



DECISION

Fair Work Act 2009
s.365—General protections

Justin Grant Perrins

v

Ben Browne T/A Oz Gazebos & Huts Pty Ltd
(C2023/1413)

DEPUTY PRESIDENT DOBSON

BRISBANE, 25 MAY 2023

Application to deal with contraventions involving dismissal – jurisdictional objection by Respondents — independent contractor – no written contract in place – application not out of time - jurisdictional objection upheld – application dismissed.

Background

[1] Mr Justin Grant Perrins (the Applicant) lodged an application pursuant to s.365 of the *Fair Work Act 2009* (the Act) to deal with a general protections dispute in relation to the alleged termination of his employment. The Application was lodged against Mr Ben Browne T/A Oz Gazebos & Huts Pty Ltd on 12 March 2023.

[2] The matter was subject to a conference by telephone before me on 26 April 2023 where a range of matters were discussed. Conciliation was explored, but the matter was unable to be resolved. The Respondent raised the jurisdictional objection that they were not the Applicant's employer, that the Applicant was an independent contractor and as such, that no dismissal had occurred.

[3] Directions were issued for the filing of material and following amendments at the request of the parties, the matter was listed for hearing on 11 May 2023.

[4] The decision of the Full Court of the Federal Court of Australia in *Coles Supply Chain Pty Ltd v Milford*¹ requires the Commission to determine a dispute about the fact of a dismissal under section 365 of the Act, before the Commission can exercise powers conferred by section 368.² It is thus necessary to determine the jurisdictional objection in order for the Applicant's application to proceed further.

Legislation

[5] Section 365 of the FW Act provides:

“365 Application for the FWC to deal with a dismissal dispute

If:

- (a) a person has been dismissed; and
- (b) the person, or an industrial association that is entitled to represent the industrial interests of the person, alleges that the person was dismissed in contravention of this Part;

the person, or the industrial association, may apply to the FWC for the FWC to deal with the dispute.”

[6] Section 365 requires a dismissal to have occurred as a jurisdictional fact. A mere allegation that a person has been dismissed will not establish this as fact. “Dismissal” for these purposes (and other purposes of the Act) is defined in section 386(1), which provides:

“386 Meaning of dismissed

(1) A person has been dismissed if:

- (a) the person’s employment with his or her employer has been terminated on the employer’s initiative; or
- (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.

[7] Section 357(1) of the Act states:

“A person (the employer) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.”

[8] Section 358 of the Act states;

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

- (a) is an employee of the employer; and
- (b) performs particular work for the employer;

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

Applicant's Submissions

[9] The Applicant contends that the Respondent dismissed the Applicant on 19 February 2023. The Applicant asserts that he submitted his application to the Commission within the prescribed timeframe per section 366(1) of the Act.

[10] The Applicant submits that for the duration of his employment with Ben Browne and Oz Gazebos & Huts, he was not employed by any other businesses. The Applicant submits that he '...only worked for them 100% of the time.'³ The Applicant also provided a statutory declaration completed by Sarah Kate Smith (Scanlan), who stated that 'he had no work with any other entity.'⁴ The Applicant submits that the Respondent held the expectation that the Applicant would work solely for the Respondent and that the Applicant's expectation was that this work was ongoing.⁵

[11] The Applicant submits that throughout the course of his employment with the Respondent, he was often required to source and buy items required to complete jobs that he was allocated by the Respondent. The Applicant asserts that he was not reimbursed for the cost of these items, nor the time taken to acquire them.⁶ The Applicant provided a Statutory Declaration by Sarah Kate Smith (Scanlan), where she supports his contention that he would often have to source tools and other equipment for jobs.

[12] The Applicant submits that he was not paid the award rate entitlements inclusive of paid sick leave and other leave entitlements. The Applicant did not provide any documentation that suggested he paid income tax for the duration of his employment with the Respondent.

Respondent's Submissions

[13] The Respondent contends that the Applicant was not dismissed by the Respondent because he was a subcontractor and that the Respondent disengaged with his services due to not having any more work for him. The Respondent asserts that as the Applicant was a contractor, he cannot be dismissed. The Respondent further submits that, if the Applicant was found to have been dismissed, the dismissal occurred 22 days from the date the application was made, thus being out of time, and that there are no exceptional circumstances warranting an extension of time under s366(2).

[14] The Respondent submits that the Applicant was hired as a head installer and that he would 'complete projects under a contract price' for the company when required.⁷ The Respondent has not provided any further evidence specifying the particulars of the Applicant's role. The Respondent submits that prior to an agreement being verbally agreed to with the Applicant in 2019, the Applicant was allegedly providing landscaping and other services for various kitchen companies.

[15] The Respondent asserts that during the course of the Applicant's employment, the Applicant used his own tools to complete the work allocated to him as a sub-contractor.⁸ The Respondent provided email correspondence dated between 22 February 2023 and 12 March 2023 evidencing the contention that the Applicant used his own tools for completing certain jobs. In a statutory declaration, Mr Lance Craig Browne, dated 21 April 2023, confirms that the

Respondent had lent the Applicant his truck, when the Applicant's own vehicle had broken down for a short period.

[16] The Respondent submits that the Applicant was entitled to subcontract work whilst working on a job for the Respondent. The Respondent contends that the Applicant engaged with an external contractor named David, who he shared work with from time to time.⁹ The Respondent submits that the Applicant had full discretion and control with regards to the amount paid to the Applicant's external contractor and that he engaged him independently from Oz Gazebos & Huts. The Respondent further submits that the Applicant engaged another subcontractor called Sarah Scanlan to assist him on an Oz Gazebos & Huts job. The Respondent provided evidence of receipts of bank transfers to evidence the remuneration awarded to the joint bank account of the Applicant and Ms Scanlan for the completion of the work done.¹⁰ The Respondent further submits that the Applicant had the ability to engage external services/other subcontractors if required and without consent from the Respondent.¹¹

[17] The Respondent provided copies of various tax invoices and Commonwealth Bank receipts of transactions, demonstrating the invoices were paid. The invoices provided did not include any itemisation or breakdown of the remuneration awarded but rather details of the relevant job to which the invoice pertained. It was noted the invoices were predominantly for the year 2020.

[18] The Applicant filed their application in the Commission on 12 March 2023. The Respondent filed their response in the Commission on 22 March 2023. The Respondent filed their submissions on the jurisdictional objection on 21 April 2023 and 28 April 2023 and the Applicant's filed their reply on 8 May 2023.

[19] It is uncontested that the Applicant and Respondent commenced a commercial relationship in August 2019, neither party could pinpoint a specific date.

Out of Time

[20] It is uncontested that the Applicant and the Respondents relationship ended on 19 February 2023. It is also uncontested that the Applicant filed his application on Sunday 12 March 2023.

[21] The application was required to be lodged on or before 12 March 2023, which was a Sunday. The timeframe for lodgement was therefore extended until the next business day, being Monday 13 March 2023.¹² The application was lodged by email on Sunday 12 March 2023; therefore the application was not lodged out of time.

Is the Applicant an Employee or an Independent Contractor?

[22] The Applicant has brought an application pursuant to Section 365 of the Act. Section 365 only entitles a person to bring an application if that person has been “dismissed” (see Section 365(a)).

[23] Section 386 of the Act states that a person has been dismissed if:

“4.1 The person’s employment with his or her employer has been terminated at the employer’s initiative; or

4.2 The person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.”

[24] Accordingly, a person can only be dismissed for the purposes of Section 386 if there is an employment relationship.

[25] In the contest of whether the Applicant was an employee or a contractor, recent authorities can assist with the determination. The High Court recently revised the applicable legal principles to determine whether a person is an employee or an independent contractor in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (**‘Personnel Contracting’**)¹³ and *ZG Operations Australia Pty Ltd v Jamsek* (**‘Jamsek’**)¹⁴ A useful analysis was applied in the Commission decision of *Waring v Hage Retail Group Pty Ltd* (**‘Hage’**):¹⁵

“[52] In two judgements delivered on 9 February 2022 the High Court of Australia pronounced on the law that applies in determining whether, absent a specific statutory rule, a person is an employee or contractor. In doing so, the Court reviewed past decisions of the Court (and other courts) and set out afresh relevant legal principles.

[53] In important respects the law as expressed by the High Court in Jamsek and Personnel Contracting has modified, if not replaced, former approaches. In particular, the past approach of the Commission (itself based on past court authority) as outlined in the leading full bench case of French Accent is, with some limited caveats, no longer good law.

[54] The High Court, via the combination of judgements in both Jamsek and Personnel Contracting, has largely rejected an approach whereby the relationship between parties across its life span is examined (including how the relationship operates in practice). The Court has

stated that contractual terms and not performance, where those terms can be ascertained and where the contract is not a sham, will determine the true nature of the relationship. However, the Court has observed that the manner in which the relationship is worked in practice may be relevant for certain limited purposes, such as to find contractual terms where they cannot otherwise be ascertained or to determine the nature of any variation to agreed terms.

[55] Indicia (such as those identified in earlier cases in the Court) may be relevant but only insofar as the terms of the contract give voice to them. One approach, to be used as a guide, is to look at whether, under the contract, the worker is engaged to work in the business of another, though this may not necessarily be useful in all cases. The extent of a contractual right to control, as evident from the terms of the contract itself, remains a major signifier of an employment relationship. That an arrangement was brought about by the superior bargaining power of one party has no bearing on the meaning and effect of the contract.

[56] Amongst the caveats expressed by the Court, is that a mere label acting as a subterfuge to the true nature of the contractual relationship will not determine the status of the parties. In this respect at least, the law remains unchanged by these recent decisions.” (footnotes omitted).

The Hearing

[26] There being contested facts involved, the Commission is obliged by s.397 of the FW Act to conduct a conference or hold a hearing.

[27] After taking into account the views of the Applicant and the Respondent and whether a hearing would be the most effective and efficient way to resolve the matter, the matter was listed for a determinative conference pursuant to s.399 of the FW Act.

[28] Both parties were self-represented at the hearing on 11 May 2023.

Witnesses

[29] The following witnesses gave evidence on behalf of the Applicant:

- The Applicant Mr Justin Perrins; and
- Ms Sarah Scanlan (partner to the Applicant).

[30] The following witnesses gave evidence on behalf of the Respondent:

- The Respondent Mr Ben Browne; and
- Mr Lance Browne (Brother and Sub-contractor to the Respondent).

[31] In considering the various indicia identified in *Stevens v Brodribb Sawmilling Co Pty Ltd*¹⁶ and other authorities, the Commission addressed the list of indicia in the following manner.

Whether the putative employer exercises, or has the right to exercise, control over the manner in which work is performed, place of work, hours of work and the like.

[32] It was uncontested by the parties that there was neither a written employment contract nor a written independent contract in place.¹⁷

[33] The Applicant submitted in his written material, that he performed work under the direction and control of the Respondent including the hours required for each job, how work was to be done and the location of the job. The Applicant claimed in his submissions that he was never in charge of the total cost for any job rendered and that he undertook all work as the head installer at the direction of the Respondent.¹⁸

[34] Under cross-examination the Applicant submitted that he determined his own hours of work,¹⁹ and was paid a fixed price for each discrete job.²⁰ The Applicant submitted an email dated 21 February 2022 in which the Respondent confirmed the rates of pay for particular jobs.²¹ It was the Respondent's position that this was a confirmation after a discussion between the Respondent and his sub-contractors and noted that the rates had increased since then.²² Whilst the facts were contested, I accept that there was compensation paid for work performed on a project by project basis.

[35] The Applicant gave evidence that he was able to employ whomever he chose to assist him to perform the project without requiring the approval of the Respondent.²³ The examples he gave included obtaining assistance from his partner, Ms Sarah Scanlan. In that example the Applicant claimed that Ms Scanlan worked on site in order to learn the business for future work that they intended to perform together as they were intending to open a business together in the future²⁴ and also evidence he had engaged other people to assist him from time to time.²⁵

[36] The Applicant also gave evidence of the control he exercised when performing additional work for a client.²⁶

[37] The Applicant gave evidence that he was not an employee²⁷ and that he ran a business.²⁸

[38] The Applicant gave evidence that at the beginning of his relationship with the Respondent in 2019, he provided invoices for the work that was performed by him under the Applicant's ABN.²⁹ The Applicant disagreed that he had any control over the pricing of the work but rather he was told what he would be paid on a project-by-project basis by the Respondent.³⁰

[39] The Respondent submitted in written submissions, that he had little control over the work of the Applicant. The Respondent further submits that the Applicant was provided with a fixed price for each project prior to commencement and the Applicant had the right to accept or decline the job without penalty.³¹

[40] The Respondent's evidence was that it was entirely up to the Applicant as to what hours he worked, whether he accepted a job and how he performed the job.³²

[41] Mr Ben Browne, under cross examination reiterated his written submissions that the Applicant controlled whether or not he accepted a job, the hours he worked to complete that job and whether or not he employed others to assist him to complete each job.³³

[42] Mr Ben Browne submitted that the Applicant was free to work for others and that he regularly performed work for other clients including performing additional work on projects directly for clients that Mr Ben Browne had allocated to the Applicant. In such cases, Mr Ben

Browne adduced evidence from the Applicant in the hearing that those clients paid the Applicant directly for that additional work.³⁴

[43] Mr Ben Browne gave evidence that he agreed a schedule of prices with all of his subcontractors, and he explained how those prices were derived.³⁵ Mr Ben Browne also submitted that when he engaged the Applicant, he checked and found that the Applicant had a QBCC license.³⁶ Mr Ben Browne gave evidence that the Applicant provided invoices initially and gave examples of those in his written submissions. Under cross examination he gave evidence that the tax invoices stopped being submitted however he continued to pay the Applicant because the Applicant told him that his mother was in hospital, and he was concerned that the Applicant would be out of pocket if he withheld payment.³⁷

[44] Under cross-examination the Respondent gave evidence that the Applicant had worked for him a total of 6 days in December (2022) and 12 days in the month of November (2022) and he did not know who he worked for at other times.³⁸ I note the Applicant contested this³⁹ however, I found the Respondent's evidence clear, detailed and credible. Further the Respondent gave evidence that a form was introduced halfway through 2022 which required a client to sign off that the project had been completed to their satisfaction so that the subcontractor could then be paid immediately upon the Respondent's receipt of that form.⁴⁰

[45] The Respondent also submitted bank documents demonstrating the amount of money he had paid the Applicant and another sub-contractor (his brother and witness Mr Lance Browne) over a period of time.⁴¹ The Applicant submitted that this included reimbursement for expenses and repayment of cash loans he had provided to the Respondent.⁴² The Respondent disputed this.⁴³ I do not place weight on this evidence as I don't believe there was either sufficient analysis of this information nor do I believe the Applicant had sufficient time to consider it before the hearing and therefore procedural fairness would be denied the Applicant were I to take any other view.

[46] Mr Lance Browne provided a statutory declaration in which he declared he was engaged by the Respondent as a subcontractor for fixed-price contracts.⁴⁴

[47] In the hearing, Mr Lance Browne gave unequivocal evidence that he was engaged as a sub-contractor.⁴⁵ Mr Lance Browne further stated in cross examination that he controlled which projects he agreed to take on, how he performed that work, took responsibility for the quality of the work performed by him or those he engaged,⁴⁶ determined what his hours of work were on-site⁴⁷ and whom else he chose to engage to assist him to perform the project.⁴⁸ Mr Lance Browne also gave evidence that he did not require the approval of the Respondent for any of these matters, rather they were all within his control.⁴⁹

[48] Mr Lance Browne also gave evidence that he agreed scheduled prices with Mr Ben Browne relevant to the size and complexity of each project. I found Mr Lance Brown's evidence to be confident and credible.⁵⁰

[49] Ms Scanlan gave evidence that the Applicant was paid immediately after completing a job, by the Respondent.⁵¹

[50] Ms Scanlan also gave evidence that the Applicant was entitled to control how and when his work was performed⁵² and she would often assist the Applicant to perform his work⁵³ and did not require the approval of the Respondent to do so.⁵⁴

[51] Ms Scanlan also gave evidence that the Applicant regularly picked up materials and transported those to site and cleaned materials from the site at the end of a project.⁵⁵

[52] Ms Scanlan gave evidence that the Applicant's partner at the time (unnamed and distinct from Ms Scanlan) was a bookkeeper and that she prepared those invoices for him. Ms Scanlan further explained that the Applicant and his partner separated and from that time forward, as the Applicant was not a bookkeeper nor did the Applicant engage one, the Applicant did not produce any further invoices.⁵⁶

[53] Ms Scanlan gave evidence that she is a bookkeeper and raised issues of concern with the Applicant's accountant which gave rise to the application presently before the Commission.⁵⁷ I found Ms Scanlan's evidence confident and credible in respect of the amount of control the Applicant had over his work and whilst there was a slight differing of views in some respects to the evidence of Mr Lance Brown, Mr Ben Browne and even the Applicant, this could be explained by the nature of some parts of Ms Scanlan's evidence amounting to hearsay.⁵⁸

[54] I am satisfied that the evidence weighed towards a finding that the Applicant had a great degree of control over what work he accepted, how and when it was performed and the nature in which he was paid for work performed and the like.

Whether the worker performs work for others.

[55] The Respondent gave evidence that there was no prohibition on the Applicant working for others⁵⁹ and gave further evidence at the hearing that the Applicant would do some landscaping work with his friend "Dave" including building a fence and drilling holes in kitchen cabinets and the like.⁶⁰ The Respondent gave evidence that the Respondent:

"would often say, I'll be at that job at 11 today, I've got to go drill some holes for such and such".
⁶¹

[56] I gave Mr Perrins an opportunity to respond to this given it was a determinative conference and Mr Perrins said the drilling was performed after work and the fencing was at the Applicant's home or his friend Dave's home.⁶²

[57] Mr Lance Browne gave evidence that he performed work for others as well as the Respondent.⁶³

[58] The Applicant gave evidence that he did work for other clients and charged them directly,⁶⁴ I note however that whilst the Applicant also gave contrary evidence,⁶⁵ I am satisfied that he gave sufficient evidence and detail to satisfy me that he did in fact perform work for others.

[59] Ms Scanlan gave evidence that the Applicant didn't do any work for anyone else.⁶⁶ Whilst Ms Scanlan was confident, on her own evidence she had witnessed the relationship

between the parties for a short time and her evidence was at odds with the Applicant himself as well as with the other witnesses who all confirmed that the Applicant performed work for other clients as well as private work directly with the clients of the Respondent.⁶⁷

If the worker provides and maintains significant tools or equipment.

[60] In written submissions the Respondent gave evidence that some of the Applicant's tools remained on the Respondent's premises after the relationship came to an end. The Respondent submitted an email from the Applicant that he received on 22 February 2023 which stated:

*"Drop off my [applicant] compressor and generator to (address removed) by midday tomorrow or I'll be reporting them as stolen goods."*⁶⁸

The Respondent submitted that this indicated that the Applicant had supplied his own tools and equipment for the work he performed.

[61] In the hearing, the Respondent gave evidence that it supplied some tools to the subcontractors that are used by all subcontractors as they were specialist tools for the installation of the gazebos that the Respondent manufactured. The Respondent gave evidence that the Applicant otherwise supplied his own carpentry tools, generator and other such equipment.⁶⁹

[62] In the hearing the Applicant gave evidence that he supplied his own carpentry tools⁷⁰ and vehicle (it was uncontested that for a period of time when his car had broken down, the Respondent loaned the applicant a Utility vehicle for the purposes of transporting materials to site and removing rubbish from site).⁷¹

[63] Mr Lance Browne also gave evidence that he provided his own tools and equipment. He gave a description of those tools:

*"Compressors, nail guns, scaffolding, ladders, planks. You name it, any tool that a carpenter would own I own. Power saws – yes".*⁷²

[64] Ms Scanlan also gave evidence that the Applicant provided his own tools for the work the Applicant performed for the Respondent.⁷³

Whether the work can be delegated or subcontracted

[65] The Applicant gave evidence that from time to time he would call a friend as he had many friends who were tradesmen who could assist him when there was a large job.⁷⁴ He gave evidence that this did not require the approval of the Respondent.⁷⁵ The Applicant further gave evidence that he paid those workers directly himself.⁷⁶ The Applicant also gave examples of where he had delegated and or subcontracted the project work he performed for the Respondent, to other employees or other subcontractors to whom he paid for their services directly.⁷⁷ Further the Applicant gave evidence that he was not required to obtain approval from the Respondent to do so.⁷⁸

[66] The Respondent submitted that there was no prohibition on the Applicant being able to delegate or subcontract the work and this was a matter for the Applicant.⁷⁹ In the hearing the

Respondent further submitted examples of where the Applicant delegated this work to others and paid them directly. He also confirmed that the Applicant did not require his approval to do so.⁸⁰ The Respondent also gave evidence that from time to time the Applicant shared projects in a direct arrangement with Mr Lance Browne, sharing the payment for the work performed and without requiring his approval.⁸¹

[67] Mr Lance Brown gave evidence at the hearing that he was able to delegate his work to others without the approval of the Respondent.⁸²

[68] Under cross examination Ms Scanlan acknowledged that she worked on one particular project with the Applicant without the approval of the Respondent nor was she paid by the Respondent for that project.⁸³ Ms Scanlan otherwise gave evidence in the hearing that was contradictory to the evidence given by the three other witnesses however Ms Scanlan acknowledged that her relationship with the Applicant had re-commenced for a short period after a previous relationship with the Applicant that some 15 or so years earlier had come to an end.⁸⁴

Whether income tax is deducted from remuneration paid to the worker

[69] It was uncontested by the parties that no income tax was deducted from the Applicant's remuneration.

[70] The Respondent gave evidence in the hearing that no income tax was deducted from the Applicant's payments for projects completed.⁸⁵

[71] Mr Lance Browne gave evidence that he paid his own income tax through his accountant each year.⁸⁶

[72] I note the Applicant gave evidence at the hearing that he knew nothing of his taxation obligations whether as a subcontractor or as an employee. The Applicant gave evidence that he did not ever receive nor request an end of year PAYG summary nor did he request a payslip.⁸⁷ The Applicant also gave evidence that he did not submit an income tax return during the period⁸⁸ that he submitted that he was employed by the Respondent.⁸⁹

[73] Based on the evidence given by the Applicant, I conclude that the Applicant from the beginning of his relationship with the Respondent was satisfied that he was a subcontractor, and with the assistance of his bookkeeper, issued tax invoices to the Respondent accordingly. When his relationship with the bookkeeper came to an end, the Applicant on his own evidence said he was not a businessman,⁹⁰ and was unsure of what to do in respect of taxation invoices or taxation at all.⁹¹

[74] I further conclude that when the Applicant resumed his relationship with Ms Scanlan who is a bookkeeper,⁹² that Ms Scanlan became rightly concerned that the Applicant had neither submitted taxation returns as an employee nor as a business. This unfortunate scenario has little bearing on the relevant considerations required to determine if the relationship between the Applicant and Respondent was one of an employee or one of a contractor.

Whether the worker was provided with paid holidays or sick leave

[75] It was uncontested by the parties that the Applicant was neither provided paid holidays nor sick leave and it was further uncontested that the Applicant had never requested paid holidays or sick leave.⁹³

Whether the work involves a profession, trade or distinct calling on the part of the person engaged

[76] The Applicant is a Carpenter. Under cross examination the Applicant gave evidence that he completed a qualified trade to become a Carpenter many years ago and he was very skilled at his trade.⁹⁴

[77] Mr Lance Browne gave similar evidence that he was a qualified tradesman.⁹⁵

Consideration

[78] I have considered the High Court authorities in Jamsek and Personnel Contracting and the Commissions previous consideration of those authorities in Hage particularly at paragraphs [54] and [55]. I note that in this present matter, there was no written agreement between the parties. Further there was no evidence before the commission that there was any verbal agreement between the parties and therefore it is necessary to look at the nature of the relationship between the parties. Accordingly, having regards to the indicia of that relationship, it is my view that the Applicant was at all times an independent contractor.

[79] The Applicant did not provide persuasive submissions contrary to the evidence and submissions set out by the Respondent. The Applicant did not negate the indicia of the contractor relationship that were identified by the Respondent, indeed on the Applicant's own evidence he met the indicia required to support that the Applicant was engaged as an independent contractor and not as an employee.

CONCLUSION

[80] On assessment of the caselaw and legislation, it is considered that the Applicant was engaged as an independent contractor and was not an employee of the Respondent. On that basis there is no utility for me to consider whether the relationship came to an end at the initiative of the Respondent.

[81] Accordingly, for the reasons set out, no section 365 application can be brought by the Applicant against the Respondent. There being no requisite employment relationship on foot, no section 365 application certificate is provided to pursue an application against Respondents.

[82] On this basis the Applicant's s.365 application against the Respondent is dismissed.

[83] I Order accordingly.



DEPUTY PRESIDENT

Hearing: Brisbane, 11 May 2023

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¹ [2020] FCAFC 152.

² See *Yi Zhang v Medlab Clinical Ltd* [2021] FWCFB 2453 [1].

³ Form F8 dated 11 March 2023, 7.

⁴ Statutory Declaration from Sarah Kate Smith dated 26 April 2023.

⁵ Form F8 dated 11 March 2023, 9.

⁶ Ibid.

⁷ Form 8A dated 22 March 2023, 8.

⁸ Email correspondence dated 28 April 2023 (Page 40 DCB).

⁹ Email correspondence dated 28 April 2023 (Page 40 DCB).

¹⁰ Commonwealth Bank receipts (7x) of transfers to Sarah Scanlan Family Trust Acc; Email correspondence dated 28 April 2023 (Page 40 DCB).

¹¹ Email correspondence dated 28 April 2023 (Page 40 DCB).

¹² *Acts Interpretation Act 1901* (Cth) s 29(1) as in force on 25 June 2009; *Fair Work Act 2009* (Cth) s 40A. See also *Boyd v MarketTrack Global Pty Ltd* [2019] FWC 8489.

¹³ *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1.

¹⁴ *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

¹⁵ *Waring v Hage Retail Group Pty Ltd* [\[2022\] FWC 540](#).

¹⁶ 160 CLR 16.

¹⁷ Transcript PN539.

¹⁸ Exhibit A1 and A2.

¹⁹ Transcript PN377-378.

²⁰ *Ibid* PN387.

²¹ Transcript PN747; Exhibit A5.

²² Transcript PN755.

²³ *Ibid* PN627-630 and PN935.

²⁴ *Ibid* PN162 and PN 169.

²⁵ *Ibid* PN162, PN424-427.

²⁶ *Ibid* PN257-258.

²⁷ *Ibid* PN201.

²⁸ *Ibid* PN179-181.

²⁹ *Ibid* PN192,

³⁰ *Ibid* PN654-665.

³¹ Exhibit R1 and R2.

³² Transcript PN550, PN567 and PN604.

³³ *Ibid* PN935.

³⁴ Transcript PN290-301 and A2, p86.

³⁵ Transcript PN602.

³⁶ Transcript PN203-207; Exhibit A4.

³⁷ Transcript PN588 and PN601.

³⁸ *Ibid* PN550.

³⁹ *Ibid* PN651.

⁴⁰ *Ibid* PN582.

⁴¹ Transcript PN675; Exhibit R4 and R5.

⁴² Transcript PN686-692.

⁴³ *Ibid* PN711.

⁴⁴ Exhibit R3.

⁴⁵ Transcript PN785, PN790.

⁴⁶ *Ibid* PN802-803.

⁴⁷ *Ibid* PN792.

⁴⁸ *Ibid* PN793-800.

⁴⁹ *Ibid*.

⁵⁰ *Ibid* PN769-771.

⁵¹ *Ibid* PN478 -486.

⁵² *Ibid* PN517-518.

⁵³ *Ibid* PN488-490.

⁵⁴ *Ibid* PN 491.

⁵⁵ *Ibid* PN505.

- ⁵⁶ Ibid PN509.
- ⁵⁷ Ibid PN511.
- ⁵⁸ Ibid PN506, PN514-516.
- ⁵⁹ Ibid PN550.
- ⁶⁰ Ibid PN609.
- ⁶¹ Ibid PN610.
- ⁶² Ibid PN611-612.
- ⁶³ Ibid PN805-810.
- ⁶⁴ Ibid PN257, PN288, PN300-301, PN314 and PN411.
- ⁶⁵ Ibid PN406-409.
- ⁶⁶ Ibid PN475.
- ⁶⁷ Ibid PN257.
- ⁶⁸ Exhibit R2.
- ⁶⁹ Transcript PN624-626.
- ⁷⁰ Ibid PN414.
- ⁷¹ Ibid PN335.
- ⁷² Ibid PN811-812.
- ⁷³ Ibid PN499.
- ⁷⁴ Ibid PN162, PN424-427.
- ⁷⁵ Ibid.
- ⁷⁶ Ibid.
- ⁷⁷ Ibid.
- ⁷⁸ Ibid PN427.
- ⁷⁹ Exhibit R1 and R2.
- ⁸⁰ Transcript PN627-630 and 935.
- ⁸¹ Ibid PN935.
- ⁸² Ibid PN794-797.
- ⁸³ Ibid PN463.
- ⁸⁴ Ibid PN470-PN471.
- ⁸⁵ Ibid PN605.
- ⁸⁶ Ibid PN814-817.
- ⁸⁷ Ibid PN618-621.
- ⁸⁸ Ibid PN622-623.
- ⁸⁹ Ibid PN130.
- ⁹⁰ Ibid PN195.
- ⁹¹ Ibid PN623.
- ⁹² Ibid PN 469.
- ⁹³ Ibid PN415, PN500-501, PN607 and PN820.
- ⁹⁴ Ibid PN417 – PN422.
- ⁹⁵ Ibid PN822.