

## NOTICE OF FILING

### Details of Filing

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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.



## Third Respondent's Concise Response

No. VID1036 of 2024

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

### Jason Lloyd Gillham

Applicant

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

First Respondent

1. The third respondent was, from 4 April 2016 to 26 August 2024, the Managing Director of the Melbourne Symphony Orchestra Pty Ltd (the **MSO**), the first respondent in this proceeding.
2. The MSO entered into a contract with Symphony Services Australia Limited (**SSA**) pursuant to which SSA was to supply with MSO with certain services in exchange for a fee, including the coordination of international tours (the **SSA Contract**). Under the SSA Contract, the SSA acted as agent for the MSO when entering into certain agreements, including those entered into for the purposes of the service of international tour coordination. Under the SSA Contract, the MSO agreed to fulfil all obligations required in order for SSA to perform its contractual obligations under those agreements, including agreed payment schedules with artists.
3. The SSA entered into a contract with the applicant (the **Contract**). The Contract was a contract for services. The applicant was not an employee of the SSA at common law.
4. There were terms of the Contract that:
  - (a) Performances meant:

Performances	Date	Venue
	11 August (Recital)	Iwaki Auditorium, Melbourne
	15 August	Melbourne Town Hall

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Filed on behalf of: Sophie Galaise, the third respondent  
Prepared by: Sandra Marks, Solicitor, and Siobhan Kelly, Counsel  
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(b) Repertoire meant the repertoire of works to be performed, set out in Annexure 1;

(c) Fee meant:

<b>Fee</b>	Fee for Recital Performance: AUD 4,000 Fee per Performance: AUD 5,500
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(a) Tour meant the concert tour of Australia by Mr Gillham as detailed in the Contract; and

(b) Mr Gillham was required to perform the Repertoire at all Performances in the Itinerary during the Tour and perform all his obligations under the Agreement with all due care and skill.

### Particulars

As to subparagraphs (a) to (c), the third respondent relies on the Schedule; as to subparagraph (d), the third respondent relies on the chapeau to the Contract; and as to subparagraph (e), the third respondent relies on cl 2.1(a) of the Contract.

2. Pursuant to the Contract, the applicant travelled to Australia to perform the Repertoire at the Performances. The performing orchestra for the Performances was the MSO. There was no implied contract between the applicant and the MSO. The applicant was not an employee of the MSO at common law, nor was the applicant an independent contractor of the MSO.
3. The applicant was scheduled to perform the Repertoire at a Performance on 11 August 2024. Prior to the Performance, the applicant sought, and was granted, permission to perform an additional piece of music called *Witness*. At the Performance, the applicant introduced the piece by saying certain words.
4. The applicant says that those words were a statement of the applicant's political belief. The third respondent does not know whether those words were a statement of the applicant's political belief or not. After introducing the piece, the applicant played *Witness*.
5. The following day, the MSO emailed the applicant's manager, copying SSA, notifying her that the MSO was advising SSA that the MSO wished to immediately terminate the

applicant's engagement. A communication was sent to patrons who had attended the Performance. The decision not to proceed with the applicant's performance at the second recital and to send the communication were made by a group of people, including the third and fourth respondents.

6. The Contract was then terminated. The applicant was paid his full Fee, in accordance with cl 17.3 of the Contract.
7. On 14 August 2024, the fourth respondent, COO of the MSO, and Mr Paul Davies of the International Federation of Musicians, the applicant's trade union representative, entered negotiations as part of a genuine attempt to resolve a dispute that had arisen between them about the cancellation of the applicant's appearance at the Performance scheduled for 15 October 2024. The third respondent objects to the communications that occurred in the course of the negotiations being relied on in this proceeding because they were, and remain, subject to without prejudice privilege.
8. The applicant claims that he had a workplace right to the benefit of a workplace law within the meaning of s 341(1)(a) of the *Fair Work Act 2009* (Cth), being the *Equal Opportunity Act 2010* (Vic). The applicant also claims that the MSO took adverse action against him because he exercised his workplace right to the benefit of the EO Act.
9. The applicant's claim must fail because:
  - (a) First:
    - (i) the applicant performed his obligations under the SSA Contract;
    - (ii) the MSO was required to fulfil all obligations required in order for SSA to perform the contractual obligations under those agreements including agreed payment schedules with artists;
    - (iii) accordingly, the applicant did not perform work for the MSO pursuant to the SSA Contract;
    - (iv) by reason of the matters in paragraphs (i)-(iii) above, the MSO was not a 'principal' within the meaning of s 4 of the EO Act in relation to Mr Gillham; and the applicant was, therefore, not a "contract worker" within the meaning of s 4(1) of the EO Act.

- (b) Second:
- (i) the EOA does not confer a right on any person not to be discriminated against; and
  - (ii) the EOA, relevantly, operates to prohibit discrimination in certain areas of public life; and to provide mechanisms for a person discriminated against in contravention of the EO Act to seek to obtain a remedy for that discrimination; and
  - (iii) by reason of the matters in (a) and (b), Mr Gillham did not have the right to not to be discriminated against for holding or expressing a political belief or engaging in political activity alleged in the statement of claim and at paragraph 16(d) of the concise statement.
- (c) Third:
- (i) 'workplace law' within the meaning of the FW Act means: the FW Act; the *Fair Work Registered Organisations Act 2009* (Cth); the *Independent Contractors Act 2006* (Cth); and any other law of the Commonwealth, a State or a Territory that regulates the relationships between employers and employees (including by dealing with occupational health and safety matters);
  - (ii) the terms 'employers' and 'employees', as used in subparagraph (d) of the definition of 'workplace law' in section 12 of the FW Act, have their ordinary meaning; and
  - (iii) by reason of the matters in (a) and (b) above, the EO Act is a workplace law within the meaning of s 341(1)(a) of the FW Act to the extent, and only to the extent, that it regulates the relationship between employers and employees within the ordinary meaning of those terms.
- (d) Fourth, the applicant did not have a workplace right to the benefit of the EO Act (to the extent that the EO Act is a workplace law) within the meaning of s 341(1)(a) of the FW Act because:

- (i) the EO Act is a workplace law to the extent, and only to the extent, that it regulates the relationship between employers and employees within the ordinary meaning of those terms; and the ordinary meaning of employer and employee is the common law meaning;
- (ii) the applicant was not an employee of either the SSA or the MSO within the ordinary meaning of that term; and
- (iii) the extended meaning of 'employee' in the EO Act does not alter the meaning and effect of the term 'employee' when used in the FW Act: see *Tattsbet Ltd v Morrow* [2015] FCAFC 62; 233 FCR 46: at [103] (Jessup J) (Allsop CJ at [1] and White J at [140] agreeing).

10. By reason of the above matters, the applicant's claim against the MSO cannot succeed. If the claim against the MSO fails, the claim against the third respondent must also fail.

11. The third respondent says that the applicant is not entitled to any relief.

### **Certificate of lawyer**

I, Sandra Marks certify to the Court that, in relation to the concise response filed on behalf of the Third Respondent the factual and legal material available to me at present provides a proper basis for: each allegation in the pleading; and each denial in the pleading; and each non admission in the pleading.

Date: 7 November 2024



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Signed by Sandra Marks

Lawyer for the Third Respondent

**Schedule**

No. VID1036 of 2024

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

**Respondents**

Sophie Galaise

**Third Respondent**

Guy Ross

**Fourth Respondent**