



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Wayne Williamson

v

Active Towing & Transport Pty Ltd
(U2023/3491)

DEPUTY PRESIDENT WRIGHT

SYDNEY, 28 DECEMBER 2023

Application for an unfair dismissal remedy

Introduction and outcome

[1] On 24 April 2023, Mr Wayne Williamson made an application to the Fair Work Commission (**Commission**) under s.394 of the *Fair Work Act 2009* (Cth) (**FW Act**) for an order granting a remedy, alleging that he had been unfairly dismissed from his employment with Active Towing Transport Pty Ltd (**ATT**).

[2] In his application, Mr Williamson stated that his employment ended on 4 April 2023. Therefore, the application has been made within the 21-day period prescribed by s.394(2) of the FW Act.

[3] On 17 May 2023, ATT filed a Form F3 – Employer response to unfair dismissal application (**response**). The response claimed that Mr Williamson was not employed by ATT. I am required to determine this matter before considering the merits of the application according to s.396(b) of the FW Act.

[4] For the reasons set out below I have found that Mr Williamson was employed by ATT at the time his employment ended.

Hearing

[5] The matter was listed for directions on 26 June 2023.

[6] On 19 July and 15 August 2023 Mr Williamson filed submissions and evidence.

[7] On 2 August 2023, ATT filed submissions and evidence.

[8] The matter was listed for hearing on 16 August and 5 October 2023.

[9] I granted permission for both parties to be legal represented at the hearing. Ms Wong of Counsel appeared for Mr Williamson. Mr Latham of Counsel appeared for ATT.

[10] Mr Williamson gave evidence on his own behalf. Mr Gareth Creasey also gave evidence on behalf of Mr Williamson.

[11] The following witnesses gave evidence on behalf of ATT:

- a. Mr Richard Tunchon, Director, ATT;
- b. Mr Ronnie Mowad, Director, ATT;
- c. Ms Febby Testolin, Administrative Manager from November 2020-November 2021, ATT;
- d. Ms Kim Hoefsmit, Bookkeeper, ATT;
- e. Ms Holly Eastway, solicitor for ATT.

Background facts

[12] From on or about 1 March 1991, Mr Williamson owned and operated the business Active Towing Sydney Pty Ltd (ACN 003 705 539) (**ATS**) with his business partner Mr John Markham. Mr Williamson was both a director and a full-time waged employee. Mr Williamson's title was 'Managing Director' and he was responsible for overseeing and carrying out the day-to-day operations of the business of ATS. ATS was operated out of 15 Rhodes Street, West Ryde NSW 2114.¹

[13] Mr Williamson also owned and operated Central District Smash Repairs Pty Ltd (ACN: 002 836 633) (**Central District**) from around 1992 to about mid-2022 when it went into external administration. Mr Williamson was a director and an employee at Central District. Central District also operated out of the premises 15 Rhodes Street, West Ryde NSW 2114.

[14] Mr Williamson's duties at ATS included:

- a. Office management duties such as:
 - i. Office administration;
 - ii. Invoicing clients;
 - iii. Answering telephone calls and receiving requests for work/jobs;
 - iv. Hiring and firing staff and contractors;
 - v. Allocating and managing staff to carry out towing services.
- b. Towing business matters such as:
 - i. Driving tow trucks;
 - ii. Carrying out towing services.
 - iii. Marketing, sales and business development.²

[15] In an ordinary week working at ATS, Mr Williamson would work Monday to Saturday. He would arrive at work at 6am and leave around 6.45pm except for Wednesdays when he would leave at 12pm. He worked on Saturdays generally from about 7am to 11am.³

[16] Mr Williamson did not have a written employment contract. He started the company and was its first employee as well as the owner.⁴

- [17] Throughout his employment with ATS, the company:
- a. Paid weekly wages to Mr Williamson;
 - b. Made superannuation payments to Mr Williamson;
 - c. Made Pay-As-You-Go income tax on Mr Williamson's behalf;
 - d. Issued payslips to Mr Williamson;
 - e. Acknowledged and accrued Mr Williamson's annual leave entitlements.⁵
- [18] During Mr Williamson's employment at ATS, he hired and worked with both Mr Richard Tunchon and Mr Rene "Ronnie" Mowad. Mr Williamson has known Mr Tunchon for approximately 35 years and Mr Mowad for approximately 15 years.⁶
- [19] In January 2019, Mr Williamson's business partner in ATS began to suffer serious health issues and decided that he did not want to be part of the business anymore.⁷
- [20] Mr Williamson was not ready to close the business of ATS. He wanted to keep working as an employee for ATS for another 5 to 7 years before selling the business so that the business of "Active Towing" could continue after he retired.⁸
- [21] In around March 2019 Mr Williamson decided he would ask Mr Tunchon and Mr Mowad if they wanted to come into the business of ATS with him.⁹
- [22] According to Mr Williamson, his plan as at around March 2019 was that:
- a. He would sell and transfer the business of ATS to a newly incorporated entity;
 - b. He would offer directorship and a 25% share of the newly incorporated entity to Mr Tunchon;
 - c. He would offer directorship and a 25% share of the newly incorporated entity to Mr Mowad;
 - d. Mr Williamson would also be a director and own a 50% share of the newly incorporated entity;
 - e. Mr Williamson would personally pay for the newly incorporated entity's purchase of the plant and equipment from ATS and this would be his contribution to the newly incorporated entity;
 - f. Mr Williamson would keep working as an employee at the newly incorporated entity but he would focus more on running the office although he would still perform towing services when required;
 - g. Mr Williamson's annual leave entitlements would be transferred from ATS to the newly incorporated entity;
 - h. Mr Williamson would work as an employee of the newly incorporated entity for another 5 to 7 years and slowly transition myself out of the business;
 - i. After 5 to 7 years, Mr Tunchon and Mr Mowad would buy out Mr Williamson's 50% share and he would exit the business.¹⁰
- [23] Between 1 March 2019 and 4 May 2019, Mr Williamson says he had conversations with Mr Tunchon and Mr Mowad to the effect set out above and they agreed in principle that:
- a. A new entity would be incorporated;
 - b. They would be directors with a 25% share each in the new entity;

- c. Mr Williamson would be a director with a 50% share in the new entity;
- d. Mr Tunchon would sell his tow truck to the new entity and become an employee of the new entity;
- e. Mr Mowad would retain ownership of his tow truck and remain a contractor to the new entity;
- f. Mr Williamson would retire in 5 to 7 years and sell them his 50% share of the new entity;
- g. Mr Williamson would keep working as an employee in the new entity.¹¹

[24] Mr Tunchon and Mr Mowad denied that there was any agreement in these terms.

[25] ATT was incorporated with Mr Williamson, Mr Tunchon and Mr Mowad as directors and shareholders.¹² Mr Williamson's payslips reflected the transfer of his entitlements to ATT.¹³

[26] There was a period of overlap between the operations of ATS and ATT because they were essentially operating the same business in the same premises using the same plant and equipment.¹⁴

[27] The trading account for ATT was opened on 5 June 2019.¹⁵ The process for winding up ATS commenced on 11 February 2021.¹⁶ Mr Williamson resigned from his position as a Director of ATT the following day.¹⁷

[28] From at least June 2019 onwards invoices started being issued in the name of ATT and transactions such as lease payments and payment of other liabilities were being processed through ATT's bank account from 5 June 2019 onwards.¹⁸

[29] Although invoices were being issued with ATT's name and bank account details, many long-term customers continued to pay their invoices to the ATS account. As a result, that bank account was kept open and every so often, Mr Williamson would transfer monies paid to ATS to ATT's bank account to pay for wages and other liabilities.¹⁹

[30] The business was trading out of ATT from at least June 2019 even though some customers continued to pay their invoices to the ATS bank account and there continued to be some overlap in the operations of ATS and ATT.²⁰

[31] According to Mr Williamson, he did not have a written contract for his work with ATT just as he did not have a written contract for his work with ATS. Mr Williamson says he carried out his duties for ATT as he had for ATS.²¹

[32] Mr Williamson contends that in accordance with Mr Williamson's agreement with Mr Tunchon and Mr Mowad:

- a. Mr Williamson started working as an employee of ATT;
- b. Mr Williamson's annual leave entitlements were transferred to ATT;
- c. Mr Williamson was paid wages on a weekly basis;
- d. Superannuation was paid to Mr Williamson;
- e. ATT paid Pay As You Go Income Tax on Mr Williamson's behalf.²²

[33] Records produced by Mr Williamson showed that he received superannuation contributions from:

- a. Ryde and District Smash Repairs during the period from 16 February 2017 to 11 July 2019;
- b. ATS during the period from 11 July 2019 to 2 December 2020;
- c. ATT during the period from 4 February 2021 to 29 November 2022.²³

[34] Mr Williamson filed a tax return for the period from 1 July 2019 to 30 June 2020 which showed that he received income from ATS but not ATT.²⁴ Mr Williamson filed a tax return for the period from 1 July 2020 to 30 June 2021 which showed he received income from both ATS and ATT.²⁵

[35] Payslips which Mr Williamson produced issued by ATT showed that for the periods from:

- a. 11 November 2020 to 1 December 2020 he was paid an annual salary of \$66,040 and was classified 'Director';²⁶
- b. 23 June 2021-29 June 2021 he was paid an annual salary of \$83,200 and was classified 'Director';²⁷
- c. 22 June 2022-28 June 2022 he was paid an annual salary of \$83,200 and was classified 'Director';²⁸ and
- d. 1 March 2023-22 March 2023 he was paid an annual salary of \$83,200 and was classified 'Shareholder'.²⁹

[36] The payslip issued to Mr Williamson for the period from 11 November 2020 to 17 November 2020 shows that the gross amount earned by Mr Williamson for that period was equivalent to the year to date earnings. This indicates that this payslip was the first payslip issued to Mr Williamson for the 1 July 2020-30 June 2021 financial year.

[37] The payslips referred to 'Salary and Wages'; 'Employment Details'; 'Pay period'; 'Total earnings'; PAYG; the inclusion of superannuation; and the accrual, on a weekly basis, of annual leave on top of the annual leave that Mr Williamson says was transferred when he started working with ATT.

[38] Mr Williamson contends that he continued working in a similar way as he did while employed with ATS. An example of a normal day for Mr Williamson as an employee of ATT was as follows:

- a. Mr Williamson would arrive at work between 6am – 7.30am each morning and usually start in the office, reviewing emails;
- b. He would then receive emails and/or phone calls in relation to cars that needed to be towed, and their location;
- c. If required, he would then drive a tow truck, either alone or with another driver, to the location of the car, and tow the car to the required location whether the driver of the car would then organise to collect their car;
- d. He would then record the relevant towing details on my computer upon returning to the office; and
- e. He would usually finish work at approximately 6.45 pm each night.³⁰

[39] Mr Williamson's says his usual days of work were Monday to Saturday, and he did not work Sundays. On Saturdays Mr Williamson would usually start work at around 7am in the morning, and leave at 11am. Each Wednesday Mr Williamson would finish at 12pm.³¹

[40] Mr Williamson claims that Mr Tunchon and Mr Mowad never raised any issues in relation to Mr Williamson's working hours or his duties.³²

[41] Mr Williamson was required to wear the appropriate safety gear, including steel boots, when carrying out his duties for ATT.³³

[42] Mr Gareth Creasey worked for ATS then ATT as a tow truck driver from 1 February 2018 to 3 October 2022. Mr Creasey confirmed that he saw Mr Williamson almost every day from Monday to Friday, that they would speak almost every day, and that Mr Williamson was always contactable by mobile or the office phone when Mr Creasey tried to call him. Mr Creasey said that Mr Williamson ran ATT, took calls for jobs and carried out towing services. Mr Creasey also said that he and Mr Williamson would carry out towing jobs together when Mr Creasey could not complete the work alone because for example long periods of travel were required. This occurred approximately once or twice a week in the busy summer months or a couple of times a month at other times.³⁴

[43] Mr Tunchon and Mr Mowad denied that Mr Williamson performed any duties for ATS but accepted that he attended the office at 15 Rhodes Street, West Ryde. They say that since October 2020, Mr Tunchon has been managing the business and its day-to-day trading, such as managing staff, answering incoming phone calls and allocating jobs, with the assistance of secretarial and/or bookkeeping staff.

[44] Ms Testolin, who worked from November 2020 to November 2021 says that Mr Williamson sat at a desk behind her in the office at 15 Rhodes Street, West Ryde. He did not assist her with office duties and she did not allocate tow truck jobs to Mr Williamson.³⁵ Mr Williamson said that he undertook Ms Testolin's duties outside of her usual working hours of 8:20am to 4:00pm.³⁶ Mr Tunchon, Mr Mowad and Ms Testolin all referred to Mr Williamson not attending work on Wednesdays due to playing golf that day.³⁷

[45] On 20 October 2020, Mr Williamson signed an Asset Sale Agreement which had the effect of formalising the sale of ATS's assets to ATT. Those assets were three tow trucks owned by ATS.³⁸

[46] Mr Williamson paid around \$75,000 out of his personal funds to purchase the three tow trucks. Mr Williamson asked his agent, Mr Tim Drury, if he had a template of an asset sale agreement available that he could give Mr Williamson to use for the purpose of officially transferring the tow trucks from ATS to ATT. Mr Drury provided the asset sale agreement to Mr Williamson for his use.³⁹

[47] Mr Drury is not a lawyer and Mr Williamson did not seek legal advice in preparing the document. Mr Williamson contends that he was not aware, nor did he intend to give any warranty relating to transferring employees because Mr Tunchon, Mr Mowad and Mr Williamson had already agreed that:

- a. Mr Williamson would be transferred as an employee to ATT;
- b. Mr Williamson's annual leave entitlements would be transferred to ATT;
- c. Mr Williamson would continue his duties and responsibilities at ATT.⁴⁰

[48] The Asset Sale Agreement was intended to formalise the sale of the three tow trucks which were already being used in the business of ATT.⁴¹ Mr Williamson claims by this time, ATT had already commenced trading and Mr Williamson had already transferred his employment on the terms agreed.⁴² Mr Tunchon claims that no employees or employee entitlements were transferred from ATS to ATT.⁴³

[49] Mr Tunchon contends that in or around the start of 2022, he made the decision to move ATT's day-to-day operations from the office at 15 Rhodes Street, West Ryde, NSW 2114 to his home. ATT's bookkeeper, Kim Hoefsmit also started during the first few months of 2022, and she commenced working from her own home. The duties that Mr Williamson alleged were carried out by him, were undertaken by Ms Hoefsmit since at least from the first few months of 2022.⁴⁴

[50] Ms Hoefsmit says she had very little contact with Mr Williamson since she started working for ATT. Ms Hoefsmit works from home 20 hour per week and took directions from Mr Tunchon, not Mr Williamson. Ms Hoefsmit operates ATT's Xero platform, which records the employees or contractors who completed the various jobs required, so that she can attend to the payroll. Mr Williamson is not recorded in the Xero platform as having completed any tow truck driving.⁴⁵

[51] Mr Williamson was declared bankrupt on 24 February 2023 and continued carrying out the same duties for ATT.⁴⁶ On 31 March 2023, Mr Williamson realised that he had not been paid on 30 March 2023. He tried to contact Mr Tunchon and Mr Mowad but was unable to get in touch with them.⁴⁷

[52] On 4 April 2023, having still not received payment, Mr Williamson engaged his agent to write to Mr Tunchon on his behalf requesting payment of his outstanding salary for the preceding week. ATT responded to this email later on 4 April 2023 through its solicitor, denying the employment of Mr Williamson.⁴⁸

[53] On 17 July 2023, the Australian Securities and Investments Commission published a press release which relevantly provided:

ASIC has disqualified Wayne Thomas Williamson of Stanhope Gardens, NSW, from managing corporations for three and a half years due to his involvement in the failure of three companies.

Between March 1991 and November 2020 Mr Williamson was the director of three companies which entered liquidation between November 2019 and February 2021:

- Active Towing Sydney Pty Ltd (ACN 003 705 539) (Active Towing Sydney);
- Ryde & District Smash Repairs Pty Ltd (ACN 003 453 012) (Ryde & District Smash Repairs); and

- Active Towing Enterprises Pty Ltd (ACN 079 145 887) (Active Towing Enterprises).

Active Towing Sydney was involved in towing and motor vehicle repair services, Ryde & District Smash Repairs provided labour hire services to Active Towing Enterprises, and Ryde & District Smash Repairs provided towing services to another entity.

ASIC found that Mr Williamson did not meet his obligations as a director when he failed to:

- ensure the companies complied with their ATO statutory lodgement obligations;
- properly use his position by entering into a sale agreement that deprived Active Towing Sydney of its only income generating assets, which included allowing for the proceeds of the sale agreement, and other funds, to be withdrawn and transferred out of the company’s bank accounts;
- act in good faith of Active Towing Sydney by circumventing employment law obligations;
- ensure the companies complied with the obligation to keep financial records;
- prevent Ryde & District Smash Repairs from incurring debts when there were reasonable grounds to suspect they were insolvent.

At the time of ASIC’s decision, the three companies owed a combined total of \$1,833,747 to unsecured creditors, including approximately \$1,472,006 owed to the ATO.⁴⁹

[54] On 12 July 2023, Mr Williamson lodged an industrial deafness claim under the *Workers Compensation Act 1987* in which he recorded the following employment history:⁵⁰

Name and address of employer business or other	Occupation	Period of employment
Ryde & District Smash Repairs Pty Ltd	Director/Tow Truck Driver	01.01.2015-30.06.2019
Active Towing Sydney Pty Ltd	Director/Tow Truck Driver	01.07.2019-10.11.2020
Active Towing Transport Pty Ltd	Director/Tow Truck Driver	11.11.2020 to date

[55] On 2 August 2023, Judge Humphreys in the Federal Circuit and Family Court of Australia imposed a pecuniary penalty of \$11,500.00 on Mr Williamson for his failure to comply with two Compliance Notices issued on 7 April 2022 and 2 May 2022 in respect of entitlements owed to Kim Hoefsmit and another employee while employed by Central District.⁵¹

Legislation

[56] Section 396 of the FW Act requires the Commission to decide a number of matters relating to an application for an order under Division 4 before considering the merits of the application including whether the person is protected from unfair dismissal.

[57] Section 382 of the FW Act provides:

382 When a person is protected from unfair dismissal

A person is *protected from unfair dismissal* at a time if, at that time:

- (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
- (b) one or more of the following apply:
 - (i) a modern award covers the person;
 - (ii) an enterprise agreement applies to the person in relation to the employment;
 - (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

[58] The issue between the parties is whether Mr Williamson is an 'employee' as required by s.382(a) of the FW Act. Section 380 states that an employee means a national system employee as defined by s.14 of the FW Act.

Submissions

[59] The parties provided detailed written and verbal submissions which are summarised below. I have considered the submissions made by the parties and all the evidence in my determination of this matter and the conclusions I have reached.

Mr Williamson

[60] Mr Williamson submitted that there is no written contract of employment between Mr Williamson and ATT. Accordingly, the Commission should have regard to the contemporaneous material annexed to Mr Williamson's witness statement and the evidence of Mr Williamson and Mr Creasey to establish the nature of the relationship between the parties.

[61] This evidence militates against the assertions made by ATT that Mr Williamson was only remunerated "in connection with his appointment as a director" and did not carry out any duties. There is no reasonable explanation for why ATT would pay superannuation and income tax payments on behalf of Mr Williamson or allow him to accrue annual leave entitlements if he was not an employee. These payments are referable only to employment.

[62] The classification of Mr Williamson as a 'Shareholder' and 'Director' in the payslips does not detract from that conclusion. Mr Williamson is described as a 'Director-Managing' in his tax returns in the financial years 2019/2020 when employed by ATS and again in the financial years 2020/2021 when he received wages from ATT. That is the office that he held in ATT while also being a full time employee of ATT. The two propositions are not mutually exclusive and the evidence of the tax returns, superannuation contributions and accrual of

annual leave entitlements in the payslips weigh heavily in favour of a finding of Mr Williamson as an employee.

[63] ATT's assertions regarding the Asset Sale Agreement and denial of any transfer of employment should be weighed against:

- a. The bank statements of ATT which show that it was making transactions on its own behalf from June 2019 onwards which militates against the assertion that ATT was not operational or trading until October 2020;
- b. The bulk of the documentary evidence that supports Mr Williamson's characterisation as an employee of ATT as at the date of his dismissal on 4 April 2023 and in particular, the payslips dated 11 November 2020 to March 2023;
- c. Mr Williamson's evidence that he did not receive legal advice in relation to this document but rather adapted it from a *pro forma* document that he received from a business associate, Mr Drury;
- d. Mr Williamson's evidence that neither he nor ATS intended to provide any warranty to ATT in relation to his transfer as an employee;
- e. The fact that the Asset Sale Agreement defined "Assets" to be the three towing vehicles described in Schedule 1 and plainly related to the transfer of those vehicles to the business of ATT rather than any transfer of personnel.

[64] The large amount of entitlements namely 2,396.7679 hours of annual leave accrued to Mr Williamson as shown in the payslip dated 18 November 2020 (referring to the period 11 November 2020 to 17 November 2020) is inconsistent with:

- a. ATT's assertion that Mr Williamson was never employed with it. If this was the case, no payslip would have ever been issued;
- b. ATT's assertion that, even if Mr Williamson was employed with it, the employment commenced on or after 20 October 2020 when ATT allegedly commenced trading. There is no way that Mr Williamson could have accrued 2,369.7679 hours of annual leave in less than one month's service with ATT;
- c. ATT's assertion that Mr Williamson was not a transferring employee from ATS.

[65] Regardless of the terms of the Asset Sale Agreement, the key issue is the status of Mr Williamson's relationship to ATT at the time of dismissal. Even if it is accepted that the Asset Sale Agreement presents some circumstantial evidence that, as at 20 October 2020, ATS did not intend to transfer Mr Williamson's employment to ATT, this does not detract from the multiple indicia found throughout the payslips, tax returns, records of superannuation contributions leading up to March 2023 and the evidence of both Mr Creasey and Mr Williamson that point towards the conclusion that Mr Williamson was an employee of ATT at the time he was dismissed.

[66] This is the case notwithstanding some of the temporary disparities in the documents including for example, that ATT issued payslips to Mr Williamson in November 2020 (and was trading from June 2019) but only started paying superannuation to Mr Williamson from 4 February 2021. As the focus of the dispute relates to the status of Mr Williamson's relationship with ATT at the time of dismissal, Mr Williamson submits that the overwhelming effect of the

evidence points to the conclusion that, whatever may have been the case in 2019 or 2020, he was certainly an employee of ATT as at 4 April 2023.

[67] The weight of evidence, including payslips, superannuation payments and tax returns show that Mr Williamson was in fact a full-time employee of ATT at the time he was dismissed. There is no reasonable explanation for why ATT would have made such payments and issued such documentation had Mr Williamson simply been receiving dividends as a shareholder or otherwise receiving some sort of payment as a director. Together with the facts deposed by Mr Williamson which set out a history of how ATT became incorporated, the conclusion must be that Mr Williamson was an employee.

[68] Mr Creasey's evidence corroborates Mr Williamson's presence, duties and employment with ATT. This evidence militates against the assertion that Mr Williamson did not carry out any duties in relation to ATT's business.

[69] Mr Williamson submitted that the credit of both Mr Tunchon and Mr Mowad cannot be supported in view of the inconsistencies in their evidence about whether ATT was operational from 2019 and whether Mr Williamson was paid wages.

ATT

[70] ATT submitted that there are three aspects to its jurisdictional objection as follows:

- (i) Mr Williamson has made a claim for enforcement of the FW Act being a claim for payment of outstanding weekly wages, statutory notice, and annual leave entitlements;
- (ii) Mr Williamson never was an employee of ATT;
- (iii) any contract between Mr Williamson and ATT was void and unenforceable for illegality.

[71] In relation to the claim for enforcement of entitlements, ATT submitted that the Commission is an arbitral body, and does not have judicial power, and therefore does not have power to make the orders sought.

[72] In relation to the claim that Mr Williamson was an employee, ATT submitted that Mr Williamson bears the onus of persuading the Commission that it has the necessary jurisdiction to determine the application.

[73] ATT submitted that the evidence relied upon by Mr Williamson, including the alleged pay slips, superannuation payments and tax returns show that Mr Williamson was classified as a 'Shareholder' and/or 'Director'. Those were accurate descriptions of his relationship with ATT.

[74] There was no written employment contract or agreement between ATT and Mr Williamson, which Mr Williamson readily admits. Mr Williamson is unable to corroborate his evidence as to any alleged verbal agreement to commence employment with ATT. There was no resolution of the board or minute of a meeting. There was no agreement to transfer Mr Williamson's employment from ATS to ATT (even if he was an employee of ATS). The Asset

Sale Agreement specially excludes transfer of employment. The other witnesses to the transaction all denied any transfer of employment.

[75] The directors of ATT had no control over Mr Williamson. ATT, through its directors, did not order nor direct Mr Williamson to perform work. Similarly, the directors of ATT did not dictate when Mr Williamson was to attend the office (when ATT carried on its business from an office), nor did the directors require Mr Williamson to be in the office at all.

[76] ATT submitted that Mr Williamson's evidence as to the performing of work was a lie. To the extent that Mr Williamson was performing work, it was not for ATT. Mr Williamson's name does not appear on a single towing record. He claimed that he was dismissed on 4 April 2023. He claimed that he had worked in the office until that day. The office closed in about January or February 2022. Mr Williamson could not have performed work for it after that day.

[77] While ATT concedes that Mr Williamson was paid at regular intervals for a period of time, ATT denies that these payments were in connection with employment as alleged. Those payments were either unauthorised or were paid to him as shareholder. Further, ATT submits that the pay slips, superannuation payments and tax returns produced by Mr Williamson are inconsistent with the period of employment alleged by Mr Williamson

[78] Mr Williamson's evidence shows that he was a director and shareholder of ATT, but reveals no more than that. The superannuation records prove only that ATT paid super. The Superannuation Guarantee legislation does not require a relationship of employment for a superannuation liability. Employee is more broadly defined to encompass a working director.

[79] ATT submits that the evidence produced by Mr Williamson is totally inconsistent with the application before the Commission. Mr Williamson's version of events is inconsistent with those originally put forward in his application.

[80] Mr Williamson's evidence as to the timeline of events is inconsistent with the documents he relies on, and should be disregarded or given little weight as a result. ATT's version of events in comparison is supported by its evidence and can be corroborated by the employees and contractors of ATT.

[81] There were a number of other potential employers. If Mr Williamson can prove that he is an employee, he then needs to persuade the Commission that ATT was his employer.

[82] ATT submitted that Mr Williamson was a witness of such little credit that he should not be believed, except when his evidence is independently verifiable. ATT provided the following examples in support of this submission:

- a. Mr Williamson's explanation of why his name did not appear on the towing records.
- b. Mr Williamson's evidence that he signed things all of the time and does not read them.
- c. Mr Williamson's evidence in relation to superannuation that he did not know where the money came from or how it got into his accounts.

- d. Mr Williamson's evidence in relation to the four companies that he operated and that he did not know whether he was an employee of Central Districts as 'the accountant switched us around'.
- e. The evidence that Mr Williamson gave about in relation to any transfer of employment was false.

[83] ATT submitted that the companies with which Mr Williamson was associated with had an unfortunate tendency to go into administration, liquidation and deregistration without Mr Williamson, apparently, knowing what was happening. The entire process created by Mr Williamson in relation to ATS was designed to create a Phoenix arrangement which potentially renders any contract of employment unlawful.

[84] The accountant and Mr Drury should have been called by Mr Williamson to give evidence. They could be expected to explain many of the transactions the subject of these proceedings. By failing to call them to give evidence, Mr Williamson is at risk of adverse inferences being made against him.

Consideration

[85] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd (CFMMEU)*⁵² and *ZG Operations Australia Pty Ltd v Jamsek (ZG Operations)*⁵³ are the most recent High Court authorities in relation to the employment relationship.

[86] 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.⁵⁴

[87] 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".⁵⁵ 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 enterprise⁵⁶ and the existence of a right of control by a putative employer over the activities of the putative employee.⁵⁷

[88] 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.⁵⁸

[89] In the current case, the dispute is not whether Mr Williamson performed work for ATT as an employee or independent contractor, but rather whether Mr Williamson performed work at all for ATT.

[90] I accept ATT's submission that Mr Williamson bears the onus of establishing that he was employed by ATT.

[91] In the current matter, there is no written agreement between the parties about the relationship between them or which dealt with the regular payments which Mr Williamson received from ATT. I am therefore required to examine the totality of the relationship between ATT and Mr Williamson for the purpose of determining whether Mr Williamson was an employee. Both Mr Williamson and ATT agree that Mr Williamson attended the workplace and that he received regular payments from ATT. However they disagree about whether Mr Williamson performed work while attending the workplace and whether the payments were wages or in relation to Mr Williamson's role as a shareholder.

Did Mr Williamson perform work for ATT?

[92] Mr Williamson's evidence is that he owned and operated ATS and Central District out of the same premises at 15 Rhodes Street, West Ryde NSW from around 1991 and that he continued to perform the same duties for ATT when it was registered in 2019. These duties included receiving emails and phone calls and towing vehicles. Mr Williamson attended work six days a week from Monday to Saturday. He commenced work between 6am – 7.30am each day and finished at approximately 6.45pm except on Wednesdays when he would finish at 12pm and on Saturdays when he would finish at 11am. Mr Williamson said that he has known Mr Tunchon for approximately 35 years and Mr Mowad for approximately 15 years and that they had each performed work for ATS. Mr Tunchon and Mr Mowad did not dispute that Mr Williamson performed work for ATS or that he carried out the work described in his evidence.

[93] Mr Williamson's evidence was corroborated by Mr Creasey⁵⁹ who worked for ATS then ATT as a tow truck driver from 1 February 2018 to 3 October 2022. Mr Creasey confirmed that he saw Mr Williamson almost every day from Monday to Friday, that they would speak almost every day, and that Mr Williamson was always contactable by mobile or the office phone when Mr Creasey tried to call him. Mr Creasey said that Mr Williamson ran ATT, took calls for jobs and carried out towing services. Mr Creasey also said that he and Mr Williamson would carry out towing jobs together when Mr Creasey could not complete the work alone approximately once or twice a week in the busy summer months or a couple of times a month at other times.

[94] ATT submitted that Mr Williamson's evidence about performance of work was a lie and to the extent that he was performing work, it was not for ATT. ATT pointed to the fact that Mr Williamson's name does not appear on a single towing record and that his explanation for this during the hearing was ridiculous. Mr Williamson's explanation for this was to the effect that the purpose of recording names was to ensure that if a contractor was doing the job, that person would get paid and because he was an employee, it was not necessary for his name to be recorded. Mr Williamson also explained that he often accompanied Mr Tunchon and Mr

Mowad to jobs where cars were drivable and registered (and required removal because they were illegally parked but not necessarily towing because they could be operated). In these situations, Mr Tunchon and Mr Mowad would tow a car and Mr Williamson would drive a second car. Approximately 4 to 5 times a month, Mr Williamson would go with Mr Mowad to pick up or deliver golf carts. The truck held golf carts and was a two person job.⁶⁰

[95] Mr Tunchon and Mr Mowad denied that Mr Williamson performed any duties for ATT but accepted that he attended the office at 15 Rhodes Street, West Ryde. They say that since October 2020, Mr Tunchon has been managing the business and its day-to-day trading, such as managing staff, answering incoming phone calls and allocating jobs, with the assistance of secretarial and/or bookkeeping staff.

[96] The task of determining whether Mr Williamson performed work for ATT is very difficult given the evidence of Mr Creasey and Mr Williamson on one hand and the evidence of Mr Tunchon, Mr Mowad, Ms Hoefsmit and Ms Testolin on the other. ATT urged me to make adverse credit findings against Mr Williamson. Similarly, Mr Williamson urged me to make adverse credit findings against Mr Tunchon and Mr Mowad.

[97] The matters relied upon by ATT in relation to Mr Williamson's credit related primarily to his dealings with the numerous companies he operated. Mr Williamson's evidence about his various companies showed that he was at times wilfully ignorant about what he was signing and who was paying him, and that he tended to hide behind professional advice when confronted with his actions. Mr Williamson's conduct in this regard does not in my view lead to an automatic conclusion that he was lying about performing work for ATT. This is especially when considering the plausibility of the differing version of events. ATT also claimed that the evidence that Mr Williamson gave in relation to any transfer of employment was 'manifestly false' and mocked Mr Williamson's evidence about why he was not recorded as performing any towing jobs as 'frankly ridiculous'.

[98] The matters relied upon by Mr Williamson in relation to Mr Tunchon's and Mr Mowad's credit related to Mr Tunchon's and Mr Mowad's evidence that the business of ATT was not operational until November 2020 when banking records showed that it was operational since at least June 2019. Further both of them gave inconsistent evidence about whether the payments made to Mr Williamson were for wages or for another purpose. Mr Tunchon was also evasive when asked whether he paid money in return for the 25 per cent shareholding in ATT.

[99] In my view, it is very unusual that a person in Mr Williamson's position who had spent approximately 30 years in the tow truck business, regularly drove tow trucks and continued attending the offices of a tow truck business would suddenly cease doing this work in the absence of any direction from Mr Tunchon or Mr Mowad. Mr Tunchon and Mr Mowad did not provide evidence that they directed Mr Williamson to cease towing or any other work once they became directors of ATT. In these circumstances, it seems more feasible than not that Mr Williamson continued performed towing work for ATT and that there was a reason that his towing work was not recorded in ATT's records.

[100] This is particularly so given that Mr Williamson ceased being a director of ATT in February 2021 with the result that the remaining directors Mr Tunchon and Mr Mowad could have, if they had chosen to, asked Mr Williamson to cease attending the workplace. That they

did not do so is consistent with Mr Williamson's evidence that he was performing work for ATT. I therefore do not accept the evidence of Mr Tunchon and Mr Mowad that Mr Williamson performed no work for ATT. In relation to the administrative and management tasks which Mr Williamson said he performed, I find that these may have reduced over time when Ms Testolin then Ms Hoefsmit were employed and Mr Williamson ceased to be a director. However I accept Mr Williamson's evidence that he performed these tasks when Ms Testolin was not at work or unavailable.

[101] The unchallenged evidence of Mr Creasey, Ms Testolin and Ms Hoefsmit together establishes that Mr Williamson performed towing work but that this work was not recorded against his name and was not allocated to him by Ms Testolin. Ms Testolin's and Ms Hoefsmit's hours of work did not correspond with Mr Williamson's, so they were unable to comment on the duties performed by Mr Williamson when they were not at work. Mr Tunchon claims that he moved ATT's office from its West Ryde location to his home in early 2022. Mr Creasey's employment continued beyond this date to October 2022 and gives evidence that he worked with Mr Williamson through his employment. I therefore find that Mr Williamson continued to perform work for ATT beyond the date that Mr Tunchon claims to have moved ATT's office.

[102] In relation to the evidence of Ms Testolin, Mr Tunchon and Mr Mowad that Mr Williamson did not attend the office on Wednesdays as he was playing golf, I accept the submission made on Mr Williamson's behalf, that if all he ever did was sit in the office for four years and do nothing, it would not be significant to anybody that he disappeared on a Wednesday to go to golf. It was significant that they remembered that Wednesday was Mr Williamson's time off to go to golf, because he was otherwise working.

[103] ATT submitted that Mr Williamson did not challenge Mr Tunchon's evidence that he did not order or direct Mr Williamson to perform work. ATT submitted that it did not dictate when Mr Williamson attended the office nor did it require Mr Williamson to be in the office at all. Contrary to ATT's submissions, there was no evidence of any discussion between Mr Tunchon, Mr Mowad and Mr Williamson that ATT did not require Mr Williamson to be in the office at all.

[104] It is not necessary for Mr Williamson to prove that ATT was giving him orders and directions on a regular basis to establish that ATT was exercising control in relation to his work. It is well established that the importance of control in determining whether a relationship is one of employment lies not so much in its actual exercise, although clearly that is relevant, but in the right of the employer to exercise it.⁶¹ Further, in the context of an employee who is also a director, it has been held that the sole governing director may exercise control, by giving orders of the company as the company's agent to herself or himself as employee.⁶²

[105] I believe that while an employee and Director of ATS, it is likely that Mr Williamson on behalf of ATS determined his duties and hours of work as an employee and that these arrangements continued when he became employed by ATT. As a Director of ATT, Mr Williamson continued to have authority on behalf of the employer to determine his duties and hours of work as an employee. When Mr Williamson ceased being a Director of ATT, he no longer had the authority to determine his own hours and duties, however there is no evidence that at that point Mr Tunchon or Mr Mowad directed him to cease performing duties for ATT or to attend the office. It is the fact that Mr Tunchon and Mr Mowad had this authority,

regardless of whether they exercised it that weighs in favour of a conclusion that Mr Williamson was an employee.

Arrangements regarding payments

[106] ATT conceded that Mr Williamson was paid at regular intervals for a period of time, but submitted these payments were either unauthorised or were paid to him as shareholder. Like Mr Williamson, Mr Mowad and Mr Tunchon were also directors and shareholders, however they were not paid as directors and shareholders. Rather, Mr Mowad was paid as a contractor and Mr Tunchon as an employee.

[107] Mr Tunchon agreed that he and Mr Mowad had a conversation with Mr Williamson around the time that ATT was incorporated in May 2019. However both Mr Tunchon and Mr Mowad deny that they agreed that Mr Williamson would become an employee of ATT and that his entitlements would be transferred from ATS to ATT.

[108] Mr Tunchon says that ATT paid Mr Williamson regularly as a shareholder because he felt that this was the right thing to do to support Mr Williamson. There was no express agreement to pay Mr Williamson. Mr Tunchon allowed the payments to continue that were initially made to Mr Williamson as shareholder of ATT, but there were no discussions as to what ATT would pay Mr Williamson. Mr Williamson set up the payments himself through the accountant for ATT, Quantiva Pty Ltd, and Mr Tunchon did not object to the payments because he felt obliged to support Mr Williamson. There was no agreement to pay Mr Williamson superannuation. This was organised by Mr Williamson with the accountant. Mr Tunchon allowed the contributions to Mr Williamson's superannuation because this previously occurred with ATS.⁶³

[109] Mr Mowad also said that ATT paid Mr Williamson regularly as a shareholder and Mr Mowad allowed this to happen because he felt obliged to support Mr Williamson, not because he was an employee. Further, he did not think that those payments would continue to be paid to Mr Williamson for as long as they did.⁶⁴

[110] Mr Tunchon agreed that there has never been a decision of the directors to give the shareholders a dividend in ATT and that Mr Williamson has not ever received shareholder dividends or director's fees.⁶⁵

[111] The payslips issued to Mr Williamson referred to his classification as either 'Director' or 'Shareholder' however there was no evidence from ATT as to who decided to refer to Mr Williamson's role in this way. Both Mr Tunchon and Mr Mowad denied that they were responsible. The payslips were issued by Ms Hoefsmit who received direction from Mr Tunchon. The payslips referred to 'Salary and Wages'; 'Employment Details'; 'Pay period'; 'Total earnings'; PAYG; the inclusion of superannuation; and the accrual, on a weekly basis, of annual leave on top of the annual leave that Mr Williamson says was transferred when he started working with ATT.

[112] Mr Tunchon claimed that the payment arrangements were initially set up by Mr Williamson.⁶⁶ Even if this was the case, it does not explain why the arrangements continued after Mr Williamson resigned as Director in February 2021. As Directors, Mr Mowad and Mr

Tunchon had the ability to change any arrangements with respect to paying Mr Williamson if they believed these arrangements did not reflect the true nature of the relationship. That they did not do so is consistent with Mr Williamson's contention that he was an employee and entitled to be paid as such. There was simply no reason for Mr Tunchon to direct Ms Hoefsmit when preparing Mr Williamson's pay to deduct tax and accrue leave if Mr Williamson was not an employee.

[113] Further there is no evidence to support Mr Mowad's and Mr Tunchon's contention that the payments made to Mr Williamson were in connection with his role as a Shareholder. There were no resolutions, decision or correspondence which reflected that payments were to be made for this purpose. No such payments were made to Mr Mowad or Mr Tunchon although they were also Shareholders. Rather, Mr Mowad was paid as a contractor and Mr Tunchon as an employee. The issuing of payslips indicates that Mr Williamson was also paid as an employee. The description of Mr Williamson as either 'Director' or 'Shareholder' is not inconsistent with Mr Williamson being an employee of ATT. This is particularly so given that neither Mr Mowad and Mr Tunchon claim to have directed Ms Hoefsmit to describe Mr Williamson in this way.

[114] I find that the payment of salary to Mr Williamson on a weekly basis, the deduction of tax, the payment of superannuation and the accrual of leave for Mr Williamson are all matters which weigh in favour of a finding that Mr Williamson was employed by ATT.

Who is the employer?

[115] ATT submitted that if Mr Williamson can prove that he is an employee, he then needs to persuade the Commission that ATT was his employer. The difficulty with that exercise is that there is significant evidence that shows that he was an employee of one or more of a number of other companies.

[116] The other two companies which Mr Williamson appeared to have been previously employed by, according to superannuation records and his workers compensation claim, were Ryde & District Smash Repairs Pty Ltd and ATS. The documentary evidence shows that Mr Williamson ceased being an employee of Ryde & District Smash Repairs Pty Ltd in approximately July 2019 and of ATS in approximately December 2020. Although Mr Williamson claimed to have performed work for Central District and was a Director and Shareholder of that company there was no evidence which established that he was ever employed by Central District. Further, Ryde & District Smash Repairs Pty Ltd, ATS and Central District were all in liquidation at the time of the termination on 4 April 2023. Therefore, it is not possible for Mr Williamson to have been employed by any of these companies at the time of termination.

[117] The evidence shows that approximately two weeks before the termination, Mr Williamson was issued with a payslip by ATT. There is no evidence that he was issued with payslips by any other companies at that time. In the circumstances, I do not accept ATT's submissions that there is any confusion about the identity of Mr Williamson's employer. I find that the evidence establishes that Mr Williamson was employed by ATT at the time of termination.

What was the period of employment?

[118] Mr Williamson claims that his employment commenced in May 2019 when ATT was incorporated. This is not supported by the documentary evidence.

[119] The first payslip issued to Mr Williamson by ATT for the 1 July 2020-30 June 2021 financial year was for the period 11 November 2020 to 17 November 2020. Mr Williamson's tax return for the 2020/2021 financial year shows that he received income from both ATS and ATT. As Mr Williamson first received payment of wages from ATT on 11 November 2020, I find he commenced employment with ATT on 11 November 2020. This is consistent with the information provided in his workers compensation claim. Although Mr Williamson's superannuation fund records show that he did not start receiving superannuation contributions from ATT until 4 February 2021, it is possible that these contributions were paid in arrears.

[120] Having found that Mr Williamson commenced employment with ATT on 11 November 2020, it follows that this occurred after Mr Williamson signed the Asset Sale Agreement on 16 October 2020. ATT relied upon the vendor's warranty in the Asset Sale Agreement that there are no transferring employees at the date of this agreement as further evidence that Mr Williamson was not an employee of ATT.

[121] In my view, ATS' warranty as to transferring employees could be evidence of the parties' intentions with respect to transferring employees at the time of signing the Asset Sale Agreement. However this does not disturb my findings that approximately three weeks later, regardless of the parties' intentions at the time of signing the Asset Sale Agreement, ATT decided that it would employ Mr Williamson and pay him as such.

[122] I believe it is more likely that the vendor warranty in the Asset Sale Agreement is relevant to whether Mr Williamson's annual leave was transferred from ATS to ATT. However this is a matter which I am not required to determine for the purpose of considering whether there was an employment relationship between Mr Williamson and ATT. I note however that AAT's claim that there was no transfer of entitlements and that Mr Williamson's evidence in this regard is 'manifestly false' is undermined by the large amount of annual leave which appears on Mr Williamson's first payslip which was permitted to increase during the period that Mr Tunchon claims to have been running ATT's business.

The claim as to illegality

[123] ATT claimed that if the Commission found that an employment relationship existed between Mr Williamson and ATS, that relationship is unlawful and therefore invalid and unenforceable. In making this claim, ATS relied upon Mr Williamson's disqualification from managing corporations for three years and the Liquidators Report to Creditors in relation to ATS which referred to possible insolvent trading and unreasonable director-related transactions.

[124] The evidence shows that Mr Williamson has engaged in some concerning practices as director of a number of companies. As director of Central District, he has received a pecuniary penalty of \$11,500.00 for his failure to comply with two Compliance Notices issued on 7 April 2022 and 2 May 2022 in respect of entitlements owed to Kim Hoefsmit and another employee who were employed by Central District. The Liquidators Report to Creditors in relation to ATS

refers to a former employee of ATS claiming \$27,586 in outstanding entitlements. Mr Williamson has been disqualified by ASIC from managing corporations for three and a half years due to his involvement in the failure of three companies. ASIC has found that Mr Williamson did not meet his obligations as a director with respect to a number of failures including entering into the asset sale agreement that deprived ATS of its only income generating assets, and allowing for the proceeds of the sale agreement, and other funds, to be withdrawn and transferred out of the company's bank accounts.

[125] The evidence establishes that Mr Williamson has received a pecuniary penalty as a director of Central District. However there is no evidence before me that establishes that Mr Williamson engaged in unlawful conduct as a director of ATS, as all that is relied upon is a press release by ASIC. It may be that ASIC's findings about Mr Williamson's failures as a director are relevant to the legality of the Asset Sale Agreement and the transfer of Mr Williamson's annual leave entitlements. However these are not matters which are relevant to the determination of whether there was an employment relationship between Mr Williamson and ATT.

[126] The cases relied upon by ATT concern the legality of contracts of employment which are inconsistent with the visa requirements of the employees who are parties to those contracts.

[127] These cases were usefully summarised by the then Federal Circuit Court of Australia in *Lal v Biber*⁶⁷ as follows:

(1) *Nonferral (NSW) Pty Ltd v Taufia* (1998) 43 NSWLR 312, where the New South Wales (NSW) Court of Appeal considered an illegal entrant to Australia and his rights under the NSW worker's compensation scheme, concluding that the worker was still covered by the NSW scheme.

(2) *Australia Meat Holdings Pty Ltd v Kazi* [2004] 2 Qd R 458, where the Queensland Court of Appeal found that a worker was not covered by the state worker's compensation scheme. However, in that case the worker had no work rights, making any employment contract illegal.

(3) *Smallwood v Ergo Asia Pty Ltd* [2014] FWC 964, where the contract was found to be illegal, as the applicant was prohibited from working for an employer who was not an employer who had been approved as a sponsor. Thus, the contract itself was illegal.

(4) *Hussein v Secretary, Department of Immigration and Multicultural Affairs (No 2)* (2006) 155 FCR 304; 157 IR 405, where the Federal Court of Australia considered a case where an applicant in detention said that he had entered into an employment agreement when he agreed to carry out work at the centre. As a person in detention he had no work rights. Graham J noted a number of overseas cases where employment claims have been refused where there were no work rights held by the employee: *Vakante v Addey and Stanhope School Governing Body* [2004] ICR 279; *Allen v Houna* [2012] IRLR 685; *Hussein v Labour Court* [2012] IEHC 364; and United States in *Hoffman Plastic Compounds Inc v National Labor Relations Board* 535 US 137 (2002).⁶⁸

[128] In *Lal v Biber*, the Court concluded that underpayments could be recovered by an employee for work in excess of 20 hours per week although the employee's visa permitted the employee to work a maximum of 20 hours per week. In that case, the applicant was permitted

to engage in employment in Australia. The initial contract of employment to carry out cleaning work appears to have been within the terms of his visa conditions, and therefore the contract itself was not illegal. In these circumstances, the Court was not persuaded that the breach of the visa condition resulted in an unenforceable contract of employment.⁶⁹

[129] In my view, these cases have no application to the current case. It may be that Mr Williamson's actions as a director of ATS are inconsistent with the *Corporations Act 2001* however there is no assertion that the employment contract between Mr Williamson and ATT is inconsistent with the *Corporations Act*, the FW Act or any other legislation.

[130] As such there is no basis for me to make a finding that the employment contract between Mr Williamson and ATT is unlawful, invalid and/or unenforceable or that it otherwise prevents Mr Williamson from proceeding with the unfair dismissal application.

[131] ATT invited the Commission to make an inference arising under *Jones v Dunkel* due to Mr Williamson's failure to call the accountant and Mr Drury. It is unclear how the accountant and Mr Drury could have assisted the Commission's determination of whether Mr Williamson was an employee of ATT. To the extent that the accountant and Mr Drury could give evidence that certain transactions were part of phoenixing arrangements, this is not a matter which is relevant to whether Mr Williamson was an employee of ATT. I therefore decline to make any adverse inferences in respect to Mr Williamson's failure to call the accountant and Mr Drury to give evidence in the matter.

Claim for enforcement

[132] As one of its jurisdictional objections to Mr Williamson's claim, ATT submitted that Mr Williamson has made a claim for enforcement of the FW Act being a claim for payment of outstanding weekly wages, statutory notice, and annual leave entitlements and that the Commission does not have power to make the orders sought.

[133] According to the application, the amount claimed is made pursuant to s.392 of the FW Act which deals with compensation. Pursuant to s.390(1), the Commission may order a person's reinstatement, or the payment of compensation to a person, if the Commission is satisfied that the person was protected from unfair dismissal at the time of being dismissed according to the criteria in s.382 and the person has been unfairly dismissed. As noted above one of the aspects of being satisfied that the person was protected from unfair dismissal at the time of being dismissed is that the person is an employee. I am required to determine this matter before considering whether the person has been unfairly dismissed according to s.396(b) of the FW Act. As I have not made a determination in relation to the balance of the matters in ss.382 and 396 or the merits of the application, it would be premature for me to determine whether the Commission has the power to make the orders sought pursuant to s.392. Accordingly, I do not to propose to determine this matter at this stage but to invite the parties to make further submissions as to remedy.

Conclusion

[134] I have found that Mr Williamson performed work for ATT. I have considered the totality of the relationship between the parties, including the degree of control, the mode of remuneration, the obligation to work, the hours of work, the provision for holidays and the deduction of income tax. In my view, my findings in all these matters demonstrate that Mr Williamson was an employee of ATT during the period from 11 November 2020 until 4 April 2023 for the purpose of the FW Act.

[135] The jurisdictional objection raised by ATT is dismissed and I order accordingly.

[136] The matter will shortly be listed for Directions so that the matter can be programmed for further conciliation and/or hearing. If the matter is programmed for hearing, the parties will be directed to make further submissions as to remedy as foreshadowed above.



DEPUTY PRESIDENT

Appearances:

Ms Wong of Counsel appeared on behalf of the Applicant

Mr Latham of Counsel appeared on behalf of the Respondent

Hearing details:

2023

In person

05 October

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¹ Exhibit A1 [7]-[8], [10] (Court Book (CB) 61).

² Ibid [11] (CB 61).

³ Ibid [12] (CB 12).

⁴ Ibid [13] (CB 62).

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- ⁵ Ibid [14] (CB 62).
- ⁶ Ibid [16]-[17] (CB 62).
- ⁷ Ibid [19] (CB 62).
- ⁸ Ibid [20]-[21] (CB 62).
- ⁹ Ibid [23] (CB 63).
- ¹⁰ Ibid [24] (CB 63).
- ¹¹ Ibid [25] (CB 63).
- ¹² Ibid [29] (CB 63).
- ¹³ Ibid [30] (CB 64,152-159).
- ¹⁴ Ibid [31] (CB 64).
- ¹⁵ Ibid [32] (CB 64).
- ¹⁶ Ibid, CB 69-76.
- ¹⁷ Exhibit R3 [5] (CB 266, 272).
- ¹⁸ Exhibit A1 [33] (CB 64).
- ¹⁹ Ibid [34] (CB 64).
- ²⁰ Ibid [35] (CB 64).
- ²¹ Ibid [36] (CB 65).
- ²² Ibid [37] (CB 65).
- ²³ Exhibit A1, CB 113-117.
- ²⁴ Ibid, CB 90-104.
- ²⁵ Ibid, CB 105-112.
- ²⁶ Ibid, CB 152-154.
- ²⁷ Ibid, CB, 155.
- ²⁸ Ibid, CB, 156.
- ²⁹ Ibid, CB, 157-159.
- ³⁰ Exhibit A1 [44]-[45] (CB 65-66).
- ³¹ Ibid [46] (CB 66).
- ³² Ibid [47] (CB 66).
- ³³ Ibid [48] (CB 66).
- ³⁴ Exhibit A3 [7]-[17] (CB 261).
- ³⁵ Exhibit R6, 656.
- ³⁶ Exhibit A2 [24]-[25].
- ³⁷ Exhibit R3 [15] (CB 267); Exhibit R5 [16] (CB 579); Exhibit R6, CB 657.
- ³⁸ Exhibit A1 [37] (CB 66).
- ³⁹ Ibid [39]-[40] (CB 66).
- ⁴⁰ Ibid [41] (CB 66).
- ⁴¹ Ibid [42] (CB 66).
- ⁴² Ibid [43] (CB 66).
- ⁴³ Exhibit R3 [12], (CB 267).
- ⁴⁴ Exhibit R3 [16], (CB 267).
- ⁴⁵ Exhibit R6 (CB 654).
- ⁴⁶ Exhibit A1 [50]-[51] (CB 67).
- ⁴⁷ Ibid [52]-[53] (CB 67).
- ⁴⁸ Ibid [54]-[55] (CB 67).

⁴⁹ Exhibit R6, CB 584-585.

⁵⁰ Exhibit R1.

⁵¹ Exhibit R6, CB 653.

⁵² [2022] HCA 1

⁵³ [2022] HCA 2

⁵⁴ *CFMMEU* [2022] HCA 1, [43]; *ZG Operations* [2022] HCA 2, [8]

⁵⁵ *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].

⁵⁶ *CFMMEU* [2022] HCA 1, [39].

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

⁵⁸ *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 24.

⁵⁹ Exhibit A3 (CB 261).

⁶⁰ Exhibit A2 [13]-[15], [20]-[23].

⁶¹ *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 [9].

⁶² *Bearings Incorporated (Australia) Pty Ltd v Treloar* (1999) 95 IR 169, [108].

⁶³ Exhibit R3 [21]-[23] (CB 268).

⁶⁴ Exhibit R5 [18] (CB 579).

⁶⁵ PN 1021.

⁶⁶ Exhibit R3 [23] (CB 268).

⁶⁷ [2021] FCCA 959.

⁶⁸ *Ibid*, [49].

⁶⁹ *Ibid*, [50].