

## NOTICE OF FILING

### Details of Filing

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File Title: TANIA KELEHEAR v STELLAR PERSONNEL BRISBANE PTY LIMITED  
& ORS  
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. VID1662 of 2018

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

### Tania Kelehear

Applicant

### Stellar Personnel Brisbane Pty Ltd and another

Respondents

#### A PARTIES AND GROUP MEMBERS

1. As to paragraph 1 of the Amended Statement of Claim (**ASOC**) the Respondents:
  - a. say that so far as she was employed by Stellar Personnel Brisbane Pty Limited (**Stellar Personnel**) during the Relevant Period, the Applicant was a national system employee within the meaning of section 13 of the *Fair Work Act 2009* (Cth) (**FWA**);
  - b. admit the Applicant purports to bring this proceeding on her own behalf and on behalf of each of the persons defined as “Group Members”; and
  - c. otherwise do not know and therefore cannot admit the allegations in paragraph 1.
2. The Respondents admit the allegations in paragraph 2 of the ASOC.
3. The Respondents admit the allegations in paragraph 3 of the ASOC.
4. The Respondents:
  - a. do not plead to paragraph 4 of the ASOC which makes no allegations of fact but rather defines the term “Group Members”; and
  - b. use the term “Group Members” in this Defence as it is defined in that paragraph without any admission as to the accuracy of that definition.

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Filed on behalf of (name & role of party)	Stellar Personnel Brisbane Pty Ltd and Stellar Recruitment Pty Ltd, Respondents		
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5. The Respondents do not know and therefore cannot admit the allegations in paragraph 5 of the ASOC.

## **B AWARD OBLIGATIONS**

### **Application of Award**

6. As to paragraph 6 of the ASOC, the Respondents:
  - a. say that the Applicant was employed by Stellar Personnel from 1 July 2014 to 28 September 2014 under a contract of employment dated 26 June 2014, which:
    - i. incorrectly names the employer as “Stellar Recruitment Pty Ltd (ACN 158 542 191)”;
    - ii. thus in naming the employer inconsistently refers to the company name of Stellar Recruitment Pty Ltd (**Stellar Recruitment**) but to the Australian company number of Stellar Personnel (ACN 158 542 191);
  - b. say that any employees falling within the definition of a Group Member were employed by Stellar Personnel;
  - c. say that Stellar Personnel, when employing the Applicant or any Group Members, was a “national system employer” within the meaning of s 14 of the FWA; and
  - d. otherwise deny the allegations.
7. As to paragraph 7 of the ASOC, the Respondents:
  - a. say that no enterprise agreement “applied” (within the meaning of section 52 of the FWA) to the Applicant or any Group Members who were employed by Stellar Personnel during the Relevant Period; and
  - b. otherwise deny the allegations.
8. As to paragraph 8 of the ASOC, the Respondents:
  - a. say that the *Black Coal Mining Industry Award 2010* (**Award**) “applied” (within the meaning of section 47 of the FWA) to Stellar Personnel and to the Applicant during the Relevant Period;
  - b. say that the Award “applied” (within the meaning of section 47 of the FWA) to any Group Members who were employed by Stellar Personnel by reason of the definition of “Group Members”; and
  - c. otherwise deny the allegations.

## Award terms

9. As to paragraph 9 of the ASOC, the Respondents:

a. say that, at all material times, clause 10.1 of the Award provided:

10.1 An employer may employ an employee in any classification included in this award in any of the following types of employment:

- (a) full-time;
- (b) part-time; or
- (c) in the case of classifications in Schedule B—Staff Employees, casual.

b. say that, on its proper construction, clause 10.1 did not prohibit the employment of production and engineering employees as casual employees; and

c. otherwise deny the allegations.

10. As to paragraph 10 of the ASOC, the Respondents:

a. say that, from 1 January 2014 until the end of the Relevant Period, clauses 25.1-3 of the Award provided:

25.1 Annual leave entitlements are provided for in the NES. This clause supplements those entitlements and provides industry specific detail.

25.2 Entitlement to annual leave

(a) An employee is entitled to annual leave, in addition to the amount provided for in the NES, such that the employee's total entitlement to annual leave pursuant to the NES and this award for each year of employment is a cumulative total of 175 ordinary hours (five weeks).

(b) An employee who:

- (i) is a seven day roster employee; or
- (ii) works a roster which requires ordinary shifts on public holidays and not less than 272 ordinary hours per year on Sundays,

is entitled annually to an additional 35 ordinary hours (one week) of annual leave.

25.3 Accrual of annual leave

Employees, other than casual employees, accrue annual leave at the following rate:

For employees who would be entitled to annual leave of:	Hours of annual leave for each completed week of employment:
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175 hours (5 weeks)	3.3654
210 hours (6 weeks)	4.0385

- b. say that, from the start the Relevant Period until 31 December 2013, the clauses in (a) were contained in clauses 24.1-3 of the Award;
  - c. say that, during the Relevant Period, the annual leave entitlements provided for in the National Employment Standards (**NES**) applied to employees other than casual employees, pursuant to ss 86 and 87 of the FWA;
  - d. say that, on their proper construction, the clauses in (a) and (b) above did not confer any entitlement to annual leave on casual employees; and
  - e. otherwise deny the allegations.
11. As to paragraph 11 of the ASOC, the Respondents:
- a. say that, at all material times, clauses 13.5(a) and 16.7 of the Award provided for payment of accrued annual leave on termination of employment according to their terms;
  - b. say that the clauses referred to in (a) did not apply in respect of casual employees (because those employees did not accrue annual leave); and
  - c. otherwise deny the allegations.
12. As to paragraph 12 of the ASOC, the Respondents:
- a. say that the expression “base rate of pay” in clause 13.5(a) of the Award during the Relevant Period, meant, for a production and engineering employee, the minimum rates applicable to the employee’s classification set out in Schedule A as varied from time to time; and
  - b. otherwise deny the allegations.

## **C     FACTS**

### **The employments**

13. As to paragraph 13 of the ASOC, the Respondents:
- a. repeat paragraph 6 above;
  - b. say that the Applicant was employed by Stellar Personnel on the basis set out at paragraphs 13(a) to (d) of the ASOC, with employment terminable on 1 hour’s notice;

- c. say that any Group Member employed by Stellar Personnel was employed on the basis set out at paragraphs 13(a) to (c) of the ASOC by reason of the definition of “Group Members”; and
- d. otherwise deny the allegations.

### **Performance of work**

- 14. As to paragraph 14 of the ASOC, the Respondents:
  - a. say that the Applicant performed work in her employment with Stellar Personnel on the basis set out at paragraphs 14(a), (b) and (d) of the ASOC;
  - b. say that any Group Member employed by Stellar Personnel performed work in their employment with Stellar Personnel on the basis set out at paragraphs 14(a), (b) and (d) of the ASOC by reason of the definition of “Group Members”;
  - c. otherwise deny the allegations.

### **Accrual of annual leave entitlements**

- 15. As to paragraph 15 of the ASOC, the Respondents:
  - a. repeat paragraphs 13(b) and (c) above;
  - b. say that the Applicant was engaged in a role falling within the “Production and Engineering Employee” classifications of the Award;
  - c. say that any Group Member employed by Stellar Personnel was engaged in a role falling within the “Production and Engineering Employee” classifications of the Award by reason of the definition of “Group Members”; and
  - d. otherwise deny the allegations.
- 16. As to paragraph 16 of the ASOC, the Respondents:
  - a. repeat paragraph 10 above;
  - b. repeat paragraphs 13(b) and (c) and 14(a) and (b) above and say that the Applicant and any Group Members employed by Stellar Personnel were casual employees within the meaning of:
    - i. s 15A of the FWA; and
    - ii. clause 10.4 of the Award as in force during the Relevant Period;
  - c. say that the Applicant and any Group Members employed by Stellar Personnel had no entitlement to annual leave and did not accrue annual leave entitlements under the Award or FWA because they were casual employees; and
  - d. otherwise deny the allegations.

17. The Respondents deny the allegations in paragraph 17 of the ASOC.

### **Ending of employments**

18. As to paragraph 18 of the ASOC, the Respondents:

- a. say that the Applicant's employment with Stellar Personnel ceased on 28 September 2014;
- b. do not know and therefore cannot admit whether "certain" Group Members ended their employments with Stellar Personnel during the Relevant Period until further particulars are provided; and
- c. otherwise deny the allegations.

19. As to paragraph 19 of the ASOC, the Respondents:

- a. say that Stellar Personnel did not pay or forward any moneys on account of alleged accrued annual leave entitlements to the Applicant or any Group Members employed by Stellar Personnel;
- b. say that, as casual employees, the Applicant and any Group Members employed by Stellar Personnel had no accrued annual leave entitlements;
- c. say that Stellar Personnel was not obliged to pay or forward any moneys to them on account of such entitlements; and
- d. otherwise deny the allegations.

## **D CLAIMS AGAINST STELLAR RECRUITMENT**

### **Debt claim**

20. The Respondents repeat paragraphs 6 and 10 to 19 above and otherwise deny the allegations in paragraph 20 of the ASOC.

### **Contravention of Termination Term**

21. The Respondents repeat paragraphs 6 and 10 to 19 above and otherwise deny the allegations in paragraph 21 of the ASOC.

22. The Respondents deny the allegations in paragraph 22 of the ASOC and say further that:

- a. the amounts claimed in the particulars to this paragraph are inconsistent with the amounts particularised in paragraph 20 of the ASOC; and
- b. they cannot plead further without particulars of the basis on which the Applicant is alleged to have been underpaid by \$7,127.10.

**Contravention of Engagement Term**

23. The Respondents repeat paragraphs 6, 9 and 13 to 15 above and otherwise deny the allegations in paragraph 23 of the ASOC.
24. The Respondents deny the allegations in paragraph 24 of the ASOC and say further that if (which is denied) Stellar Personnel contravened clause 10.1 of the Award in employing the Applicant or any Group Member as a casual employee:
- a. in relation to the alleged loss of financial benefits:
    - i. if they had not been engaged by Stellar Personnel as a casual employee, they would not have been engaged by Stellar Personnel at all;
    - ii. alternatively to (i), if they had been engaged by Stellar Personnel other than as a casual employee, they would have been paid at the lower rates of pay applicable under the Award, which did not include a casual loading;
    - iii. in assessing the loss (if any) suffered by the Applicant or Group Member for the purposes of s 545(2)(b) of the FWA the Court ought to compare all of the financial benefits which the Applicant or Group Member received from Stellar Personnel with:
      1. the financial benefits they would have received if not engaged by Stellar Personnel at all;
      2. alternatively to (1), the minimum terms and conditions to which the employee would have been entitled had they been engaged other than as a casual employee in accordance with the Award;
    - iv. any of the Applicant or Group Members who were better off financially, or no worse off, as a result of having been employed pursuant to their casual contracts of employment will have suffered no loss by reason of any such contravention; and
  - b. in relation to the alleged loss of non-financial benefits, the claim is not measurable or compensable pursuant to s 545 of the FWA.

**E ALTERNATIVE CLAIMS AGAINST STELLAR PERSONNEL**

25. As to paragraph 25 of the ASOC, the Respondents:
- a. repeat paragraphs 1 to 19 above;



- b. say, further or in the alternative, if Stellar Recruitment was the employer of the Applicant or any of the Group Members, the Respondents repeat paragraphs 1 to 19 above but replacing the references to “Stellar Personnel” with “Stellar Recruitment”; and
  - c. otherwise deny the allegations.
26. As to paragraph 26 of the ASOC, the Respondents:
- a. repeat paragraphs 20 to 24 above;
  - b. say, further or in the alternative, if Stellar Recruitment was the employer of the Applicant or any of the Group Members, the Respondents repeat paragraphs 20 to 24 above but replacing the references to “Stellar Personnel” with “Stellar Recruitment”; and
  - c. otherwise deny the allegations.

**F GROUP MEMBERS**

27. Further pleas by way of defence that may be available to the Respondents 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: 7 November 2023



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Signed by Ian Grant Humphreys  
Lawyer for the Respondents

This pleading was prepared by Ashurst Australia and settled by Jenny Firkin KC and Adam Hochroth of Counsel.

**Certificate of lawyer**

I, Ian Grant Humphreys 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: 7 November 2023



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Signed by Ian Grant Humphreys  
Lawyer for the Respondents