



DECISION

Fair Work Act 2009
s.365—General protections

James Parker-Brown

v

The Carly Ryan Foundation Incorporated
(C2023/4926)

DEPUTY PRESIDENT ANDERSON

ADELAIDE, 11 OCTOBER 2023

Application to deal with contraventions involving dismissal – jurisdiction – presentations to schools on behalf of charitable organisation – whether employee or contractor – no written contract – agreed terms – relationship in practice – no contract of employment – no dismissal – application dismissed

[1] On 15 August 2023 James Parker-Brown (Mr Parker-Brown or the applicant) made a general protections application to the Commission under s 365 of the *Fair Work Act 2009* (Cth) (FW Act) alleging contraventions of the FW Act associated with an alleged dismissal.

[2] Mr Parker-Brown’s application is against The Carly Ryan Foundation which he claims committed the contraventions (the Foundation or the respondent).

[3] The Foundation opposes the application. It filed a response on 25 August 2023 raising a jurisdictional issue.

[4] The jurisdictional issue is whether Mr Parker-Brown was an employee or contractor. Mr Parker-Brown submits that he was dismissed from a contract of employment. The Foundation submits that Mr Parker-Brown worked as a contractor and that the Foundation chose not to further engage his services.

[5] The decision of the Full Court of the Federal Court of Australia in *Coles Supply Chain Pty Ltd v Milford*¹ requires the Commission to determine a dispute about the fact of a dismissal from employment under s 365 of the FW Act before the Commission can exercise powers conferred by s 368. It is thus necessary to determine the jurisdictional issue if Mr Parker-Brown’s application is to proceed.

[6] I issued directions on 8 September 2023.

[7] I heard the jurisdictional matter by video on 25 September 2023. Both parties were self-represented; the Foundation by Ms Sonya Ryan OAM (by video from Washington, USA).

[8] I received evidence and submissions, including oral evidence from three persons:

- Mr James Parker-Brown (applicant);
- Ms Ashlee Scotland (associate of Mr Parker-Brown); and
- Ms Sonya Ryan OAM (founder and CEO) (Ms Ryan).

Facts

[9] The facts are largely not in dispute.

The Foundation

[10] The Foundation was established by Sonya Ryan in 2010. It has the purpose of protecting children and ensuring their online experiences are positive and safe.

[11] The Foundation is named after Ms Ryan's daughter Carly, who was murdered by an online sexual predator in 2007.

[12] The Foundation is a South Australian based registered charity. Although initially privately established, it has since secured funding from Federal and State governments, from the private sector and from private citizens.

Project Connect

[13] A programme conducted by the Foundation is Project Connect. The programme was initially conducted independent of government funding. In recent years the project has been supported with significant funding from the Commonwealth through the Department for Social Services (DSS).

[14] Project Connect involves delivering presentations to schools, at the request of schools, about online safety and related matters. Schools make a request to the Foundation for the delivery of a presentation. The Foundation then arranges for its delivery.

[15] Persons delivering a presentation do so on behalf of the Foundation. Presentations are pre-approved by the Foundation's founder, Ms Ryan and by the funding agency, DSS. Presenters are not permitted to alter the content of a presentation without Ms Ryan's prior agreement. Presenters take questions and comments from students at the conclusion of presentations and are required to empathetically deal with issues raised (including one-on-one feedback by attendees about personal experiences, including those that may require follow-up).

[16] In order to maintain government funding for Project Connect, the Foundation is required to submit annual budgets to DSS and to report each six months on progress against budget.

Engagement of Mr Parker-Brown

[17] Mr Parker-Brown is a resident of Adelaide.

[18] In March 2023 Mr Parker-Brown saw an online advertisement for presenters for the Foundation. The advertisement as sent to him by the Foundation read:²

“Online Safety Presenter

Employer: The Carly Ryan Foundation

Work Type: Contractor

Location: National

Are you an experienced public speaker? Do you want to create change for young people across Australia?

Then The Carly Ryan Foundation could be the perfect place for you!

We’re on the hunt for energetic, motivated and authentic program presenters to join our growing team. If you’re passionate about online safety for young people, and you’re comfortable with public speaking, then you’ll fit right in!

As a program presenter, your primary role will be to attend schools to deliver positive workshops with students across Australia, on various topics such as cyberbullying, and online safety. Our workshops rely on our presenters’ abilities to think on their toes and facilitate a range of group dynamics, while still sticking to our message. This is a unique opportunity to educate and connect with young people.

This is a contractor position which operates on a pay-per-session arrangement.

CORE RESPONSIBILITIES

- Facilitate strengths-based, student-centred learning
- Deliver workshops nationally
- Demonstrate positive leadership and proactive behaviours to young people
- Contribute to the development of presentations
- Actively pursue opportunities and relationships for The Carly Ryan Foundation in the educational community

KEY SELECTION CRITERIA

- Passion for working directly with young people.
- Be an experienced presenter and public speaker.
- Demonstrated commitment to advocating for the needs of young people.
- Creative, strengths-based and fun approach to youth engagement.
- Comfortable public speaking / presenting / facilitating / performing to large groups of people
- Ability to thrive both independently and as part of a team.
- An understanding of social media platforms and device settings is favoured, but not required.
- 18+ years old with current Australian drivers’ license
- Have, or have the ability to acquire, an Australian Business Number (ABN)

BENEFITS FOR YOU

- Access to high-level training and development with the full support of a team.
- Join a tight-knit team of passionate individuals.
- Work directly with a number of our partners.
- Connect with diverse communities, including the LGBTQIA+ community, culturally and linguistically diverse communities, people with a disability, and people from regional and rural areas.

The successful applicant will be required to have the relevant working with children checks.”

(emphasis in original)

[19] Mr Parker-Brown considered that the Foundation aligned with his values. Mr Parker-Brown made direct contact with the Foundation. The Foundation confirmed that it was seeking presenters and invited him to submit a resume. Mr Parker-Brown did so.

[20] Ms Ryan read the resume and interviewed Mr Parker-Brown. She considered his background in yoga and meditation to be indicative of an empathetic persona and assessed that he had good speaking and presentation attributes.

[21] The Foundation agreed to take Mr Parker-Brown’s expression of interest to the next stage. Together with another interested applicant (S), Mr Parker-Brown was asked to attend training and induction sessions firstly at a school (11 April) and then at the Foundation’s office (26 April).³

[22] Mr Parker-Brown did so. The induction involved observing a presentation by Ms Ryan, and trial (moot) presentations with a briefing from the Executive Manager of the Foundation, Ms Durdin. Mr Parker-Brown and S were assessed as capable and advised that they would be offered work as presenters.

[23] No written agreement was entered into though on 11 April 2023 Mr Parker-Brown agreed to be bound by the Foundation’s Code of Conduct and completed an “employee/contract presenter details” form.⁴

[24] The agreed arrangement was a product of email exchanges⁵ and discussions at interview and during training/induction by Mr Parker-Brown with Ms Ryan and Ms Durdin.

[25] Delivering presentations for the Foundation was not the only work performed by Mr Parker-Brown. At the time of being engaged and prior, through his private business ‘Balanced Being’ (holding its own ABN), Mr Parker-Brown was delivering yoga and massage courses privately in the local area. He was also working privately as a labourer in the construction industry, though scaled back that work (but not the massage/yoga work) once engaged by the Foundation.

[26] Mr Parker-Brown agreed to provide services to the Foundation through his business Balanced Being.

[27] There was no negotiation on price. Each presentation was to take approximately one hour. The fee payable per presentation was fixed, and determined by the Foundation based on the approved budget and funding provided by DSS. Mr Parker-Brown agreed to the fee.

[28] It was agreed between Mr Parker-Brown and the Foundation that he would invoice the Foundation for his services.

[29] In the two month period in May and June 2023 Mr Parker-Brown was offered and agreed to make nineteen presentations on behalf of the Foundation to schools in and around Adelaide. These presentations were made on 5 May, 16 May, 18 May, 23 May, 24 May, 25 May (x 2), 26 May, 29 May (x3), 31 May, 1 June, 2 June, 5 June, 6 June, 13 June, 15 June and 20 June.

[30] Mr Parker-Brown, through Balanced Being, sent four invoices in total:

- 28 April – for the two training/induction sessions;
- 26 May – for seven presentations;
- 7 June – for eight presentations; and
- 20 June – for four presentations.

[31] The full amount of these invoices were paid by the Foundation. Income tax was not deducted.

[32] Mr Parker-Brown would be advised by the Foundation when a school sought a presentation and the Foundation would discuss with Mr Parker-Brown (and other presenters) their availability to deliver the presentation. Mr Parker-Brown, wanting to make a good early impression and because the work aligned with his values, gave priority to days and times when the Foundation sought his services.

[33] In mid-May 2023 the Foundation asked Mr Parker-Brown whether he would be available to travel to Queensland in August 2023 to make presentations in that State. Mr Parker-Brown replied that he could do so.⁶

[34] The Foundation had a motor vehicle (marked with the Foundation's logo) which could be used by presenters to travel to schools. Time spent in travelling to the Foundation office to collect the vehicle or in travelling to a school from the office or home was not paid time. If Mr Parker-Brown used his private vehicle to travel to a school (which he did on 24 May⁷) no payment or travel allowance was made.

[35] When making a presentation, Mr Parker-Brown was provided with and required to wear a jacket with the Foundation's logo on it. He was representing the Foundation, and the presentation script he was provided required him to state that he was 'from the Foundation'.

[36] When making a presentation, Mr Parker-Brown was required to use the Foundation's laptop. To protect its intellectual property, the Foundation did not permit its presentation slides to be downloaded to a private laptop.

[37] The Foundation carried insurance for those that delivered its services. Mr Parker-Brown was not required to take out private insurance.

Dispute over status and superannuation

[38] On 19 June 2023 a presentation Mr Parker-Brown was scheduled to deliver was cancelled by the school at short notice (two hours prior). Mr Parker-Brown was put out by the cancellation.

[39] In light of the cancellation, and after delivering nineteen presentations in the preceding seven week period, on 20 June 2023, Mr Parker-Brown queried Ms Durdin about whether he would be paid for the cancellation. He was told that he would not.⁸ Mr Parker-Brown then queried whether he was entitled to superannuation, and whether he was actually an employee entitled to more than a fixed service fee. At around this time, Mr Parker-Brown obtained advice from an accountant, and also researched and contacted the Australian Tax Office and 'Fair Work' websites and inquiries lines.

[40] Ms Ryan was overseas at the time. Nonetheless, emails on the issue were exchanged on 20 and 22 June.

[41] On 20 June Mr Parker-Brown wrote to Ms Durdin copied to Ms Ryan:⁹

“... ”

Also I would like to say thank you for the chat earlier with regards to the employment status. To summarise, I'm getting a little confused as to if the position is a contract role, or a casual (sic) employee position. In your previous email you mentioned 'As with a casual role', which leads me to believe it is actual (sic) a casual position.

I have been asked by someone who I am dealing with my accounts to query with CRF to the nature of the position, as he mentioned it sounds like a casual (role) not contract, and following Super Annuation (sic) Guarantee Eligibility tool, it may also appear to be casual employment as well given the use of company car, uniform, laptop, etc.

I really appreciate you looking into this. I just want to make sure I'm doing the right thing when filing my taxes / super this year.

Regards
James”

and

“Hi Liz,

I have just been sent this by the person I referred in the previous email. He has sent me a link giving the differences between a contractor and a employee. It appears that these definitions may have changed since a High Court decision being made in February 2022.

https://www.ato.gov.au/business/employee-or-contractor/difference-between-employees-and-contractors/?=redirected_calc_ECDTSGETDifferenceEmployeesContractors

A lot companies / business are confused by this given the recent changes, and as mentioned, so was my previous employer in Melbourne last year.

Regards

James”

[42] Ms Ryan replied on 20 June:¹⁰

“Good afternoon James,

To clarify, please see the presenter job description attached. Your position is a contract presenter not a casual employee.

As per the ATO’s direction a contractor is contracted to achieve a specific result and is paid when they have completed that result, often at a fixed fee. You are not deemed an employee of the foundation for superannuation purposes.

You are contracted by the foundation to deliver presentations only at a fee of \$150 per presentation delivered.

Let me know if you have any further questions.

Kindest regards

Sonya Ryan OAM”

[43] Mr Parker-Brown wrote again on 22 June:¹¹

“Hi Sonya,

Thanks for getting in touch. It’s always wonderful to hear from you. How is your work in the States going?

I understand that the job advertisement claims that the position is to be a contract role, but due to the nature of the work, and the work carried out, it appears to be that of a casual employee position. Casual employee work can also include task-based work at a fixed rate, and doesn’t inherently make the worker a contractor.

My adviser has given me this link that employers can go through, that can determine whether the position is actually a casual employee position vs. a true independent contractor role, regardless of advertisement or contract agreement. I have taken this test as a contractor/employee, and the result says that I would be classed as a causal (sic) employee.

<https://www.ato.gov.au/Business/Super-for-employers/Work-out-if-you-have-to-pay-super/>

<https://www.fairwork.gov.au/find-help-for/independent-contractors>

As mentioned, I'm just raising this as my adviser that works in accounting / legal said that it sounds like the work is that of a casual employee rather than my usual independent contracting.

Sometimes without realising, entities can be engaged in something called 'sham contracting' – it happened to a previous employer in Melbourne. They unknowingly presumed their workers were contractors, but we were in fact classified as casual employees in the eyes of the ATO and FairWork. Therefore, entitled to Super. They changed this within a few weeks after consultation with their accountant, as they didn't realise it was illegal, and SCG fees may have to be paid.

Regardless as to whether the position is one of independent contracting or casual employment, presenters are also required to be paid Super, which can be found near the bottom of this page:

<https://www.ato.gov.au/business/employee-or-contractor/how-to-work-it-out--employee-orcontractor/>

This has also been confirmed on the phone by the ATO that Super needs to be paid for any presentation position, regardless of subject matter or audience (not only within media/arts/entertainment).

I'm happy to have any conversations needed to help discuss through the above in further detail. I just want to make sure that I'm doing the right thing with regards to my own job classification, tax and super, as well as protecting the foundation.

Warm regards,

James"

[44] On 22 June Ms Ryan replied:¹²

"Hi James,

I am well, things are moving well here in the US. I'm hopeful to get Carly's Law introduced soon.

How are you going with the presentations? Are you enjoying it?

We have contracted presenters since 2013 and have never been instructed by the ATO, our accountants or lawyers to pay super.

The foundations governance is regularly reviewed by our board and lawyers.

The job advertisement doesn't claim to be a contract role, it is a contract role.

The foundation chooses who and how we employ, your claim that you think it's a casual position is presumptuous.

Independent contractors don't get employee entitlements such as annual leave, sick leave and minimum rates of pay.

Independent contractors are also responsible for paying their tax and GST and pay their own superannuation.

You are a contract presenter, definitely not a casual employee. You are contracted to present our material, the CRF presentation script is not your own original content which is usually the case in media, arts and entertainment where additional benefits can sometimes be included.

I will have our accountants look into this further with our legal team and come back to you.

If this contract presenter role doesn't align with what you're looking for moving forward, just let me know as soon as you can.

The foundation prides itself in looking after everyone involved in representing Carlys legacy, it is important to me that you are satisfied and happy with the current arrangement.

I'll come back to you as soon as possible.

Kindest regards
Sonya Ryan OAM"

[45] On 22 June Mr Parker-Brown wrote:¹³

"The point you raise that I present CRF material, rather than my own original content, heavily informs that the position would be classified as a casual position, and not a contract role, in the eyes of the ATO for Super purposes. This is all new to me as well, I am in no way assuming you are acting in a way that is knowingly malicious or deceitful.

I'm also aware that both contractors and casual employees aren't entitled to sick leave, minimum pay/hours or annual leave. That's just for permanent full-time/part-time employees.

The position aligns with my self immensely, and is work that I wish to continue carrying out into the foreseeable future. The only issue I raise is purely the classification of the role and super entitlement as the end of the tax year is fast approaching and I want to ensure everything is going through correctly for everyone.

I look forward to hearing back from you once the queries have been raised with accounting / legal.

Warm regards

James"

[46] After seeking advice, Mrs Ryan provided a considered response on 30 June. The Foundation indicated to Mr Parker-Brown that it would make superannuation payments to all its contractors:¹⁴

“Good morning James,

How are you?

We have been looking into the possibility of paying Super and it seems to be filled with a lot of conflicting information.

Given that CRF is not your only source of income along with the many tests that you need to go through for eligibility to fit the definition creates quite a process.

Regardless of this I want you to feel supported as CRF prides itself on ethical and fair conditions for all contractors therefore we have come to the decision that we will contribute to your super moving forward.

I will need the following from you;

Full Legal Name

TFN

DOB

Address

Name of Superfund

Superfund membership number

Kindest regards,

Sonya Ryan OAM”

[47] On 3 July 2023 Mr Parker-Brown provided the requested details and indicated that “it is wonderful to hear that I’m eligible for Super moving forwards”.¹⁵

[48] Eight days later, on 11 July 2023, Mr Parker-Brown was advised by email that the Foundation no longer required his services:¹⁶

“Good morning James,

We have been in meetings discussing CRF’s strategic plan moving forward, as of July 30th we will no longer require your services as a contractor presenter.

We are waiting on funding support from the Federal Attorney General’s Department to expand our team with full time staff.

Thank you for your contribution to Carly’s legacy, I will be in touch if any contract or employment opportunities arise in the future with the foundation.

Kindest regards,

Sonya Ryan OAM”

[49] Mr Parker-Brown believed that he had been removed as a contractor for disputing his status and seeking superannuation. He did not agree that it was the product of a planned restructure. On 11 July Mr Parker-Brown informed co-presenter S, who had been offered office-based employment with the Foundation, that he was “definitely taking this to fair work now”.¹⁷

[50] Mr Parker-Brown proceeded to obtain advice about general protections claims. He filed this application on 15 August 2023 alleging that he was notified of dismissal on 11 July 2023 which took effect on 30 July 2023.

Submissions

Mr Parker-Brown

[51] Mr Parker-Brown submits that he was a casual employee, not a contractor. As such, Mr Parker-Brown submits that he was dismissed from a contract of employment when the Foundation unilaterally decided to not offer him further work.

[52] Mr Parker-Brown submits that he was an employee because the Foundation exercised control over the content of the presentations he made, required him to use the Foundation’s laptop, he could not delegate his work to another person, it required him to wear its uniform, it required him to disclose that he was from the Foundation, it controlled the dates and times he delivered presentations, it required him to attend training, he worked regularly over a two month period, it took out insurance for his work, it provided an identifiable vehicle owned by the Foundation for his transport, it gave him a notice period and he had a reasonable expectation of ongoing work particularly future presentations in Queensland.

[53] Mr Parker-Brown also submits that he was an employee because the Foundation agreed, belatedly, to pay superannuation in addition to his presentation fee.

The Foundation

[54] The Foundation submits that Mr Parker-Brown was a contractor because the advertisement he responded to was for work as a contractor, and that this was the understood and agreed basis on which he was engaged.

[55] The Foundation also submits that Mr Parker-Brown was a contractor because this was the method of engagement contemplated by the Foundation’s funding agreement for Project Connect with the Commonwealth.

[56] The Foundation submits that Mr Parker-Brown was also a contractor because he could regulate his availability to deliver a particular presentation, exercised judgement and skill in dealing with students particularly in answering questions or responding to comments and assessing whether follow-up issues arose, was able to use a private vehicle for transport if he wished, invoiced through his private business, did not seek to have taxation deducted from the fees he invoiced and only provided his tax file number two months after when asked for superannuation purposes.

[57] The Foundation submits that because it agreed to pay superannuation to its contractors does not mean that an employment relationship existed. It voluntarily made superannuation payments having regard to the specific provisions of the relevant superannuation legislation and ATO rulings.

Consideration

[58] Section 365 of the FW Act provides:

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

If:

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

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

[59] Section 365 requires a dismissal to have occurred as a jurisdictional fact. “Dismissal” for these purposes (and other purposes of the FW Act) is defined in s 386(1). It provides:

“386 Meaning of dismissed

(1) A person has been dismissed if:

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

[60] It is not in dispute that the Foundation gave notice of the termination of its relationship with Mr Parker-Brown on 11 July 2023 effective 30 July 2023.

[61] Nor is it in dispute that “dismissal” for the purposes of s 386 and thus s 365 requires termination from a contract of employment.

[62] The question that determines the jurisdictional issue is whether at the relevant time (11 July 2023) a contract of employment existed between Mr Parker-Brown and the Foundation.

[63] Whilst Mr Parker-Brown and the Foundation were capable of being a “national system employee” and a “national system employer” within the meaning of the FW Act, whether they were depends on whether a contract of employment regulated their relationship.

[64] The FW Act does not, for the purposes of Part 3-1 (general protections) prescribe a special definition of employer and employee. Those terms are said to “have their ordinary meanings”.¹⁸ This means that general legal principles established by the courts regulating whether an employment relationship exists will determine this matter.

[65] Those principles were most recently considered by the High Court of Australia in the cases of *Jamsek* and *Personnel Contracting*.¹⁹

[66] The Court stated that contractual terms and not performance, where those terms can be ascertained and where the contract is not a sham, will determine the true nature of the relationship. In those circumstances it is those agreed terms which have primacy in determining the true character of the relationship.²⁰ However, the Court also observed that the manner in which the relationship is worked in practice may be relevant for certain limited purposes, such as to find contractual terms where they cannot otherwise be ascertained²¹ or to determine the nature of any variation to agreed terms.²²

[67] In this matter, whilst there were agreed terms it is not in dispute that no written agreement or contract existed between the parties that expressed those terms. Nor does the evidence suggest that the terms were neatly encapsulated into a confined or singular conversation. That being so, assessing whether the relationship between Mr Parker-Brown and the Foundation was one of contractor or employee requires a consideration of what was said and done to constitute the agreed basis on which work would be performed and also an examination of the manner in which the relationship worked in practice in order to ascertain the full extent of those terms or whether terms initially agreed were varied.

Agreed terms

[68] Engagement. Somewhat confusingly, the advertisement Mr Parker-Brown responded to stated:

“Employer: The Carly Ryan Foundation
Work Type: Contractor”.

[69] Despite the evident inconsistency between referring to itself as an employer yet describing the work sought to be performed by a contractor, the agreed basis for engagement was clear in the body of the advertisement.²³

“This is a contractor position which operates on a pay-per-session arrangement”.

[70] To underscore this point, the advertisement as sent to Mr Parker-Brown and to which he responded highlighted this part of the text in bold.

[71] The “employee/contract presenter details” form completed by Mr Parker-Brown on 11 April 2023 was one and the same form for either an employee or a contractor, though evidence that Mr Parker-Brown understood himself to be engaged as a contractor is apparent from the fact that the form stated “contract presenters do not need to complete superannuation details”²⁴ and Mr Parker-Brown did not populate this part of the form.

[72] I find that Mr Parker-Brown was expressly engaged as a “contractor” and that this was an agreed term of engagement. Nor was there an agreement to the contrary during the life of the relationship.

[73] I make this finding having regard to the express terms of the advertisement Mr Parker-Brown responded to and the subsequent conduct of Mr Parker-Brown and the Foundation in the days and weeks that followed. That conduct concerned Mr Parker-Brown providing details of his ABN (as required by the advertisement) and Mr Parker-Brown, when interviewed, not asking Ms Ryan or Ms Durdin to be engaged on any basis other than that stated in the advertisement.

[74] I do not accept Mr Parker-Brown’s submission that the arrangement was simply labelled as a contractor relationship to avoid employment obligations and thus a sham. As is evident from this decision, the nature of the work and the manner in which it was performed lent itself to either an independent contractor relationship or a casual employment relationship. Indices cut both ways. There is nothing plainly inconsistent between the agreed terms or the way the relationship worked in practice that suggests the label was an avoidance mechanism, a misrepresentation or evidence of sham contracting.

[75] In arriving at this finding I place no significant weight on whether the funding budget agreed between the Foundation and the Commonwealth contemplated work by “contract presenters”.²⁵ This does not weigh significantly as it is, at best, evidence of the Foundation’s position only. It is consistent with the aforementioned finding but cannot be evidence of an agreement between Mr Parker-Brown and the Foundation as Mr Parker-Brown was not a party to this budget description nor any arrangement with the Commonwealth.

[76] The agreed form of engagement and the unchanged nature of that form of engagement points strongly towards a contractor relationship being in existence at the time the relationship ended.

[77] Negotiation of terms. There was very little negotiation of terms.

[78] The remuneration per presentation was fixed in advance.

[79] The flexibility Mr Parker-Brown had was largely limited to accepting an offer of work on a set date and time that a school presentation had been scheduled. He did not negotiate dates and times for the provision of his services with a school. He did so with the Foundation. His right to not accept work was real, and whilst he gave priority to the Foundation amongst his other income generating work, it was his decision to do so.

[80] The general lack of negotiation over terms was more consistent with an employment relationship than a contractor relationship.

[81] Use of a private business vehicle and ABN. It was an agreed term that Mr Parker-Brown would provide services through a private business controlled by him which had a registered Australian Business Number. Mr Parker-Brown already had an active, registered and income generating business (Balanced Being) and he used that same vehicle to provide services to the Foundation.

[82] Although there was very little business risk assumed by Mr Parker-Brown as the nature of the work largely involved the provision of personal services in the form of a scripted oral presentation, he did so through his privately established business vehicle and agreed with the requirement that he do so via his own ABN. This was not only specified as a “selection criteria” in the advertisement but also the way the arrangement operated in practice.

[83] This was consistent with a contactor relationship and not an employment relationship.

[84] Remuneration. Although the remuneration was fixed, it was agreed to be a set amount per presentation. The remuneration was not described as a wage or salary. Ms Durdin’s email to Mr Parker-Brown on 11 April 2023 referred to it as “compensation” and a “fee”.²⁶ Although presentations were expected to take one hour, the remuneration did not bear a relationship to time, it bore a relationship to the service to be provided. It was agreed that no payment would be made for time taken to travel to a school. The remuneration was an all up amount.

[85] This was somewhat more consistent with a contactor relationship than an employment relationship.

Relationship in practice

[86] I now consider the manner in which the relationship operated in practice.

[87] Nature of the services. The work required delivery of short and discrete hour-long presentations at different locations with no provision for paid travel or preparation time, and were usually (though not always) a singular task on a given day. No minimum engagement period per day applied.

[88] This consideration is consistent with both task-specific contract work and casual employment.

[89] Payment. Mr Parker-Brown invoiced his fee for services on a regular basis. Invoices were sent in the name of his private business and ABN.²⁷ Mr Parker-Brown did not agree nor intend to have income tax deducted from his invoiced sum, nor did the Foundation.

[90] This was consistent with a contactor relationship and not an employment relationship.

[91] Performance of services. The presentations delivered by Mr Parker-Brown were largely scripted, with the content controlled by the Foundation. Mr Parker-Brown was however required to deal with questions and comments from students, teachers or parents that were not known in advance or scripted. He was required to exercise a degree of skill and judgment in dealing empathetically, accurately and sensitively to issues raised about online experiences.

[92] I have some regard to the fact that Mr Parker-Brown had two initial sessions by way of training and induction. Whilst familiarising oneself on site with the work of a client (in this case, the Foundation) is not inconsistent with delivering services as a contractor, the training and induction undertaken by Mr Parker-Brown in these two sessions largely involved observing

and then making moot presentations. As such, it was part of an assessment by the Foundation as to whether he was sufficiently skilled to be engaged to present its scripted presentations.

[93] I further take into account that there was no agreement or scope for Mr Parker-Brown to delegate or subcontract the delivery of the presentations to a third party. If he could not undertake the work on a given day, it would be for the Foundation, not him, to find another presenter. Whilst the nature of the work performed did not lend itself to subcontracting this is itself indicative of the fact that it was an arrangement for the provision of personal services to the Foundation, not business services.

[94] The scripted nature of the presentations, the two training sessions, the only limited scope to tailor information to the audience, and the inability to subcontract the work was more consistent with an employment relationship than a contractor relationship.

[95] Equipment and branding. Mr Parker-Brown was required to use a Foundation supplied laptop, and was precluded from downloading the presentation to his own device. Whilst this was for the Foundation's legitimate purpose of protecting its intellectual property assets, it was more consistent with an employment relationship. That Mr Parker-Brown was able to, and usually used the Foundation supplied vehicle to travel to presentations also points towards an employment relationship, though somewhat less so because this was not compelled (he could and did use a private vehicle).

[96] That Mr Parker-Brown was required to wear a jacket branded with the Foundation's name and was required to introduce himself as being from the Foundation also points somewhat to an employment relationship. Having branding identifying his own business or introducing himself as from his own business (Balanced Being) neither occurred, nor was agreed, nor would have been consistent with the messaging of his presentations. Whilst presenting, he was the face of the Foundation, not his private business.

[97] The equipment used and the branding which applied to the work was consistent with an employment relationship.

[98] Insurances and risk. I have noted that there was very little business risk assumed by Mr Parker-Brown as the nature of the work largely involved the provision of personal services in the form of a scripted oral presentation. I have also found that the Foundation carried insurances to cover the work of its presenters.

[99] The absence of business risk and the fact that the Foundation carried insurance was consistent with an employment relationship.

[100] Notice period. The Foundation gave Mr Parker-Brown a two-week notice period before its relationship with him was brought to an end. Whilst this is conduct consistent with an employment relationship, it is not inconsistent with a contractor relationship where contractual services were terminated at short notice to enable the business to transition to a new arrangement and to enable its service providers to adapt to the relationship ending.

[101] This conduct somewhat suggests an employment relationship.

[102] Ongoing expectation of work. I find that whilst Mr Parker-Brown had a reasonable expectation of ongoing work all things being equal (including delivering future presentations in Queensland with a co-presenter) this was not guaranteed and was at all times subject to funding, the discretion of the Foundation and the structure for Project Connect determined by the Foundation and those that funded it.

[103] A reasonable expectation of being offered ongoing work, all things being equal, was consistent with both a casual employment relationship and a contractor relationship. It is a neutral consideration.

[104] Payment of superannuation. Following Mr Parker-Brown raising with the Foundation in June 2023 whether he was entitled to superannuation, the Foundation took advice and agreed to pay its contractors superannuation. I do not consider this to necessarily be indicative of an employment relationship. Firstly, it is the provisions of the relevant superannuation legislation that determine the categories of workers to whom superannuation is payable. Those categories extend beyond the ordinary meaning of employee that is the assessment required in this matter. For example, contractors (such as Mr Parker-Brown) who were engaged wholly or principally for their labour are deemed to be employees for the purposes of the superannuation guarantee legislation (but not for all purposes). Secondly, the fact a business agrees to voluntarily make a payment of superannuation, as the Foundation did, is not evidence of the legal nature of the relationship any more than a decision by a business to decide not to make such a payment. The matter is to be determined objectively, not subjectively.

[105] Further, in agreeing to pay superannuation, the Foundation did not agree expressly or by inference that Mr Parker-Brown was thereafter engaged as an employee or that the agreed form of engagement as a contractor was or had been varied. What was agreed to be varied was that he would be thereafter paid superannuation, no more no less.

[106] This is a neutral consideration.

Conclusion on relationship status

[107] It is evident from the above that the agreed terms, and in particular the agreement to be engaged as a contractor, be remunerated as a contractor and seek payment by invoice in the name of his privately registered business and its ABN, and that such an arrangement was not a sham, are strong indices in favour of this having been a contractor relationship.

[108] However, the manner in which the relationship operated in practice, together with agreed terms restricting the discretion as to how the services were to be delivered and the absence of the capacity to subcontract or take business risk generally point towards an employment relationship.

[109] Considered overall, and having regard to the emphasis placed by the High Court in *Jamsek* and *Personnel Contracting* to the primacy of the agreement reached between the parties as being the guiding principle to determine the true nature of a relationship providing personal labour services I find, on balance, that Mr Parker-Brown was a contractor delivering presentations to schools on behalf of the Foundation.

[110] Mr Parker-Brown expressed interest in advertised contract work. He was then offered work as a contractor for a fixed rate per presentation. He then agreed to work as a contractor. He then invoiced payment through his business as a contractor. He was then paid as a contractor. Only belatedly and after not being paid for a cancelled job did he investigate his status and claim to be other than a contractor. These considerations are strong indications of an agreement to provide services as a contractor and of conduct that gave effect to that agreement. They, amongst other relevant considerations, override those terms and other factors that point in the other direction, noting that some considerations are neutral.

[111] I do not find that Mr Parker-Brown was engaged under a contract of employment, either at the time of engagement or at the time the engagement was ended.

Conclusion

[112] This being so, Mr Parker-Brown was not dismissed within the meaning of the FW Act because he was not employed by the Foundation.

[113] There being no dismissal from employment, there is no jurisdiction to deal further with the application. It must be dismissed. An order giving effect to this decision accompanies its publication.²⁸



DEPUTY PRESIDENT

Appearances:

Mr J Parker-Brown, *on his own behalf*

Ms S Ryan, *of and on behalf of* The Carly Ryan Foundation Incorporated

Hearing details:

2023

Adelaide (by video)

25 September

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¹ [2020] FCAFC 152

² A4

³ A5 Email chain 4 April to 11 April 2023

⁴ A5 Emails 11 April 2023

⁵ A5

⁶ A1 REF 9 Text messages 17 May 2023

⁷ A6 paragraph 1

⁸ A1 REF1

⁹ A1 REF 3, REF4

¹⁰ A1 REF6 Email 20 June 2023 13.46

¹¹ A1 REF6 Email 22 June 2023 14.21

¹² A1 REF6 Email 22 June 2023 15.27

¹³ A1 REF 6 Email 22 June 2023 17.00

¹⁴ A1 REF 6 Email 30 June 2023 7.20

¹⁵ A1 REF 6 Email 3 July 2023 10.37

¹⁶ A1 REF 6 Email 11 July 2023 5.46

¹⁷ A2 REF21

¹⁸ Section 335

¹⁹ *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 ('Personnel Contracting'); *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 ('Jamsek')

²⁰ *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [40] - [62], Gordon J at [172] - [178]; Gageler and Gleeson JJ observing otherwise at [143]

²¹ *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [42], [54], Gordon J at [177] - [178], [188] - [190]

²² *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [46], [54]

²³ A3 and A4

²⁴ A5 attachment to email 11 April 2023

²⁵ R2

²⁶ A5 Email 11 April 2023 8.28am

²⁷ R1 6.3 to 6.6

²⁸ [PR766810](#)