DECISION

Fair Work Act 2009
s.365—General protections

Robert Spiro Benderli
v
Itero Australia Pty Ltd
(C2023/2561)

DEPUTY PRESIDENT BEAUMONT PERTH, 21 JULY 2023

Application to deal with contraventions involving dismissal

1 Issue and outcome

[1] On 6 May 2023, Mr Robert Spiro Benderli (the **Applicant**) lodged a general protections application under s 365 of the *Fair Work Act 2009* (Cth) (the **Act**) alleging that on 17 April 2023 he was dismissed in contravention of the general protections provisions of the Act by Itero Australia Pty Ltd (the **Respondent**).

[2] The Respondent raised a jurisdictional objection to the application proceeding on the basis that the Applicant was not dismissed within the meaning of s 386 of the Act, because he was not an employee, he was an independent contractor.

[3] It is not in contest that the definition of 'dismissed' in s 386(1) takes as its predicate the prior existence of an employment relationship. Part 3-1 of the Act is given the title 'General Protections'. Section 340(1) relevantly provides that a person must not take 'adverse action' against another person because the other person has exercised (or proposes to exercise) a 'workplace right'. As s 342(1), item 1 and s 342(3) of the Act make clear, 'adverse action' is taken by 'an employer' against an employee if, relevantly, the employer dismisses the employee, and that action is not authorised by or under a specified law. Adverse action in the form of a dismissal cannot be taken by a person against an employee other than by the employer of the employee.

[4] Section 12 of the Act defines 'dismissed' by reference to s 386. That section relevantly 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.

[5] That which is readily apparent from the meaning ascribed to the word 'dismissed' is that dismissal describes the ending of the employment of an employee at the initiative of the employee's 'employer' or by reason of the conduct or course of conduct in which the employer engaged. The expression 'employment … has been terminated' in s 386(1)(a) of the Act means termination of the employment relationship and/or termination of the contract of employment.

[6] For there to be a dismissal there must be in existence immediately before the dismissal takes effect, an employment relationship and/or contract of employment. Put another way, there can be no dismissal for the purposes of s 365 unless the Applicant was an employee employed by the Respondent.

[7] The Respondent's objection therefore has implications for the application on foot because it is accepted that a person *must* have been dismissed to be entitled to make a general protections dismissal dispute application.[1] Section 365 relevantly 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.

[8] Where there is a dispute about whether a person was dismissed, the Commission is obliged to determine that point before exercising its powers under s 368 of the Act.[2] Therefore, the discrete issue for determination is whether the Applicant was 'dismissed' from his employment within the meaning of s 386(1)(a) or/and (b) of the Act.

[9] For the reasons that follow, I have concluded that the Applicant was not an employee of the Respondent. It follows that I uphold the Respondent's jurisdictional objection and the application is dismissed. An Order[3] issues concurrently with this decision. If, however, I was wrong on this point, I would nevertheless dismiss the Applicant's application under s 587(1)(a) of the Act, it having not been made in accordance with the Act.

2 Background

2.1 Qualifications, experience, and previous work of the parties

[10] Mr Patrick McCormack, the director and founder of the Respondent, gave evidence on behalf of the Respondent, whilst the Applicant relied upon his own evidence.

[11] Mr McCormack explained that the Respondent was a full-service rope access provider, specialising in projects that required work to be conducted at heights.[4] The Respondent's work was said to include maintenance, construction and the shutdown of major oil and gas projects and infrastructure.[5]

[12] Mr McCormack said he had been a technical rope access operator for over 18 years, instructing advanced working at heights, rope access, technical rescue, and confined space

vertical rescue.[6] Mr McCormack noted that he had also operated as a subject matter expert for a major manufacturer and the Working at Heights Association of Australia due to his past experience as the technical manager for design, manufacture, testing and certification of all equipment used in the industry.[7]

[13] The Respondent's business was managed by Mr McCormack, who reviewed the scope of projects to develop access methodologies with a view to completing works that were difficult to safely and efficiently complete.[8]

[14] Regarding the internal operations of the Respondent business, Mr McCormack stated that the Respondent had no in-house human resources or legal support, and that all decisions were made by himself in consultation with the Operations Manager and the Operations Coordinator, Ms Jenny McGillemhaoil.[9]

[15] It was Mr McCormack's evidence that the Respondent did not provide, or purport to provide, any services relating to coating or coating inspections.[10]

[16] However, Mr McCormack stated that:

a) the Respondent was engaged to provide rope access duties at the Iron Bridge site;
b) SIMPEC was the principal contractor on the site and it engaged the Respondent;
c) SIMPEC required a third-party NACE qualified inspector to inspect and certify its industrial coatings and this was also a service that the Respondent needed to be completed; and
d) it was necessary for the inspector to be rope access qualified so it was decided that the Respondent should be the one to engage the inspector.[11]

[17] It appears uncontroversial that the Respondent was contracted to SIMPEC as the principal rope access provider for the Iron Bridge magnetite plant project of which SIMPEC was awarded the build.[12]

[18] The Applicant gave evidence that he is an AMPP/NACE certified coating inspector and an IRATA certified rope access technician.[13]

[19] In 2016, the Applicant acquired his NACE certification and has worked in the coating inspection industry for eight years.[14] The Applicant observed that the industry was vast and at least ten years' experience is required to grasp all the knowledge involved. However, he had been training himself and gaining experience to a level of competence to call himself a coating inspector.[15]

[20] The Applicant said that in 2009 he was an electrician so he registered ICAC Systems for the purpose of an air conditioning installation business with the intention of starting his own business installing split system air conditioner units.[16] The Applicant noted that he also purchased the domain name and set up an email address which he had used since then in many variations including Rob@icacsystems.com.au, sales@icacsystems.com.au, and accounts@icacsystems.com.au.

[21] Prior to accepting work with the Respondent, the Applicant was working for LMATS, a laboratory and testing company in Brisbane.[17] The Applicant said he was employed on a salary and was provided with a car and equipment.[18]

2.2 Work with the Respondent

[22] The Applicant said that in August 2022, the Respondent's project manager, Mr Patrick King, with whom the Applicant worked at Karratha Gas Plant in about 2017 to 2018, texted the Applicant to ask whether he was interested in a position as his back to back and as a NACE inspector for SIMPEC.[19] The Applicant stated that he was informed that he was to be engaged through the Respondent as rope access would be involved in both positions (with SIMPEC and the Respondent).[20] Whilst the Applicant attached text messages in support, it is not evident from those text messages that the Applicant was informed that he was to be engaged through the Respondent because rope access would be involved in both positions with SIMPEC and the Respondent.

[23] Mr McCormack stated that in August 2022, the Respondent advertised the casual position of Coatings Project Manager for the Iron Bridge site.[21] Mr McCormack noted that as this was not a service the Respondent usually offers, and it was only for the Iron Bridge site, it was not practical to make it a permanent position.[22]

[24] It was Mr McCormack's evidence that on 18 August 2022, the Applicant made an application for the Coatings Project Manager role, and in a telephone call with both Mr McCormack and Ms McGillemhaoil, the Applicant requested that instead of being employed, the Respondent engage him as a contractor through his Australian Business Number (**ABN**). According to Mr McCormack, both he and the Applicant negotiated rates for the project and agreed to engage the Applicant as a contractor instead of employing him as an employee.[23]

[25] It was the Applicant's evidence that he was given the terms of employment by Mr King with a brief of the project and his responsibilities. Mr King was said to have informed the Applicant that the Respondent needed a project manager and SIMPEC needed a third NACE qualified inspector for their coating scopes.[24]

[26] The Applicant stated that once he confirmed his interest and availability, Mr King said he would pass his details to Mr McCormack and that he should expect a call shortly.[25] Mr McCormack made contact with the Applicant in mid-August 2022.[26]

[27] In his witness statement, the Applicant stated that Mr McCormack spoke about the project briefly, noting that he would send the Applicant an email that day with the particulars of the contract.[27]

[28] By email dated 19 August 2022, Mr McCormack emailed the Applicant the following:

> Hi Rob,
>
> Apologies I did not get this to you yesterday as promised
> Thank you for your application to work with Itero.

> We would like to offer you the position of Coatings /project manager at the Iron Bridge construction project.
> As discussed we are happy to engage you as a subcontractor through your ABN at an all-inclusive flat rate of $104.50 per hour.
>
> The roster will be predominantly a 2 week on 2 week off roster with the potential for a 3 rd week if a critical occasion requires (however this is not expected to be required)
>
> The role will include coatings inspections and reporting, coordinating, and conducting coating repairs and support of our other rope access tasks on the project.
> As discussed, we will require you to refresh your IRATA certifications however this can be completed within your first 2 swings.
>
> Our office team will be in touch with your formal letter of offer and contract. In the new few days, we would like to have you start on the project in the next 3 weeks however we will work with you to confirm a date and complete the mobilisation process.
>
> Please give me a call if you have any questions.
>
> Regards
>
> Patrick McCormack[28]

[29] Mr McCormack said that the Applicant operated as a sole trader under the business name ICAC Systems (ABN 69 044 391 056).[29] Mr McCormack confirmed that on 19 August 2022 he sent an email to the Applicant at the email address sales@icacsystems.com.au confirming that in accordance with the Applicant's request, the Respondent would be engaging ICAC Systems to provide the services of 'coatings inspections and reporting, coordinating, and conducting coating repairs and support for [the Respondent's] tasks on the project.'[30]

[30] According to the Applicant, the Respondent employed the Applicant using his personal ABN which he had held for 20 years.[31] That ABN was said to have been associated with R Mobile Mechanical Service (as the Applicant is a qualified mechanic).[32]

[31] A few days later, on 22 August 2022, the Applicant received an email from Ms McGillemhaoil titled 'ITERO Employment Contract (ABN) – Rob Benderli'.[33] The email attached three documents titled 'New Supplier Details', 'Ironbridge – ABN Confidentiality Agreement' and 'Simpec Health Dec Form', and it thereafter stated:

> Hi Rob,
>
> It was good to have a chat with you today. As discussed, please sign the documents, and forward me all the licences required.
>
> <u>Sub-Contractor – ABN</u>
> Coatings / Project Manager
> $104.50 p/hr (all inclusive flat rate)
> 2:2 swing
> 11.5hrs a day
>
> START DATE: 07 Sept 2022

- Right to work (Passport, Birth or Citizenship Certificate or Visa)
- Current Driver's Licence
- Construction Card
- Covid Certs (MyGov)
- Relevant Health and Safety Certifications
- Current Provide First aid and CPR
- Simpec LTSC Form – Must be completed and signed
- Residential address
- Emergency Contact (Name, Relationship, Contact number)
- USI Student Number

Outstanding:-

1) Simpec Online Induction
(I will send you the details in a separate email)

2) Full Medical Test (Requested for 31 Aug – waiting for confirmation)
(Let me know which date n preferred time, so I can book it in for you.)

3) Worksmart Cultural Training (Full Day) – Will book this for 06/09/22
Need your USI number to book.

4) FMG Online Induction
(You'll receive an email from FMG once all your tests are completed.)

5) Uniforms (Please collect it on 05/09/22)
(Shirts & Pants, Overalls Sizing?)

If you've any other questions, please feel free to let me know.

Many thanks

Jenny McGillemhaoil[34]

[32] In respect to the hourly rate, Mr McCormack clarified that it was standard practice to engage contractors on hourly rates rather than lump sum for a specific task due to the difficultly in accurately estimating the quantity of work required.[35]

[33] Mr McCormack gave evidence that:

a) whilst Ms McGillemhaoil's email referred to an offer of employment, it was inconsistent with the terms of the Applicant's engagement, and it had been made in error as the Respondent had initially planned to make an offer of employment;[36]
b) it was standard practice to engage contractors to work in accordance with a roster due to work scheduling requirements and to ensure that relevant contractors were on site at the same time as other contractors with whom they carry out their work;[37]
c) at no stage did the parties express an intention to form an employment relationship, with the Applicant expressing a desire to be engaged as a contractor instead of an employee;[38]

d) following the confirmation of the 'contract', the Respondent sent to the Applicant a Confidentiality Agreement to be executed by ICAC Systems;[39] and
e) the Applicant was also sent a 'New Supplier Details Form', a standard procedure when a contractor is engaged by the Respondent. The form, which was completed by the Applicant, refers to ICAC Systems, contains the Applicant's ABN and references the email address accounts@icacsystems.com.au.[40]

[34] The Applicant stated that the Respondent supplies rope access to SIMPEC and he liaised with, worked for and represented SIMPEC, albeit he was employed by the Respondent to complete inspections that required rope access.[41] Whilst initially employed as a Project Manager and Coating Inspector, his duties extended to project managing the Respondent's rope crews and being the SIMPEC Coatings Supervisor.[42]

[35] The Applicant clarified that he was SIMPEC's in-house inspector employed through the Respondent because inspections on the 'LFCU and storage tanks would require rope access. [The Respondent] provided me ropes access equipment to complete my duties'.[43] The Applicant stated that at the time he was employed by the Respondent, he did not have the valid IRATA rope access certification, which he had advised Mr King who informed Mr McCormack.[44] The Applicant said that Mr McCormack advised him it would not be an issue because he had two swings in which he could revalidate the certification.[45]

[36] In respect of work direction and supervision, the Applicant gave evidence that he received instructions from SIMPEC on how to prioritise his duties, and as a Project Manager and Coatings Inspector he attended the 5:00 AM SIMPEC managers' meeting (except for the last two months of work when he was on night shift).[46]

[37] The Applicant added that the SIMPEC Construction Manager consistently instructed him of deadline expectations for completion of the coating application in the 'LFCUs', and supervisors, SIMPEC superintendents, construction managers and 'FMG' all gave him direction and oversaw the completion of the projects he worked upon.[47]

[38] Mr McCormack stated that other than organising the Applicant's shifts and flights, the Respondent exercised little to no control over the Applicant's work,[48] because the Respondent had no employees or contractors with a similar skill set to the Applicant therefore making it impossible to supervise the Applicant. Mr McCormack stated that the Applicant directly liaised with SIMPEC during the engagement.[49]

[39] According to Mr McCormack:

a) outside of a uniform and the standard rope access PPE, the Respondent did not provide the Applicant with any tools or equipment;[50]
b) the Respondent obtained no insurance with respect to the Applicant during the engagement as this was the Applicant's responsibility;[51]
c) whilst an internal email account was set up for the Applicant this was actioned on SIMPEC's request so that the Applicant could be more easily included in site communications;[52]
d) the Respondent was provided with invoices from ICAC Systems during the engagement which showed a separate line item for GST;[53]

e) the Respondent did not withhold any tax from the payments to ICAC Systems;[54]
f) the Respondent was directly invoiced for any flights or expenses that were incurred during the engagement plus a 10% loading (inclusive of travel time to and from the site which attracted a separate rate);[55] and
g) the Applicant took no paid leave during the engagement and did not assert he was an employee or request any entitlements associated with employment.[56]

[40] It is uncontroversial that the Applicant was provided with the Respondent's uniform to wear on site.[57]

[41] Regarding inspection equipment, the Applicant said that this was provided by SIMPEC and included office and other work supplies.[58] The Applicant said that he provided a computer, as do most inspectors if they have worked outside of the mining industry.[59] As to standard rope access PPE, the Applicant stated that it was required to be registered and recorded in a registry system, therefore no personal rope access could be used.[60]

[42] The Respondent assigned the Applicant with an email address, which, said the Applicant, was done prior to SIMPEC making such request (if a request was actually made).[61]

[43] It was the Applicant's evidence that the Respondent explained the rate of pay to him and how such payment would be made.[62] In this respect, the Applicant stated that he followed the Respondent's direction and submitted invoices with GST.[63] The Applicant acknowledged that his accountant registered his ABN for GST and advised him that under the work arrangement he would need to charge the Respondent GST.[64] The Applicant stated that the Respondent did not withhold any tax from the payments made to ICAC Systems.

[44] The Applicant gave evidence that he invoiced the Respondent for three flights that he had booked because it was administratively easier, and Ms McGillemhaoil agreed by email to the approach.[65]

[45] The Applicant further noted that once his 'employment' had started with the Respondent, he re-registered the business name to ICAC Systems on 20 September 2022.[66] At that time the Applicant said he rebranded the business to ICAC Systems – Inspection Consultant for Anti-Corrosion Systems.[67]

3 Factual findings

[46] The Respondent purports to have advertised for the position of Coatings Project Manager in August 2022, the engagement to be on a casual basis. However, aside from Mr McCormack's evidence, there is no corroborating material to suggest that this was the case. Further, I am unconvinced that on 18 August 2022, the Applicant made an application for the Coatings Project Manager role as purportedly advertised in August 2022.

[47] Save one exception which I will traverse shortly, I prefer the evidence of the Applicant that Mr King reached out to him to ascertain his interest and availability in a project manager position come NACE qualified inspector of coating scopes on a Western Australian-based project, where SIMPEC was the main or principal contractor. However, having considered the

evidence, I do not find that Mr King gave the Applicant the terms of the employment, as purported by the Applicant.

[48] It is not in dispute that on 18 August 2022, Mr McCormack and the Applicant spoke on the telephone about the available work. The Applicant was firm in his position that at no point were the rates of pay negotiated with the Respondent. Instead, he was advised by the Respondent that the rate would be $104.50/hr. Further, the Applicant insists that he did not ask to be paid through his ABN, but that had been predetermined. This contrasts with the evidence of Mr McCormack, who gave evidence that the Applicant requested to be paid through his ABN.

[49] While the parties are in dispute about whether the rate of pay was negotiated and whether the Applicant asked to be paid via his ABN, it is evident that on 19 August 2022, Mr McCormack emailed to the Applicant via his sales@icacsystems.com.au email address, the offer for the position of 'Coatings/project manager at the Iron Bridge construction project.' The Applicant himself acknowledged that Mr McCormack had spoken about the project briefly on the phone, noting that he would send the Applicant an email that day with the *particulars of the contract*.[68]

[50] That offer, set out in the email dated 19 August 2022, unequivocally stated:[69]

a) the engagement would be as a subcontractor through the Applicant's ABN;
b) the flat rate of $104.50 per hour was an all-inclusive rate;
c) the roster would be predominately a two week on and two week off roster with the potential of a third week if a critical occasion arose;
d) work required – coating inspection and reporting, coordinating, conducting coating repairs and support of the Respondent's other work access tasks on the project; and
e) refreshment of the Applicant's IRATA certifications was required.

[51] On 22 August 2022, the Applicant received an email from the Respondent, which was titled 'ITERO Employment Contract (ABN) – Rob Benderli',[70] and included three attached documents titled 'New Supplier Details', 'Ironbridge – ABN Confidentiality Agreement' and 'Simpec Health Dec Form', which I will address shortly.

[52] The Applicant completed the New Supplier Details providing the trading name of ICAC Systems and detailing the Applicant's ABN. Bank account details referred to the Applicant's name, and information regarding insurances had been omitted by the Applicant. The Applicant also signed the Confidentiality Deed, a Deed Poll made between ICAC Systems (ABN 69 044 391 056) and the Respondent.

[53] Regarding the contractual terms set out in the email dated 22 August 2022, they included the following: (a) Sub-Contractor – ABN; (b) Coatings / Project Manager; (c) $104.50 p/hr (all inclusive flat rate); (d) 2:2 swing; and (e) 11.5hrs a day.

[54] Other matters were referred to in the email dated 22 August 2022, which included further information and certificates, and the completion of various tests, inductions, and training.

[55] Whilst no written employment contract signed by the Applicant was produced by either party, it is evident that the Applicant accepted the Respondent's offer as articulated in the emails of 19 August 2022 and 22 August 2022 and by his conduct.

[56] It is uncontroversial that the Applicant commenced work on the site and thereafter submitted invoices from ICAC Systems – Inspection Consultant for Anti-Corrosion Systems (ABN 69 044 391 056) to the Respondent which included a GST component.[71] Furthermore, the Respondent did not withhold tax from any payment made to the ICAC Systems.

[57] It was not disputed that not long after starting work at the Iron Bridge site, the Applicant's roster of two weeks on and two weeks off was changed on SIMPEC's request to longer swings.[72] Further, the parties agreed that with respect to work direction provided to the Applicant, this was provided by SIMPEC. There is no suggestion that the Respondent had the expertise or skill set to provide inspection services for coatings, whilst the Applicant was clearly trained and experienced in the subject matter.

[58] It is evident that the Applicant provided his own laptop computer, but a uniform was to be provided by the Respondent (compliant with PPE), and that the Respondent would reimburse the Applicant for travel time between Perth and the mine site, in addition to the cost of flights.

[59] Whilst the Respondent asked for information on insurances held by the Applicant, the Applicant did not provide that information and did not obtain insurance coverage whilst working for the Respondent.

4 Consideration

[60] The issue to be determined is whether the Applicant was an employee of the Respondent.

[61] In *ZG Operations Australia Pty Ltd v Jamsek* (**Jamsek**)[73] and *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (**Personnel Contracting**),[74] the High Court emphasised the central importance of the contract between the parties in ascertaining the existence and nature of any relationship between them. When characterising a relationship regulated by a wholly written, comprehensive contract which is not a sham or otherwise ineffective, the question is to be determined solely by reference to the rights and obligations under that contract. It is not permissible to examine or review the performance of the contract or the course of dealings between the parties.[75]

[62] The principles established in *Jamsek* and *Personnel Contracting* were conveniently summarised by Wigney J in *JMC Pty Ltd v Commissioner of Taxation*[76] as follows:

> 16. The fundamental principles established by the judgments of the majority of the justices in *Personnel Contracting* and *Jamsek* may be shortly summarised as follows.
>
> 17. First, where the rights and duties of the parties are comprehensively committed to a written contract, the legal rights and obligations established by the contract are decisive of the character of the relationship provided that the validity of the contract has not been challenged as a sham, or that the terms of the contract have not been varied, waived or are subject to an estoppel: *Personnel Contracting* at [43], [44], [47], [59] (Kiefel CJ, Keane and Edelman JJ),

[172] (Gordon J, Steward J relevantly agreeing at [203]). The task is to construe and characterise the contract made between the parties at the time it was entered into: *Personnel Contracting* at [174] (Gordon J).

18. Second, in order to ascertain the relevant legal rights and obligations, the contract of employment must be construed in accordance with the established principles of contractual interpretation: *Personnel Contracting* at [60] (Kiefel CJ, Keane and Edelman JJ), [124] (Gageler and Gleeson JJ), [173] (Gordon J). In that respect, regard may be had to the circumstances surrounding the making of the contract, as well as to events and circumstances external to the contract which are objective, known to the parties at the time of contracting and which assist in identifying the purpose or object of the contract: *Personnel Contracting* at [174]-[175] (Gordon J); Jamsek at [61] (Kiefel CJ, Keane and Edelman JJ), referring to *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352. The nature of the specific job that the putative employee applied for and the nature and extent of any tools or equipment they have to supply for that job may also be relevant: *Personnel Contracting* at [175] (Gordon J). It is, however, generally not legitimate to use in aid of the construction of a contract anything which the parties said or did after it was made: *Personnel Contracting* at [176] (Gordon J).

19. Third, and flowing from the first two principles, the characterisation of the relationship between the parties is not affected by circumstances, facts or occurrences arising between the parties that have no bearing on their legal rights: *Personnel Contracting* at [44] (Kiefel CJ, Keane and Edelman JJ), [173]- [178] (Gordon J); Jamsek at [109] (Gordon and Steward JJ). A "wide-ranging review of the entire history of the parties' dealings" is neither necessary nor appropriate: *Personnel Contracting* at [59] (Kiefel CJ, Keane and Edelman JJ); see also [185]-[189] (Gordon J). For a "matter to bear upon the ultimate characterisation of a relationship, it must be concerned with the rights and duties established by the parties' contract, and not simply an aspect of how the parties' relationship has come to play out in practice but bearing no necessary connection to the contractual obligations of the parties": *Personnel Contracting* at [61] (Kiefel CJ, Keane and Edelman JJ) (emphasis added).

20. It follows that the fact that the parties' subsequent conduct may not have precisely aligned with their contractual rights and obligations, or the fact that a particular contractual right may have never been exercised or utilised, will generally be irrelevant when it comes to characterising the relationship. That is so unless the manner in which the parties conducted themselves after entering into the contract was such as to establish that the contract was a sham, or that the contract had been varied, or that certain rights under the contract were subject to an estoppel.

21. Fourth, the contractual provisions that may be relevant in determining the nature of the relationship include, but are not limited to, those that deal with the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work, the provision for holidays, the deduction of income tax, the delegation of work and the right to exercise direction and control: *Personnel Contracting* at [113] (Gageler and Gleeson JJ); [174] (Gordon J), referring to *Brodribb* at 24 (Mason J); see also 36-37 (Wilson and Dawson JJ).

…

23. Fifth, the characterisation of the relationship as one of service or employment involving an employer and employee, as opposed to a relationship involving an independent contractor providing services to a principal, often hinges on two considerations. The first consideration is the extent to which the putative employer has the right to control how, where and when the putative employee performs the work: *Personnel Contracting* at [73]-[74] (Kiefel CJ, Keane and Edelman JJ); [113] (Gageler and Gleeson JJ); see also *Brodribb* at 24 (Mason J) and 36-37

> (Wilson and Dawson JJ). The second is the extent to which the putative employee can be seen to work in his or her own business, as distinct from the business of the putative employer – the so-called "own business/employer's business" dichotomy: *Personnel Contracting* at [36]-[39] (Kiefel CJ, Keane and Edelman JJ); [113] (Gageler and Gleeson JJ); cf [180]- [183] (Gordon J). Neither of those considerations are determinative and both involve questions of degree.
>
> …
>
> 26. Sixth, a "label" which the parties may have chosen to describe their relationship is not determinative of the nature of the relationship and will rarely assist the court in characterising the relationship by reference to the contractual rights and duties of the parties: *Personnel Contracting* at [63]-[66] (Kiefel CJ, Keane and Edelman JJ); [127] (Gageler and Gleeson JJ); [184] (Gordon J). The parties' "legitimate freedom to agree upon the rights and duties which constitute their relationship" does not "extend to attaching a 'label' to describe their relationship which is inconsistent with the rights and duties otherwise set forth" – to permit otherwise would elevate the freedom to "a power to alter the operation of statute law to suit ... the interests of the party with the greater bargaining power": *Personnel Contracting* at [58] (Kiefel CJ, Keane and Edelman JJ).
>
> 27. The characterisation of a relationship as being either one of employer and employee, or one involving the engagement of an independent contractor, is ultimately an evaluative judgment that takes into account the totality of the parties' contractual rights and obligations. The exercise may not necessarily be straightforward because, in some cases at least, the parties' contractual rights and obligations may point in different directions. The evaluative exercise also should not be approached on the basis that there is some checklist against which ticks and crosses may be placed so as to produce the right answer. Some degree of uncertainty is unavoidable, particularly in the case of many modern-day work or service contracts." [emphasis added]

[63] However, there will be circumstances where the contractual terms between the parties have not been reduced to writing such as the case in *Personnel Contracting*. Instead, the terms may be wholly oral (and some to be implied), for example, *Muller v Timbecon Pty Ltd* (**Timbecon**),[77] or in part oral and in part written. It is of course accepted that the approach taken in *Personnel Contracting* and *Jamsek* also applies where there is no wholly written contract.[78]

[64] In *Timbecon*, Deputy President Bell considered the applicable legal principles to determine whether Mr Muller was an employee or an independent contractor in circumstances where the contract between the parties consisted of wholly oral terms (and some to be implied). Ultimately, the Deputy President concluded that Mr Muller had been an independent contractor at the relevant time and dismissed his unfair dismissal application. That decision was later appealed and whilst permission to appeal was granted, the appeal was ultimately dismissed.[79]

[65] Deputy President Bell observed that where the contract is not wholly in writing, it is necessary, at the threshold level, to identify the terms of the contract, the parties to it, and when it was formed.[80]

[66] The Deputy President identified that in *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd*,[81] Hammerschlag J stated the principles applicable to proof of oral contracts observing that his Honour's observations were also relevant to identifying the terms of an oral agreement:

> 94 Where a party seeks to rely upon spoken words as a foundation for a cause of action, including a cause of action based on a contract, the conversation must be proved to the reasonable satisfaction of the court which means that the court must feel an actual persuasion of its occurrence or its existence. Moreover, in the case of contract, the court must be persuaded that any consensus reached was capable of forming a binding contract and was intended by the parties to be legally binding. In the absence of some reliable contemporaneous record or other satisfactory corroboration, a party may face serious difficulties of proof. Such reasonable satisfaction is not a state of mind that is obtained or established independently of the nature and consequences of the fact or facts to be proved. The seriousness of an allegation made, inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question of whether the issue has been proved to the reasonable satisfaction of the court. Reasonable satisfaction should not be produced by inexact proofs, indefinite testimony, or indirect inferences: see *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362; *Helton v Allen* (1940) 63 CLR 691 at 712; *Rejfek v McElroy* (1965) 112 CLR 517 at 521; *Watson v Foxman* (1995) 49 NSWLR 315 at 319.
>
> 95 The sensation of feeling an actual persuasion, after a contest, that an event has happened or that something exists is one which is well known and recognised by experienced trial judges for what it is.

[67] Regarding the implication of terms into an oral contract, the Deputy President considered that the relevant principles were those initially advanced by Deane J in *Hawkins v Clayton*[82] and later developed by McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd*, where in the latter case, their Honours stated:

> In such situations, the first task is to consider the evidence and find the relevant express terms. Some terms may be inferred from the evidence of a course of dealing between the parties. It may be apparent that the parties have not spelled out all the terms of their contract, but have left some or most of them to be inferred or implied. Some terms may be implied by established custom or usage, as described above. Other terms may satisfy the criterion of being so obvious that they go without saying, in the sense that if the subject had been raised the parties to the contract would have replied "of course". If the contract has not been reduced to complete written form, the question is whether the implication of the particular term is necessary for the reasonable or effective operation of the contract in the circumstances of the case; only where this can be seen to be true will the term be implied.[83]

[68] Turning to evidence of post-contractual conduct, the Deputy President stated:

> …whether evidence of conduct occurring after the formation of the contract might be had regard to in characterising the contractual relationship. I consider the judgments of Kiefel CJ, Keane and Edelman JJ at [45], and Gordon J (Steward J concurring) at [176] make it clear that such conduct cannot, as a general rule, be admitted for the purpose of construing the contract as made.[84]

[69] However, the Deputy President identified that there were exceptions to the general rule as espoused in *Personnel Contracting*. In arriving at such conclusion, he again considered *Personnel Contracting*, particularly the proposition of Kiefel CJ, Keane and Edelmann JJ at paragraph [42], where it was stated:

> A contract of employment may be partly oral and partly in writing, or there may be cases where subsequent agreement or conduct effects a variation to the terms of the original contract or gives rise to an estoppel or waiver. In such cases, it may be that the imposition by a putative employer of its work practices upon the putative employee manifests the employer's contractual right of control over the work situation; or a putative employee's acceptance of the exercise of power may show that the putative employer has been ceded the right to impose such practices.[85]

[70] The Deputy President, in addition, considered what was said by Gordon J in *Personnel Contracting* at paragraphs [177] and [183]:

> [177] Of course, the general principle against the use of subsequent conduct in construing a contract wholly in writing says nothing against the admissibility of conduct for purposes unrelated to construction, including in relation to: (1) formation – to establish whether a contract was actually formed and when it was formed; (2) contractual terms – where a contract is not wholly in writing, to establish the existence of a contractual term or terms; (3) discharge or variation – to demonstrate that a subsequent agreement has been made varying one or more terms of the original contract; (4) sham – to show that the contract was a "sham" in that it was brought into existence as "a mere piece of machinery" to serve some purpose other than that of constituting the whole of the arrangement; and (5) other – to reveal "probative evidence of facts relevant to rectification, estoppel or any other legal, equitable or statutory rights or remedies that may impinge on an otherwise concluded, construed and interpreted contract". The relevance of subsequent conduct for the purposes of a particular statutory provision, legislative instrument or award was not in issue in this appeal."
>
> [183]…That does not detract from the fact that where the contract is oral, or partly oral and partly in writing, subsequent conduct may be admissible in specific circumstances for specific purposes – to objectively determine the point at which the contract was formed, the contractual terms that were agreed or whether the contract has been varied or discharged.[86]

[71] On appeal, the appellant, Mr Muller, challenged the Deputy President's findings regarding recourse to post-contractual conduct. At paragraph [40] of the Full Bench decision,[87] it was stated that:

> The Respondent submits that the Appellant mischaracterised the Deputy President's reasoning. They say that the Deputy President reasoned, consistent with *Personnel Contracting* and *Jamsek*, that post-contractual conduct may only be relevant and available in limited exceptions. We agree with the Respondent. The Deputy President did not indicate that post-contractual conduct is "unnecessary". To the contrary, the Deputy President accepts that post-contractual conduct can be used when there is doubt about contract formation or whether it was a sham, to ascertain the scope of the terms of an oral contract and to prove variation in the contract. However, the Deputy President held that the terms of the contract, as varied in January 2017, cannot be added to, or subtracted from by reason of post-contractual conduct. We note that this would be, in effect, reverting back to the multi-factorial test which focuses on the indicia of employment as opposed to the parties' rights and duties under the contract as it was formed.

[72] The Full Bench affirmed the Deputy President's approach as reflective of the High Court's reasoning in *Personnel Contracting* and *Jamsek*, observing that in *Secretary, Attorney-General's Department v O'Dwyer*, Goodman J confirmed that *Personnel Contracting* and *Jamsek* applied where there is no wholly written contract and expressly rejected the applicability of the multi-factorial approach in such cases.[88]

4.1 The contract – formation and parties

[73] The contract was in part written, it having been formed during, or shortly following, the provision of the email to the Applicant on 22 August 2022. In any event, by the time the Applicant had mobilised to the Iron Bridge site, he had, by his conduct, accepted the terms offered in Respondent's email of 19 August 2022 and the following email on 22 August 2022.

[74] The express written contractual terms included that the arrangement was a subcontractor arrangement and that the Applicant would be engaged through his ABN.

[75] It is important to clarify at his juncture that as to the identity of the parties to that contract, they were ICAC Systems (ABN 69 044 391 056) and the Respondent. It is not the case that the Applicant was employed by an incorporated company of which he was a director, but it is apparent from his own evidence that he was a sole trader operating under the business name of ICAC systems.

4.2 The contract - express terms

[76] I find from the evidence there were express terms of the contract as follows:

a) the Applicant would perform coating inspection and reporting, coordinating, conduct coating repairs and support of the Respondent's other work access tasks on the project and would hold the requisite qualifications or certifications (IRATA certifications) to conduct such work;
b) the parties agreed that the Applicant would be referred to as the Coatings/Project Manager;
c) the parties agreed that the Applicant would be engaged as a subcontractor through his business ICAC Systems, the Applicant's ABN;
d) the Applicant would be paid the flat hourly rate of $104.50 per hour albeit it was an all-inclusive rate;
e) the Applicant would be paid a different hourly rate of pay for travel time between Perth and the Iron Bridge site;
f) in circumstances where the Applicant purchased flights, payment would be reimbursed by the Respondent on provision of tax receipts;
g) the Applicant would work a roster which would be predominately a two week on and two week off roster with the potential of a third week if a critical occasion arose;
h) the Applicant would submit invoices to the Respondent for the hours worked;[89]
i) the Applicant would work 11.5hrs a day; and
j) the Respondent would provide the Applicant with a uniform which constituted compliant PPE.

[77] Further express contractual terms included those included in the Deed Poll between ICAC Systems and the Respondent.

[78] Mr McCormack gave evidence about having specifically requested from the Applicant certificates of currency concerning workers' compensation and indemnity insurance. It is not entirely evident whether the Applicant disagreed with Mr McCormack's evidence. The 'New Supplier Details' document stated, 'Please complete the following details and return with copies

of current Insurance Certificates to accounts@iteroaustralia.com.au.[90] Mr McCormack gave evidence that whilst the Applicant was initially requested to provide insurances on the commencement of work, he was also asked several times during the lifetime of the contract to provide insurances. It is uncontroversial that the Applicant did not provide insurances to the Respondent, the Applicant giving evidence that he did not hold them.

4.3 The contract – implied and inferred terms

[79] It has been said that '"[s]ome terms may be inferred from the evidence of a course of dealing between the parties", and "[s]ome terms may be implied by established custom or usage", and "[o]ther terms may satisfy the criterion of being so obvious that they go without saying".'[91] However, in each of these cases, 'the question is whether the particular term "is necessary for the reasonable or effective operation of the contract in the circumstances of the case". In this way, even where the contract has not been reduced to a complete written form, the admissible evidence is limited to identifying those matters – formation and terms – objectively and for those limited purposes.'[92]

[80] In respect of contractual terms that were implied into the contract, it was apparent from the evidence of the Applicant and Mr McCormack that while some contractual terms were expressly agreed upon, some others were necessary for the reasonable or effective operation of the contract:

a) the hourly rate was the total amount payable to the Applicant by the Respondent and no annual leave, sick leave, superannuation or other amounts would be payable;
b) the Applicant would take direction from representatives of SIMPEC in respect of the work allocated, as might be advised from time to time;
c) the Applicant would apply his professional skill to the tasks at hand such that tasks would be completed to SIMPEC's satisfaction;
d) the Applicant would notify the Respondent and SIMPEC if he was, or was likely to be, absent; and
e) the Applicant would provide his own laptop computer.

[81] Regarding those terms that are inferred:

a) prior to working hours additional to those rostered, the Applicant would seek the approval of the Respondent;[93]
b) in circumstances where the Applicant was to work night shift, such shifts attracted an additional 15% to the flat hourly rate;
c) work hours were at the request of SIMPEC and time sheets were to be signed by SIMPEC;[94]
d) the Applicant would notify the Respondent with regard to work issues arising on site – such as working hours, roster and payment for hours worked; and
e) rope access equipment would be provided by the Respondent, with other equipment such as office equipment, and an office, to be provided by SIMPEC.

[82] In relation to the term regarding additional payment for work performed on nightshift, it is unclear on the evidence whether it was specifically discussed or contemplated on the formation of the contract. From the evidence it appears that at a later point working night shifts

became relevant and seemingly attracted an additional 15% (text messages between the Applicant and Mr McCormack in or around February 2023),[95] albeit the parties appeared to be in dispute about this point.[96]

[83] Whilst not expressly discussed as a contractual term, it appears to have been accepted by the parties that the Applicant would provide his own laptop computer and the remainder of the equipment would be provided by the Respondent or SIMPEC.

[84] According to the Applicant, the Respondent provided him with ropes access equipment to complete the assigned work.[97] The Respondent did not disagree with this contention. The Applicant stated that IRATA govern the rope access industry, and rope access service providers inspect and maintain all rope access equipment on a register certifying its use at three, six or twelve-month intervals. The Applicant gave evidence that all inspection equipment was provided by SIMPEC, including an office and work supplies. Again, the Respondent did not appear to dispute this contention.

[85] As is evident from the text messages exchanged by the Applicant and Respondent, it can be inferred that issues arising at the Iron Bridge site concerning working hours, roster, and payment for hours worked, were to be elevated to the attention of the Respondent, and not the Respondent's client, SIMPEC.[98]

4.4 Characterisation of the contract

[86] The Respondent relied upon the evidence of Mr McCormack that it had, prior to the engagement of the Applicant, contemplated, and advertised for the position of a Coatings Project Manager, a position that was advertised on a casual basis. Whilst I have noted that the Respondent provided no corroborating evidence and I am not, therefore, persuaded that this had occurred, the following point warrants mentioning. Such evidence is suggestive that the relationship initially being sought by the Respondent was one where the degree of control the Respondent would exercise would reflect the degree of control present in an employer-employee relationship in circumstances of a labour hire agreement. That is, where the Respondent contracts out its labour to a principal or main contractor.

[87] For similar reasons, I consider the contractual requirement to work on fixed days in accordance with the rosters stipulated by the Respondent's client, in substance, conveys a greater sense of control by the Respondent (and its client), an indication that the Applicant was working in the business of the Respondent, rather than his own business. This view is further supported by the evidence that the Respondent's client, SIMPEC, was authorised to provide direction to the Applicant about work allocation and prioritisation of the same.

[88] In my view, it is these terms which speak most strongly of an employment relationship, as they suggested a foundation where – from the Respondent's perspective – it was paying the Applicant to work a roster as prescribed by its client, and its client was required to authorise hours worked and approve all timesheets.

[89] The fact that the work to be undertaken could only be performed by the Applicant, who had the specialist skills to perform that work, is further strengthened by evidence that appears to suggest that there was no express right to delegate the work. So much was clear from the

contractual terms, terms that did not traverse the Applicant's right to delegate the work to be performed. It appears that any work performed by a third party would, unless paid at a rate less than his own hourly rate, be remuneration that the Applicant would not receive. These matters may also be suggestive of an employment relationship, albeit they might similarly be suggestive of a consultancy arrangement where the Applicant was a contractor. I note that, in a practical sense, such delegation or performance by a third party was unlikely to happen.

[90] I do not consider much turns on the provision of equipment given what was said by the parties concerning the regulation of rope access equipment. It is evident that the Respondent was contracted to SIMPEC to provide ropes access, and the Applicant's role involved both support of the Respondent's rope access tasks on the project and that of coatings inspections and reporting, coordinating, and conducting coating repairs (for which there was limited equipment).

[91] Turning to the Applicant's work, whilst I have identified that the Respondent's client instructed the Applicant as to work allocation and prioritisation, it is not evident that the Respondent or its client were positioned to provide instruction to the Applicant as to how[99] he performed his work regarding coatings inspections and coating repairs. This is understandable given the circumstances, circumstances where the Applicant had been specifically engaged because of the level of expertise he held in the subject matter.

[92] Whilst the Applicant sought to emphasise that in early correspondence from the Respondent, the Respondent had referred to an employment contract, one such reference whilst referring to the 'employment contract' in the same instance includes reference to the acronym 'ABN'. I do not consider Ms McGillemhaoil's reference to 'employment' was in anyway indicative of the nature of the contract between Applicant and Respondent. This is particularly the case given Ms McGillemhaoil's position in the Respondent business and her apparent confusion between a contractor and employment relationship, noting the observation of her having referenced the acronym 'ABN' within the same subject matter of 'employment contract'.

[93] Notwithstanding my above observations, and the Applicant's protestations that he did not negotiate the contractual flat hourly rate and did not request that the engagement proceed on the basis of hiring him through his ABN, the bargain that the parties ultimately struck and thereafter agreed to and acted upon, was that of a contract for service.

[94] The contract expressly provided for the engagement of the Applicant as a subcontractor through his business ICAC Systems, the Applicant's ABN (ABN 69 044 391 056). Furthermore, it was ICAC Systems that was bound by the Deed Poll, and it was ICAC Systems which was required to submit invoices for the Applicant's services. The hourly rate was the total amount payable to the Applicant by the Respondent and no annual leave, sick leave, superannuation, or other amounts were payable. Further, although SIMPEC appeared to have the right to determine the allocation of work to the Applicant, the Applicant had the right and, quite appropriately, the independence to exercise a significant degree of control over the manner of performing rope access tasks on the project and that of coatings inspections and reporting, coordinating, and conducting coating repairs. The terms of the contract showed that the Applicant was required to assume responsibility for obtaining insurances regarding workers' compensation and professional indemnity.

[95] After considering and weighing the relevant contractual rights and obligations, my evaluative assessment is that the Applicant was operating an independent enterprise trading as ICAC Systems and as part of that enterprise he was providing services to the Respondent, which ultimately subcontracted ICAC Systems to perform certain work on the Iron Bridge project. That work involved rope access and the provision of the specialist work of coatings inspections and reporting, coordinating, and conducting coating repairs, all work which the Respondent was absent the capability to perform.

[96] In addition to the matters I have already addressed, the parties adduced evidence in relation to how their relationship came to play out in practice during the period of the engagement. I have in addition considered that evidence because it would appear that the Applicant was asserting that the contractual arrangement between him and the Respondent was a sham. It is of course accepted that when characterising a relationship regulated by a wholly written, comprehensive contract, the question is to be determined solely by reference to the rights and obligations under that contract. However, that proposition does not extend to circumstances where what is alleged is a sham arrangement. I will, however, have more to say on this point shortly. Irrespective, my consideration of all the evidence does not detract from the conclusion subsequently reached.

5 Conclusion

[97] I conclude that the correct characterisation of the contract as it was formed in around August 2022 was that of an independent contracting arrangement. It is for this reason that I find that the Applicant was not an employee and, accordingly, I uphold the Respondent's jurisdictional objection. As a result, the Applicant's application under s 365 of the Act is dismissed.

[98] However, it is further observed that the Form F8 filed in these proceedings failed to provide any information at question 3.2 of that form, which asks the Applicant to state which section(s) of the Act the employer has allegedly contravened – in other words, which section of Part 3-1 of the Act has been contravened. The Applicant was informed at the hearing that his application was deficient in this respect and he had not indicated the general protection provision(s) that had been allegedly contravened. The Applicant has not sought to amend his application and at the time of writing the alleged contravention(s) had not been identified as required on the Form F8.

[99] From further enquiry at hearing, the Applicant appeared to assert that the relationship between him and the Respondent had been misrepresented as an independent contracting arrangement (see s 357 of the Act) or that there had been a contravention of s 340 of the Act on the basis of protection from unfair dismissal. That is the Applicant appeared to assert that the 'protection' or 'workplace right' was against unfair dismissal.

[100] It is noted that if it is the case that the Applicant argues that there has been a contravention of s 357 of the Act, this is not a matter for this Commission to determine. Should the Applicant believe that this provision applies to his circumstances, he can make an application to a court of competent jurisdiction. The Applicant does not require the approval of, or a certificate from, the Commission to do so.[100]

[101] A failure to identify on a Form F8 the sections of Part 3-1 which have allegedly been contravened has led this Commission in the past to dismiss applications under s 587(1)(a).[101] In my view, the deficiency in the Form F8 engages s 587(1)(a) and therefore the Commission has a discretion to dismiss the application. If I had not already determined to dismiss the application, I would do so in my exercise of discretion under s587(1)(a) because it is fair and reasonable to do so. The Applicant has taken no action to address the deficiencies in the Form F8. Further, whilst appreciating that the Applicant was self-represented, his explanations as provided at hearing regarding the purported contravention(s) did not elucidate what protection he says has been contravened under Part 3-1 that gives rise to the application under s 365.

DEPUTY PRESIDENT

Appearances:

R Benderli, Applicant.
D Branford for the Respondent.

Hearing details:

2023.
Perth (by video):
6 July.

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[1] *Coles Supply Chain Pty Ltd v Milford* (2020) 279 FCR 591, 603 [54], special leave to appeal declined in [2021] HCASL 37.

[2] Ibid 602 [51].

[3] PR764302.

[4] Witness Statement of Patrick McCormack, [3] (**McCormack Statement**); Digital Hearing Book Part 2, 54 (**DHB Part 2**).

[5] McCormack Statement (n 4) [4]; DHB Part 2 (n 4) 54.

[6] McCormack Statement (n 4) [5]; DHB Part 2 (n 4) 54.

[7] McCormack Statement (n 4) [5]; DHB Part 2 (n 4) 54.

[8] McCormack Statement (n 4) [6]; DHB Part 2 (n 4) 54.

[9] McCormack Statement (n 4) [8]; DHB Part 2 (n 4) 54.

[10] McCormack Statement (n 4) [9]; DHB Part 2 (n 4) 54.

[11] McCormack Statement (n 4) [10]–[13]; DHB Part 2 (n 4) 54.

[12] Witness Statement of Robert Benderli, [12] (**Benderli Statement**); DHB Part 2 (n 4) 4.

[13] Benderli Statement (n 12) [2]; DHB Part 2 (n 4) 3.

[14] Benderli Statement (n 12) [9]; DHB Part 2 (n 4) 3.

[15] Benderli Statement (n 12) [9]; DHB Part 2 (n 4) 3.

[16] Benderli Statement (n 12) [5]; DHB Part 2 (n 4) 3.

[17] Benderli Statement (n 12) [10]; DHB Part 2 (n 4) 3.

[18] Benderli Statement (n 12) [10]; DHB Part 2 (n 4) 4.

[19] Benderli Statement (n 12) [11]; DHB Part 2 (n 4) 4.

[20] Benderli Statement (n 12) [11]; DHB Part 2 (n 4) 4.

[21] McCormack Statement (n 4) [15]; DHB Part 2 (n 4) 55.

[22] McCormack Statement (n 4) [15]; DHB Part 2 (n 4) 55.

[23] McCormack Statement (n 4) [17]; DHB Part 2 (n 4) 55.

[24] Benderli Statement (n 12) [14]; DHB Part 2 (n 4) 4.

[25] Benderli Statement (n 12) [16]; DHB Part 2 (n 4) 4.

[26] Benderli Statement (n 12) [17]; DHB Part 2 (n 4) 4.

[27] Benderli Statement (n 12) [17]; DHB Part 2 (n 4) 4.

[28] Benderli Statement (n 12) annexure RB-5; DHB Part 2 (n 4) 20.

[29] McCormack Statement (n 4) [19]; DHB Part 2 (n 4) 55.

[30] McCormack Statement (n 4) annexure PM-1; DHB Part 2 (n 4) 58.

[31] Benderli Statement (n 12) [3]; DHB Part 2 (n 4) 3.

[32] Benderli Statement (n 12) [3]; DHB Part 2 (n 4) 3.

[33] Benderli Statement (n 12) annexure RB-7; DHB Part 2 (n 4) 23.

[34] Benderli Statement (n 12) annexure RB-7; DHB Part 2 (n 4) 23.

[35] McCormack Statement (n 4) [23]; DHB Part 2 (n 4) 55.

[36] McCormack Statement (n 4) [25]; DHB Part 2 (n 4) 56.

[37] McCormack Statement (n 4) [24]; DHB Part 2 (n 4) 55.

[38] McCormack Statement (n 4) [28]; DHB Part 2 (n 4) 56.

[39] McCormack Statement (n 4) [29]; DHB Part 2 (n 4) 56.

[40] McCormack Statement (n 4) [30]; DHB Part 2 (n 4) 56.

[41] Benderli Statement (n 12) [38]; DHB Part 2 (n 4) 6.

[42] Benderli Statement (n 12) [39]; DHB Part 2 (n 4) 6–7.

[43] Benderli Statement (n 12) [22]; DHB Part 2 (n 4) 5.

[44] Benderli Statement (n 12) [24]; DHB Part 2 (n 4) 5.

[45] Benderli Statement (n 12) [24]; DHB Part 2 (n 4) 5.

[46] Benderli Statement (n 12) [27]; DHB Part 2 (n 4) 5.

[47] Benderli Statement (n 12) [28]–[29]; DHB Part 2 (n 4) 5.

[48] McCormack Statement (n 4) [31]; DHB Part 2 (n 4) 56.

[49] McCormack Statement (n 4) [41]; DHB Part 2 (n 4) 57.

[50] McCormack Statement (n 4) [34]; DHB Part 2 (n 4) 56.

[51] McCormack Statement (n 4) [35]; DHB Part 2 (n 4) 56.

[52] McCormack Statement (n 4) [36]; DHB Part 2 (n 4) 56.

[53] McCormack Statement (n 4) [37]; DHB Part 2 (n 4) 56.

[54] McCormack Statement (n 4) [39]; DHB Part 2 (n 4) 57.

[55] McCormack Statement (n 4) [38]; DHB Part 2 (n 4) 57.

[56] McCormack Statement (n 4) [43]–[45]; DHB Part 2 (n 4) 57.

[57] Benderli Statement (n 12) [30]; DHB Part 2 (n 4) 6.

[58] Benderli Statement (n 12) [31]; DHB Part 2 (n 4) 6.

[59] Benderli Statement (n 12) [31]; DHB Part 2 (n 4) 6.

[60] Benderli Statement (n 12) [31]; DHB Part 2 (n 4) 6.

[61] Benderli Statement (n 12) [33]; DHB Part 2 (n 4) 6.

[62] Benderli Statement (n 12) [34]; DHB Part 2 (n 4) 6.

[63] Benderli Statement (n 12) [34]; DHB Part 2 (n 4) 6.

[64] Benderli Statement (n 12) [34]; DHB Part 2 (n 4) 6.

[65] Benderli Statement (n 12) [35] annexure RB-11; DHB Part 2 (n 4) 6.

[66] Benderli Statement (n 12) annexure RB-19; DHB Part 2 (n 4) 42.

[67] Benderli Statement (n 12) [6]; DHB Part 2 (n 4) 3.

[68] Benderli Statement (n 12) [17]; DHB Part 2 (n 4) 4.

[69] McCormack Statement (n 4) annexure PM-1; DHB Part 2 (n 4) 58.

[70] Benderli Statement (n 12) annexure RB-7; DHB Part 2 (n 4) 23.

[71] Benderli Statement (n 12) [34]; DHB Part 2 (n 4) 6.

[72] Benderli Statement (n 12) [41]; DHB Part 2 (n 4) 7.

[73] (2022) 96 ALJR 144.

[74] (2022) 96 ALJR 89 (**Personnel Contracting**).

[75] Ibid [40]–[62] 104–9 (Kiefel CJ, Keane and Edelman JJ), 129–131 [172]–[178] (Gordon J), 138 [203] (Steward J).

[76] [2022] FCA 750, [16]–[27]. These principles were also adopted by Goodman J in *Secretary, Attorney-General's Department v O'Dwyer* [2022] FCA 1183, [27] (**O'Dwyer**).

[77] [2022] FWC 1685 (**Timbecon**).

[78] *O'Dwyer* (n 76) [27].

[79] *Muller v Timbecon Pty Ltd* [2023] FWCFB 42 (**Timbecon Appeal**).

[80] *Timbecon* (n 77) [84].

[81] [2015] NSWSC 451.

[82] (1987) 164 CLR 539, 571.

[83] (1995) 185 CLR 410, 442.

[84] *Timbecon* (n 77) [98].

[85] *Personnel Contracting* (n 74) 104 [42].

[86] Ibid 130–1 [177], 133 [183].

[87] *Timbecon Appeal* (n 79).

[88] *O'Dwyer* (n 76) [28]–[29].

[89] Benderli Statement (n 12) [34]; DHB Part 2 (n 4) 6.

[90] DHB Part 2 (n 4) 68.

[91] *Personnel Contracting* (n 74) 135 [190] (Gordon J).

[92] Ibid.

[93] DHB Part 2 (n 4) 27–9.

[94] Ibid.

[95] Ibid 29.

[96] Ibid 26.

[97] Benderli Statement (n 12) [22]; DBH Part 2 (n 4) 5.

[98] DHB Part 2 (n 4) 27–9.

[99] *Personnel Contracting* (n 74) 130 [175] (Gordon J).

[100] See *Drivas v Hypoxi Body Shaping of Kew Pty Ltd* [2012] FWA 10715.

[101] See, eg, *Lawless v Beach Energy Ltd* [2021] FWC 4574; *Di Labio v Bags & Baggage* [2014] FWC 7021.