DECISION

Fair Work Act 2009
s.604—Appeal of decision

Church Of Ubuntu
v
Lainie Chait
(C2022/6387)

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT CROSS
COMMISSIONER P RYAN

SYDNEY, 30 JANUARY 2023

Appeal against order PR745276 of Deputy President Asbury at Brisbane on 29 August 2022, and Decision [2022] FWC 2947 on 7 November 2022, in matter number U2021/9704

Background

[1] The Church of Ubuntu (the Appellant) has lodged an appeal under s.604 if the *Fair Work Act 2009* (the Act) for which permission to appeal is required against a Decision of Deputy President Asbury issued on 29 August 2022 (the Decision), and a document titled Reasons for Decision issued on 7 November 2022 (the Reasons for Decision). The Decision and Reasons for Decision concerned an application, brought by Ms Lainie Chait (the Respondent/Ms Chait) for an unfair dismissal remedy against the Appellant, pursuant to s.394 of the Act (the Application). The Respondent had been dismissed on 11 October 2021.

[2] Ms Chait was dismissed from her position with the Appellant because she received a COVID-19 vaccination. The beliefs of the Appellant include that receiving a COVID-19 *"inoculation"* is contrary to God's teachings and the Appellant indicated they will not hire anyone as a contractor or volunteer who has received an injection of any of the current or future planned injections purported to protect against the COVID–19 virus. In the Decision and the Reasons for Decision, the Deputy President dealt with the Jurisdictional objection of the Appellant that the Respondent was not an employee of the Appellant, and was instead engaged as an independent contractor by a separate entity, the Ubuntu Wellness Clinic (the Clinic).

[3] The matter was listed for permission to appeal, and consideration of the merits of the appeal. On 7 October 2022, directions were set for the filing of material and the matter was listed for hearing on 21 November 2022. The following documents were received pursuant to those Directions:

- Appellant submissions dated 21 October 2022.
- Respondent submissions dated 4 November 2022.

- Further Appellant submissions dated 13 November 2022.
- Further Respondent submissions dated 18 November 2022.

[4] Two versions of a Form F2 Unfair Dismissal Application dated 28 October 2021, were filed on behalf of Ms Chait on 29 October 2021, by her representative Mr Mark Swivel of Barefoot Law. Both Form F2's were dated 28 October 2021, and nominated the employer of Ms Chait as Karen Margaret Burge and/or Ubuntu Wellness Clinic Newcastle, ABN 61 649 115 200 (the Clinic). The first version was filed at 9:35 am and the second version at 1:34 pm. The difference between the two documents was the addition of a letter terminating Ms Chait's contract which was referred to in the first version of the Form F2 but not attached. The second version of the Form F2 was served on Ms Burge on 9 November 2021, by the Commission's Registry.

[5] A third version of a Form F2 was filed by Ms Chait's representative Mr Swivel on 9 November 2021 and nominated the employer of the Applicant as Church of Ubuntu (ABN 66 886 378 677) with Mr Barry Futter as the contact person for the Application. The third version of the Form F2 was served on the Appellant on 10 November 2021, by the Commission's Registry.

[6] In correspondence sent to the Appellant on 10 November 2021 effecting service of the third Form F2, the Appellant was requested to download and complete a Form F3 Employer response to the Application, within 7 days in accordance with rule 19 of the *Fair Work Commission Rules 2013*. The Appellant did not comply with this request.

[7] The Appellant advised the Commission that it did not wish to participate in conciliation and that the matter should be referred to a Member of the Commission for a formal hearing. The matter was allocated to the Deputy President for hearing.

[8] After some correspondence between the Commission and the parties, a Conference occurred on 11 February 2022, and following that Conference, Directions were issued requiring the parties to file and serve outlines of submissions and statements of evidence. A specific direction was also made requiring the Appellant to file a Form F3 Response to the Application and a witness statement made by Mr Futter to outline *"the basis on which the Respondent asserts that the Applicant was an Independent Contractor and was not an employee, and the name of the entity the Respondent asserts had a contractual relationship with the Applicant."* The Direction also required Mr Futter to annexe copies of any documents that the Appellant wished to rely on, such as copies of contracts, invoices or correspondence, supporting its objection to the Application. As it objected to the Application, the Appellant was directed to file its material first. The Directions clearly stated that the hearing would deal only with the Appellant's jurisdictional objection as a preliminary matter and that the questions for determination would be whether the Applicant was a person protected from unfair dismissal, based on the Appellant's contention that the Applicant was not an employee and was engaged by the Clinic as an independent contractor.

[9] On 17 February 2022, the Appellant filed a Form F3 Response (the Form F3) signed by Mr Futter. In the Form F3 the Appellant was described as a religious incorporated association and asserted jurisdictional objections that Ms Chait had been engaged as an independent contractor by the Clinic and had never been an employee of the Appellant. The Appellant

indicated a further objection to the Application based on an assertion that Ms Chait was not dismissed because *"alternative subcontracting options"* were offered to Ms Chait which she declined. Other questions answered in the third Form F2 and Form F3 pointed to a further possible jurisdictional objection involving the Application being lodged out of time. In particular:

(a) the Third Form F2 recorded at Questions 1.3 and 1.4 that Ms Chait was notified of her dismissal on 11 October 2021, and it took effect immediately; and

(b) the Third Form F2 was dated 28 October 2021, but as noted above it was filed on 9 November 2021.

[10] Due to the inadequacy of the material filed by all parties, a second Case Management Hearing occurred on 29 March 2022, and further Directions were issued requiring:

(a) the Appellant, by 5 April 2022, file in the Commission and serve on Ms Chait, additional evidence in relation to the assertion that the Appellant was not the entity which engaged Ms Chait and identifying which entity the Appellant asserted did engage Ms Chait, including any relevant documents such as copies of contracts or invoices, annexed to a witness statement identifying the documents; and

(b) Ms Chait, by 12 April 2022, file in the Commission and serve on the Appellant, an outline of submissions and a witness statement of Ms Chait responding to the material filed by the Appellant as well as addressing the basis on which Ms Chait asserted that she was not engaged as an independent contractor but rather was an employee.

[11] A hearing was conducted on 30 May 2022. Evidence was given in support of the Appellant's objections to the Application, by Mr Futter and Ms Burge. Ms Chait gave evidence on her own behalf and evidence was also given for the Applicant by Ms Jessica Mountford a former employee of the Appellant and colleague of the Applicant.

[12] At the commencement of the hearing, we granted permission to appeal. The Full Bench was satisfied that the grant of permission to appeal in this matter was in the public interest as the appeal was jurisdictional in nature. Permission to appeal was therefore granted in accordance with ss.400(1) and 604(2) of the Act.

The Decision and Reasons for Decision under Appeal

[13] As noted above, the Deputy President issued the Decision on 29 August 2022, and a document titled Reasons for Decision on 7 November 2022. The Decision provided only:

> *A. The Fair Work Commission orders that the jurisdictional objections raised by the Church of Ubuntu, on the grounds that Ms Lainie Chait was not dismissed, and that Ms Chait was not a person protected from unfair dismissal on the basis that she was not engaged as an employee, are dismissed.*
>
> *B. Reasons for decision will issue separately.*

[14] The Reasons for Decision, being issued on 7 November 2022, contained detailed reasons for the Decision, and were issued after the filing of the Appeal on 18 September 2022, and after the Appellant filed its original appeal submissions on 21 October 2022. The Appellant did, however, make further appeal submissions after the receipt of the Reasons for Decision on 13 November 2022, prior to the Hearing of the matter on 21 November 2022.

[15] The Deputy President commenced her consideration by noting s.382 of the Act provides the circumstances in which a person is protected from unfair dismissal, and s.13 of the Act provides the definition of 'National System Employee'.[1]

[16] Regarding the approach to determining whether a person is an employee or an independent contractor, the Deputy President noted that a recent decision of the Full Bench of the Commission in *Hempel v Northern Territory Air Services Pty Ltd* [2] (*Hempel*) highlighted the use of the multi-factorial test, and while that multi-factorial test was recently considered by the High Court in *CFMMEU v Personnel Contracting Pty Ltd*[3] (*Personnel Contracting*) and *ZG Operations Australia Pty Ltd v Jamsek,*[4] (*Jamsek*), those decisions considered the relevance and applicability of the multi-factorial test in circumstances where an employer and a putative employee had comprehensively committed the terms of their relationship to a written contract and the validity of the contract was not challenged. However, where the parties had not committed the terms of the relationship into a written contract comprehensively, or where the validity of the contract was challenged as a sham or otherwise ineffective, the multi-factorial test is relevant to the characterisation of the relationship to determining whether it was employment or an independent contract.

[17] The Deputy President noted that the different factors and indicia that may be applied in a multi-factorial test were comprehensively summarised in the decision of a Full Bench of the Commission in *Jian Shen Cai trading as French Accent v Michael Anthony Do Rozario*[5], and that in *Abdallah v Viewdaze Pty Ltd*[6] (*Abdallah*) a Full Bench of the Commission found that the starting point for determining whether a relationship is one of employment or independent contract, is an analysis of its totality including the nature of the work performed, the manner in which it is performed and the terms and terminology of the contract.

[18] If, after weighing the indicia, the result is still uncertain, the Full Bench in *Abdallah* was of the view that the determination should be guided by the notions referred to in the judgment of the majority in *Hollis v Vabu*[7] including the statement that the distinction between an employer and an independent contractor *"is rooted fundamentally"* in the difference between a person who serves his or her employer in the employer's business with little or no independence in the conduct of operations as distinct from a person who carries on his or her own trade or business.

[19] In applying the relevant indicia to this matter, the Deputy President noted there was no written contract between Ms Chait and the Appellant, and it was common ground that the contract was oral. The Deputy President therefore analysed the totality of the relationship pursuant to which Ms Chait performed her work, based on the evidence in relation to the nature of the work, the way it was performed and the terms and terminology of the contract.

[20] The Deputy President found the evidence established that Ms Chait had no control over how her work was performed, and she was working rostered shifts of a set duration. Ms Chait

did not pursue or generate her own client base and the clients she contacted were allocated to her by other *"staff"*. Ms Chait was free to communicate with clients in a way that she determined but was required to follow detailed instructions in relation to how she conducted consultations and was provided with guidelines to be used *"like a script"*. Ms Chait was also required to follow detailed instructions for recording consultations and providing information to a despatch area so that products could be sent to clients.

[21] The Deputy President found that there was no indication that Ms Chait had any control over how the work was performed or that she could elect to change the script or undertake fewer or more consultations or follow-ups during her shift than the prescribed and allocated number. Shift lengths, including meal, breaks were prescribed by the Appellant. Ms Chait was paid according to the length of her shifts and was expected to undertake a certain number of consultations or follow-ups during each shift. Ms Chait worked with a group or team of other persons undertaking the same work and that consultations were booked for them by *"staff"* engaged for that purpose. The Deputy President found these matters were indicative of employment.

[22] The Deputy President also found that a purported requirement that Ms Chait be a member of the Appellant Church and comply with its belief systems, is further evidence of control.

[23] Regarding the short period of work Ms Chait performed for another entity – theportal.life – the Deputy President noted the evidence established that there was a relationship between theportal.life and the Appellant.[8] The Deputy President further found that, given the degree of control exercised over the manner and the times at which Ms Chait performed work for the Appellant, the fact that Ms Chait may have been able and entitled to work for other entities is not inconsistent with her having been an employee rather than an independent contractor, thereby being also indicative of an employment relationship.[9]

[24] The Deputy President noted the following indicia all pointed towards an employment relationship rather than a relationship between contractor and principal:[10]

(a) The Appellant advertised the goods and services it provides, and there is no evidence that Ms Chait had a separate place of work, or that she advertised her services to the world at large;

(b) There is also no evidence that Ms Chait provided any tools or equipment necessary to perform the work;

(c) Ms Chait used the intranet of the Appellant to undertake her work and was allocated work by staff of the Appellant;

(d) There was no evidence that Ms Chait had the right to delegate or subcontract her work to others; and

(e) The Appellant terminated the contract for breach and operated on the basis of a belief that there was a right to so terminate.

[25] Dealing with indicia that may have pointed to a contractor relationship, and in finding that all the indicia were neutral or pointed directly to Ms Chait being in an employment relationship rather than in a relationship as a contractor with a principal, the Deputy President found:[11]

(a) While Ms Chait was neither provided with nor required to wear a uniform, that consideration did not point in either direction on the relevant relationship;

(b) In relation to responsibility for tax affairs, the Appellant did not deduct income tax from the remuneration paid to Ms Chait, and there was no written contract between the parties stipulating that responsibility for tax rested with Ms Chait. Ms Chait accepted that the fact that she was a contractor responsible for her own taxation was spoken about at the time she was engaged, but that in her view this situation changed. However, while the evidence in relation to the Ms Chait's responsibility for her tax affairs, taken at its highest, was indicative only of the intention on the part of the Appellant to engage her as a contractor, that evidence does not establish that this was what occurred;

(c) Ms Chait did not receive paid holidays or sick leave, other than an ex gratia payment that was made to her when she was absent from work due to a requirement to have surgery. The Deputy President found that while this is an indication of the Ms Chait being an independent contractor it is equally an indication of casual employment;

(d) Ms Chait did not provide invoices after the completion of tasks and was paid periodically based on time worked which may have included a notional number of consultations she was required to undertake in each working period. The Deputy President found this was more closely aligned to Ms Chait being paid by periodic wage or salary than her being paid to complete tasks upon the provision of invoices;

(e) Ms Chait's work for the Appellant did not involve a profession, trade or distinct calling;

(f) Ms Chait created no goodwill or saleable assets for her own business, and any such results benefited only the Appellant; and

(g) There is no evidence that Ms Chait spent any of her remuneration on business expenses associated with any business or undertaking that she was running.

[26] In conclusion, the Deputy President found that when all of the indicia relevant to determining whether Ms Chait was an employee or an independent contractor were considered, they weighed overwhelmingly in favour of a finding that Ms Chait was an employee of the Appellant, and a contrary finding that Ms Chait was carrying on her own business was counter-intuitive and would be contrary to the established principles by which the question of whether a person is an employee or an independent contractor were determined.

[27] The Deputy President then turned to the question of which of the two putative employers, the Appellant or the Clinic, was the other party to that employment relationship. The Deputy President relied on the principles outlined by Edmonds J in *Gothard v Davey*[12], and found that the evidence established that the Clinic was part of and controlled by the Appellant.

[28] In finding that Ms Chait was an employee, and that her employer was the Appellant, the Deputy President relied upon:[13]

(a) A hyperlink to the Appellant's website where when a person clicks on the hyperlink they are taken to a website home page upon which the following appears: *"Church of Ubuntu & Ubuntu Wellness Clinic"*. The term *"Ubuntu Hemp"* also appears on the home page, which is the product made by the Appellant and distributed by the Clinic. The menu has links to allow persons to join the Appellant or the Clinic;

(b) The fact that the Appellant manufactures products and the Clinic prescribes and despatches them to clients;

(c) The email addresses of all persons working under the auspices of the clinic are designated *"@churchofubuntu.org"*;

(d) Persons who work for the Clinic are full members of the Appellant. Such membership is a requirement for persons working for the Clinic; and

(e) It was Mr Futter of the Appellant who ended Ms Chait's employment.

[29] The Deputy President noted that Ms Burge paid Ms Chait's wages, but found that was not determinative of Ms Burge or the Clinic employing her, noting that the Appellant did not have an operating bank account, and that the Appellant and the Clinic were significantly intertwined.

Principles on Appeal

[30] An appeal against a decision under Part 3 - 2 of the Act is one to which s.400(1) of the Act applies.[14] Section 400(1) requires that permission to appeal must not be granted unless the Commission considers it is in the public interest to do so. This test is a stringent one.[15] The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[16] Some of the considerations that may attract the public interest are where a matter raises issues of importance and general application, or there is a diversity of decisions at first instance so that appellate guidance is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.[17] It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated.[18] However, the fact that the member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.[19]

Grounds of Appeal

[31] In the Form F7 Notice of Appeal (the Form F7), the Appellant identified the Grounds of appeal as follows:

1. *Error of Law, Jurisdictional Error Deputy President Asbury's failure to provide reasons.*

2. *Error of Law, incorrect identified respondent as Church of Ubuntu. The respondent in the documentation appears to be different to the original application and the title of the proceedings does not match the listed respondent.*

3. *Error of Law, Jurisdictional Error. The Fair Work Commission cannot dictate to a Church on its Canons and Beliefs.*

4. *Significant Errors of Fact*

    a. *Decision flies in the face of the facts*
    b. *Apprehended bias*
    c. *Applicant by her own confession was engaged as a subcontractor.*

    d. *The Applicant by her own confession was offered alternative work with another subcontractor and refused that offer.*

    e. *Applicant by her own confession did not work for 12 months as she claimed to have worked for another organisation in that time for at least one month, had other income, only earned $660 per week maximum and also did not work because of sickness for at least two weeks hence not meeting the 12 month criteria.*

    f. *Applicant by her own confession was working as a subcontractor for Karen Burge T/as The Ubuntu Wellness Clinic and only produced evidence of payment from that business.*

    g. *The Church of Ubuntu had no business operations in the time of this matter as it was closed down because of the alleged governments both Federal and State being under acknowledgement of obedience, allegiance and adherence to foreign powers, and introducing unconstitutional mandates. Further to this The Church Of Ubuntu throughout the relevant period did not even have an operational bank account.*

    h. *The application is duplicitous as it identities two different respondent entities and appears to have changed since the original application.*

    i. *The Fair Work took three months to provide a decision then provided no reasons in support of that decision.*

j. The Fair Work Commission has no jurisdiction in this matter in regards to The Church of Ubuntu and no jurisdiction in regards to Karen Burge T/as Ubuntu Wellness Clinic

k. The Appellant cannot possibly provide court books within 7 days of this Appeal because we have been provided nothing in which to respond, as no reasons have been provided, and even if reasons where provided, the Fair work Commission clearly has no jurisdiction.

l. The decision makes an absolute mockery of the Fair Work Commission and has nothing to do with Justice, law, procedural fairness, due process, or any other of the many founding principles of a representative democracy and a lawful and upright system of justice.

m. The decision made by Fair Work is null and void and impossible to be enforced.

Consideration

[32] Analysis of the grounds of appeal discloses that the Appellant's challenge to the Decision and the Reasons for Decision fall into three broad categories, being:

(1) Complaints regarding the issuing of the Decision not containing any reasons, and the subsequent issuing of the Reasons for Decision ten weeks later (Grounds 1, and 4(b), (i), (k), (l));

(2) Assertions of error in the conclusions of the Deputy President (Ground 4(a), (c), (d), (e), (f), (g), (h), (j); and

(3) Broad assertions of the Commission lacking jurisdiction to determine the Application (Grounds 2, 3 and 4(m)).

(1) The Decision and the Subsequent Reasons for Decision

[33] Section 601 of the Act sets out the writing and publication requirements for the Commission's decisions. It provides:

Writing and publication requirements for the FWC's decisions

(1) The following decisions of the FWC must be in writing:

(a) a decision of the FWC made under a Part of this Act other than this Part;

(b) an interim decision that relates to a decision to be made under a Part of this Act other than this Part;

(c) a decision in relation to an appeal or review.

Note: For appeals and reviews, see sections 604 and 605.

(2) The FWC may give written reasons for any decision that it makes.

(3) A decision, and reasons, that are in writing must be expressed in plain English and be easy to understand in structure and content.

(4) The FWC must publish the following, on its website or by any other means that the FWC considers appropriate:

(a) a decision that is required to be in writing and any written reasons that the FWC gives in relation to such a decision;

(b) an enterprise agreement that has been approved by the FWC under Part 2-4.

The FWC must do so as soon as practicable after making the decision or approving the agreement.

(5) Subsection (4) does not apply to any of the following decisions or reasons in relation to such decisions:

(a) a decision to issue, or refuse to issue, a certificate under paragraph 368(3)(a);

(c) a decision to issue an entry permit under section 512;

(d) a decision to impose conditions on an entry permit under section 515;

(e) a decision to issue, or refuse to issue, an exemption certificate under section 519;

(f) a decision to issue, or refuse to issue, an affected member certificate under section 520;

(g) a decision or reasons in relation to which an order is in operation under paragraph 594(1)(d).

(6) Subsections (1) and (4) do not limit the FWC's power to put decisions in writing or publish decisions.

[34] While both the Decision and the Reasons for Decision satisfied the provisions of s.601 of the Act, the Reasons for Decision were essential for the Appellant, and the Respondent, to understand the basis for the Decision. It is highly desirable that where a decision is made by the Commission, that adequate reasons are provided to the parties to allow them to understand the basis of the decision. The delay in providing the Reasons for Decision was regrettable.

[35] We do not consider, however, that the publication of the Decision without reasons, and the subsequent publication of the Reasons for Decision, establishes appellate error. The Deputy President did, belatedly provide the reasons for the Decision, and as we conclude below, those

reasons did not contain errors as alleged. The Appellant filed Amended Submissions on the Appeal and was unhindered in its ability to address the Reasons for Decision.

(2) Assertions of Error in the Conclusions of the Deputy President

[36] A significant focus of the Appellant's allegations of error revolved around an assertion Ms Chait conceded she was engaged as a sub-contractor (Grounds 4(c), (f)). It was clear that the Deputy President found Ms Chait had accepted that the fact that she was a contractor responsible for her own taxation was spoken about at the time she was engaged, but that in Ms Chait's view this situation changed thereafter. However, the focus on that one concession regarding Ms Chait's understanding at the commencement of engagement disregards the myriad of other factors found by the Deputy President to be indicative of employment or at least neutral considerations (see paragraphs [24] and [25] above).

[37] Similarly, the contentions regarding Ms Chait working for another employer (Ground 4(e)) disregard the Deputy President's conclusion that there was a relationship between theportal.life and the Appellant,[20] and the Deputy President's finding that Ms Chait may have been able and entitled to work for other entities.

[38] While the Appellant asserted error as it had no business operations at the relevant time (Ground 4(g)), the Deputy President found it to be the relevant employer based on numerous soundly based factual conclusions,[21] that have not been impeached in any way.

[39] Rather than establishing error in the Decision and/or Reasons for Decision of the Deputy President, the Appellant simply urges a different result based on extremely limited facts and assertions, while disregarding the Deputy President's detailed and correct analysis of the relevant relationship and employer. The Deputy President followed the correct principles and the Decision was entirely unremarkable in the factual circumstances existing.

(3) The Commission Lacking Jurisdiction to Determine the Application

[40] The Appellant submitted the Decision and the Reasons for Decision constituted the Commission dictating to the Appellant on its Canons and Beliefs. Referring to the judgment of High Court in *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)(Church of New Faith)*[22], the Appellant submitted:

> *"There is no law higher than that of Almighty God and there is no court or jurisdiction superior to that of our Lord God and Creator of All, the nameless formless imperishable absolute. This will eventually become clear to every single being no matter what they believe now, when their breathing eventually stops, which inevitably it will. Laws made contrary to God's Laws are null and void and impossible to be enforced."*

[41] *Church of New Faith* does not stand for the proposition asserted by the Appellant. *Church of New Faith* involved consideration of a corporation incorporated pursuant to the *Associations Incorporation Act 1956-1965 (S.A.)*, and registered in Victoria pursuant to the *Companies Act 1961 (Vict.)* as a foreign company. Subsequently, it changed its name to *"The Church of Scientology Incorporated"* in South Australia, though no change of name was registered in Victoria. The corporation was assessed to pay-roll tax under the *Pay-roll Tax Act*

1971 (Vict.). Section 10(b) of under the *Pay-roll Tax Act 1971 (Vict.)* at the relevant time provided:

> *"The wages liable to pay-roll tax under this Act do not include wages paid or payable —*
> *…*
> *(b)*
> *by a religious or public benevolent institution, or a public hospital."*

[42] The High Court, in deciding the corporation was exempt from pay-roll tax, held the test of religion should not be confined to theistic religions. Put simply, that corporation was exempt from pay-roll tax because the relevant legislation excluded it, not because it was excluded because of its own canons and beliefs.

[43] Since the decision of the High Court in *Ermogenous v Greek Orthodox Community of SA Inc,*[23] it has been clear that, at least in relation to ministers but also clearly other staff, the common law of Australia does not recognise any presumption that relationships between religious bodies and their ministers are not intended to create legal obligations. Whether the parties to a religious relationship intended to create legal relations is to be assessed objectively in light of all the evidence, like any other case.

[44] In their joint judgment, Gaudron, McHugh, Hayne and Callinan JJ said that it is of the very essence of a contract that there be a voluntary assumption of a legally enforceable duty and that this required that there be identifiable parties, certain terms, and, unless the arrangement is made under deed, real consideration.[24] Their Honours noted however that the circumstances may show that the parties did not intend their agreement to be legally enforceable and that in considering whether this is so a court may take into account 'the subject matter of the agreement, the status of the parties to it, their relationship to one another, and other surrounding circumstances'.[25]

[45] They continued:[26]

> *"Because the search for the "intention to create contractual relations" requires an objective assessment of the state of affairs between the parties (as distinct from the identification of any uncommunicated subjective reservation or intention that either may harbour) the circumstances which might properly be taken into account in deciding whether there was the relevant intention are so varied as to preclude the formation of any prescriptive rules. Although the word "intention" is used in this context, it is used in the same sense as it is used in other contractual contexts. It describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened. It is not a search for the uncommunicated subjective motives or intentions of the parties."*

[46] The conclusions of the Deputy President, which we have found to be without error, based on an objective assessment of what was said and done, establish a clear intention to create legal relations, in the form of an employment relationship, between Ms Chait and the Appellant.

[47] We are not satisfied that the Appellant has identified any error in the Deputy President's reasoning or the conclusion she reached. The Deputy President applied the law in an exhaustive and orthodox manner.

Conclusion and Disposition

[48] As noted above, at the commencement of the hearing, we granted permission to appeal because the appeal was jurisdictional in nature.

[49] In the recent decision in *Lisha Herc v Hays Specialist Recruitment (Australia) Pty Limited*[27] *(Herc)*, a matter involving five different jurisdictional objections was considered. Those objections were that the Applicant:

- lodged her unfair dismissal application outside the time required in s.394(2) of the Act;
- was not an employee;
- was not dismissed;
- had not completed the minimum employment period as required by s.382(a) and s.383; and
- earned more than the high income threshold.

[50] The Member at first instance in *Herc* dealt only with the high income threshold objection, because after a number of conferences with the parties, 'it was decided that the jurisdictional objection relating to the high income threshold would be determined first because prima facie, she earned more than the high income threshold'. The Full Bench of the Commission held:[28]

> *"For the reasons that follow, we have decided that in determining the jurisdictional objection relating to whether the Appellant's earnings exceeded the high income threshold, in advance of other objections, the Deputy President erred by acting on a wrong principle and failing to take other material considerations into account. The material considerations the Deputy President failed to take into account before determining whether the Appellant's earnings exceeded the high income threshold were: whether the application was made within the time required in s.394(2); whether the Appellant was an employee; if the Appellant was an employee, the entity that employed her; and whether the Appellant was dismissed. While the Commission has broad discretion to decide how a matter will be dealt with, by not determining, in the proper order, other objections upon which the validity an application depends, will result in an error of the kind identified in House v The King."*

[51] Upon the conclusion that Ms Chait's employer was the Appellant, the issue of whether the Application in the form of the Third Form F2 is out of time comes into focus because it recorded Ms Chait was notified of her dismissal on 11 October 2021, and the dismissal took effect immediately, but the Third Form F2 was filed on 9 November 2021, eight days outside the 21 day period for filing.

[52] Consistently with *Herc*, the first consideration is whether the application was made within the time required in s.394(2). Pursuant to s.607(3)(c) of the Act, we refer the matter to Deputy President Asbury to deal with it in accordance with this decision.

[53] The Order of the Commission is:

1. The matter is referred to Deputy President Asbury to determine whether the Appellant's unfair dismissal application was filed within the time required in s.394(2) of the Act.

VICE PRESIDENT

Appearances:

Mr P Burton, for the Appellant.
Mr M Swivel, for the Respondent.

Hearing details:

2022.
Microsoft Teams (Video).
21 November.

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[1] Reasons for Decision at [71] and [72].

[2] [2021] FWCFB 3707.

[3] [2022] HCA 1.

[4] [2022] HCA 2.

[5] [2011] FWAFB 8307.

[6] (2003) AIRC 504.

[7] [2001] 207 CLR 21.

[8] Reasons for Decision at [86].

[9] Reasons for Decision at [87].

[10] Reasons for Decision at [88].

[11] Reasons for Decision at [89] to [92].

[12] [2010] FCA 1163.

[13] Reasons for Decision at [97] to [103].

[14] *Australian Postal Corporation v Gorman* [2011] FCA 975, 196 FCR 126 at [37].

[15] *Coal & Allied Mining Services Pty Ltd v Lawler and others* [2011] FCAFC 54, 192 FCR 78, 207 IR 177 at [43] per Buchanan J (with whom Marshall and Cowdroy JJ agreed).

[16] *O'Sullivan v Farrer* [1989] HCA 61, 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied *in Hogan v Hinch* [2011] HCA 4, 243 CLR 506 at [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* [2011] FCAFC 54, 192 FCR 78, 207 IR 177 at [44]-[46].

[17] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343, 197 IR 266 at [27].

[18] *Wan v AIRC* [2001] FCA 1803, 116 FCR 481 at [30].

[19] *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089, 202 IR 388 at [28], affirmed on judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54, 192 FCR 78, 207 IR 177; *NSW Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663, 241 IR 177 at [28].

[20] Reasons for Decision at [86].

[21] Reasons for Decision at [97] to [103]

[22] (1953) 154 CLR 120.

[23] (2001) 209 CLR 95.

[24] Ibid at [24].

[25] Ibid at [25].

[26] Ibid at [25].

[27] [2022] FWCFB 234.

[28] Ibid at [10].