in, or practical connection with the contravening conduct at paragraphs 89 and 95 of the Statement of Claim.~~

Representative action

The Applicant brings this application as a representative party under Part IVA of the *Federal Court of Australia Act 1976*.

The Group Members to whom this proceeding relates are all persons who:

1. who were employed by Stellar Personnel (or alternatively Stellar Recruitment), to work at ~~the Mines~~ black coal mines in Australia at any time during the ~~Group Award Period~~ period 25 December 2012 to 24 December 2018 (Inclusive) (Relevant Period);
2. who were at any time during the ~~Group Award Period~~ Relevant Period, each a coal mining employee within the meaning of cl 4.1(b)(ii) of the ~~Award~~ Black Coal Award 2010 (Award) and, as a result, each covered by the Award, and who were not covered by an enterprise agreement;
3. who were engaged in roles falling within the '~~Schedule A~~— Production and Engineering employees' classifications of the Award ~~in accordance with a roster as pleaded in paragraph 8 of the accompanying Statement of Claim and worked generally in accordance with a full-time roster~~; and
4. who were treated as "casual" employees by Stellar Personnel (or alternatively, Stellar Recruitment).

Applicant's address

The Applicant's address for service is:

Place: ~~5 Torrens Street, Braddon ACT 2612-3~~ Hobart Place, Canberra ACT 2601

Email: rory.markham@aderolaw.com.au

Service on the Respondent

It is intended to serve this amended application on all Respondents.

Date: ~~December 2018~~



Signed by Rory Markham
Lawyer for the Applicant

Schedule

No. 1662 of 2018

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

Respondents

Second Respondent

**Stellar Recruitment Pty Limited
(ACN 157 737 150)**

~~Third Respondent~~

~~**Shaun James McCambridge**~~

Date: