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Reply (UCPR 8)

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	Amireh Fakhouri, Plaintiff 1
Legal representative	REBECCA GILSENAN
Legal representative reference	
Telephone	02 9261 1488
Your reference	3052894

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Reply (UCPR 8) (21.07.02 reply with verifying affidavit signed by A Fakhouri.pdf)

[attach.]

Form 8 (version 5)
UCPR 14.4

REPLY

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	
Plaintiff	**Dr Amireh Fakhouri**
First defendant	**The Secretary for the NSW Ministry of Health**
Second defendant	The State of New South Wales

FILING DETAILS	
Filed for	**Dr Amireh Fakhouri**, Plaintiff
Filed in relation to	Plaintiff's claim
Legal representative	Rebecca Gilsenan, Maurice Blackburn Lawyers
Legal representative reference	3052894
Contact name and telephone	Rebecca Gilsenan, 02 9261 1488
Contact email	rgilsenan@mauriceblackburn.com.au

PLEADINGS AND PARTICULARS

Save as to the allegations addressed below, the Plaintiff relies upon the implied joinder of issue pursuant to r. 14.27 of the *Uniform Civil Procedure Act 2005* (NSW).

1 To the extent that the defence to the amended statement of claim (**Defence**) pleads matters relating to some or all Group Members other than the Plaintiff, the Plaintiff says that:

a. the claims of individual Group Members other than the Plaintiff have not been, and are not required to be, pleaded in the Amended Statement of Claim, and will not be pleaded until after the initial trial of common issues, and to the extent the Defence pleads in relation to those claims of individual Group Members other than the Plaintiff, it is not necessary for the Plaintiff to reply to it;

b. to the extent that she knows and can admit or deny matters relating to common questions arising in relation to the claims of some or all of the Group Members, she does so in this Reply;

c. she does not otherwise know and therefore cannot admit or deny the factual matters as they are pleaded in relation to some or all of the Group Members;

d. she responds to the factual matters as they are pleaded in relation to her personally, to the extent that it is necessary to do so and it is not subject to the implied joinder of issue.

2 In response to paragraphs 1(c)(i), 5(b), 17(b), 23, 24, 29(b) and 32(a) of the Defence, and any other part of the Defence, where the Defendants plead that any time worked as Unrostered Overtime that did not fall within the categories of authorised Unrostered Overtime in the applicable Employee Arrangements Policy Directive, or was not the subject a claim by the Plaintiff or any Group Member in accordance with the applicable Employee Arrangements Policy Directive and their employment contracts, is to be deemed or treated as:

a. not "time worked" for the purposes of clause 9 of the Awards;

b. work performed by them by reason of attendances at work of their own volition outside of hours rostered on duty, or attendances when formally released from the obligation to perform professional duties,

the Plaintiff:

c. says that the construction of the words "time worked" in clause 9 of the Awards is a question of law;

d. on the proper construction of the words "time worked", whether the Plaintiff or any Group Member made a claim in accordance with the applicable Employee Arrangements Policy Directive and their employment contracts does not alter whether time was worked by the Plaintiff or any Group Member within the meaning of clause 9 of the Awards;

e. on the proper construction of the words "time worked", whether the Unrostered Overtime fell within the categories of authorised Unrostered Overtime in the applicable Employee Arrangements Policy Directive does not alter whether time was worked by the Plaintiff or any Group Member within the meaning of clause 9 of the Awards;

f. further, on the proper construction of the words "time worked", on each and every occasion when the Plaintiff or any Group Member performed work in the

circumstances pleaded in paragraphs 16 – 22 of the Amended Statement of Claim, they were performing work as required by the Defendants and thereby such work constituted time worked within the meaning of clause 9 of the Awards;

g. further, the applicable Employee Arrangements Policy Directive expressly stated that the circumstances pleaded in paragraphs 16 – 21 of the Amended Statement of Claim were instances of Unrostered Overtime that were authorised without the need for prior approval;

h. to the extent that the Defendants rely upon the terms of the applicable Employee Arrangements Policy Directive and any employment contract entered into by the Plaintiff or any Group Member to contend that in circumstances where the Unrostered Overtime did not fall within the categories of authorised Unrostered Overtime, or in the absence of making a claim for payment of Unrostered Overtime, in accordance with those terms that the Plaintiff and Group Members do not have an entitlement to receive payment for the Unrostered Overtime they performed in the circumstances pleaded in paragraphs 16 – 22 of the Amended Statement of Claim, the relevant terms relied upon by the Defendants do not and cannot exclude an entitlement to:

   i. payment for time worked pursuant to the Awards; and/or

   ii. bring a claim for underpayment pursuant to section 365 of the *Industrial Relations Act 1996* (NSW);

i. further to subparagraph 2h. above, the terms of the applicable Employee Arrangements Policy Directive and employment contracts, to the extent that they curtail or extinguish in whole or in part an entitlement on the part of the Plaintiff or any Group Member for payment for time worked pursuant to the Awards or to bring a claim for underpayment, they are contrary to public policy, void, or otherwise unenforceable and are contrary to the statutory right of applicable persons to bring a claim for underpayment at any time within the applicable limitation period specified in section 369(3) of the *Industrial Relations Act 1996* (NSW).

3 In respect of paragraphs 4A – 4D of the Defence, the Plaintiff:

a. admits that she entered into the Plaintiff's first employment contract and the Plaintiff's second employment contract (together, **her employment contracts**);

b. relies on her employment contracts for their full force, meaning and effect, at law (to the extent that such terms are valid, enforceable, and not contrary to public policy as pleaded in subparagraph 2i. above); and

c. further, says that the terms of her employment contracts required her to act consistently with directions issued to her by the Defendants, which included her supervisors and department directors.

4 In response and in answer to the Defendants' estoppel by conduct case pleaded at paragraphs 1, 44 – 57 of the Defence, the Plaintiff:

a. says that at all material times, the Defendants had knowledge of her rostered hours of work as the Defendants determined and published to her such rostered hours;

b. says that at all material times, the Defendants had knowledge that the Plaintiff performed Unrostered Overtime given the matters pleaded in subparagraphs 4e. – 4h. below;

c. says that at all material times, the Defendants published the applicable Employee Arrangements Policy Directive which expressly stated that the circumstances pleaded in paragraphs 16 – 21 of the Amended Statement of Claim where instances of Unrostered Overtime which did not require prior approval;

d. says that at all material times, she performed work under the supervision and at the direction of:

i. her supervisors;

ii. heads of departments;

iii. consultants;

iv. advanced trainees;

v. senior registrars;

vi. registrars; and/or

vii. resident medical officers;

e. says that she was directed, from time to time, to work Unrostered Overtime by her superiors (being persons holding the positions identified in 4d. above), including but not limited to:

i. consultants, Dr Greg White and Associate Professor Golo Ahlenstiel;

ii. advanced trainee, Dr Vikas Gupta; and

iii. registrar, Dr Thevaki Sivagnanam;

f. says that the fact that she was working Unrostered Overtime was evident from:

i. her presence at work outside of her rostered hours;

ii. her supervisors' observation (being those persons identified in 4d. above) of her presence at work outside of her rostered hours;

iii. clinical and other discussions at handover, including discussing patients' care with nurses;

iv. documents including patients' medical records, such as admission records, discharge summaries, medication charts, letters to other medical practitioners, surgical theatre logs, requests for pathology, histopathology, cytology and radiology investigations, and referrals to other departments within the same hospital, other hospitals and Allied Health Professionals;

g. says that the fact that she was working Unrostered Overtime was also the subject of:

i. discussions between her and her supervisors (being persons holding the positions identified in 4d. above), including but not limited to Professor Jacob George, consultant and head of the gastroenterology department of Westmead Hospital;

ii. discussions between her and human resources employees of the Defendants, including Jalal Ahmad and Jan Worsley;

h. in the premises, says that the Defendants:

i. had actual knowledge that the Plaintiff was working Unrostered Overtime;

ii. alternatively, had constructive knowledge that the Plaintiff was working Unrostered Overtime;

iii. alternatively, by basic observation or reasonable enquiry ought to have known that the Plaintiff was working Unrostered Overtime;

i. further, in the premises, says that the Defendants obtained the benefit of the Plaintiff working Unrostered Overtime;

j. further, the Defendants had knowledge from surveys undertaken by them and/or published to them that persons in the position of the Plaintiff were working Unrostered Overtime without payment or without making a claim for payment of the Unrostered Overtime, including the reasons why persons in such positions did not claim payment for Unrostered Overtime;

k. denies the assertion at 51(aa) of the Defence that she attended or remained at work for pre-authorised Unrostered Overtime in circumstances in which:

    i. she had been told or invited to go home by her supervisor or a more senior employee; or

    ii. where another employee was available to take over her duties;

l. in relation to making claims for payment of Unrostered Overtime, says that:

    i. in her first term in the general surgery department at Auburn Hospital, she admits that she made claims and was paid for Unrostered Overtime;

    ii. in her second term in the gastroenterology department of Westmead Hospital, she admits that she made claims for Unrostered Overtime for approximately the first two weeks, but says that these claims for payment of Unrostered Overtime were rejected by Professor George;

    iii. in approximately early May 2015, Professor George called all interns in the gastroenterology department at Westmead Hospital, including the Plaintiff, to a meeting and stated that he would not approve any of their claims for payment of Unrostered Overtime;

    iv. despite the matter pleaded in subparagraph 4l.iii., the Plaintiff continued to work Unrostered Overtime, with the knowledge of her supervisors and more senior employees within the gastroenterology department at Westmead Hospital, but relying upon Professor George's statement did not submit claims for payment of Unrostered Overtime;

    v. in her following terms in relief, geriatrics and aged care, infectious diseases and psychiatry at Westmead Hospital, relying upon Professor George's statements she did not submit claims for Unrostered Overtime;

    vi. in her term in the dermatology department of Westmead Hospital, made claims and was paid for Unrostered Overtime in circumstances

where she was regularly working Unrostered Overtime, but when she made claims for the payment of Unrostered Overtime she was required by Professor Fernandez Penas, consultant and head of the dermatology department at Westmead Hospital, to retrospectively justify her claims when there was no such requirement in the applicable Employee Arrangements Policy Directive or her employment contract;

vii. as a result of both Professor George's statement and her experience in the dermatology department of Westmead Hospital with Professor Penas, she did not in her subsequent terms in adolescent health and relief at Westmead Hospital or in emergency and general medicine at Children's Hospital Westmead make any claims for payment of Unrostered Overtime, though she continued to work Unrostered Overtime from time to time;

m. in the premises, says that the Defendants:

i. had actual or constructive knowledge, or ought to have known through observation or basic or reasonable enquiry that Professor George had stated that he would not approve payment of her Unrostered Overtime;

ii. had actual or constructive knowledge, or ought to have known through observation or basic or reasonable enquiry that the Plaintiff was working Unrostered Overtime but was being required retrospectively to justify it by Professor Penas in a manner inconsistent with the applicable Employee Arrangements Policy Directive and her employment contracts;

iii. had actual or constructive knowledge, or ought to have known through observation or basic or reasonable enquiry that the Plaintiff was being discouraged from making claims for payment of Unrostered Overtime, even though she was working Unrostered Overtime and repeats subparagraph 4b. above;

iv. obtained the benefit of her working Unrostered Overtime despite the matters in 4mi. – 4miii. above;

n. says that, despite the matters in subparagraphs 4a. – 4l. above the Defendants did not change or take steps to change their rostering practices relating to the Plaintiff or allocation of work to avoid the Plaintiff working Unrostered Overtime;

o. in the premises, says that the factual assumptions and premises pleaded at paragraphs 44 – 57 of the Defence as forming the essential bases of the asserted estoppel by conduct case are unsupported or assumptions or premises that were and are not available to the Defendants;

p. further says that that Defendants' estoppel by conduct case seeks to operate to curtail or extinguish in whole or in part an entitlement on the part of the Plaintiff or any Group Member for payment for time worked pursuant to the Awards or to bring a claim for underpayment and is thereby not available to the Defendants as it is or would be contrary to public policy and contrary to the statutory right of applicable persons to bring a claim for underpayment at any time within the applicable limitation period specified in section 369(3) of the *Industrial Relations Act 1996* (NSW).

5 Without limiting the above paragraphs or the implied joinder arising under r. 14.27 of the *Uniform Civil Procedure Act 2005* (NSW), the Plaintiff replies to specific paragraphs of the Defence as follows:

a. the Plaintiff admits the facts in sub-paragraphs 9(a) – (c) of the Defence;

b. the Plaintiff admits the facts in paragraph 11 of the Defence;

c. the Plaintiff in reply to subparagraph 17(a) of the Defence admits that to the extend that the Plaintiff or any Group Member elected to take time off in lieu of payment for overtime, they would be entitled to take one hour off for each hour of overtime worked, paid at the ordinary rate;

d. in reply to 44 – 46, 49 – 57 of the Defence repeats paragraph 4 above;

e. in reply to 47 of the Defence, admits the facts in subparagraphs 47(b), (c) and (d) of the Defence;

f. in reply to 48 of the Defence, the Plaintiff repeats subparagraphs 4l.ii. – 4l.iii. above;

g. in reply to 49 of the Defence, the Plaintiff repeats subparagraphs 4l.i. – 4l.vi. above;

h. further in reply to 44 – 57 of the Defence, any failure of the Defendants to take the asserted steps that they say they would have taken but did not take to their detriment including as to changing roster arrangements, changing models of care and making operational changes in the delivery of health services, employing or rostering more medical officers, reallocating responsibility for some activities or functions to more senior doctors or other

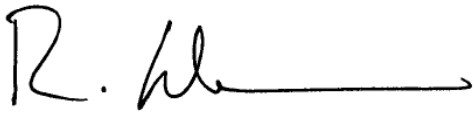
personnel, issuing directions in relation to working or not working Unrostered Overtime, and planning, forecasting or budgeting for Unrostered Overtime, did not result from the conduct of the Plaintiff as one individual employee;

i. further to subparagraph 5h. above, to the extent that the Defendants rely upon the conduct of all of the Group Members, including the Plaintiff, as forming the basis of an estoppel by conduct such claim has not been properly pleaded or particularised and the Plaintiff does not understand the case as to how her conduct together with multiple others with whom she had no or little contact disentitles her from payment of an entitlement under the Awards and for which she is able to make a claim for underpayment pursuant to section 365 of the *Industrial Relations Act 1996* (NSW).

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 claim for damages in this reply has reasonable prospects of success.

Signature



Capacity	Solicitor on record
Date of signature	2 July 2021

#AFFIDAVIT VERIFYING

Name	Amireh Fakhouri
Address	2 Stockyard Street, Truganina, Victoria 3029
Occupation	Doctor
Date	2 July 2021

I say on oath:

1 I am the plaintiff.

2 I believe that the allegations of fact contained in the reply are true.

3 I believe that the allegations of fact that are denied in the reply are untrue.

4 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the reply are true.

SWORN at 2 Stockyard Street, Truganina, Victoria 3029

Signature of deponent

Name of witness	Katherine McCallum
Address of witness	Level 32, 201 Elizabeth Street, Sydney, NSW 2000
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.

2 #I have confirmed the deponent's identity using the following identification document:

Victorian Driver Licence 090884676

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.]