DECISION

Fair Work Act 2009
s.365—General protections

Xiao Ping (Lisa) Zhong
v
Hawthorn Resources Limited
(C2023/123)

DEPUTY PRESIDENT BELL MELBOURNE, 20 APRIL 2023

Application to deal with contraventions involving dismissal - jurisdiction objection - whether applicant an employee - whether applicant dismissed -not an employee – application dismissed.

[1] Ms Zhong has made an application under s.365 of the *Fair Work Act 2009* (**Act**) against Hawthorn Resources Limited (**Respondent**) alleging she was "dismissed" in contravention of the 'general protections' provisions of the Act.

[2] By ss.12 and 386 of the Act, a "dismissal" is defined by reference to employment. The Respondent denies that there was any employment relationship with Ms Zhong. It says that, at all times, the only relationship involving Ms Zhong was with the corporate entity Austic Enterprises Pty Ltd (**Austic**). Accordingly, the Respondent contends there was no employment relationship and, therefore, no "dismissal" for the purposes of s.365 of the Act.

Procedural background

[3] It is necessary to set out a brief history of certain procedural matters.

[4] Shortly after the matter was allocated to me, I issued directions on 2 February 2023 for the filing of evidence and submissions, as well as listing the matter for a mention hearing on 8 February 2023 and a substantive hearing on 28 March 2023. By those directions, the Respondent was initially required to file and serve its evidence and any submissions supporting its jurisdictional objection by 16 February 2023, Ms Zhong by 2 March 2023 and any reply material by the Respondent on 16 March 2023.

[5] At the mention hearing, and following discussion, Ms Zhong indicated she would obtain legal advice, which included whether or not Austic might decide to press a general protections claim in its own name (in which case, no certificate from the Commission was required for Austic, as opposed to Ms Zhong making the claim in her personal capacity). Accordingly, I extended time for the Respondent to file its material until 23 February 2023 in the event that the claim was not going to be pressed. Ms Zhong was asked to indicate by 16 February 2023

whether she wished to continue with her claim (after, presumably, the benefit of legal advice). The other directions remained unchanged.

[6] Unfortunately, Ms Zhong failed to indicate her position as to whether Austic would make a claim in its name or whether she wished to continue the claim in her own name (which required determination of the jurisdictional question as to whether Ms Zhong was an employee or not.) Out of fairness to the Respondent, I delayed the order requiring it to file material in the event that it became unnecessary to do so and provided Ms Zhong with additional time to provide her response. It appears that Ms Zhong did not, at least in any timely way, obtain legal advice as she indicated she would do. Obtaining clarification of her position took further time but ultimately it became clear that her personal claim was pressed and I issued updated directions. Relevantly, those directions required the Respondent to file and serve its material by 3 March 2023 (which it did) and Ms Zhong to file and serve her material by 9 March 2023 (which she did). The date for the Respondent to file any reply material (16 March 2023) remained unchanged.

[7] The Respondent's initial material contained only documentary evidence and submissions. After the granting of a short extension of time, to 9:00am on 17 March 2023, it also filed reply material on 17 March 2023, which included a short witness statement of Mr Glenn Fowles, company secretary for the Respondent. With no disrespect to Mr Fowles, who is not legally trained, the statement filed on 17 March 2023 was largely in the nature of submission based on his interpretation of various documents and added very little evidentiary weight to those documents.

[8] I would make some general observations about the witnesses. I consider that Mr Fowles was a reliable witness, who was doing his best to provide honest and clear evidence. The deficiency of Mr Fowles' evidence was that he has only been company secretary since February 2022 and many of the key events predate his involvement. That observation is not levelled as a criticism, but it reflects the fact that Mr Fowles' understanding of various matters was necessarily based on his interrogation of the Respondent's business records or what he had been told by others.

[9] I did not consider that Ms Zhong was a reliable witness. I have given her some significant leeway in the fact that English is not her native language but, in that respect, she was clearly proficient enough to perform professional translation and cross-border business liaison services since at least 2013. Ms Zhong was prone to ignoring questions, making statements, and generalising from (often) tangentially-relevant matters. Some of her observations about relevant matters appear deeply coloured by suspicion about other matters, such as an alleged "dark deal of power transfer" within the board of the respondent in late 2022.[1] That is not to say that I reject her evidence outright. To the contrary, there are a number of matters I accept in her favour.

[10] At the determinative conference on 28 March 2023, Ms Zhong represented herself and the Respondent was represented by Mr Fowles with Mr Tony Amato, the Chief Financial Officer, also in attendance. Ms Zhong and Mr Fowles each gave evidence and were each cross-examined.

[11] A transcript of the determinative conference was produced. Ms Zhong initially indicated there were errors in it. I gave her opportunity to make any proposed corrections to the transcript against the audio recording, which became available on 12 April 2023. She did so and identified a collection of (largely) minor edits. The Respondent did not object to those changes and I proceeded on the basis of relying on the transcript, as reflected with Ms Zhong's edits.

[12] I would also record that prior to giving her evidence, Ms Zhong explained she wanted to hand up a signed statement, which was not in the court book. Upon inquiries at that point,[2] Ms Zhong stated that the signed document was a signed version of her statement submitted on 9 March 2023.[3] For that reason, I indicated she would be asked, after being affirmed as a witness, to adopt her statement from the Court Book (which she did). Ms Zhong also objected to Mr Amato giving evidence. As noted above, Mr Amato did not give evidence.

[13] Notwithstanding, Ms Zhong later sought to file written submissions and evidence *after* the close of evidence at the determinative conference on 28 March 2023.[4] When asked why these documents had not been filed earlier, Ms Zhong explained the delay by reference to the Respondent's statement dated 17 March 2023. She stated: [5]

> "Because for the 17 of the statement from the Hawthorn I didn't realise, you know, Hawthorn just talking about my job is the interpreter. And also, you know, why the payment refused, because that is the reason, you know, the reason means and my job only the limited translation".

[14] As will become clearer from the following reasons, Ms Zhong was referring to the fact that (as I accept), her role was not limited to translation work and (as I also accepted) the payment charges changed. As Ms Zhong had had an opportunity to (and did) give evidence about the change in payments and whether her role was limited to "translation", the issue of new material did not appear necessary or relevant. However, *after* the Respondent had made its closing address Ms Zhong again sought to hand up her signed documents. After I initially sought clarification that she was (again) referring to a signed version of her existing statement in the Court Book, it soon became apparent that it was more extensive. They included a document titled "Submissions of Applicant", a document titled "Brief", an email exchange with Mr Amato on 23 and 27 December 2022, and a witness statement. On the briefest inspection, the witness statement was plainly more extensive than her statement in the Court Book. Ms Zhong initially indicated that the witness statement was the same as her statement submitted on 9 March 2023.[6] That was demonstrably incorrect. I accepted the Outline of Submission, the email and the document titled "Brief". For the witness statement, Ms Zhong said that if I didn't accept that documents, "that's fine".[7] As there was no basis explained to me why I should accept the witness statement, I did not.

[15] While I considered this was the last word on the subject, Ms Zhong sent an email on 17 April 2023 (following her review of the transcript) making further reference to the "new statement" she wished to file. I return to her email below but, as I discern her complaint, she seeks to dispute assertions made in the Respondent's statement dated 17 March 2023 regarding changes to payment charges and another complaint about a document called "Employee Share Option Plan". As will become apparent, even taking Ms Zhong's further complaints at face value, they make no difference to my findings.

Factual background and findings

[16] Austic is a proprietary limited company, whose shareholders are Ms Zhong, her former husband and a Chinese business partner. The ownership split is approximately one-third each, although the Chinese business partner's share is slightly under that amount. Ms Zhong and her former husband are the only directors. At least by 2013, the company was effectively in the control of Ms Zhong to use for her purposes and the company did not appear to have any other trading activities, although tax records for the company were not in evidence.

[17] Hawthorn Resources Limited is a junior mining company. It is a public company, listed on the Australian Stock Exchange.

[18] In 2005, the Respondent operated under a different name and, I infer, different ownership structure. At around that time, it was called Great Gold Mines. At some point prior to 2013, it changed its name to its current form.

[19] Since at least 2013 (and possibly much earlier, although the date is not material), the board of the Respondent was composed of a mix of Australian and Chinese residents, which I infer reflected the location and nationality of its shareholders. One practical consequence of this board structure was that each of the directors was largely conversant in their native language only (being, for the Australian-based directors, English, and for the Chinese nationals, a Chinese dialect).

[20] In 2013, the Respondent required the provision of "liaison" services, to assist in ensuring clear communications between its Chinese directors and the Australian directors and management. Ms Zhong's 'Form F8', which she filed on 10 January 2023 to commence her claim, states she began working for the Respondent on 1 May 2013. Her written statement provides a different date and states she commenced on 1 April 2013.

[21] Ms Zhong says that, in around April 2013, she was "told" by the then managing director that she would not be allowed to work for the Respondent unless she provided a company ABN and tax invoices. She was also told that the Respondent wanted to engage her as a contractor. I accept that the Respondent only wanted any engagement to be via a contracting arrangement and that something to that effect was communicated to Ms Zhong. I also note it was consistent with Mr Fowles' evidence that the practice of the Respondent was to engage contractors, wherever possible. That practice extended to Mr Fowles (as current company secretary), Mr Fowles' predecessor, the Chief Financial Officer and others. That practice appears to have been in place well before Mr Fowles' commencement.

[22] On 20 May 2013, there was a board meeting of the Respondent. I was provided unsigned minutes of the meeting (**May 2013 minutes**). Ms Zhong's witness statement says she cannot now recall the contents of that meeting nor if it occurred. So much is unsurprising, given it occurred 10 years ago. She also states that as the minutes were unsigned and queries what they are "proof" of, suggesting the minutes are unreliable.

[23] While the absence of signed minutes raises some concern about the Respondent's record-keeping standards (a theme to which I will return below), I am satisfied that the unsigned minutes I was provided reflect the fact of that meeting and outcomes of it. I note that the fact

of the meeting is corroborated by other events (namely Ms Zhong creating the first invoice for Austic on that same day) and Ms Zhong's own evidence relies upon unsigned minutes of a different meeting, suggesting that there was nothing inherently unreliable about them. The May 2013 minutes were also confirmed as correct in subsequent (albeit, unsigned) meeting minutes dated 30 August 2013.

[24] The May 2013 minutes record that Ms Zhong was 'in attendance' and described her as a 'consultant'. Item 6.1 of the May 2013 minutes was titled "Remuneration matters". At item 6.1(c), the minutes stated:

> "**(c) Chinese Liaison Services – Ms Lisa Zhong**
>
> The Board discussed and agreed that a company associated with Ms Zhong be appointed as a consultant to the Company to provide liaison services between it and the Chinese directors at the rate annual of A$26,000.00 payable quarterly in arrears and as invoiced by Ms Zhong. The Company to prepare a confirmatory Letter of Appointment between it and the company associated with Ms Zhong on the following terms:
>
> (i) Parties: Hawthorn Resources Limited and [insert name Ms Zhong's company];
>
> (ii) Terms: Annually renewable;
>
> (iii) Fees: A$26,000 quarterly plus GST and reasonable out-of-pocket and travel expenses;
>
> (iv) Services: As directed by Mr M E Elliott."

[25] On the same day as the above board meeting, Austic issued an invoice dated 20 May 2013 to the Respondent (**May 2013 invoice**). I infer the invoice was issued following the meeting. Ms Zhong says, and I accept, she sent the invoice that day because the Chief Financial Officer told her to do so. The May 2013 invoice:

- was issued in the name of Austic;
- was expressed to be a "tax invoice";
- contained a description of the services provided as "International Liaison Services";
- was for a gross sum amount of $26,000, plus goods and services tax of $2,600, totalling $28,600;
- was payable to a bank account in the name "Austic Enterprises Pty Ltd", and also provided a SWIFT Code number for payment purposes.

[26] The only copy of the May 2013 invoice in evidence was a copy provided by the Respondent. That copy had a hand annotation written on it stating "Agreement started 01 April 2013". No one gave evidence as to the annotation, although it is consistent with Ms Zhong's evidence that the liaison services provided commenced in about 1 April 2013.

[27] The Respondent relies on a written contract dated 18 June 2013, which was a one-page document on the Respondent's letterhead and titled "International Liaison Services" (**June**

2013 letter). The letter was addressed to Austic (at the same address specified by Austic in the May 2013 invoice). The substantive parts of the letter were as follows:

> "Further to your discussions with the Company and as confirmed at the meeting of the Board of Directors of Hawthorn on Monday 20 May 2013 your company has been engaged by Hawthorn to provide international liaison services.
>
> Such services will be directed by the Hawthorn Managing Director and CEO Mark Elliott.
>
> ***Terms and Conditions:***
>
> | | |
> |---|---|
> | Start Date: | 1st April 2013; |
> | Period: | The term of the engagement is annually renewable; |
> | Termination: | Either party may terminate the agreement by giving three (3) months notice in writing to the other party; |
> | Fees: | The agreed professional fee is $26,000 a calendar quarter plus GST; |
> | Expenses: | Reasonable out-of-pocket and travel expenses will also be reimbursed by Hawthorn; |
> | Invoicing: | All tax invoices to be sent to the Company for the attention of Tony Amato. |
>
> Please signify your acceptance of these terms by signing the acceptance clause below."

[28] The letter was signed by the then company secretary of the Respondent (i.e Mr Fowles' predecessor). The letter was not signed by Ms Zhong or anyone else on behalf of Austic.

[29] Ms Zhong says she cannot ever recall seeing the June 2013 letter or signing it. Ms Zhong says she has kept her emails since 2012. And while she has not positively stated she has checked those emails, the Respondent did not produce an email showing it was sent. If the letter was provided to Austic, I infer it was only provided in hardcopy by post or by hand. Having regard to Ms Zhong's denials (which were stronger in her oral evidence), I am not satisfied the letter was sent to her or, if it was, she did not sign and return it. The only other person who might have been able to give evidence on that matter was the previous company secretary, who was not called as a witness.

[30] As to the services actually provided, there is no dispute that the Applicant personally performed a number of "liaison" activities. There was some dispute – perhaps more on emphasis – as to the nature of the services. Mr Fowles' evidence was that the "main requirement" for services was for "translation" during meetings of the Respondent held between its China-based directors, and the Australian-based directors and Australian-based management. Ms Zhong challenged this. She says, and I accept, that her job was much more than translation. She was not required to translate much, as the Chinese directors had their own translators with them.

[31] However, in fairness to the Respondent, it also says that, in addition to translations, the services included providing advice on problem solving and navigating the cultural differences between the Chinese and Australia participants. That accords with Ms Zhong's own

descriptions[8], which emphasised the cultural understanding and liaison that was required as part of the liaison services.

[32] While the May 2013 minutes and May 2013 invoice refer to "Chinese liaison services" and "international liaison services" in a shorthand way, I find that those descriptions are generally apt for what services were being provided and reflect the descriptions I have just provided.

[33] The Respondent also relies on a variation letter allegedly sent on 30 April 2014 (**April 2014 letter**). That letter does not otherwise change the terms set out in the June 2013 letter, save that it says the services agreement would be "rolled over for 2014 and 2015". A copy of that letter was signed by the previous company secretary for the Respondent but was not signed on behalf of Austic.

[34] Ms Zhong's statement attests that she does not recall seeing the April 2014 letter or ever signing it, although in substance she says she never received it at all. Again, the Respondent has not produced a signed copy or even proof that that unsigned copy was sent by email. While the existence of the April 2014 letter is suggestive that Ms Zhong was provided with a copy of the April 2014 letter, having regard to her denials, I am not satisfied that it actually was. The April 2014 letter states that the directors of the Respondent "agreed" at a board meeting on 31 March 2014 to extend the contract, although those minutes were not produced (signed or otherwise). On balance, I infer there was likely to have been some discussion between the Respondent and Ms Zhong about that matter at the time, although I am not satisfied she was provide a copy of the April 2014 letter.

[35] Notwithstanding the dispute about the April 2014 letter, the evidence does not disclose there had been any changes to the services provided – i.e. liaison services, including some translation work – from the initial engagement and throughout 2014 and beyond.

[36] Ms Zhong's evidence states that the agreements contained in the June 2013 letter and April 2014 letter were "superseded" by a "later oral agreement or variation when the charges were changed". The reference to the "charges" are to the fees in the invoices from Austic. While the exact details are not clear, Ms Zhong referred to invoices in Austic's name dated 5 August 2015 for $7,700 (including GST), 28 July 2016 for $9,900 (including GST), and 01 May 2018 for $13,200 (including GST). I accept there were oral agreements amending the payment term. Austic was initially paid a fixed amount per quarter but, at some point (which was not made clear), Ms Zhong says changes were required by the Respondent.

[37] Other than the three invoices I have just described, the changes were not explained and there is no evidence to suggest that the agreed services were changed. For example, in 2016, Ms Zhong described in her oral evidence services provided at a mine site. The services where in the nature of liaison services (not translation) to assist in resolving a problem between the Respondent and a local community member near the site.

[38] In 2018, Ms Zhong was listed in an "Employee Share Option Plan" (**ESOP**) established by the Respondent.[9] Ms Zhong relied upon (unsigned) board minutes dated 30 November 2018. Despite being unsigned, I accept those minutes as being an accurate reflection of the matters described in them for that meeting. A table attached to those minutes contains a list of

shareholders (at 29 March 2018 and 31 October 2018), which shows that Ms Zhong held 250,000 shares (about 0.08%) in the Respondent by 31 October 2018. At 29 March 2018, Austic was recorded as holding 1,750,000 shares (about 0.54% of issued capital) and by 31 October 2018 it held 2,000,000 shares (about 0.61% of issued capital).

[39] The significance of the ESOP was, on Ms Zhong's case, the fact that it was an "*employee* share option plan", which was said to demonstrate that "the Respondent had always considered me an employee and not a contractor".

[40] Mr Fowles stated, and I accept, that the ESOP involved the issue of performance rights for the achievement of project milestones (which, I understand, were subsequently met). He said that of all the recipients listed on the ESOP, only the Managing Director (then, Mr Kerr) was an employee of the Respondent. He said all other recipients were contractors that had been involved in the Respondent's projects. I accept that evidence, and note that Mr Amato, the Chief Financial Officer, confirmed he too operated via a contracting arrangement. While Mr Amato's statement was given from the bar table, I had no reason to doubt it as correct.

[41] In short, despite the label "employee", it was very clear that the ESOP applied to persons – indeed, nearly all persons listed on it – who were *not* employees. The one possible exception appeared to be Mr Mark Kerr, a former Managing Director. On 17 April 2023, in an email statement filed well after the determinative conference, Ms Zhong stated in relation to the ESOP:

> "… in the statement on 17th of March, the Employee Share Option Plan mentioned that only Mr. Mark Kerr was an employee. This is not truth. Everyone in the company knows that Mr. Mark Kerr is not an employee of HAW. Mark Kerr's company - Berkeley Consultant Pty Ltd, has signed a package service agreement with HAW. This package service agreement included the provision of office, all office facilities, water, electricity, telephone and Internet services as well as the work service of Mr. Mark Kerr at HAW as CEO and Managing Director. We all know that, and the company secretary also very clear it, why is he hiding it? One of the reasons why Mr. Mark Kerr was terminated in December 2022 that was the fee in Mr. MARK Kerr's Package service agreement was too high, in addition to the dark deal of power transfer within the Board of HAW. All of these are the facts. If the Fair Work Commission needs evidence, I will be happy to provide it. But the Fair Work Commission has given me a limited amount of time - the deadline is 5 o 'clock on 9th of March. Very difference between HAW's statement of 17th of March and 2nd of March. Do I have a chance to clarify HAW's statement of 17th March in hearing on 28th of March?"

[42] Ms Zhong's statement that Mr Kerr was not an employee does not change my conclusion that the ESOP substantially applied to non-employees. If I accepted Ms Zhong's assertion, that would indicate that there were no employees at all (other than, perhaps, Ms Zhong) who were participants in the option scheme.

[43] No other evidence was given about any change to the international liaison services provided, save perhaps that from 2016, Ms Zhong was provided with an office, computer, printer and other equipment at the Respondent's office. She was also provided with a business card for Hawthorn Resources Limited, which had her name on it and title as "Consultant".

[44] Ms Zhong also gave evidence of general practices that I infer applied at all relevant times. Namely, all services provided by Austic were performed by Ms Zhong personally, and she did not delegate to anyone else. Also, from time to time, charges or expenses were incurred by Austic (or Ms Zhong). When those expenses were incurred, the Respondent reimbursed those amounts. No actual examples were provided, however, nor of the reimbursement claims.

[45] At no point did Ms Zhong ever issue invoices in her personal capacity.[10] All payments were only made to Austic, following production of a tax invoice. In her email dated 17 April 2023, Ms Zhong also complains that the Respondent did not produce "the invoices of 38 quarters" to the Commission. The Respondent was not required to do so and it was open for Ms Zhong to have done so. In any case, the purpose of producing each invoice was apparently to demonstrate that the service fees charged changed over time. As set out above, I have accepted there were such changes.

[46] Ms Zhong's witness statement asserts the work was "highly controlled" by the Respondent and, in the majority of cases, was required to undertake work in a "specific way and at specific times". She also states there was no choice as to "how" the work would be undertaken and would "only be able to make suggestions which may or may not be taken into account."

[47] No probative evidence was provided to support the contention that the work was "highly controlled", including as to "how" it would be performed. The services provided included translation services and liaison services, the latter being contingent on an assessment on the nuances of cultural differences between (primarily) Chinese and Australian-based directors. There is no evidence to suggest that anyone at the Respondent did, let alone *could*, dictate how communications were to be translated or what cultural implications would arise. I accept that the services were required to be provided at very specific times and locations – board meetings are an obvious example. I also accept that often "suggestions" were given by Ms Zhong, which were sometimes taken into account and sometimes not.

Parties' submissions

[48] This decision concerns whether Ms Zhong was an employee of the Respondent and, as a consequence, whether she has jurisdiction to make a claim in her own name as an employee under s.365. While Ms Zhong has raised a number of other allegations, they do not form part of this decision.

[49] The Respondent's position can be simply stated. It contends that its contractual arrangements were not with Ms Zhong but were, instead, with the corporate entity Austic at all relevant times.

[50] Ms Zhong's Outline of Submissions, which appear to have been prepared with the assistance of a lawyer, stated the cases of *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 (***Personnel Contracting***) and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 (***Jamsek***) can be distinguished, because:

- The relationship between the parties was not wholly committed to contract, as the agreements did not specify the terms on which Ms Zhong or Austic were to be engaged;
- There is no agreement between "the parties" (which I infer is a reference to Austic, not Ms Zhong) beyond 2015;
- The parties by their conduct varied or discharged any written agreement beyond 2015; and
- The Respondent was engaged in "sham contracting".

[51] Ms Zhong's submissions rely on the "multifactorial test" set out in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 (***Stevens***) and *Hollis v Vabu* (2001) 207 CLR 21. She states that the relevant factors to be considered are:

- For the involvement of Austic, the "engagement of the Applicant via Austic is not decisive" and Austic was merely involved for the channelling of income to a corporate vehicle as described in *ACE Insurance Limited v Trifunovski* [2013] FCAFC 3.
- The Respondent exercised control as to "when" and "how" work was to be performed.
- Ms Zhong was "held out as a representative of the Respondent", including with a business card.
- Neither Austic or Ms Zhong were engaged in a business separate to the Respondent's business, and they were provided office space and other facilities, and did not incur "substantial" business expenses.
- The remuneration was paid as a fixed amount per quarter and was not paid on actual work undertaken.

[52] As to the allegation of a "sham", the submissions state that:

- The (alleged) written agreements were prepared after Ms Zhong's engagement in circumstances she could not reasonably refuse for fear of losing out on payment and employment;
- The Respondent "knew" at all times, or at least since the 2018 ESOP, that Ms Zhong was in fact an employee.
- The Respondent treated Ms Zhong as an employee.

Consideration

[53] Having regard to the issues raised, I consider I need to address the following questions:

- Who was party to a contract with the Respondent beginning in 2013?
- If that party was Austic, was that an employment agreement for Ms Zhong?
- If that party was Ms Zhong, was that contract an employment agreement?
- Did the events after 2015 (and 2018 with the ESOP) change or vary the contracts above, such as to establish an employment contract with Ms Zhong?
- If there was a contract with Austic, was it a "sham" such that any conclusions from the above should be changed?

[54] As to who was party to a contract, the Victorian Court of Appeal stated in *Nurisvan Investment Ltd v Anyoption Holdings Ltd* [2017] VSCA 141 at [74]:

> "It is well established that, in an appropriate case, as part of that process, a court is entitled to have recourse to extrinsic evidence to identify the parties to a contract, or to clarify and determine the particular capacity in which a party, or parties, purported to execute a contractual document."

[55] As to the principles to be applied in characterising whether a particular contract is a contract of employment or an independent contracting arrangement, I consider the starting point for consideration is *Personnel Contracting* and *Jamsek*. If the Applicant's submission that *Personnel Contracting* and *Jamsek* are "distinguished" is a suggestion that they have no application, I disagree. Rather, I understand her submissions are to the effect that there were either variations or "sham", such that the characterisation of any putative contract involves matters beyond the strict four corners of any initial contract.

[56] A point of distinction in the matter before me and *Personnel Contracting* was that the contract between the parties in the matter before me contained terms that were primarily oral (and to be implied), although there are some particular matters concerning post-formation conduct and variation that I will address.

[57] Where there is a wholly written contract whose terms are not disputed, there is usually no difficulty identifying those terms for the purpose of undertaking the exercise in characterisation (although the task of characterisation may still be a difficult one). Where the contract is not wholly in writing, it is necessary at the threshold level to identify the terms of the contract, the parties to it, and when it was formed. Many aspects are often not in dispute but in all likelihood, some will be, given the nuance of the characterisation exercise that will derive from those terms. Where (as is the case here) a variation occurs, it is also necessary to identify the scope of any variation and when it occurred.

[58] As with written contracts, recourse may be had to external events, where appropriate, as explained by Gordon J in *Personnel Contracting* at [175] (citations omitted, emphasis added):

> "Recourse may be had to events, circumstances and things external to the contract which are objective, which are known to the parties at the time of contracting and which assist in identifying the purpose or object of the contract. The nature of the specific job that the purported employee applied for as well as the nature and extent of the equipment to be supplied by that purported employee for that particular job may well be relevant to the question of characterisation of the contract. Indeed, it is often relevant, but not determinative, to observe that the purported employee must supply some uniform, tools or equipment. But again that observation must be made in context. The context is the nature and extent of what is required to be provided under the contract. In many forms of employment, employees provide their own uniform and bring their own tools to work."

[59] As Wigney J recently stated in *JMC Pty Limited v Commissioner of Taxation* [2022] FCA 750 (***JMC v COT***) at [23], the task of characterising the terms of the contract, once properly identified, is often informed by two particular considerations:

> "The first consideration is the extent to which the putative employer has the right to control how, where and when the putative employee performs the work: *Personnel Contracting* at [73]-[74] (Kiefel CJ, Keane and Edelman JJ); [113] (Gageler and Gleeson JJ); see also *Brodribb* at 24 (Mason J) and 36-37 (Wilson and Dawson JJ). 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 – the so-called "own business/employer's business" dichotomy: *Personnel Contracting* at [36]-[39] (Kiefel CJ, Keane and Edelman JJ); [113] (Gageler and Gleeson JJ); cf [180]-[183] (Gordon J). Neither of those considerations are determinative and both involve questions of degree."

[60] In relation to the element of control, as stated by Kiefel CJ, Keane and Edelman JJ in *Personnel Contracting* at [73] (and see also *JMC v COT* at [24]):

> " … the existence of a right of control by a putative employer over the activities of the putative employee serves to sensitise one to the subservient and dependent nature of the work of an employee, so as to assist in an assessment of whether a relationship is properly to be regarded as a contract of service rather than a contract for services"

[61] As for the "own business/employer's business" dichotomy, Wigney J summarised the matter thus in *JMC v COT* at [25] (original emphasis):

> " … it also "usefully focusses attention upon those aspects of the relationship generally defined by the contract which bear more directly upon 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": *Personnel Contracting* at [39] (Kiefel CJ, Keane and Edelman JJ); cf [180]-[182] (Gordon J). Another way of framing the question, which focusses more directly on the terms of the contract, is whether the person "is *contracted to work in the business or enterprise of* the purported employer": *Personnel Contracting* at [183] (Gordon J) (emphasis in original). One consequence of answering that question in the negative *may* be that the person is not an employee."

[62] While the elements of control and the own/employer's business dichotomy are significant matters, it remains appropriate to consider the "totality" of the relationship between the parties albeit – importantly – as framed by the rights and duties established by the parties' contract. As stated by Kiefel CJ, Keane and Edelman JJ in *Personnel Contracting* at [61] (citations omitted, emphasis added):

> "The foregoing should not be taken to suggest that it is not appropriate, in the characterisation of a relationship as one of employment or of principal and independent contractor, to consider "the totality of the relationship between the parties" by reference to the various indicia of employment that have been identified in the authorities. What must be appreciated, however, is that in a case such as the present, for a matter to bear upon the ultimate characterisation of a relationship, it must be concerned with the rights and duties established by the parties' contract, and not simply an aspect of how the parties' relationship has come to play out in practice but bearing no necessary connection to the contractual obligations of the parties."

[63] With the important limitation placed upon recourse to the "various indicia" being established from the terms of the parties' contract, the indicia described in *Stevens* at 24 per Mason J remain relevant (citations omitted, emphasis added): [11]

> "But the existence of control, whilst significant, is not the sole criterion by which to gauge whether a relationship is one of employment. The approach of this Court has been to regard it merely as one of a number of indicia which must be considered in the determination of that question:… Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee."

[64] To similar effect, Wilson and Dawson JJ said in *Stevens* at 36 – 37 (emphasis added):

> "The other indicia of the nature of the relationship have been variously stated and have been added to from time to time. Those suggesting a contract of service rather than a contract for services include the right to have a particular person do the work, the right to suspend or dismiss the person engaged, the right to the exclusive services of the person engaged and the right to dictate the place of work, hours of work and the like. Those which indicate a contract for services include work involving a profession, trade or distinct calling on the part of the person engaged, the provision by him of his own place of work or of his own equipment, the creation by him of goodwill or saleable assets in the course of his work, the payment by him from his remuneration of business expenses of any significant proportion and the payment to him of remuneration without deduction for income tax. None of these leads to any necessary inference, however, and the actual terms and terminology of the contract will always be of considerable importance."

[65] In the present case, I find that the contract entered into by the Respondent was with Austic, not Ms Zhong. There is no dispute that the parties had been in discussions. Even on Ms Zhong's evidence, she says she was "told" there would be a contracting arrangement and, on behalf of Austic, she agreed to enter one. Every invoice that was issued was with Austic and no payments we made to Ms Zhong. While some ten years' later Ms Zhong seeks to impugn those arrangements, I do not accept that any evidence by Ms Zhong is sufficiently reliable for me to conclude that the arrangement established at the time was anything other than a contract between the Respondent and Austic.

[66] As to the terms of that contract, I find that the description accorded to the agreement described in the May 2013 minutes was a matter communicated between Ms Zhong (on behalf of Austic) and, most likely, Mr Elliott (on behalf of the Respondent). They were discussed at the board meeting (which Ms Zhong was present at) and confirmed when she sent an invoice in Austic's name that same day. The services to be provided under the contract were not comprehensive but were for the provision of "international liaison services", which included some translation services.

[67] The fact of the contracting party being Austic is an indication that the relationship is not one of employer and employee: *Personnel Contracting* at [174] (Gordon J). See, too, *Fair Work Ombudsman v Avert Logistics Pty Ltd* [2022] FCA 841, where Logan J stated that the "ability for the "Contractor/Supplier" to incorporate tells against the notion that the contract, in each

instance, is one of employment". In this case, there was more than the "ability" to incorporate – that event had occurred. I do not accept that Austic was merely a vehicle through which invoices were provided. The parties intended to, and did, establish a contract between Austic and the Respondent.

[68] I do not consider that any of the other traditional factors assist the Applicant. While I accept that there was control over *when* work would be performed, the exercise of such control is often an essential part of both contracting and employment relationships. There is nothing remarkable about a company outsourcing services, particularly specialist services. There was no reliable evidence before me to suggest that a particular conclusion should be found here concerning control. I do not accept Ms Zhong's evidence that she was directed as to "how" she would provide services. There was no evidence of anyone else being capable of providing liaison services for the Respondent, let alone the Respondent dictating "how" she would provide them. The Respondent was reliant on Ms Zhong's work, as provided through Austic.

[69] I do not accept that Ms Zhong was working in the business of the Respondent. She was described as a "consultant". So much can be accepted, but the activity of a consultant is one routinely found in principal-contractor relationships. In this case, an important aspect of the services were "liaison" services between the different members of the board and management. No members of that cohort would be unaware of Ms Zhong's role in meetings or communications. There was no reliable evidence to suggest that the activities performed by the Respondent, other than perhaps isolated examples, were "international liaison". The Respondent's business was related to mining and exploration. To the contrary, if there was anyone who could be identified as being capable of providing international liaison services, it was Ms Zhong (or Austic by making her services available).

[70] Similarly, the provision of (limited) facilities does not, in the circumstances, point strongly to an employee-employer relationship. Contractors frequently do work on-site alongside employees of the principal.

[71] At the formation of the contract, there was no discussion about delegation or the potential to delegate. While the contract was with Austic, it is tolerably clear that the services were to be performed by Ms Zhong. This is a matter in Ms Zhong's favour, because in the absence of an express term permitting delegation to (or, perhaps more accurately, vicarious *performance* by) a third person there is no implied term of delegation. The law does not permit – without prior agreement - an agent to assign, delegate or to have performed those obligations for which personal skill and competence is required.[12] There being no prior (express) agreement permitting delegation, it follows that a term permitting that very activity will not be implied.

[72] I do not agree with the Applicant that payment of fixed remuneration per quarter is indicative of an employment relationship. I consider it points in the opposite direction, as it was not a payment scheme typically seen in employment arrangements. Further, as to the "mode of remuneration"[13] as a relevant indicia, "deduction of income tax"[14], and the term for fixed payments with GST, these features - together with no amounts such as annual leave, sick leave and the like being payable – were all suggestive of an independent contracting relationship. These matters were unchanged throughout. The amounts received following the issuing of an invoice had no income tax deducted, which is also a factor suggestive of an independent contracting relationship.[15]

[73] The Applicant's submissions contend there is "no agreement" between "the parties" beyond 2015. It is unclear what is intended here, but I infer it was to the effect that if there was a contract with Austic (which Ms Zhong disputed), such a contract did not survive beyond 2015. For the reasons given, I disagree that there was no contract with Austic. I also disagree that the Austic contracts were terminated or otherwise ceased from 2015 or at all, until late 2022.

[74] As stated by Gordon J in *Personnel Contracting* at [178]:

> "It is necessary to say something further about the admissibility of conduct. Where a wholly written contract has expired but the parties' conduct suggests that there was an agreement to continue dealing on the same terms, a contract may be implied *on those terms* (save as to duration and termination)[16]. The parties' conduct may also demonstrate "a tacit understanding or agreement" sufficient to show that there was a contract in the absence of an earlier express contract[17]. In a dynamic relationship where "new terms [may] be added or [may] supersede older terms", it may also be necessary "to look at the whole relationship and not only at what was said and done when the relationship was first formed"[18]. The reference to the "whole relationship" should not be misunderstood. The inquiry remains an objective inquiry[19] the purpose of which is to ascertain the terms the parties can be taken to have agreed[20]. It is not an approach directed to inquiring into the conduct of parties which is not adduced to establish the formation of the contract or the terms on which the parties contracted."

[75] Even if the Austic contract was constituted in writing, I would conclude it continued by implication, save for a term for reasonable notice. As it stands, there was no written contract to continue and I consider that a term of reasonable notice existed. But that was a contract with Austic.

[76] Save as to the question of notice and the variation on fees charged, I do not consider the evidence supports a finding that there was a replacement of the services contract with Austic for an employment contract with Ms Zhong. The issuance of performance rights in 2018 under the ESOP does not affect that conclusion. The evidence of the ESOP arrangement was that it could – and did – apply to persons and entities who were not employees. Indeed, it appears that nearly all the persons described in the ESOP were not employees. Both Austic and Ms Zhong were listed on it, albeit Austic's listing of rights was more extensive.

[77] When considering the totality of the relationship between the parties having regard to all the matters above, I conclude that the correct characterisation of the contractual arrangements, as they were formed in around April and May 2013, was that of an independent contracting arrangement. The arrangement was with Austic. The characterisation was not changed by any subsequent variations. Other than the changes to fees charged, I am not satisfied there is evidence that the parties expressly sought to alter to or detract from the terms of the contract and I am not satisfied from the evidence that there was a manifestation of control[21] that would otherwise change the character of the contract with Austic.

[78] Finally, as to the allegation of "sham", the evidence does not permit a finding that the Respondent "knew" (or, perhaps more accurately, "believed") that Ms Zhong was an employee. As to the Respondent's belief, I consider it points in the opposite direction in that it assumed

that the "international liaison services" were being provided by a contracting arrangement, similar in form to a number of other important services for the company (such as company secretarial services and those for the chief financial officer).

[79] It is for the reasons above that I find that the Applicant is not an employee and, accordingly, her application must be dismissed. An order[22] to that effect will be issued with this decision.

DEPUTY PRESIDENT

Appearances:

X Zhong on her own behalf
G Fowles from the Respondent

Determinative conference details:

2023.
Melbourne:
March 28.

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[1] See Ms Zhong's email on 17 April 2023, following the hearing of the matter.

[2] Transcript PN18 – PN38.

[3] Court Book, page 23.

[4] Transcript PN279 – PN293.

[5] Transcript PN 294.

[6] Transcript PN487 – PN488.

[7] Transcript PN493.

[8] Transcript PN140 – PN145.

[9] Exhibit A3.

[10] Transcript PN168.

[11] See also *Personnel Contracting*, [174] (Gordon J).

[12] *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 at 669 (Collins MR); *John McCann & Co (a firm) v Pow* [1975] 1 All ER 129 at 131-132 (Lord Denning MR). *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* (2006) 149 FCR 395 at [32] (Finn and Sundberg JJ).

[13] *Personnel Contracting*, [174] (Gordon J), [113] (Gageler and Gleeson JJ); *Stevens*, at 24 (Mason J).

[14] *Personnel Contracting*, [113] (Gageler and Gleeson JJ); *Stevens*, at 24 (Mason J) and also at 36-37 (Wilson and Dawson JJ).

[15] Cf, *Stevens*, *op cit*, per Mason J at 24 and Wilson and Dawson JJ at 36-37.

[16] *Brambles Ltd v Wail* (2002) 5 VR 169 at 184-189 [54]-[62]; *CSR Ltd v Adecco (Australia) Pty Ltd* [2017] NSWCA 121 at [88]-[118]. A majority of the High Court allowed an appeal from *Brambles* on a different point and considered that it was not necessary to address the question whether the contractual terms relied on continued in force after their formal expiry: *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424 at 438 [29].

[17] *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR 11,110 at 11,117, quoted in *Brambles Holdings* (2001) 53 NSWLR 153 at 178 [77].

[18] *Integrated Computer Services* (1988) 5 BPR 11,110 at 11,118, quoted in *PRA Electrical Pty Ltd v Perseverance Exploration Pty Ltd* (2007) 20 VR 487 at 489 [5].

[19] See, eg, *Meates v Attorney-General* [1983] NZLR 308 at 377, quoted in *Vroon BV v Foster's Brewing Group Ltd* [1994] 2 VR 32 at 82. See also *Codelfa* (1982) 149 CLR 337 at 353; *PRA* (2007) 20 VR 487 at 489 [6].

[20] *Integrated Computer Services* (1988) 5 BPR 11,110 at 11,117-11,118, quoted in *Brambles Holdings* (2001) 53 NSWLR 153 at 177 [74], 178 [77].

[21] *Personnel Contracting*, [42].

[22] PR760727