DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Mr Andrew O'Farrell
v
Guest Tek Australia Pty Ltd
(U2018/8699)

COMMISSIONER RIORDAN SYDNEY, 14 FEBRUARY 2019

Application for an unfair dismissal remedy.

[1] Mr Andrew O'Farrell (the Applicant) has made an application under section 394 of the *Fair Work Act, 2009* (the Act), alleging that his employment was terminated by Guest Tek Australia Pty Ltd (the Respondent) on 31 July 2018.

[2] The Respondent claims that the Applicant was an independent contractor and not an employee and that his contract was terminated in accordance with the provisions of the contract.

[3] The Respondent's parent company, Guest Tek Interactive Entertainment Ltd (Guest Tek), is situated in Calgary, Canada. The Respondent was represented by Guest Tek's Canadian based Legal Officer, Ms Van Ly.

[4] The Applicant has been represented by Mr William Clarke, Solicitor, from Resolution123.

[5] Due to some internal confusion, the Respondent did not attend at the scheduled Hearing on 27 November 2018. The Commission was able to contact Ms Ly by email who then participated in a Conference by telephone from Canada. Ms Ly did not require the opportunity to cross-examine the Applicant. The parties were satisfied to rely on the submitted submissions and it was agreed for the matter to be determined on "the papers".

[6] After conducting a detailed review of the submitted evidence and submissions, the Commission, as presently constituted, sent a list of questions to both parties in an attempt to further clarify the relationship between the parties.

[7] The parties' responses to these questions were submitted on 19 December 2018.

Background

[8] Guest Tek install high speed internet and communications equipment in the hospitality industry. The Applicant commenced employment with Guest Tek, in its Calgary Office in August 2009, as a Project Manager.

[9] The Applicant's wife was being transferred to Australia in early 2012. The Applicant requested a transfer to Australia from Guest Tek. The Applicant's unchallenged evidence is that the following conversation occurred between himself and Guest Tek's Human Resources Director, Ms Sharon Shane;

> "Sharon Shane said: To make admin less of a hassle, we will need you to sign a new agreement. It will say consulting agreement but **we will just divide your annual salary into 12 equal instalments and you can send us an invoice at the end of each month.** Everything else will stay the same.
>
> Applicant said: Sounds good to me."[1]
> (my emphasis)

[10] The Applicant and his family moved to Australia on 22 February 2012.

[11] The Applicant returned to work on 1 March 2012.

[12] Relevantly, the new contract signed by both the Applicant and Guest Tek states:

> "This Agreement (hereinafter referred to as this "Agreement") effective as of the 1st day of March, 2012 (the "Effective Date")
>
> BETWEEN:
>
> **Guest-Tek Interactive Entertainment Ltd, a body incorporated under the laws of the province of Alberta, having offices at Calgary, Alberta (hereinafter referred to as "Guest-Tek")**
>
> **Andrew O'Farrell, an Independent Contractor residing in Sydney, Australia (hereinafter referred to as "Contractor")**
>
> Where Guest-Tek desires to obtain certain services from Contractor pertaining to the business of Guest-Tek, and Contractor desires to provide such services to Guest-Tek as an independent contractor.
>
> Now therefore this Agreement witnesseth (sic) that in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto mutually agree as follows:
>
> 1. Performance of Services
>
> Contractor shall perform the services (the "services") described in the Statement of Work attached as Schedule "A" to this Agreement, and in any

subsequent written amendment to this Statement of Work agreed to by the parties. The initial Statement of Work shall specify:

a) The scope of Services to be provided;
b) The person to whom the Contractor shall report (the "Contract Administrator");
c) The term of this Agreement or any amendment to this Agreement (the Term");
d) The project deliverables and milestones to be completed by the Contractor;
e) The amounts to be paid to the Contractor for providing and performing the Services (the "Fees");
f) The payment terms on which the Fees shall be paid to the Contractor (the "Payment Terms"); and
g) The key personnel to be assigned to perform the Services by the Contractor.

The Statement of Work and any amendment thereto shall be governed by the terms set forth in this Agreement and the terms set forth in the Statement of Work. In the event of any inconsistency between he terms of this Agreement and the terms of the Statement of Work, the terms of the Statement of Work shall govern.

2. Nature of Relationship

Contractor is and shall act as an independent contractor at all times. It is expressly understood and agreed that Contractor is not an employee, agent, joint venture or partner of Guest-Tek. Contractor shall not have the authority to act, nor act, represent or hold itself out as having authority to act, as an agent, or partner of Guest-Tek, or in any way bind or commit Guest-Tek to any agreements or obligations, unless otherwise agreed to in writing by the Contract Administrator prior to such commitment being made.

…

4. Performance and Standards

…

While Contractor is free to carry on other business activitires during the Term, Contractor agrees that in consideration of Contractor receiving the Fees, Contractor will not carry on any business activity that would conflict with Contractor providing the Services to Guest-Tek.

5. Fees, Expenses and Benefits

Guest-Tek agrees to pay Contractor the Fees specified in the Schedule of Work in accordance with the Payment Terms set out in the Statement of Work.

…

6. a) Contractor shall be fully and solely responsible for all applicable employment insurance, workers compensation premiums and taxes (including the filing of all applicable tax forms). Guest-Tek shall not withhold or pay any payroll or employment taxes of any kind with respect to any payments to Contractor during the Term. Contractor will promptly pay, as they become due, all taxes required to be paid by applicable law, including any interest and penalties from any related deficiency. **Contractor and/or its employees shall not assert a claim of employment against Guest-Tek**. Contractor acknowledges that it and, if applicable, its employees are not an "insured person" within the meaning of the *Unemployment Insurance Act* (Canada) or the *Worker's Compensation Act* (Alberta) or similar insurance Acts in the Contractor's place of residence, and Guest-Tek will not pay any "employer's premium" or other premiums within the meaning of those Acts.

b) Contractor agrees to indemnify and hold harmless Guest-Tek from any responsibility deriving from Contractors failure to comply with the Income Tax Act, Canada Pension Plan Act, or any other governing legislation including but not limited to its failure to remit tax assessments, penalties or any other amount as required under the legislation.

…

21. Governing Law

This contract shall be governed by and in accordance with the laws of the Province of Alberta, and the Courts of Alberta shall, subject to Article 22 below, have exclusive jurisdiction over any matter of thing arising from this Agreement.

…

25. Insurance

Contractor covenants and agrees to obtain where required, at its own and sole cost, such insurance coverages as are required by law in order to allow Contractor to provide the Services.

Further, except as expressly permitted by a policy of insurance carried by Guest-Tek, Contractor acknowledges that Contractor will not be covered by any insurance obtained by Guest-Tek.

…

32. Independent Legal Advice

Contractor acknowledges and agrees that Contractor has had ample opportunity to have this Agreement reviewed by a lawyers of Contractor's own choosing and has either done so or voluntarily chosen not to do so.

SCHEDULE A – Statement of Work

…

(G) **Key Personnel**
Andrew O'Farrell"[2]
(my emphasis)

[13] This contract was signed by the Applicant and Guest Tek's Interim COO.

[14] In December 2016, the Applicant sought an increase in remuneration from Guest Tek. Following negotiations in early 2017, a new contract was signed in April 2017 reflecting the negotiated rate. This contract was signed by the Applicant and the Managing Director of the Respondent.

[15] On 17 July 2018, the Applicant participated in a phone conversation with Ms Ly and Mr Tony Thompson, Vice President of Operations APAC, where the Applicant was advised that, as a result of an organisational restructure, his position was being made redundant. The Applicant was advised that he would be paid 2 weeks' notice in accordance with the terms of his agreement.

[16] The Applicant's employment/engagement was terminated on 31 July 2018.

[17] It is not in dispute that the Applicant was paid his reumeration in twelve equal payments per month, irrespective of how many working days actually occurred during that month.

[18] It is not in dispute that the Respondent did not deduct any income tax on behalf of the Applicant or pay any contributions to a compliant superannuation account on behalf of the Applicant.

[19] It is not in dispute that the Applicant did not charge that Respondent any GST in his monthly invoices.

[20] It is not in dispute that the Applicant accrued annual leave and sick leave.

[21] It is not in dispute that as of 24 October 2018, Guest Tek had advertised for a Project Manager's role in the Asia Pacific Region. It is not in dispute that the Applicant was not offered this position by either the Respondent or Guest Tek.

Legislation

[22] The defining provisions of the Act in relation to whether the Applicant is an employee or independent contractor are:

"**Section 12**
"independent contractor" is not confined to an individual

"associated entity" has the meaning given by section 50AAA of the *Corporations Act 2001* .

Section 13
Meaning of national system employee

A national system employee is an individual so far as he or she is employed, or usually employed, as described in the definition of national system employer in section 14, by a national system employer, except on a vocational placement.

Section 14
Meaning of national system employer
(1) A national system employer is:

(a) a constitutional corporation, so far as it employs, or usually employs, an individual; or

(b) the Commonwealth, so far as it employs, or usually employs, an individual; or

(c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or

(d) a person so far as the person, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:

(i) a flight crew officer; or

(ii) a maritime employee; or

(iii) a waterside worker; or

(e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or

(f) a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.

Note 1: In this context, Australia includes Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands (see the definition of Australia in section 12).

Note 2: Sections 30D and 30N extend the meaning of national system employer in relation to a referring State.

Particular employers declared not to be national system employers

(2) Despite subsection (1) and sections 30D and 30N, a particular employer is not a national system employer if:

(a) that employer:

(i) is a body established for a public purpose by or under a law of a State or Territory, by the Governor of a State, by the Administrator of a Territory or by a Minister of a State or Territory; or

(ii) is a body established for a local government purpose by or under a law of a State or Territory; or

(iii) is a wholly-owned subsidiary (within the meaning of the Corporations Act 2001) of, or is wholly controlled by, an employer to which subparagraph (ii) applies; and

(b) that employer is specifically declared, by or under a law of the State or Territory, not to be a national system employer for the purposes of this Act; and

(c) an endorsement by the Minister under paragraph (4)(a) is in force in relation to the employer.

(3) Paragraph (2)(b) does not apply to an employer that is covered by a declaration by or under such a law only because it is included in a specified class or kind of employer.

Endorsement of declarations

(4) The Minister may, in writing:

(a) endorse, in relation to an employer, a declaration referred to in paragraph

(2)(b); or

(b) revoke or amend such an endorsement.

(5) An endorsement, revocation or amendment under subsection (4) is a legislative instrument, but section 42 (disallowance) of the Legislation Act 2003 does not apply to the endorsement, revocation or amendment.

Note: Part 4 of Chapter 3 (sunsetting) of the Legislation Act 2003 does not apply to the endorsement, revocation or amendment (see regulations made for the purposes of paragraph 54(2)(b) of that Act).

Employers that cannot be declared

(6) Subsection (2) does not apply to an employer that:

(a) generates, supplies or distributes electricity; or

(b) supplies or distributes gas; or

(c) provides services for the supply, distribution or release of water; or

(d) operates a rail service or a port;

unless the employer is a body established for a local government purpose by or under a law of a State or Territory, or is a wholly-owned subsidiary (within the meaning of the Corporations Act 2001) of, or is wholly controlled by, such a body.

(7) Subsection (2) does not apply to an employer if the employer is an Australian university (within the meaning of the Higher Education Support Act 2003) that is established by or under a law of a State or Territory."

Jurisprudence

[23] In *Abdalla v Viewdaze Pty Ltd t/a Malta Travel*[3] a Full Bench of the AIRC provided an analysis on the issue of whether a worker is an employee or independent contractor. This decision was subsequently revised by the FWA Full Bench decision in *Jiang Shen Cai t/a French accent v Michael Anthony Do Rozaio,* where it was held:

"[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[4]: that is, whether, viewed as a practical matter, the putative worker could be said to be conducting a business of his or her own[5] 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[6].

(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[7]. However, the parties cannot alter the true nature of their relationship by putting a different label on it[8]. 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[9]: the parties cannot deem the relationship between themselves to be something it is not[10]. Similarly, subsequent conduct of the parties may demonstrate that relationship has a character contrary to the terms of the contract[11].

(4) Consideration should then be given to the various indicia identified in Stevens v Brodribb Sawmilling Co Pty Ltd[12] 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.[13]
>
> 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[14]. While control of this sort is a significant factor it is not by itself determinative[15]. 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[16]. 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[17].

"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."[18] "But 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 droving 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."[19]

● 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[20] and or advertises his or her services to the world at large.

● Whether the worker provides and maintains significant tools or equipment.[21]

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[22].

● Whether the work can be delegated or subcontracted.[23]

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[24]. 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.[25]

● Whether the putative employer presents the worker to the world at large as an emanation of the business.[26]

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.[27]

● Whether the worker is remunerated by periodic wage or salary or by reference to completion of tasks.[28]

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.[29]

● Whether the work involves a profession, trade or distinct calling on the part of the person engaged.[30]

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.[31]

● Whether the worker spends a significant portion of his remuneration on business expenses.[32]

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.

(5) Where a consideration of the indicia (in the context of the nature of the work performed and the terms of the contract) points one way or overwhelmingly one way so as to yield a clear result, the determination should 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. The ultimate question remains as stated in (1) above. If, having approached the matter in

that way, the relationship remains ambiguous, such that the ultimate question cannot be answered with satisfaction one way or the other, then the parties can remove that ambiguity a term that declares the relationship to have one character or the other 46.

(6) If the result is still uncertain then the determination should be guided by "matters which are expressive of the fundamental concerns underlying the doctrine of vicarious liability" including the "notions" referred to in paragraphs [41] and [42] of Hollis v Vabu.

[24] In *Oncall Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation*[33], the Federal Court, (Bromberg J) held;

"208 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 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.

209 The question which this approach poses appears to me to be the central question in the application of the totality test. The question provides the focal point around which the indicia thrown up by the totality test may be examined. The central question has two elements. The first is whether the person has a business. The second is whether the work or the economic activity being performed is being performed in and for the business of that person: *Sweeney* at [31].

…

212 **A personal services business is a business which is likely to involve system, repetition and continuity in the pursuit of profit. A genuine personal services business will aspire to make profits and not simply be paid remuneration, as is an employee.** Such a business will seek to be remunerated not simply for the provision of the labour of the self-employed entrepreneur that provides the personal services, but also for the risks involved in that person being an entrepreneur.

213 The risk profile of a personal services business is very different to that of an employee. By its very nature, a genuine commercial enterprise is an undertaking which involves risk. Business risk is a product of a need for a business to invest (either in physical assets, time or effort) at a cost and without any certainty or assurance of that cost being recovered and any profit being made. Unlike an employee who

generally seeks security, and is not risk-tolerant, a personal services business is prepared to invest time, money and effort with little or no certainty that such investment will be rewarded with a financial return. All of that is done in the hope of making a profit. It is in that sense, that an entrepreneur operating a personal services business seeks profit and not simply remuneration, for the personal services provided.

214 A genuine independent contractor providing personal services will typically be: autonomous rather than subservient in its decision-making; financially self-reliant rather than economically dependent upon the business of another; and, (as I have said), chasing profit (that is a return on risk) rather than simply a payment for the time, skill and effort provided.

215 In an employment relationship, there will typically be an entrepreneur, but that will be the employer, it will never be the employee. The employer will take the risk of profit or loss. The employee seeks the security of fixed and certain remuneration. Unlike the independent contractor, the employee has no business, and typically will have no interest or desire, in exposure to the risk of loss in return for the chance of profit."
(my emphasis)

[25] The most recent analysis of this complex legal question was provided by Justice Katzmann in *Fair Work Ombudsman v Grouped Property Services Pty Ltd*[34], where Her Honour said:

"39.The question of whether someone is an employee or an independent contractor is not to be determined by what they may be called or, indeed, what they may call themselves. A label, consensual or otherwise, cannot affect "the inherent character" of the relationship: Curtis v Perth and Fremantle Bottle Exchange Co Ltd [1914] HCA 21; (1914) 18 CLR 17 at 25 (Isaacs J). It is the substance or reality of the relationship that counts: Hollis v Vabu Pty Ltd [2001] HCA 44; (2001) 207 CLR 21 at [24], [58]. Further, as the majority observed in Hollis v Vabu at [24]:

> [T]he relationship between the parties ... is to be found not merely from these contractual terms. The system which was operated thereunder and the work practices imposed by Vabu go to establishing "the totality of the relationship" between the parties; it is this which is to be considered.
>
> (Citations omitted.)

40.Bromberg J discussed at some length the reason for, and the importance of, this approach in On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3) [2011] FCA 366; (2011) 214 FCR 82.

41. A contract of employment is based on personal service. Shortly put, the difference between an employee and an independent contractor is "rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own": Marshall v Whittaker's Building Supply Co [1963] HCA 26; (1963) 109 CLR 210 at 217 (Windeyer J). Control (and later the right to control) the manner in which the work is done was once determinative. For some time now, however, it is regarded

as only one relevant factor (albeit an important one); the totality of the relationship must be considered: Stevens v Brodribb Sawmilling Co Pty Ltd [1986] HCA 1; (1986) 160 CLR 16 at 29 (Mason J). Other indicia of an employment relationship include "whether tax is deducted; whether sub-contracting is permitted; ... whether uniforms are worn; whether tools are supplied; whether holidays are permitted; ... whether wages are paid ...; what is disclosed in the tax returns; whether one party 'represents' the other; for the benefit of whom does the goodwill in the business inure; how 'business-like' is the alleged business of the putative employee – are there systems, manuals and invoices; and so on ...": ACE Insurance Ltd v Trifunovski [2011] FCA 1204; (2011) 200 FCR 532 at [29] (Perram J) citing Stevens v Brodribb at 24 (Mason J) and 36–37 (Wilson and Dawson JJ).

42.As Bromberg J put it in On Call Interpreters at [204], **the modern approach to determining whether someone is an employee is "multi-factorial**". His Honour described the exercise as one involving a level of intuition, referring at [205], amongst other things, to the following passage in Hall (Inspector of Taxes) v Lorimer [1992] 1 WLR 939 at 944 where Mummery J said:

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 is a matter of evaluation 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."
(my emphasis)

Consideration

[26] I have taken into account all of the submissions that have been provided by the parties.

[27] At first instance, it is necessary to determine whether the Applicant was an employee of the Respondent or simply an independent contractor.

[28] I have taken into account that the Applicant and the Respondent entered into a "Consulting Agreement" which identifies the Applicant as a contractor. Further, I accept that the Agreement states that the Applicant is responsible for his own employment related insurances and any tax liabilities.

[29] I have taken into account that the Applicant accrued annual leave during his tenure with the Respondent. Relevantly, whenever the Applicant took his annual leave, Guest Tek would source the Applicant's replacement, who was typically another Guest Tek employee. It is highly unlikely that this practice would have occurred if the Applicant was an independent contractor. Also, the Applicant's replacement was not paid for by the Applicant but by Guest Tek, which would also be a highly irregular occurrence if the Applicant was a contractor. From my 30 years' experience in industrial relations, I have never heard of a contractor accruing annual leave, taking the leave after approval had been provided by the client and then the client paying for the contractor's replacement. Such a scenario would involve the client paying 2 contractors at the same time for the same service.

[30] I have taken into account that the Applicant appears to have been paid under a form of "annualised salary" arrangement where his annual remuneration was divided into 12 equal payments, irrespective of the number of work days in that calendar month. This practice would be an unusual system of payment for any contractor.

[31] Under Australian Law, if the Applicant was operating as a contractor, he would have been obligated to charge the Respondent a 10% Good and Services Tax on all of his invoices. It is not in dispute that no GST was charged to the Respondent, nor was there any GST paid to the Government by the Applicant. The Applicant claims that he has lodged personal income tax assessments for each year since 2012. I also note that the Applicant does not have an ABN. I have taken these issued into account.

[32] I have taken into account that the Applicant, whilst working remotely, would be in contact with his respective managers on a daily and weekly basis.

[33] I have taken into account that the Applicant has not sought profit, as described in *On Call Interpreters.* The Applicant simply had his exact wage that he was paid in Canada, paid in a different way. There is no profit margin or on-costs built into the Applicant's rate.

[34] I have taken into account that the Applicant's 2017 Agreement was signed in Australia, that the governing law provision of the Agreement now refers to the laws which apply in NSW but that the monthly remuneration was continuing to be paid to the Applicant in US dollars.

Conclusion

[35] I am compelled to the view and find that the Applicant was an employee of the Respondent.

[36] I accept that the Respondent entered into an Agreement with the Applicant which expressly stated that he was not an employee. For an overseas company, such a provision may result in the belief that the outcome of this matter is guaranteed. However, the Australian law does not support such an outcome. Following the obiter in *Oncall Interpreters* it is obvious that the Applicant was not performing the work of an entrepreneur who owns and operates the business. The Applicant was not billing the Respondent for anything but his wages and mobile phone. There was no GST charged, no on-costs, no overheads and no profit.

[37] It is not plausible for a company to pay an additional person to cover for a contractor whilst that contractor took annual leave. Such a scenario would be unique in Australian employment relations. In the same way that if a bird looks like a duck, walks like a duck and quacks like a duck – then it is a duck - the Applicant in this case is an employee. The Applicant was paid an annualised salary in 12 equal instalments, like an employee. The Applicant accrued annual leave and sick leave, like an employee. The Applicant was required to report to his supervisors on a regular basis, like an employee.

[38] Having found that the Applicant was an employee of the Respondent, it is now necessary to determine whether the Applicant was unfairly dismissed.

Statutory Provisions

[39] The relevant provisions of the *Fair Work Act, 2009* (the Act) in relation to unfair dismissals are:

"**381 Object of this Part**

(1) The object of this Part is:

(a) to establish a framework for dealing with unfair dismissal that balances:

(i) the needs of business (including small business); and

(ii) the needs of employees; and

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

(i) are quick, flexible and informal; and

(ii) address the needs of employers and employees; and

(c) to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.

(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 employer and employee concerned.

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

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 to the person 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.

385 What is an unfair dismissal

A person has been unfairly dismissed if the FWC is satisfied that:

(a) the person has been dismissed; and

(b) the dismissal was harsh, unjust or unreasonable; and

(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

(d) the dismissal was not a case of genuine redundancy.

Note: For the definition of consistent with the Small Business Fair Dismissal Code: see section 388.

387 Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and

(b) whether the person was notified of that reason; and

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and

(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(h) any other matters that the FWC considers relevant.

389 Meaning of genuine redundancy

(1) A person's dismissal was a case of genuine redundancy if:

(a) the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and

(b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

(2) A person's dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:

(a) the employer's enterprise; or

(b) the enterprise of an associated entity of the employer."

Relevant Modern Award

[40] The Respondent has not disputed the Applicant's claim that he is covered by the Telecommunications Services Award 2010.[35]

[41] Relevantly, clause 8 of this Modern Award states:

"**8. Consultation about major workplace change**
[8—Consultation regarding major workplace change renamed and substituted by PR546288, 8—Consultation renamed and substituted by PR610204 ppc 01Nov18]

8.1 If an employer makes a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must:

(a) give notice of the changes to all employees who may be affected by them and their representatives (if any); and

(b) discuss with affected employees and their representatives (if any):

(i) the introduction of the changes; and

(ii) their likely effect on employees; and

(iii) measures to avoid or reduce the adverse effects of the changes on employees; and

(c) commence discussions as soon as practicable after a definite decision has been made.

8.2 For the purposes of the discussion under clause 8.1(b), the employer must give in writing to the affected employees and their representatives (if any) all relevant information about the changes including:

(a) their nature; and

(b) their expected effect on employees; and

(c) any other matters likely to affect employees.

8.3 Clause 8.2 does not require an employer to disclose any confidential information if its disclosure would be contrary to the employer's interests.

8.4 The employer must promptly consider any matters raised by the employees or their representatives about the changes in the course of the discussion under clause 8.1(b).

8.5 In clause 8:

significant effects, on employees, includes any of the following:

(a) termination of employment; or

(b) major changes in the composition, operation or size of the employer's workforce or in the skills required; or

(c) loss of, or reduction in, job or promotion opportunities; or

(d) loss of, or reduction in, job tenure; or

(e) alteration of hours of work; or

(f) the need for employees to be retrained or transferred to other work or locations; or

(g) job restructuring.

8.6 Where this award makes provision for alteration of any of the matters defined at clause 8.5, such alteration is taken not to have significant effect."

Consideration

[42] It is not in dispute that the Respondent replaced the Applicant with a Project Manager in India and advertised for a "Project Manager – Asia Pacific" less than three months after the Applicant's employment had been concluded. The Applicant was not offered this role.

[43] The Applicant's undisputed evidence is that there was no consultation in relation to his position being made redundant:

"9. In December 2016 I had a conversation with the Second Respondent's Director of Deployment Services, APAC, Larry Lai about a salary increase whereby the words to following the effect were exchanged:

Applicant said: I've been working for you guys for many years now and was hoping to get a pay increase to $USD 7,000.00 per month.

Larry Lai said: Well, it may put a target on you, the more you earn means that you will be one of the first to be cut when the time arises. But if you're ok with that I will discuss with Managing Director Greg Beatty.

Applicant said: Yes, that sounds ok, I doubt they will cut me, and I deserve the increase. Please let me know the outcome of your discussion.

10. I continued to engage in salary negotiations with Mr Beatty for the first half of 2017.

11. I signed the new contract reflecting the pay increase on 1 April 2017.

12. On 17 July 2018, I received a phone call from the Respondents Global HR Director, Van Ly and my manager, Tony Thompson, Vice President of Operations, APAC where words to the effect were exchanged:

Van Ly said: Due to organisational restructuring your position is going to be made redundant. As per your consulting agreement we are giving you 2 weeks notice.

Applicant said: 2 weeks is not going to be enough, I have kids in school, bills, Sydney is an expensive city to live in and I have no unemployment insurance here. I've been with GuestTek for 9 years. Please take this into account."

13. Later that evening I called Ms Ly again and had a conversation whereby the words to the effect were exchanged:

Applicant said: I am sorry if I was short during our earlier phone conversation. I was very stressed.

Van Ly said: That's ok, I understand. I will speak to senior management to see what can be done.

14. On 18 July 2018, Ms Ly sent me an email that offered me an additional $10,000 USD severance payment."[36]

[44] The Explanatory Memorandum to the Act, made the following comment in relation to section 389(1):

"1550. Paragraph 389(1)(b) provides that it will not be case of genuine redundancy if an employer does not comply with any relevant obligation in a modern award or enterprise agreement to consult about the redundancy. This does not impose an absolute obligation on an employer to consult about the redundancy **but requires the employer to fulfil obligations under an award or agreement if the dismissal is to be considered a genuine redundancy**."
(my emphasis)

[45] A Full Bench of Fair Work Australia, in *UES (Int'l) Pty Ltd v Leevan Harvey*[37] held that:

> "[48] UES, however, failed to consult with Mr Harvey as required by the "consultation regarding major workplace change" clause in the modern award that applied to his employment. In the circumstances the failure to so consult was unreasonable. We regard such a failure to consult as also a matter relevant to our consideration as to whether Mr Harvey's dismissal was harsh, unjust or unreasonable. Further, it is a matter telling for a conclusion that Mr Harvey's dismissal was harsh, unjust or unreasonable.
>
> Conclusion regarding harsh, unjust or unreasonable
>
> [49] Taking into account the matters referred to above, we are satisfied Mr Harvey's dismissal by UES was harsh, unjust or unreasonable. A failure to consult does not necessarily mean a dismissal was harsh, unjust or unreasonable. However, in this case we consider the failure to consult was unreasonable and is sufficient to lead us to conclude Mr Harvey's dismissal was harsh, unjust or unreasonable, notwithstanding the valid reasons for his dismissal and the due weight we have given to those valid reasons."[38]

[46] In *CEPU v QR Ltd (No 2) the Federal Court of Australia*[39] held;

> "49. A purpose of a consultation clause is to facilitate change where that is necessary, but to do that in a humane way which also takes into account and derives benefit from an interchange between worker and manager. These clauses involve a recognition that good workplace relations and indeed, good management in modern times, benefits from consultation with a work force and the interchange between worker and management."

[47] It is evident that the Respondent did not consult with the Applicant in accordance with the provisions of the Modern Award. There was no discussion about the nature of the changes, the reason for the change or any measures to mitigate the adverse effects of the restructure upon the Applicant.

[48] I am satisfied that the Applicant's termination was not a genuine redundancy.

[49] I now turn to the criteria of section 387 of the Act.

Section 387(a) valid reason

[50] The Respondent has relied on the proposition and their submissions that the Applicant was an independent contractor. Having found that the Applicant was in fact an employee, I rely on the information which has been submitted by the parties to deal with this matter in totality.

[51] The Respondent advised the Applicant that due to an organisational restructure, the Applicant's position was going to be made redundant. Every organisation has a right to restructure its operations. Restructuring will sometimes result in an employee's role being made redundant. An appropriate restructuring process, in compliance with the relevant

Modern Award or Enterprise Agreement, will provide an employer with a valid reason to terminate an employee. I have taken this into account.

[52] The meaning of the phrase "valid reasons" has been universally drawn from the judgement of Northrop J in *Selvachandran v Peterson Plastics Pty Ltd*:

> "In broad terms, the right is limited to cases where the employer is able to satisfy the Court of a valid reason or valid reasons for terminating the employment connected with the employee's capacity or performance or based on the operational requirements of the employer. …
>
> Section 170DE(1) refers to "a valid reason, or valid reasons", but the Act does not give a meaning to those phrases or the adjective "valid". A reference to dictionaries shows that the word "valid" has a number of different meanings depending on the context in which it is used. In the *Shorter Oxford Dictionary*, the relevant meaning given is: "2. Of an argument, assertion, objection, etc; well founded and applicable, sound, defensible: Effective, having some force, pertinency, or value." In the *Macquarie Dictionary* the relevant meaning is "sound, just, or well founded; a valid reason".
>
> In its context in s 170DE(1), the adjective "valid" should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s 170DE(1). At the same time the reason must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must "be applied in a practical, commonsense way to ensure that" the employer and employee are each treated fairly…"[40]

Section 387(b) notified of reason

[53] The Applicant was advised that the termination of his contract was due to the restructuring of the organisation.

Section 387(c) opportunity to respond

[54] The Applicant was not given an opportunity to respond to the decision of the Respondent. I note that the Applicant did try and negotiate a more financially acceptable separation package.

Section 387(d) support person

[55] There is no suggestion that the Respondent denied the Applicant the opportunity to have a support person present.

Section 387(e) unsatisfactory performance

[56] There is no evidence that the Applicant's performance was unsatisfactory.

Section 387(f) size of employer

[57] The Respondent is a large firm based in Canada. Its Australian operation is very small. The Applicant's on-going relationship with the Respondent was terminated by way of a Conference telephone call with two representatives, one from the Respondent and one from Guest Tek.

Section 387(g) HR expertise

[58] It is evident that the Canadian representatives of the Respondent, whilst undoubtedly very professional and competent, are not conversant with Australian workplace practice or the Act.

Section 387(h) any other matter

[59] I have taken into account that the Respondent has not complied with the consultative provisions of the Modern Award and that the Applicant's termination was not a genuine redundancy.

[60] The Respondent claims that the Applicant only began working for the Respondent in April 2017. I accept that a new contract was signed in 2017 where the parties to the Agreement were the Applicant and Guest Tek Australia Pty Ltd (the Respondent). Similar Agreements had been signed in 2012 and 2014 where the parties were the Applicant and Guest Tek Interactive Entertainment Ltd (the parent Company). I also note that Schedule "B" of the 2017 Agreement was in exactly the same terms as the 2014 Agreement when Guest Tek signed the Agreement.

[61] The Respondent has not raised any issue in relation to the applicability of the *Fair Work Act, 2009* (the Act) to the Applicant's employment after the 2017 Agreement, however, a question remains in relation to the period between 2012 to 2017.

[62] In *Fair Work Ombudsman v Chia Tung Development Corp & Anor*[41], Justice Altobelli provided a useful summary of the current law in relation to the applicability of the Act and the Modern Award to an employer.

> "41. But even if the Court considers that, in the exercise of its discretion, it should still consider whether the Employees were covered by Australian workplace laws, the steps outlined in Fair Work Ombudsman v Valuair Limited (No 2) [2014] FCA 759 (Valuair) apply in these proceedings; those steps to consider being whether:
>
> (a) the Employees employed by the First Respondent are "national system employees", within the meaning of section 13 of the FW Act;
>
> (b) the First Respondent is a "national system employer", within the meaning of section 14 the FW Act; and
>
> (c) the Building and Construction Award applies and covers particular employment relationships under which the work is performed, within the meaning of subsections 47(3) and 48(5) of the FW Act.

42. Section 13 of the FW Act provides:

> "A national system employee is an individual so far as he or she is employed, or usually employed, as described in the definition of national system employer in section 14, by a national system employer, except on a vocational placement." (emphasis in original)

43. Section 14 of the FW Act relevantly provides:

"(1) A national system employer is:

> (a) a constitutional corporation, so far as it employs, or usually employs, an individual; or ..." (emphasis in original)

44. A constitutional corporation is a corporation to which paragraph 51(xx) of the Constitution applies, including foreign corporations. Within that meaning, the First Respondent is a constitutional corporation (SOC, [3(c)]).

45. However, as Justice Buchanan observed in Valuair, subsection 14(1)(a) must be read in conjunction with subsection 21(1)(b) of the Acts Interpretation Act 1901 (Cth) (Interpretation Act) (the Interpretation Act applies as it was when in force on 25 June 2009 by reason of section 40A of the FW Act), which provides that:

(1) In any Act, unless the contrary intention appears:

> (b) references to localities jurisdictions and other matters and things shall be construed as references to such localities jurisdictions and other matters and things in and of the Commonwealth.

46. Some sufficient connection must be made with Australia, either so far as the constitutional corporation is concerned, or so far as its employees are concerned (Valuair, [68]). This sufficient connection must be made with the employment relationship in question, and not simply with particular work (Valuair, [75]). In summary:

> (a) the FW Act depends, in the first instance, upon a relationship of employment arising from a contract of employment. It is upon that legal circumstance, not just the performance of work, that the FW Act and modern awards operate (Buchanan J, from [75] to [81], set out that contracts must first exist for award entitlements, including rates of pay, to be imported into them: Valuair at [78] to [80], citing Byrne v Australian Airlines Ltd (1995) 185 CLR 410 at 420, 462);
>
> (b) awards apply to and supplement a contract of employment in a comprehensive way, and not in some partial or fragmented way (Valuair, [82] and [83]); and
>
> (c) the structure of the FW Act makes it clear that the FW Act applies to and covers "employment" or "particular employment" in relation to the NES and modern awards, respectively (Subsection 61(1) of the FW Act provides

that the NES "apply to the employment of employees"; Subsections 47(3) and 48(5) of the FW Act provide that modern awards cover an "employee in relation to particular employment.) These provisions do not operate "at large" in relation to foreign employers and foreign employees, as the relevant provisions must be read in accordance with subsection 21(1)(b) of the Interpretation Act (Valuair, [86] to [90]).[42]"

[63] Section 12 of the Act, defines an "associated entity" in accordance with section 50AAA of the Corporations Act, 2001. Section 50AAA of the Corporations Act states:

"**CORPORATIONS ACT 2001 - SECT 50AAA**
Associated entities

(1) One entity (the associate) is an associated entity of another entity (the principal) if subsection (2), (3), (4), (5), (6) or (7) is satisfied.

(2) This subsection is satisfied if the associate and the principal are related bodies corporate.

(3) This subsection is satisfied if the principal controls the associate.

(4) This subsection is satisfied if:

(a) the associate controls the principal; and

(b) the operations, resources or affairs of the principal are material to the associate.

(5) This subsection is satisfied if:

(a) the associate has a qualifying investment (see subsection (8)) in the principal; and

(b) the associate has significant influence over the principal; and

(c) the interest is material to the associate.

(6) This subsection is satisfied if:

(a) the principal has a qualifying investment (see subsection (8)) in the associate; and

(b) the principal has significant influence over the associate; and

(c) the interest is material to the principal.

(7) This subsection is satisfied if:

(a) an entity (the third entity) controls both the principal and the associate; and

(b) the operations, resources or affairs of the principal and the associate are both material to the third entity.

(8) For the purposes of this section, one entity (the first entity) has a qualifying investment in another entity (the second entity) if the first entity:

(a) has an asset that is an investment in the second entity; or

(b) has an asset that is the beneficial interest in an investment in the second entity and has control over that asset."

[64] I am satisfied and find that the Respondent is an associated entity of Guest Tek. The staffing and reporting arrangements above identify the necessary operational influence and financial investment to satisfy the test of section 50AAA of the Corporations Act.

Conclusion

[65] The Applicant was entitled to be consulted in accordance with the provisions of the Telecommunications Award. If the Respondent wanted to make the Applicant redundant and transfer the Applicant's role to Asia, then such a transfer should have been discussed with the Applicant. If there was a need for the Applicant to re-locate then this opportunity should have been provided to the Applicant. Alternatively, the Applicant may have been able to prove that, with today's electronic capacity, he may have been able to service the Respondent's customers and market from Sydney. The lack of consultation by the Respondent makes the Applicant's termination harsh. An appropriate level of consultation may have resolved the issues to the parties satisfaction.

[66] I also note that the Applicant was not offered the opportunity to redeploy to any other part of the Respondent's business. It was unreasonable that the Applicant was not provided with this opportunity to consult with the Respondent in relation to his possible redeployment.

[67] I am not satisfied that the Respondent's decision to terminate the Applicant was sound, defensible or well founded. As a result, I find that the Applicant's termination was harsh and unreasonable.

Remedy

[68] The relevant provisions of the Act state:

"**Section 390**
When the FWC may order remedy for unfair dismissal

(1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:

(a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and

(b) the person has been unfairly dismissed (see Division 3).

(2) The FWC may make the order only if the person has made an application under section 394.

(3) The FWC must not order the payment of compensation to the person unless:

(a) the FWC is satisfied that reinstatement of the person is inappropriate; and

(b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case."

391 Remedy—reinstatement etc.

Reinstatement

(1) An order for a person's reinstatement must be an order that the person's employer at the time of the dismissal reinstate the person by:

(a) reappointing the person to the position in which the person was employed immediately before the dismissal; or

(b) appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

(1A) If:

(a) the position in which the person was employed immediately before the dismissal is no longer a position with the person's employer at the time of the dismissal; and

(b) that position, or an equivalent position, is a position with an associated entity of the employer;
the order under subsection (1) may be an order to the associated entity to:

(c) appoint the person to the position in which the person was employed immediately before the dismissal; or

(d) appoint the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

Order to maintain continuity

(2) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to maintain the following:

(a) the continuity of the person's employment;

(b) the period of the person's continuous service with the employer, or (if subsection (1A) applies) the associated entity.

Order to restore lost pay

(3) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to cause the employer to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the dismissal.

(4) In determining an amount for the purposes of an order under subsection (3), the FWC must take into account:

(a) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for reinstatement; and

(b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement.

392 Remedy—compensation

Compensation

(1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

Criteria for deciding amounts

(2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:

(a) the effect of the order on the viability of the employer's enterprise; and

(b) the length of the person's service with the employer; and

(c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and

(d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and

(e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and

(f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and

(g) any other matter that the FWC considers relevant.

Misconduct reduces amount

(3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

(4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

Compensation cap

(5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:

(a) the amount worked out under subsection (6); and

(b) half the amount of the high income threshold immediately before the dismissal.

(6) The amount is the total of the following amounts:

(a) the total amount of remuneration:

(i) received by the person; or

(ii) to which the person was entitled;

(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and

(b) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations."

[69] Neither party supports the option of the Applicant being reinstated. I am satisfied and find that reinstatement is not appropriate.

[70] In relation to the level of compensation to be awarded, the Applicant is seeking the statutory maximum of 26 weeks. I note the Respondent offered the Applicant an additional $10,000US shortly after being advised of his pending redundancy which equates to approximately 7 weeks' pay.

[71] I now turn to an analysis of section 392 of the Act.

Section 392(a) effect of order on viability of enterprise

[72] The Respondent is a small entity in Australia but is an associated entity of Guest Tek which is a large organisation in Canada. I am confident that my Order will not adversely affect the viability of the Respondent. I have taken this into account.

Section 392(b) length of service

[73] I have previously found that the Respondent is an associated entity of Guest Tek company. As a result, I find that the Applicant's earlier contiguous service with Guest Tek should count in relation to the Applicant's length of service with the Respondent. I find that the Applicant had been employed by the Respondent for 9 years between August 2009 and 31 July 2018. I have taken this into account.

Section 392(c) remuneration Applicant would have likely received if not dismissed

[74] There is no record of any complaint about the Applicant's work performance. I note that the Applicant has previously been awarded Guest Tek's Service Excellence Award. Apart from the issue of the Respondent's restructure, I cannot find any reason why the Applicant's employment would not have been on-going. I have taken this into account.

Section 392(d) efforts of person to mitigate loss

[75] The Applicant advised that he was actively looking for work following his termination. The Applicant advised that he commenced alternative employment on 10 December 2018. I have taken this into account.

Section 392 (e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation

[76] The Applicant advised that he was unemployed between 31 July 2018 and 10 December 2018, which is a continuous period of 19 weeks.

Section 392(f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation

[77] The Applicant found new employment on a full time basis on 10 December 2018. I have taken this into account.

Section 392(g) any other matter

[78] The commonly used formula to calculate the appropriate amount of compensation emanates from a Full Bench decision in *Sprigg v Paul's Licensed Festival Supermarket*[43] (the Sprigg Formula), which states:

> "1. Estimate the remuneration the employee would have received if they had not been dismissed. Lost remuneration is usually calculated by estimating how long the employee would have remained in the relevant employment but for the termination of their employment i.e. the anticipated period of employment.
>
> 2. Deduct any **remuneration** earned by the employee since their dismissal until the end of the anticipated period of employment.
>
> 3. Deduct an amount for **contingencies**…
>
> 4. Consider the impact of **taxation** and adjust the figure accordingly.
>
> 5. Assess the figure against the **compensation cap**. If the amount is more than the compensation cap it should be reduced to the compensation cap."

[79] I can find no reason why the Applicant would not have been able to perform the Project Manager/Asia Pacific role from Sydney. The Asia Pacific Region is a vast and considerable geographic location. It is not possible for a single employee to be located in every location where the Respondent may win a contract. The key component and concept of project management is the ability to co-ordinate work from a remote location. I have taken this into account.

[80] The Applicant would have accrued an additional 1.5 weeks of annual leave during the 19 week period between his termination from the Respondent and his new employment.

[81] A relevant contingency consideration is that the Respondent, if it had conducted the consultation process in the manner prescribed by the Modern Award, may still have arrived at the decision to terminate the Applicant's employment due to redundancy. The Applicant would have then been entitled to receive a redundancy payment in accordance with the Award, including the beneficial taxation rates associated with this scenario. As a result, I have applied a contingency of 10% to my Order.

[82] The amount ordered is to be taxed as an Eligible Termination Payment. This tax should be forwarded to the Australian Taxation Office (ATO) by the Respondent.

[83] Applying the *Sprigg* formula, as outlines above, the total compensation payable to the Applicant is:

19 weeks +1.5weeks annual leave = 20.5weeks		
Minus		
Contingency of 10%	=	2.05weeks
	=	18.45weeks
18.45weeks x $1,411.15	=	$26,035.72
Minus		

ETP tax of 32%
Total (US dollars) = $17,704.29(nett)

[84] I note that my proposed Order does not exceed the compensation cap.

[85] The amount ordered does not contain any component for the Applicant's shock, distress or humiliation.

[86] The Applicant was paid in US dollars throughout his employment with the Respondent and Guest Tek. It is appropriate to continue this arrangement for the compensation I have ordered.

[87] I note that the Applicant does not appear to have been paid any superannuation in accordance with the Superannuation Guarantee Levy Act or any pro rata Long Service Leave in accordance with the NSW Long Service Leave Act. The Applicant may wish to consider an application to the Fair Work Ombudsman in relation to these issues. Based on the evidence before the Commission, the Applicant is entitled to be paid both Superannuation and pro-rata Long Service Leave.

Conclusion

[88] The Applicant was not a contractor for the Respondent but an employee. As such, the Applicant is entitled to the protections afforded to employees covered by the Act and the Modern Award.

[89] The Applicant was unfairly dismissed. There was no consultation with the Applicant in relation to his termination. The Applicant's termination was not as a result of a genuine redundancy. The appropriate remedy in this circumstance is for the Respondent to pay to the Applicant $17, 704.29(nett) in US dollars within the next 14 days.

[90] I so Order.

COMMISSIONER

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[1] Witness statement; Andrew O'Farrell PN5

[2] Witness statement; Andrew O'Farrell Exhibit A

[3] (2003) 122 IR 215

[4] *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at p. 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 p. 37.3 per Wilson and Dawson JJ.

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

[6] *Brodribb* esp Mason J at p. 29.3

[7] *Brodribb* per Wilson and Dawson at p. 37.2

[8] "The parties cannot create something which has every feature of a rooster, but call it a duck and insist that everyone else recognise it as a duck." *Re Porter* (1989) 34 IR 179 at p. 184 per Gray J; *Massey v Crown Life Insurance* [1978] 2 All ER 576 at p. 579 per Lord Denning approved by the Privy Council in *AMP v Chaplin* (1978) 18 ALR 385 at p. 389.

[9] *AMP v Chaplin* (1978) 18 ALR 385 at 389

[10] *Hollis v Vabu* (2001) 207 CLR 21 at para [58]

[11] *AMP v Chaplin* (1978) 18 ALR 385 at p. 394

[12] (1986) 160 CLR 16

[13] *Brodribb*

[14] Flows from the reasoning of Mason J in *Brodribb* at p 24

[15] *Brodbribb* esp Mason J at p 24.4

[16] *Zuijs v Wirth Bros. Pty. Ltd* (1955) 93 CLR 561 at p. 571

[17] *Hollis v Vabu* (2001) 207 CLR 21

[18] *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 at p. 404 per Dixon J

[19] *Brodribb* per Wilson and Dawson JJ at p. 36

[20] *Ibid* at p. 37.1

[21] *Brodribb* per Mason J at p 24.6

[22] *Hollis v Vabu* (2001) 207 CLR 21 at [47] see also [58]

[23] *Brodribb* per Mason J at p. 24.7

[24] *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539; *AMP v Chaplin* (1978) 18 ALR 385 at p. 389

[25] *Brodribb* per Wilson and Dawson JJ at p. 36.9

[26] *Hollis v Vabu* at [50]

[27] *Brodribb* per Mason J at p. 24.6; Wilson and Dawson JJ at p. 37.2

[28] *cf Brodribb* per Mason J at p. 24.6

[29] *as to paid holidays, see Brodribb* per Mason J at p. 24.6

[30] *Brodribb* per Wilson and Dawson JJ at p. 37.1

[31] *Ibid at p. 37.2*

[32] *Ibid at p. 37.2*

[33] [2011] FCA 366

[34] 2016 FCA 1034 at [39]-[42]

[35] MA000041

[36] Witness statement – Andrew O'Farrell [9]-[14]

[37] [2012] FWAFB 5241

[38] Ibid at [48]-[49]

[39] [2010] FCA 652

[40] (1995) 62 IR 371, 372-3.

[41] [2016] FCCA 2777

[42] Ibid [41]-[46]

[43] (1998) 88 IR 21