DECISION

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

Ali Raza
v
First Call Services
(U2022/7229)

Nilakshi Kanapaddala Gamage
v
First Call Services
(U2022/7234)

DEPUTY PRESIDENT HAMPTON ADELAIDE, 9 MAY 2023

Termination of employment – two related applications heard together - jurisdictional objection – whether applicants were employees of respondent or engaged by labour hire companies – jurisdictional objections dismissed – applications to be further listed.

1. What this decision is about

[1] This decision concerns applications by Ali Raza **(Mr Raza)** and Nilakshi Kanapaddala Gamage (**Ms Gamage**) – collectively the **Applicants** – each seeking an unfair dismissal remedy pursuant to s.394 of the *Fair Work Act 2009* (Cth) (**Act**). As the applications made by Mr Raza and Ms Gamage largely concern the same factual and legal circumstances, by consent, they have been dealt with together.

[2] Mr Raza and Ms Gamage had been initially engaged as Hotel Quarantine Security Officers in Victorian hotels during the Covid-19 Pandemic and as Customer Service Officers for Metro Trains in Melbourne. This work was undertaken for the respondent in this matter, First Call Staffing Pty Ltd (trading as First Call Services)[1] (**FCS** or **Respondent**). Later, both Applicants undertook operations roles in the business of the FCS. The Applicants contend that they were employed and dismissed by FCS. The Employer response forms filed by FCS in relation to Mr Raza and Ms Gamage, and the written submissions made by FCS, contend that it was never the employer of the Applicants. Rather, as finally stated, FCS contended that various labour hire companies, including at the time of the cessation of the relationship, Secure Services Pty Ltd (**Secure Services**) were the party to any employment or contractual relationship with Mr Raza and Ms Gamage.

[3] For reasons outlined later, for these applications to be heard and determined on their merits, it is necessary for the Applicants to have been employed (and dismissed) by FCS. Accordingly, this dispute goes to the jurisdiction of the Commission to hear the substance of the applications (**jurisdictional issue**) and is the focus of this Decision.

[4] Importantly, the jurisdictional issue is not merely a dispute about how any relationship between the Applicants and FCS and Secure Services operated and how it should be characterised. Rather, the Applicants entirely deny any (knowing) involvement with Secure Services (and the other labour hire companies now said by FCS to be involved) in the context of some confusion about which entities were paying them from time to time for the work undertaken for FCS.

[5] The conclusion of each Applicant's engagement with FCS was communicated to them by FCS via email on 28 June 2022. This took place in the context of the Respondent being of the view that the Applicants' "recent failings, non-actioning and non-responsiveness has resulted in a loss of commercial confidence which cannot be overcome." Although serious doubts about the validity of this view have subsequently emerged, this is beyond the present focus of this Decision.

[6] The Commission conducted an MS Teams Video Hearing to determine the jurisdictional issue on 25 November and 19 December 2022 and 23 February 2023. Mr Raza and Ms Gamage represented themselves. Mr Joseph D'Abaco, of counsel, appeared with permission[2] on behalf of the Respondent.

[7] The matter has proceeded with some difficulty. Although there is common ground that the Applicants worked within the Respondent's business between early April 2020 and late June 2022, most of the associated arrangements and legal relationships are squarely in dispute.

[8] Indeed, the Applicants considered that the Respondent's case was a complete fiction, and this led to what appeared to be a reluctance to initially disclose the precise basis of their case, and certain case materials, to the Respondent in advance of the hearing for fear that a response would be concocted. This, and the need to ensure procedural fairness for FCS in that light, impacted upon the time necessary to hear the applications. Further, despite considerable latitude and non-partisan assistance from the Commission regarding evidence and procedures,[3] the Applicants were not always able to fully appreciate the nature and form of evidence that was relevant to their cases. Some entirely relevant material was also provided by the Applicants relatively late into the hearing. Given the fundamental dispute about the basic facts, I generally accepted the documentary and related voice mail material, the veracity of which was not in dispute, and permitted it to be put to the Respondent's key witness, who was on face value directly able to deal with the issues raised. In so doing, I considered the nature of the Respondent's representation and the capacity to fairly deal with that material at shorter notice. However, in assessing weight, I have also had regard to the absence of evidence from the Applicants in some instances to support some of the associated contentions. Further, there were some contentions that were advanced by the Applicants, about the veracity of certain documents and the impact of relationships between certain individuals, only during final submissions, which were not previously known to the Commission and not put to the relevant Respondent witnesses. Given the obligation to afford natural justice and fairness to all parties, this has impacted upon some of the findings that can ultimately be made about those particular aspects.

[9] However, the evidence about the circumstances applying in the last iteration of the roles undertaken by the Applicants, and the conclusion of the relationships, was clearer and this is significant for reasons that will become clear.

[10] There was also some change in the Respondent's case, from initially focusing upon Secure Services as the "employer" of the Applicants, to a contention advanced largely in final submissions that there were a series of labour hire companies that engaged each of the Applicants ending with Secure Services at the time of the conclusion of the relationship. I will also return to this aspect.

[11] I confirm that there are 2 applications and I have considered them in their own context. Ultimately, I have determined that the same result follows for each.

[12] For reasons that follow, I have determined that the Applicants were engaged by FCS and were employees at the time of their dismissal. The basis of those findings is set out in the Decision that follows.

2. The cases presented by the parties on the jurisdictional issue

2.1 Mr Raza and Ms Gamage

[13] The Applicants, in effect, presented joint cases in this matter. Whilst there are some factual differences concerning dates and roles, the relevant propositions and contentions concerning the jurisdictional issue were consistent. They, appropriately, relied upon each other's evidence and submissions where relevant.

[14] The fundamental proposition advanced by the Applicants is that they were directly employed by FCS, worked throughout their employment in that business and were ultimately dismissed by it. They both contend that they were not aware of the existence and alleged involvement of Secure Services (or any other labour hire entity) until the Respondent outlined its response to the applications and that they had no known dealings with Secure Services at any time.

[15] Mr Raza contends he was first employed by FCS in April 2020 during the Covid-19 pandemic as a security officer for quarantine hotels for overseas travellers in Melbourne and later as a customer service officer and a team leader at different Victorian metropolitan train stations (guiding and giving the direction to the customers for replacement buses and managing staff at various train stations). He contends that after some time, FCS requested Mr Raza to work for its own Operations team and an interview was arranged and a position in the operations team obtained. This work could be undertaken from home, however Mr Raza continued to work in onsite roles for some time. In early 2021 Mr Raza moved to Mount Gambier in South Australia for personal reasons but continued to undertake his operations role on-line and remotely until he was terminated in June 2022.

[16] Mr Raza contends that he provided his personal details, tax file number and superannuation fund details to FCS prior to his commencement of work. Further, the work roster was sent directly from FCS as was the termination notification.

[17] Mr Raza provided a statement of his evidence[4], a further statement in support of Ms Gamage[5], and a supplementary witness statement[6].

[18] It is Ms Gamage's contention that she was also first employed by FCS at the same time as Mr Raza in April 2020 during the Covid-19 pandemic. Further, Ms Gamage was employed as a security officer for quarantine hotels and later as a customer service officer and a team leader at various Victorian metropolitan train stations. Ms Gamage also contends that the FCS owner and director Mr Robert Wall requested that she, via Mr Raza, work for the FCS Operations team. This role involved monitoring rosters, communicating with staff and clients via telephone and email and authorising time sheets for other employees. Ms Gamage contends that she attended the Respondent's Preston offices for training purposes to undertake the operations role and did not ever visit the offices of Secure Services. After her initial training Ms Gamage was working from home undertaking the operations duties, but also continued to undertake her onsite duties for a period. In mid-2021 Ms Gamage also moved to South Australia due to personal commitments but continued to undertake the operations role until she was terminated on 28 June 2022.

[19] Ms Gamage contends that like Mr Raza, she provided her personal details, tax file number and superannuation to FCS prior to her commencement of work. These documents were not supplied by her to any other entity. Further, the work rosters were sent directly from FCS as was the termination notification.

[20] Ms Gamage provided a statement of her evidence[7] and a further statement in support of Mr Raza,[8] and a supplementary witness statement.[9]

[21] Both Applicants contend that the Commission should take into account that the Respondent changed its position, from the basis that Secure Services was the relevant party from 2020, to the point where it now contends that there were multiple labour hire companies involved. Further, they contend that there was no evidence of any connection between them and Secure Services. Rather, the Applicants contend that FCS was using different companies to pay the employees, "just to save or hide the tax involved." During final submissions, the Applicants also referred to Secure Services as potentially being a "dummy company", just to show that payments came from them and not the Respondent.

[22] In addition, the Applicants urged the Commission to find that the evidence provided by the Respondent was both unreliable and inconsistent, and in effect, should be rejected.

[23] Mr Raza and Ms Gamage both relied upon various authorities that emphasise the degree of control exercised by the employer as indicators that in this case, FCS was the employer and that they were employees.

[24] In addition to their own evidence, the Applicant's subpoenaed the following:

- Mr Mohammed Ahmed, Operations Manager, Secure Services Victoria Pty Ltd;[10] and

- Mr Waleed Shah, Consultant (described at one point in the documentary evidence as being a Financial Controller for FCS).

2.2 First Call Services

[25] It was the Respondent's initial contention that both Mr Raza and Ms Gamage were not its employees (or workers) and instead were "labour hire" workers whose services were provided by a particular labour hirer company; namely Secure Services. During the course of the hearing, the Respondent adjusted its case from the contention that Secure Services provided the services of the Applicants at all times to asserting that there were 3 other labour hire companies that were involved in providing the services of the Applicants. I observe that this largely arose from the material provided by the Applicants in response to a subpoena for documents, rather than from any material or evidence that it provided. The Respondent further contends that the FWC does not have jurisdiction to consider the applications before it and both should be dismissed.

[26] FCS accepts that the Applicants worked in its business, providing services between April 2020 until they were terminated on 28 June 2022. Initially both Applicants worked as security guards (in various roles) and from approximately July 2021, they worked monitoring telephones and staff of the Respondent between 8.00pm and 8.00am.

[27] The Respondent contends that there was no written agreement between the Applicants and the Respondent regarding their relationship. The only written agreement relating to the Applicants' relationship with the Respondent is a written agreement entitled "Contractor Services Agreement"[11] dated 14 February 2020 between the Respondent and Secure Services. The applicants are not a party to that agreement.

[28] FCS accepts that due to what it described as "performance-related reasons", it directly informed the Applicants on 28 June 2022 that their services would no longer be required.

[29] Further, the Respondent submits that in order for a person to be protected from unfair dismissal they must be an employee as set out in s.382 of the Act. To this, the Respondent submit that at no time was the Respondent the employer of Mr Raza and Ms Gamage since there is no written employment agreement and no direct relationship between the Applicants and the Respondent. The Respondent's reasoned that a tripartite relationship existed instead, comprising of the Respondent, Secure Services, and either of the Applicants at any given time.

[30] FCS contends its only legal relationship (at the relevant time) was with the labour hire company, Secure Services and that legal relationship is embodied in the Contractor Services Agreement. Secure Services engaged the Applicants and provided their services as labour hire workers to the FCS pursuant to the terms of the that agreement.

[31] FCS emphasised that the documentation confirmed that there was a contract between it and Secure Services, that Secure Services had invoiced FCS for the provision of labour and that the Applicants had been paid by a series of companies, and not by the Respondent.

[32] As finally advanced, the Respondent contends that the legal relationship with the Applicants during the time in which they provided services to it was with:

- Elite Protection Systems (EPS);
- M Solutions Pty Ltd (MS);
- Glade Management Services (Glade); and finally
- Secure Services, until the cessation of employment.

[33] FCS contends that Mr Raza and Ms Gamage bear the onus of establishing, on the balance of probabilities, that they were at all relevant times employees of the Respondent and in that regard the following omissions were said to be notable:

- There is no evidence before the Commission of any agreement, be it in writing or be it verbal, between the applicants and FCS in relation to their alleged employment as employees, or indeed, their direct engagement by FCS in any other capacity, such as a contractor.
- With the exception of a single, one-off payment to each of the applicants on 10 October 2020, some seven months after the relationship commenced, there is no evidence before the Commission of any payments directly from FCS to either of the Applicants in relation to the work that they performed.

[34] Rather, FCS contends that the evidence is that from the time the Applicants commenced working for FCS they did so as labour hire employees, or labour hire workers. Indeed, FCS contends that they were actually employed by external labour hire providers to FCS, and then afterwards, after a period of some approximately five to six months, they were engaged, it appears, as contractors, by Secure Services who in turn provided their services to FCS.

[35] FCS also contends that the authorities make it clear that in a labour hire arrangement, the fact that the "host employer" may exercise practical control over the actual work and may directly communicate changes in the work arrangements including the cessation of those relationships, is not an indicator that the host employer was the actual party to any contractual relationship with the workers involved.

[36] Finally, FCS contends that there was no evidence of any corporate relationship between First Call and Secure Services, beyond the contracts that existed for the provision of the labour. As a result, the true primary relationship is between the labour hire company (Secure Services) and the person providing his or her labour (the Applicants) and not truly between that person and the business in which the labour is ultimately utilised (FCS).

[37] The Respondent called the following witnesses to give evidence:

- Mr Gregory Metzger, former Chief Executive Officer, First Call Staffing Pty Ltd;[12]
- Mr Mohammed Ahmed, Operations Manager, Secure Services Victoria Pty Ltd;[13] and

- Mr Robert Wall, Director, First Call Staffing Pty Ltd.[14]

3. Observations on the evidence

[38] I have made some observations about the evidence earlier in this Decision. However, given the factual disputes, it is also appropriate that I outline my findings and approach to the witness evidence in this matter.

[39] In respect of both Applicants, I found that they had a tendency to assume the worst motive or action in the absence of any direct understanding and this has led me to treat their evidence with some caution. However, in terms of those events and actions that they directly participated in, their evidence was plausible, and I have generally accepted it. This includes their evidence about how they became involved with working for FCS and the absence of any dealings with other entities in connection with that work. The Applicants were strongly pressed under cross-examination about the consistency of their evidence in light of their taxation returns, which did not contain payments made to them where no pay as you go (PAYG) tax was deducted and no PAYG summary provided. Their evidence about that may have been somewhat naïve, but given they have directly reported these events to the ATO and sought clarification about their obligations, there is no basis to draw any negative inference from those events. Their explanation that they raised with FCS (Mr Wall) concerns about the absence of paperwork in connection with their work for FCS, and that they appeared to have been paid by different entities about which they did not have knowledge of, was also convincing and I have accepted it.

[40] Where the Applicant's expressed opinions in their statements about the consequences of certain actions, I have treated this material as submissions. To the extent that the statements provided by the Applicant's referred to factual matters involving the other, I have only given weight to facts that each actually witnessed.

[41] Despite evidence from Mr Ahmed, Operations Manager of Secure Services, there was a complete absence of any direct evidence from Secure Services about any arrangements or documentation that may have taken place concerning the Applicants prior to May 2022. I generally accept his evidence that when he commenced in May 2022, he found that to be the case. Mr Ahmed's evidence that since May 2022 and up until the time of the dismissals in early July 2022, Secure Services made payments to the Applicants for the work they had undertaken for FCS was plausible. The suggestion made by the Applicants in final submissions that the documents provided with his statement were fraudulent, was not raised prior to that time and was not put to Mr Ahmed. I cannot make such a finding given the circumstances. I do however place no weight upon the suggestion in Mr Ahmed's statement that the Applicants started working for Secure Services in 2020. There are no records to support that contention, it is contrary to the documentary material that is before the Commission, and Mr Ahmed provided no proper basis for that proposition.

[42] The Applicants subpoenaed Mr Waleed Shah, who had dealings with them in the context of the work they were undertaking for FCS. Mr Shah's evidence was that he was an independent consultant who sometimes performed work for both FCS and Secure Services. Mr Shah's

evidence was unsatisfactory in some respects. It was at times inconsistent and unconvincing. I observe that Ms Shah's involvement in the affairs of FCS would have made it very difficult for the Applicants to know who (which entity) they were dealing with and would reasonably have been left with the impression that Mr Shah was a Financial Controller[15] working for FCS. Mr Shah's evidence that the Applicants were working for Secure Services from before November 2020, was unconvincing and not supported by any objective evidence.

[43] Mr Metzger was a solid witness and I accept the broad thrust of his evidence about how labour hire arrangements might work. However, he had little first-hand knowledge of the matters directly affecting the Applicants at the time and his evidence was largely based upon hearsay. This impacts upon the weight to be afforded to that evidence, particularly in the almost complete absence of business records to support the contentions about the arrangements between what he was describing as the triangular relationship involving the Applicants, FCS and Secure Services (or any other labour hire provider). The Services Contract between FCS and Secure Services and the invoices from Secure Services and FCS for the provision of labour being the exceptions. However, there was no documentary or first hand-evidence that directly tied those arrangements to the Applicants. Mr Metzger's evidence about whether he knew Ms Gamage when they were both attending/working at the Melbourne Cricket Ground was unconvincing but of no great moment.

[44] Mr Wall was not an impressive witness. He was not careful with his evidence and tendered to generalise. He also displayed a poor recall of events in which he would have had an involvement and had a tendency to downplay his role in operations and when some of the objective evidence revealed a hands-on approach at times. Mr Wall had no real knowledge, that he revealed, about how and when the Applicant's became involved with the business and when and how the alleged changes between the labour hire companies and the roles of the Applicants occurred. This contrasts with the evidence of the Applicants, which was reliable and in part supported by objective evidence, that Mr Wall was directly involved in certain stages of their engagement and roles, including the Applicants becoming part of the Respondent's operations area where he regularly dealt with Mr Raza, in particular, in that capacity.

[45] I observe that prior to the hearing, the Applicants sought that a person be subpoenaed to attend the hearing based upon the apparent fact that he had signed the Services Agreement between FCS and Secure Services. As part of that application, no other basis was advanced that might lead to a suggestion of directly relevant evidence and that application was denied. During the cross-examination of Mr Wall, the last of the Respondent's witnesses, a potential basis to broaden the relevance of that person (an association with Mr Wall) was disclosed. However, this was far too late to be considered.

[46] Ultimately each party has the responsibility to conduct their own case. I must decide these matters based upon the evidence that is properly before the Commission, and I have done so.

4. Findings about the broad context

[47] FCS is, in effect, a labour hire provider in its own right. Its substantive business is to provide labour to various organisations in the security, retail and many other business sectors. It is based in Victoria.

[48] During the Covid-19 pandemic which substantially commenced in 2020, FCS also provided services to the Victorian Government in terms of labour to staff both security and customer service functions at quarantine hotels and within the Victorian public transport sector. It is likely that due to the urgency of making staffing arrangements and the complications for providing staff during that period, administrative and other corners were cut to get the positions filled. This included not following what would normally be applied recruitment and employment processes. I so find. This may provide a context for some features of the very early dealings between the Applicants and FCS, but does not explain the events as they unfolded with respect to the Applicant's work for FCS.

[49] FCS's business operational model involves a number of directly employed staff, approximately 100 in October 2022, and the bulk of the staff being supplied to it by other labour hire companies for, in effect, on supply to various host employers. At times, there were 6 such labour hire suppliers.

[50] The precise contractual and business relationships between FCS and its (other) supplier labour hire companies is not before the Commission and it is plausible that they have close relationships and work interchangeably. However, the evidence that is before the Commission does not support such a finding.

[51] The only evidence that is before the Commission, which I also accept, is that when the Applicants became aware of the availability of work with FCS, they each supplied their TFN, visa information and superannuation forms directly to FCS to, in effect, apply for employment. It is probable that these were then provided, by FCS, to the various labour hire companies who made payments to the Applicants, in effect, on behalf of FCS. There is no reliable indication that any other party, including the other labour hire companies, was involved in the establishment of the working relationships.

[52] There is no indication of any written employment or engagement arrangements between the Applicants and FCS, or the Applicants and any other of the labour hire companies said to have engaged them.

[53] The Applicants worked at various locations and roles assigned to them by FCS commencing in 2020. This work was undertaken for FCS in meeting its obligations to supply labour.

[54] The Applicants continued to work with some other labour hire companies, not related to this matter, for periods after they commenced undertaking work for FCS.

[55] To the extent that Mr Shah may have been involved at times in the working arrangements at various time, there is no reliable indication that the Applicants were advised of the purported involvement of any third party.

[56] I find that as some point relatively early on in their work with FCS, the Applicants approached Mr Wall and sought clarification about their terms and conditions, and they were advised to the effect that this would be finalised when the arrangements with the Victorian Government were confirmed. Mr Raza also raised the fact that they were receiving payments with different (unknown) names on payslips and was advised by Mr Wall to the effect that they (the Applicants) were being paid in any event and that it (FCS) were working it out.[16]

[57] The evidence[17] reveals that various entities transferred monies to the Applicants for the work undertaken by them for FCS. They were:

- Elite Protection Systems (EPS) for a period of approximately 3 months in 2020;
- M Solutions Pty Ltd (MS) for a further period in 2020;
- Glade Management Services (Glade); and finally
- Secure Services sometime after August 2021 until the cessation of employment.

[58] Mr Raza also worked for other businesses during the period when he undertook work with FCS. This included earning in the order of $40,000 with a security firm during the 2021/22 financial year. In addition, some Covid-19 related isolation payments were received from the Commonwealth Government.

[59] A contract existed between FCS and Secure Services for the provision of labour hire employees to FCS. This provided:

> "**2. APPPOINTMENT OF CONTRACTOR**
>
> **2.1 Appointment**
>
> 2.1.1 The Company appoints the Contractor to provide the Services on the terms set out in this Agreement. The Contractor accepts the appointment in accordance with the terms of this agreement.
>
> 2.1.2 The Contractor has no claim against the Company in respect of personal disability·; accident or workers compensation in respect of its engagement under this Agreement.
>
> 2.1.3 Neither the Contractor nor any of its employees, agents or sub-contracts has any claim against the Company in respect of annual leave, public holidays, sick leave and long service leave in respect of its engagement under this Agreement.
>
> **2.2 Sub-Contractors**
>
> The Contractor may appoint sub-contractors to carry out its obligations under this agreement.
>
> **3. PROVISION OF SERVICES**

3.1 The Contractor warrants that it possesses, or is able to procure via the Contractor Personnel, the qualifications, expertise and experience appropriate to perform the Services and acknowledges that its senior personnel are required to perform the Services.

3.2 The Contractor must, and warrants that it will:

(a) provide the Services with due skill and care and to the best of the Contractor's knowledge and expertise, and comply with all laws and any relevant policies of the Company in carrying out such Services;

(b) must follow any reasonable direction in relation to the Services given to the Contractor by the Company from time to time, including the time within which the direction is to be complied with;

(c) otherwise carry out and complete the Services in accordance with the Agreement;

(d) not act dishonestly, fraudulently or illegally;

(e) not act in a manner which is or is likely to bring the Company into disrepute or affects the Company's reputation; and

(f) not act in a manner which leads to a material adverse change in the value, products and or services, operations, operational ability or resources of the Company.

4. CONTRACTOR PERSONNEL

4.1 Contractor's Key Personnel

The Contractor must ensure that the Key Personnel lead and personally oversee the performance of the Services on behalf of the Contractor and to the extent to which each Key Personnel has been allocated to perform the Services.

4.2 Responsibility for Contractor Personnel

The Contractor will be responsible for all action, statements, neglect and omissions of the Contractor Personnel with respect to the Services and this Agreement.

5. ADDITIONAL SERVICES

5.1 The Company and the Contractor may, from time to time, enter into and execute a further agreement detailing terms and conditions (in addition to those set out in this Agreement) upon which the Company will purchase and the Contractor will supply additional services.

5.2 Any further agreement will take effect from the relevant commencement date and will continue until it is validly terminated pursuant to the terms of this Agreement.

5.3 To the extent that there is any inconsistency or conflict between the terms and conditions set out in a further agreement and this Agreement, the terms and conditions set out in this Agreement will prevail."

[60] Although the contract was dated 14 February 2020, there is no reliable evidence that Secure Services played any role in the engagement and/or payment of the Applicants until August 2021, when the transfer of payments commenced. There is also no reliable evidence that Secure Services played any role in relation to the work the Applicants performed for FCS, beyond the payments that were made to the Applicants.

[61] There is no direct evidence that Secure Services charged FCS for the supply of the Applicants, or the payments made to them, although the latter is feasible.

[62] During the hight of the Covid-19 Pandemic, both Applicants required work permits to enable them to travel to the various work locations that were assigned to them by FCS. I find that a work permit[18] was provided to each of them by FCS. Although the work permits refer to the Applicants as employees, I do not consider that this is decisive for present purposes. I also accept that this was a proforma document and that Mr Wall may not have personally signed the permits.

[63] In early or mid-2021, the Applicants moved to Mt Gambier in South Australia. This meant that they were no longer able to undertake the various shifts that would otherwise have been allocated to them by FCS in Victoria. FCS has no labour supply contracts in South Australia.

[64] I find that Mr Wall proposed that Mr Raza undertake an FCS operations role prior to the Applicants change in residential location. Further, I find that Mr Wall, via Mr Raza, sought to also have Mr Gamage work in an associated administration/operations role. Both of the Applicants agreed to do so, and they each commenced work in those roles. These roles involved them directly assisting in the administration of the FCS labour hire contracts including the allocation and organisation of labour to clients including a major retail chain. In so doing, each had access to the internal administration systems of FCS and each acted on behalf of FCS.

[65] I find that Ms Gamage attended the Respondent's Preston offices for training purposes to undertake the operations role.

[66] I am also satisfied that Mr Wall regularly engaged with Mr Raza, in particular, in the context of these operational roles.

[67] The Applicants worked on-line from their Mt Gambier residence[19] and for the most part, undertook what might be described as a night shift. Both Applicants undertook significant weekly hours on the FCS work from at least June 2021. Some other work was performed by Mr Raza during this time and both Applicants had less, and somewhat fluctuating hours, early in their FCS administration roles.

[68] By June 2022, Mr Raza was paid in the order of $2,100 per week for the work he performed for FCS. This did fluctuate to some degree depending upon a change in hours and

sometimes represented around $1,500 per week. Ms Gamage was generally paid $2,100 per week at that time. The precise details of the payments made to them are evident from their financial records that are before the Commission.

[69] I find on balance, that during the period that the Applicants acted in the operations roles for FCS, these payments were transferred to them by Secure Services without the deduction of taxation. No superannuation payments were made with respect to the payments transferred by Secure Services. The payments appeared in the bank statements of each of the Applicants without any clear indication as to which entity was making the payment. Secure Services was certainly not clearly identified as the payee. There is no reliable indication that the Applicants supplied invoices to any organisation in connection with their work for FCS or sought to rely upon their ABNs for that purpose. There is also no reliable indication that FCS or Secure Services required or expected these arrangements to apply to the Applicants. Although the absence of the PAYG deductions and superannuation payments would have been known the Applicants, there is no reliable suggestion that this change in payment arrangement was the subject of any agreement or discussions with the Applicants.

[70] As indicated earlier, the Applicants did not include the income from their work with FCS, where no PAYG taxation was deducted, in their relevant taxation returns on the basis that no PAYG statement had been issued for inclusion in that return. Although this was naive, the Applicants have reported this to the ATO and, in effect, sought clarification about the relevant responsibilities.

[71] There is evidence that in August 2021 a single payment was made directly by FCS to each of the Applicants. Given the nature and timing of this payment, it is possible that this was in the form of a reimbursement of expenses, and I do not consider this to be significant for present purposes.

[72] On 28 June 2022, FCS wrote to the Applicants in the following terms:

> "Hi Ali/Nikki,
>
> Unfortunately, recent failings, non-actioning and non-responsiveness has resulted in a loss of commercial confidence, which cannot be overcome.
>
> Therefore, it is with regret that I must inform you that your services will no longer be required by First Call Services, effective immediately.
>
> We would like to thank you for past services and wish you all the best for the future
>
> Kindest Regards,
>
> Andrew van Horen
> Operations Manager.[20]

[73] The evidence about how and when Secure Services were advised of the termination of the Applicants is unclear. Secure Services played no role in the dismissals, the communication of the dismissals, or the post-dismissal discussions between the Applicants and FCS that followed the termination. Payments to the Applicants ceased.

5. Were Mr Raza and Ms Gamage employees of First Call Services?

[74] This question has 2 related parts. Firstly, whether the Applicants were each engaged by FCS at the relevant time. Secondly, whether any relationship between the Applicants and FCS was that of employment within the meaning of the Act. The history of the arrangements is important, and this sets the context. However, given the nature of the applications, the question becomes whether the Applicants were employees of FCS at the time of the alleged unfair dismissals.

[75] The Applicants have each taken and advanced their applications on the basis that FCS was the employer party. They have also declined to modify their applications to cite Secure Services as their employer. As a result, it will be necessary that the Commission find that it was FCS which was the party to any employment contract.

[76] Further, to make and advance these applications, the Applicants must each have been an employee within the contemplation of the Act. This arises from, amongst other sources, the requirement in s.382 that in order to be protected from unfair dismissal, the person (the Applicant in each case) must be an employee who has served at least the minimum employment period. Under s.380 of the Act the terms "employee" and "employer" are defined by reference to the concepts of national system employee and national system employer as defined in s.13 and s.14 respectively.

[77] Relevantly for present purposes, employee has its normal meaning which imports the common law test as to what constitutes an employee and employment.[21]

[78] In assessing these two aspects, although FCS has advanced a jurisdictional objection, given the nature of the issue raised I consider that the Applicants bear the onus to persuade the Commission that it has the necessary jurisdiction to deal with each application based upon relevant evidence.

[79] The authorities acknowledge that as a practical reality of labour hire arrangements, the hirer of the labour will exercise control over the work of the employee and how that work is performed. However, this does not by itself result in the hirer of the labour becoming the employer of that labour.[22] In *FP Group Pty Ltd v Tooheys Pty*[23] the Full Bench of the Commission observed:

> "[29] From a practical point of view, it is necessarily a fundamental feature of any labour hire arrangement that the hirer of the labour is able to exercise a large degree of management control over the performance of the work of the hired workers and is also able to integrate them to a significant degree into its existing work systems. Without this, the arrangement would become unworkable. In our experience, labour hire arrangements almost invariably involve the hirer being able to communicate directly to the hired worker instructions concerning the performance of work without the interposition of the labour hire company. That, without more, cannot operate to render the hirer the employer of the hired worker."

[80] The plurality of the High Court took the same general view in *Personnel Contracting* in the following terms:

> "Contrary to Construct's submissions, and to the observations of Lee J there is nothing in the tripartite nature of a labour-hire arrangement that precludes recognition of Construct's contractual right to control the provision of Mr McCourt's labour to its customers, and the significance of that right to the relationship between Construct and Mr McCourt. As between Construct, Mr McCourt and Hanssen, it was only by reason of Mr McCourt's promise to Construct that Mr McCourt was bound to work as directed by Hanssen."[24]

[81] In *Personnel Contracting*, "Construct" was the labour-hire firm, "Hanssen" was the host business where the work was performed and Mr McCourt was the worker involved. The High Court found that Mr McCourt was an employee of Construct. In so doing, the High Court took issue with the notion that "Odco-style" triangular labour-hire arrangements are not capable of creating relationships of employment.[25]

[82] I deal firstly with whether FCS engaged the Applicants to work for it or whether Secure Services (and/or other entities) were the party to any relationship for the Applicants to provide the work involved.

[83] There were no written contracts between the Applicants and FCS or between the Applicants and Secure Services. There was a Contractor Services Agreement, dated 14 February 2020, under which Secure Services would provide labour to FCS. Assuming for present purposes that this document was legitimate, the real issue is whether this contract was applied in practice to engage the Applicants. Although originally relied upon by the Respondent as the basis for the arrangement for the entire period, there is no reliable suggestion that the Applicants had any dealings with Secure Services (even in relation to payments) prior to August 2021.

[84] There is no evidence of any engagement of the Applicants by Secure Services (or any other labour hire company) and the only evidence before the Commission points to each of the Applicants making direct arrangements with FCS for the provision of their services.

[85] In terms of the practical arrangements for the work, there is also no evidence of any role played by Secure Services (or any other labour hire company) in terms of the location, roles, assignments or cessation of the Applicants' engagements. The evidence is that FCS undertook all of those functions directly. I will return to the significance of these events.

[86] Further, the fact that the Applicants were not party to the Contractor Services Agreement does not of itself directly determine the nature of any relationship between the Applicants and FCS.

[87] The weight of the evidence is that each Applicant's TFN and Superannuation details were provided by them to FCS as part of seeking employment and recorded within FCS's systems. The only available inference is that these details were supplied to the (other) "labour hire" businesses by FCS which then utilised that information to make the payments – along with the details of the hours worked and roles undertaken by the Applicants, which were also provided by FCS. In the case of Secure Services, payments were made without reference to the TFN and no taxation was deducted. However, there is no evidence to suggest that the

contractual nature of any relationship between any of the relevant parties was materially different to that which existed up until that point.

[88] By the time that the dismissals took place, payments were being made by Secure Services for the work undertaken in the business of FCS. There is no reliable evidence that the Applicants were required to, or did, issue invoices to any party in connection with their work performed for FCS.

[89] In practical terms, the only role played by Service Services (or the other entities) was to act as a payroll service. It made the payments based upon the information supplied to them by FCS in relation to each of the Applicants in connection with the work required by and performed for FCS. In the absence of any role in the engagement of the Applicants, I do not consider that this payroll function means that it became the "employer" of the Applicants. There is absolutely no evidence of any contractual elements existing between the Applicants and Secure Services and the evidence of the Applicants, which I accept, is that were no dealings with that entity (or any of the other relevant labour hire companies) at all – other than the payments which were apparently deposited into their bank accounts by them without, in the case of Secure Services, clearly identifying the source.

[90] In light of that finding and the evidence more generally about the formation and conduct of the relationships, the obvious party for any contractual relationships with the Applicants is FCS. However, as contended on its behalf, there are some of the elements of the normal engagement that are missing, or at least not expressed. These include:

- The stated terms and conditions of the engagement; and
- The absence of (direct) payments (beyond the reimbursements) made to the Applicants by FCS.

[91] In *Australian Workplace Solutions Pty Ltd v P. Fox*[26] the Full Bench of the AIRC set out the elements of a contract as follows:

> "The elements of a contract are stated in Macken, McCarry and Sappideen's "The Law of Employment" (4th edition, 1997 by the Hon James Macken, Paul O'Grady and Carolyn Sappideen) (Macken, McCarry and Sappideen), a text to which reference was made both before Simmonds C and us, as follows (p.74):
>
> > "The law holds that before any simple contract is enforceable it must be formed so as to contain various elements. These are:
> >
> > 1. There must be an 'intention' between the parties to create a legal relationship, the terms of which are enforceable.
> >
> > 2. There must be an offer by one party and its acceptance by the other.
> >
> > 3. The contract must be supported by valuable consideration.
> >
> > 4. The parties must be legally capable of making a contract.

5. The parties must genuinely consent to the terms of the contract.

6. The contract must not be entered into for any purpose which is illegal."

"In relation to the first of these elements, the learned authors say (p. 74):

"The first element essential to the existence of any contract is the requirement that the parties have a mutual intention to create a legally enforceable bargain."

[92] The application of these principles was however further considered by the Federal Court in *Damevski v Giudice*[27] which observed as follows:

"82 Although contracts are not to be implied lightly, the Court may find exceptions to the general rule concerning express intentions. The Court may imply a contract by concluding that the parties intended to create contractual relations after examining extrinsic evidence, including what the parties said and did: see *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153; *Air Great Lakes Pty Ltd v K S Easter (Holdings) Pty Ltd* (1985) NSWLR 309; *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 3 All ER 25 at 31 per Bingham LJ and *Orion Insurance Co Plc v Sphere Drake Insurance Plc* [1990] 1 Lloyd's Rep 465 at 492-4 per Hirst J.

83 Prerequisites for an enforceable contract were set out by Grainger C and are reproduced at [40] above. However, as discussed in the relevant chapter of The Law of Employment, which was the source for the list of prerequisites, those elements of contract are to be applied subject to the various nuances of contract law. In relation to the second element listed, offer and acceptance, it is pointed out in Cheshire, Fifoot & Furmston's Law of Contract, 14th ed, (M P Furmston), (2001), England, Butterworths LexisNexis, at p.33 that:

"These complementary ideas present a convenient method of analysing a situation, provided that they are not applied too literally and that the facts are not sacrificed to phrases."

Lord Wilberforce's judgment in *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd* [1975] AC 154 at 167 is quoted and reference is made to cases where the courts have held that there is a contract despite the difficulty or impossibility of analysing the transaction in terms of offer and acceptance. Below the relevant passage from the decision of Lord Wilberforce in New Zealand Shipping is set out more fully:

> "It is only the precise analysis of this complex of relations into the classical offer and acceptance, with identifiable consideration, that seems to present difficulty, but this same difficulty exists in many situations of daily life, e.g., sales at auction; supermarket purchases; boarding an omnibus; purchasing a train ticket; tenders for the supply of goods; offers of rewards; acceptance by post; warranties of authority by agents;

> manufacturers' guarantees; gratuitous bailments; bankers' commercial credits. These are all examples which show that English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration."[28]

[93] In *Damevski v Giudice*,[29] the Federal Court also confirmed that although intention is a necessary ingredient in the formation of a contractual relationship, the test of intention is objective, not subjective; and intention may be inferred from conduct.[30]. The High Court said in *Ermogenous v Greek Orthodox Community of SA Inc*[31]:

> "24. "It is of the essence of contract, regarded as a class of obligations, that there is a voluntary assumption of a legally enforceable duty." To be a legally enforceable duty there must, of course, be identifiable parties to the arrangement, the terms of the arrangement must be certain, and, unless recorded as a deed, there must generally be real consideration for the agreement. Yet "[t]he circumstances may show that [the parties] did not intend, or cannot be regarded as having intended, to subject their agreement to the adjudication of the courts".
>
> 25. Because the inquiry about this last aspect may take account of the subject-matter of the agreement, the status of the parties to it, their relationship to one another, and other surrounding circumstances, not only is there obvious difficulty in formulating rules intended to prescribe the kinds of cases in which an intention to create contractual relations should, or should not, be found to exist, it would be wrong to do so. Because the search for the "intention to create contractual relations" requires an objective assessment of the state of affairs between the parties (as distinct from the identification of any uncommunicated subjective reservation or intention that either may harbour) the circumstances which might properly be taken into account in deciding whether there was the relevant intention are so varied as to preclude the formation of any prescriptive rules. Although the word "intention" is used in this context, it is used in the same sense as it is used in other contractual contexts. It describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened. It is not a search for the uncommunicated subjective motives or intentions of the parties." (references omitted)

[94] There must also be an offer by one party (the promisor) and an acceptance of that offer by another party (the promisee).[32] An offer is the expression of the promisor's willingness to contract on the terms as stated. Further, the promisor must be reasonably understood to be seeking something in return for the promise. The High Court in *Australian Woollen Mills Pty Ltd v Commonwealth*[33] said:

> "In such cases as the present, therefore, in order that a contract may be created by offer and acceptance, it is necessary that what is alleged to be an offer should have been intended to give rise, on the doing of the act, to an obligation."[34]

[95] The laws of contract look to the objective intention of the parties in relation to offer and acceptance. That is, the effect of an offer is to be determined by what a reasonable person in the position of the promisee would understand the offer to be.[35]

[96] A legally binding contract will usually result once the offer has been accepted by the promisee. However, to be valid, the acceptance must be given by the promisee with the knowledge of the offer and an intention to accept that offer. That is, the acceptance must be "truly responsive" to the offer.[36] It is clear that the laws of contract contemplate that acceptance will not always be expressly given and may, on occasion, be implied from conduct. However, it is important to note that a contract will not be implied lightly and the conduct must be such that one can confidently conclude that the parties intended to create contractual relations and the agreement was to effect contended.[37]

[97] The acceptance must also be unequivocal[38] and generally, communicated to the promisor.

[98] The fundamental terms of a contract must also be sufficiently certain. That is, where the terms of a purported contract are obscure and incapable of any definite or precise meaning it may not be possible to attribute to the parties any particular contractual intention and the contract may be held to be void or uncertain or meaningless.[39]

[99] However, as Barwick C.J. said in *Upper Hunter County District Council v. Australian Chilling and Freezing Co. Ltd*:[40]

> "But a contract of which there can be more than one possible meaning or which when construed can produce in its application more than one result is not therefore void for uncertainty . As long as it is capable of a meaning, it will ultimately bear that meaning which the courts, or in an appropriate case, an arbitrator, decides is its proper construction . . . ".

[100] It is only if it is not possible to put any definite meaning on the contract that it can be said to be uncertain.[41] That is, there is a distinction between an uncertainty of meaning, as distinct from absence of meaning or of objective intention.

[101] Valuable consideration must also be provided. That is, a price must be paid (although it need not be monetary) for the promise of the other party. The consideration must not be too vague or uncertain and it must be present or future, but not past.[42] The parties must also have the legal capacity to enter into, and genuinely consent to, the making of a contract.

[102] In this case, many of the terms of any contract would need to be implied. There is no direct evidence about the discussions between the Applicants and Mr Wall about the detailed terms of their "engagement" in their operations roles. However, I consider that this in an occasion where the terms (or at least sufficient to determine the existence of contract) can be implied from the parties' conduct.

[103] I consider that there is sufficient certainty in the arrangements to ascertain the parties' legal intention and that the parties objectively intended that a legal contract be made. The offer to undertake the operational roles, in particular, was made by Mr Wall on behalf of FCS to each

of the Applicants. It would be objectively understood that they were to perform the tasks required to undertake those roles as directed and that they were obliged to do so having accepted the roles. It would also be reasonably understood that they would be paid for their work, which occurred.

[104] The absence of any expressly agreed terms on matters such as position descriptions, hours of work, whether they were weekly hired or casual employees is problematic, but at least in the context of the workplace where industrial instruments and statutory provisions may apply to provide that detail where applicable, these deficiencies do not in my view lead to the absence of enforceable rights and obligations. To use the language of *Damevski v Giudice*,[43] the elements of contract should not be applied too literally and the facts sacrificed to phrases.

[105] In relation to the absence of direct payments by FCS, I do not consider this to be decisive. All of the work was performed for FCS, all of the information upon which any payments were made was held by FCS and provided to Secure Services to make the payment, and the fact that another entity (which was not in a contractual relationship with Applicants) was used to actually transfer the payment, is not a sound indicator that FCS was not a party to a relevant contract with the Applicants. Valuable consideration was provided by FCS for the work performed for it by the Applicants.

[106] Mr Wall, on behalf of FCS, engaged the Applicants to undertake the operational roles that they occupied when they were dismissed. The details of the work and the day-to-day instructions and resources to undertake the work were supplied by FCS. The relationships were directly concluded by FCS.

[107] Although in a genuine labour hire triangular relationship, the direct giving of directions and the control that is exercised is not determinative, in this case, these elements are completely consistent with the fact that the actual legal relationship was with FCS.

[108] Subject to the operation of a relevant statutory provisions, such as the transfer of business arrangements,[44] a contract of employment once formed cannot just simply be assigned to another unrelated entity without notice or consent.[45] In the case of the 2 Applicants here, both elements were missing, and it was not contended that any statutory provision applied.

[109] On balance, I consider that both of the Applicants were engaged by and worked for FCS at the time of the alleged unfair dismissals.

[110] I turn now to the second requirement, that is whether the Applicants were employees.

[111] In 2022, the High Court of Australia in *Jamsek*[46] and *Personnel Contracting*[47] pronounced on the approach to be adopted under the law in determining whether, absent a specific statutory definition or rule, a person is an employee or contractor. This also involved the High Court reviewing past decisions of the Court and other courts. Relevantly, elements of the past approach of the Commission (itself based on the extant court authority) as outlined in the Full Bench decision of *French Accent*[48] are, to a large degree, no longer to be applied.

[112] Amongst the principles that now apply, the following may be stated with some confidence:

- The characterisation of the relationship is to be determined by reference only to the parties' legal rights and obligations.

- Where a comprehensive written contract is in place, this will be the primary source of the parties' legal rights and obligations, and these will be decisive of the characterisation of the relationship. This will apply unless the contract is a sham, or has been varied after it was made, or post agreement conduct or context demonstrates that a term is legally ineffective.[49]

- The conduct and expectations of the parties after entering into the contract are not generally relevant to the assessment.[50]

- 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[51] or to determine the nature of any variation to agreed terms.[52]

- It is permissible to have regard to objective events, circumstances and things external to the contract known to the parties at the time of contracting which assist in identifying the purpose or object of the contract.[53]

- The relative bargaining power of the parties is not relevant. That is, the fact that the arrangement was brought about by the superior bargaining power of the company has no bearing on the meaning and effect of the contract.[54]

- The "multifactorial" test remains appropriate; however, it is to be applied by reference to the parties' legal rights and obligations not to the post contract conduct. In that respect, the terms of contract between the parties are not merely "factors" but are determinative.[55] The manner in which the contractual terms address the mode of remuneration, provision of equipment, obligation to work, hours of work, delegation of work, holidays and the right to control may show that it is not an employment contract.[56]

- Whilst all relevant factors require consideration, two factors in particular assist in assessing the ultimate question of whether an applicant was an employee:

  Control: The greater the degree (rights) of control exercisable by the principal/employer over the work performed, the greater the likelihood that an employment relationship existed.

  Own business/employer's business: The resolution of the question whether a person engaged to work for another as an employee or an independent contractor depends upon the extent to which, upon an analysis of the parties' rights and obligations under the terms of their contract, it can be shown that the person acts in the business of, and under the control and direction of, the other.[57] In this way, one may discern a more cogent and coherent basis for the time-honoured distinction between a contract of service and a contract for services than merely

forming an impressionistic and subjective judgment or engaging in the mechanistic counting of ticks on a multifactorial checklist'.[58]

- While the "own business/employer's business" dichotomy may not be perfect or universal (because not all contractors are entrepreneurs), it usefully focuses attention upon those aspects of the contractual relationship which bear more directly upon whether the worker's work was so subordinate to the employer's business that it can be seen to have been performed as an employee of that business rather than as part of an independent enterprise.[59]

- It is not necessary or suitable to ask whether the worker is working in their own business. This is not a binary choice between employment or own business. The better question is whether, by the terms of the contract, the worker is contracted to work in the business or enterprise of the purported employer.[60]

- The notion of the generation of goodwill by the worker is not necessarily relevant or decisive.[61]

- When assessing the significance of a relevant fact in the characterisation process, the court (Commission) should consider the extent to which the fact bears directly or obliquely on whether the worker is contracted to work in the employer's business rather than part of an independent enterprise. The more directly it bears on that issue, the more significant it is.[62]

- The label applied by the parties to the contract is not decisive and does not act as a "tie-breaker" where the multifactorial test is ambiguous. The proper characterisation of the relationship is a matter for the courts, not the parties.[63]

- Non-exclusive work may be consistent with casual employment and not just contracting. The fact that the worker was free under the contract to accept or reject any offer of work, and not precluded from working for others, are not necessarily contraindications of employment, since this is also commonplace for casual employees.[64]

- Terminability at short notice and the absence of a guarantee of work of any direction are not decisive given that they may also be indicative of casual employment.[65]

[113] More generally, I have applied the approach summarised by Wigney J in *JMC Pty Limited v Commissioner of Taxation* [2022] FCA 750 at [16] to [27] and by the Full Bench of the Commission in *Deliveroo Australia Pty Ltd v Franco, Diego* [2022] FWCFB 156 at [34] to [38].

[114] There were no written contracts in which the Applicants were parties. The Commission must therefore assess the totality of parties' rights and obligations that may be discerned from the conduct of the oral contracts.[66] That is, the events subsequent to the making of the oral contracts may be considered as part of the process of identification of the terms agreed between the parties.

[115] The earlier findings about the identity of the parties to each of the contracts are also relevant here. In particular, it is the nature of the contractual relationships in place at the time of their cessation which is the focus of the present assessment.

[116] In this case, the following elements, discerned from the conduct of the contracts, also point to legal rights and obligations which squarely indicate that the contracts were that of employment:

- FCS exercised day to day control over the performance of the work and the right to exercise that control is strongly implied by the conduct;
- The Applicants were contracted to work in the business of FCS;
- There is no indication that the Applicants could delegate the performance of their contractual duties, beyond the delegation of work to others in the team as would be present in any employment contract;
- There is no meaningful sense in which the Applicants were working for themselves in the performance of their roles in the operations of FCS. This focuses attention upon those aspects of the contractual relationship, such as in this case the nature and extent of control, which bear directly to support the notion that the Applicants' work was so subordinate to the FCS's business that the work was performed as employees of that business rather than as part of an independent enterprise; and
- The Applicants were individually paid for the work performed not by reference to output.

[117] There are some contrary indicators including the absence of PAYG taxation arrangements, paid leave and superannuation. However, for reasons outlined above, these aspects are not significant in the present context as indictors of the nature of the contractual relationship.

[118] Although the Applicants largely worked from their home in the operations roles, and by implication provided the rooms, desks, computers, power and lighting etc. to undertake the roles, this is not unusual in (post) Covid-19 working arrangements and in my view is not a decisive indicator against employment.

[119] There was no label as such applied to the arrangements by the parties, given the purely oral form of contracts. To the extent that no PAYG taxation was deducted, this does not in my view act as a strong indicator of the form of contract here given the facts set out earlier. This includes the absence of any use of invoices or any common intention for the payments to be made in the form.

[120] Having regard to the parties' legal rights and obligations discerned from the conduct of the parties in the absence of any written agreements, I consider on balance that both Applicants were engaged as employees at the relevant time.

6. Conclusions

[121] I have determined that each of the Applicants were engaged by FCS and were employees at the time of their dismissal.

[122] As a result, I must, in effect, dismiss the Respondent's jurisdictional objection.

[123] I will list the unfair dismissal applications for further directions with a view to the determination of each matter. I will also raise with the parties the prospect that some further conciliation, this time with a Member of the Commission, be conducted given the circumstances of these matters.

DEPUTY PRESIDENT

Appearances:

A Raza and *N Gamage*, the Applicants on their own behalf.

J D'Abaco of counsel, with *A Merlo* of Melbourne Legal, with permission for the Respondent.

Hearing details:

2022
MS Teams Video Hearing
November 25, December 19.

2023
February 23.

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[1] The formal identity of the Respondent differs from that cited in the applications. The Commission has not yet dealt with whether the applications should be amended given the nature of the present proceedings.

[2] Permission was granted under s.596 of the Act for reasons provided separately to the parties. Amongst other considerations, the likelihood that additional evidence and contentions would be advanced by the Applicants during the course of the hearing, and the increased efficiency associated with having the Respondent represented and able to fairly deal with such eventualities, was important.

[3] Both Applicants are educated intelligent people; however, English is not their first language and they were not fully familiar with Australian workplace laws or the practices of the Commission.

[4] Exhibit A4

[5] Exhibit A5

[6] Exhibit A6

[7] Exhibit A1

[8] Exhibit A2

[9] Exhibit A3

[10] Mr Ahmed had already provided a witness statement which was filed by the Respondent.

[11] Attachment GM-1 to Exhibit R10

[12] Exhibits R10 and R11.

[13] Exhibit R12.

[14] Exhibit R13

[15] As set out on his email signature block used in communications with one or both Applicants.

[16] Transcript PN445.

[17] The taxation and bank statements of the Applicants.

[18] Exhibits A3 and A6 Supplementary statements of the Applicants.

[19] The Applicants shared a residence but were not in a relationship.

[20] Attachment AR3 to Exhibit A4 – Witness Statement of Mr Raza.

[21] *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610 at [46].

[22] *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (2011) 198 FCR 174.

[23] [2013] FWCFB 9605.

[24] Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd [2022] HCA 1 (*Personnel Contracting*).at [78] per Kiefel CJ, Keane and Edelman JJ.

[25] Ibid at [85].

[26] AIRC Print S0253.

[27] (2003) 133 FCR 438 (‘*Giudice*’).

[28] Ibid per Marshall J.

[29] *Giudice* (n 23).

[30] Ibid per Wilcox J at par 3.

[31] (2002) 209 CLR 95 per Gaudron, McHugh, Hayne and Callinan JJ.

[32] See *R v Clarke* (1927) 40 CLR 227.

[33] (1954) 92 CLR 424. This decision was affirmed by the Privy Council on appeal in *Australian Woollen Mills Pty Ltd v Commonwealth* (1955) 93 CLR 546.

[34] Ibid at 457.

[35] See *Manufacturers’ Mutual Insurance Ltd v John H Boardman Insurance Brokers Pty Ltd* (1992) 27 NSWLR 630 at 638.

[36] *Gjergja v Cooper* [1987] VR 167 at 206.

[37] *Blackwood and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 3 All ER 25.

[38] *Appleby v Johnson* (1874) LR 9 CP 158.

[39] See *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd* [1968] HCA 8; (1968) 118 CLR 429.

[40] [1968] HCA 8; (1968) 118 CLR 429, at p 436.

[41] See also *Meehan v Jones* [1982] HCA 52; (1982) 149 CLR 571.

[42] *Shields v Drysdale* (1880) 6 V.L.R. E 126, *Roscorla v Thomas* (1842) 3 Q.B. 234 and *Stilk v Myrick* (1809) 2 Camp 317.

[43] *Giudice* (n 23).

[44] Part 2-8 of the Act.

[45] *Innovateq Australia Pty Ltd and Anor v Barnes and Ors [2016] VSC 618.*

[46] *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1 (*Personnel Contracting*).

[47] *ZG Operations & Ors v Jamsek & Ors* [2022] HCA 2 (J*amsek).*

[48] *Jiang Shen Cai trading as French Accent v Rozario* [2011] FWAFB 8307.

[49] *Jamsek* per Kiefel CJ, Keane and Edelman JJ at [40]-[62], *Personnel Contracting* per Gordon J at [172]-[178]:

[50] Ibid.

[51] *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [42], [54], Gordon J at [177] - [178], [188] - [190].

[52] *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [46], [54].

[53] *Jamsek* per Kiefel CJ, Keane and Edelman JJ at [61].

[54] *Jamsek* per Kiefel CJ, Keane and Edelman JJ at [6], [8], [62] and *Personnel Contracting* at [81].

[55] *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [33]-[34], [47], [61], per Gordon J at [174], [186]-[189].

[56] *Personnel Contracting* per Gordon J at [174], [186]-[189].

[57] *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [62].

[58] *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [39] and *Jamsek* at [60].

[59] Ibid.

[60] *Personnel Contracting* per Gordon J at [180]-[183].

[61] J*amsek* per per Kiefel CJ, Keane and Edelman JJ at [58].

[62] *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [39], *Jamsek* at [60].

[63] *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [58], [63]-[66], [79], Gageler and Gleeson JJ at [127], Gordon J at [184]:

[64] *Personnel Contracting* per Kiefel CJ, Keane and Edelman at [84].

[65] *Personnel Contracting* per Gordon J at [196].

[66] *Secretary, Attorney-General's Department v O'Dwyer* [2022] FCA 1183, [28] to [33].