

NOTICE OF FILING

Details of Filing

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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.

Concise statement



No. VID1036 of 2024

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

Jayson Lloyd Gillham

Applicant

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

Respondents

The important facts giving rise to the claim

1. The applicant (**Mr Gillham**) is an international concert pianist.
2. On 11 June 2024, Mr Gillham entered into a written contract with Symphony Services Australia Limited (**SSA**) to give one recital with the first respondent (**MSO**) on 11 August 2024 (**Recital**), perform one concert with the MSO on 15 August 2024 (**Concert**) and attend and participate in rehearsals for the Recital and Concert (**Contract**).
3. SSA supplied Mr Gillham's services to the MSO pursuant to an express contract between SSA and the MSO.

Particulars

- (i) Service Level Agreement between SSA and the MSO dated 15 July 2010, read together with a letter entitled *Amendment to Service Level Agreement*, dated 13 June 2013.
4. There was an implied contract between Mr Gillham and the MSO.
5. Prior to the Recital, on 5 August 2024, Mr Gillham's manager asked the MSO that Mr Gillham be permitted to add a piece called *Witness*, composed by Connor D'Netto, to the Recital repertoire. The next day, the MSO agreed to Mr Gillham performing *Witness* at the Recital and explained that Mr Gillham would be provided with a microphone to speak during the Recital.
6. At the Recital, Mr Gillham introduced *Witness* by explaining that Mr D'Netto had dedicated the piece to the journalists of Gaza and saying the following words (**Introduction**), which were an expression of Mr Gillham's political belief:

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[Form approved 01/08/2011]

Over the last 10 months, Israel has killed more than one hundred Palestinian journalists. A number of these have been targeted assassinations of prominent journalists as they were travelling in marked press vehicles or wearing their press jackets. The killing of journalists is a war crime in international law, and it is done in an effort to prevent the documentation and broadcasting of war crimes to the world.

In addition to the role of journalists who bear witness, the word Witness in Arabic is Shaheed, which also means Martyr.

7. Following the Introduction, Mr Gillham played *Witness*.
8. On 12 August 2024, the MSO emailed attendees of the Recital stating, inter alia: Mr Gillham had not sought the MSO's approval or sanction for the Introduction, which was "*an intrusion of personal political views*" of Mr Gillham without authority; Mr Gillham would not be performing in the Concert; and it apologised for the "*offence and distress*" caused (**cancellation message**).
9. Also on 12 August 2024, the MSO emailed Mr Gillham's manager (copying SSA) informing her that the MSO was advising SSA that the MSO wished immediately to terminate the Contract.
10. The decisions to cancel Mr Gillham's performance at the Concert and to send the cancellation message were made by the Third Respondent (**Ms Galaise**).
11. On 14 August 2024, Mr Gillham's trade union representative, Mr Paul Davies, entered into discussions with Mr Ross about re-instating Mr Gillham's performance at the Concert. There were three conditions attached to this reinstatement: *first*, Mr Gillham would perform the Concert, including a rehearsal; *second*, "*No physical or verbal statement from the stage*" (**Second Condition**); *third*, "*Agreement on the statement below (to be issued publicly by the MSO)*". The 'statement' referred to in the third condition included an apology to Mr Gillham.
12. Mr Gillham made some amendments to the draft statement and an amended version was sent to a representative of the MSO, Mr Andrew Moore. Via his representative, Mr Samuel Cairnduff, Mr Gillham also provided the MSO with a statement to be published in response, which accepted the MSO's apology.
13. Instead of the MSO publishing the agreed statement, on 15 August 2024, it published a statement which did not include an apology to Mr Gillham (**final public statement**) and provided the MSO's final public statement to media mastheads that also published it.
14. The MSO ultimately cancelled the Concert and no performance went ahead on 15 August 2024.

The relief sought from the Court

15. The relief sought is as follows:
 1. Pursuant to s 545 of the *Fair Work Act 2009* (Cth) (**FWA**), declarations that:
 - (a) the First Respondent took adverse action against the Applicant in contravention of s 340 of the FWA;

- (b) the Third Respondent was involved, within the meaning of s 550 of the FWA, in the First Respondent's contravention of s 340 of the FWA; and
 - (c) the Fourth Respondent was involved, within the meaning of s 550 of the FWA, in the First Respondent's contravention of s 340 of the FWA.
2. Pursuant to s 545(2)(b) of the FWA, an order that the Respondents compensate the Applicant for the loss which he has suffered as a result of the contraventions of s 340 of the FWA declared at 1 above.
 3. Pursuant to s 545(1) of the FWA, an order that:
 - (a) the First Respondent make a public apology to the Applicant for the matters outlined at 1(a) above;
 - (b) the Third Respondent make a public apology for the matters outlined at 1(b) above; and
 - (c) the Fourth Respondent make a public apology for the matters outlined at 1(c) above.
 4. Pursuant to s 546(3)(c) of the FWA, orders that the Respondents pay a pecuniary penalty to the Applicant for each of their contraventions of s 340 of the FWA declared at 1 above, in the maximum amount payable under s 546 of the FWA.
 5. Further or other order as the Court sees fit.

The primary legal grounds for the relief sought

16. In order to succeed in his claim, Mr Gillham must establish that:
 - (a) he was an independent contractor, or alternatively, an employee of either SSA or the MSO within the meaning of those expressions in the *Fair Work Act 2009 (FWA)*;
 - (b) SSA was Mr Gillham's 'employer' within the meaning of that expression in the *Equal Opportunity Act 2010 (Vic) (EOA)*, and the EOA is a workplace law within the meaning of that expression in s 341 of the FWA;

Particulars

- (i) The Contract was plainly a contract for services. Accordingly, SSA falls within the definition of 'employer' in EOA, s.4 which includes a person who engages another person under a contract for services.
- (c) Mr Gillham did work for the MSO pursuant to a contract between SSA and the MSO, and he was accordingly a 'contract worker' within the meaning of that expression in s 4 of the EOA;

Particulars

- (i) SSA was Mr Gillham's employer as set out at (b) above;

- (ii) The MSO was the 'principal' as defined in EOA, s.4, that is, a person who contracts with another person for work to be done by employees of the other person.
- (d) pursuant to the EOA (ss 6(k), 8 and 21), Mr Gillham had a right not to be discriminated against for holding or expressing a political belief or engaging in political activity;
- (e) alternatively, the MSO was Mr Gillham's employer, for the reasons set out in the particulars to (b) above. Accordingly, equally, Mr Gillham had a right not to be discriminated against for holding or expressing a political belief or engaging in political activity (EOA, ss.6(k), 8 and 18);
- (f) by reason of [16(a)] to [16(c)] above, Mr Gillham had a 'workplace right' within the meaning of that expression in ss 340 and 341 of the FWA;
- (g) in contravention of s 340 of FWA, the MSO took adverse action (within the meaning of that expression in s 342 of the FWA) against Mr Gillham by:
 - (i) cancelling Mr Gillham's performance at the Concert, because Mr Gillham had exercised his workplace right to hold and express his political belief or engage in political activity (without discrimination);
 - (ii) sending the cancellation message, because Mr Gillham had exercised his workplace right to hold and express his political belief or engage in political activity (without discrimination);
 - (iii) imposing the Second Condition on Mr Gillham:
 - (A) because he had a workplace right to hold and express his political belief and engage in political activity, in order to contract out of such right; and/or
 - (B) because he had exercised his workplace right to express his political belief and engage in political activity at the Recital; and/or
 - (C) in order to prevent him from exercising his workplace right to express his political belief and engage in political activity at the Concert; and
 - (iv) publishing the MSO's final public statement, because Mr Gillham had exercised his workplace right to hold and express his political belief or engage in political activity (without discrimination);
- (h) Ms Galaise was 'involved', within the meaning of that expression in s 550 of the FWA, in the MSO's contravention of s 340 of the FWA above in that she:
 - (i) aided, abetted, counselled or procured the contravention by deciding to cancel Mr Gillham and sending, or causing to be sent, the cancellation message; or
 - (ii) was in any way, by her acts of deciding to cancel Mr Gillham and sending the cancellation message, or causing the cancellation message to be sent, directly or indirectly, knowingly concerned in or a party to the MSO's contravention,

and she is taken to have contravened s 340 of the FWA pursuant to s 550(1) of the FWA;

(i) with respect to Mr Ross:

- (i) he imposed the Second Condition by communicating it to Mr Davies; or
- (ii) he assisted the MSO to impose the Second Condition by agreeing to, and in fact communicating it to, Mr Davies,

and therefore he was 'involved', within the meaning of that expression in s 550 of the FWA, in the MSO's contravention of s 340 of the FWA above in that he:

- (iii) aided or abetted the contravention by imposing, or communicating, the Second Condition to Mr Davies; or
- (iv) was in any way, by his act of imposing or communicating the Second Condition on or to Mr Davies, directly or indirectly, knowingly concerned in or a party to the MSO's contravention,

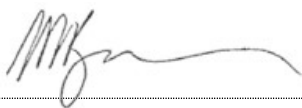
and he is taken to have contravened s 340 of the FWA pursuant to s 550(1) of the FWA.

The alleged harm suffered by the applicant

17. Mr Gillham has suffered distress, hurt, humiliation and anxiety. He has also suffered damage to his professional reputation.

Certificate of lawyer

I, Michael Bradley, certify to the Court that, in relation to the concise statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.



Date: 16 October 2024

Signed by Michael Bradley
Lawyer for the Applicant