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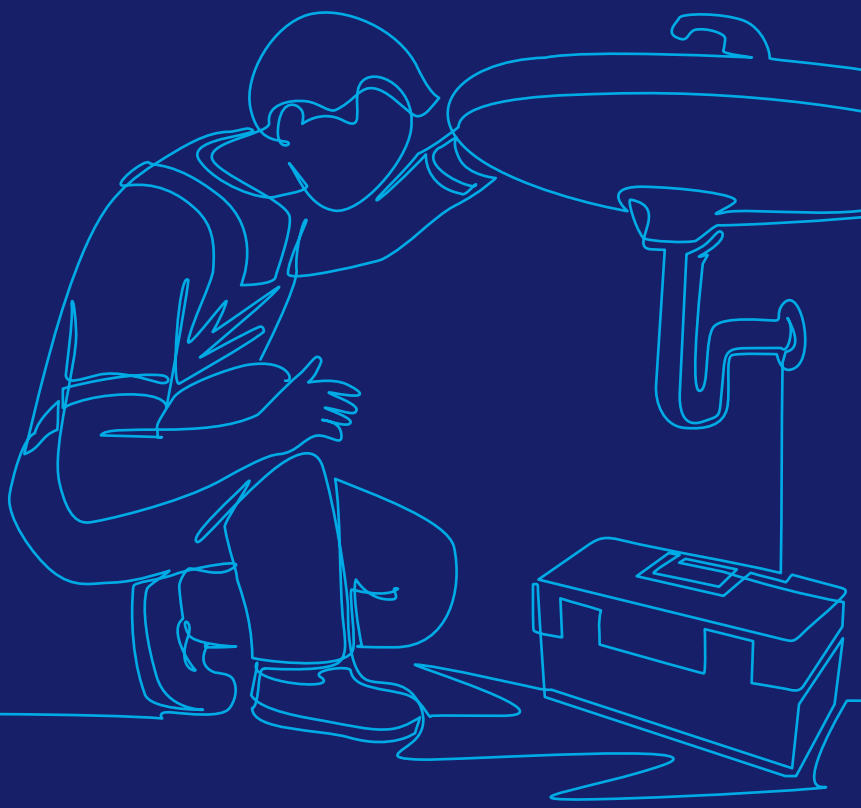
HUMAN RESOURCES & INDUSTRIAL RELATIONS

Independent Contractors and the Ordinary Meaning of Employee and Employer



Productivity, Education and Training Fund
An Australian Government Initiative

This publication has been funded by the Australian Government Department of Employment and Workplace Relations through the Productivity, Education and Training Fund grant program.

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1. Introduction

1 The use of independent contractors by plumbing companies has long been a feature of the plumbing industry.

2 The use of independent contractors by plumbing companies will (in all likelihood) continue to be a feature of the plumbing industry because some individuals prefer to be classified and / or termed an independent contractor rather than an employee, because of the perceived benefits that that provides the individual.

3 The use of independent contractors by plumbing companies will continue to be a feature of the plumbing industry because of the relative freedom it provides the plumbing company:

- in terminating the relationship between the plumbing company itself and the independent contractor; and / or
- in supplementing the workforce of the plumbing company for short periods of time;
- and / or because of the perceived ease of engaging and using an independent contractor in comparison to the perceived difficulties the plumbing company face with the employment of an employee.

4 However, plumbing companies need to be aware that as a result of recent changes made to the Fair Work Act 2009 (C'th) (**FW Act**) by the Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024 (**Closing Loopholes Act**), a person who was previously considered to be an independent contractor may no longer be considered to be an independent contractor but may well be deemed to be an employee.

5 I**t needs to be clearly understood that just because that is the way that you have operated in the past, that it does not mean that that method of operation is appropriate for today or the future!**

6 This Guide is designed to do four (4) things:

- firstly, to assist plumbing companies understand what is the difference between an independent contractor and an employee; and
- secondly, to assist plumbing companies understand why a person should be correctly classified (as an independent contractor or as an employee); and
- thirdly, to assist plumbing companies understand what is sham contracting and the consequences of misrepresenting an employment arrangement as an independent contracting arrangement; and
- fourthly, to assist plumbing companies understand what may be considered to be an unfair contract term and what may happen should the Fair Work Commission (**Commission**) find that a term is an unfair contract term.

2. The Guide

7 The Guide will review and examine:

- the revised definition of employee (Section 15AA of the FW Act); and
- the revised definition of sham contracting (Section 357 up to an including Section 359 of the FW Act); and
- the introduction of the unfair contract terms (Sections 536MY up to and including 536NJ of the FW Act).

8 The changes made to the FW Act were made by the Closing Loopholes Act.

9 The Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (**the Bill**) was first introduced into the House of Representatives in September 2023.

10 The Bill was subject to numerous amendments by both the House of Representatives and the Senate.

11 The Bill was passed by the Senate on 8 February 2024 and the House of Representatives on 12 February 2024.

12 The Closing Loopholes Act was given Royal Assent on 26 February 2024.

13 The changes made to the FW Act took effect from **26 August 2024.**

14 The law will continue to evolve as more and more decisions are made by the Courts and / or the Commission.

15 At the time of writing this Guide there were only a handful of decisions (all made by the Commission).

16 Part 5 of the Guide will examine some of the decisions made by the Commission prior to 19 May 2025.

3. Part 1 - The revised definition of employee

(Section 15AA of the FW Act)

17 On 9 February 2022, the High Court of Australia (**High Court**) handed down two (2) decisions.

18 The first decision of the High Court was Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 (**Personnel Contracting**) and the second was ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2 (**Jamsek**).

19 Both Personnel Contracting and Jamsek considered the question of whether the person(s) subject to the proceedings were properly characterised as an independent contractor or whether they should have been more properly characterised as an employee.

20 In Personnel Contracting, the High Court found that the person at the centre of the proceedings was best characterised as an employee. In Jamsek, the High Court found that the persons at the centre of the proceedings were best characterised as independent contractors.

21 In determining the questions raised in the proceedings, the High Court relied on the terms expressed in the contracts that existed between the parties.

22 The revised definition of employee provided in Section 15AA of the FW Act was a direct result of the Personnel Contracting and Jamsek decisions. The introduction of Section 15AA of the FW Act has meant that 'contract is no longer King'; as the amendments have seen a return to the multi – factorial test established by the Courts prior to Personnel Contracting and Jamsek.

23 Section 15AA of the FW Act provides that:

15AA - Determining the ordinary meanings of employee and employer

(1) For the purposes of ... (the FW Act) ... whether an individual is an **employee** of a person within the ordinary meaning of that expression, or whether a person is an **employer** of an individual within the ordinary meaning of that expression, is to be determined by ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person.

(2) For the purposes of ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person:-

(a) the totality of the relationship between the individual and the person must be considered; and

(b) in considering the totality of the relationship between the individual and the person, regard must be had not only to the terms of the contract governing the relationship, but also to other factors relating to the totality of the relationship including, but not limited to, how the contract is performed in practice.

24 The changes made to Section 15AA of the FW Act commenced operation on **Monday 26 August 2024.**

25 Therefore, Section 15AA of the FW Act only applies to arrangements made from Monday 26 August 2024. For arrangements prior to Monday 26 August 2024, the approach taken by the High Court in Jamsek and Personnel Contracting applies.

26 The Explanatory Memorandum for the Bill stated:

31. Part 15 of Schedule 1 would insert a new Section 15AA into Part 1 - 2 of the FW Act. New Section 15AA would require that the ordinary meanings of 'employee' and 'employer' be determined by reference to the real substance, practical reality and true nature of the relationship between the parties. This would require the totality of the relationship between the parties, including not only the terms of the contract governing the relationship but also the manner of performance of the contract, to be considered in characterising a relationship as one of employment or one of principal and contractor.

32. The amendments respond to the High Court's decisions in ... (Personnel Contracting and Jamsek) ... These decisions require that where the parties have comprehensively committed the terms of their relationship to a written contract the validity of which is not in dispute, the characterisation of that relationship proceeds by reference to the rights and obligations of the parties under the contract. Except in limited circumstances, a wide-ranging review of the parties' subsequent conduct is inappropriate. Prior to Personnel Contracting and Jamsek, it was broadly believed that the correct approach was to apply the 'multi-factorial' test.

33. The intention of the amendments is to facilitate a return to the 'multi-factorial' test previously applied by courts and tribunals in characterising a relationship as one of employment or of principal and contractor.

973. In requiring an inquiry that extends beyond the contractual rights and obligations of the parties, the amendments would overcome the contract-centric approach established by the High Court's decisions in ... (Personnel Contracting and Jamsek) In these decisions, a majority of the High Court held that where a comprehensive written contract exists, the question of whether an individual is an employee of a person is to be determined solely with reference to the rights and obligations found in the terms of that contract. In such circumstances, the High Court held, it is not necessary or appropriate to engage in a wide-ranging review of the parties' conduct in performing their obligations under that contract. There are limited exceptions where one can look beyond the terms of the contract, such as where a contract is a sham, or has been varied or rendered unenforceable, or subject to an estoppel.

974. The intention of this Part is to require a 'multi-factorial' assessment, as was previously commonly understood to be the correct approach in characterising a relationship as one of employment, or of principal and contractor, for the purposes of the FW Act. There is no exhaustive list of factors that will be relevant to a 'multi-factorial' assessment, ensuring a flexible approach that will enable the ordinary meanings of 'employee' and 'employer' to continue to adapt to changing social conditions, market structures and work arrangements.

976. Subsection 15AA(1) would require that the ordinary meanings of 'employee' and 'employer' be determined by ascertaining the real substance, practical reality and true nature of the relationship between the parties. This phrase indicates that, while the terms of the contract between the parties will be a relevant factor, they are not determinative in circumstances where they do not reflect the real nature of the working relationship.

977. The new interpretive principle aligns with Article 9 of ILO Recommendation 198, which states that, with respect to the employment relationship, 'the determination of the existence of such a relationship should be Guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.' By ensuring that the true nature of the relationship is determinative, the new provision will ensure that disguised employments, which seek to evade or attenuate the legal obligations of an employment relationship, are legally ineffective.

978. Section 15AA(1) would make it clear that this new approach applies for the purposes of the FW Act. New Section 15AA would not change the meaning of 'employee' or 'employer' at common law. New Section 15AA would not change the meaning of these terms in the context of any other Commonwealth legislative scheme.

979. Section 15AA(2) would identify matters that must be considered in ascertaining the real substance, practical reality and true nature of the relationship between parties.

980. Section 15AA(2)(a) would first require consideration of the totality of the relationship between the parties. This phrase, drawn from His Honour Justice Mason's judgment in Stevens v Brodribb Sawmilling Co Pty Ltd [1986] HCA 1 (Brodribb) and echoed by the majority in Hollis v Vabu [2001] HCA 44 (Hollis), is intended to indicate that in characterising the relationship, all relevant incidents of the relationship must be considered and no one incident will necessarily be determinative.

981. Section 15AA(2)(b) would provide that in considering the totality of the relationship between the individual and the person, regard must be had not only to the terms of the contract governing the relationship, but also to other factors including, but not limited to, the manner in which the contract is performed. This would make it clear that analysis of the totality of the relationship is not restricted to a consideration of the rights and duties established under the parties' contract. It must include, among other things, how the contract is performed in practice.

982. The intention is to ensure that the way in which a contract is performed in practice can be considered in characterising the relationship irrespective of whether the performance of the contract has resulted in a contractual variation. This is intended to directly counteract the principle established in Personnel Contracting and Jamsek that where a comprehensive written contract exists, evidence of post-contractual conduct of the parties is not relevant in establishing the existence of an employment relationship or otherwise (except in limited circumstances, including where the contract has been varied by post-contractual conduct).

983. The intention is that Section 15AA(2) would facilitate the use of a multi - factorial approach when characterising a relationship, even in the face of a comprehensive written contract.

984. Under the multi - factorial approach, guidance for the outcome is provided by various factors or indicia. A considerable number of case authorities, including Brodribb and Hollis, identify factors relevant in the characterisation of a relationship as one of employment or one of contractor and principal. In Brodribb, Mason J noted a prominent factor in determining the nature of the relationship between a person who engages another to perform work and the person so engaged is the degree of control which the former can exercise over the latter. Other relevant matters were said to include, among other things:-

- the mode of remuneration;
- the provision and maintenance of equipment;
- the obligation to work;
- the hours of work and provision for holidays;
- the deduction of income tax;
- the delegation of work by the putative employee.

985. Wilson and Dawson JJ determined that factors suggesting a Contract of Service (an employment relationship) include:

- the right to have a particular person do the work;
- the right to suspend or dismiss the person engaged;
- the right to the exclusive services of the person engaged and the right to dictate the place of work, hours of work and the like.

986. Indicia which indicate a contract for services (a relationship of principal and contractor) were said to include:

- work involving a profession, trade or distinct calling on the part of the person engaged;
- the provision by the putative employee of their own place of work or their own equipment;
- the creation by the putative employee of goodwill or saleable assets in the course of their work;
- the payment by the putative employee from their remuneration of business expenses of any significant proportion;
- the payment to the putative employee of remuneration without deduction for income tax.

987. Wilson and Dawson JJ also noted that the actual terms and terminology of the contract will always be of considerable importance.

988. Other indicia have arisen over time in the authorities. Courts have often observed that there is no exhaustive list of relevant factors and that they will vary from case to case. So too will the weight to be afforded to particular indicia. This is partly because the test has evolved to adapt to changing social conditions and new work arrangements, and indeed will continue to do so.

4. What is the multi – factorial test?

27 Paragraph 984 of the Explanatory Memorandum for the Bill notes that there are indicia that "identify factors relevant in the characterisation of a relationship as one of employment or one of contractor and principal"; those being:-

- degree of control;
- the mode of remuneration;
- the provision and maintenance of equipment;
- the obligation to work;
- the hours of work and provision for holidays;
- the deduction of income tax;
- the delegation of work by the putative employee.

28 Paragraph 985 of the Explanatory Memorandum for the Bill notes that in addition to the factors identified in Paragraph 984 of the Explanatory Memorandum for the Bill, the following are factors that could be used in determining the characterisation of a relationship as one of employment or one of contractor and principal; those being:-

- the right to have a particular person do the work;
- the right to suspend or dismiss the person engaged;
- the right to the exclusive services of the person engaged and the right to dictate the place of work, hours of work and the like.

29 When assessing and using those factors what is the difference/s between a Contract of Service / employee and a contract for services / independent contractor?

Factor: Degree of control

Contract of Service / employee indicia

- An employment contract is an agreement to render personal services.
- Employer exercises, or has the right to exercise, control over the manner in which work is performed by the employee, the location of the work, the hours of work worked by the employee, etc.
- Detailed control over what and how a person does something is a strong indicator that there is an employment relationship.
- The relationship is such that a person classified as an employee owes a duty of loyalty and fidelity towards their employer.
- Work uniforms / badges with logos tend to suggest an employment relationship.

Contract for Services / Independent Contractor indicia

- Independent contractor controls how work is performed.
- If someone else is engaged to complete the task/s, it is a strong indicator that they are an independent contractor.
- a qualified right to subcontract (i.e. a right to subcontract that is contingent on approval by the principal) still tends against a finding of employment where it is indicative of a desire by the principal to ensure the work remains to a particular quality or safety standard.

Factor: The mode of remuneration / The deduction of income tax

Contract of Service / employee indicia

- Employee is paid a wage / salary by reference to the time worked by the employee for the employer.
- Employer deducts income tax from wage / salary paid to the employee.
- Employer pays the employee on a regular basis (weekly, fortnightly, monthly).
- A contract of permanent employment not only requires an exchange of work for wages, but also provides mutual promises for future performance.

Contract for Services / Independent Contractor indicia

- Independent contractor is paid based on results / work completed.
- Independent contractor is responsible for the payment of tax.
- Independent contractor has obtained an ABN and submits an invoice for work completed or is paid at the end of the specific task/s.

Factor: The provision and maintenance of equipment

Contract of Service / employee indicia

- The employer provides the tools and equipment that are required, or a tool allowance is paid to the employee.

Contract for Services / Independent Contractor indicia

- Independent contractor uses their own tools and equipment.

Factor: The obligation to work

Contract of Service / employee indicia

- Employee generally works standard / set hours determined by the employer.
- Employee works solely for the employer.

Contract for Services / Independent Contractor indicia

- Independent contractor works for other plumbing companies (or is entitled to do so – no exclusive relationship).

Factor: The hours of work and provision for holidays

Contract of Service / employee indicia

- Employee generally works standard / set hours determined by the employer.
- Employer provides paid annual leave, personal / carer's (sick) leave, etc.

Contract for Services / Independent Contractor indicia

- Independent contractor generally decides what hours to complete the task/s.
- Independent contractor does not receive payment for time not worked.

Factor: The delegation of work by the employee / independent contractor. The right to have a particular person do the work. The right to the exclusive services of the person engaged and the right to dictate the place of work, hours of work and the like.

Contract of Service / employee indicia

- Employer can determine what work can be delegated or sub - contracted out and to whom.
- Employer exercises, or has the right to exercise, control over the manner in which work is performed by the employee, the location of the work, the hours of work worked by the employee, etc.
- Detailed control over what and how a person does something is a strong indicator that there is an employment relationship.

Contract for Services / Independent Contractor indicia

- Independent contractor can delegate or sub - contract the tasks/s to another person/s to complete.
- If someone else is engaged to complete the task/s, it is a strong indicator that they are an independent contractor.

Factor: The right to suspend or dismiss the person engaged

Contract of Service / employee indicia

- Employer has the right to suspend or dismiss the worker.

Contract for Services / Independent Contractor indicia

- The contract may be terminated for breach / non - performance of the contract.

30 The new ordinary meaning definition of employee and employer essentially does two (2) things.

31 The first of those things is that Section 15AA of the FW Act provides that, when ascertaining whether a person falls within the definition of employee (or not), is to be determined by ascertaining "the real substance, practical reality and true nature of the relationship between the individual and the" person / company / business engaging them.

32 The second of those things is that, because Section 15AA of the FW Act requires a determination of "the real substance, practical reality and true nature of the relationship between the individual and the" person / company / business engaging them, it effectively reverts back to the multi factorial test used by the Courts and Tribunals prior to the handing down of two (2) decisions by the High Court on 9 February 2022.

33 Prior to the Personnel Contracting and Jamsek decisions, the Courts and / or Tribunals used what was termed a multi factorial test.

34 Following the proclamation of Closing Loopholes 2024 and the amendments made to the FW Act all that is old is new again (as far as the test required to be used to determine whether a person is best characterised as an independent contractor / sub – contractor or an employee).

35 The multi factorial test required the Courts and / or Tribunals to look at the totality of the employment relationship to determine whether the person was an independent contractor / sub – contractor or an employee.

36 There is an old saying in industrial relations 'If it walks like a duck, quacks like a duck, it is a duck not a rooster"; the same can be said of the question of employee vs independent contractor / sub – contractor.

37 Having said all of that, Justice Bromberg of the Federal Court of Australia in On Call Interpreters &

Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3) ([2011] FCA 366) made the following observation:-

Simply expressed, the question of whether a person is an independent contractor in relation to the performance of particular work, may be posed and answered as follows:

Viewed as a "practical matter":

(i) is the person performing the work … (as) … an entrepreneur who owns and operates a business; and,

(ii) in performing the work, is that person working in and for that person's business as a representative of that business and not of the business receiving the work?

If the answer to that question is yes, in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee.

4.1. What does all this mean? Two (2) examples.

4.1.1. Background – 1

A Plumbing Company uses A Person to install each hot - water system that they sell.

A Plumbing Company and A Person have an agreement that specifies that the arrangement is a contract for services / independent contractor arrangement.

A Person is a sole trader with an ABN.

The agreement provides that only A Person can perform the required works.

The agreement provides that A Person can work for other plumbing companies, but must be available at all times to undertake the work required by A Plumbing Company. The agreement provides that A Person cannot refuse the work offered by A Plumbing Company.

A Plumbing Company pays A Person for all hours worked in installing the hot -water system. If A Person works on a Saturday or a Sunday A Plumbing Company pays A Person a penalty rate that is the equivalent of the overtime payments prescribed in the Plumbing and Fire Sprinklers Award 2020. A Plumbing Company deducts income tax from the payments made to A Person.

A Plumbing Company tells A Person when and where the work is to be performed.

Employee / Independent Contractor?

If this type of example ended up in the Courts, one would think that using the multi – factorial test A Person would, in all likelihood, be considered to be an employee of A Plumbing Company.

Why?

Whilst the arrangement between A Plumbing Company and A Person specifies that the arrangement is a contract for services / independent contractor arrangement, it needs to be read subject to Section 15AA of the FW Act.

Section 15AA of the FW Act requires that in determining whether A Person is an employee of A Plumbing Company there needs to be an examination of the ordinary meaning of that expression by ascertaining the real substance, practical reality and true nature of the relationship between A Plumbing Company and A Person.

In the example given:

- A Plumbing Company has a high degree of control over A Person, in that A Plumbing Company specifies when the work is to be performed and A Person cannot delegate the work to anyone else – both indicators of an employment relationship;
- A Plumbing Company pays A Person for all hours worked and deducts income tax from that payment – both indicators of an employment relationship;
- A Plumbing Company pays A Person a penalty rate that is the equivalent of the overtime payments prescribed in the Plumbing and Fire Sprinklers Award 2020 for work carried out on a Saturday or a Sunday – an indicator of an employment relationship.

That is why if it ended up in the Courts, one would think that using the multi – factorial test, A Person would, in all likelihood, be considered to be an employee of A Plumbing Company.

4.1.2. Background – 2

A Plumbing Company uses A Person to install all hot - water systems that they sell.

A Plumbing Company and A Person have an agreement that specifies that the arrangement is a contract for services / independent contractor arrangement.

A Person is a sole trader with an ABN.

The agreement provides that A Person will be paid a specific amount for the work undertaken on behalf of A Plumbing Company (irrespective of how long the job takes and irrespective of when the work is performed).

The agreement provides that A Person will coordinate with the client and determine the most appropriate time to do the job.

The agreement provides that A Person may delegate the work to another suitably qualified person.

The agreement provides that A Person will invoice A Plumbing Company at the end of each month for the work undertaken in that month.

Employee / Independent Contractor?

Whilst the arrangement between A Plumbing Company and A Person specifies that the arrangement is a contract for services / independent contractor arrangement, it needs to be read subject to Section 15AA of the FW Act.

Section 15AA of the FW Act requires that in determining whether A Person is an employee of A Plumbing Company there needs to be an examination of the ordinary meaning of that expression by ascertaining the real substance, practical reality and true nature of the relationship between A Plumbing Company and A Person.

In the example given:

- A Person can determine when they will do the work and whether they do the work, or whether they will engage another suitably qualified person to do the work – both indicators of an independent contractor arrangement;
- A Person is paid based on the results and accepts some risks in undertaking the work – both indicators of an independent contractor arrangement;

That is why if it ended up in the Courts, one would think that using the multi – factorial test, A Person would, in all likelihood, be considered to be in an independent contractor arrangement.

5. Part 3 - The revised definition of sham contracting

(Section 357 up to an including Section 359 of the FW Act)

5.1. Sham Contracting - What is sham contracting?

These provisions started from 27 February 2024

40. Generally speaking, sham contracting is a situation where a person has been incorrectly classified as undertaking a contract for services / independent contractor; instead of a contract of service / employment.

41. Sham contracting may also involve a situation where a business dismisses or threatens to dismiss an employee in order to engage them as a contractor for the same or similar work.

42. It also applies where a person or business that employs, or has at any time employed, an individual to perform particular work makes a statement that the employer knows is false in order to persuade or influence the individual to enter into a contract for services under which the individual will perform, as an independent contractor, the same, or substantially the same, work for the employer.

43. In such situations, the results of the sham contracting arrangement are that the person that has been wrongly classified under a contract for services / independent contractor arrangement, would in all likelihood, not have access to employment protections and employee entitlements; including minimum or award wages and leave entitlements (e.g. annual leave, personal / carer's leave, bereavement / compassionate leave, etc).

44. Sections 357, 358 and 359 of the FW Act provide that:

Subdivision A—Independent contracting

357 Misrepresenting employment as independent contracting arrangement

(1) A person (the employer) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.
Note: This subsection is a civil remedy provision (see Part 41).

(2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer reasonably believed that the contract was a contract for services.

(3) In determining, for the purpose of subsection (2), whether the employer's belief was reasonable:-

(a) regard must be had to the size and nature of the employer's enterprise; and

(b) regard may be had to any other relevant matters.

358 Dismissing to engage as independent contractor

An employer must not dismiss, or threaten to dismiss, an individual who:-

(a) is an employee of the employer; and

(b) performs particular work for the employer;

in order to engage the individual as an independent contractor to perform the same, or substantially the same, work under a contract for services.

Note This section is a civil remedy provision (see Part 41).

359 Misrepresentation to engage as independent contractor

A person (the **employer**) that employs, or has at any time employed, an individual to perform particular work must not make a statement that the employer knows is false in order to persuade or influence the individual to enter into a contract for services under which the individual will perform, as an independent contractor, the same, or substantially the same, work for the employer.

Note This section is a civil remedy provision (see Part 41)

45. The changes made to Section 357(2) of the FW Act has changed the defence to misrepresenting a contract of service / employment as a contract for services (independent contractor) from a test of recklessness to one of reasonableness.

46. The new test would provide that an employer would not contravene the prohibition on sham contracting in Section 357(1) of the FW Act if the employer reasonably believed that the contract was a contract for services / independent contractor.

47. Before the changes were made to the FW Act, the defence to sham contracting was made if the employer proved that, when the representation was made, the employer did not know, and was not reckless as to whether, the contract was a contract of service / employment rather than a contract for services / independent contractor.

48. The burden of proof would rest with the party who made the representation (employer), consistently with the existing defence of reasonableness. The burden is on the employer because it is a defence and the burden of proving a defence usually rests with the party seeking to rely on it.

49. The changes made are designed to ensure that a more objective test is applied when determining whether an employer can make out the defence to sham contracting.

50. This test would require the employer who has misrepresented a contract of service / employment as one of a contract for services / independent contractor to prove that they reasonably believed that the employee was an independent contractor, not merely that they were not reckless as to the person's correct status.

51. It is expected that this change will provide a further incentive for an employer to correctly classify a person from the outset, ensuring that person receives their proper (and lawful) entitlements.

52. Section 357(3) of the FW Act provides guidance to a court in determining whether an employer's belief was reasonable.

53. Section 357(3)(a) of the FW Act provides that the size and nature of the employer's enterprise must be considered when determining if an employer's belief was reasonable.

54. Section 357(3)(b) of the FW Act gives a court discretion to consider any other relevant factors relevant to determining if an employer's belief was reasonable. Depending on the particular circumstances, other relevant factors might include:-

- the employer's skills and experience;
- the industry in which the employer operates;

- how long the employer has been operating;
- the presence or absence of dedicated human resource management specialists or expertise in the employer's enterprise; and
- whether the employer sought legal, or other professional advice, about the proper classification of the person, including any advice from Master Plumbers, and, if so, acted in accordance with that advice.

55. Section 357(3) of the FW Act can also provide guidance to employers as to the evidence they may seek to rely upon in establishing the new defence to sham contracting and reinforce the expectation that employers should take appropriate steps, commensurate with their experience and the nature of their operations, to understand how they are engaging a person before entering into a contract.

56. If an employer is found to have engaged in sham contracting, but successfully makes out the defence, the employer would not be liable to a civil penalty for a contravention of Section 357(1) of the FW Act. However, they may still be liable for other civil contraventions in relation to the misclassification. For example, if an employer has not paid correct entitlements to an employee as a result of a misclassification of a contract of service / employment as a contract for services / independent contractor, the employer may be liable to a civil penalty and / or to backpay the unpaid entitlements.

6. Part 4 – The introduction of the unfair contract terms

(Sections 536MY up to and including 536NJ of the FW Act)

6.1. Unfair Contract Terms

These provisions started from 26 August 2024.

The Commission can only accept applications that relate a contract for services / independent contractor that were made, or entered into, on or after 26 August 2024 and where the independent contractor earns less than the contractor high income threshold (which as of 1 July 2024 was $175,000.00 gross per annum).

57. The introduction of the unfair contract terms in the FW Act are new. They did not exist previously.

58. Sections 536N through to and including 536NC of the FW Act provide:-

536N Object of Part

(1) The object of this Part is:

(a) to establish a framework for dealing with unfair contract terms of services contracts that:

(i) balances the needs of principals and the needs of independent contractors; and

(ii) addresses the need for a level playing field between independent contractors and principals by creating disincentives to the inclusion of unfair contract terms in services contracts; and

(iii) recognises and protects the freedom of independent contractors to enter into services contracts; and

(b) to establish procedures for dealing with unfair contract terms that:

(i) are quick, flexible and informal; and

(ii) address the needs of principals and independent contractors; and

(c) to provide appropriate remedies if a term of a services contract is found to be unfair.

(2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a "fair go all round" is accorded to both the principals and independent contractors concerned.

Note: The expression "fair go all round" was used by Sheldon J in re Loty and Holloway v Australian Workers' Union [1971] AR (NSW) 95.

Division 3 Orders in relation to unfair contract terms of services contracts
536NA When the FWC may make an order in relation to an unfair contract term of a services contract

(1) The FWC may make an order under this Part in relation to a services contract if the FWC is satisfied that the services contract includes one or more unfair contract terms which, in an employment relationship, would relate to workplace relations matters.

(2) The FWC may make the order only if a person has made an application under section 536ND in relation to the services contract.

(3) The FWC must take into account fairness between the parties concerned in deciding whether to make an order under this Division, and the kind of order to make.

536NB Matters to be considered in deciding whether a term of a services contract is an unfair contract term

(1) In determining whether a term of a services contract is an unfair contract term, the FWC may take into account the following matters:

(a) the relative bargaining power of the parties to the services contract;

(b) whether the services contract as a whole displays a significant imbalance between the rights and obligations of the parties;

(c) whether the contract term under consideration is reasonably necessary to protect the legitimate interests of a party to the contract;

(d) whether the contract term under consideration imposes a harsh, unjust or unreasonable requirement on a party to the contract;

(e) whether the services contract as a whole provides for a total remuneration for performing work that is:

(i) less than regulated workers performing the same or similar work would receive under a minimum standards order or minimum standards guidelines; or

(ii) less than employees performing the same or similar work would receive;

(f) any other matter the FWC considers relevant.

(2) The matters in paragraphs (1)(b) to (f) are to be assessed as at the time the FWC considers the application.

536NC Remedy—order to set aside etc. contract

(1) The FWC may make an order under this section:

(a) setting aside all or part of a services contract which, in an employment relationship, would relate to a workplace relations matter; or

(b) amending or varying all or part of a services contract which, in an employment relationship, would relate to a workplace relations matter.

59. It should be noted that the Procedural Matters prescribed in Section 536ND through to and including 536NK have not been reproduced.

60. The Commission will have the authority and the ability to cancel / set aside or change / amend / vary unfair contract terms that would relate to **workplace relations matters** as if the independent contractor were an employee.

61. Under section 536JQ of the FW Act, the following are workplace relations matters:-

- remuneration, allowances or other amounts payable to employees; and / or
- employees' leave entitlements; and / or
- employees' hours of work; and / or
- enforcing or terminating contracts of employment; and / or
- making, enforcing or terminating other agreements determining terms and conditions of employment; and / or
- industrial action by employees and employers (unless it affects essential services); and / or
- disputes between employees and employers, or the resolution of such disputes; and / or
- other matters that are substantially the same as matters that relate to employees or employers dealt with by or under the FW Act and other applicable laws including state or territory industrial laws.

62. The following are not workplace relations matters:-

- preventing discrimination or promoting equal employment opportunity (unless contained in a state or territory industrial law); and / or
- superannuation; and / or
- workers' compensation; and / or
- occupational health and safety; and / or
- child labour; and / or
- public holidays (except rates of pay for public holidays); and / or
- deductions from wages or salaries; and / or
- industrial action affecting essential services; and / or
- jury service; and / or
- professional or trade regulation; and / or
- consumer protection; and / or
- taxation.

63. When determining whether a term in a contract for services / independent contractor is unfair, the Commission will consider:

- the relative bargaining power of the parties to the contract; and / or
- whether the contract as a whole displays a significant imbalance between the rights and obligations of the parties; and / or
- whether the contract term is reasonably necessary to protect the legitimate interests of a party to the contract; and / or
- whether the contract term imposes a harsh, unjust, or unreasonable requirement on a party to the contract; and / or
- whether the contract as a whole provides for a total remuneration for performing work that is less than what employees performing the same or similar work would receive; and / or
- any other matters the Commission considers relevant.

Opt - Out Provisions / Options

64. Introduced as part of the amendments to the FW Act is a contract for services / independent contractor opt - out provision.

65. The opt – out provisions only apply where the individual independent contractor earns more than the contractor high income threshold.

66. The contract for services / independent contractor opt - out provision allows the parties to the contract for services / independent contractor arrangement (i.e. the plumbing company and the independent contractor themselves) to agree that the new definition of employment (as prescribed in Section 15AA of the FW Act) will not apply to them.

67. In order to make the opt – out agreement, the plumbing company must issue a written notice to the independent contractor, which states that the independent contractor may give the company an opt out notice, if the independent contractor considers that the relationship between the parties may be a relationship in which the plumbing company is the employer of the independent contractor because of the operation of Section 15AA of the FW Act.

68. If the independent contractor agrees to the suggestion by the plumbing company to opt – out, then they need to provide, within twenty - one (21) days, written notice stating that they elect that section 15AA is not to apply to the relationship between the parties.

69. In the alternative, the independent contractor may provide an opt - out notice to the plumbing company at any time stating that the contractor elects that section 15AA is not to apply to the relationship between the parties if the independent contractor themselves wishes to opt – out.

70. In both situations, the independent contractor may elect to withdraw or cancel their opt – out notice at any time by giving written notice (known as a revocation notice) to the plumbing company that the contractor elects that section 15AA is to apply to the relationship between the parties.

71. An independent contractor may give only one opt-out notice and one revocation notice in respect of the relationship.

Independent Contractors Act 2006

72. Independent contractors who earn above the contractor high income threshold will still be able to access remedies for unfair or harsh contract terms under the Independent Contractors Act 2006 (C'th).

7. Part 5 – Commission Decisions

7.1. Yi – Hsien Chou v Steadfast Shareholding Pty Ltd

Deputy President Butler (C2024/10265) [2025] FWC 769 18 March 2025

Introduction / Background

John Yueh Han Ang (**Ang**), Amy Chu – Hsin Hseuh (**Hseuh**) and Hseuh's mother had a business - Steadfast Shareholding Pty Ltd (**Steadfast Shareholding**).

Yi – Shien Chou (Chou) performed various services for Steadfast Shareholding as a Resident Manager.

Ang hand delivered to Chou a notice of termination. Steadfast Shareholding subsequently changed the locks so that Chou could not enter the Resident Manager's Office.

Chou filed an application with the Fair Work Commission (**Commission**) claiming unfair dismissal under Section 394 of the Fair Work Act 2009 (C'th) (**FW Act**).

Steadfast Shareholding objected to the application as they asserted that Chou was employed by Fresh First Pty Ltd (**Fresh First**). Steadfast Shareholding claimed that there was a contract for service between Steadfast Shareholding and Fresh First, for Fresh First to provide particular services to Steadfast Shareholding.

Chou asserted that he was an employee of Steadfast Shareholding and that Fresh First was just a vehicle through which his wage / salary was paid.

Decision

The Commission found that:

- it is not in dispute that there was no written contract between the parties, or between Steadfast and Fresh First;
- it was not disputed that Fresh First invoiced Steadfast for work performed by Chou and that payment of the invoices was made to Fresh First's bank account;
- determining whether Chou was an employee will, relevantly, turn on whether he was an employee within the ordinary meaning of that term. Deciding this question is not necessarily straight-forward. There is a long history of decisions in the Commission and the Courts in relation to deciding whether a person is an employee;
- the ordinary meanings of "employee" and "employer" for the purposes of the FW Act are also affected by Section 15AA of the FW Act;
- Chou, Ang and Hsueh, on their own behalf and / or on behalf of their respective companies, agreed that Chou would carry out the work of the Resident Manager. Though Chou admitted his wife helped him with the work, and though Steadfast Shareholding tried to argue that Chou could outsource or subcontract the work, that was not the reality of the situation. Both parties accepted that the Resident Manager had to be vetted by the body corporate committee, including through the provision of a police check, and it is not plausible to suggest that it was open to Chou to arrange for someone else do the work;
- there was no suggestion that Chou had engaged or could engage another staff member to undertake the Resident Manager work, and the arrangement was specifically for that work;
- the parties to the contract agreed on remuneration. Remuneration was calculated by reference to salary, bonus, and superannuation. They agreed that Fresh First would invoice Steadfast Shareholding, and that Steadfast Shareholding would pay Fresh First. It can be discerned from the various persons' conduct that the parties to the contract also agreed that Steadfast Shareholding would provide business cards, a credit card, work email, and access to an online drive to Chou. They

agreed that Chou would obtain the necessary licence, would live on the premises, and would pay rent;

- on the evidence, Chou's work was so subordinate to Steadfast Shareholding's business that it can be seen to have been performed as an employee of that business, rather than as part of an independent enterprise. It is not plausible to assert that Chou was running his own independent enterprise, Fresh First, when that company was only providing Chou's labour as a Resident Manager who lived on - site and had made a full - time commitment to that job. Chou was working in Steadfast Shareholding's enterprise, not his own;
- it can be discerned from the parties' evidence, and particularly the messages between Chou on the one hand and Hsueh and Ang on the other, over the years of his engagement, that all three (3) of them took for granted that Steadfast Shareholding had a contractual right to control Chou's activities (including how, where and when the work was done);
- Steadfast Shareholding conceded it had referred to the engagement as employment from time to time but argued that this was just imprecision in language. I accept that the parties' use of the language of employment is irrelevant or at the least not determinative;
- I find that Chou was an employee of Steadfast Shareholding at all material times.

7.2. Doo Hong v MTP Services Pty Ltd

Commissioner Sloan (C2024/7793) [2025] FWC 767 18 March 2025

Introduction / Background

In August 2024, MTP Services Pty Ltd (**MTP Services**) purported to enter into an agreement with Gamma Plus Pty Ltd (**Gamma Plus**) and Doo Hong (**Hong**) (**Agreement**).

The Agreement was titled "Labour Hire Agreement".

According to the terms of the Agreement, Gamma Plus was to provide Hong to perform services for one of MTP's clients.

MTP's client informed Hong that it had decided to terminate his engagement.

As a result of that decision, MTP terminated the Agreement on 14 October 2024.

Hong commenced proceedings in the Fair Work Commission (**Commission**) under Section 365 of the Fair Work Act 2009 (C'th) (**FW Act**).

Hong alleged that in raising his concerns with MTP he had exercised a workplace right; that he was dismissed as a result of doing so; and that this constituted adverse action in contravention of Section 340 of the FW Act.

Hong also claimed that MTP dismissed him on the basis of a temporary absence due to illness or injury, in contravention of Section 352 of the FW Act.

Decision

The Commission found that:

- in the FW Act, the term "employee" has its "ordinary meaning".
- Section 15AA of the FW Act sets out how the Commission is to determine whether a person is an employee within the "ordinary meaning" of the term.
- the Commission must ascertain "the real substance, practical reality and true nature of the relationship" between the parties. In doing so, the Commission must consider the totality of the relationship between them, and in that respect the Commission must have regard not only to the terms of the contract governing the relationship, but also to other factors relating to the totality of the relationship including, but not limited to, how the contract is performed in practice.
- on its face, the Agreement created a tripartite relationship between MPT, Gamma Plus and Hong.

- the Agreement expressly provided for the creation of an independent contractor relationship between MTP and Hong.
- the Agreement expressly stated that nothing in its terms would create an employment relationship between the parties. There is no probative evidence that the parties were in any doubt that these provisions were to be given their full effect. To the contrary, the parties conducted themselves in accordance with the terms of the Agreement.
- Hong led no evidence to convince me that at any stage was he in an employment relationship with MTP.
- Hong asserted that he had read but did not understand the effect of the Agreement.
- Hong claimed that he understood that he would become an employee of MTP.
- Hong's conduct, though, puts the lie to these contentions.
- in purporting to provide his services through Gamma Plus, and issuing invoices in the name of Gamma Plus, Hong deliberately sought to create the appearance of the tripartite relationship anticipated by the Agreement.
- having regard to all of the evidence, and in particular Hong's conduct, I am satisfied that "the real substance, practical reality and true nature of the relationship" between MTP and Hong was not one of employment.
- the absence of an employment relationship means that Hong was not (because he could not have been) dismissed by MTP for the purposes of the FW Act.

7.3. AB v Free Hearts Free Minds

Commissioner Redford (C2024/8663) [2025] FWC 353 21 March 2025

Introduction / Background

Free Hearts Free Minds (**FHFM**) is an organisation that primarily provides support to people who live or have lived in a Muslim – majority country who have faced persecution because of their beliefs and / or orientation.

AB was engaged by FHFM to provide, amongst other things, therapy sessions for FHFM clients.

EF is a Director of FHFM. EF was the person who engaged AB to perform work for FHFM and to whom AB directly reported.

On 28 November 2024, AB filed an application with the Fair Work Commission (**Commission**) claiming that the termination of her employment with FHFM occurred in a manner that was in contravention of Section 365 of the Fair Work Act 2009 (C'th) (**FW Act**).

FHFM deny it engages any persons capable of being described as an "employee" in any part of the world, but does engage people to provide services, sometimes for remuneration, on the basis of what it describes as a contracting arrangement.

FHFM also utilises volunteers.

Decision

The Commission found that:

- the characterisation of the relationship between AB and FHFM requires an analysis of the true nature of that relationship, through an examination of the various elements associated with the engagement and the work performed.
- the terms "employee" and an "employer" carry their ordinary meanings. Section15AA of the FW Act deals with how to determine the "ordinary meanings" of the terms "employee" and "employer". Section 15AA of the Act is a new provision, inserted by the Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024 (the amending Act), and commenced operation on 26 August 2024.

- in the application of the "multifactorial test", prior to the decisions of the High Court in Personnel Contracting and Jamsek, the Commission often had regard to the decision of a Full Bench in Jiang Shen Cai trading as French Accent v Michael Anthony Do Rozario (French Accent) particularly because it contained a useful summary of some of the "indicia" which might be considered to determine whether, using the multifactorial test, a person is an employee or an employer. The summary of indicia outlines factors similar to those identified in the Explanatory Memorandum ... including the following (by way of summary):
    - the "ultimate question" is whether the worker is a servant of another in that other's business, or carries on a trade or business of his or her own behalf.
    - the nature of the work performed and the manner in which it is performed must always be considered.
    - the terms and terminology of the contract are always important. However, the parties cannot alter the true nature of the relationship by putting a different label on it.
    - whether the putative employer exercises, or has the right to exercise, control over the manner in which work is performed, place or work, hours of work and the like is indicative of a relationship of employment, and the absence of such control or the right to exercise control is indicative of an independent contract.
    - whether the worker performs work for others (or has a genuine and practice entitlement to do so) is characteristic of an employment relationship and working for others (or the genuine and practical entitlement to do so) suggests an independent contract.
    - whether the worker has a separate place of work and or advertises his or her services to the world at large.
    - where the worker provides and maintains significant tools or equipment, or is significantly invested in capital equipment requiring a substantial degree of skill or training to use, this may be indicative of an independent contract.
    - if a worker is contractually entitled to delegate the work to others without reference to the putative employer this is a strong indicator the worker is an independent contractor.
    - if the putative employer has the right to suspend or dismiss the person engaged, this can be an indicator of an employment relationship.
    - if the putative employer presents the worker to the world at large as an emanation of the business, such as a requirement to wear the "livery" of the putative employer, this may be an indication of an employment relationship.
    - employees tend to be paid a periodic wage or salary. Independent contractors tend to be paid by reference to completion of tasks.
    - the provision of paid holidays or sick leave can be indicative of an employment relationship.
    - where the work involves a profession, trade or distinct calling on the part of the person engaged, such persons tend to be engaged as independent contractors rather than as employees.
    - a worker that creates goodwill or saleable assets in the course of his or her work may be more likely to be an independent contractor.
    - a worker who spends significant portion of their remuneration on business expenses may be more likely to be an independent contractor.

  In relation to the application of the test, this decision cited an earlier comment made by Mummery J in Hall (Inspector of Taxes) v Lorimer, that the application of the indicia:

  "... is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It isa matter of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another."

  In On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3), Bromberg J observed that in Vabu, the High Court had provided a "focal point" around which relevant indicia

can be examined (also referred to as "the ultimate question" above). The focal point is whether the individual is running their own business.

- since the decision in French Accent was delivered by this Commission, and the decisions upon which it is based, including Brodribb and Vabu, the nature of the modern workplace has continued to evolve significantly. It is now very common for employees to work in a remote setting, often from home, with a degree of flexibility and personal control as to how they undertake their work vastly different from a more traditional workplace supervisory setting. The transformation of the modern workplace may in some circumstances impact on the application of the multifactorial test. Taking into account the remote nature of AB's engagement, I consider it important I have regard to the evolution of the modern workplace, particularly in giving consideration to traditional notions of "control" within an employment relationship.
- based on the evidence before me, it seems to me that the structure of the role performed by AB revolved around a weekly meeting she had with EF, during which she received direction as to what work to do, which was then undertaken in an autonomous fashion. In this regard, it appeared the work was undertaken similar to many remote working arrangements, particularly in respect to an employee holding a senior role.
- AB was plainly not entitled to refuse to undertake the work arising from her interactions with EF–she was required to follow her instructions. The work – such as liaising with donors or improving the online infrastructure was not project based. It was part of a broad role.
- I have considered the various indicia associated with AB's engagement by FHFM in relation to the "ultimate question" or "focal point" –whether AB was carrying out a trade or business on her own behalf.
- there is no evidence supporting the proposition that AB was carrying out a trade or business on her own behalf in respect to her work for FHFM. Her work, such as fund raising activities, the maintenance and improvement of the FHFM infrastructure, her engagement with other FHFM personnel was engaged in solely for the benefit of FHFM and not part of any trade or undertaking being carried on by AB. She presented herself and was presented by FHFM to the world at large, not as an autonomous entity, but as the Executive Director of FHFM
- the absence of trappings more consistent with an employment relationship, such as the remittance of tax, the provision of leave entitlements and superannuation could be said to add weight to a conclusion this was an independent contract. I note however that these a features of the relationship are also absent largely because FHFM refused to provide them. AB said EF said "we can go through the process of making you an employee, but this would be difficult for me and requires a lot of extra paperwork and steps ..." They are not absent because the true nature of the relationship involved AB carrying on an undertaking on her own behalf. Their absence is more reminiscent of sham, created to cause an impression the arrangement is something different from what it truly is.
- while to some extent unusual, the relationship between FHFM and AB had features that are becoming more and more common in an employment relationship, through the increase in remote working arrangements and the use of technology. While at first blush it appears to be an unlikely "employment" relationship taking into account its remote character, the "employer's" overseas location and the way the parties labelled the relationship, an analysis of its true nature is more indicative of employment than an independent contract. I find AB was an employee of FHFM.

7.4. Christian Turner v InfraBuild Trading Pty Ltd

Commissioner Connolly (C2024/7549) [2025] FWC 813 24 March 2025

Introduction / Background

Christian Turner (**Turner**) has been performing work for InfraBuild Trading Pty Ltd (**InfraBuild**) for almost twenty (20) years.

Turner's work has generally involved machinery and plant maintenance work, as well as engaging and facilitating the work of contractors on - site in associated activities.

Turner initially performed work as an employee of a company previously engaged by InfraBuild to undertake on - site machinery and plant maintenance work.

When Turner's employer said they were no longer going to undertake this work, he was asked if he was interested in taking on the role. Turner stated he was and then set up CB Industries Pty Ltd (**CB Industries**) to provide services to InfraBuild.

On 1 July 2020, Turner signed a contract for the purchase of services on behalf of CB Industries with InfraBuild.

On 19 September 2024, InfraBuild wrote to Turner advising that the Contract for the purchase of Services dated 1 July 2020 between CB Industries and InfraBuild would be terminated effective 3 October 2024.

Decision

The Commission found that:

- Section 15AA of the Fair Work Act 2009 (C'th) (FW Act) requires that regard must be had to the totality of the relationship, including the terms of the contract governing the relationship and other factors relating to the totality of the relationship, including how the contract is performed in practice. This approach draws the distinction as an employment relationship being when an individual provides their personal service (skill, time, effort etc) under a contract of service to be discharged by the individual personally. Whereas an independent contracting relationship is a contract for services where an individual is conducting their own independent business with a degree of control over how their services are provided.
- CB industries operated as a company providing services, almost exclusively, for the InfraBuild for over fifteen (15) years.

  On 1 July 2020, Turner signed a contract for the purchase of services on behalf of CB Industries with InfraBuild. The terms of the contact provided hourly, overtime and public holiday rates of payment of invoices to CB Industries for completed maintenance and related services at the Scoresby site or other service locations as specified on an order-by-order basis in a Purchase Order.

  Other terms included freedom for CB Industries to accept or decline a purchase order; freedom for CB Industries to engage competent employees, agents or subcontractors; freedom for InfraBuild to procure maintenance services from alternative sources; express reference to the relationship being one of independent contracting; requirements of CB Industries to retain certain insurances, including workers compensation, public and professional liability and requirements for CB Industries to supply and maintain equipment.
- The overwhelming evidence in this case supports the position of InfraBuild. Much is also not contested.

  Turner accepts he signed a services contract with InfraBuild in 2020. He accepts he created CB Industries as an independent proprietary limited company to provide services to InfraBuild. That on occasion he engaged employees and contractors through CB Industries to assist providing services to InfraBuild. That he invoiced for services provided and anything additional he was requested to do. And that he paid GST for services rendered, and that he was an employee of CB Industries.

  These concessions alone suggest that the true nature of the relationship between Turner and InfraBuild was not one of employment. That he had freedom to engage contractors and / or employees and did.

- Furthermore, in evidence Turner accepted he had the freedom to seek to unilaterally raise prices for the services he provided and successfully did so. And that he had freedom to not provide his services and at least on one occasion did so as part of a late payment dispute. These freedoms to unilaterally raise prices and withdraw services do not support his position that he was in an employment relationship.

  The evidence of invoices and payment terms presented by both Turner and InfraBuild is uncontested and consistent with a relationship between independent contracting parties.

  Turner would cause CB Industries to invoice for work performed and CB Industries would be paid on receipt of invoices. If Turner performed additional work, he accepts he would invoice for this and then be paid for it.

  The fact that Turner was paid hourly, was paid a higher rate for work performed on a weekend and that Ms Ren had cause to have some oversight of the hours charged to the Respondent does not take his argument much further in the present circumstances …

  The summary of monthly earnings showing a significant variance in Turner's earnings are also indicative he was not paid a regular wage, and his earnings from InfraBuild were subject to variance and risk. Again, these are not characteristics indicative of an employment relationship.
- Turner accepted that his presentations at toolbox meetings were as a contractor acting within the scope of his contract.
- Similarly, Turner's submissions that he was able to use company tools and equipment onsite to assist in his duties does little to advance his case. Turner's evidence is that he used his tools for at least fifty per cent (50%) of the time. And that he relied on InfraBuild's tools for the remainder of the time. Usually this involved use of cranes and lifts on - site that made his tasks easier and did not require him to bring large pieces of equipment on - site.
- In terms of his ability to determine how his work was performed, I accept Turner was told what tasks he needed to complete. It was not the case, however, that he was instructed how, when and who would perform these tasks for CB Industries. Rather, as Turner accepted in proceedings, how tasks were done was left up to him, but he was told when they needed to be completed.
- Turner accepted that he was not provided with annual leave and could have taken leave if he wished.
- I have considered that it is not disputed Turner was provided with a company shirt and email. Considering the weight and balance of the evidence above however, these facts do not alter my conclusion that the true nature and practical reality of his relationship with InfraBuild was one of independent contracting.
- Turner acknowledged that he had the freedom to work for others. The freedom to work for others is again not a factor consistent with a relationship of employment.
- Considering this final factor along with those set out above and the overall circumstances of this case, it is clear to me the real substance, practical reality and true nature of the relationship between Turner and InfraBuild was not one of employment, but independent contracting. Therefore, it cannot logically follow that Turner was dismissed by InfraBuild within the meaning of Section 386 of the FW Act as Turner alleges.

7.5. Murray v 239 Brunswick Pty Ltd and Raffoul

Deputy President Roberts (C2025/221) [2025] FWC 978 7 April 2025

Introduction / Background

239 Brunswick Pty Ltd (**Brunswick**) is an adulty entertainment venue.

Sarah Murray (**Murray**) made application under Section 365 of the Fair Work Act 2009 (C'th) (**FW Act**).

Moussa Raffoul (**Raffoul**) was said to be involved in the contravention by Brunswick in accordance with Section 550 of the FW Act.

Both Brunswick and Raffoul raised a jurisdictional objection that Murray was not an employee, but was engaged as an independent contractor. Therefore, Murray could not be dismissed under Section 365 of the FW Act.

Decision

It should be noted that Murray filed no evidence and did not appear at the hearing on 3 April 2025.

The Commission noted that the decision had been reached on the basis of the uncontested evidence of Brunswick and Raffoul without the benefit of any active participation, evidence or submissions by Murray.

The Commission found that:

- the uncontested evidence of Paul Kane an employee of Brunswick was:
  - Murray entered into an agreement with Brunswick on approximately 22 September 2023 (Agreement).Murray commenced work in or about September 2023 and worked under a pseudonym chosen by her;
  - under the Agreement, Murray was required to pay Brunswick a fee for reserving the premises, which was determined by the day and the time the reservation is made for;
  - the Agreement also included a clause that Murray was not entitled to receive any fee or payment from Brunswick for any of her performances. Murray was not paid any form of remuneration by Brunswick for her performances, and she made her income for the night by being paid directly by clients, either by cash or bank transfer. The only payment Murray received for performing at Brunswick's premises was directly from her clients. This included any tips paid by clients, the whole of which Murray was entitled to keep;
  - under the Agreement Murray was also required to pay a fine for failing to give notice or give sufficient notice of cancelling or not showing up to a reservation. This was only implemented so that Brunswick had sufficient time to ask another dancer if they were available to perform if it was expected to be a busy night;
  - the current rostering process involves dancers being provided access to make a reservation to perform through the mobile application called "Deputy". The ordinary process was that through Deputy, dancers would roster the times that they wanted to perform (by selecting from a range of available time slots);
  - Dancers could also arrange for another dancer to perform in their place if they were unavailable at the last minute;
  - Murray was not issued with directions regarding the hours or days on which she would perform by Brunswick;
  - Brunswick did not enforce any minimum shift requirements or specific days of work for Murray in practice even though Friday and Saturday nights are the busiest nights and dancers were encouraged to perform at least one of those nights;
  - Murray was required to pay Brunswick a door fee depending on the time that they arrive - if they arrive before 7.00 pm they are not charged a door fee, but the later they arrive, the higher the door fee. Dancers also pay a fixed price for each lap dance that they provide, based upon the length of the dance. Murray risked running at a loss if she were unable to secure enough lap dances in one night;

- Brunswick did not pay tax in relation to dances performed by Murray,
- Brunswick did not pay superannuation contributions to Murray and did not otherwise provide her with sick leave, annual leave or any other employment entitlements;
- Murray was not provided with any uniforms or clothing by Brunswick and was not required to wear clothing bearing the logo of Brunswick;
- any equipment or props used by dancers such as Murray, were to be supplied at their own discretion and cost.

- Section 15AA(2) requires a consideration of the totality of the relationship which involves in turn a consideration of, amongst other things, the terms of the contract between the parties and an assessment as to how the contract is performed in practice. The approach to a consideration of the totality of the relationship under Section 15AA is guided by the common law principles established by cases such as Stevens v Brodribb Sawmilling Co. Pty Ltd and Hollis v Vabu Pty Ltd and involves a reversion to the multifactorial test that was well known and widely applied prior to the High Court decisions in CFMMEU v. Personnel Contracting5and ZG Operations v. Jamsek.

  The common law approach has been set out in numerous decisions of the courts and in decisions of this Commission. In Jiang Shen Cai trading as French Accent v. Do Rozario7the Full Bench summarised the approach to the determination of the employee / contractor issue including whether the worker is the servant of another in that other's business or whether the worker carries on a trade or business of his or her own behalf, the nature of the work performed and the manner of its performance, the identification and application of the relevant indicia to the circumstances, and the terms of the contract between the parties.

  In the same decision, the Full Bench identified the various indicia that are ordinarily considered in an assessment as to the nature of the relationship. They include the actual exercise, or the right to exercise, control over the putative employee, whether the worker performs work for others, or provides tools and equipment, whether the work can be delegated, whether the worker is remunerated by periodic wages or salary or by reference to completion of tasks and whether the worker is presented to the world at large as an emanation of the putative employer's business. The Bench also cautioned that "no list of indicia is to be regarded as comprehensive or exhaustive and the weight to be given to particular indicia will vary according to the circumstances.

  The terms of the Agreement did not exclusively point in favour of a relationship of principal and independent contractor and in some respects, there were internal inconsistencies and contraindicators.

- I am of the view that the real substance, practical reality and true nature of the relationship was one of principal and independent contractor;

- Nonetheless, the assessment is not a mechanical running through of items on a checklist and a simple tallying of items for or against either conclusion. Nor is it any longer overwhelmingly focused on the legal rights and obligations created by the contract at its inception. Regard must be had to the totality of the relationship, including how the contract is performed.

  In this assessment I think it significant that the Applicant was not paid a wage or any other remuneration by Brunswick for the performances. To the contrary, Murray paid Brunswick a reservation fee to perform and a part of the income earned for each dance performance, depending on the length of the dance. Murray could also be penalised for cancelling a reservation. It is also noteworthy that Murray's earnings were derived directly from the clients for whom she performed not Brunswick. The identity of the clients, the number of those clients and the amounts that the clients were to pay were all determined, or in the latter case, negotiated by Murray. Accordingly, it was Murray who bore the financial risk of earning or losing money for each attendance.

- although the contract specified a minimum number of shifts during particular periods, generally Murray was able to choose the days and times at which she could perform through the rostering application and the rostering arrangements were not fixed but could also be changed informally by the performers discussing that issue with the Managers.

7.6. Ms Jessica Dickson v Ms Susann Kovacs, Mr Felipe Cespedes

Deputy President Butler (C2024/7717) [2025] FWC 1218 2 May 2025

Introduction / Background

Jessica Dickson (**Dickson**) was hired by Susann Kovacs (**Kovacs**) and Felipe Cespedes (**Cespedes**) as a nanny for their two (2) children.

The arrangement concluded on 5 October 2024.

Dickson applied to the Fair Work Commission (**Commission**) to deal with a general protections dispute under the Fair Work Act 2009 (C'th) (**FW Act**) involving dismissal.

Kovacs and Cespedes objected to the application on the basis that Dickson was not an employee and was therefore not dismissed.

Decision

The Commission found that:

- in determining whether the Commission's jurisdiction has been enlivened for the purposes of Section 365 of the FW Act, the question is whether Dickson was an employee on the date the engagement came to an end, and therefore was susceptible to being dismissed on that date. This requires consideration of the meaning of "employee" as affected by Section 15AA of the FW Act as in force at the time the engagement ended in October 2024;
- the terms of the contract were difficult to identify because they were not reduced to writing, and the discussions between the parties were not wholly specific or clear;
- as to whether the parties agreed that Dickson would be a contractor, the parties' label is not determinative of the relationship;
- in this matter the worker was engaged not in a business or enterprise but in a household, as a nanny. As Kovacs and Cespedes pointed out in their written submission, in Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd32 Kiefel CJ, Keane and Edelman JJ observed that this "dichotomy may not be perfect so as to be of universal application for the reason that not all contractors are entrepreneurs." It is equally the case that not all principals are businesses or enterprises. Some are households. It is commonplace for households to engage contractors to do everything from gardening to installing solar panels. Nonetheless the dichotomy is useful because it
- focuses attention on whether the relationship between the parties is one where the worker's activities are subordinate to those of the employer or principal as the case may be.

  In the case of households and domestic workers, by analogy, the question is not whether a person worked as a servant of another's business or carried out a business of her own, but whether they worked as a servant of the household or carried out a business of their own, of which the heads of the household were clients.

  Nannies may perform work under a direct arrangement with the family. Alternatively, they may do so as an employee or sub - contractor of their own corporate entity, or an agency.

  In this particular case, Dickson does not appear to have been running her own business. There is no suggestion she was providing nannying, childcare, or other personal care services to other households on her own account. She took on another job at a childcare centre, that is, in someone else's business. She did not render invoices, provide an ABN, arrange to be engaged through an incorporated entity, or file quarterly reports with the Australian Taxation Office.

  I accept Dickson was not, in nannying for the Cespedes and Kovacs household, generating goodwill for herself.
- Nannies employed in private residences are inherently subject to significant control, in the sense of direction or command. They are self - evidently expected to fulfil parents' directions as to the care of their children. Counsel for the respondents cautioned that this view would mean the only factor assessed. It is easy to imagine a situation where one nanny is a sole proprietor operating their own business, providing care to a different family each day or for different parts of a week, or for short

periods. Such a person could conceivably be an independent contractor despite being under a high degree of control in each different household. Similarly, a person might be engaged through an agency as an employee or sub-contractor of that agency, but still under significant control from that agency's clients, the parents.

- I find that Dickson's working hours changed and were changeable, and that she could not set her own hours. They were negotiated.
- It could not seriously be argued that Dickson could choose to care for the children at any place of her choosing, just because she had been allowed to care for them at her own home occasionally. Cespedes and Kovacs had the right to direct Dickson in relation to where she cared for their children.
- I have found that Dickson was an employee of Kovacs and Cespedes and was dismissed, within the meaning of that term for the purposes of Section 365 of the FW Act.

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Publish date: July 2025