

NOTICE OF FILING

Details of Filing

Document Lodged:	Concise Statement
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	8/11/2024 1:10:56 PM AEDT
Date Accepted for Filing:	8/11/2024 1:11:00 PM AEDT
File Number:	VID1036/2024
File Title:	JAYSON LLOYD GILLHAM v MELBOURNE SYMPHONY ORCHESTRA PTY LTD ABN 47 078 925 658 & 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.



First and Fourth Respondents' Concise Response

No. VID 1036 of 2024

Federal Court of Australia

District Registry: Victoria

Division: Fair Work

Jayson Lloyd Gillham

Applicant

Melbourne Symphony Orchestra Pty Ltd ABN 47 078 925 658 and others

Respondents

(a) The important facts giving rise to the claim

1. The Melbourne Symphony Orchestra Pty Ltd (**MSO**) is a not-for-profit company. It is a charitable, cultural organisation that exists to advance the work and profile of the MSO in the Australian and International orchestral music communities as Australia's pre-eminent symphony orchestra. The MSO also promotes the public benefit in having its world class symphony orchestra, as well as in fundraising from the public and working collaboratively with partners / sponsors to continue to support its important charitable and cultural work.
2. At all material times, Sophie Galaise (**the Third Respondent**) was the Managing Director of the MSO.¹ Ms Galaise reported to the MSO Board,² which has strategic and governance oversight of the MSO's business affairs. Guy Ross (**the Fourth Respondent**) is the Chief Operating Officer (**COO**) of the MSO.
3. For many years, the MSO has been provided artist services by Symphony Services Australia Limited (**SSA**) (**the SSA / MSO Agreement**). SSA³ provides specialised services to several Member Orchestras throughout Australia (including the MSO). Under the SSA / MSO Agreement, the SSA would provide International Tour Coordination, including contracting and contract management for international artists' engagement.
4. In mid-June 2024, Jayson Gillham (**Mr Gillham**), an international concert pianist, entered into a written contract for services with the SSA (not the MSO) (**the Gillham / SSA Agreement**).

¹ Ms Galaise's tenure as Managing Director ceased on or around 26 August 2024.

² And while she was in the position of Managing Director was a member of the MSO Board.

³ SSA is no longer a party to the proceeding by reason of the Applicant having filed a Notice of Discontinuance on 16 October 2024.

Filed on behalf of: the First Respondent and Fourth Respondent

Prepared by: Leon Zwier and Rachel Soh

Law firm: **ARNOLD BLOCH LEIBLER**

Tel: (03) 9229 9999

Email: lzwier@abl.com.au and rsoh@abl.com.au

Address for service: Level 21, 333 Collins Street, Melbourne, VIC 3000

Ref: 011928243

Fax: (03) 9229 9900

Under the Gillham / SSA Agreement,⁴ Mr Gillham was to provide the following services to the SSA:

- a. perform at “**the Recital**”⁵ at the Iwaki Auditorium at 11am on Sunday, 11 August 2024. The Recital was to include Mr Gillham performing each of Beethoven’s Sonata No.21 in C Major (“*Waldstein*”), Ligeti’s *Études* for Piano (Book 1), and Fauré’s Nocturne no. 6 D flat major op. 63; and
 - b. perform at “**the Concert**”⁶ at Melbourne Town Hall on Thursday, 15 August 2024.
5. It is an express term of the Gillham / SSA Agreement⁷ that Mr Gillham was not an employee of the SSA, or of any Member Orchestra (such as the MSO); he was an independent contractor of the SSA. This point assumes significance, as the MSO and Mr Ross allege that Mr Gillham is unable to make certain claims against them under the *Fair Work Act 2009* (Cth) because he is neither an employee nor an independent contractor of the MSO.
 6. On Sunday, 11 August 2024, during the Recital, Mr Gillham made personal remarks to the audience prior to the piece titled “*Witness*” (by Connor D’Netto) (wrongly described in this proceeding by the Applicant as “**the Introduction**”⁸). The MSO later learned that some audience attendees walked out after Mr Gillham’s personal remarks in the Introduction. Mr Gillham made these personal remarks without the MSO’s prior knowledge or authorisation.
 7. Over the afternoon and the evening of Monday, 12 August 2024, the MSO gave notice to both Mr Gillham and the SSA requesting Mr Gillham’s contract for services with the SSA to be terminated for convenience (**Termination of the Gillham / SSA Agreement**). In consequence, Mr Gillham would not perform in the Concert. Mr Gillham’s fee for the Recital and the Concert was paid in full. Mr Gillham has not suffered any financial detriment.
 8. The MSO also issued “**the Cancellation Message**”⁹ to the attendees of the Recital, in which it noted that Mr Gillham had not sought approval from the MSO to make his remarks.
 9. The MSO’s Code of Conduct reflects the MSO’s affirmation that its employees, as members of the community, have a right to make public comment, including about matters of political opinion. However, the MSO’s Code of Conduct precludes the MSO’s employees, and its contractors, from making personal statements without the authority of the MSO Managing Director, or from making public comments which might be perceived as an official comment of the MSO. The MSO and Mr Ross allege that these standards are so well known and generally accepted as a matter of custom and practice within the community of Australian and

⁴ The essential scope of the Gillham / SSA Agreement for Mr Gillham to perform the Recital and the Concert and the fees was approved by Mr Ross on behalf of the MSO.

⁵ See Amended Statement of Claim (**ASOC**) filed on 16 October 2024 at [7(a)].

⁶ ASOC [7(b)].

⁷ Gillham / SSA Agreement at cll 13.1, 27.3.

⁸ ASOC [16].

⁹ ASOC [21].

international orchestras as to be impliedly incorporated into the terms of the Gillham / SSA Agreement.¹⁰

10. Mr Gillham had no express or implied contractual right with either the SSA or the MSO to have his own platform (at the Iwaki Auditorium, the Melbourne Town Hall or otherwise) from which he could make statements about **any** matter.
11. In the days immediately following the Termination of the Gillham / SSA Agreement, the MSO reconsidered its position as to Mr Gillham's participation in the Concert. The MSO Board authorised Mr Ross (as the COO) and Mr Andrew Moore (as the Director of Programming) to engage in good faith negotiations with Mr Gillham's trade union representative and his agent. The MSO and Mr Ross allege these negotiations, which included the possibility of the MSO making a public statement about recent events involving Mr Gillham, were conducted on a without prejudice basis and object to it being admitted into evidence. Under cover of objection, the MSO and Mr Ross deny that an agreement was reached about Mr Gillham's participation in the Concert or as to the terms of any public statement.
12. Ultimately, a decision was taken by the MSO to cancel the one remaining Concert based on independent advice about the safety and security risks associated with it proceeding at the Melbourne Town Hall in what was a febrile environment of public debate about the actions of both Mr Gillham and the MSO. On the morning of Thursday, 15 August 2024, the MSO updated ticketholders and the public about this, in a written communication described as the "**Final Public Statement**".¹¹

(b) The relief sought by Mr Gillham against the MSO and Mr Ross

13. Mr Gillham alleges contraventions by the MSO of Part 3-1 (General Protections) of the Fair Work Act on the basis that he is a person with a workplace right, being an entitlement to the benefit of a workplace law, for the purposes of s 341(1)(a) of the Fair Work Act. Specifically, Mr Gillham says that he was entitled not to be discriminated against because he held or expressed a political belief or engaged in political activity (**asserted workplace right**). The source of Mr Gillham's asserted workplace right is said to be the **Equal Opportunity Act 2010** (Vic) as the relevant "*workplace law*". Mr Gillham then alleges that each of:
 - a. the MSO's (initial) cancellation of his performance in the Concert (via the Termination of the Gillham / SSA Agreement) and sending the Cancellation Message;
 - b. Mr Ross's request to Mr Gillham, which is alleged to impose a condition on Mr Gillham not to make comments (of a similar kind) if he performed at the Concert; and
 - c. the MSO issuing the Final Public Statement,

¹⁰ The MSO and Mr Ross admit that it did not provide a copy of the MSO Code of Conduct to Mr Gillham in their joint Defence filed on 7 November 2024 at [9(a)].

¹¹ ASOC [33].

were each instances of “adverse action” taken by the MSO because of, or for reasons that included, his either having, exercising or preventing the exercise of his asserted workplace right.

14. Ms Galaise and Ms Ross are alleged to be liable as accessories to the MSO’s alleged contraventions.
15. Mr Gillham seeks compensation, pecuniary penalties and declarations of unlawful conduct as against each of the MSO, Ms Galaise and Mr Ross for the MSO’s alleged contraventions of the Fair Work Act, even though he has been paid the agreed fee for the Recital and the Concert.

(c) The MSO and Mr Ross’s primary defence to the relief sought by Mr Gillham

16. The MSO and Mr Ross deny that the MSO took any alleged “adverse action” against Mr Gillham because of, or for reasons that include, his asserted workplace right. The initial cancellation of the Concert and the Termination of the Gillham / SSA Agreement occurred for the reasons stated in the Cancellation Message, including that Mr Gillham’s personal remarks at the Recital were not authorised by the MSO. Similarly, the reasons why the Concert ultimately did not proceed are as outlined in the Final Public Statement, including the safety concerns associated with the Concert. The actions taken by the MSO were lawful and were otherwise consistent with the fulfilment of the MSO’s charitable objectives.
17. The MSO and Mr Ross otherwise allege an insurmountable hurdle to Mr Gillham’s claims. The Equal Opportunity Act is not a workplace law for the purposes of the Fair Work Act, at least in so far as it relates to Mr Gillham’s status as an independent contractor of the SSA, and not as an employee or an independent contractor of the MSO. While the Equal Opportunity Act extends the definition of “employment” to include a contract for services (like the Gillham / SSA Agreement), there was no contract for services between Mr Gillham and the MSO. In that context, the Equal Opportunity Act is not a State Law that regulates common law employers and employees for the purposes of the “General Protections” framework in Part 3-1 of the Fair Work Act. Without this foundation, there is no basis for Mr Gillham to assert that he has a protected workplace right under the Fair Work Act based on alleged prohibited discrimination on the grounds of political activity under the Equal Opportunity Act and Mr Gillham’s proceeding is foredoomed to fail. The MSO and Mr Ross otherwise deny that it engaged in any such prohibited discrimination.
18. The MSO and Mr Ross have otherwise taken issue with discrete parts of Mr Gillham’s pleaded case, not on the basis that he may or may not hold a political belief, but on the basis that he wishes to prove the underlying factual basis for his asserted political beliefs. The MSO and Mr Ross say that Mr Gillham’s assertions about the Middle East conflict which he spoke about

during the Recital, and whether Mr Gillham may genuinely believe them to be true, are irrelevant to any pleaded cause of action and otherwise an abuse of the Court's process.

(d) Mr Gillham has no entitlement to any relief as against the MSO and Mr Ross

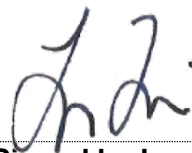
19. If the matters alleged in the MSO's and Mr Ross's joint Defence are accepted by this Court, Mr Gillham will have no entitlement to compensation, pecuniary penalties or declaratory relief under the Fair Work Act.
20. The accessorial liability of each of Ms Galaise and Mr Ross entirely hinge on Mr Gillham making out his contraventions as against the MSO, which, for the reasons outlined in this Concise Response, the MSO and Mr Ross allege will not succeed.

Certificate of lawyer

I, Leon Zvier, certify to the Court that, in relation to the Concise Response filed on behalf of each of the First Respondent and the Fourth 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: 8 November 2024



**Signed by Leon Zvier
Arnold Bloch Leibler
Lawyers for the First Respondent and
The Fourth Respondent**