

[2019] FWC 2981 [Note: An appeal pursuant to s.604 (C2019/4259) was lodged against this decision – refer to Full Bench decision dated 17 July 2019 [[2019\] FWC 4949](#)] for result of appeal]



DECISION

Fair Work Act

2009

s.394—Unfair dismissal

Yin Leung

v

Rejoice Chinese Christian Communication Centre

(U2019/256)

COMMISSIONER WILSON

MELBOURNE, 3 MAY 2019

Application for an unfair dismissal remedy.

[1] Leung Yin Fun, (Ms Leung), has made an application for unfair dismissal remedy pursuant to s.394 of the *Fair Work Act 2009* (the Act) against the Rejoice Chinese Christian Community Centre Inc (Rejoice) in relation to what she alleges is a termination of employment on or around 21 December 2018.

[2] Rejoice contest either that it was Ms Leung’s employer on the date in question or that there was a termination at the initiative of the employer.

[3] Evidence was given in the matter by Ms Leung on her own behalf and Raymond Chow on behalf of the Respondent.

[4] The background to Ms Leung’s application is that she has worked at various times for Rejoice. While there appears some contrary evidence¹ Rejoice overall submits that it did not employ Ms Leung after 4 March 2018, and that “Ms Leung was a contractor providing services to Respondent in the period 5 December 2011 – 30 June 2012 and 1 July 2015 – 4 March 2018. The work amount was negotiated in the weekly/biweekly meeting”.² The evidence shows as well that Ms Leung worked for another entity with a connection of some kind to Rejoice, being Creative Everyday Pty Ltd, (Creative Everyday), which undertakes a project of Rejoice’s known as “Sameway”. Until July 2012 the Sameway project was directly run by Rejoice. After that date, responsibility for the project moved into Creative Everyday.³

[5] Rejoice contests not only that it was not Ms Leung’s employer at the time she says her employment was terminated, but also whether there was a termination at the initiative of the employer.⁴

[6] Rejoice, as well as Creative Everyday, have not consented to a correction or amendment of the Respondent’s identification from Rejoice to Creative Everyday however, such may be possible if the circumstances allow, pursuant to s.586(b) of the Act. Without directly addressing the subject of a correction to the identification of the Respondent, Mr Chow who is both the Chief Executive Officer of Rejoice and one of two directors of Creative

Everyday and who has agreed he spoke for both entities,⁵ implied there may be little utility for a correction or amendment since, in any event Ms Leung as a casual employee would not have completed the applicable minimum employment period even if there had been a termination at the initiative of the employer, whomsoever they may be, on or around 21 December 2018.

[7] Mr Chow also put forward in the hearing that Rejoice and Creative Everyday were not associated entities within the meaning of the Act.⁶

[8] The evidence shows that Rejoice employed either four people at the time Ms Leung's employment ended⁷ or two.⁸ Creative Everyday claims five employees,⁹ whereas Ms Leung says these numbers underestimate the overall employment cohort.

[9] Under any scenario Ms Leung's employer was likely at the time her employment ended, a small business within the meaning of the Act. It also likely follows that under any scenario Ms Leung would have to have served a minimum employment period of 12 months in order for her to be a person protected from unfair dismissal. Plainly if she was employed at the time her employment ended by either entity it would have been a small business. Similarly even if it were to be found that the two entities were associated entities, the combined number of employees would likely still be beneath the small business threshold.

[10] The matter referred to me for determination is whether at the time Ms Leung asserts, she was terminated, namely on or around 21 December 2018, Ms Leung was an employee of the organisation she names as the Respondent, that is, Rejoice.

[11] Rejoice as well as Creative Everyday contest both that Ms Leung was an employee of it on the date in question, as well as whether there was an employment relationship at all. The entities regarded her not as an employee, but as an independent contractor. The employer Response Form submitted by Rejoice first asserts that, after Ms Leung experienced problems with committing time to her work, "She assumed the role of a contractor instead of a casual worker" and then repeatedly refers to her status as "Casual (in contractor mode)". Further, the Respondent's written submissions refer to Ms Leung as having been a "contractor providing service".¹⁰ After seeking clarification about what this meant, Mr Chow confirmed that "Ms Leung should be classified as a contractor instead of an employee of Creative Every Day at the time of claimed dismissal".¹¹

[12] Because of the parties' various contentions, the question of whether Ms Leung was an employee of Rejoice in December 2018 must be resolved by considering a number of subsidiary questions going to the heart of s.382 of the Act which defines when a person is protected from unfair dismissal. That section is in the following form:

“382 When a person is protected from unfair dismissal

A person is *protected from unfair dismissal* at a time if, at that time:

- (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
- (b) one or more of the following apply:

- (i) a modern award covers the person;
- (ii) an enterprise agreement applies in relation to the employment;
- (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold."

[13] Following from these considerations, the relevant questions for determination in this decision are:

- Was Ms Leung's working relationship one of independent contractor?
- Was Ms Leung an employee of Rejoice in December 2018?
- Had Ms Leung served the minimum employment period by the time she ceased work?

Was Ms Leung's working relationship one of independent contractor?

[14] As set out above, the responses provided include that even though there is a contest about whether Rejoice was Ms Leung's employer in December 2018, Ms Leung may not have been party to an employment relationship at all with either Rejoice or Creative Everyday, but rather that she had been working as an independent contractor. The responses include that Ms Leung was in the role of "contractor instead of a casual worker" or was a "Casual (in contractor mode)" and then that "Ms Leung should be classified as a contractor instead of an employee.

[15] The submissions provided by Ms Leung on the subject of the status of her employment include an analysis of her circumstances against what may be required as the usual indicia to be considered to ascertain whether a person is an employee or an independent contractor. Her table in this regard is shown as Attachment 1.¹²

[16] The submissions from Rejoice and Creative Everyday on the subject are limited but include that there was "no written agreement but only a series of discussions at different stages on what work and how the job would be performed"¹³; that Ms Leung could complete her tasks at home at whatever time she chose; that even though there was a change in engagement status Ms Leung's hours of work were consistently varied according to the project she was working on and her family responsibilities. Further, it was argued that while initially there was no change in the payment schedule when Mr Leung became a contractor that changed at a later time with the amount paid reduced to reflect the amount of time required. It is argued in relation to the provision of equipment and tools that "After she assumed the role of a contractor, she would be using her own computer at home or anywhere she thought appropriate to provide the services to us. Even when Ms Leung was at office, she would still bring and use her own computer instead of using the computer provided to her at office."¹⁴ During the overall period of engagement, the contracting entity changed, and "the amount and nature of job Ms Leung involved were usually determined through negotiation according to how much time she could spend and what we agreed as priority. The entity for payment would be determined by the entity in charge of assigning most of her work."¹⁵

[17] The Commission’s approach, following the Courts on the matter, is to apply a multifactorial approach to assessment of whether a person works under a contract of employment or contract of services. The Full Bench set out the relevant principles in *Jiang Shen Cai trading as French Accent v Michael Anthony Do Rozario*¹⁶ (French Accent). In that decision the Full Bench explicitly continued earlier reasoning on such determinations with its reference to *Abdalla v Viewdaze Pty Ltd*.¹⁷

“[18] We endorse the proposition in sub-paragraph (1) of the *Abdalla* summary, based on the High Court authorities, that:

“... the ultimate question will always be 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 behalf¹⁸: that is, whether, viewed as a practical matter, the putative worker could be said to be conducting a business of his or her own¹⁹. This question is answered by considering the terms of the contract and the totality of the relationship²⁰.”²¹ (references in original)

[18] *French Accent* summarised the indicia in the following way:

“[30] The general law approach to distinguishing between employees and independent contractors may be summarised as follows:

- (1) In determining whether a worker is an employee or an independent contractor the ultimate question is 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: that is, whether, viewed as a practical matter, the putative worker could be said to be conducting a business of his or her own of which the work in question forms part? This question is concerned with the objective character of the relationship. It is answered by considering the terms of the contract and the totality of the relationship.
- (2) The nature of the work performed and the manner in which it is performed must always be considered. This will always be relevant to the identification of relevant indicia and the relative weight to be assigned to various indicia and may often be relevant to the construction of ambiguous terms in the contract.
- (3) The terms and terminology of the contract are always important. However, the parties cannot alter the true nature of their relationship by putting a different label on it. In particular, an express term that the worker is an independent contractor cannot take effect according to its terms if it contradicts the effect of the terms of the contract as a whole: the parties cannot deem the relationship between themselves to be something it is not. Similarly, subsequent conduct of the parties may demonstrate that relationship has a character contrary to the terms of the contract.
- (4) Consideration should then be given to the various indicia identified in *Stevens v Brodrigg Sawmilling Co Pty Ltd* and the other authorities as are relevant in the particular context. For ease of reference the following is a list of indicia identified in the authorities:

- *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.*

Control of this sort is indicative of a relationship of employment. The absence of such control or the right to exercise control is indicative of an independent contract. While control of this sort is a significant factor it is not by itself determinative. In particular, the absence of control over the way in which work is performed is not a strong indicator that a worker is an independent contractor where the work involves a high degree of skill and expertise. On the other hand, where there is a high level of control over the way in which work is performed *and* the worker is presented to the world at large as a representative of the business then this weighs significantly in favour of the worker being an employee.

“The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter’s order and directions.” “[B]ut in some circumstances it may even be a mistake to treat as decisive a reservation of control over the manner in which work is performed for another. That was made clear in *Queensland Stations Pty. Ltd v Federal Commissioner of Taxation*, a case involving a driving contract in which Dixon J observed that the reservation of a right to direct or superintend the performance of the task cannot transform into a contract of service what in essence is an independent contract.”

- *Whether the worker performs work for others (or has a genuine and practical entitlement to do so).*

The right to the exclusive services of the person engaged is characteristic of the employment relationship. On the other hand, 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.*
- *Whether the worker provides and maintains significant tools or equipment.*

Where the worker’s investment in capital equipment is substantial and a substantial degree of skill or training is required to use or operate that equipment the worker will be an independent contractor in the absence of overwhelming indications to the contrary.

- *Whether the work can be delegated or subcontracted.*

If the worker is contractually entitled to delegate the work to others (without reference to the putative employer) then this is a strong indicator

that the worker is an independent contractor. This is because a contract of service (as distinct from a contract for services) is personal in nature: it is a contract for the supply of the services of the worker personally.

- *Whether the putative employer has the right to suspend or dismiss the person engaged.*
- *Whether the putative employer presents the worker to the world at large as an emanation of the business.*

Typically, this will arise because the worker is required to wear the livery of the putative employer.

- *Whether income tax is deducted from remuneration paid to the worker.*
- *Whether the worker is remunerated by periodic wage or salary or by reference to completion of tasks.*

Employees tend to be paid a periodic wage or salary. Independent contractors tend to be paid by reference to completion of tasks. Obviously, in the modern economy this distinction has reduced relevance.

- *Whether the worker is provided with paid holidays or sick leave.*
- *Whether 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.

- *Whether the worker creates goodwill or saleable assets in the course of his or her work.*
- *Whether the worker spends a significant portion of his remuneration on business expenses.*

It should be borne in mind 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. Features of the relationship in a particular case which do not appear in this list may nevertheless be relevant to a determination of the ultimate question.²²

[19] In assessing the question of whether a person is an independent contractor or an employee, the Commission will take account of the nature of the work performed and the manner in which it is performed. It will consider the terms and terminology of the contract between the parties. A consideration of those indicia informed by the context of the nature of the work performed and the terms of the contract may point overwhelmingly one way or another and a determination should then be in accordance with that result:

“... However, a consideration 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 of the relationship 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 is a 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. ...”²³

[20] Remaining uncertainty may require resolution through consideration of the terms of the parties’ documented agreement, or principles of vicarious liability.²⁴

[21] The evidence to be considered in relation to whether Ms Leung is an employee or independent contractor is essentially that set out above. The material within Ms Leung’s table was not directly contradicted by Mr Chow on behalf of Rejoice and Creative Everyday.

[22] In relation to the matter of the overall relationship and how it was intended to work, I have also had regard to Mr Chow’s submissions, which included these matters:

“2. Before Yin Fun started her work, she had indicated she wished to be employed as a permanent part-time worker. However she was told that the project might not be viable and no contract would be given for any period of work. It was always emphasised that the Sameway project would finish any time. Hence she could only be employed on casual basis when there was work. She was also told that from mid-December to mid-January every year, both REJOICE and Sameway would stop operating and she would have no job during this period. No pay would be given in this period.

3. After she started working with REJOICE for some time, it was discovered that she could not always committed the time as promised. She had to leave the office at certain time while others were working and she would rather work at her own time at home after everybody stopped working. She assumed the role of a contractor instead of a causal worker since then.

4. On July 1, 2012 Sameway became an individual business seperated from REJOICE. Because of this, the work given to Yin Fun was from and she was employed by Creative Every Day which traded also as Sameway Magazine. She was paid by Creative Every Day since then. Her first employment with REJOICE finished since then.

5. After June 21, 2015, Yin Fun was employed by REJOICE as a ministry supporter including give advice to design work for the ministry partner of REJOICE, Creative Every Day.

6. March 27, 2017, the design work from Creative Every Day stopped as Yin Fun could not work with other staff from Creative Every Day and her work in REJOICE was reduced. It was emphasized that she would be working as a ministry worker for REJOICE to support the promotion of REJOICE and related ministries. New skill sets will be required and Yin Fun promised she would try her best.

7. Starting from March 5, 2018, after other staff in Creative Every Day had left, Yin Fun was then employed by Creative Every Day again. Since March 5, 2018, REJOICE has no employment relationship with Yin Fun Leung. She was no longer paid by REJOICE since then.

8. In summary, Yin Fun was employed and paid by REJOICE in the period 5 December 2011 – 27 January 2013 and 22 June 2015 – 4 March 2018 as a casual worker / contractor of her services at different roles.”²⁵

[23] I also take into account Mr Chow’s evidence, speaking for Rejoice, about the potential variability of the work, since “[t]he work amount was negotiated in the weekly/biweekly meeting”.²⁶ While giving that indication, it is noted that such simply was not how the relationship actually worked, at least in the period for which payslips have been provided, being the 15 months after 11 September 2017, which included one fortnight in which two days were worked, 10 in which four days were worked, and 21 in which eight days were worked.

Control

[24] Ms Leung asserts that she reported to Mr Chow and that he directed her work. Mr Chow asserts that “the amount and nature of job Ms Leung involved were usually determined through negotiation according to how much time she could spend and what we agreed as priority”.²⁷ Whereas Mr Chow submits that “Ms Leung could choose the period that she did not want to work with us and the time she would like to spend on these projects. Ms Leung would also refuse on our suggested work saying that she could not do it in that timeframe. For example, she had refused to work out some exhibition materials as she thought that not enough time was given”.²⁸ While the evidence does not disclose the extent to which this was a broad direction or a close control, the overall evidence and discourse between the parties in relation to this matter would suggest that Ms Leung’s work was largely self-directed, which may well be consistent with her being a contractor. However, there is insufficient evidence to form a conclusive view on the subject and so this consideration is a neutral factor in my overall determination.

Performance of work for others

[25] Since there is insufficient evidence before me to draw a conclusion about the application of this indicia it is a neutral factor in my overall determination.

Separate place of work/advertising to the world

[26] In relation to location at which Ms Leung’s work was performed, while Mr Chow argued that she could perform work from home in her own time in order to attend to family responsibilities as well as in Hong Kong when she was visiting, I accept Ms Leung’s evidence that generally she performed work from the Rejoice and Creative Everyday premises. On balance, consideration of this indicia resolves in favour of a finding of an employment relationship.

Equipment

[27] Ms Leung's submission is that equipment and office tools were provided for her use. Mr Chow contests this, arguing that "After she assumed the role of a contractor, she would be using her own computer at home or anywhere she thought appropriate to provide the services to us. Even when Ms Leung was at office, she would still bring and use her own computer instead of using the computer provided to her at office."²⁹ This matter is not directly resolved on the evidence. If the employer's submission is accepted, consideration of this indicia would resolve in favour of a finding of a contractual relationship. Resolution of this matter is not necessary since even if the evidence did resolve in favour of Rejoice or Creative Everyday, such would not become a tipping point in favour of those entities, since consideration of other indicia do not lean towards a finding of an independent contractor relationship.

Delegation or subcontracting

[28] Since there is insufficient evidence before me to draw a conclusion about the application of this indicia it is a neutral factor in my overall determination.

Capacity to suspend or dismiss

[29] Since there is insufficient evidence before me to draw a conclusion about the application of this indicia it is a neutral factor in my overall determination.

Whether an emanation of the business

[30] Ms Leung puts forward in her submissions that she was held out to be a part of Sameway (Creative Everyday) with her name being shown in the Sameway Magazine as its Art Director.³⁰ In the overall context both of the relationship between Ms Leung and the organisations in question as well as what may be regarded as usual practice by many magazines to acknowledge people contributing to them, whatever their engagement status may be, I do not find this to be conclusively in favour of Ms Leung's contention. Since the evidence is not conclusive, this is a neutral factor in my overall determination.

Taxation

[31] PAYG income tax was deducted from payments made to Ms Leung until the pay period commencing 5 February 2018, with that payment being made by Rejoice in its second last payment to her. However, PAYG tax was deducted from Ms Leung after that date, by Rejoice for two pay periods and by Creative Everyday for a further 19 pay periods. These deductions in the latter part of Ms Leung's engagement count against assessment of her status as an independent contractor. Since this decision is primarily concerned with the circumstances in December 2018 I find the consistency of the tax treatment after February 2018 to be a consideration in favour of finding that Ms Leung was an employee.

Mode of remuneration

[32] The payments table referred to at Attachment 2 of this decision shows a significant regularity to Ms Leung's engagements and that she was paid on the basis of the number of days that she worked. There is no evidence before me that would suggest Ms Leung was paid by reference to the completion of tasks. Ms Leung puts forward in relation to her having an expectation of ongoing work that she was required to "[m]anage the design teams and make sure the same way magazine and rejoice have high-quality design works".³¹ I place no

reliance upon that contention, since the evidence on each matter is insufficient to be able to draw any conclusions. Overall, and principally due to the basis of the payments to Ms Leung being based on the number of days that she worked in each fortnight, I find that consideration of this factor resolves in favour of finding that Ms Leung was an employee.

Provision of holidays or sick leave

[33] It is also possible that the indicia dealing with the provision of paid holidays or sick leave could count in favour of assessment of Ms Leung as an independent contractor. The evidence is that she was provided with time off in order to attend to her needs, but not paid. Of course, it is the case that a casual employee will not have direct access to paid leave. On balance this indicator is a neutral consideration in my decision.

Profession, trade or distinct calling

[34] While it is also possible that the profession, trade or distinct calling indicia could resolve in favour of independent contractor status, since Ms Leung's work as a graphic designer is something that is often carried out by contractors there is insufficient evidence on the subject to be definitive and therefore this factor is a neutral consideration in my decision.

Creation of goodwill or saleable assets

[35] Since there is insufficient evidence before me to draw a conclusion about the application of this indicia it is a neutral factor in my overall determination.

Business expenses

[36] Since there is insufficient evidence before me to draw a conclusion about the application of this indicia it is a neutral factor in my overall determination.

[37] In summary those indicia able to be conclusively determined lean in favour of a finding that Ms Leung was an employee. Other than the provision of equipment indicia (on which the evidence is inconclusive), no indicia leans firmly toward a finding that she was an independent contractor.

[38] Having regard to the submissions made by Rejoice and Creative Everyday, it seems likely that the organisations have used the terms "contractor" and "casual worker" and related terms interchangeably, leaving the impression there is not a sophisticated understanding of the distinction between employment and independent contracting. Flowing from this it is more than likely that neither organisation had a clear view about Ms Leung's actual status. In other words, in relation to the indicia concerned with the contractual intention of the parties, this is not a case in which a carefully developed strategy has been thought through and deployed to define as an independent contractor someone who may otherwise be an employee.

[39] After consideration of all these matters I find that Ms Leung was not an independent contractor but was instead engaged as an employee.

Was Ms Leung an employee of Rejoice in December 2018?

[40] The evidence generally does not lead to a finding that Ms Leung was an employee of Rejoice in December 2018.

[41] Mr Chow's evidence is that Creative Everyday was established as a vehicle to progress the development of the Sameway Magazine.

[42] Ms Leung's evidence on the identity of her employer includes:

- "I thought my employer was Rejoice Chinese Christian Communication Centre, based on my interview with Raymond and Alex at the start of my employment.
- I was never told by Raymond that my employer had changed.
- Despite not being told, based on the "employer response form" provided by Raymond, I understand my employer at the end of my employment was Creative Every Day, and if that is correct, I wish to make my application against that employer."³²

and

"I was unaware that my employer had changed – over the entire period of my employment my continued to do the same work, at the same place, for the same boss. Raymond didn't tell me and the pay slips didn't show up, too. Only "Sameway magazine" was printed on the pay slips."³³

[43] The payments made to Ms Leung over the course of the relationship she had both with Rejoice and Creative Everyday are set out in the Payments Table shown in Attachment 2, which have been extracted from payslips the parties provided to the Commission.³⁴

[44] The last payment made by Rejoice to Ms Leung was in the pay period commencing 19 February 2018 and ending on 4 March 2018. Creative Everyday then commenced payments to Ms Leung from the start of the pay period commencing on 5 March 2018. The last payment made to Ms Leung was in the pay period between 10 December 2018 and 23 December 2018.

[45] While the evidence on the subject of the March 2018 shift in the identity of Ms Leung's employer is generally unclear, that which is before me does not allow a finding that there was an explicit conversation with Ms Leung by anyone on behalf of the two entities to the effect that the identity of her employer was changing or the reasons why the change was being made. The best that the evidence rises on the matter is that the work and subsequently the entity who paid Ms Leung varied throughout her employment due to the changes in business structure of the two entities.

[46] While it is the case that Ms Leung was engaged as a casual employee, there is little question from the payments table referred to above that Ms Leung's employment with Rejoice was on a regular and systematic basis and that until 4 March 2018 she had a reasonable expectation of continuing employment with that organisation. The payments table shows that over a period of 13 fortnights there were nine in which she worked four days within the fortnight; one in which she worked two days in the fortnight; two in which she worked eight days; and one in which Ms Leung did not work at all.

[47] Likewise it is the case that the evidence supports a finding that Ms Leung's casual employment with Creative Everyday was on a regular and systematic basis and that until 21

December 2018 she had a reasonable expectation of continuing employment with the company. In a period of 21 consecutive fortnight's there were 19 in which eight days in the fortnight were worked; one in which she worked four days; and one in which no work was performed at all.

[48] The product of these considerations is a finding that Ms Leung's employment relationship was with Creative Everyday at the date she asserts as the date of termination of her employment, being on or around 21 December 2018. There is no evidence that would support a finding that her employer in December 2018 was Rejoice.

Had Ms Leung served the minimum employment period by the time she ceased work?

[49] A consideration of whether Ms Leung had served the minimum employment period requires a determination that the period of continuous service that Ms Leung completed with Creative Everyday amounted to 12 months (s.384(1)) as well as a finding that her service as a casual employee is to be included as continuous service for the purpose of the Act (s.384(2)). Depending upon the determination of the period of continuous service, it may be necessary to consider whether Creative Everyday, the entity in which she last worked, was a small business within the meaning of the Act. The Dictionary of the Act provides that the meaning of "continuous service" is affected by s.22. That section provides the following, so far as is relevant:

"22 Meanings of service and continuous service

General meaning

(1) A period of **service** by a national system employee with his or her national system employer is a period during which the employee is employed by the employer, but does not include any period (an **excluded period**) that does not count as service because of subsection (2).

(2) The following periods do not count as service:

- (a) any period of unauthorised absence;
- (b) any period of unpaid leave or unpaid authorised absence, other than:
 - (i) a period of absence under Division 8 of Part 2-2 (which deals with community service leave); or
 - (ii) a period of stand down under Part 3-5, under an enterprise agreement that applies to the employee, or under the employee's contract of employment; or
 - (iii) a period of leave or absence of a kind prescribed by the regulations;
- (c) any other period of a kind prescribed by the regulations.

...

(5) If there is a transfer of employment (see subsection (7)) in relation to a national system employee:

(a) any period of service of the employee with the first employer counts as service of the employee with the second employer; and

(b) the period between the termination of the employment with the first employer and the start of the employment with the second employer does not break the employee's continuous service with the second employer (taking account of the effect of paragraph (a)), but does not count towards the length of the employee's continuous service with the second employer.

Note: This subsection does not apply to a transfer of employment between non-associated entities, for the purpose of Division 6 of Part 2-2 (which deals with annual leave) or Subdivision B of Division 11 of Part 2-2 (which deals with redundancy pay), if the second employer decides not to recognise the employee's service with the first employer for the purpose of that Division or Subdivision (see subsections 91(1) and 122(1)).

(6) If the national system employee has already had the benefit of an entitlement the amount of which was calculated by reference to a period of service with the first employer, subsection (5) does not result in that period of service with the first employer being counted again when calculating the employee's entitlements of that kind as an employee of the second employer.

Note: For example:

(a) the accrued paid annual leave to which the employee is entitled as an employee of the second employer does not include any period of paid annual leave that the employee has already taken as an employee of the first employer; and

(b) if an employee receives notice of termination or payment in lieu of notice in relation to a period of service with the first employer, that period of service is not counted again in calculating the amount of notice of termination, or payment in lieu, to which the employee is entitled as an employee of the second employer.

Meaning of transfer of employment etc.

(7) There is a **transfer of employment** of a national system employee from one national system employer (the **first employer**) to another national system employer (the **second employer**) if:

(a) the following conditions are satisfied:

(i) the employee becomes employed by the second employer not more than 3 months after the termination of the employee's employment with the first employer;

(ii) the first employer and the second employer are associated entities when the employee becomes employed by the second employer; or

(b) the following conditions are satisfied:

(i) the employee is a transferring employee in relation to a transfer of business from the first employer to the second employer;

(ii) the first employer and the second employer are not associated entities when the employee becomes employed by the second employer.

Note: Paragraph (a) applies whether or not there is a transfer of business from the first employer to the second employer.

(8) A transfer of employment:

(a) is a *transfer of employment between associated entities* if paragraph (7)(a) applies; and

(b) is a *transfer of employment between non-associated entities* if paragraph (7)(b) applies.”

(original formatting)

[50] In relation to s.22(2), it is to be noted that there were no periods of unauthorised absence (a) or excluded periods of a kind prescribed by the regulations (being a reference to s.22(2)(b)(iii) and (c), noting that there appear to be no regulations on the subject), but that there were short periods of unpaid leave of the manner set out within the payments table referred to above.

[51] Sections 22(5) and (7) require consideration in this decision. In particular, the question to be determined is whether or not there has been a transfer of employment between non-associated entities.

[52] In this regard it is noted that while Mr Chow contests that Rejoice and Creative Everyday are not associated entities, Ms Leung argues that they are. Overall there is insufficient evidence to be conclusive on the subject. I make no findings about whether the two entities are associated entities, chiefly because it is unnecessary for me to do so given the findings I make about there having been a “transfer of employment between non-associated entities”.

[53] The term “transfer of employment between non-associated entities” is referred to within s.22 of the Act, which defines the meaning of “continuous service”. Section 22(7) makes reference to a “transferring employee” which The Dictionary defines with reference to s.311(2). The wider s.311 defines that there has been a transfer of business in certain circumstances including when an old employer outsources work to a new employer. The relevant provisions are as follows:

“311 When does a transfer of business occur

Meanings of transfer of business, old employer, new employer and transferring work

(1) There is a ***transfer of business*** from an employer (the ***old employer***) to another employer (the ***new employer***) if the following requirements are satisfied:

- (a) the employment of an employee of the old employer has terminated;
- (b) within 3 months after the termination, the employee becomes employed by the new employer;
- (c) the work (the ***transferring work***) the employee performs for the new employer is the same, or substantially the same, as the work the employee performed for the old employer;
- (d) there is a connection between the old employer and the new employer as described in any of subsections (3) to (6).

Meaning of transferring employee

(2) An employee in relation to whom the requirements in paragraphs (1)(a), (b) and (c) are satisfied is a ***transferring employee*** in relation to the transfer of business.

...

Old employer outsources work to new employer

(4) There is a connection between the old employer and the new employer if the transferring work is performed by one or more transferring employees, as employees of the new employer, because the old employer, or an associated entity of the old employer, has outsourced the transferring work to the new employer or an associated entity of the new employer.

[54] The Act does not define the meaning of “outsources work”.

[55] The evidence on the subject before the Commission of the work being performed by Ms Leung and how it came to move from being performed for and on behalf of one entity to another includes, Ms Leung’s submissions that while her workload and duties fluctuated as a result of staff turnover and absences which created excess workload as well as changes in her own family and carer responsibilities which precipitated changes to workload. That she was unaware of the changes between employers during her employment being that the person she reported to Mr Chow and the location she worked at remained constant throughout.³⁵ While Mr Chow’s evidence confirms that Ms Leung’s family responsibilities affected her employment, he further submits that her performance and ability to perform certain roles as well as changes in business structure of the entities precipitated changes Ms Leung’s employment stating:

“On July 1, 2012 Sameway became an individual business separated from REJOICE. Because of this, the work given to Yin Fun was from and paid by Creative Every Day which traded also as Sameway Magazine. Initially an arrangement between Creative Every Day and REJOICE agreed that Yin Fun was still paid by REJOICE until end of

January 2013. From January onwards, Yin Fun mainly worked for Sameway but also took up other design work related with REJOICE as her duty...³⁶

[56] No evidence is led by Mr Chow that the Applicant was aware of the business changes or the changes to her employment at the time.

[57] I am satisfied that the work performed by Ms Leung both before and after the change in engaging entity was the same, or substantially the same. I am also satisfied that Rejoice outsourced to Creative Everyday the work that Ms Leung performed once performed for it directly, with it being said that, with reference to Ms Leung's work, "the work change so much that we changed the employer".³⁷ After consideration of these matters I am satisfied that Ms Leung was a transferring employee, subject to a transfer of employment, in relation to a transfer of business between Rejoice and Creative Everyday.

[58] It follows from the foregoing consideration that Ms Leung's continuous service with Creative Everyday is her aggregate service with both Creative Everyday and Rejoice, from which is to be deducted only the periods of unpaid leave envisaged by s.22(2)(b) of the Act. On the basis of the payslips provided by Ms Leung, those periods appear somewhat incidental and likely only in connection with the pay periods commencing 18 and 25 December 2017 and 9 July 2018. The outer limits of those periods appears from the payslips to be four to five weeks. As a result, Ms Leung's period of continuous service is the 15 months between a date near to 11 September 2017 (the first of the available payslips) and 21 December 2018, less the short periods of incidental leave she took; that is an overall period of around 14 months, which is greater than 12 months, the longest of the two minimum employment periods.

[59] On the basis of this analysis, with an aggregate employment relationship with Creative Everyday ending on or around about 21 December 2018 and starting in September 2017, there appears little question that Ms Leung has completed the minimum employment period, irrespective of the individual or aggregate number of employees of the two entities.

[60] On the basis of the foregoing analysis, I make the findings that at 21 December 2018:

- Ms Leung's employer at the time was Creative Everyday;
- Ms Leung had completed a period of employment of at least the minimum employment period; and
- Ms Leung was a person protected from unfair dismissal.

[61] Notwithstanding these findings, it is evident that Ms Leung's application indicates an incorrect Respondent, referring as it does to Rejoice Chinese Christian Communication Centre and not to Creative Everyday.

[62] On the basis of the material before the Commission I am of the preliminary view that Ms Leung made an honest mistake in the completion of her application form and that s.586(b) of the Act may be used to correct or amend the Respondent's identification from Rejoice to Creative Everyday. It has been accepted by the Full Bench in *Djula v Centurion Transport Co. Pty Ltd*³⁸ that s.586 may provide the power to so amend an application by making a change to the identity of the respondent if the evidence clearly weighs in favour of such an amendment, with the power being a matter of discretion.³⁹ I have formed the view that the

evidence is in favour of such a change. The relevant evidence includes that Ms Leung had worked for some time first for one and then another entity; that the entities had a close operating relationship of some kind, if not actually being associated entities; that there had been a transfer of business in relation to her employment, with it not being clearly communicated to her that the identity of her employer had changed; and that she was confused at the time her employment ended as to which entity employed her.

[63] If either party objects to me correcting or amending the Respondent's identification and wishes to be heard in relation to their objection they are to notify my Chambers within 7 days of the date of this decision after which a hearing date will be advised for the determination of the matter. If neither party objects, then the identification of the Respondent in Ms Leung's application will be changed to Creative Everyday Pty Ltd, with her application then proceeding to the next stage of the usual process associated with unfair dismissal applications.



COMMISSIONER

Appearances:

Yin Fun Leung on her own behalf.
Raymond Chow on behalf of the Respondent.

Hearing details:

2019.
Melbourne:
5 April.

Final written submissions:

Respondent: 1 May 2019.
Applicant: 23 April 2019.

Printed by authority of the Commonwealth Government Printer

<PR707872>

ATTACHMENT 1

Indicator	Employee	Why Yin Fun Leung id employee
Degree of control over how work is performed	Performs work, under the direction and control of their employer, on an ongoing basis.	I reported to Raymond Chow, the director of Rejoice and Creative Everyday(Sameway) everything and ongoing form 2011 – 2018 (8 years)
Hours of work	Generally works standard or set hours (note: a casual employee's hours may vary from week to week)	Working hours is 10:00 -3:00 (4:00 – 6:00) Wednesday working hour: 10:00 – (4:00 – 11:00)
Expectation of work	Usually has an ongoing expectation of work (note: some employees may be engaged for a specific task of specific period)	Manage the design teams and made sure the Sameway Magazine and Rejoice have high quality design works.
Superannuation	Entitled to have superannuation paid into nominated fund by their employer	Superannuation fund by employer.
Tools and equipment	Tools and equipment are generally provided by the employer, or a tool allowance is provided	Computers , printer and office tool is provided by employer
Tax	Has income tax deducted by their employer	Income tax deducted by my employer
Method of payment	Paid regularly (for example, weekly/fortnightly/monthly)	No ABN Pay by fortnightly
Leave	Entitled to receive paid leave (for example, annual leave, personal/carer's leave, long service leave) or receive a loading in lieu of leave entitlements in the case of casual employees.	Entitled to sick leve and public holiday,

ATTACHMENT 2 – PAYMENTS TABLE

Payslips issued by Rejoice Chinese Christian Com. Centre Inc. ABN 99 027 261 737

<i>Period</i>		<i>Salary Daily Rate</i>	<i>Number of Days</i>	<i>Salary</i>	<i>PAYG Tax</i>	<i>Employer Superannuation Contribution</i>
11/09/2017	24/09/2017	\$130.00	4	\$520.00	\$0.00	\$49.40
25/09/2017	7/10/2017	\$130.00	4	\$520.00	\$0.00	\$49.40
9/10/2017	22/10/2017	\$130.00	4	\$520.00	\$0.00	\$49.40
23/10/2017	5/11/2017	\$130.00	4	\$520.00	\$0.00	\$49.40
6/11/2017	19/11/2017	\$130.00	4	\$520.00	\$0.00	\$49.40
20/11/2017	3/12/2017	\$130.00	4	\$520.00	\$0.00	\$49.40
4/12/2017	17/12/2017	\$130.00	4	\$520.00	\$0.00	\$49.40
18/12/2017	24/12/2017	\$130.00	2	\$260.00	\$0.00	\$24.70
25/12/2017	7/01/2018					
8/01/2018	21/01/2018	\$130.00	4	\$520.00	\$0.00	\$49.40
22/01/2018	4/02/2018	\$130.00	4	\$520.00	\$0.00	\$49.40
					-	
5/02/2018	18/02/2018	\$130.00	8	\$1,040.00	\$84.00	\$98.80
					-	
19/02/2018	4/03/2018	\$130.00	8	\$1,040.00	\$84.00	\$98.80

Payslips issued by Sameway Magazine ABN 80 159 857 388

<i>Period</i>		<i>Salary Daily Rate</i>	<i>Number of Days</i>	<i>Salary</i>	<i>PAYG Tax</i>	<i>Employer Superannuation Contribution</i>
	Sameway				-	
22/09/2014	5/10/2014 400 & 401	\$130.00	6	\$780.00	\$14.00	\$74.10
	Sameway				-	
5/03/2018	18/03/2018 557	\$130.00	8	\$1,040.00	\$84.00	\$98.80
	Sameway				-	
19/03/2018	1/04/2018 558	\$130.00	8	\$1,040.00	\$84.00	\$98.80
	Sameway				-	
2/04/2018	15/04/2018 559	\$130.00	8	\$1,040.00	\$84.00	\$98.80
	Sameway				-	
16/04/2018	29/04/2018 560	\$130.00	8	\$1,040.00	\$84.00	\$98.80
	Sameway				-	
30/04/2018	13/05/2018 561	\$130.00	8	\$1,040.00	\$84.00	\$98.80
	Sameway				-	
14/05/2018	27/05/2018 562	\$130.00	8	\$1,040.00	\$84.00	\$98.80
	Sameway				-	
28/05/2018	10/06/2018 563	\$130.00	8	\$1,040.00	\$84.00	\$98.80
	Sameway				-	
11/06/2018	24/06/2018 564	\$130.00	8	\$1,040.00	\$84.00	\$98.80
	Sameway				-	
25/06/2018	8/07/2018 565	\$130.00	4	\$520.00	\$49.40	\$98.80
9/07/2018	22/07/2018					
	Sameway				-	
23/07/2018	5/08/2018 567	\$130.00	8	\$1,040.00	\$82.00	\$98.80

		Sameway				-	
6/08/2018	19/08/2018	568	\$130.00	8	\$1,040.00	\$82.00	\$98.80
		Sameway				-	
20/08/2018	2/09/2018	569	\$130.00	8	\$1,040.00	\$82.00	\$98.80
		Sameway				-	
3/09/2018	16/09/2018	570	\$130.00	8	\$1,040.00	\$82.00	\$98.80
		Sameway				-	
17/09/2018	30/09/2018	571	\$130.00	8	\$1,040.00	\$82.00	\$98.80
		Sameway				-	
1/10/2018	14/10/2018	572	\$130.00	8	\$1,040.00	\$82.00	\$98.80
		Sameway				-	
15/10/2018	28/10/2018	573	\$130.00	8	\$1,040.00	\$82.00	\$98.80
		Sameway				-	
29/10/2018	11/11/2018	574	\$130.00	8	\$1,040.00	\$82.00	\$98.80
		Sameway				-	
12/11/2018	25/11/2018	575	\$130.00	8	\$1,040.00	\$82.00	\$98.80
		Sameway				-	
26/11/2018	9/12/2018	576	\$130.00	8	\$1,040.00	\$82.00	\$98.80
		Sameway				-	
10/12/2018	23/12/2018	577	\$130.00	8	\$1,040.00	\$82.00	\$98.80

¹ See *Form F3 Employer Response*, dated 23 January 2019, pp.7.

² Exhibit R1, *Respondent Outline of Submissions; Jurisdictional Objection*, dated 18 March 2019, pp.21.

³ Exhibit R2, *Witness Statement of Raymond Chow*, dated 18 March 2019, [3] – [4].

⁴ See Form F3, pp.4, 6, 8.

⁵ Transcript, PN 67 - 72.

⁶ Transcript, PN 298 – 301.

⁷ Form F3, Q.1.7.

⁸ Email from Raymond Chow, 11 April 2019.

⁹ *Ibid.*

¹⁰ Exhibit R1, p.21.

¹¹ Email from Raymond Chow, 23 April 2019.

¹² Email from Yin Fun Leung, 23 April 2019.

¹³ *Ibid.*, pp.1.

¹⁴ *Ibid.*, pp.2.

¹⁵ *Ibid.*

¹⁶ [2011] FWAFB 8307 at [10].

¹⁷ (2003) 122 IR 215, [34].

¹⁸ *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at 217 per Windeyer J approved by the majority in *Hollis v Vabu* (2001) 207 CLR 21 at para [40]; see also *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 (Brodribb) at 37.3 per Wilson and Dawson JJ.

¹⁹ *Hollis v Vabu* (2001) 207 CLR 21 at [47] and [58].

²⁰ *Brodribb* esp Mason J at 29.3.

²¹ *French Accent* [2011] FWAFB 8307, [18].

²² *Ibid.*

²³ *Ibid.*, [30] (5).

²⁴ Ibid, [30] (5) – (6).

²⁵ Exhibit R2.

²⁶ Exhibit R1, pp.21.

²⁷ Email from Raymond Chow, 23 April 2019.

²⁸ Form F3, pp5.

²⁹ Ibid, pp.2.

³⁰ Email from Yin Fun Leung, dated 23 April 2019.

³¹ Ibid.

³² Exhibit A1, *Applicant Outline of Arguments Objections*, dated 27 March 2019, pp.22.

³³ Exhibit A2, *Applicant Statement of Evidence*, dated 27 March 2019, pp.6.

³⁴ Exhibit A4; *Applicant and Respondents Documents filed in response to F52 Order for Production of the Documents*, dated 4 April 2019.

³⁵ Form F2, Q5d; Exhibit A2, pp.4-5.

³⁶ Form F3, pp.6.

³⁷ Transcript, PN 244; see also PN; 270; 313

³⁸ [2015] FWCFB 2371.

³⁹ Ibid, [30] – [32].