

NOTICE OF FILING

Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32
Court of Filing FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment: 7/11/2024 3:31:42 PM AEDT
Date Accepted for Filing: 7/11/2024 3:31:49 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.



Defence

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

In response to the Amended Statement of Claim (**ASOC**) filed on 16 October 2024, the third respondent (adopting the terms defined in the ASOC):

PARTIES

1. As to paragraph 1, admits the allegations.
2. As to paragraph 2:
 - (a) admits the allegations in subparagraphs (a) to (c) and (g) to (h);
 - (b) as to subparagraph (d), says that the allegation is embarrassing and liable to be struck out by reason that it is irrelevant to any cause of action pleaded in this proceeding and, under cover of that objection, admits that the MSO is a national system employer in relation to its employees;
 - (c) as to subparagraph (e), denies the allegations and says further that:
 - (i) s 793 does not operate to make a person liable for the conduct of their employees;

Filed on behalf of:	Sophie Galaise, the third respondent
Prepared by:	Sandra Marks, Solicitor, and Siobhan Kelly, Counsel
Law firm:	Harmers Workplace Lawyers
Tel:	(02) 9267 4322 Fax n/a
Email	sandra.marks@harmers.com.au; ekaterina.oglos@harmers.com.au
Address for service	Level 27, 31 Market Street, Sydney NSW 2000

- (ii) s 793 operates to deem certain conduct of employees to have been engaged in by their employer for the purposes of the FW Act and the procedural rules (as defined); and
- (iii) will rely on s 793 of the FW Act for its full meaning and effect; and
- (d) denies the allegations in subparagraph (f) and says further that:
 - (i) from 4 April 2016 to 26 August 2024, she held the position of Managing Director; and
 - (ii) management of the MSO was a function shared among various executive employees of the MSO and the Board of Directors, including the third respondent.

3. As to paragraph 3:

- (a) admits the allegations in subparagraph (a);
- (b) does not know, and therefore cannot admit, the allegation in subparagraph (b);
- (c) says that the allegation in subparagraph (c) is irrelevant to any pleaded cause of action and is therefore embarrassing and liable to be struck out, and under cover of that objection, does not know and therefore cannot admit the allegation; and
- (d) as to subparagraph (d), denies the allegations and refers to paragraph 2(b) above.

4. As to paragraph 4:

- (a) admits the allegations in subparagraph (a); and
- (b) denies the allegations in subparagraph (b) and refers to paragraph 2(c)(i) above.

5. As to paragraph 5:

(a) as to subparagraph (a), admits the allegations; and

(b) as to paragraph (b):

(i) admits that the fourth respondent was the Chief Operating Officer of the first respondent from about May 2019 to 26 August 2024; and

(ii) otherwise does not know, and therefore cannot admit, the allegation.

APPLICANT'S ALLEGED ENGAGEMENT BY THE FIRST RESPONDENT

6. As to paragraph 6, admit the allegations.

7. As to paragraph 7, deny the allegations and say further that there were terms of the Contract that:

(a) Performances meant:

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

(b) Repertoire meant:

Repertoire	The repertoire of works to be performed, set out in Annexure 1.
-------------------	---

(c) Fee meant:

Fee	Fee for Recital Performance: AUD 4,000 Fee per Performance: AUD 5,500
------------	--

(d) Tour meant the concert tour of Australia by Mr Gillham as detailed in the Contract; and

- (e) 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

1. As to subparagraphs (a)-(c), the third respondent relies on the Schedule.
 2. As to subparagraph (d), the third respondent relies on the chapeau to the Contract.
 3. As to subparagraph (e), the third respondent relies on cl 2.1(a) of the Contract.
8. As to paragraph 8, admits the allegations.
9. As to paragraph 9, does not know, and therefore cannot admit, paragraph 9.
10. As to paragraph 10, says that:
- (a) the allegation is scandalous and embarrassing and liable to be struck out by reason that:
 - (i) it pleads a legal conclusion without pleading any material facts capable of supporting that legal conclusion; and
 - (ii) it is not supported by particulars;
 - (b) further or in the alternative to subparagraph (a) above, the allegation is scandalous and embarrassing and liable to be struck out by reason that the particulars in (ii):
 - (i) are not particulars of the allegation in paragraph 10; and
 - (ii) are irrelevant to any pleaded cause of action;

- (c) in the alternative to subparagraph (b) above, if the particulars in (ii) are relevant to a pleaded cause of action, they are allegations of material fact which should be pleaded and not particularised; and
 - (d) under cover of these objections, denies the allegation.
11. As to paragraph 11, denies the allegations and says further that, on 15 July 2010, SSA offered to enter into an agreement with the MSO pursuant to which SSA offered to supply to, or for the benefit of, MSO and MSO agreed to obtain from SSA, various specific services, and the MSO agreed to enter into an agreement on those terms (the **SSA Contract**).
- 11A. There were terms of the SSA Contract that, or to the effect that:
- (a) Services meant the various services specified in cls 5 and 6 of the SSA Contract;
 - (b) Term meant 1 January to 31 December 2013 and thereafter as agreed;
 - (c) The core Services that SSA would provide during the Term were in the following Service Categories:
 - (i) National Music Library;
 - (ii) Program Notes;
 - (iii) National Artist Development;
 - (iv) International Tour Co-ordination; and
 - (d) MSO agreed to pay SSA specified fees for providing the core Services;

Particulars

- (i) As to subparagraph (a), the third respondent relies on cl 3 of the SSA Contract.

- (ii) As to subparagraph (b), the third respondent relies on cl 4 of the SSA Contract.
- (iii) As to subparagraph (c), the third respondent relies on cl 5 of the SSA Contract.
- (iv) As to subparagraph (d), the third respondent relies on cl 7 of the SSA Contract.

11B. At all material times, cl 10 of the SSA Contract was in the following terms:

MSO acknowledges that SSA is acting as its agent in the course of purchasing goods and services required in order to fulfil certain of SSA's obligations under this Agreement. In particular this includes entering agreements on behalf of Member orchestras including MSO for International Tour Co-ordination, National Artist Development and with The Music House. In accordance with the relevant details of those agreements provided to MSO, it agrees to fulfil all obligations required in order for SSA to perform the contractual obligations under those agreements including agreed payment schedules with artists.

11C. By written agreement dated 13 June 2013, the SSA Contract was amended to (among other things) provide that the Term was indefinite.

12. Not used.

THE RECITAL

13. As to paragraph 13, admits the allegations.

14. As to paragraph 14, admits the allegations.

15. As to paragraph 15, admits the allegations.

16. As to paragraph 16, admits the allegations and says further that:
- (a) the particulars to paragraph 16 are scandalous and embarrassing and liable to be struck out by reason that:
 - (i) the particulars are not particulars of the material fact alleged in paragraph 16; and
 - (ii) the particulars are irrelevant to any fact in issue in the proceeding as presently pleaded; and
 - (b) to avoid doubt, she does not admit the particulars.
17. As to paragraph 17, does not know, and therefore cannot admit, the allegation.
18. As to paragraph 18, admits the allegations.
19. As to paragraph 19, does not know and therefore cannot admit the allegation.
20. As to paragraph 20, admits the allegations.

THE TERMINATION OF THE CONTRACT

21. As to paragraph 21, admits the allegations.
22. As to paragraph 22, admits the allegations.
23. As to paragraph 23:
- (a) admits that on 12 August 2024, Andrew Moore sent Elaine Armstrong an email;
 - (b) says that the content of the email is as set out in the email; and
 - (c) otherwise denies the allegations.

24. As to paragraph 24:
- (a) denies that the MSO was required to, or could at law, give Mr Gillham prior written notice of the termination of the Contract as required by cl 17.3 of the Contract by reason that the MSO was not party to the Contract;
 - (b) does not know, and therefore cannot admit, whether SSA gave Mr Gillham prior written notice of the termination of the Contract; and
 - (c) otherwise denies the allegations and says further that:
 - (i) Mr Gillham's second Performance with the MSO was scheduled for 15 August 2024;
 - (ii) on 12 August 2024, the MSO advised the SSA in writing that it wished to terminate Mr Gillham's engagement with the MSO with immediate effect; and
 - (iii) Mr Gillham was paid 100% of the Fee.
25. As to paragraph 25, denies the allegation and refers to paragraph 24(a) above.

WITHOUT PREJUDICE NEGOTIATIONS

26. As to paragraph 26, denies the allegations and says further that on 14 August 2024, Guy Ross, COO of the MSO, and Mr Paul Davies, Mr Gillham's trade union representative, entered into negotiations as part of a genuine attempt to resolve a dispute that had arisen between them about the cancellation of Mr Gillham's appearance at the Performance scheduled for 15 August 2024.
27. As to paragraph 27, says that the text message was sent as part of the genuine attempt to resolve a dispute that had arisen between the MSO and Mr Gillham about the cancellation of Mr Gillham's appearance at the Performance scheduled for 15 August 2024, as pleaded in paragraph 26 above, and objects to the text message being relied on in this proceeding by reason that it was sent, and remains, subject to without prejudice privilege.

28. As to paragraph 28, says that:
- (a) the alleged Second Condition forms part of the text message pleaded in paragraph 27 of the ASOC;
 - (b) refers to paragraph 27 above; and
 - (c) objects to the text message being relied on in this proceeding by reason that it was sent, and remains, subject to without prejudice privilege.
29. As to paragraph 29, says that:
- (a) the alleged Second Condition forms part of the text message pleaded in paragraph 27 of the ASOC;
 - (b) refers to paragraph 27 above; and
 - (c) objects to the text message being relied on in this proceeding by reason that it was sent, and remains, subject to without prejudice privilege.
30. As to paragraph 30, denies the allegations.
31. As to paragraph 31, says that the email pleaded in paragraph 31 of the ASOC was sent as part of the genuine attempt to resolve a dispute that had arisen between the MSO and Mr Gillham about the cancellation of Mr Gillham's appearance at the Performance scheduled for 15 August 2024, as pleaded in paragraph 26 above, and objects to the email being relied on in this proceeding by reason that it was sent, and remains, subject to without prejudice privilege.
32. As to paragraph 32:
- (a) admits that the MSO did not publish a statement in the terms particularised in paragraph 30 of the ASOC; and
 - (b) otherwise denies the allegations and refers to paragraph 30 above.

COMMUNICATIONS FOLLOWING CANCELLATION OF RECITAL

33. As to paragraph 33:

- (a) admits that the MSO published the statement alleged on its website;
and
- (b) otherwise denies the allegations.

34. As to paragraph 34, does not know and therefore cannot admit the allegation.

35. As to paragraph 35, does not know and therefore cannot admit the allegation.

APPLICANT'S ALLEGED 'EMPLOYMENT'

36. As to paragraph 36:

- (a) admits that the Contract was a contract for services;
- (b) admits that Mr Gillham was an independent contractor within the meaning of s 338A of the FW Act in connection with his engagement with SSA; and
- (c) otherwise denies the allegations.

37. As to paragraph 37, admits the allegation.

38. As to paragraph 38, denies the allegation and says further that:

- (a) Mr Gillham did not perform work for the MSO pursuant to the SSA Contract; and
- (b) Mr Gillham performed his obligations under the SSA Contract;
- (c) 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, as pleaded in

paragraph 11B above; and Mr Gillham was, therefore, not a “contract worker” within the meaning of s 4(1) of the EO Act.

39. As to paragraph 39, denies the allegations and says further that:
- (a) the EOA does not confer a right on any person not to be discriminated against; and
 - (b) the EOA, relevantly, operates to:
 - (i) to prohibit discrimination in certain areas of public life; and
 - (ii) to provide mechanisms for a person discriminated against in contravention of the EO Act to seek to obtain a remedy for that discrimination; and
 - (c) by reason of the matters in (a) and (b), Mr Gillham did not have the right pleaded in paragraph 39 of the ASOC.
- 39A. As to paragraph 39A, denies the allegation and refers to paragraph 10 above.
- 39B. As to paragraph 39B, denies the allegation and refers to:
- (a) paragraphs 10 and 39A above; and, or in the alternative
 - (b) paragraph 39 above.

THE ALLEGED CONTRAVENTIONS OF THE FW ACT BY THE FIRST RESPONDENT

40. As to paragraph 40, denies the allegations and says further that:
- (a) ‘workplace law’ within the meaning of the FW Act means:
 - (i) the FW Act;
 - (ii) the *Fair Work Registered Organisations Act 2009* (Cth);

- (iii) the *Independent Contractors Act 2006* (Cth); and
 - (iv) 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);
- (b) 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
- (c) 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.

Particulars

1. As to subparagraph (a), Mr Gillham relies on s 12 of the FW Act.
 2. As to subparagraph (b), Mr Gillham relies on s 11 of the FW Act.
41. As to paragraph 41, denies the allegations and says further that:
- (a) by reason of the matters in paragraph 39 above, the EOA did not confer such an entitlement on any person, including Mr Gillham; and, or in the alternative
 - (b) Mr Gillham 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;

- (ii) the ordinary meaning of employer and employee is the common law meaning;
- (iii) Mr Gillham was not an employee of either the SSA or the MSO within the ordinary meaning of that term;
- (iv) 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); and

- (c) in the alternative to paragraph (a) above, if Mr Gillham did have the right to the benefit of the EO Act for the purposes of s 341(1)(a) of the FW Act, he had that right to the extent, and only to the extent, pleaded in paragraph 40 above.

42. As to paragraph 42, denies the allegations, refers to paragraph 41 above and says further

- (a) that a person has right to the benefit of a workplace law:
 - (i) to the extent, and only to the extent, that the law in question is a workplace law; and
 - (ii) where subparagraph (d) of the definition of 'workplace law' in s12 of the FW Act is relied on, if, and only if, they are an employee or an employer within the ordinary meaning of that term;
- (b) the EO Act was a workplace law to the extent, and only to the extent, that it regulated the relationship between employers and employees within the common law meaning of those terms, as pleaded in paragraph 40(c) above; and

(c) Mr Gillham was not an employee of either the SSA or the MSO within the ordinary meaning of those terms.

43. As to paragraph 43, denies the allegations and refers to paragraph 10 above.
44. As to paragraph 44, denies the allegations and refers to paragraph 43 above.
45. As to paragraph 45, denies the allegations and refers to paragraph 43 above.
46. As to paragraph 46, denies the allegations and refers to paragraph 43 above.
47. As to paragraph 47, denies the allegations and refers to paragraph 43 above.
48. As to paragraph 48, denies the allegation, refers to paragraph 43 above, says further that Mr Gillham did not have the pleaded workplace right by reason of the matters pleaded in paragraphs 39B, 40, 41 and 42 above.
49. As to paragraph 49, denies the allegation, refers to paragraph 43 above, says further that Mr Gillham did not have the pleaded workplace right by reason of the matters pleaded in paragraphs 39B, 40, 41 and 42 above.
50. As to paragraph 50, denies the allegations.
51. As to paragraph 51, denies the allegations.
52. Not used.

ALLEGED INVOLVEMENT OF THE THIRD RESPONDENT

53. As to paragraph 53, denies the allegations and says further that the decision to cancel Mr Gillham's engagement for the Performance scheduled for 15 August 2024 and the decision to send the cancellation message were made by a group of people that included the third and fourth respondents.
54. As to paragraph 54, denies the allegations and refers to paragraph 50 above.
55. As to paragraph 55, denies the allegations and refers to paragraph 50 above.

ALLEGED INVOLVEMENT OF THE FOURTH RESPONDENT

- 56. As to paragraph 56, does not know and therefore cannot admit the allegation.
- 57. As to paragraph 57, does not know and therefore cannot admit the allegation.
- 58. As to paragraph 58, does not know and therefore cannot admit the allegation.
- 59. As to paragraph 59, does not know and therefore cannot admit the allegation.

CLAIMED RELIEF

- 60. As to paragraph 60, denies that Mr Gillham is entitled to the relief sought, or any relief at all.
- 61. As to paragraph 61, denies that Mr Gillham is entitled to the relief sought, or any relief at all.
- 62. As to paragraph 62, denies that Mr Gillham is entitled to the relief sought, or any relief at all.

Date: 7 November 2024



Signed by Sandra Marks
Lawyers for the Third Respondent

This pleading was prepared by Sandra Marks, lawyer and Siobhan Kelly, counsel for the third respondent.

Certificate of lawyer

I, Sandra Marks, certify to the Court that, in relation to the defence filed on behalf of the Third 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 2024



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