



**IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
GROUP PROCEEDINGS LIST**

No. _____

Case: S ECI 2024 01683

Filed on: 11/04/2024 02:06 PM

BETWEEN

ELWYN GONSALVEZ

and others named in the Schedule

Plaintiffs

- and -

EMERGENCY SERVICES SUPERANNUATION BOARD

Defendant

WRIT

Date of document: 11 April 2024
Filed on behalf of: the Plaintiffs
Prepared by:
Gordon Legal
22/ 181 William Street
Melbourne, Victoria, 3000

Solicitors' code: 112125
Tel: +61 3 9603 3000
Att: James Naughton
Email: jnaughton@gordonlegal.com.au

TO THE DEFENDANT

TAKE NOTICE that this proceeding has been brought against you by the plaintiffs for the claim set out in this writ.

IF YOU INTEND TO DEFEND the proceeding, or if you have a claim against the plaintiffs which you wish to have taken into account at the trial, YOU MUST GIVE NOTICE of your intention by filing an appearance within the proper time for appearance stated below.

YOU OR YOUR SOLICITOR may file the appearance. An appearance is filed by—

- (a) filing a "Notice of Appearance" in the Prothonotary's office, 436 Lonsdale Street, Melbourne, or, where the writ has been filed in the office of a Deputy Prothonotary, in the office of that Deputy Prothonotary; and

(b) on the day you file the Notice, serving a copy, sealed by the Court, at the plaintiffs' address for service, which is set out at the end of this writ.

IF YOU FAIL to file an appearance within the proper time, the plaintiffs may OBTAIN JUDGMENT AGAINST YOU on the claim without further notice.

*THE PROPER TIME TO FILE AN APPEARANCE is as follows—

- (a) where you are served with the writ in Victoria, within 10 days after service;
- (b) where you are served with the writ out of Victoria and in another part of Australia, within 21 days after service;
- (c) where you are served with the writ in Papua New Guinea, within 28 days after service;
- (d) where you are served with the writ in New Zealand under Part 2 of the *Trans-Tasman Proceedings Act 2010* of the Commonwealth, within 30 working days (within the meaning of that Act) after service or, if a shorter or longer period has been fixed by the Court under section 13(1)(b) of that Act, the period so fixed;
- (e) in any other case, within 42 days after service of the writ.

FILED 11 April 2024

Prothonotary

THIS WRIT is to be served within one year from the date it is filed or within such further period as the Court orders.

**IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
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No. _____

BETWEEN

ELWYN GONSALVEZ

and others named in the Schedule

Plaintiffs

- and -

EMERGENCY SERVICES SUPERANNUATION BOARD

Defendant

STATEMENT OF CLAIM

Date of document: 11 April 2024

Solicitors' code: 112125

Filed on behalf of: the Plaintiffs

Tel: +61 3 9603 3000

Prepared by:

Att: James Naughton

Gordon Legal

Email: jnaughton@gordonlegal.com.au

22/ 181 William Street

Melbourne, Victoria, 3000

A. Parties and Group Members

A1. The Plaintiffs

1 The First Plaintiff (**Gonsalvez**):

- (a) is a former employee of Metro Trains Melbourne Pty Ltd (**Metro**);
- (b) retired from his employment by Metro on about 30 June 2023;
- (c) was a member of the **Transport Superannuation Fund** established under the *Transport Superannuation Act 1988* (Vic) (the **TS Act**) since its commencement until about 18 September 2023;
- (d) was a member of the scheme administered by the Defendant (the **Board**) established by the *Emergency Services Superannuation Act 1986* (Vic) (the **ESS Act**) (the **Scheme**) from 1 December 2005 until about 18 September 2023.

2 The Second Plaintiff (**Ferraro**):

- (a) is a former employee of Metro;
- (b) retired from his employment by Metro on about 10 August 2023;
- (c) was a member of the Transport Superannuation Fund from its commencement until about 10 August 2023;
- (d) was a member of the Scheme from 1 December 2005 until about 10 August 2023.

3 The Third Plaintiff (**Seventis**):

- (a) is a current employee of Metro;
- (b) is and has been a member of the Transport Superannuation Fund since 5 March 1990;
- (c) is and has been a member of the Scheme since 1 December 2005.

A2. The Board

4 The Board is a body corporate capable of being sued.

A3. Group Members

5 The Plaintiffs bring this proceeding as a group pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) on behalf of themselves and all persons who are former and current members of the Transport Superannuation Fund, who:

- (a) in the case of former members of the Transport Superannuation Fund:
 - (i) performed shift work before the termination of their membership of the Transport Superannuation Fund;
 - (ii) performed “recognised service” within the meaning of the TS Act within the two years before the termination of their membership of the Transport Superannuation Fund;
 - (iii) received a Shift Penalty Allowance (as defined in paragraph 26 below) in the two years immediately before the termination of their membership of the Transport Superannuation Fund; and

- (iv) received, or became entitled to receive, an amount of money from the Board purported to be a Defined Benefit (defined in paragraph 20 below), which amount was calculated excluding any Shift Penalty Allowance as a component of their “final average salary” (defined below);
- (b) in the case of current members of the Transport Superannuation Fund:
 - (i) perform shift work;
 - (ii) receive a Shift Penalty Allowance; and
 - (iii) in respect of any Shift Penalty Allowance paid to them, the Board has not approved a schedule of allowances and published such schedule in the Government Gazette,

(together and severally, the **Group Members**).

- 6 The Group Members are each a member of one of the following sub-groups:
- (a) a sub-group (**Former Fund Members**), who are former members of the Transport Superannuation Fund; or
 - (b) a sub-group (**Current Fund Members**), who are current members of the Transport Superannuation Fund.
- 7 As at the date of the commencement of this proceeding, there are seven or more Group Members.
- 8 The claims of the Group Members:
- (a) arise out of the same, similar or related circumstances; and
 - (b) give rise to the common questions of law or fact as identified in Part H below.

B. The Transport Fund

- 9 The TS Act established the Transport Superannuation Fund.
- 10 The Transport Superannuation Fund was established for the purpose of providing superannuation benefits to persons employed in operating authorities and agencies of what was previously called the Ministry of Transport.
- 11 At its inception the Transport Superannuation Fund was administered by the Transport Superannuation Board.

- 12 The Transport Superannuation Board was the trustee of the Transport Superannuation Fund.
- 13 As trustee, the Transport Superannuation Board owed equitable obligations to the members of the Transport Superannuation Fund, including:
- (a) to administer the fund on behalf of its members in accordance with the terms of the TS Act; and
 - (b) to apply the moneys in the Transport Superannuation Fund in accordance with the TS Act.
- 14 The members of the Transport Superannuation Fund have, and have had since its establishment, an equitable interest in the performance by the trustee of the Transport Superannuation Fund of its duties as trustee of the Transport Superannuation Fund, including the duties referred to in paragraph 13 above.
- 15 Since about 1 December 2005:
- (a) the Board has administered the Transport Superannuation Fund;
 - (b) the Board has:
 - (i) held all property, rights and assets of the Transport Superannuation Board in respect of the Transport Superannuation Fund;
 - (ii) held all liabilities of the Transport Superannuation Board in respect of the Transport Superannuation Fund;
 - (iii) been the successor in law of the Transport Superannuation Board;
 - (iv) been the trustee of the trust and subject to the duties referred to in paragraph 13 above;
 - (c) the members of the Transport Superannuation Fund have had an equitable interest in the performance by the Board of its duties as trustee of the Transport Superannuation Fund;
 - (d) the contributions of members and payments and repayments of “transport authorities” (as defined in the TS Act) and any other money received or recovered by the Board under the TS Act have been and are to be paid into the Scheme;

- (e) the benefits provided for in the TS Act and all the costs of administering that Act have been and are to be paid out of the Scheme by the Board.

Particulars

- (1) As to paragraph 15 above, *Superannuation Legislation (Governance Reform) Act 2005* (Vic), section 2.
 - (2) As to paragraphs 15(b)(i) to (iv) above, by operation of the *Superannuation Acts (Amendment) Act 1996* (Vic), *Government Superannuation Act 1999* (Vic), the *Superannuation Legislation (Governance Reform) Act 2005* (Vic), and the ESS Act, ss 22DB, 22DC(1)(d)-(f), all of the property, liabilities, duties, rights and obligations referred to in paragraph 15(b) above were ultimately transferred from the Transport Superannuation Board to the Board.
 - (3) As to paragraph 15(d) above, ESS Act, section 22DB(2)(c).
 - (4) As to paragraph 15(e) above, ESS Act, section 22DB(2)(f).
 - (5) Further particulars may be provided before trial.
- 16 The Transport Superannuation Fund is and has at all material times been a defined benefit superannuation scheme.

C. Member “salary” and entitlements

- 17 By reason of the operation of Part 7 of the TS Act, a member of the Transport Superannuation Fund becomes entitled to be paid a defined benefit upon the occurrence of specified events (each a **Fund Membership Termination Event**).

Particulars

- (1) Fund Membership Termination Events include:
 - (A) the retirement of a member due to age, by reason of section 29 of the TS Act;
 - (B) the death of a member, by reason of section 30 of the TS Act;
 - (C) the retirement of a member due to disability, by reason of section 31 of the TS Act;

- (D) the retirement of a member due to ill-health, by reason of section 33 of the TS Act;
 - (E) the retrenchment of a member, by reason of section 34 of the TS Act;
 - (F) the resignation of a member, by reason of section 35 of the TS Act.
- (2) Further particulars may be provided before trial.
- 18 Section 29(1) of the TS Act provides that the accrued retirement benefit in respect of a member is the amount determined in accordance with the formulae contained in that section (in respect of a member, an **Accrued Retirement Benefit**).
- 19 A component of the formulae for which section 29 of the TS Act provides is, in respect of the Accrued Retirement Benefit of a member, that member’s “final average salary”.
- 20 Upon the occurrence of a Fund Membership Termination Event in respect of a member (a **Terminating Member**), that member is entitled to be paid, and the Board must pay that member:
- (a) a lump sum equal to his or her Accrued Retirement Benefit; or
 - (b) an amount calculated by reference to the member’s Accrued Retirement Benefit,
- (each a **Defined Benefit**).

Particulars

- (1) As to paragraph 20(b), save as referred to in paragraph (2) below, by operation of Part 7 of the TS Act the Defined Benefit of a Terminating Member is calculated by reference to that member’s Accrued Retirement Benefit.
 - (2) By operation of section 35(1)(b) of the TS Act, the Defined Benefit of a Terminating Member who resigns from his or her employment will be calculated partly by reference to the member’s Accrued Retirement Benefit only if the member’s period of service exceeds five years.
- 21 In respect of a Terminating Member with two years or more of recognised service, “final average salary” under and for the purposes of the TS Act means an amount equal to one half of the member’s aggregate “salary” (as defined in the TS Act) for the two year period of recognised service ending on the member’s last day of service.

- 22 In respect of a Terminating Member with less than two years of recognised service, “final average salary” under and for the purposes of the TS Act means the amount determined in accordance with the formula contained in paragraph (a) of the definition of “final average salary”, contained in section 3(1) of the TS Act.
- 23 Under and for the purposes of the TS Act, “salary” means the pecuniary emoluments payable to a member as prescribed.
- 24 Since 27 September 1988, the definition of “salary” has been prescribed in regulations made under the TS Act.

Particulars

- (1) *Transport Superannuation Regulations 1988* (Vic) (**TS Regulations 1988**), reg 4. The TS Regulations 1988 commenced on 27 September 1988: Note 1.
 - (2) *Transport Superannuation Regulations 1998* (Vic) (**TS Regulations 1998**), reg 5. The TS Regulations 1998 commenced on 25 September 1998 and revoked the TS Regulations 1988: regs 3, 4.
 - (3) *Transport Superannuation Regulations 2008* (Vic) (the **TS Regulations 2008**), reg 5. The TS Regulations 2008 commenced on 21 September 2008 and revoked the TS Regulations 1998: regs 3, 4.
 - (4) *Transport Superannuation Regulations 2018* (Vic) (the **TS Regulations 2018**), reg 6. The TS Regulations 2018 are current, commenced operation on 14 September 2018, and revoked the TS Regulations 2008: regs 3, 4.
- 25 Since 27 September 1988, “salary” under and for the purposes of the TS Act has relevantly meant the amount, computed as determined by the Board, of the annual rate of remuneration for the time being payable periodically and regularly to a member by an employer including:
- (a) the annual rate of any higher duties allowances that have been paid continuously for at least 12 months; and
 - (b) in the case of an employee performing shift work, “salary” has been defined to include an additional amount of remuneration calculated according to the schedule of shift allowances approved by the Board and published from time to time in the Government Gazette.

Particulars

- (1) TS Regulations 1988, regs 4(1), 4(2)(e) (definition of “salary”).
- (2) TS Regulations 1998, regs 5(1), 5(2)(e) (definition of “salary”).
- (3) TS Regulations 2008, regs 5(1), 5(2)(e) (definition of “salary”).
- (4) TS Regulations 2018, regs 7(1), 7(2)(e).

26 In the case of a member of the Transport Superannuation Fund who performs shift work and receives an additional allowance in consideration for performing shift work (a **Shift Penalty Allowance**), that member’s Shift Penalty Allowance falls within the “additional amount of remuneration” referred to in paragraph 25(b) above.

Particulars

- (1) A Transport Superannuation Fund member’s entitlement to receive a Shift Penalty Allowance arises from the employment contract between that member and the member’s employer. Where a Transport Superannuation Fund member is entitled to receive a Shift Penalty Allowance, the member’s employment contract may refer to the Shift Penalty Allowance as a “Shift Allowance”, a “Shiftwork Allowance”, or in other cognate terms.
- (2) The Metro Trains Melbourne Rolling Stock Enterprise Agreement 2019 refers to a Shift Penalty Allowance as a “Shift Allowance”. The Metro Trains Melbourne Pty Ltd Rail Operations Enterprise Agreement 2019 refers to Shift Penalty Allowances as “Shiftwork Allowances”. Copies of these agreements are in the possession of the Plaintiffs’ solicitors and are available for inspection upon request.
- (3) Further particulars may be provided before trial.

D. The Board’s obligations in respect of the Transport Superannuation Fund

27 Since 1 December 2005, the Board has been obliged to calculate the Defined Benefit of a Terminating Member accurately and in accordance with the TS Act (the **Benefit Calculation Duty**).

Particulars

- (1) The Plaintiffs refer to and repeat paragraphs 13, 15(b)(iv), 24 to 26 above.
- (2) The Benefit Calculation Duty is a necessary incident of the equitable obligations set out in paragraph 13 above, which obligations were owed by the Board to members of the Transport Superannuation Fund for the reason set out in paragraph 15(b)(iv) above.
- (3) Further particulars may be provided before trial.

28 In order to perform the Benefit Calculation Duty in respect of a member's Defined Benefit, the Board must ensure, including by exercising the powers available to it under the TS Act, that it possesses all information that is necessary to perform the Benefit Calculation Duty in respect of that member's Defined Benefit (the **Information Gathering Duty**).

Particulars

- (1) The Information Gathering Duty is a necessary incident of the equitable obligations set out in paragraph 13 above and the Benefit Calculation Duty, which obligations were owed by the Board to members of the Transport Superannuation Fund for the reason set out in paragraph 15(b)(iv) above.
- (2) The Board has a power under section 38 of the TS Act to compel employers of Transport Superannuation Fund members, including Metro, to furnish it with any information the Board requires for the purpose of administering the TS Act.
- (3) Further particulars may be provided before trial.

29 In the premises of paragraphs 27 and 28 above, the Benefit Calculation Duty includes, in respect of a Terminating Member who, within the two years before the Fund Membership Termination Event, has received a Shift Penalty Allowance, a duty to:

- (a) approve and publish in the Government Gazette a schedule of allowances of the kind referred to in paragraph 25(b) above in respect of the Shift Penalty Allowance applicable to that Terminating Member;

(b) calculate the Terminating Member's Defined Benefit such that the member's "salary" includes the Shift Penalty Allowance the subject of the approval referred to in paragraph 29(a) above.

30 In the premises of paragraphs 13, 15(b)(iv), 18, 20 and 27 above, the Board must pay to a Terminating Member a Defined Benefit in an amount calculated in accordance with the Benefit Calculation Duty (the **Benefit Payment Duty**).

31 In the premises of paragraph 30 above, in order to perform the Benefit Payment Duty in respect of a Terminating Member who has received a Shift Penalty Allowance in the two years immediately before the Fund Membership Termination Event in respect of that member, the Board must pay the Terminating Member a Defined Benefit calculated on the basis that the member's "final average salary" includes the Shift Penalty Allowances received by that member.

E. The Plaintiffs' Defined Benefit entitlements

32 Gonsalvez:

- (a) was entitled to, and did, receive Shift Penalty Allowances from Metro in the two years preceding his retirement;
- (b) had more than two years' "recognised service" (within the meaning of the TS Act) with Metro immediately before his retirement;
- (c) performed shift work from about 1980 until his retirement.

Particulars

- (1) In the two years immediately before his retirement, the relevant terms of Gonsalvez's employment by Metro were contained in the Metro Trains Melbourne Pty Ltd Rail Operations Enterprise Agreement 2019.
- (2) The Shift Penalty Allowances applicable to Gonsalvez were contained in clause 2.15 and Schedule C of the Metro Trains Melbourne Pty Ltd Rail Operations Enterprise Agreement 2019.
- (3) The Shift Penalty Allowances paid to Gonsalvez in the two years immediately preceding his retirement are recorded in his fortnightly payslips issued to him by Metro. Copies of those payslips are in the possession of the Plaintiffs' solicitors and are available for inspection

upon request.

- (4) Gonsalvez's period of "recognised service" (within the meaning of the TS Act) with Metro commenced in 2009 and ended upon his retirement.
- (5) Further particulars may be provided following discovery and before trial.

33 Ferraro:

- (a) was entitled to, and did, receive Shift Penalty Allowances from Metro in the two years preceding his retirement;
- (b) had more than two years' "recognised service" (within the meaning of the TS Act) with Metro immediately before his retirement;
- (c) performed shift work from about 1987 until his retirement.

Particulars

- (1) In the two years immediately before his retirement, the relevant terms of Ferraro's employment by Metro were contained in the Metro Trains Rolling Stock Enterprise Agreement 2019.
- (2) The Shift Penalty Allowances applicable to Ferraro were contained in clause 32 of the Metro Trains Rolling Stock Enterprise Agreement 2019.
- (3) The Shift Penalty Allowances paid to Ferraro in the two years immediately preceding his retirement are recorded in his fortnightly payslips issued to him by Metro. Copies of those payslips are in the possession of the Plaintiffs' solicitors and are available for inspection upon request.
- (4) Ferraro's period of "recognised service" (within the meaning of the TS Act) with Metro commenced in 2009 and ended upon his retirement.
- (5) Further particulars may be provided following discovery and before trial.

34 Seventis is entitled to, and does, receive Shift Penalty Allowances from Metro.

Particulars

- (1) The relevant terms of Seventis's employment by Metro are contained in the Metro Trains Rolling Stock Enterprise Agreement 2019.

- (2) The Shift Penalty Allowances applicable to Seventis are contained in clause 32 of the Metro Trains Rolling Stock Enterprise Agreement 2019.
- (3) The Shift Penalty Allowances paid to Seventis are recorded in his fortnightly payslips issued to him by Metro. Copies of payslips issued to Seventis are in the possession of the Plaintiffs' solicitors and are available for inspection upon request.
- (4) Further particulars may be provided following discovery and before trial.

F. The Board's breaches of duty

35 In breach of the Benefit Calculation Duty, the Board:

- (a) wrongly calculated Gonsalvez's Defined Benefit;
- (b) wrongly calculated Ferraro's Defined Benefit.

Particulars

- (1) The Board miscalculated Gonsalvez's Defined Benefit and Ferraro's Defined Benefit by failing to include in the "final average salary" of each of them the "salary" attributable to the Shift Penalty Allowances they received in the two years immediately preceding their retirement.
- (2) The Board's error referred to in paragraph (1) resulted from the Board failing to approve a schedule of allowances in respect of the Shift Penalty Allowances paid by Metro to Gonsalvez and Ferraro in the two years preceding their retirement, and the Board's failure thereafter to publish that schedule in the Government Gazette, before determining the amount of Gonsalvez's Defined Benefit and Ferraro's Defined Benefit. In this respect, the Plaintiffs rely upon the matters in paragraphs 27 to 29 above.
- (3) Further particulars may be provided before trial.

36 In breach of the Benefit Payment Duty, the Board:

- (a) wrongly paid Gonsalvez an amount of money purportedly constituting his Defined Benefit that was less than the Defined Benefit that he was entitled to receive under the TS Act;

Particulars

- (1) The Board paid Gonsalvez \$877,294.14 on or around 18 September 2023.
 - (2) The Board's calculation of Gonsalvez's Defined Benefit is summarised in a letter from ESSSuper to Gonsalvez dated 18 September 2023. A copy of the letter is in the possession of the Plaintiffs' solicitors and is available for inspection upon request.
 - (3) The Board did not include in its calculation of Gonsalvez's Defined Benefit the Shift Penalty Allowances he received during the two years before his retirement.
 - (4) Further particulars may be provided following discovery and before trial.
- (b) wrongly paid Ferraro an amount of money purportedly constituting his Defined Benefit that was less than the Defined Benefit that he was entitled to receive under the TS Act.

Particulars

- (1) The Board paid Ferraro \$870,182.92 on 10 August 2023.
- (2) The Board's calculation of Ferraro's Defined Benefit is summarised in a letter from ESSSuper to Ferraro dated 15 November 2023. A copy of the letter is in the possession of the Plaintiffs' solicitors and is available for inspection upon request.
- (3) The Board did not include in its calculation of Ferraro's Defined Benefit the Shift Penalty Allowances he received during the two years before his retirement.
- (4) Further particulars may be provided following discovery and before trial.

37 By reason of the matters referred to in paragraphs 35 and 36 above, Gonsalvez and Ferraro have suffered loss.

Particulars

- (1) Gonsalvez's loss includes the difference between the amount he was paid by the Board and the amount of the Defined Benefit he would have been paid if the Shift Penalty Allowances in fact paid to him by Metro were included in the computation of his Defined Benefit.

- (2) Ferraro's loss includes the difference between the amount he was paid by the Board and the amount of the Defined Benefit he would have been paid if the Shift Penalty Allowances in fact paid to him by Metro were included in the computation of his Defined Benefit.
- (3) Further particulars may provided following discovery and before trial.

38 By reason of the matters referred to in paragraphs 1, 2, 13 to 15, and 27 to 33 above, each of Gonsalvez and Ferraro have an interest sufficient to allow them seek proper performance of the Board's equitable obligations by this Honourable Court.

G. Disputed conception of the Board's duties

39 On or about 3 February 2023, the Plaintiffs' solicitors sent the Board a letter stating to the effect that the Board was subject to the Benefit Calculation Duty, the Information Gathering Duty, and the Benefit Payment Duty.

Particulars

A copy of the letter is in the possession of the Plaintiffs' solicitors and may be inspected upon request.

40 On or about 30 March 2023, the Board sent a letter to the Plaintiffs solicitors stating to the effect that it denied that is subject to the Benefit Calculation Duty, the Information Gathering Duty or the Benefit Payment Duty.

Particulars

A copy of the letter is in the possession of the Plaintiffs' solicitors and may be inspected upon request.

41 In the premises, when a Fund Membership Termination Event occurs in respect of Seventis, he will be entitled to be paid, and the Board will be obliged to pay him, a Defined Benefit calculated in accordance with the Benefit Calculation Duty, and paid in accordance with the Benefit Payment Duty.

42 By reason of the matters referred to in paragraphs 3, 13 to 15, 27 to 31, 34, and 39 to 41 above, Seventis has a real interest in a declaration that the Board is subject to the Benefit Calculation Duty, the Information Gathering Duty, and the Benefit Payment Duty.

H. Common questions of fact or law

43 The common questions of fact or law are:

(the Board's duties)

(a) whether the Board owed to Former Fund Members, or owes to Current Fund Members:

- (i) the Benefit Calculation Duty;
- (ii) the Information Gathering Duty;
- (iii) the Benefit Payment Duty;

(compensation of Former Fund Members)

(b) whether, in respect of Former Fund Members who:

- (i) performed shift work before the termination of their membership of the Transport Superannuation Fund;
- (ii) performed "recognised service" within the meaning of the TS Act within the two years before the termination of their membership of the Transport Superannuation Fund;
- (iii) received a Shift Penalty Allowance in the two years immediately before the termination of their membership of the Transport Superannuation Fund; and
- (iv) received, or became entitled to receive, an amount of money from the Board purported to be a Defined Benefit, which amount was calculated excluding any Shift Penalty Allowance as a component of their "final average salary",

the Board breached the Benefit Calculation Duty owed to those Former Fund Members;

(c) whether, in respect of Former Fund Members who:

- (i) performed shift work before the termination of their membership of the Transport Superannuation Fund;

- (ii) performed “recognised service” within the meaning of the TS Act within the two years before the termination of their membership of the Transport Superannuation Fund;
- (iii) received a Shift Penalty Allowance in the two years immediately before the termination of their membership of the Transport Superannuation Fund; and
- (iv) received, or became entitled to receive, an amount of money from the Board purported to be a Defined Benefit, which amount was calculated excluding any Shift Penalty Allowance as a component of their “final average salary”,

the Board breached the Information Gathering Duty owed to those Former Fund Members;

(d) whether, in respect of Former Fund Members who:

- (i) performed shift work before the termination of their membership of the Transport Superannuation Fund;
- (ii) performed “recognised service” within the meaning of the TS Act within the two years before the termination of their membership of the Transport Superannuation Fund;
- (iii) received a Shift Penalty Allowance in the two years immediately before the termination of their membership of the Transport Superannuation Fund; and
- (iv) received, or became entitled to receive, an amount of money from the Board purported to be a Defined Benefit, which amount was calculated excluding any Shift Penalty Allowance as a component of their “final average salary”,

the Board breached the Benefit Payment Duty owed to those Former Fund Members;

(e) if the Board breached the Benefit Payment Duty, whether the Board must pay an amount of money to Former Fund Members in respect of its breach of the Benefit

Payment Duty (and, if so, what are the principles applicable to determining the amount the Board must pay to Former Fund Members).

AND THE PLAINTIFFS CLAIM

- A. A declaration that since 1 December 2005 the Board has been and is subject to, and has owed and owes to the Group Members, the Benefit Calculation Duty, the Information Gathering Duty, and the Benefit Payment Duty.
- B. An order directing the Board to approve a schedule of allowances, and to publish such schedule in the Government Gazette, pursuant to reg 7(2)(e) of the TS Regulations 2018, in respect of each Shift Penalty Allowance paid to each Group Member.
- C. An order directing the Board to pay to each Former Fund Member the amount of the member's Defined Benefit in accordance with the Benefit Payment Duty (less the amounts already paid to that member), after the Board complies with the order contained in paragraph B above.
- D. Further or alternatively, equitable compensation.
- E. Further or alternatively, injunction.
- F. Costs.
- G. Such further order as the Court thinks fit.

Dated: 11 April 2024

M. P. Costello

A. G. Willoughby

Counsel for the Plaintiffs

- 1 Place of trial – Melbourne
- 2 Mode of trial – Judge alone
- 3 This writ was filed – for the plaintiffs by Gordon Legal, solicitor, of 22/ 181 William Street, Melbourne VIC 3000
- 4 The address of the first plaintiff is – Unit 2/ 6 Melville Park Drive, Berwick VIC 3806
- 5 The address of the second plaintiff is – 2 Valero Place, Thomastown VIC 3074
- 6 The address of the third plaintiff is – 11 Joyce Grove, Taylors Hill VIC 3037
- 7 The address for service of the plaintiffs is – c/- Gordon Legal, solicitor, of 22/ 181 William Street, Melbourne VIC 3000
- 8 The email address for service of the plaintiffs is – jnaughton@gordonlegal.com.au
- 9 The address of the defendant is – 16/140 William St, Melbourne VIC 3000

SCHEDULE

Elwyn Gonsalvez

First Plaintiff

Sebastiano Ferraro

Second Plaintiff

Basil Seventis

Third Plaintiff

Emergency Services Superannuation Board

Defendant