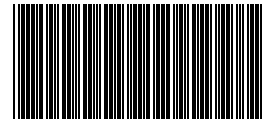




Filed: 1 April 2021 4:21 PM



D0001EFHCC

Form 7A/B
UCPR 14.3

DEFENCE

COURT DETAILS

Court	Supreme Court of NSW
Division	Common Law
List	Common Law General
Registry	Supreme Court Sydney
Case number	2020/00356588

TITLE OF PROCEEDINGS

First Plaintiff	Amireh Fakhouri
First Defendant	The Secretary for the NSW Ministry of Health ABN 92697899630

FILING DETAILS

Filed for	The Secretary for the NSW Ministry of Health, Defendant 1
Legal representative	KATHLEEN ANNE PLOWMAN
Legal representative reference	
Telephone	+61 2 9921 4891

NOTICE OF LISTING

This matter has been listed for Directions at Supreme Court Sydney on 16 April 2021 at 09:00 AM

AFFIDAVIT

Deponent Name	Dean Anthony Bell
Sworn/Affirmed on	1 April 2021

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Defence (e-Services), along with any other documents listed below, were filed by the Court.

Defence (UCPR 7A/7B) (Defence.pdf)

[attach.]

Form 7A (version 5)
UCPR 14.3

DEFENCE

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
List	General (Class Actions)
Registry	Sydney
Case number	2020/00356588

TITLE OF PROCEEDINGS

Plaintiff	Dr Amireh Fakhouri
Defendant	Secretary, NSW Ministry of Health

FILING DETAILS

Filed for	Secretary, NSW Ministry of Health, Defendant
Legal representative	Kate Plowman, MinterEllison
Legal representative reference	1328209
Contact name and telephone	Kate Plowman, (02) 9921 8580
Contact email	kate.plowman@minterellison.com

PLEADINGS AND PARTICULARS

In this defence, unless otherwise stated or the context otherwise requires:

- (a) references to paragraphs and sub-paragraphs are references to paragraphs and sub-paragraphs in the statement of claim dated 16 December 2020 (**statement of claim**);
- (b) a pleading to a paragraph or sub-paragraph is a pleading to each allegation in the paragraph or sub-paragraph;
- (c) the Defendant:
 - (i) adopts the definitions in the statement of claim;
 - (ii) advances reasons for denials also as allegations of material fact;
 - (iii) does not plead to particulars or allegations of law in the statement of claim; and
 - (iv) joins issue on the statement of claim.

Summary of defence

1. In answer to the whole claim, the Defendant says:
 - (a) she was not the employer of the Plaintiff or Group Members during the Relevant Period (see paragraph 8 below);
 - (b) the Plaintiff has not identified any occasions on which she was not paid in accordance with her entitlements for:
 - (i) Rostered Overtime (see subparagraph 29(c) below);
 - (ii) Unrostered Overtime that was authorised and that she claimed pursuant to the 2010, 2015, 2016, 2017 or 2019 Policy Directive (**Employee Arrangements Policy Directive**) as applicable and her employment contract (see subparagraphs 29(c), 32(b) and 35(d) below); or
 - (iii) meal breaks for which she was entitled to payment (see subparagraphs 38(a) 38(b) and 40 below);
 - (c) in relation to any Unrostered Overtime that was not authorised under the applicable Employee Arrangements Policy Directive, or for which the Plaintiff or any Group Member did not make a claim in accordance with the applicable Employee Arrangements Policy Directive and their employment contract or otherwise during the term of the employment contract in which the relevant work was performed:
 - (i) such time did not constitute 'time worked' for the purposes of the Awards, or the Defendant otherwise was not liable to pay for that time, pursuant to clause 9 of the Awards (see paragraph 24 below);
 - (ii) further or alternatively, the Plaintiff or Group Member is estopped from asserting that, in relation to that Unrostered Overtime, they were or were required to be in attendance at a hospital to carry out functions that they had been called upon to perform on behalf of the Defendant, or they did not perform it of their own volition (see paragraphs 44 to 57 below); and
 - (iii) alternatively, the Court should decline to exercise its discretion to grant relief.

Parties

2. The Defendant does not plead to paragraph 1 because it does not allege a material fact, but says there is no position of 'Junior Medical Officer', only the positions in subparagraphs 1(b)(i)(2) to (5).

Particulars

Clause 1 of each of the Awards.

3. The Defendant admits subparagraph 2(a) and says that the Plaintiff's periods of employment, the local health district or specialty network in which she was employed for each period, and her classification under the *Health Professional and Medical (State) Salaries Award (Salaries Award)* for each period, were as set out in the table below:

	Start date	End date	Local health district / specialty network	Classification
(a)	19/01/2015	31/01/2016	Western Sydney Local Health District	Medical Officer – Intern
(b)	1/02/2016	31/01/2017	Western Sydney Local Health District	Medical Officer – Resident – 1st Year
(c)	1/02/2017	5/02/2017	Western Sydney Local Health District	Medical Officer – Resident – 2nd Year
(d)	7/08/2017	4/02/2018	Sydney Children's Hospital Network	Medical Officer – Resident – 2nd Year

4. As to subparagraph 2(b), the Defendant:
- (a) denies subparagraph (i) because the Plaintiff was employed in the position of Intern in the period set out in row (a) of the table in paragraph 3 above;
 - (b) denies subparagraph (ii) because the Plaintiff was employed in the position of Resident Medical Officer in the periods set out in rows (b) and (c) of the table in paragraph 3 above; and
 - (c) admits subparagraph (iii) and says the Plaintiff was employed in the position of Senior Resident Medical Officer in the period set out in row (d) of the table in paragraph 3 above.
5. As to subparagraph 2(c), the Defendant:
- (a) admits the Plaintiff was required to work Rostered Overtime, Unrostered Overtime and Paid Meal Break Shifts from time to time;
 - (b) to the extent it is alleged that the Plaintiff was required to work Unrostered Overtime that was not authorised under the applicable Employee Arrangements Policy Directive, or for which she did not make a claim in accordance with the applicable Employee Arrangements Policy Directive and her employment contract or otherwise

during the term of the employment contract in which the relevant work was performed, denies the allegation for the reasons in paragraphs 24 to 27 below;

- (c) otherwise does not admit the subparagraph for the reasons in paragraphs 33, 35, 37 and 39 below.
6. The Defendant denies subparagraph 2(d) for the reasons in paragraphs 23 to 40 below.
 7. The Defendant admits subparagraph 2(e).
 8. The Defendant denies subparagraph 3(a) because:
 - (a) the Plaintiff and Group Members were employed by the Government of New South Wales in the NSW Health Service pursuant to Chapter 9, Part 1 of the *Health Services Act 1997* (NSW) (**Health Services Act**);
 - (b) pursuant to section 115(1) of the *Health Services Act*, members of the NSW Health Service are employed in the service of the Crown, such that the Crown in right of New South Wales is their true employer (**State**);

Particulars

Section 13(b) of the Interpretation Act 1987 (NSW).

- (c) pursuant to section 116H(1) of the *Health Services Act*, the Defendant is taken to be the employer of members of the NSW Health Service only for the purposes of any proceedings relating to a member of the NSW Health Service held before a competent tribunal having jurisdiction to deal with industrial matters; and
 - (d) this Court is not a competent tribunal having jurisdiction to deal with industrial matters within the meaning of section 116H(1) of the *Health Services Act*, because it:
 - (i) is not a tribunal within the meaning of the *Health Services Act*;
 - (ii) further or alternatively, is not an industrial tribunal; and
 - (iii) further or alternatively, does not have general jurisdiction over industrial matters within the meaning of section 6 of the *Industrial Relations Act 1996* (NSW) (**Industrial Relations Act**).
9. As to subparagraph 3(b), the Defendant:
 - (a) denies subparagraph (i) because:
 - (i) the Plaintiff and any Group Members employed in the NSW Health Service in a classification set out in the applicable Salaries Award (**covered Group Members**) in the period from 1 July 2014 to 30 June 2015 were covered by an

award called the *Public Hospital (Medical Officers) Award (374 IG 332) (Reviewed Award)*, as varied up to 1 July 2014 (**2014 Award**); and

- (ii) the Reviewed Award took effect from 26 April 2012 and remained in effect until rescinded by the successor award from 1 July 2015;
 - (b) denies subparagraph (ii) because the award that covered the Plaintiff and any covered Group Members employed in the period from 1 July 2015 to 30 June 2016 was called the *Public Hospital (Medical Officers) Award (377 IG 1901) (2015 Award)*;
 - (c) denies subparagraph (iii) because the award that covered the Plaintiff and any covered Group Members employed in the period from 1 July 2016 to 30 June 2017 was called the *Public Hospital Medical Officers Award (380 IG 615) (2016 Award)*;
 - (d) admits subparagraphs (iv) to (vi) (the awards referred to in those subparagraphs being the **2017 Award**, **2018 Award** and **2019 Award** respectively).
10. As to subparagraph 3(c), the Defendant:
- (a) says that the Awards were binding on the employer and employees to which they related, including being binding on the Plaintiff and Group Members in the periods they were covered by each Award;
 - (b) says that, accordingly, the Plaintiff and covered Group Members had entitlements under the Awards during those periods;
 - (c) otherwise does not admit the subparagraph because the Defendant does not otherwise understand what is meant by 'entitled to the benefits'.
11. As to subparagraph 3(d), the Defendant:
- (a) denies subparagraph (i) because:
 - (i) the salaries to which the Plaintiff and any covered Group Members employed in the period from 1 July 2014 to 30 June 2015 were entitled were as set out in a variation to an award called the *Health Professional and Medical Salaries (State) Award*, the variation having been published on 24 June 2014 (377 IG 689); and
 - (ii) the salaries set out in that variation applied from the first full pay period commencing after 1 July 2014;
 - (b) denies subparagraph (ii) because the salaries to which the Plaintiff and any covered Group Members employed in the period from 1 July 2015 to 30 June 2016 were

entitled were as set out in an award called the *Health Professional and Medical Salaries (State) Award (377 IG 1592)*;

- (c) denies subparagraph (iii) because the salaries to which the Plaintiff and any covered Group Members employed in the period from 1 July 2016 to 30 June 2017 were entitled were as set out in an award called the *Health Professional and Medical Salaries (State) Award (380 IG 378)*;
- (d) denies subparagraph (iv) because:
 - (i) the salaries to which the Plaintiff and any covered Group Members employed in the period from 1 July 2017 to 30 June 2018 were entitled were as set out in an award called the *Health Professional and Medical Salaries (State) Award (382 IG 305)*; and
 - (ii) the salaries set out in that award applied from the first full pay period commencing after 1 July 2017;
- (e) denies subparagraph (v) because the the salaries set out in that award applied from the first full pay period commencing after 1 July 2018;
- (f) denies subparagraph (vi) because the the salaries set out in that award applied from the first full pay period commencing after 1 July 2019.

12. As to subparagraph 3(e), the Defendant:

- (a) says that, pursuant to clause 10 of the Awards (including Ministry of Health Circular No. 88/251 (**RMO Circular**) in relation to Resident Medical Officers), the arrangements in the Circular applied in relation to meal breaks during Shifts Other than Day Shifts, Monday to Friday within the meaning of clause 10 and the RMO Circular;
- (b) says that, accordingly, the Plaintiff and covered Group Members had entitlements under the Awards that the Circular would be applied in relation to their meal breaks during Shifts Other than Day Shifts, Monday to Friday;
- (c) otherwise denies the subparagraph because the entitlements of the Plaintiff and covered Group Members in relation to Day Shifts – Monday to Friday within the meaning of clause 10 of the Award were as set out in:
 - (i) for Resident Medical Officers – clauses 1 to 4 of the RMO Circular; and
 - (ii) otherwise – subclauses 10(i) to (iv) of the Award.

13. As to subparagraph 3(f), the Defendant:
- (a) admits subparagraph (i);
 - (b) as to subparagraph (ii):
 - (i) admits that, from time to time, the Plaintiff was required to work Unrostered Overtime;
 - (ii) otherwise does not admit the subparagraph because no particulars have been provided of the alleged requirement to work outside of the rostered hours and the Defendant cannot properly plead without those particulars and the subparagraph is liable to be struck out.
14. As to paragraph 4, the Defendant:
- (a) as to subparagraph (a):
 - (i) admits the Defendant has the function of providing governance, oversight and control of the public health system and the statutory health organisations within it, under subsection 122(1)(c1) of the *Health Services Act*;
 - (ii) otherwise denies the subparagraph because the functions of the Defendant are as set out in section 122 of the *Health Services Act* and other legislation that confers functions on the Defendant;

Particulars

Other legislation that confers functions on the Defendant includes the Health Administration Act 1982 (NSW) and the Public Health Act 2010 (NSW).

- (b) denies subparagraph (b) for the reasons in paragraph 8 above.

The Awards

15. The Defendant admits paragraph 5.
16. The Defendant admits paragraph 6 but says that, in addition to rostered ordinary hours, the Defendant was permitted to roster employees to work reasonable overtime.

Particulars

Clauses 6(vii) and the 'Reasonable Hours' clause of each of the Awards (clause 32 of the 2017, 2018 and 2019 Awards, clause 33 of the 2015 and 2016 Awards and clause 34 of the 2014 Award).

Overtime

17. As to paragraph 7, the Defendant:

- (a) denies the paragraph to the extent that the Plaintiff or any Group Member elected to take time off in lieu of payment for overtime, in which case the employee would be entitled to take one hour off for each hour of overtime worked, paid at the ordinary time rate (TOIL election);

Particulars

Clause 18B(iv) of each of the Awards.

- (b) says that 'time worked' has the meaning set out in clause 9 of the Awards, which does not include Unrostered Overtime that was not authorised under the applicable Employee Arrangements Policy Directive or for which a claim was not made in accordance with the applicable Employee Arrangements Policy Directive and their employment contract, for the reasons in paragraph 24 below;
- (c) subject to subparagraph (b) above, admits the paragraph.

18. As to paragraphs 8 and 9, the Defendant:

- (a) denies the paragraphs to the extent that the Plaintiff or any Group Member made a TOIL election for the reasons in subparagraph 17(a) above;
- (b) subject to subparagraph 17(b) above, otherwise admits the paragraphs.

Payment for meal breaks

19. As to paragraph 10, the Defendant:

- (a) admits that the Awards required the Defendant, on behalf of the State, to apply the arrangements outlined in the Circular in relation to meal breaks during Shifts Other than Day Shift –, Monday to Friday within the meaning of clause 10 of the Award and the RMO Circular;
- (b) otherwise denies the paragraph for the reasons in subparagraph 12(c) above.

20. As to paragraphs 11 and 12, the Defendant:

- (a) denies the paragraphs because:
- (i) subclauses 10(i) to (iv) of the Awards, and clauses 1 to 4 of the RMO Circular in relation to Resident Medical Officers, governed the entitlements of officers covered by the Awards to meal breaks for 'Day Shifts – Monday to Friday' within the meaning of clause 10 of the Award and the RMO Circular;

- (ii) the meaning of 'Day Shifts – Monday to Friday' for the purposes of clause 10 of the Award and the RMO Circular was not constrained by the Circular;
 - (iii) further or alternatively, on its proper construction, clause 2.2(iii) of the Circular does not apply to every shift commencing before 8.00 am or finishing after 6.00 pm;
 - (b) says the arrangements in clause 2.2(ii) of the Circular were expressed not to apply where agreement was reached between a hospital and the Public Service Association.
21. Subject to the qualification in subparagraph 20(b) above, the Defendant admits paragraph 13.
22. The Defendant does not admit paragraph 14 because, despite making reasonable inquiries, the Defendant does not know whether an agreement of the kind described in subparagraph 20(b) above was in operation during the Relevant Period.

Unrostered overtime

23. The Defendant denies paragraph 15 because:
- (a) in addition to circumstances where they were not 'required' by the Defendant to be in attendance at a hospital for the purpose of carrying out such functions as the Defendant may call on them to perform, the Plaintiff's and the covered Group Members' time is not to be treated as 'time worked' for the purposes of the Awards if:
 - (i) they attended work of their own volition outside of hours rostered on duty, or when they remained in attendance when formally released from the obligation to perform professional duties; or
 - (ii) the time constituted a break allowed and actually taken for meals;
 - (b) the Defendant was not liable to pay for any time falling within the categories in subparagraphs (a)(i) or (a)(ii) above.

Particulars

Clause 9 of each of the Awards.

24. The Defendant denies paragraphs 16 to 19:
- (a) because, pursuant to each of Employee Arrangements Policy Directives, employees were authorised to work Unrostered Overtime in the circumstances set out in

paragraphs 16 to 19, but whether they were required to do so would depend on the circumstances of each case;

Particulars

The clauses in the Employee Arrangements Policy Directives referred to in subparagraph (ii) of the particulars of paragraphs 16 to 19 provide that an employee 'may' undertake unrostered overtime without prior approval.

- (b) further or alternatively, for the reasons in subparagraphs (c) and (d) below;
- (c) the authorisation to work in the circumstances set out in paragraphs 16 to 19 was subject to the condition that the employee make a claim in relation to the time purportedly worked in accordance with the applicable Employee Arrangements Policy Directive and the employee's employment contract;

Particulars

- (i) *Clauses 9.3 and 9.4 of the 2019 Policy Directive; clause 9.2 of the 2015, 2016 and 2017 Policy Directives; clause 8.2 of the 2010 Policy Directive.*
 - (ii) *Third paragraph, and clause headed 'Payment', of the 'Offer of Temporary Employment' to the Plaintiff dated 29 September 2014, which contained terms of her employment contract between 19 January 2015 and 5 February 2017 (Plaintiff's first employment contract).*
 - (iii) *Clauses headed 'Remuneration' and 'Compliance with legislation and policies' of the 'Offer of Temporary Employment' to the Plaintiff dated 16 November 2016, which contained terms of her employment contract between 7 August 2017 and 4 February 2018 (Plaintiff's second employment contract).*
 - (iv) *Further particulars in relation to other Group Members will be provided after the Group Members are known.*
- (d) if an employee did not make a claim in accordance with the applicable Employee Arrangements Policy Directive and their employment contract, or otherwise during the term of the employment contract in which the relevant work was performed:
- (i) for the purposes of clause 9 of the Awards, the employee is taken:
 - (A) not to have been required by the employer to be in attendance at a hospital for the purpose of carrying out functions that the employer called on the employee to perform during the relevant time;

(B) further or alternatively, to have attended during the relevant time of his or her own volition;

(C) further or alternatively, to have been formally released from their obligation to perform professional duties;

(ii) further or alternatively, the employee is estopped from asserting the contrary of the matters in subparagraph (i)(A) or (i)(B) above for the reasons in paragraphs 44 to 57 below.

25. The Defendant denies paragraph 20:

(a) in relation to time worked prior to 2 July 2019, because, pursuant to the 2010, 2015, 2016 and 2017 Policy Directives, there was no authorisation to work in those circumstances unless the employee had obtained prior approval;

Particulars

Clause 9.2 of the 2015, 2016 and 2017 Policy Directives; clause 8.2 of the 2010 Policy Directive.

(b) in relation to time worked on or after 2 July 2019, because, pursuant to the 2019 Policy Directive, the authorisation to work unrostered overtime to complete outstanding patient transfer / discharge summaries did not apply if the task was able to be handed over to another medical officer to finish;

(c) further or alternatively, for the reasons in paragraph 24 above.

26. The Defendant denies paragraph 21:

(a) in relation to time worked on or after 2 July 2019, because, pursuant to the 2019 Policy Directive, the authorisation to work unrostered overtime when requested by a superior to attend a late ward round terminated either when the employee's ward round responsibilities concluded or when it was feasible for the work to be handed over to another medical officer to complete;

Particulars

Clause 9.1.6 of the 2019 Policy Directive.

(b) further or alternatively, for the reasons in paragraph 24 above;

(c) further or alternatively in relation to time worked prior to 2 July 2019, for the reasons in subparagraph 25(a) above.

27. As to paragraphs 22 to 24, the Defendant:

- (a) denies the paragraphs in relation to the circumstances pleaded in paragraphs 16 to 21 of the statement of claim for the reasons in paragraphs 23 to 26 above;
- (b) otherwise denies the paragraphs:
 - (i) because pursuant to each of the Employee Arrangements Policy Directives, there was no authorisation to work Unrostered Overtime in any circumstance outside those expressly identified in the applicable Employee Arrangements Policy Directive as not requiring prior approval (**pre-authorised Unrostered Overtime**), unless the employee had obtained prior approval;

Particulars

The circumstances expressly identified as not requiring prior approval were those set out in clauses 9.1.1 to 9.1.9 of the 2019 Policy Directive; clauses 9.2.1 to 9.2.4 of the 2015, 2016 and 2017 Policy Directives; and clauses 8.2.1 to 8.2.4 of the 2010 Policy Directive.

- (ii) further or alternatively, for the reasons in subparagraphs 24(c) and (d) above.

Underpayment

28. As to paragraph 25, the Defendant:

- (a) admits the paragraph to the extent that 'time worked' is understood as set out in subparagraph 17(b) and paragraph 23 above;
- (b) otherwise denies the paragraph because the Defendant was not otherwise required to pay for any time of the Plaintiff or Group Members.

29. As to paragraphs 26 and 27, the Defendant:

- (a) denies the paragraphs to the extent that the Plaintiff or any Group Member made a TOIL election for the reasons in subparagraph 17(a) above;
- (b) denies the paragraphs to the extent it is alleged that the Fortnightly Overtime or the Daily Overtime included Unrostered Overtime for which no claim had been made in accordance with the applicable Employee Arrangements Policy Directive and the employee's employment contract, or which had not been approved prior to being performed when required by the applicable Employee Arrangements Policy Directive, for the reasons in paragraphs 23 to 27 above;
- (c) otherwise admits the paragraphs but says the Plaintiff has not identified any amounts she was not paid and to which she was entitled for:

- (i) Rostered Overtime; or
 - (ii) Unrostered Overtime which was approved in accordance with the applicable Employee Arrangements Policy Directive and her employment contract, and for which she claimed in accordance with the applicable Employee Arrangements Policy Directive and her employment contract or otherwise during the term of the employment contract in which the relevant work was performed.
30. The Defendant denies paragraph 28 for the reasons in paragraph 20 above.
31. The Defendant does not admit paragraph 29 for the reasons in paragraph 22 above.
32. As to paragraph 30, the Defendant:
- (a) denies the paragraph to the extent the purported Unrostered Overtime includes Unrostered Overtime that was not authorised under the applicable Employee Arrangements Policy Directive or for which no claim had been made in accordance with the applicable Employee Arrangements Policy Directive and the employee's employment contract, for the reasons in paragraphs 23 to 27 above;
 - (b) says that, from time to time during the Fakhouri Employment Period, the Plaintiff submitted claims for Unrostered Overtime which were approved and the Plaintiff has not identified any such claims for which she was not paid;

Particulars

The claims for Unrostered Overtime made by the Plaintiff and approved included those set out in the table below:

Date of claim	Period for which Unrostered Overtime claimed	Total days (hours) of Unrostered Overtime claimed	Date of approval
(i) 17/02/2015	2/02/2015 – 13/02/2015	9 days (9 hrs)	24/02/2015
(ii) 26/02/2015	16/02/2015 – 27/02/2015	10 days (11.5 hrs)	2/03/2015
(iii) 12/03/2015	2/03/2015 – 13/03/2015	10 days (10 hrs)	12/03/2015
(iv) 26/03/2015	16/03/2015 – 26/03/2015	8 days (8.5 hrs)	26/03/2015
(v) 5/05/2015	13/04/2015 – 17/04/2015	5 days (7 hrs 20 mins)	5/05/2015
(vi) 28/10/2016	13/09/2016 – 13/10/2016	22 days (18 hrs, 10 mins) ¹	2/11/2016

¹ *In preparing this pleading, the Defendant has become aware that, by inadvertence, 30 minutes of this period was not paid. The Defendant will take steps to rectify that inadvertent underpayment as soon as possible. The Defendant is not otherwise aware of any claimed Unrostered Overtime that has not been paid to the Plaintiff.*

- (c) otherwise does not admit the paragraph because no particulars have been provided of the dates on which or circumstances in which it is alleged that the Plaintiff or any Group Members worked Unrostered Overtime, the Defendant cannot properly plead without those particulars and the paragraph is liable to be struck out, but refers to subparagraph 29(c) above.

33. As to paragraph 31, the Defendant:

- (a) admits that, from time to time during the Fakhouri Employment Period, the Plaintiff was rostered to work in excess of 80 hours in a fortnight;
- (b) admits that, from time to time, Group Members were rostered to work in excess of 80 hours in a fortnight; and
- (c) otherwise does not admit the paragraph because no particulars have been provided of the dates on which or circumstances in which it is alleged that the Plaintiff or any Group Members were required by the Defendant to work in excess of 80 hours in a fortnight, and the Defendant cannot properly plead without those particulars and the paragraph is liable to be struck out.

34. As to paragraph 32, the Defendant:

- (a) denies the paragraph to the extent set out in subparagraph 32(a) above;
- (b) otherwise does not admit the paragraph because no particulars have been provided of the dates on which or circumstances in which it is alleged that the Plaintiff or any Group Members worked Fortnightly Overtime, the Defendant cannot properly plead without those particulars and the paragraph is liable to be struck out, but refers to subparagraph 29(c) above.

35. As to paragraph 33, the Defendant:

- (a) admits that, from time to time during the Fakhouri Employment Period, the Plaintiff was rostered to work in excess of 10 hours in a day;
- (b) admits that, from time to time, Group Members were rostered to work in excess of 10 hours in a day;

- (c) otherwise does not admit the paragraph because no particulars have been provided of the periods or circumstances in which it is alleged that the Plaintiff or any Group Members worked Daily Overtime, and the Defendant cannot properly plead without those particulars and the paragraph is liable to be struck out;
- (d) says that, from time to time during the Fakhouri Employment Period, the Plaintiff made claims for Unrostered Overtime for which she was paid.

Particulars

See particulars of subparagraph 32(b) above.

36. As to paragraph 34, the Defendant:
- (a) denies the paragraph to the extent set out in subparagraph 32(a) above;
 - (b) otherwise does not admit the paragraph because no particulars have been provided of the dates on which or circumstances in which it is alleged that the Plaintiff or any Group Members worked Daily Overtime, the Defendant cannot properly plead without those particulars and the paragraph is liable to be struck out, but refers to subparagraphs 29(c), 32(b) and 35(d) above.
37. As to paragraph 35, the Defendant:
- (a) admits that, from time to time during the Fakhouri Employment Period, the Plaintiff was rostered to work shifts that commenced before 08:00 or finished after 18:00, Monday to Friday;
 - (b) admits that, from time to time, Group Members were rostered to work shifts that commenced before 08:00 or finished after 18:00, Monday to Friday;
 - (c) otherwise does not admit the paragraph because no particulars have been provided of the dates on which or circumstances in which it is alleged that the Plaintiff or any Group Members were required by the Defendant to work such shifts, the Defendant cannot properly plead without those particulars and the paragraph is liable to be struck out.
38. As to paragraph 36, the Defendant:
- (a) denies the paragraph for the reasons in paragraph 20 above;
 - (b) says the Plaintiff has not identified any occasion on which such a payment was not made.

39. As to paragraph 37, the Defendant:
- (a) admits that, from time to time during the Fakhouri Employment Period, the Plaintiff was rostered to work shifts on Saturdays and Sundays;
 - (b) admits that, from time to time, Group members were rostered to work shifts on Saturdays and Sundays;
 - (c) otherwise does not admit the paragraph because no particulars have been provided of the dates on which or circumstances in which it is alleged that the Plaintiff or any Group Members were required by the Defendant to work such shifts, the Defendant cannot properly plead without those particulars and the paragraph is liable to be struck out.
40. The Defendant admits paragraph 38, but says the Plaintiff has not identified any occasion on which such a payment was not made.
41. The Defendant denies paragraphs 39 to 41 for the reasons in paragraphs 23 to 40 above.
42. The Defendant denies paragraph 42:
- (a) for the reasons in paragraphs 23 to 40 above;
 - (b) further or alternatively, because an order under section 365 of the *Industrial Relations Act* is discretionary, and the Court should decline to exercise that discretion by reason of the matters in paragraphs 44 to 57 below.
43. The Defendant does not plead to paragraphs 43 to 46 because they do not allege material facts, but says the Defendant does not accept that the questions set out in paragraphs 43 to 46 are common questions of law or fact for all Group Members or appropriate common questions because, for example, the extent of any requirement to be in attendance at a hospital for the purpose of carrying out and performing functions as called on by the Defendant differed between hospitals and departments.

Estoppel by conduct

Background to the estoppel

44. Pursuant to the terms of their employment contracts, the Plaintiff and Group Members were:
- (a) informed that their conditions of employment were governed by the Award;
 - (b) obliged to comply with the Employee Arrangements Policy Directives as in force from time to time;

- (c) obliged to obtain approval for unrostered overtime from the appropriate employer delegate in accordance with the applicable Employee Arrangements Policy Directive; and
- (d) obliged to submit claims for unrostered overtime for payment no later than four weeks after the claimed unrostered overtime was worked.

Particulars

- (i) *In relation to the Plaintiff, see particulars (ii) and (iii) of subparagraph 24(b) above, and fifth paragraph of the Plaintiff's second employment contract.*
 - (ii) *Particulars in relation to Group Members will be provided after the Group Members are known.*
45. Pursuant to each of the Employee Arrangements Policy Directives, a medical officer was required:
- (a) to obtain prior approval before undertaking any unrostered overtime other than pre-authorised Unrostered Overtime; and
 - (b) to submit any claims for unrostered overtime to the relevant public health organisation no later than four weeks after the unrostered overtime was worked.

Particulars

Clauses 9.2 and 9.3 of the 2019 Policy Directive; clause 9.2 of the 2015, 2016 and 2017 Policy Directives; clause 8.2 of the 2010 Policy Directive.

46. Pursuant to the 2019 Policy Directive, in addition to the requirement in subparagraph 45(b) above, a medical officer was required to:
- (a) submit any claims for unrostered overtime using an overtime claim form;
 - (b) provide specified minimum information on the overtime claim form; and
 - (c) sign the form and as part of this signature confirm that the claims were a true and accurate reflection of work performed and that the officer sought prior approval where it was required.

Particulars

Clause 9.3 of the 2019 Policy Directive. The minimum information was specified in clause 9.3 as:

- (i) *the employee's name and employee number;*
- (ii) *the department or cost centre where overtime was worked;*

- (iii) *the name and Medical Record Number (MRN) of the last patient seen during the period claimed (if relevant);*
 - (iv) *reason for the overtime (as per clause 9.1, or state the reason if not included in this list);*
 - (v) *date, start and finish time of the unrostered overtime; and*
 - (vi) *for a claim relating to Mandatory Training, the name of the training course.*
47. The Plaintiff and at least some Group Members who commenced employment with NSW Health at the beginning of their first clinical year as a medical officer, in the position of Intern, participated in an orientation in which they were informed of:
- (a) their ordinary hours of work (and given a copy of the Award);
 - (b) the requirement to make a claim for unrostered overtime;
 - (c) the requirement for a claim for unrostered overtime to be submitted within four weeks;
 - (d) the process for claiming unrostered overtime, including by submitting the claim using the approved claim form; and
 - (e) a web address where they could access the Employment Arrangements Policy Directive then in force.

Particulars

- (i) *The Plaintiff was informed of those matters in documents provided or shown to her as part of her orientation with the Western Sydney Local Health District at Westmead Hospital between 19 January 2015 and 30 January 2015. The documents included:*
 - (A) *a document titled 'Understanding Your Timesheet' dated January 2013 (page 2);*
 - (B) *a document titled 'JMO Payment – Frequently Asked Questions' dated January 2013 (pages 1, 4);*
 - (C) *a document titled 'Policy Summaries' dated January 2015 (section 1);*
 - (D) *a presentation titled 'Westmead Hospital Medical Workforce Unit', by Kylie Laraghy – JMW Manager (slide 5);*
 - (E) *a copy of the Reviewed Award;*
 - (F) *an unrostered overtime claim form.*
- (ii) *Particulars in relation to Group Members will be provided after the Group Members are known.*

48. The Plaintiff and Group Members who participated in a rotation in the Westmead Hospital Department of Gastroenterology & Hepatology were, at the beginning of their rotation, given a handbook which stated to the effect that:

- (a) Resident Medical Officers should claim for unrostered overtime worked; and
- (b) they were to ensure that unrostered overtime claims were submitted for authorisation within four weeks of the overtime being worked.

Particulars

- (i) *The handbook provided to the Plaintiff was titled 'Department of Gastroenterology & Hepatology – Medical Officer Manual' updated 5 January 2015. The relevant passage is on page 12 under the heading 'Un-rostered Overtime'.*
- (ii) *Particulars in relation to Group Members will be provided after the Group Members are known.*

49. From time to time throughout the Relevant Period, the Plaintiff and Group Members submitted claims for Unrostered Overtime which were approved and for which they were paid (**claimed Unrostered Overtime**).

Particulars

- (i) *In relation to the Plaintiff, see the particulars of subparagraph 32(b) above.*
- (ii) *Particulars in relation to Group Members will be provided after the Group Members are known.*

50. By reason of paragraphs 44 to 49 above, the Plaintiff and Group Members were:

- (a) aware of their ordinary hours of work;
- (b) aware of the requirement to obtain prior approval to work unrostered overtime other than the pre-authorised Unrostered Overtime;
- (c) aware of the requirement to submit claims for Unrostered Overtime and the process for doing so; and
- (d) capable of complying with those requirements.

Operation of the estoppel

51. In the circumstances set out in paragraphs 44 to 50 above, to the extent that the Plaintiff and Group Members:

- (a) attended or remained at work outside their ordinary hours of work other than for Rostered Overtime or pre-authorised Unrostered Overtime, having not obtained prior

approval in accordance with the applicable Employee Arrangements Policy Directive and their employment contract; or

- (b) did not submit a claim for work outside their ordinary hours of work:
 - (i) in accordance with the applicable Employee Arrangements Policy Directive and their employment contract; or
 - (ii) otherwise during the term of the employment contract in which they performed that work,

then, by that conduct, the Plaintiff and Group Members induced the Defendant to assume, and the Defendant did assume:

- (c) that they were not, or were not required to be, in attendance at a hospital to carry out functions that they had been called upon to perform on behalf of the Defendant during any such time;
- (d) further or alternatively, that any attendance at a hospital during any such time was of their own volition.

52. The Plaintiff and Group Members did not correct any mistake in the assumptions set out in subparagraph 51(c) and, further or alternatively, 51(d) above (**unapproved or unclaimed time assumptions**), despite being under a duty to do so:

- (a) by reason of their contractual obligations set out in subparagraphs 44(b) to (d) above;
- (b) further or alternatively, because, by reason of the matters in paragraphs 44 to 50 above:
 - (i) the Plaintiff and Group Members knew, or should reasonably have known, that the Defendant would be induced by the acts or omissions referred to in subparagraphs 51(a) or (b) above to make the unapproved or unclaimed time assumptions; and
 - (ii) a reasonable person would have expected the Plaintiff and Group Members to correct any mistake in those assumptions by submitting a claim in accordance with the applicable Employee Arrangements Policy Directive and their employment contract.

53. In the circumstances set out in paragraph 52 above, to the extent the Plaintiff or Group Members engaged in the conduct in subparagraph 51(a) or 51(b) above, it amounted to a representation by the Plaintiff and Group Members as to the matters in subparagraph 51(c)

and, further or alternatively, 51(d) above (**unapproved or unclaimed time representations**).

54. The Defendant acted in reliance on the unapproved or unclaimed time representations and the unapproved or unclaimed time assumptions, in that the Defendant, by reason of the unapproved or unclaimed time representations and the unapproved or unclaimed time assumptions:
- (a) was not aware of, and did not investigate contemporaneously, any assertion that the Plaintiff or Group Members had purportedly attended at work outside their ordinary hours of work other than during the periods of Rostered Overtime and claimed Unrostered Overtime;
 - (b) did not make any payment to the Plaintiff or Group Members in relation to any purported attendance at work outside their ordinary hours of work other than during the periods of Rostered Overtime and claimed Unrostered Overtime; and
 - (c) did not take steps that were available to the Defendant to reduce any such time being worked by the Plaintiff and Group Members.

Particulars

The steps that would have been available to the Defendant included:

- (i) changing roster arrangements to reduce the possibility of Unrostered Overtime arising;*
- (ii) changing models of care and making operational changes in the delivery of health services, such as changing theatre scheduling arrangements, to address the causes of Unrostered Overtime, based on the information provided by the Plaintiff and Group Members in their claim forms;*
- (iii) employing or rostering more medical officers;*
- (iv) reallocating responsibility for some activities or functions to more senior doctors or other personnel;*
- (v) issuing directions in relation to working or not working Unrostered Overtime or performing or not performing particular activities, including changing the circumstances in which Unrostered Overtime was authorised without approval and approval processes;*
- (vi) planning, forecasting or budgeting for the Unrostered Overtime to ensure that the Defendant could meet any liability for Unrostered Overtime.*

55. To the extent the Plaintiff or Group Members engaged in the conduct in subparagraph 51(a) or 51(b) above, it was reasonable for the Defendant to regard that conduct as amounting to the unapproved and unclaimed time representations, to make the unapproved or unclaimed time assumptions, and to rely on those assumptions as set out in paragraph 54 above, in circumstances in which the Plaintiff and Group Members:
- (a) were obliged to comply with the Employee Arrangements Policy Directives and the requirements of their employment contracts in relation to obtaining approval for Unrostered Overtime other than pre-authorised Unrostered Overtime, and submitting claims for Unrostered Overtime, as set out in paragraphs 44 to 46 above;
 - (b) were informed of those obligations by the Defendant as set out in paragraphs 47 and 48 above;
 - (c) were capable of complying with those obligations as set out in paragraph 50 above; and
 - (d) were on notice of the Defendant's reliance on the unapproved or unclaimed time representations and the unapproved or unclaimed time assumptions.

Particulars of (d)

The Plaintiff and Group Members were on notice including because:

- (i) *they were not paid in relation to any purported attendance at work outside their ordinary hours of work other than during the periods of Rostered Overtime and claimed Unrostered Overtime;*
 - (ii) *their day-to-day work was autonomous, such that they could not reasonably expect the senior staff with authority to approve or require Unrostered Overtime on behalf of the Defendant to have known they were working outside their ordinary hours unless they submitted a claim or otherwise brought that work to the Defendant's attention.*
56. The Defendant would suffer detriment if the Plaintiff and Group Members were permitted to assert to the contrary of any of unapproved or unclaimed time assumptions, to the extent that any of those assumptions is incorrect (which is not admitted), being that:
- (a) the Defendant would be required to make further payments to the Plaintiff and Group Members in relation to Unrostered Overtime;
 - (b) further or alternatively, the Defendant has lost the opportunity to avoid all or some of the Unrostered Overtime by taking the steps referred to in subparagraph 54(c) above,

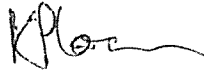
which she did not take in reliance on the unapproved or unclaimed time representations and the unapproved or unclaimed time assumptions.

57. By reason of paragraphs 51 to 56 above, the Plaintiff and Group Members are estopped from asserting:
- (a) that they were, or were required to be, in attendance at a hospital to carry out functions that they had been called upon to perform on behalf of the Defendant during any such time;
 - (b) further or alternatively, that any attendance at a hospital during any such time was not of their own volition.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature



Capacity

Solicitor on the record

Date of signature

1 April 2021

AFFIDAVIT VERIFYING

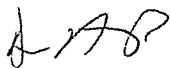
Name Dean Anthony Bell
 Address 1 Reserve Road, St Leonards
 Occupation Deputy General Counsel and Director Legal
 Date 1 April 2021

I affirm:

- 1 I am the Deputy General Counsel and Director Legal, NSW Ministry of Health.
- 2 I believe that the allegations of fact contained in the defence are true.
- 3 I believe that the allegations of fact that are denied in the defence are untrue.
- 4 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the defence are true.

AFFIRMED at

Signature of deponent



Name of witness

Hugh Percival

Address of witness

1 Reserve Road St Leonards NSW 2055

Capacity of witness

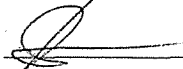
Solicitor

And as a witness, I certify the following matters concerning the person who made this affidavit (the deponent):

- 1 #I saw the face of the deponent. [OR, delete whichever option is inapplicable]
 #I did not see the face of the deponent because the deponent was wearing a face covering, but I am satisfied that the deponent had a special justification for not removing the covering.*
- 2 #I have known the deponent for at least 12 months. [OR, delete whichever option is inapplicable]
 #I have confirmed the deponent's identity using the following identification document:

 Identification document relied on (may be original or certified copy) †

Signature of witness



Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

[* The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012).]

[† "Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.]