



# DECISION

*Fair Work Act 2009*  
s.365—General protections

**Tamara Rabadi**

**v**

**The Trustee for The YBL 2020 Trust**  
(C2023/2025)

DEPUTY PRESIDENT WRIGHT

SYDNEY, 12 DECEMBER 2023

*General protections dismissal dispute - jurisdictional objection – whether applicant was an employee- whether applicant was dismissed –applicant found to be an employee - jurisdictional objection dismissed.*

## **Introduction and outcome**

[1] Ms Tamara Rabadi has made an application to the Fair Work Commission (Commission) under s.365 of the *Fair Work Act 2009* (Cth) (FW Act) for the Commission to deal with a dispute arising out of allegations that she was dismissed from her employment with ACN 640 543 979 Pty Limited Pty Ltd ATF The YBL Trust trading as Yates Beaggi Lawyers (YBL) in contravention of Part 3-1 of the FW Act.

[2] YBL has objected to the application on the ground that Ms Rabadi was not an employee and therefore was not dismissed from her employment.

[3] Before dealing with the dispute under s.368, I must be satisfied that Ms Rabadi was employed by YBL and was dismissed from her employment.

[4] In summary, I have found that Ms Rabadi was employed by YBL and was dismissed from her employment on 22 March 2023 within the meaning of s.365 of the FW Act.

[5] The application was filed on 11 April 2023 and as such is within the timeframe required by s.366(1)(a) of the FW Act.

## **Directions and hearing**

[6] The matter was listed for directions on 5 July 2023.

[7] On 3 August 2023, YBL filed a statement of evidence.

[8] On 4 September 2023, Ms Rabadi filed submissions and evidence.

[9] The matter was listed for hearing on 19 September 2023. I granted permission for Mr Meyerowitz-Katz of Counsel to appear for Ms Rabadi at the hearing. Mr Farshad Amirbeaggi who is a Solicitor Director of YBL appeared for YBL. Ms Rabadi gave evidence on her own behalf. Mr Amirbeaggi gave evidence on behalf of YBL.

### **Factual background**

[10] Ms Rabadi worked for a law firm known as Yates Beaggi Lawyers from 16 January 2017 until 22 March 2023. Throughout this period, Mr Amirbeaggi was a Solicitor Director of Yates Beaggi Lawyers.

[11] There is no dispute between the parties that during this period, Ms Rabadi was employed by three different entities which traded as Yates Beaggi Lawyers.

[12] Ms Rabadi commenced employment as a Senior Associate with Strut Master No. 2 Pty Limited (SM2) trading as Yates Beaggi Lawyers on 16 January 2017 pursuant to a contract of employment dated 13 December 2016.<sup>1</sup>

[13] On 1 October 2018, Ms Rabadi's employment with SM2 was transferred to a company called A.C.N. 627 087 030 Pty Limited (ACN). According to Mr Amirbeaggi, the change in structure was undertaken because of the exiting of former principals of Yates Beaggi Lawyers.<sup>2</sup>

[14] On 14 May 2020, Ms Rabadi's employment with ACN was transferred to a company called A.C.N. 640 543 979 Pty Limited as trustee for the YBL 2020 Trust trading as YBL. Mr Amirbeaggi's evidence was that the change in structure was undertaken because of the uncertainty created by and surrounding the Covid-19 Pandemic.<sup>3</sup>

[15] Australian Securities and Investment Commission (ASIC) records produced by Ms Rabadi show that Mr Amirbeaggi was a Director of all three employing entities of Yates Beaggi Lawyers.<sup>4</sup>

[16] Ms Rabadi claims that when the transfers occurred, she did not receive any termination entitlements (for example for accrued annual leave), the staff remained the same and Yates Beaggi Lawyers continued to use the same software, operate from the same premises, and continued work on existing matters. Ms Rabadi's employment was not terminated, and her staff entitlements were transferred. Ms Rabadi only became aware of the change in employing entities as staff were told to start using new letterheads and engagement letters in external communications. Staff were also provided with Yates Beaggi Lawyers' new law practice trust account details and employee payslips started to refer to the new entity as the employer.<sup>5</sup>

[17] According to Ms Rabadi, from the commencement of her employment with Yates Beaggi Lawyers on 16 January 2017 to the termination on 22 March 2023, Ms Rabadi reported to and received directions from Mr Amirbeaggi.<sup>6</sup> Ms Rabadi also dealt with Ms Brooke Maniscalco who primarily completed work for Mr Amirbeaggi, was akin to Mr Amirbeaggi's Personal Assistant, and would frequently relay Mr Amirbeaggi's instructions to Ms Rabadi. Ms Maniscalco did not hold any legal qualifications.<sup>7</sup> During the period from 16 January 2017 to

22 March 2023, Ms Rabadi did not complete any work outside of Yates Beaggi Lawyers or receive any income for the provision of legal services or any services other than from Yates Beaggi Lawyers.<sup>8</sup>

**[18]** Ms Rabadi's evidence is that during the period she worked for Yates Beaggi Lawyers, Ms Rabadi was required to, amongst other things:

- a. Comply with the terms of the Employment Contract;
- b. Provide Mr Amirbeaggi with frequent matter lists describing her active matters and anticipated work. Mr Amirbeaggi never provided a matter list to Ms Rabadi;
- c. Assume conduct or begin work in matters assigned to her by Mr Amirbeaggi;
- d. Cease work on matters as directed by Mr Amirbeaggi;
- e. Supervise work assigned by Mr Amirbeaggi to other solicitors;
- f. Complete administrative and non-chargeable work where support staff were provided with strict instructions from Mr Amirbeaggi to only complete work for him;
- g. Spend a significant amount of time on Mr Amirbeaggi's personal matters (as did other solicitors employed by YBL).
- h. Apply for any leave including sick leave and annual leave;
- i. Take holidays and return to work on dates designated by Mr Amirbeaggi during the Christmas closure period.<sup>9</sup>

**[19]** According to Ms Rabadi, her title changed during the time that she worked for Yates Beaggi Lawyers, however her responsibilities remained the same except her income and workload increased. Staff including Ms Rabadi were required to work from Monday to Friday from 8:30am to 5:30pm although Ms Rabadi worked longer hours due to the volume of work.<sup>10</sup>

**[20]** Ms Rabadi states that Mr Amirbeaggi made all decisions pertaining to YBL. Mr Amirbeaggi was the only person at YBL that, inter alia, settled and signed off on client engagement letters, authorised deductions, authorised withdrawals, increased and reduced staff pay, hired and fired staff. Ms Maniscalco may have held the authority to recruit support staff.<sup>11</sup> Ms Rabadi produced emails which she says showed that Mr Amirbeaggi had authority and control at YBL to the exclusion of anyone else.<sup>12</sup>

**[21]** Ms Rabadi's evidence was that her salary was determined by Mr Amirbeaggi. She received several pay rises during her employment with Yates Beaggi Lawyers, the first taking place within 8 months of her employment. She did not know what salary or other incentives Mr Amirbeaggi received from YBL or the terms of employment of any other staff member except if it was mentioned in passing in emails relating to recruitment.<sup>13</sup>

**[22]** There is no dispute between the parties that from 2018, there was communication between Ms Rabadi and Mr Amirbeaggi about Ms Rabadi taking up a proprietorship in Yates Beaggi Lawyers. YBL claims that in or about January 2021, Ms Rabadi accepted a proprietorship in YBL and thereafter ceased being an employee. Ms Rabadi disputes this and claims that she continued to be an employee until she was terminated on 22 March 2023.

**[23]** There is extensive email correspondence between the parties about this matter and other issues relevant to the legal relationship between the parties so I have reproduced this correspondence in some detail in the paragraphs that follow.<sup>14</sup>

*Email correspondence in 2021*

[24] On 21 January 2021 at 2:35pm, Mr Amirbeaggi sent the following email to Mr Steve Bunnell, the accounts manager for YBL with the subject 'tamara's shareholding in ybl':

Mark,  
Please make time for this to happen before end of month.  
For Brooke as well.  
They take a 10% shareholding each dated back to 1 October 2020.  
We'll do the documentation when Tamara has time to draft them.  
They take full and equal equity each after 3 consecutive years.<sup>15</sup>

[25] On 21 January 2021 at 3:01pm, Mr Amirbeaggi sent the following further email to Mr Steve Bunnell, the accounts manager for YBL with the subject 'two things':

1. Brooke and Tamara pay to increase to \$400k each per annum from next pay period.
2. We need to keep some separate accountng from 1 October 2020 so it is clear what the accounts show - they are equity from that date. Can you turn your mind to this for me please.<sup>16</sup>

[26] Mr Amirbeaggi and Ms Rabadi exchanged emails during the period from 21 January to 23 January 2021 in relation to Ms Rabadi obtaining a 10% interest in the YBL 2020 Trust.<sup>17</sup>

[27] These emails included an email sent by Mr Amirbeaggi at 7:34am on 23 January 2021 to Ms Rabadi, Ms Maniscalco and Mr Bunnell as follows:

Thanks for this.

If Mark says it's the set-up, then that's all good to go. I take it that each successive year Vashti's units decrease, and they are taken up by Brooke/Tam?

**Mark**, I'd like to have quarterly meetings with the girls and you present to review accounts.

I've assumed a \$4mil profit in YBL for the year ending 2021 hence for the girls ~ 10% interest have increased their wages / pay to \$400,000 pa which will be paid fortnightly. But I'd like to sit and review each quarter so that all three can see:

- (a) revenues;
- (b) taxation liability;
- (c) remittance of tax;
- (d) monitor running overheads;
- (e) what the lawyers are billing;
- (f) whether lawyers are performing;
- (g) need for additional / reduction of staff;
- (h) expenses and need for repricing / procurement.

Each of **Brooke** and **Tamara** are to change their title to “Principal | General Manager” and “Principal | Solicitor”.

The accounts will come to include the addition of circa \$3mil per annum turnover of the practice of Stuart Garrett (Byron, Cabarita, and Gold Coast Offices taken up in February 2021), and in second quarter 2021 the circa \$4mil of the practice of Mark O’Brien Legal. We’ll have a management of approximately 30 staff by end of year.

Let’s take YBL to the next phase.<sup>18</sup>

[28] On 7 February 2021 at 2:18pm, Mr Amirbeaggi sent the following email to Mr Bunnell and YBL’s external accountant with the subject ‘interest in The YBL 2020 Trust’:

And please note Mark/Steve that we will need to keep a clear and distinct line re creditors/debtors/WIP for 1 October 2020 so that any that fall before 1 October go to old partnership, and any after go to new partnership.

That’s particularly important when recoveries are made now from pre 1 October 2020, that they are not applied to liabilities of post 1 October 2020, and visa versa.<sup>19</sup>

[29] Ms Rabadi says that she did not know if this ever eventuated as she has never seen any financial statements (including balance sheets or profit and loss statements), bank statements (including general or trust account statement) or tax returns for YBL and has never attended a conference or had any telephone conversation with any accountant of YBL pertaining to YBL.<sup>20</sup>

[30] On 10 April 2021 Ms Rabadi executed documentation as trustee for the Aleisa Family Trust making an application to acquire 13 units (representing a 10% interest in YBL) in The YBL 2020 Trust.<sup>21</sup> According to Ms Rabadi, the documentation was never executed by the other parties so the units were not issued to the Aleisa Family Trust.<sup>22</sup>

[31] On 12 July 2021 at 10:38pm, Mr Amirbeaggi sent Ms Rabadi and Ms Maniscalco the following an email:

Dear Tamara and Brooke,

We need to have a discussion about your role in the practice. I learnt that unless I raise these things, they bottle up and end badly. I’ve taken you both on to enable growth in the practice, and some distribution of the stress and anxiety I have to live day to day. So far, there isn’t any improvement on the position, and at the rate we are going I don’t expect there will be any soon.

I’m not prepared to progress the partnership further unless there’s a real wake up call in your areas.

I don’t need a \$400k per annum PA. I don’t need a \$400k per annum Senior Associate or even Salary Partner.

If my message wants to make you both leave, then please leave. It will be regretful, but I'm dying here, and its only going to get worse from my perspective. My message is intended to make you sit up and listen, improve, and create change. If it does the opposite then so be it. I'm not living so I have no fear of death.

Tamara – you should be supervising 2-3 Senior Associates at the moment. And heading up a division.

Brooke – you should be managing every HR, Support, and Admin process in the firm.

Farshad - I should be winning work, doing it, and supervising 2-3 senior lawyers.

Tamara, you are doing precisely what you were 12 months ago. So are you Brooke.

Let's discuss. I don't how long that discussion or the discussions take, but unless you both can change your approach, it won't work. Either we can manage growth and your development, or we go back to the employment model. And if you say "*we've been too busy to even get a chance*" save your breathe [sic], because that's a fail, and just look for a role elsewhere.

Let me know when you want to start the discussion.

f

**Farshad Amirbeaggi** | Solicitor Director<sup>23</sup>

[32] On 21 July 2021 at 8:07am, Mr Amirbeaggi sent the following email to Mr Bland and copied in Ms Maniscalco and Ms Rabadi:

Gents,

Come to October, we will need to know the profit of the practice from 1 October 2020 to 1 October 2021 (exclusive of payments relating to pre-partnership date).

I've operated on a \$4mil profit for the calculation of base salaries for Tamara and Brooke for that period, and will want to test that against actual profit/feasibility for the following year (ie keep at that level or reduce and receive distributions are quarterly dividend).

Can you (we) please discuss what we need to do in order to bring about that calculation for that point in time.

Thank you,

f

**Farshad Amirbeaggi** | Solicitor Director<sup>24</sup>

[33] According to Ms Rabadi, she was not copied into any response to this email and was not involved in any subsequent discussion in relation to the email.<sup>25</sup>

[34] On 23 August 2021, Ms Rabadi sent the following email to Ms Maniscalco which copied in Mr Amirbeaggi:

Hey Brooke,

Have you signed the ybl docs?

My whole future revolves around my career (and I would've thought yours should do). If I'm not a partner at ybl then I should start considering other opportunities that open to me as I've been asking for certainty for a while now and it seems I'm the only one that really cares. Staff are coming into the firm with less PQE that are being proffered the same (which I don't mind) even though I literally killed myself from 2017 to 2019 trying to establish myself (at one point, I was running 2 substantive hearings per month for an entire year with no assistance whatsoever, at the expense of my health and family) and have nothing concrete to show for it.

I just don't know what to take from this as it will literally take a minute or so to sign docs that I prepared (approved by FA/Mark Bland) which will give me comfort and direction, but I've been chasing this since the start of the year. If FA has changed his mind, it's fine (no pressure from me) but I just need to be kept in the loop to assess my options and plan my future please.

Thanks.

Yours faithfully,

**Tamara Rabadi** | Associate Director<sup>26</sup>

[35] Mr Amirbeaggi sent the following response later that day:

I read it before you could withdraw it. But I'm glad you sent it because I always want to know what people are thinking angry, or otherwise.

It's been about having time Tamara,.....I think if I had a problem I wouldn't be paying you each \$400k a year salary (without you taking directorships and when the firm is doing a net profit of \$2mil for the current year and where for the last 12 weeks I've been putting money in to prop up the wages / liabilities etc).

Note that is more than Brenton, Tracey O'Neill, and Steve Agosta are making running their own practices. Most other mid to large/first tier are paying their salary partners \$225k to \$350k. Ask your recruiter for some stats.

And no one is coming in and being offered more than you two. As if I'd allow that. I made you the offers precisely because of what you both did in 2017-2019 and stood by me when I was being shot at. I don't forget – ever.

Please note - bringing on an "Associate Director" is not bringing on a "Partner" – which is what you two are. An "Associate Director" simply means someone who is responsible for a particular division ie it doesn't mean a "Director". You are both meant to be "Directors" but presently have decided not to be. If you were, we would be a 3 director firm, with several Associate Directors – and then several Senior Associates - as I plan it ie 9 solid kick arse senior lawyers.

Can I note however please (whilst Brooke gets the documentation signed up and issued to us all) that the year 2 take up needs to be discussed/extended because without some changes from you two to delegate/grow, the 3 year spacing needs to be expanded to a point where you are changing / growing / improving – because the plan is that at year 3 ie 33/33/33 you two will be capable of running the firm – and because nothing is really changing in the structure to allow you to have that growth that might need time to enable it. I'd hope that with Nechama and someone like Tom coming etc, it will allow it – because we need more people to make you two do less, and get more involved in management. But let's discuss that on a Zoom – **weekly**. It might mean that the expected next 2 years takes 3 instead. I'm committed to leaving the practice at age 50 and leaving it to you two (with any others the three of us have agreed to take in). I'll then consult and just refer work into the practice etc.

Brooke – please get the documentation together, and issue.

xf

**Farshad Amirbeaggi** | Solicitor Director<sup>27</sup>

[36] On 9 September 2021, Mr Amirbeaggi sent an email to Ms Ms Rabadi which relevantly provided:

There's plenty you're not seeing Tamara, and I'm remaining quiet because I think you are young and have a lot to learn and it is my job to teach you.

You're not ready for partnership, yet I'm inviting you to take it so that over a 3 year period I can teach you what you need to know.

Let's discuss these issues, so you are aware of some of my concerns.

Your emails are rude offensive.

You're getting paid more than what you should be, have been told you can change your title, and that we are progressing towards your betterment as an equity partner. Execution of the documentation doesn't matter a jot.

We're working on getting it all executed, and need time. You know why that is.

Being treated like a child,...? Rude choice of words. But some of your behaviour on this is a bit childish.

I don't mind if you stay or you go. That's entirely up to you. We'd like you to stay because you are a good human and you work hard (and you stayed for the 2 years I was threatened and I don't forget to repay), but if you are poor in your approach and consideration / acceptance of needing knowledge / learning, then I'm too old and weathered for that. I've had my fair share of Farbod's Brenton's Sarah's and I'm not interested.

Let's cover some issues for you to consider for Friday:

1. You work hard – sure. All lawyers do, and the work you are doing is at Special Counsel level. But know that I'm finding that at times when you think you are right you



are wrong, and you take an approach where you are hell bent on saying you are right when you aren't.

2. You can't manage client's [sic];
3. You can't manage money/estimates;
4. You have no idea about business/financials;
5. You spend too much time on matters to the point that you cannot take on much because of your focus/drilling on a matter. A lot of times it results in substantial write offs;
6. You don't contribute to any aspect of the practice. All you do is do work.
7. You don't supervise staff/lawyers/or delegate.

All of those areas above you need to learn about, and that is what I've committed to teaching you two over the next 2, 3, or 4 years, so I can leave.

If the above is alarming to you then tough luck. Because it's the truth. Now either accept that and commit to learning as we had proposed, or go off into the wild world of legal practice and set up your own practice or partner at another. You'll have my complete support.<sup>28</sup>

#### *Email correspondence in 2022*

**[37]** On 21 March 2022, Mr Amirbeaggi sent an email to Ms Maniscalco and Ms Rabadi in which he insisted on a partnership meeting twice a month starting in April 2022 and that from 1 July 2022, he would increase Ms Maniscalco's and Ms Rabadi's equity to 20% each.<sup>29</sup> According to Ms Rabadi, there were no partners' meetings other than a telephone conference in February 2023.<sup>30</sup>

**[38]** On 3 April 2022, Ms Rabadi enquired with Mr Amirbeaggi if there would be any change to her financial circumstances as she intended to bid at a property auction and needed certainty as her parents were providing their property as surety.<sup>31</sup> Mr Amirbeaggi sent an email to Ms Rabadi and Ms Maniscalco which relevantly provided:

My email below meant that you and Brooke will be on at least \$400k salary for the year ahead, and as your equity increases to 20% each on 1 July and we do quarterly profit distributions, there should be extra income/distributions for both of you.

The firm did a \$3 mil profit to 30 June 2021. 10% of that is \$300k. I'm expecting it will do the same for 30 June 2022. If it doesn't/or does less than that, you'll both still have your 400k salary ie I am guaranteeing that.

When the equity increases to 20% on 1 July 2022, if the firm does a 3 mil profit to 30 June 2023, then at 20% you two will receive an aggregate circa \$600,000 salary each, ie \$400k base on \$200k worth quarterly of quarterly or bi-annual dividends. I'm hoping it will do a \$4 mil profit, by them with additional staff, etc.<sup>32</sup>

**[39]** Ms Rabadi's evidence is that based on Mr Amirbeaggi's representation above, on 27 April 2022, she exchanged Contracts to purchase a family home. The purchase was completed on 1 August 2022. Ms Rabadi borrowed \$2.8 million in relation to the purchase. Her parents

granted the Commonwealth Bank of Australia a registered mortgage over their home as security for the \$2.8 million loan.<sup>33</sup>

[40] On 17 October 2022, Ms Rabadi sent an email to Mr Amirbeaggi advising that she had removed ‘Principal’ from her signature block to avoid any issues with the Law Society as she did not meet the definition of Principal under the Legal Profession Uniform Law (NSW) because she has not taken up directorship or completed a Variation of a Practising Certificate to Practise as a Principal of a Law Practice.<sup>34</sup> Mr Amirbeaggi responded that a ‘fresh’ company could be started if Ms Rabadi wanted a ‘clean’ company to be a director of.<sup>35</sup>

[41] On 18 October 2022, Ms Rabadi an email to Mr Amirbeaggi which relevantly provided:

I’ve already completed and obtained the certificate for the practise management course (ie there is no restriction/delay on me managing a law firm).

We should get together to discuss the below. You’re the best/kindest soul to partner with but because I’m not involved in accounts/financials and don’t really get a say about any of that, it makes it difficult for me to take on directorship. That’s not my preference but I’ve accepted it. Also I don’t have actual clarity about ybl but I know you so have just ran with it.<sup>36</sup>

*Email correspondence in 2023*

[42] On 17 January 2023, Ms Maniscalco sent an email to Ms Rabadi, Mr Tony Truong and Mr Kendall Odgers as follows:

I have been monitoring the daily timesheets and you are each only entering time for about 5 hrs a day. (Tam is entering more than 5 hrs a day). That is your absolute minimum billing requirement. You each work from 8:30am to 5:30pm daily ie 9 hour days - and most of you work longer hours than that.

Can you please let me know what sort of tasks you are working on that is non billable/and or why you are only entering around 5 hrs a day so I can gage [sic] why your time entries aren’t higher and what you are working on for the additional circa 4 hrs a day that can’t be charged. I am copied into all the admin support tasks and can see that you are always delegating the admin tasks to support and even if you’re working on an admin task, we still expect you to enter your time for it.

I ask because Farshad enters time about 10 - 14 hrs a day (yes he works longer hours than you but still he is capturing all his attendances in his timesheets).<sup>37</sup>

[43] On 6 February 2023, Ms Maniscalco forwarded the above email to Mr Amirbeaggi, who then sent the following email to Ms Maniscalco, Mr Odgers and Ms Rabadi:

Please both accept notice of termination of your employment.

I’m happy to have a discussion about it at 2pm tomorrow.

Your call, I don't care at all. But the offensive exhibition from you ends.<sup>38</sup>

[44] On 15 February 2023, Mr Amirbeaggi emailed senior staff at YB3 saying he wished to discuss wage reductions the following day. Ms Rabadi responded to Mr Amirbeaggi's email the same day. No discussion as referred to in Mr Amirbeaggi's email took place.<sup>39</sup>

[45] On 9 March 2023, Ms Rabadi discovered from reviewing her bank statement that \$4,815 was paid into her account for her fortnightly wages. This was a 55% reduction of the fortnightly salary she had been receiving since 2021. Ms Rabadi panicked and immediately tried to contact Mr Amirbeaggi and Ms Maniscalco by phone, but neither responded. She then sent Mr Amirbeaggi a text message at 6:45pm on 9 March 2023. Mr Amirbeaggi did not respond to Ms Rabadi but sent senior staff an email at 7:00pm that day.<sup>40</sup>

[46] At 8:20am on 10 March 2023 Mr Amirbeaggi sent the following email to Ms Rabadi and Mr Odgers and copied in Ms Maniscalco and Mr Matthew Pellegriti:

Please do not give Matthew any instruction over the next 3 weeks. He is working solely with me and Brooke on Kate Harper, and doing at least 12 hour days there.

I have employed Sienna for you to both train up as a secretary. Please focus your attention and instruction there.

Matthew - if I find you doing work for Tamara/Kendall or Brooke outside of my instructions, we will have an unpleasant discussion.<sup>41</sup>

[47] At 8:23am on 10 March 2023 Mr Amirbeaggi sent the following email to Ms Rabadi and Mr Odgers and copied in Ms Maniscalco:

And this is after me asking for more than 6 months for you to each locate and employ support staff.

All of my messages ignored.

You know that in any firm/workplace when a principal's directions are ignored the employee is summarily terminated?<sup>42</sup>

[48] At 12:54pm on 10 March 2023 Ms Rabadi sent an email to Mr Amirbeaggi in relation to the reduction of her pay and the impact that this was having on her and indicating that she would need to do consultancy work on the weekends. The email stated, 'I understand that this will mean my role at ybl will also need to change to consultant and I'll prepare the necessary work for that to happen via Law Society'.<sup>43</sup>

[49] Later that day, Mr Amirbeaggi responded to Ms Rabadi's email. In the response, Mr Amirbeaggi stated, 'I won't disrupt what you intend to do for work. If you are going to consult outside of the firm, you will need your own insurance from LawCover and won't be able to use the firm's email/represent you are doing it as YBL.'<sup>44</sup>

[50] At 1:24pm on 10 March 2023 Ms Rabadi asked Mr Bunnell what her entitlements were in case she had to cash out her annual leave in advance to meet her mortgage repayment. Mr Bunnell advised Ms Rabadi that she had accrued 405 hours of annual leave.<sup>45</sup>

[51] On 10 March 2023, Ms Rabadi registered with ASIC the company name TRA Law Pty Limited A.C.N. 666 404 584<sup>46</sup>, and on 13 March 2023 obtained an Australian Business Number.<sup>47</sup>

[52] On 21 March 2023, Ms Rabadi sent Mr Amirbeaggi a Medical Certificate with the following email:

Hi All, I tried to keep going because I care about clients, but it's affecting my health very badly and I'm very unwell. My doctor has said I'm not fit to work and should not be working. Please enter sick leave for me until 21 April 2023.<sup>48</sup>

[53] On 21 March 2023, Mr Amirbeaggi responded saying "*I don't know what the illness is sorry?*". Ms Rabadi responded with "*Stress and anxiety*".<sup>49</sup>

[54] The following morning, on 22 March 2023, Ms Rabadi received an email from Mr Amirbeaggi which stated:

Let's have a discussion today please. Let me know what time works. I'm trying to save the law practice financially, and with that was prepared to overlook/postpone the notices of termination I issued to your earlier this year. However if your position is that you cannot now work then I will stand by the earlier notices and your last day will be 31 March 2023.<sup>50</sup>

[55] On 22 March 2023, and after an exchange of correspondence with Ms Rabadi,<sup>51</sup> Mr Amirbeaggi wrote to Ms Rabadi stating: "*I've just read the first sentence with an allegation of a lie. You are terminated – summarily. Effective today.*"<sup>52</sup>

[56] Ms Rabadi says that on 4 April 2023, Mr Amirbeaggi advised Ms Rabadi in writing that "And YBL is paying your entitlements week to week [either you are happy to accept them that way, or it goes into VA and it won't be able to pay you – that's the reality of the situation]". Notwithstanding this email, YB3 has not make any payments to Ms Rabadi for her statutory entitlements since termination.<sup>53</sup>

#### *Other relevant matters*

[57] During the hearing, Ms Rabadi was asked by Mr Amirbeaggi why her pay increased from \$250,000 to \$400,000. Ms Rabadi said that this was because of her exceptional performance; there would have been incentive at that time for her to remain at YBL when it was short staffed and there was nobody being employed; the lengthy work hours that she was working; the exceptional results she was receiving in her matters; and that Mr Amirbeaggi repeatedly said that Ms Rabadi was the best thing that happened to YBL.<sup>54</sup> In response to Mr Amirbeaggi's question about whether the increase reflected a genuine pre-estimate of the profit of the law practice of Yates Beaggi Lawyers that represented 10 per cent of her proprietorship, Ms Rabadi stated that if this were the case, she would have asked for all the financial records

to corroborate the 10 per cent.<sup>55</sup> Ms Rabadi also pointed to an email which she sent to Mr Amirbeaggi in which she understood the 10% equity to be 10% profit after expenses, separate to wages.<sup>56</sup>

**[58]** Mr Amirbeaggi claimed that Ms Rabadi and Mr Amirbeaggi, together with Brooke Maniscalco who was also being admitted into the partnership, agreed that if the partnership/relationship did not work, then they could terminate the partnership without recourse, and each would walk away without making any claims against the other or upon their share/interest in the partnership. Mr Amirbeaggi claimed there is a written record of that agreement that he was unable to locate.<sup>57</sup> No such agreement was produced during the hearing. Ms Rabadi's evidence was that there were no discussions between Mr Amirbeaggi, Ms Maniscalco and Ms Rabadi in relation to the alleged partnership. Further there was no exchange of any communications, and no agreement was signed as no partnership agreement (written or otherwise) was ever entered into.<sup>58</sup>

**[59]** Ms Rabadi claimed that she was never included in emails sent to clients with tax invoices although she repeatedly requested that Mr Amirbeaggi and Ms Maniscalco provide these. Ms Rabadi only occasionally came across tax invoices if for example she was preparing Costs Notices (which Mr Amirbeaggi had to approve), preparing updated costs estimates (which Mr Amirbeaggi had to approve), responding to queries from clients or asked by Ms Rabadi or Ms Maniscalco to follow up payment of a tax invoice from clients that dealt primarily with her.<sup>59</sup>

**[60]** There was a dispute between the parties about the extent to which Ms Rabadi was aware of the financial accounts and records of YBL. There were also disputes about whether Ms Rabadi was involved in recruitment activities locating premises for YBL and the extent that she managed her own legal practice. Mr Amirbeaggi relied on Ms Rabadi referring to herself as Principal in her email signature in 25 September 2021 but by 6 February 2023, Ms Rabadi was not referring to herself in that way. In re-examination, Ms Rabadi explained that she wrote to Mr Amirbeaggi saying that she didn't think it was appropriate for her to have the title 'principal' because it referred to the Law Society definition of a principal as a director of the firm. She had refused to take up any directorship in the firm because she wasn't across anything that was happening in the firm, was not privy to any of the financials and did not agree with a lot of the way the practice was conducted.<sup>60</sup>

**[61]** Ms Rabadi's evidence was that through her employment with Yates Beaggi Lawyers, Mr Amirbeaggi frequently promised employees, including Ms Rabadi, an interest in the business. Mr Amirbeaggi sent these emails unilaterally and without consulting with anyone beforehand. Ms Rabadi's understanding is that Mr Amirbeaggi did this to entice staff to remain at YBL. Whenever someone left YBL to start their own practice, Mr Amirbeaggi would talk to Ms Rabadi and text her to discourage her from doing the same thing.<sup>61</sup> None of these representations for staff to own an interest in YBL eventuated. Ms Rabadi produced emails which showed Mr Amirbeaggi making such representations to staff.<sup>62</sup> These emails included an email from Mr Amirbeaggi to Ms Rabadi, Ms Maniscalco and another employee dated 30 September 2018 proposing to make them Directors and be provided with 5% equity annually from 2 October 2019.<sup>63</sup> Also included was an email from Mr Amirbeaggi to Ms Rabadi and Ms Maniscalco dated 1 September 2020 advising he would like to issue them both with shares in YBL within the next seven days.<sup>64</sup>

[62] Mr Amirbeaggi claimed that the termination of Ms Rabadi was of her participation in the partnership of YBL, not as an employee. Moreover, and in the alternative, on 10 March 2023, Ms Rabadi herself either:

- resigned from the partnership of YBL to pursue her own work and remain only as a consultant, and or
- abandoned the partnership (or her employment if she is found to be an employee) by establishing and trading her own law practice under the name of TRA Legal.<sup>65</sup>

[63] Mr Amirbeaggi stated his objective in inviting Ms Rabadi, and Ms Maniscalco into the partnership was to provide them the training/tuition they required over a 3-4 year period so that they could take over the practice of YBL and he could retire from legal practice at the age of 50 by 2026.<sup>66</sup>

[64] Mr Amirbeaggi's evidence is that after the departure of Ms Rabadi, he abandoned any succession planning of the law practice of YBL. He terminated all its staff, its lease over its office space, and now practices part-time as a sole practitioner.<sup>67</sup>

[65] Mr Amirbeaggi says that if Ms Rabadi is found not to be a Partner then a claim will be pursued against her for at the very least the overpayment of her remuneration of \$150,000 per annum (being the increase of her remuneration when she transitioned from an employee to a partner).<sup>68</sup>

## Legislation

[66] The application has been brought under s.365 of the FW Act which 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.

[67] Section 365 is in Part 3-1 of the FW Act. Section 335 provides that in relation to Part 3-1, 'employee' and 'employer' have their ordinary meanings, The issue between the parties which the Commission has been asked to determine is whether Ms Rabadi was an employee of YBL and whether she was dismissed on 22 March 2023. The dictionary at clause 12 of the FW Act refers to section 386 for the definition of "dismissed".

[68] Section 386 of the FW Act 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.
- (2) However, a person has not been *dismissed* if:
  - (a) the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or
  - (b) the person was an employee:
    - (i) to whom a training arrangement applied; and
    - (ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement;and the employment has terminated at the end of the training arrangement; or
  - (c) the person was demoted in employment but:
    - (i) the demotion does not involve a significant reduction in his or her remuneration or duties; and
    - (ii) he or she remains employed with the employer that effected the demotion.
- (3) Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person's employment, to avoid the employer's obligations under this Part.

## Submissions

### *Ms Rabadi*

[69] Ms Rabadi submitted that the question that the Commission is required to determine is whether Ms Rabadi's relationship with YBL was a relationship of employment. It is not uncommon for someone who is employed by an organisation to hold some sort of ownership interest in that organisation. It is quite common in, for example, technology companies where employees are issued equity as part of their pay package. It happens in publicly listed companies as well. People are issued shares as part of their pay package. They then become part owners in the business and yet they remain employees and this Commission deals with situations like that all the time.

[70] Similarly for directors, a person can be an executive director or a non-executive director or a managing director. The managing director of a company is generally also an employee. There are plenty of cases in the authorities where a managing director has sued as an employee in relation to the termination of their employment. Ms Rabadi submitted that she was not a director, but even if she had been a director that would not establish that she was not an employee.

[71] There is no dispute that Ms Rabadi was employed by YBL at least as at about May 2020 when YBL became the entity responsible for Yates Beaggi Lawyers. There is no evidence to

prove that Ms Rabadi did not remain an employee as at the date she was terminated. In fact, the evidence is all the other way. There certainly seem to have been some discussions about Ms Rabadi taking on some other role. But during the course of that time, that is from May 2020 through to 22 March 2023 Ms Rabadi continued to receive a salary, continued to take directions from her employer, and continued to receive pay slips that showed leave entitlements.

[72] It is not in dispute that Ms Rabadi was an employee of YBL as at 14 May 2020. For Ms Rabadi to have transitioned into some other role she would have had to cease being an employee, however there is nothing to indicate that she did.

[73] Ms Rabadi had an employment agreement that she entered into at least with the first entity. There does not seem to have been any written agreement between Ms Rabadi and the subsequent two entities. That contract provided Ms Rabadi's duties, who she reported to, her working hours and that her salary would be paid every fortnight. These arrangements remained the same throughout the period that Ms Rabadi was working for YBL until 22 March 2023.

[74] Ms Rabadi's evidence is that she received superannuation payments up until the end of 2022 and it appears that her superannuation entitlements stopped being paid at around that time which is part of the claim that she makes in this matter, in relation to unpaid entitlements. But there's no suggestion that anything, in particular, happened to change her status as at the end of 2022. The fact that Ms Rabadi continued to receive superannuation is an indication that she was an employee and that she was not holding some other role.

[75] The fact that YBL was withholding PAYG tax and that annual and personal leave was accrued is also an indication that Ms Rabadi was employed.

[76] Mr Amirbeaggi's email to Ms Rabadi dated 15 February 2023 advising that salaries will be reduced to \$200,000 and that this is higher than market rate is not a comment that would be made to someone who is a joint proprietor of a business. Ms Rabadi also relied upon emails from Mr Amirbeaggi dated 10 March 2023 to show that he was the person in charge, that he was giving instructions to his subordinates and if Ms Rabadi doesn't obey Mr Amirbeaggi directions she as an employee will be summarily terminated.

[77] Ms Rabadi submitted that the language used in the termination email indicates that an employment relationship was being terminated. It was not a notice of dissolution of partnership or a notice from a trustee that units in the trust will be reacquired by the trustee. That is something that an employer says to an employee. That is not something that a partner says to another partner in the same business.

[78] Mr Amirbeaggi has not produced the register of unit holdings to show that Ms Rabadi was issued units. Mr Amirbeaggi has not produced a certificate of unit holding that was given to Ms Rabadi and her evidence is that she never received it. Mr Amirbeaggi has not produced any documents to show that units that had been issued to her were taken away or how the units that were issued to her were taken away.

[79] There also are no indicia at all that Ms Rabadi was carrying on her own business. Ms Rabadi did not have any ABN. Ms Rabadi was not issuing invoices to YBL that were being paid. Instead she was being paid a fortnightly salary.



[80] Ms Rabadi was never paid a single dividend distribution. There is no evidence at all that there were any distributions actually discussed or paid other than just the concept of distributions being put forward in some emails. There are no distribution statements. Ms Rabadi's evidence was that these were all discussions that were happening constantly for a period of about five years and none of it ever went anywhere.

[81] In relation to the decision to reduce Ms Rabadi's salary, Mr Amirbeaggi is clearly saying that he is the person who is making the cuts and that he is entitled to make them. He provided a statutory demand to Ms Rabadi. He did not provide any financial records otherwise. Ms Rabadi did not receive any profit and loss statements or a report in relation to the outstanding creditors or outstanding debtors or any of the sorts of things that one would expect a partner to be receiving.

*YBL*

[82] YBL submits that the question before the Commission is whether Ms Rabadi was an employee within the definition of section 13 or section 14 of the FW Act.

[83] YBL's position is that Ms Rabadi was not an employee within the meaning of the provisions of the FW Act.

[84] YBL's submission is that the facts of this case fall consistently with at least four or five of the principles in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd (CFMMEU)*<sup>69</sup> and *ZG Operations Australia Pty Ltd v Jamsek (ZG Operations)*<sup>70</sup> that would suggest that Ms Rabadi is not an employee, in particular the extent to which the putative employer has the right to control how, where and when the putative employee performs the work.

[85] The second is the extent to which the putative employee can be seen to work in his or her own business as distinct from the business of the putative employer.

[86] There is no contest that at one point Ms Rabadi was employed by YBL.

[87] YBL submitted that Ms Rabadi's engagement was for a six-year period, one half of it as an employee, and the second half as a proprietor of YBL. During this second period Ms Rabadi, whether herself or through a family trust, entered into a contract with YBL and became not an employee working for YBL but promoted her own interest in the proprietorship of a partnership between herself and YBL.

[88] The change of relationship referred to in the decision of the High Court in *ZG Operations* and the circumstances in that case are similar in this sense; in that case, the applicants were bringing claims for their entitlements and for their long service and their annual leave and the Court found that because they had a proprietorship interest in the business and they were pursuing the interest of their own undertaking in their own business, that they were not employees within the meaning of the Act.

[89] This is analogous to this case because Ms Rabadi was pursuing her own interest in the business. Ms Rabadi, consistent with proprietorship interest, engaged in human resources and recruitment activities and decision making of the law practice.

[90] Ms Rabadi gave evidence that she was engaged in the development of the website and Google Reviews. She gave evidence that she had access to some financial records and she had some access to the accountant's practice and the bookkeeper. She rejected that it was open or unfettered access but the evidence was that she had access and that she was included and she made independent approaches to those people herself to pursue her proprietorship interest and her interest in the law practice. The record that was before the Commission showed clearly that Ms Rabadi's income, was referable to the profitability of the law practice.

[91] It is open for the Commission to accept and find that Ms Rabadi's income was directly referable to the performance and profitability of the business that she has a proprietorship in. The Commission must therefore find that Ms Rabadi is not an employee within the meaning of the FW Act.

[92] YBL submitted that the fact that Ms Rabadi received leave and superannuation and had PAYG tax deducted from her salary did not establish that she was an employee. YBL said there was no evidentiary basis for Ms Rabadi's submission that her salary was reduced and that various emails relied upon by Ms Rabadi did not establish that there was an employment relationship.

### **Consideration**

[93] YBL correctly referred to *CFMMEU* and *ZG Operations* as the most recent High Court authorities in relation to the employment relationship.

[94] These cases held that where the parties' relationship was comprehensively committed to a written contract, the validity of which was not challenged as a sham, and the terms of which were not varied, waived or the subject of an estoppel - the question of whether a person was an employee or an independent contractor was to be resolved solely by a consideration of the terms of the contract and not by reference to performance of the contract.<sup>71</sup>

[95] Where the terms of the relationship between the parties has not been committed comprehensively to a written agreement, the characterisation of a relationship as being either one of employment or one of principal and independent contractor is to be determined by reference to "the totality of the relationship between the parties".<sup>72</sup> In examining the totality of the relationship between the parties, relevant matters include whether the putative employee'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<sup>73</sup> and the existence of a right of control by a putative employer over the activities of the putative employee.<sup>74</sup>

### ***Was there a written contract between Rabadi and YBL?***

[96] Ms Rabadi worked for three different entities trading as YBL. There was a written contract of employment between Ms Rabadi and the first entity.

[97] According to Mr Amirbeaggi, on 1 October 2018, Ms Rabadi's employment with the first entity was terminated and transferred to a second entity then on 14 May 2020, Ms Rabadi's employment with the second entity was terminated and transferred to a third entity.

[98] Ms Rabadi's evidence is that during these transfers, she did not receive any termination entitlements, the staff remained the same and she continued to use the same software, operate from the same premises, and continued work on existing matters. Ms Rabadi's entitlements were transferred and she only became aware of the change employing entity as staff were told to start using new letterheads and engagement letters in external communications. Staff were also provided with YBL's new law practice trust account details and employee payslips started to refer to the new entity as the employer.

[99] Neither party alleged that there is a written contract of employment between Ms Rabadi and YBL. Neither party alleged that the terms of Ms Rabadi's employment contract were altered during the transfer of her employment between the three entities. Ms Rabadi submitted that the arrangements described in the written contract of employment between Ms Rabadi and the first entity including her duties, who she reported to, her working hours and that her salary would be paid every fortnight remained the same throughout the period that Ms Rabadi was working for YBL until 22 March 2023.

[100] It is therefore likely that there was a verbal contract of employment between Ms Rabadi and YBL in substantially similar terms to Ms Rabadi's contract with the first employing entity.

[101] In relation to YBL's claim that Ms Rabadi became a proprietor of YBL, the evidence establishes that on 21 January 2021, Mr Amirbeaggi provided instructions to Mr Bland that Ms Rabadi and Ms Maniscalco be given a 10% shareholding in YBL and that Ms Rabadi's and Ms Maniscalco's pay be increased to \$400,000 each from the next pay period. Mr Bland advised Mr Amirbeaggi the same day that that he could change the shareholdings in the trustee company at any time and that paperwork would need to be completed to issue units in the unit trust to Ms Maniscalco and Ms Rabadi. Ms Rabadi then prepared the paperwork for the interest in the YBL 2020 Trust and sent this to Mr Amirbeaggi and Ms Maniscalco on 22 January 2021. On 23 January 2021, Mr Amirbeaggi approved the paperwork for by email and requested that Mr Bland set up quarterly meetings with Mr Amirbeaggi, Ms Maniscalco and Ms Rabadi to review the accounts. In the same email, Mr Amirbeaggi requested that Ms Maniscalco and Ms Rabadi change their respective titles to Principal General Manager and Principal Solicitor.

[102] The evidence also establishes that on 10 April 2021, Ms Rabadi sent her signed paperwork to Mr Amirbeaggi advising the requirements in relation to the other signatories and requesting that Mr Amirbeaggi issue the certificate. There is no evidence as to whether Mr Amirbeaggi ever responded to Ms Rabadi's email, however on 23 August 2021, Ms Rabadi wrote to Ms Maniscalco and copied in Mr Amirbeaggi querying whether Ms Maniscalco had signed the paperwork and if Mr Amirbeaggi had changed his mind. In that email Ms Rabadi indicates that the signed documents will give her 'comfort and direction' and that if she is 'not a partner at ybl then [she] should start considering other opportunities..' In response, Mr Amirbeaggi refers to Ms Rabadi and Ms Maniscalco being a 'Partner' but not a 'Director' and needing to be 'more involved in management'. Mr Amirbeaggi also requests that Ms Maniscalco issue the paperwork. An email from Ms Rabadi to Mr Amirbeaggi dated 18 October

2022 indicates that as she is not involved in accounts/financials and doesn't really get a say about any of that, it makes it difficult for her to take on a directorship.

[103] Mr Amirbeaggi claimed there is a written record of the partnership agreement that he was unable to locate. Ms Rabadi's evidence was that there were no discussions between Mr Amirbeaggi, Ms Maniscalco and Ms Rabadi in relation to the alleged partnership. Further Ms Rabadi says there was no exchange of any communications and no agreement was signed as no partnership agreement (written or otherwise) was ever entered into. No such agreement was produced during the hearing. I prefer the evidence provided by Ms Rabadi to Mr Amirbeaggi as I believe that it is unlikely that an experienced lawyer like Mr Amirbeaggi would lose or misplace an important legal document such as a partnership agreement especially if one of its purposes was to displace Ms Rabadi's employment relationship.

[104] Based upon the evidence summarised above, I find that there was no written or verbal agreement between Ms Rabadi and YBL which provided that Ms Rabadi was a proprietor of YBL. The ASIC records show Mr Amirbeaggi and Ms Maniscalco are Directors of YBL but not Ms Rabadi. Further there is no evidence that Ms Rabadi has ever been a Director of YBL.

[105] I find that Ms Rabadi accepted Mr Amirbeaggi's offer to apply for a 10% interest in the YBL 2020 Trust and prepared and signed the required paperwork. However, despite Ms Rabadi's requests, there is no evidence that the paperwork was ever executed by all signatories and that the units were issued. Although there were references by Mr Amirbeaggi in email correspondence to Ms Rabadi being paid dividends, there is no evidence that this ever occurred.

[106] If there had been no change to the employing entity and Ms Rabadi remained employed by SM2 pursuant to the contract of employment dated 13 December 2016, it is likely that this would have been the end of the matter and Ms Rabadi would be found to be an employee. This is because, according to *CFMMEU*, the question of whether Ms Rabadi was an employee or an independent contractor would be resolved solely by a consideration of the terms of that contract and not by reference to performance of the contract.

[107] However, given that there is no written contract between Ms Rabadi and YBL, it is necessary for me to determine whether Ms Rabadi was employed by YBL at the time of the dismissal by reference to the totality of the relationship between the parties. However I will first deal with YBL's claims that the circumstances in *ZG Operations* were analogous to this case in that there was a change in the relationship between the parties from an employment relationship to an independent contract/principal relationship.

### ***Application of ZG Operations***

[108] The Respondents in *ZG Operations* were Mr Jamsek and Mr Whitby who were engaged as truck drivers by the predecessors of ZG Operations Australia Pty Ltd (the company) from 1977 to 2017. They were initially engaged as employees and drove trucks provided by their employer. In late 1985 or early 1986, the company said it would no longer employ Mr Jamsek and Mr Whitby, and would continue to use their services only if they purchased their trucks and entered into contracts to carry goods for the company. Mr Jamsek and Mr Whitby agreed to the new arrangement and each of them set up a partnership with his wife. Those partnerships purchased trucks from the company and executed a written agreement with the company for

the provision of delivery services. Each partnership invoiced the company for the delivery services provided, and was paid by it for those services. Part of the revenue earned was used to meet the partnerships' costs of operating the trucks. The net revenue earned was declared as partnership income and split between husband and wife for the purposes of income tax.<sup>75</sup>

[109] The agreement between the partnerships and the company was terminated in 2017. Mr Jamsek and Mr Whitby then commenced proceedings in the Federal Court of Australia seeking declarations in respect of statutory entitlements alleged to be owed to them as employees of the company pursuant to the FW Act and other legislation.<sup>76</sup>

[110] The primary judge (Thawley J) concluded that Mr Jamsek and Mr Whitby were not employees of the company, and instead were independent contractors. The Full Court of the Federal Court of Australia (Perram, Wigney and Anderson JJ) allowed Mr Jamsek's and Mr Whitby's appeal, holding that they were employees of the company.<sup>77</sup>

[111] In *ZG Operations*, the High Court agreed with the primary judge that Mr Whitby and Mr Jamsek as members of their partnerships, were engaged in the conduct of their own businesses, and were employees. The character of the relationship between the parties in this case was to be determined by reference to the rights and duties created by the written agreement which comprehensively regulated that relationship.<sup>78</sup>

[112] In my view, the circumstances of Ms Rabadi's case are markedly different to that of *ZG Operations*. In *ZG Operations*, the company explicitly advised Mr Jamsek and Mr Whitby in about 1986 that it would no longer employ them. YBL does not assert that it advised Ms Rabadi at any time that she would cease to be an employee of YBL. In particular, YBL does not assert that it advised Ms Rabadi during the time that it was communicating with her about equity in the business that she would cease to be an employee if she accepted a proprietary interest in the YBL. There was no evidence that YBL advised Ms Rabadi at any stage that her employment contract was coming to an end or that she will cease to be an employee. Mr Amirbeaggi did not assert that he provided such advice to Ms Rabadi and there is no reference to the employment relationship between YBL and Ms Rabadi ending or changing in the emails exchanged between the parties in January 2021 and at other times about Ms Rabadi acquiring equity in YBL. YBL has not paid out Ms Rabadi's leave and other entitlements and they have continued to accrue.

[113] In *ZG Operations* the company advised Mr Jamsek and Mr Whitby that it would continue to use their services only if they purchased their trucks and entered into contracts to carry goods for the company. Mr Jamsek and Mr Whitby subsequently entered into such contracts. In this regard, the High Court stated,

Given that the genesis of the contract was the company's refusal to continue to employ the respondents as drivers, and the respondents' evident acceptance of that refusal, it is difficult to see how there could be any doubt that the respondents were thereafter no longer employees of the company.<sup>79</sup>

[114] As noted above, I have found that there was no written contract between Ms Rabadi and YBL in relation to the alleged partnership. Further, it is not asserted by either party and there is no evidence which establishes that YBL informed Ms Rabadi that she could continue to work for YBL only if she ceased being an employee and became an independent contractor.

[115] Even if units had been issued, or Ms Rabadi had received dividends, which appears to be unlikely on the material before me, there is no evidence of an agreement between the parties that changed Ms Rabadi's status as an employee. This is in contrast with *ZG Operations* where there was an explicit agreement, confirmed in writing, that Mr Jamsek and Mr Whitby were to cease being employees and commence providing services as independent contractors.

[116] In *ZG Operations*, Mr Whitby and Mr Jamsek contracted with the company through partnerships and received the advantage of splitting the income generated by the business conducted by the partnerships with their fellow partners. This is in contrast to Ms Rabadi who performed work for YBL as an individual receiving a salary. Although Ms Rabadi intended to acquire units in the YBL 2020 Trust through her own family trust, there is no indication that this ever occurred.

[117] In *ZG Operations*, Mr Whitby and Mr Jamsek negotiated several pay increases while engaged as independent contractors<sup>80</sup> and used their own equipment to perform work. This is in contrast to Ms Rabadi whose pay was determined by Mr Amirbeaggi rather than negotiated and where there was no evidence that she was required to provide her own equipment.

[118] The circumstances in *ZG Operations* are not in any way analogous to the relationship between Ms Rabadi and YBL and do not support YBL's contention that Ms Rabadi was not an employee at the time of her dismissal.

### ***Totality of the relationship between the parties***

#### *Whether Ms Rabadi was working in her own business or YBL's business*

[119] In relation to whether Ms Rabadi was working in her own business or YBL's business, YBL relied upon Ms Rabadi's evidence that she engaged in human resources and recruitment activities, decision making of the law practice, the development of the website or Google Reviews and that she had access to some financial records, the accountant's practice and the bookkeeper.

[120] Although Ms Rabadi's title changed during the time she for YBL, she says her responsibilities remained the same except her income and workload increased. Staff including Ms Rabadi were required to work from Monday to Friday from 8:30am to 5:30pm although Ms Rabadi worked longer hours due to the volume of work.

[121] During the period from 16 January 2017 to 22 March 2023, Ms Rabadi did not complete any work outside of YBL or receive any income for the provision of legal services or any services other than from the three entities trading as YBL which employed her during this period.

[122] Ms Rabadi claimed that Mr Amirbeaggi made all decisions pertaining to YBL. Mr Amirbeaggi was the only person at YBL who settled and signed off on client engagement letters, authorised deductions, authorised withdrawals, increased and reduced staff pay, hired and fired staff. Ms Maniscalco may have held the authority to recruit support staff.

[123] Ms Rabadi's salary was determined by Mr Amirbeaggi. She did not have an ABN and did not provide an invoice to YBL. She did not know what salary or other incentives Mr Amirbeaggi received from YBL or the terms of employment of any other staff member except if it was mentioned in passing in emails relating to recruitment.

[124] In my view, the matters relied upon by YBL as establishing that Ms Rabadi was running her own business are duties which could be carried out by a senior employee and are therefore not inconsistent with there being an employment relationship.

[125] The greatest difficulties that YBL faces in arguing that Ms Rabadi was running her own business is that matters that were referred to in emails that may have leant themselves to such a characterisation were never followed through and implemented. For example, there is no evidence that the quarterly meetings which Mr Amirbeaggi emailed Mr Bland about on 21 January 2021 to review accounts with Ms Rabadi and Ms Maniscalco ever happened. Apart from a teleconference in February 2023, there is no evidence that there the twice monthly partnership meetings referred to in Mr Amirbeaggi's email of 21 March 2021 occurred from April 2022. Although she had access to some financial records, Ms Rabadi was not involved in the financial management of YBL and this is the reason she was reluctant to become a director. And perhaps most tellingly, Mr Amirbeaggi's proposal to give Ms Rabadi a 10% stake in YBL in January 2021 to increase to 20% in July 2022 never eventuated. This was despite Ms Rabadi preparing and signing the paperwork required to transfer unit holdings to her family trust and indicating that Mr Amirbeaggi's lack of action on this matter was causing her to reconsider her future with YBL. This followed previous promises by Mr Amirbeaggi in September 2018 and September 2020 to provide Ms Rabadi with equity which were never delivered.

### *Control*

[126] In relation to the existence of a right of control by YBL over the activities of Ms Rabadi, Ms Rabadi's evidence was that she reported to and received directions from Mr Amirbeaggi. Ms Rabadi's uncontested evidence is that while she was working for YBL, Ms Rabadi was required to, amongst other things, provide Mr Amirbeaggi with frequent matter lists describing her active matters and anticipated work, assume conduct or begin work in matters assigned to her by Mr Amirbeaggi, cease work on matters as directed by Mr Amirbeaggi, supervise work assigned by Mr Amirbeaggi to other solicitors, complete administrative and non-chargeable work where support staff were provided with strict instructions from Mr Amirbeaggi to only complete work for him and spend a significant amount of time on Mr Amirbeaggi's personal matters.

[127] Ms Rabadi produced emails which showed that as recently as two months prior to her termination on 22 March 2023, she was questioned about her timesheets, directed to not engage with a specific employee but to train another employee and threatened with termination of her employment. All of this points to the existence of a right of control by YBL over the activities of Ms Rabadi. Ms Rabadi accepted in cross examination that she had liberty to conduct files under her own decision-making and under her own control, to contact and communicate with clients and witnesses to contact and communicate with junior and senior counsel. In my view these are tasks which would be undertaken by most experienced employed lawyers daily and are consistent with the employment relationship.

### *The relevance of Ms Rabadi's income*

[128] YBL placed considerable emphasis on the increase of Ms Rabadi's income from \$250,000 to \$400,000 in January 2021 as demonstrating that Ms Rabadi ceased to be an employee at that time. In one of Mr Amirbeaggi's emails dated 21 January 2021, he indicated he had assumed a \$4 million profit in YBL for the year ending 2021 and therefore increased the wages/pay for Ms Maniscalco and Ms Rabadi to \$400,000 per annum. Mr Amirbeaggi does not allege that Ms Rabadi requested the pay increase or that he consulted her about it.

[129] Ms Rabadi's evidence is that on 3 April 2022 she asked Mr Amirbeaggi if there would be any change to her financial circumstances as she intended to bid at a property auction and needed certainty as her parents were offering their property as surety. Mr Amirbeaggi responded by email that Ms Maniscalco and Ms Rabadi would be on at least \$400k salary for the year ahead, and as their equity increased to 20% each on 1 July and there are quarterly profit distributions there should be extra income/distributions for both of them. Based on Mr Amirbeaggi's assurances, Ms Rabadi then exchanged contracts for the property. Less than a year later, YBL reduced Ms Rabadi's salary by 55% without notice.

[130] In my view, YBL's decision to align Ms Rabadi's income with the profit of the business has no relevance to the issue of whether Ms Rabadi was an employee. It certainly does not establish that Ms Rabadi was no longer an employee at the point of receiving the salary increase. This is particularly the case given that there is no written contract between the parties which reflected a change in or termination of, the employment relationship between the parties. It is not unusual for employers to share profits amongst employees, by way of bonuses and other payments. The purpose of this could be to reward employees but it also might be to incentivise employees to work harder to bring in new business and increase profits or to encourage to employees to remain employed with an employer. This is what appears to have happened in Ms Rabadi's case.

#### *Other matters*

[131] Other matters which may be relevant in determining the nature of the relationship include, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work, the provision for holidays, the deduction of income tax and the delegation of work.<sup>81</sup>

[132] The evidence shows that Ms Rabadi was paid a salary which was determined by Mr Amirbeaggi, that PAYG tax was deducted, and that she accrued leave and received superannuation. Ms Rabadi's evidence at the hearing was that she was required to work the core hours of 8:30am to 5:30pm Monday to Friday but regularly worked outside of these hours. There was no evidence that Ms Rabadi was required to maintain or provide her own equipment. All these matters are indicative of an employment relationship.

[133] I have considered the totality of the relationship between the parties, including whether Ms Rabadi was working in her own business or YBL's business and the degree of control, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work, the provision for holidays, the deduction of income tax. In my view, my findings in all these matters overwhelmingly demonstrate that Ms Rabadi was an employee of YBL for the purpose of the Act.



[134] There is no evidence to support YBL's submission that Ms Rabadi resigned from the partnership of YBL to pursue her own work and remain only as a consultant, and/or abandoned her employment by establishing and trading her own law practice under the name of TRA Legal. Although Ms Rabadi indicated in her email dated 10 March 2023 to Mr Amirbeaggi that she intended to become a consultant at YBL so that she could do consultancy work on the weekends, this had not occurred by 22 March 2023 and she was still employed by YBL on that date. The evidence establishes that on 22 March 2023, YBL sent an email to Ms Rabadi terminating her employment.

[135] There is no evidence that establishes, and the parties have not submitted, that the exemptions in s.386(2)(a)-(c) apply. Accordingly, I find that Ms Rabadi was an employee of YBL and that she was dismissed within the meaning of s.365 of the FW Act.

### **Conclusion**

[136] The jurisdictional objection raised by YBL is dismissed and I order accordingly.

[137] The matter will shortly be listed for Conference so that the Fair Work Commission can deal with the matter as required by s.368 of the FW Act.



### DEPUTY PRESIDENT

#### *Appearances:*

*Mr D Meyerowitz-Katz*, of Counsel, for the Applicant  
*Mr F Amirbeaggi*, on behalf of the Respondent

#### *Hearing details:*

2023.  
Sydney  
Tuesday 19 September 2023

Printed by authority of the Commonwealth Government Printer

<PR769340>

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<sup>1</sup> Digital Court Book (DCB), 19, 40-53.

<sup>2</sup> Ibid, 150.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid, 54-63.

<sup>5</sup> Ibid, 19-20.

<sup>6</sup> Ibid, 20.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid, 21.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid. 22

<sup>12</sup> Ibid, 23, 84-97.

<sup>13</sup> Ibid, 24.

<sup>14</sup> Ibid.

<sup>15</sup> DCB, 171.

<sup>16</sup> Ibid, 157.

<sup>17</sup> Ibid, 158-184.

<sup>18</sup> Ibid, 182-183.

<sup>19</sup> Ibid, 185.

<sup>20</sup> Ibid, 29.

<sup>21</sup> Ibid, 190-192.

<sup>22</sup> Ibid, 30.

<sup>23</sup> Ibid, 201.

<sup>24</sup> Ibid, 203.

<sup>25</sup> Ibid, 30.

<sup>26</sup> Ibid, 205.

<sup>27</sup> Ibid, 206.

<sup>28</sup> Ibid, 212-213.

<sup>29</sup> Ibid, 221.

<sup>30</sup> Ibid, 30-31.

<sup>31</sup> Ibid, 24.

<sup>32</sup> Ibid, 98.

<sup>33</sup> Ibid, 24.

<sup>34</sup> Ibid, 83.

<sup>35</sup> Ibid, 82.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid, 92-93.

<sup>38</sup> Ibid, 60.

<sup>39</sup> Ibid, 25

<sup>40</sup> Ibid, 25.

<sup>41</sup> Ibid, 95.

<sup>42</sup> Ibid, 96.

<sup>43</sup> Ibid, 113.

<sup>44</sup> Ibid, 115.

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<sup>45</sup> Ibid, 27.

<sup>46</sup> Ibid, 227-229.

<sup>47</sup> Ibid, 230.

<sup>48</sup> Ibid, 26, 120-121.

<sup>49</sup> Ibid, 26, 122-124.

<sup>50</sup> Ibid, 26, 126.

<sup>51</sup> Ibid, 127-128.

<sup>52</sup> Ibid, 26, 129.

<sup>53</sup> Ibid, 27.

<sup>54</sup> PN365 – PN368.

<sup>55</sup> PN377.

<sup>56</sup> DCB, 182; PN618

<sup>57</sup> DCB, 151.

<sup>58</sup> Ibid, 30

<sup>59</sup> Ibid, 22.

<sup>60</sup> PN910-PN913.

<sup>61</sup> DCB, 27-28.

<sup>62</sup> Ibid, 133-139.

<sup>63</sup> Ibid, 133.

<sup>64</sup> Ibid, 135-136.

<sup>65</sup> Ibid, 152.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> [2022] HCA 1

<sup>70</sup> [2022] HCA 2

<sup>71</sup> *CFMMEU* [2022] HCA 1, [43]; *ZG Operations* [2022] HCA 2, [8]

<sup>72</sup> *CFMMEU* [2022] HCA 1, [34]; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 29; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 33 [24].

<sup>73</sup> *CFMMEU* [2022] HCA 1, [39].

<sup>74</sup> *CFMMEU* [2022] HCA 1, [42]; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 41-45 [47]-[57].

<sup>75</sup> [2022] HCA 2, [1]-[2].

<sup>76</sup> Ibid, [3].

<sup>77</sup> Ibid, [5].

<sup>78</sup> Ibid, [8].

<sup>79</sup> Ibid, [61].

<sup>80</sup> Ibid, [20].

<sup>81</sup> *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 24.