DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Christian Walkerden

v

Oncall Language Services Pty Ltd
(U2023/4118)

COMMISSIONER BISSETT MELBOURNE, 24 AUGUST 2023

Application for an unfair dismissal remedy – objection to jurisdiction of Commission to hear application – found Applicant is not an employee but if was an employee annual rate of earnings is in excess of high income threshold – objections upheld – application dismissed

[1] Mr Christian Walkerden (**Applicant**) has made an application to the Commission pursuant to s.394 of the *Fair Work Act 2009* (**FW Act**) in which he seeks a remedy for unfair dismissal. The Applicant says that he was dismissed from his employment with Oncall Language Services Pty Ltd (**Respondent**) with effect from 28 April 2023.

[2] The Respondent objects to the application on the grounds that it says the Applicant was not an employee of the Respondent. The Respondent says that it entered into a contract with Griffin Digital Consulting Pty Ltd for the provision of services and that the Applicant was a 'designated person' under that contract.[1]

[3] In the alternative and, if it is the Commission finds the Applicant was an employee, the Respondent says the Applicant's annual earnings are above the high income threshold and he is therefore not protected from unfair dismissal.

[4] With the consent of the parties, I determined to deal with the two jurisdiction issues in the first instance and, following the resolution of these, would then consider the merits of the application if that remained relevant.

[5] For the reasons that follow I have decided to dismiss the application.

PROCEDURAL MATTERS

[6] Prior to the hearing of the application, I granted the Respondent permission to be represented. The reasons for this were issued separately.[2]

[7] The Applicant was due to file his submissions and evidence on 21 July 2023. Over the following days the Applicant advised that his computer, that of his wife, along with the phones and other electronic equipment in his home, had been subject to an attack of some description

and he lost access to his submissions and documents. The Applicant was asked to advise if he sought an extension for filing his material and consequently indicated that it could be filed by the Tuesday prior to the Thursday hearing. The Respondent advised that it considered it could still deal with the matters on that timeframe. I therefore granted an extension to the Applicant but also delayed the hearing commencement by one hour.

[8] The Applicant filed a number of documents including one he identified as his witness statement, a witness statement of Mrs Bianca Walkerden (his wife), submissions and various documents and screen shots of text messages.

[9] The Respondent filed its submissions and witness statements of Ms Gayle Antony – Manager People and Culture and Mr Mohammed Taher – Chief Financial Officer for the Respondent.

[10] The filed material was collated into a Court Book which was used in proceedings. Reference to evidence and submissions is by reference to the Court Book page number. Additional material produced during the hearing is separately referenced.

[11] At the conclusion of the hearing on 27 July 2023 I reserved my decision pending receipt of brief further submissions from each party on matters that arose during the hearing.

[12] On Monday 31 July 2023 the Applicant filed extensive material which was beyond the latitude provided at the hearing to the parties to file further, limited, material. I determined that some of that material would be considered and the Respondent was given an opportunity to respond to that material, but other aspects were not relevant to the matter before me and would not be considered.

[13] The Respondent filed its reply to that material of the Applicant on 3 August 2023.

[14] After hearing from the parties I determined that the matter should proceed by way of determinative conference. In doing so I allowed two employees of the Respondent who were observing for learning and development reasons to remain in the court room. All those present were reminded of the private nature of the proceedings.

BACKGROUND

[15] There is little complexity in the background to this matter.

[16] In August 2022 the Applicant established a company called Griffin Digital Consulting Pty Ltd (**GDC**).

[17] On 16 August 2022 GDC entered into a contract for the provision of ‘Sales and marketing’ services to the Respondent (**the contract**). In brief, the contract specified the Applicant as the ‘designated personnel’ of GDC to provide the services captured by the contract. The contract also provided that the ‘Contractor’ (GDC) would ‘not invoice the [Respondent] for more than $16,923.00 per four (4) week period’ for the services provided. In circumstances where the Contractor was not available for certain periods of time the amount

invoiced for the four week period was to be reduced by a specified amount per day of unavailability. More details as to the terms of the contract are given below.

[18] The contract was subject to some negotiations between the Applicant and Respondent prior to it being signed. The Applicant said:

> 1. … The role was not attractive to me at first however after some discussions the purpose of the role crystalised into a form that I did find attractive and that was:
>
>   Help the company find its next frontier of growth into the Global Saas space with present ordering and to productise their technical expertise in order to create more Saas offerings
>
>   Help Tekin (Mustafa's Brother to grow in leadership so that he could develop into a more engaged contributor at the c-level)
>
>   Shadow Mustafa as a CEO coach and help him to better manage the company and his team –The executive
>
>   Build a team that was sales focused something the company had never done before (sic)
>
> 2. On this basis it sounded varied enough to be interesting to me on the condition that I should be able to work with other clients of mine at my discretion…[3]

[19] The Applicant gave evidence that, following to-ing and fro-ing with the Respondent on the contract he was 'sufficiently satisfied' to sign the contract.[4]

[20] At the time the Applicant commenced providing services to the Respondent he continued to hold the position of CEO of a company separate to the Respondent called OZEDI. Apparently he held this position until September 2022 on his evidence[5] or December 2022 on the evidence of Mrs Walkerden.[6] During this period OZEDI continued to pay wages or other like payments to the Applicant including in relation to the novated lease of his vehicle. During the first eight weeks of his engagement with the Respondent the Applicant spent 50% of that period providing services to the Respondent and the remainder working for OZEDI.

[21] It appears from the evidence of the Applicant and of Mrs Walkerden that, over time, the Applicant was spending more of his time undertaking work for the Respondent. Whether this work was performed or required to be performed from the Respondent's premises is not substantiated.

[22] During the period leading up until Christmas 2022 the Applicant was also involved in establishing a 'buy and flip' management company and was at least considering other possibilities through his accountant.[7] He sought the involvement of Mr Taher in the 'buy and flip' venture, external to the Respondent.[8]

[23] The Applicant attempted to end the contract, on his evidence, a number of times but each time says he was talked out of it by Mr Mustafa Hulusi[9] (CEO of the Respondent, sometimes referred to as 'Mus').

[24] The Applicant established GDC for the purpose of forming the contract with the Respondent.[10] The Applicant is the sole director of GDC which is wholly owned by the Griffin Digital Investments Trust. Mrs Walkerden holds all shares in the company.[11]

[25] GDC invoiced the Respondent on a monthly basis. Over the eight-month period of the contract GDC invoiced the Respondent in excess of $130,000.00 plus travel and other expenses.

The offer of a contract of employment

[26] In late March or early April 2023 the Applicant and 'Mo' (Mr Taher) and/or Mr Hulusi of the Respondent had a series of conversations that led to a decision to offer the Applicant a contract of employment with the Respondent. Following discussions between the parties the Applicant sent a text message to Mr Hulusi on 2 April 2023 confirming that he wished to proceed with the contract of employment. On 4 April 2023 Mr Hulusi emailed the Applicant and said that, based on their conversations, the proposal would be for the payment of a salary, inclusive of superannuation, of $219,999.00 per annum (equivalent to that paid to GDC under the contract).[12]

[27] The details of the proposed contract of employment were provided to the Applicant by the Respondent on 5 April 2023.

[28] The Applicant said that, after some discussion with Ms Antony on some of the terms, he 'signed it and sent it over' to the Respondent.[13] He also said that he signed the contract and assumed that the detail would be worked out later.[14] This narrative surrounding the employment contract is contrary to the evidence. The evidence shows that on 17 April 2023 the Applicant sent back to the Respondent a version of the employment contract on which he made numerous proposed changes. The changes of the Applicant included to the hours of work clause, the desire to have included a performance measure and additional annual leave, changes to the restraint and intellectual property provisions and more.[15] Despite the claim of the Applicant that he had signed the employment contract the evidence does not support that he signed a copy of the contract *as proposed to him by the Respondent.* Rather he put to the Respondent a counter-offer which he signed. The evidence before the Commission does not show that this counter-offer was signed, or otherwise accepted, by the Respondent. While the Applicant suggested that the employment contract was completed as it contained an offer, acceptance and intention,[16] he ultimately agreed that it was not fully executed[17] although maintained there was an offer he accepted.[18] In these circumstances attempts by the Applicant to argue there was a contract of employment when the evidence clearly demonstrates that there was not is disingenuous and is rejected.

[29] I accept that the Applicant did put a counter-offer to the Respondent to its proposed employment contract. While Ms Antony did not recall receiving the email from the Applicant on 17 April 2023 with the counter-offer attached, this does not alter my conclusion in relation to whether an employment contract was formed.

Terms of the contract between GDC and the Respondent

[30] The terms of the contract between GDC and the Respondent are not complex.[19] The contract specified:

- Clause 1 – its purpose
- Clause 2 – the engagement of GDC
- Clause 3 – duration, continuing until terminated in accordance with the terms of the contract
- Clause 4 – the services to be provided (referenced to Schedule 1), the designated persons of GDC to provide the services, the provision of equipment by GDC and reporting and supervision
- Clause 5 – Fees
- Clause 6 – use of the Respondent facilities
- Clause 7 – obligations of GDC in relation to performance of services, insurance expenses, payment of its employees and agents, compliance with laws and warranties
- Clause 8 – relationship between GDC and the Respondent including that the relationship was not a partnership or one of employer and employee
- Clause 9 – conflicts of interest
- Clause 10 – confidentiality, indemnity and breach, privacy and survival obligations
- Clause 11 – intellectual property disclosure and ownership
- Clause 12 – termination of agreement arrangements
- Clause 13 – post-agreement restraints
- Clause 14 – GDC indemnity
- Clause 16 – general matters including assignment, severability, notices, waiver, variation etc

[31] Schedule 1 to the contract states as follows:

SCHEDULE 1

1. Services

(a) The Services will include:
  (i) To be agreed between the CEO and the Contractor

2. Designated Personnel

The contractor's designated personnel are:
(a) Christian Walkerden

3. Term

Ongoing until advised by either party in line with contract provisions.

4. Fees

(a) The Fees will be:

The Contractor will not invoice the company for more than $16,923.00, per four (4) week period, for the services.

The Contractor is not entitled to sick leave, annual leave or long service leave. In the event that the Contractor will be unable to provide the Services for: a) more than 3 business days in a row or b) more than 16 business days in a 3 month period the Contractor will deduct an amount of $846.15 for each of those days. Leave taken will be by mutual agreement taking into consideration business requirements.

(b) Performance bonus payment:

Bonus and performance KPIs are to be agreed upon at a later date by written agreement of both parties (being the contractor and the CEO) and are to be based on the principle of the Company sharing a portion of the economic benefit that the Contractors services generate with the Contractor in a reasonable and equitable manner for the benefit of the Contractor.

5. Facilities

The Facilities will be:

Office space and company equipment including laptop and mobile phone.

ASSESSMENT OF WITNESSES AND EVIDENCE

[32] While the Respondent took no specific objections to the evidence given for and on behalf of the Applicant, it did make general submissions in relation to the relevance of, and weight to be afforded to, that evidence. I have taken these submissions into account in my consideration of the evidence.

[33] While the Applicant's witness statement was not in the form generally expected, I allowed him to rely on that statement and to make a further statement under oath. I did not find the Applicant's evidence persuasive of the questions I have to decide. The Applicant developed his evidence to support the narrative he wanted heard. He changed his evidence during the course of his oral testimony as to whether he had a written and signed contract of employment in circumstances where he had done no more than put a counter-offer in relation to employment to the Respondent. Further, he claimed variations on the contract between GDC and the Respondent without any evidence to support such a claim. For these reasons, where there is a conflict in the Applicant's evidence and the evidence of the Respondent's witnesses, I prefer the evidence of the Respondent's witnesses.

[34] The evidence of Mrs Walkerden was, overall, of little or no relevance to the matters I need to decide. I do not dispute the genuineness of the concern of Mrs Walkerden for the time she says her husband spent providing services to the Respondent, but this is not probative of the determination of whether he was an employee or a contractor. Evidence in relation to Government actions which adversely affected vehicle leasing at some indeterminate date not apparently related to this matter, a decision of the Walkerden family to drive to Queensland at Christmas 2022, the signing of a person called Gerry Vee for an advance of $1 million by a company not otherwise connected with this matter and whether a person named Emal was shouted at do not assist me. Further, much of the evidence of Mrs Walkerden was hearsay, based on what the Applicant had said, or were assumptions she made from seeing the Applicant working late at night or early in the morning. For these reasons I have had limited regard to the evidence of Mrs Walkerden.

[35] Ms Antony was a witness I found to be open and clear in her evidence and recollection of events. While there was one matter she could not recall – the receipt of an email and attachment in relation to the counter-offer contract of employment from the Applicant – she quickly conceded that she must have received it when presented with the email (not previously filed) which demonstrated this to be the case. This error does not cast doubt over the totality of the evidence she provided.

[36] Mr Taher was not subject to any cross examination. The Applicant was advised that a failure to cross examine Mr Taher would result in me accepting his evidence as unchallenged and truthful, which I have done. I do note that the Applicant said of Mr Taher's evidence that 'I don't think we differ on the truth of it.'[20]

WAS THE APPLICANT A CONTRACTOR OR EMPLOYEE OF THE RESPONDENT?

Respondent's Submissions

[37] The Respondent submitted that a consideration of whether the Applicant was a contractor or employee starts with a consideration of the terms of the contract itself.[21]

[38] The Respondent submitted that there was written and signed contract between GDC and the Respondent and that the Applicant, as an employee or agent for GDC, had been involved in the negotiations and finalisation of that contract. There was no further variation to that contract or substitution of that contract with a contract of employment. The terms of the contract support the contract being characterised as a contract for service. These are:

(i) The only parties to the contract were GDC and the Respondent

(ii) The Applicant was identified as a 'designated person' in the contract but otherwise had no personal legal obligations under the contract

(iii) The designated person could be removed from the contract at the request of the Respondent

(iv) A monthly service fee was payable by the Respondent to GDC without reference to actual hours worked by the designated person except in circumstances specified in the contract when the fee could be reduced

(v) The services to be provided under the contract were 'as agreed between the CEO [of the Respondent] and the Contractor'

(vi) The Contractor could engage in any other work or assignments as long as such work did not conflict with the work performed by the Respondent

(vii) GDC was required to provide the services at its own cost unless otherwise specified and was to have its own indemnity insurance

[39] Further, the Respondent submitted that under the contract the Applicant was not restrained from undertaking other work and the work performed by the Applicant for the Respondent was consistent with the Applicant's 'wider professional offering of business and consultancy services to the world at large' as established in his LinkedIn profile and he was, therefore, not subordinate to the Respondent's business.

[40] As to the Applicant's hours of work, the Respondent submitted that the Applicant did not provide any evidence that additional work taken on by him was at the direction of the Respondent. Rather, he took on that work at his own discretion as he became personally invested in the success of the business. In any event, the Respondent says that during the period of his engagement the Applicant continued to work for OZEDI for a period of time and continued to seek out other business opportunities outside the Respondent's business.

[41] While the Applicant – as the designated person – was required to report and to perform the services at the direction of the CEO (or other nominated person), with the exception of being required to attend certain specified internal and client meetings, the Applicant was otherwise free to deliver the contracted services as he saw fit. The level of control of the Applicant by the Respondent was not that which would characterise an employment contract.

[42] GDC was engaged by the Respondent due to the Applicant's specific expertise and the Respondent generally relied on the Applicant's discretion as to how that expertise would be deployed. Further, the contract between GDC and the Respondent was not one of control but rather of 'consensus and agreement'.

[43] GDC invoiced the Respondent monthly and this amount was remitted as per the invoices. In addition, the Applicant and Mrs Walkerden derived financial benefits by structuring GDC in the way they did.

Applicant's submissions

[44] The Applicant said that he was, for all intents and by actions of the Respondent, an employee of the Respondent. He said that the contract entered into between GDC and the Respondent was a sham because it was undefined in that:

a. Its purpose is not stated beyond to provide undefined 'services' to the Respondent;

b. 'engagement' is defined as the services, which are undefined;

c. No duration is specified;

d. 'Performance bonus' is defined as a set of undefined KPIs.

[45] As the contract left so much undefined the Applicant said he had to continuously re-orientate to meet the needs of the Respondent as if he was an employee. The Applicant also said the contract was a sham because it was always intended that he 'come on' with the Respondent as an employee and that is, in effect, what he was at the time of the termination.

[46] The Applicant also said that the contract contained contradictory and/or implausible clauses including:

a. The 'designated person' provision was meaningless and when the Applicant did attempt to delegate work to an employee of the Respondent this provided [part of the] grounds for termination of the contract.

b. It was not realistic that the Applicant should perform services 'at the direction of Mustafa Hulusi or such other person as notified by the Company'. This was unrealistic and could not happen and designed to give the illusion of a contract for services when what the Respondent wanted from the Applicant was to be an executive leader.

c. The reporting requirements in the contract were not defined and could not operate as Mr Hulusi left everything to Mr Taher to approve or not.

d. The restrictive covenants and obligations that survive the termination are not typical of a contract for services and are more akin to an employment relationship, suggesting it was a sham.

e. The contract, in its actual application, did not give the Applicant (or GDC) the right to take on more clients as the Respondent demanded more of the Applicant's time.

f. The letter of termination of the contract reads more like a letter terminating employment.

[47] The Applicant further suggested he had signed a contract of employment with the Respondent in April 2023. A copy of the 'signed' contract of employment he said was reached was provided by the Applicant. It is dated, by the Applicant, 17 April 2023.[22]

RELEVANT CASE LAW

[48] The determination of whether a contract is truly one for services or the relationship is that of employer and employee has been subject to extensive review over the last two years. The High Court delivered judgements in *CFMMEU v Personnel Contracting Pty Ltd*[23] (**Personnel Contacting**) and *ZG Operations Australia Pty Ltd v Jamsek*[24] (**Jamsek**) in early 2022. Following the issue of these two decisions the Full Bench of the Commission issued its decision in *Deliveroo Australia v Diego Franco*[25] (**Deliveroo**).

[49] The Full Bench in *Deliveroo* said:

> **[52]** The key propositions in *Personnel Contracting* which are to be applied in this appeal are to be derived from the judgment of Kiefel CJ and Keane and Edelman JJ, and from the judgment of Gordon J (with whom Steward J agreed as to the

relevant principles but not the outcome). Although Gageler and Gleeson JJ formed part of the majority in *Personnel Contracting*, the approach they took to the analysis whereby the "totality of the relationship", including both the terms of the employment contract and the manner of performance of the contract, must be considered[46] no longer commands majority support in the High Court. Gageler and Gleeson JJ noted that the approach they preferred was one previously applied by trial and intermediate courts in Australia,[47] as well as by the High Court,[48] and it was certainly the approach applied by the Commissioner in the decision under appeal (as well as by the parties before us in their submissions made prior to *Personnel Contracting*).

[53] We respectfully adopt the summary of the key propositions in *Personnel Contracting* stated in the Full Bench decision in *Chambers and O'Brien v Broadway Homes Pty Ltd* as follows:

(1) 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.

(2) The subsequent conduct of the parties may be considered to ascertain the existence of variation of contractual terms.

(3) The multifactorial approach only has relevance in respect of the required assessment of the terms of the contract.

(4) It is necessary to focus on 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. The question is: whether, by the terms of the contract, the worker is contracted to work in the business or enterprise of the purported employer.

(5) Existence of a contractual right to control the activities of the worker (including how, where and when the work is done) is a major signifier of an employment relationship.

(6) The label or characterisation placed on the relationship by the contract is not relevant even as a "tie breaker", or at least it is not determinative.

[Footnotes omitted]

[50] I have applied these propositions to the matter before me.

[51] In his further material filed on 31 July 2023 the Applicant suggested I should adopt the approach outlined by the Full Bench at paragraph [54] of the decision in *Deliveroo* to his

application. The Applicant's submission in this respect is misconceived as he has not considered that paragraph in the context of the decision. Paragraphs [52] to [54] of the decision in *Deliveroo* state:

> *Realities we are obliged to ignore*
>
> **[52]** In accordance with the approach dictated by the *Personnel Contracting* decision, we have analysed the question required to be determined in this appeal by reference only to the terms of the 2019 Agreement. Mr Franco's submissions sought to identify a number of objective background facts which, it was contended, we are permitted to take into account, but it does not appear to us that any of these bear upon the proper construction of the relevant terms of the 2019 Agreement. Mr Franco did not contend that we should infer that the 2019 Agreement was varied as a result of any conduct of the parties after the agreement came into effect; accordingly, this is not a matter to which we have given consideration.
>
> **[53]** In the circumstances described the application of the *Personnel Contracting* decision has obliged us to ignore certain realities concerning way in which the working relationship between Mr Franco and Deliveroo operated in practice. These include the following…
>
> **[54]** Had we been permitted to take the above matters into account, as the Commissioner did, we would have reached a different conclusion in this appeal. As a matter of reality, *Deliveroo* exercised a degree of control over Mr Franco's performance of the work, Mr Franco presented himself to the world with Deliveroo's encouragement as part of Deliveroo's business, his provision of the means of delivery involved no substantial capital outlay, and the relationship was one of personal service. These matters, taken together, would tip the balance in favour of a conclusion that Mr Franco was an employee of *Deliveroo*. However, **as a result of *Personnel Contracting*, we must close our eyes to these matters**.
>
> [Emphasis added]

[52] Given the full decision in *Deliveroo*, I cannot adopt the course proposed by the Applicant. To do so would be in error.

[53] The Applicant has also referred to paragraphs [176]-[177], [188] (in part) and [183] from the decision in *Personnel Contracting* but does not place these disparate paragraphs in the context of the decision as a whole or say how these demonstrate some error in the approach in *Deliveroo.* I have not, for this reason, taken account of the Applicant's submissions in this respect.

CONSIDERATION

Was the contract wholly written?

[54] I am satisfied that the contract in this case was wholly written. The Applicant claims that the contract was not fully reflective of the agreement between GDC and the Respondent

and that negotiations continued through August, September and October 2022.[26] However, I do not consider those matters the Applicant said were done post the signing of the contract were reflective of a variation to the actual terms of the contract or that they were additional terms to the contract. It would seem that the development of a five year plan and the detailing of staff responsibilities were deliverables under the terms of contract itself. In any event it was not put to witnesses for the Respondent that these things constituted a variation to the contract. Further, that the Applicant had 'circular conversations…with Mo and Gayle [Antony] about getting things signed off and doing things'[27] is not evidence of variation to the contract but rather difficulties in his relationship with those individuals.

[55] While there are some clauses in the contract that merely flow from the naming of the contract as one for services (statement of the relationship, for example) there are other clauses which weigh in favour of finding that the Applicant was an independent contractor.

[56] The contract did allow GDC to nominate another designated person besides the Applicant to deliver services under the contract. While the Applicant said that in practice this was not possible, the evidence is that GDC did not, at any time, employ or otherwise engage another person, let alone seek to have that person designated for the purpose of the contract and have this refused by the Respondent. That a reason for termination of the contract was that the Applicant sought to delegate some work he was contracted to perform to an employee of the Respondent is not, in my view, evidence that another nominee of GDC could not or would not be designated. It should not be overlooked however that the Respondent engaged GDC because of the specific expertise of the Applicant.

[57] GDC was free to take on other clients or other work – the only restriction being that it not conflict with the work of the Respondent. That GDC did not take on other clients was not by any term of the contract. The evidence is that the contract for services was entered into because the Applicant wished to be able to take on other clients. There was nothing in the contract per se that restricted the Applicant from doing so.

[58] The expenses associated with the provision of the services to the Respondent by the Applicant were to be met by GDC unless otherwise specified in the contract (access to office space and a laptop being so specified). That is, the cost of providing the service was to be borne by the Applicant.

[59] GDC was paid a fixed amount per month for the services provided, regardless of the hours worked. While that might be seen as conformable with a contract of employment GDC was to receive this sum regardless of the time taken by the Applicant to provide the services, the only restriction being the actual number of days the Applicant gave to the provision of the services. The contract required an invoice from GDC with payment made in accordance with the invoice.

[60] While the Applicant maintained that the confidentiality, conflict of interest and restraint provisions were more akin to that found in an employment contract, he neither provided evidence that is the case nor articulated why the presence of these clauses in this contract made the contract one of employment.

[61] The terms of the contract are clear. While the Applicant claimed uncertainty in some clauses I am satisfied that the contract defined the services as follows:

> Sales and Marketing services to the Company. The services are to be agreed with the CEO in line with the company's current, and future, sales and marketing strategy.

[62] The engagement was to provide those services on the terms in the contract. The term was specified as being until such time as the agreement was terminated within the terms specified.

[63] I do accept that the performance bonus was not defined but do not consider that is enough to render the contract void. In any event no performance bonus was specified or agreed.

[64] The Applicant submits that the actual performance of the contract meant that it was no longer a contract for services but rather an employment contract. However, as was said in *Deliveroo*, in circumstances where the relationship is wholly governed by a written contract, it is 'not permissible to review the performance of the contract or the course of dealings between the parties.' This means that those matters the Applicant now complains of (hours dedicated to the Respondent, lack of specificity of the services) are not matters relevant to the determination of the actual relationship. These matters go to the performance of the contract and not the content of the contract.

[65] By the terms of the contract, GDC was engaged to provide professional expertise in sales and marketing to the Respondent. GDC could also agree on further services with the CEO of the Respondent. GDC was, however, not obliged to take on further work by the terms of the contract. In any event, the evidence before the Commission does not allow a conclusion that GDC did take on further work beyond that specified in the contract. To the extent the Applicant says things were going along smoothly until some financial issue for the Respondent arose in early 2023, there is no evidence before the Commission of this, beyond the claims of the Applicant that he was required to deal with these issues. Further, it was not a matter put to the Respondent's witnesses by the Applicant such that they could address the issue.

[66] While the Applicant was required to attend certain meetings of the Respondent, including with key clients, the evidence is that these were limited. That there were meetings the Applicant was required to attend for the purpose of reporting on the contract or so that he could understand the strategic direction of the Respondent to properly align the services he provided could not be seen to be unusual in a contract for services.

[67] Ms Antony agreed that she suggested that if the Applicant was in the office more often it may help overcome some of the miscommunications between the Applicant and Mr Taher.[28] However, this is not indicative of a *contractual* right of control. Further, I do not consider the requirement to attend some executive meetings to discuss the strategic direction or limited client meetings directly relevant to the services provided a *contractual* right of control, nor does the provision of a laptop and office space.

[68] None of these peripheral issues alter my conclusion that the contract was wholly written and encapsulates the totality of the relationship between the Applicant (through GDC) and the Respondent.

Was there a variation of contractual terms?

[69] In addition to what I have said above, I am not satisfied that there was any variation to the contractual terms. While there were discussions and a clear intention to vary the contractual terms by the parties entering into a contract of employment, that did not eventuate prior to the termination of the contract for services.

[70] For these reasons I am not satisfied, on the basis of the evidence before me, that there was a variation to the contract for services between GDC and the Respondent.

Is the contract a sham?

[71] The Applicant maintained that the contract was a sham primarily because of deficiencies he saw with the contract but also because of the work he performed under the contract.

[72] 'Sham' is defined in the Concise Australian Legal Dictionary[29] as 'A false, deceptive, or spurious imitation or front which is not genuinely intended to be what it purports to be.'

[73] The FW Act prohibits the use of sham contracts. Section 357 of the FW Act states:

> **357 Misrepresenting employment as independent contracting arrangement**
>
> (1) A person (the ***employer***) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.
>
> Note: This subsection is a civil remedy provision (see Part 4-1).
>
> (2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:
>
> (a) did not know; and
>
> (b) was not reckless as to whether;
>
> the contract was a contract of employment rather than a contract for services.

[74] In *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*[30] the High Court held that:

> 16. To confine the prohibition [in s.357 of the FW Act] to a representation that the contract under which the employee performs or would perform work as an independent

> contractor is a contract for services with the employer would result in s.357(1) doing little to achieve the evident purpose within the scheme of Pt 3-1. That purpose is to protect an individual who in truth is an employee from being misled by his or her employer about his or her employment status… [underlining added]

[75] A contract is a sham contract if it represents the contract as one thing when the relationship is, in fact, the other.

[76] In this case I am not satisfied that the contract is a sham contract in the legal sense of that term.

[77] I do not consider that there was, at the time of the making of the contract between GDC and the Respondent, an attempt to misrepresent the contractual relationship. The Applicant sought a contract for service so he could work with other clients – the arrangement suited him. Further, he established GDC for the purpose of it entering into the contract. I am satisfied that each party intended to enter into a contract for services at the time the contract was made. This is reflected in clause 8 of the contract and the evidence of the Applicant set out at paragraph [18] above. That they later agreed to negotiation of an employment contract does not alter their intention in August 2022.

[78] The Applicant does not suggest that the Respondent coerced him into the contract. To the contrary, the uncontested evidence of Ms Antony of the first meeting with the Applicant is that:

> 6. During the meeting on 27 July 2022 Mr Hulusi, Mr Taher and myself discussed with Mr Walkerden his skills and level of interest in ONCALL. We explained that the engagement would be short term, and that it involved developing and implementing sales strategies for pilot digital translation services to ONCALL's clients. The contractor would also be required to provide leadership to a team who would go on to implement these strategies at an operational level. It was ONCALL's intention that this function would permanently be given to an employee, Mr Tekin Hulusi, who is a family member of the founders of ONCALL and that Mr Walkerden would mentor and provide consultancy advice to Mr Hulusi and ONCALL as to sales.
>
> 7. On 28 July 2022, I contacted Mr Walkerden following the meeting to confirm whether he was interested in a short term engagement at ONCALL, and organised a further meeting on 3 August 2022 with Mr Walkerden Mr Bobinac, Mr Hulusi and myself.
>
> 8. It was my understanding from the meetings and conversations with Mr Walkerden, that he found the short-term nature of the engagement attractive. He had expressed preference for it being flexible as he had other ongoing consulting opportunities.[31]

[79] Further, the contract was subject to negotiation between the Applicant and Mr Taher of the Respondent.[32]

[80] While the Applicant may have a grievance about the scope of work he performed under the contract I am not convinced this demonstrates that the contract was a sham.

[81] To the extent the Applicant submitted that, despite what the contract said, the reality of his relationship with the Respondent was that of employer and employee that is, in my opinion, not the appropriate inquiry required since the decision of the High Court in *Personnel Contracting* and the guidance now given to the Commission by the Full Bench in *Deliveroo*.

[82] I have carefully considered all of the evidence before me. In this case the written contract provides overwhelming evidence that the contract between GDC and the Respondent was a contract for services and that the Applicant was the designated person under the contract to provide services to the Respondent. I am therefore not satisfied that the Applicant was an employee of the Respondent.

[83] In these circumstances the Applicant cannot be, and is not, protected from unfair dismissal.

THE HIGH INCOME THRESHOLD

[84] The Respondent argues that, in the alternative to the above, the Applicant was not protected from unfair dismissal as he earned above the high income threshold and was otherwise not covered by an award.

[85] For the reasons given below I am satisfied that, if the Applicant was an employee of the Respondent, the sum of his annual rate of earnings at the time he was terminated exceeds the high income threshold. Further, I am satisfied that the work performed by the Applicant was not covered by the *Clerks – Private Sector Award 2020* and the Applicant does not argue otherwise. There is no enterprise agreement that would apply to the Applicant's employment with the Respondent. For this reason, if the Applicant was an employee, he was not protected from unfair dismissal.

[86] The high income threshold at the time the Applicant said he was dismissed was $162,500.00.

[87] In relation to the high income threshold, s.332 of the FW Act establishes the definition of earnings for the purpose of calculating the high income threshold. Section 332 states:

> **332 Earnings**
>
> (1) An employee's *earnings* include:
>
> (a) the employee's wages; and
>
> (b) amounts applied or dealt with in any way on the employee's behalf or as the employee directs; and
>
> (c) the agreed money value of non-monetary benefits; and
>
> (d) amounts or benefits prescribed by the regulations.

(2) However, an employee's *earnings* do not include the following:

(a) payments the amount of which cannot be determined in advance;

(b) reimbursements;

(c) contributions to a superannuation fund to the extent that they are contributions to which subsection (4) applies;

(d) amounts prescribed by the regulations.

Note: Some examples of payments covered by paragraph (a) are commissions, incentive-based payments and bonuses, and overtime (unless the overtime is guaranteed).

(3) *Non-monetary benefits* are benefits other than an entitlement to a payment of money:

(a) to which the employee is entitled in return for the performance of work; and

(b) for which a reasonable money value has been agreed by the employee and the employer;

but does not include a benefit prescribed by the regulations.

(4) This subsection applies to contributions that the employer makes to a superannuation fund to the extent that one or more of the following applies:

(a) the employer would have been liable to pay superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992* in relation to the person if the amounts had not been so contributed;

(b) the employer is required to contribute to the fund for the employee's benefit in relation to a defined benefit interest (within the meaning of section 291-175 of the *Income Tax Assessment Act 1997*) of the employee;

(c) the employer is required to contribute to the fund for the employee's benefit under a law of the Commonwealth, a State or a Territory.

[88] There is no dispute that, for the period the Applicant was engaged by the Respondent superannuation was to be paid from the earnings paid to GDC and that there were no non-monetary benefits said to be provided to the Applicant.

[89] The Applicant was only engaged for an eight-month period and, based on the invoiced amounts[33] excluding reimbursement for expenses, the Applicant received $134,537.55 over that period. I do not consider it appropriate to include expenses in the Applicant's earnings as these were amounts that would otherwise have been met by the employer.

[90] In *Zappia v Universal Music Australia Pty Limited T/A Universal Music Australia*[34] (**Zappia**) the Full Bench said the following in relation to the determination of the annual rate of earnings:

> **[9]** Section 382 of the Act relevantly provides that a person is protected from unfair dismissal at a time if, at that time, the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold. It is clear that the time at which the annual rate of earnings must be ascertained is at the time of the termination of the person's employment. What needs to be ascertained is the annual rate of earnings **at** that time, not the annual earnings **to** that time (the amount earned in the 12 months to that time).

[91] In *Tamara Trezise v Universal Music Australia Pty Limited T/A Universal Music Australia*[35] (**Universal Music**) Commissioner Harrison considered the effect of a period of leave without pay on the annual rate of earnings for the purpose of determining if that Applicant in that matter was protected from unfair dismissal. The Commissioner found that:

> **[11]** The consistent use of the word "earnings" in ss332 and 382(b)(iii) as distinct from the term "payment" is no mere coincidence. Counsel for Universal submitted that if a period of unpaid leave such as parental leave was to be considered for the purpose of determining the annual rate of earnings, referred to in s.382, parliament would have said so plainly and expressly. I agree.
>
> **[12]** In my view a period of unpaid leave does not affect the annual rate of earnings as referred to in s.328.

[92] The decision in *Zappia* confirms that I should determine the Applicant's annual rate of earnings based on what he was being paid at the time of termination. That figure is $219,999.00 (inclusive of superannuation). This is $199,094.11 with 10.5% superannuation not included, clearly in excess of the high income threshold.

[93] Both the Applicant and Respondent however suggested that I should look at what the Applicant was actually paid to the time his relationship with the Respondent ended. Even if I did so this would not alter the outcome. The Applicant suggested that I should limit the extent to which I scale up payments to him based on his assessment of the amount of time he may have taken away from work within the 12 month period for school holidays, to care for his wife etc. For the reasons given in *Universal Music* I have not discounted the annual rate of earnings for periods the Applicant suggested he might have been on leave without pay.

[94] I have excluded the GST amounts added to the invoices of GDC. The invoices submitted by GDC were paid by the Respondent. If the Applicant was an employee of the Respondent the GST amount would not have been added to the invoices so should be excluded from any calculations. In any event the resolution of this is not necessary given my conclusion. I am satisfied that any reimbursement of actual expenses should also be excluded (such expenses for travel and accommodation and the like) as these would have been met by the Respondent.

Month	**Invoiced amount less GST[36] $**	**Less superannuation component[37] $**	**Total earnings $**
August 2022	4,230.75		
September 2022	8,461.50		
October 2022	16,923.00		
November 2022	16,923.00		
December 2022	16,076.55		
January 2023	14,384.55		
February 2023	16,923.00		
March 2023	16,923.00		
April 2023	16,923.00		
April 2023 make-up[38]	6,769.20		
TOTAL	**134,537.55**	**12,784.12**	**121,753.43**

[95] Had the Applicant been an employee for the period (8 months) the contract ran he would have earned $134,537.55 inclusive of superannuation and, therefore $121,753.43 excluding superannuation.

[96] The annual earnings for the Applicant would therefore be $182,630.14 ($121,753.43 for 8 months + $60,876.71 (for 4 months) to determine an annual amount).

[97] The high-income threshold at the time the Applicant was terminated was $162,500.00. The Applicant clearly would have earned in excess of the high-income threshold and, given his employment was not covered by an award and no enterprise agreement applied to him, he therefore would not be protected from unfair dismissal.

CONCLUSION

[98] Section 382 of the FW Act provides as follows:

> **382 When a person is protected from unfair dismissal**
>
> A person is ***protected from unfair dismissal*** at a time if, at that time:
>
> (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
>
> (b) one or more of the following apply:
>
> (i) a modern award covers the person;
>
> (ii) an enterprise agreement applies to the person in relation to the employment;

(iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

[99] For the reasons set out above I am not satisfied the Applicant was an employee of the Respondent. If he was an employee I am satisfied the Applicant earned above the high income threshold at the time of termination. The Applicant therefore was not protected from unfair dismissal. The application for unfair dismissal is therefore dismissed.

COMMISSIONER

Appearances:

C Walkerden on his own behalf

A Maher of CIE Legal for the Respondent

Hearing details:
2023.
27 July:
Melbourne.

Final written submissions:
Applicant, 31 July 2023
Respondent, 3 August 2023

Printed by authority of the Commonwealth Government Printer

<PR765083>

---

[1] Court Book (**CB**) pages 45-60

[2] [2023] FWC 1794

[3] Witness statement Mr Christian Walkerden, CB page 9

[4] Transcript PN435

[5] Transcript PN417

[6] Transcript PN550

[7] Transcript PN6729

[8] Witness statement of Mohammed Taher paragraphs 10-13 and attachments MT-3 and MT-4, CB pages 176 and 196-204

[9] Transcript PN853

[10] See witness statement of Mohammed Taher paragraph 8 and attachment MT-3, CB pages 175 and 195

[11] Transcript PN482-487

[12] See replacement page for CB 61

[13] Transcript PN370

[14] Transcript PN372

[15] Exhibit A1

[16] Transcript PN378

[17] Transcript PN433

[18] Transcript PN380

[19] CB pages 45-59

[20] Transcript PN320

[21] See *Deliveroo Australia v Diego Franco* [2022] FWCFB 156 and the cases cited therein

[22] Exhibit A1

[23] [2022] HCA 1

[24] [2022] HCA 2

[25] [2022] FWCFB 156

[26] Transcript PN435

[27] Transcript PN436

[28] Transcript PN107

[29] Butterworths (3rd ed)

[30] [2015] HCA 45

[31] Witness statement of Gayle Antony, CB page 251

[32] Witness statement of Mohammed Taher, attachments MT-1 (to which was attached the Applicant's marked up copy of the proposed contract for services) and MT-2, CB pages 177 and 194

[33] Witness statement of Gayle Antony, attachment GA-2, CB pages 255-265

[34] *Francesco Zappia v Universal Music Australia Pty Limited T/A Universal Music Australia* [2012] FWAFB 6108

[35] [2011] FWA 5960

[36] These amounts are taken from the actual invoices issued to the Respondent by GDC. See witness statement of Gayle Antony, attachment GA-2, CB pages 255--265

[37] The SGC amount over the period the Applicant was engaged by the Respondent was 10.5%

[38] GDC had invoiced the Respondent on a calendar month basis where the contract was for an amount every four weeks. This 'make-up' amount is for the odd days in a month in excess of 4 weeks.