# DECISION

*Fair Work Act 2009*
s.604—Appeal of decision

**Shelton Muller**
**v**
**Timbecon Pty Ltd**
(C2022/7121)

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT CLANCY
COMMISSIONER YILMAZ

SYDNEY, 24 FEBRUARY 2023

*Appeal against decision [2022] FWC 1685 of Deputy President Bell at Melbourne on 06 October 2022 in matter number U2022/2774 - permission to appeal granted - appeal dismissed.*

**Background**

**[1]** Mr Shelton Muller (the Appellant) has lodged an appeal under s.604 of the *Fair Work Act 2009* (Cth) (the Act) against a decision[1] (Decision) of Deputy President Bell (Deputy President) issued on 6 October 2022, for which permission to appeal is required. The Decision concerned an application brought by the Appellant for an unfair dismissal remedy against Timbecon Pty Ltd (the Respondent) pursuant to s.394 of the Act.

**[2]** At first instance, the Respondent raised a jurisdictional objection to the Appellant's application, contending that the Appellant was not an employee and therefore he was not capable of being 'dismissed' for the purposes of ss.385(a) and 386(1) of the Act. The Respondent contended that the Appellant was engaged as an independent contractor, and that on 14 February 2022 the Respondent notified the Appellant that they were terminating his contract with immediate effect. In the Decision, the Deputy President predominantly dealt with whether the Appellant was an employee or an independent contractor of the Respondent. Ultimately, the Deputy President found that the Appellant was not an employee and accordingly, he dismissed the Appellant's application.

**[3]** This matter was listed for permission to appeal and the merits of the appeal. On 31 October 2022, directions were issued for the filing of material by both parties. Both the Appellant and Respondent filed written submissions and made further oral submissions at the hearing on 6 December 2022. The Appellant and Respondent were legally represented at the hearing, with permission.

**[4]** For the reasons that follow, permission to appeal is granted and the appeal is dismissed.

## Decision Under Appeal

*Background and Factual Findings*

**[5]** The Appellant is a photographer of 35 years' experience, and the Respondent operates a hardware store selling woodworking tools. In September 2016, the Respondent began seeking a photographer to create photographic and video content for its website and marketing channels. The Appellant and Respondent initially communicated via email, in which the Respondent emphasised that it was looking to engage a visual content creator on a time-structured and traditional working arrangement. Following this email exchange, the parties met in-person on 23 September 2016 with a view to reaching an agreement.

**[6]** At this meeting, the Appellant clarified that he wished to be engaged as a contractor, such that he still had the freedom to provide photographic services for third parties. The parties also discussed the nature of the tasks that the Appellant would be performing, which were primarily photography and videography work supplemented by some marketing tasks. The parties agreed upon a time-structured work arrangement, whereby the Appellant would come in for three full days per week. The amount of remuneration was also agreed upon at $39 per hour, invoicing on a fortnightly basis. The Deputy President found at paragraph [38] of the Decision that this meeting formed the basis of the agreement entered into between the parties.

**[7]** The Appellant commenced work on or about 9 November 2016, by which time the Respondent had reimbursed him for some photographic and computer equipment he had purchased. The Appellant also utilised his own cameras and specialist equipment in addition to that paid for by the Respondent as part of his work.

**[8]** In December 2016, the Respondent asked the Appellant to increase his hours to a full-time equivalent, to which the Appellant eventually agreed. The Deputy President accepted at paragraph [50] of the Decision that no discussion regarding any other changes was had at this time, other than the increase in working hours. The Appellant began working five days a week from January 2017.

**[9]** The Deputy President noted that the evidence before him was relatively scant as to the exact tasks and responsibilities that the Appellant undertook in the months leading up to January 2017, outside of photography and videography. In the minutes of a staff meeting that occurred on 16 December 2016, it was recorded that the Appellant would need to assist other staff members in various administrative processes such as barcoding, weighing, and digitising new products.

**[10]** The Deputy President found at paragraph [56] of the Decision that, prior to January 2017, the Appellant's primary tasks were photography and videography work, and any marketing tasks were merely tangential to those duties. Moreover, the Deputy President found at paragraph [47] of the Decision that, although the Respondent had some control over the Appellant's work in this period, any degree of prescription was primarily outcome-based.

**[11]** In the period following January 2017, the Deputy President accepted that the Appellant was likely involved in the performance of other tasks such as cleaning business premises and attending daily morning meetings. The Deputy President also accepted that the Appellant was

required to comply with any business policies of the Respondent, such as a directive regarding the purchasing of stock dated November 2017. The Respondent also continued to reimburse the Appellant for any work-related expenses, such as stationery. From time to time, the Appellant was asked by the Respondent to perform photography work for third parties, for which he was not offered the opportunity to quote or charge directly. The Deputy President also accepted at paragraph [78] of the Decision that, after the Appellant transitioned to a full-time workload, he made no attempt to seek further work save for sporadic wedding photography on weekends.

**[12]** In 2019, the Respondent employed Mr John Madden who had primary responsibility for managing the Appellant's work. Mr Madden often provided scripts and specific visual features to be included in the videos that the Appellant made. In mid-2021, the Appellant suggested to Mr Madden that his wife, who was also a photographer, be allowed to perform some of the work assigned to him to better meet deadlines. Mr Madden refused the proposal and requested that the Appellant complete all work personally.

**[13]** Throughout the period that the Appellant worked for the Respondent, he was never paid any amounts for annual leave, sick leave, or superannuation. The Appellant would invoice the Respondent through his trading name Living in Pictures until April 2018, after which he began invoicing the Respondent under the partnership "N. Muller & S. Muller", the other partner being his wife.

**[14]** The Deputy President found that although the Appellant wore the Respondent's business uniform, he was not directed to wear it, but rather merely accepted the uniform that was offered to him. Furthermore, the Deputy President was not satisfied that the Respondent had implemented a business practice prior to January 2017 that required the Appellant to obtain approval for any lateness or absences from work.

*Applicable Principles – Employee or Contractor*

**[15]** After setting out the background and factual findings, the Deputy President turned to consider the applicable legal principles to determine whether the Appellant was an employee or an independent contractor. The Deputy President began by pointing to the relevance of *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 (*Personnel Contracting*) and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 (*Jamsek*), both of which were addressed by the parties in their submissions.

**[16]** Given the contract between the Appellant and Respondent was wholly oral, and noting that this was a key point of distinction from *Personnel Contracting*, the Deputy President addressed additional matters concerning post-formation conduct and variation. To this end, the Deputy President observed that where a 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 because, as the Deputy President noted, inevitably some of these aspects will be in dispute. The Deputy President then provided the relevant principles to identify express and implied terms in an oral agreement,[2] and noted that like written contracts, recourse may be had to external events where appropriate.[3]

**[17]** The Deputy President subsequently considered the characterisation of traditional indicia, including the existence of a right to control and the "own business/employer's business"

dichotomy. On this point, the Deputy President noted that *Personnel Contracting* confirmed that while the elements of control and the own/employer's business dichotomy are significant matters, it remained appropriate to consider the "totality" of the relationship between the parties albeit as framed by the rights and duties established by the parties' contract.

**[18]** Next, he turned to the use of "labels" as the Respondent placed some importance on the fact that the parties had called the relationship a contracting relationship, whereas the Appellant submitted that "the High Court has held that the label ascribed by the parties to the engagement is of no consequence." The Deputy President did not accept that the High Court had made such a definitive statement, although he did accept that the parties' own descriptions cannot be determinative.

**[19]** Finally, the Deputy President considered how conduct which occurs after the formation of the contract should be characterised. The Deputy President considered the judgments of Kiefel CJ, Keane and Edelman JJ at [45], and Gordon J (Steward J concurring) at [176], which clarified that such conduct cannot, as a general rule, be admitted for the purpose of construing the contract. He noted that while there are exceptions to this general rule, as discussed below, they are confined.

*Consideration*

**[20]** Having elucidated the key legal principles, the Deputy President subsequently detailed the restrictions he would be placing on the consideration of post-contractual conduct in the matter before him:

> "[103] The Applicant's case relied upon the contract initially formed between the parties in September 2016, as it was varied in about January 2017 when the days to be worked were changed from three days to five days. It was a matter specifically confirmed for the Applicant in closing address.
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> [104] What follows from this is that I consider that conduct occurring after those points in time cannot be relied upon to establish the terms of the contract, as varied, except to demonstrate that there was a particular term at either of those points in time. Taking the five matters listed by Gordon J in paragraph [177] of *Personnel Contracting*, it was not suggested that there was doubt about "formation" (although the *identity* of the parties to the contract that was formed was initially in dispute), nor was a "sham" asserted and nor was rectification or estoppel in issue (c.f. *Personnel Contracting* at [177]).
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> [105] As to post-contractual conduct to prove a contractual "variation", it was *agreed* between the parties that, in about January 2017, the days required to be worked changed from three days to five days. It is not necessary to have recourse to post-contractual conduct for proof of that variation. I accept that does potentially leave available post-contractual conduct to assist in determining if there were other variations to the contract that occurred between September 2016 and January 2017 and I set out my findings on those matters below.
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> [106] I also accept that post-contractual conduct in the matter before me is potentially capable of resolving a dispute where that dispute concerns the "existence" (and, I consider it follows where an oral term is concerned, the "scope") of a particular term in the initial contract or that contract as varied.

> [107] But with those exceptions aside, I do not consider that the terms of the contract, as varied in January 2017, might be added to or subtracted from by reason of post-contractual conduct occurring after those events unless I consider that conduct was factually reflective of the statements and conduct occurring at the time the contract was originally agreed and upon variation. Put another way, the fact that certain practices might have been occurring in November 2021 is not determinative of them having been in place in November 2016." (footnotes omitted)

**[21]** The Deputy President then set out his findings on the terms of the contract. He found that the contract was formed during or shortly after the discussion that occurred on 23 September 2016. Further, though there was some dispute about the identity of the contracting parties at first instance, he ultimately found that the contract was between the Appellant and Respondent.

**[22]** The Deputy President proceeded to identify the express terms of the contract at [113] of the Decision, which are as follows:

> "a. The Applicant would primarily perform photography, as well as videography and other marketing tasks, as supplied by the Respondent.
> b. The Applicant would be paid at an hourly rate of $39 per hour, plus any GST.
> c. The Applicant would work on a time-structure basis, three days per week on days to be agreed as needed but expected to be Wednesdays, Thursdays and Fridays.
> d. The Applicant would issue invoices for his work, which were to be issued on a fortnightly basis in accordance with the Respondent's pay cycle.
> e. Except for the days when the Applicant was working at the Respondent, he could work elsewhere for other clients or work.
> f. The parties agreed that Applicant would be engaged as a contractor.
> g. The Respondent would supply the Applicant for use with a suitable laptop and other photography equipment on agreement.
> h. The Respondent would reimburse the Applicant for specific equipment purchases that he would use for his work, as agreed."

**[23]** The Deputy President also identified several terms which he found to be implied in the contract at [115] of the Decision and set out below. While these terms were not expressly agreed upon by the parties, the Deputy President considered them necessary for the contract's reasonable and effective operation:

> "a. The hourly rate was the total amount payable to the Applicant by the Respondent and no annual leave, sick leave, superannuation or other amounts would be payable.
> b. The Applicant would perform the tasks directed by the Respondent and to the standard expected of the Respondent, as might be advised or directed from time to time.
> c. The Applicant would apply his professional skill to the tasks at hand.
> d. The Applicant would not delegate his work nor allow another person to perform his contracted obligations without prior permission.
> e. The Applicant would notify the Respondent if he was, or was likely to be, absent.
> f. The Applicant would supply his own equipment for photography and videography, save for equipment supplied or made available by the Respondent.
> g. The Applicant's expenses would be paid, where approved, and any modest expenditure required discussion and agreement before the expense was incurred.

h. The Applicant granted the Respondent a bare licence to use any photographic or video works he created for the purpose that they were created (such as publication on the Respondent's website.).
i. Termination of the Contract would be upon either party giving reasonable notice."

**[24]** In paragraphs [126] – [129] of the Decision, the Deputy President listed various terms, advanced primarily by the Appellant, that he did not consider to be express or implied terms of the contract as it was formed in September 2016:

"a. The Applicant's miscellaneous duties that he was required to perform included:
    (i) cleaning duties pursuant to a roster;
    (ii) managing company meetings;
    (iii) photography duties for other companies for which the Respondent would be paid.
b. the Applicant was required to perform his duties personally and could not delegate tasks;
c. the Applicant was unable to reject a direction to perform duties or a direction on how he should perform those duties;
d. all the intellectual rights to the material created by the Applicant remained with the Respondent;
e. the Applicant was required to present himself as an employee of the Respondent to third parties and other employees of the Respondent by:
    (i) using a company email address and signature;
    (ii) wearing a uniform with the Respondent's branding;
    (iii) bring referred as "staff".
f. the Applicant was required to work exclusively for the Respondent during weekdays;
g. the Applicant was required to comply with the Respondent's policies and procedures;
h. the Applicant's performance would be managed by the Respondent;
i. the Applicant would be provided with the equipment needed for his work by the Respondent; and
j. the Applicant would be reimbursed for expenses incurred during his work."

**[25]** Turning to the contractual variation that occurred in January 2017, the Deputy President found at paragraph [131] of the Decision that the contract was amended such that the Appellant's working days increased from three to five days per week. However, he did not find any other variation of the contract had occurred. Notably, he did not consider that the contract had been varied in as to allow the Respondent to exercise a greater degree of control over the Appellant.

**[26]** The Deputy President proceeded to characterise the contract, identifying aspects which pointed towards an employment relationship. The Deputy President considered that the Respondent initially sought to engage a part-time employee on a "time-structured" basis to be indicative of an employment relationship. Similarly, the contractual requirement to work on fixed days demonstrated a greater degree of control by the Respondent. Also pointing to an employment relationship was that the Appellant's work had to be performed personally and could not be delegated. The Deputy President considered the factor which mostly strongly pointed to an employment relationship was that the Respondent was obliged to pay for fixed blocks of the Appellant's time and the Respondent could ask the Appellant to perform other tasks if his core photography and videography work were not available.

**[27]** The Deputy President moved to discuss other aspects that went against a finding of an employment relationship. Notably, that the Respondent could not dictate how the Appellant's

work was to be performed, other than that it had to be at a requisite standard. The Appellant also likely retained intellectual property ownership over his work, which suggests that these works were assets of his own business. Likewise, the Appellant was not paid any amounts for annual leave, sick leave and other similar benefits, and income tax was not deducted from the Appellant's pay. Further, at the beginning of September 2016, the Appellant had his own clients separate from the Respondent's business, and this was a key reason why he was initially engaged as a "contractor" for three days per week.

**[28]** The fact that the Appellant provided his own equipment pointed slightly towards a contracting relationship, though the Deputy President found that the supply of equipment is not itself inconsistent with an employment relationship. Additionally, the Deputy President considered that photographers are frequently engaged as both independent contractors and as employees, and noted that there is nothing inherent about photograph/videography/marketing work that points specifically towards an employee or independent contractor relationship.

**[29]** The Deputy President finally turned his attention to the impact that the label of contractor, which was initially agreed upon by both parties, had on the question of characterisation:

> "[154] The Respondent was originally recruiting for an employee. However, the bargain of the parties consciously proceeded in a different direction – at the Applicant's behest – where they agreed a "contractor" relationship would ensue. The context for this was that the Applicant was, at that time, working only as a contractor, he had his own existing business and customers, and he wanted to preserve and continue them. I consider that this context helps "assist in identifying the *purpose or object* of the contract" as it was made (and, other than the Variation, remained unchanged).
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> [155] The absence of a formal documented agreement lends significance to the parties' own characterisation of the arrangement between them in these circumstances and reflects the purpose or object of the contract they sought to achieve. That object was for the Applicant to remain a contractor, but while working on fixed days for the Respondent." [citations omitted]

**[30]** Ultimately, the Deputy President came to the following conclusion:

> "[156] 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 Contract as it was formed in around 23 September 2016 was that of an independent contracting arrangement. The characterisation was not changed by the Variation. Other than the increase of the days to be worked, I am not satisfied there is evidence that the parties expressly sought to alter to or detract from the terms of the Contract by the Variation and I am not satisfied from the evidence that there was a manifestation of control that would other change the character of the control by those practices, together with the Variation.
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> [157] It is for this reason that I find that the Applicant is not an employee and, accordingly, his application must be dismissed."

**[31]** In light of the complexity of the matter before him, the Deputy President subsequently considered whether the Appellant's unfair dismissal application would have been successful, had he been an employee. At [188] of the Decision, following a detailed analysis of the matters specified in s.387 of the Act, the Deputy President was satisfied that the dismissal of the

Appellant would have been harsh, unjust and unreasonable had he been incorrect about the Appellant not being an employee. On this counterfactual basis, and pursuant to s.392(1) of the Act, the Deputy President noted at [200] of the Decision that he would have ordered the Respondent pay the Appellant an amount for lost remuneration.

## Grounds of Appeal

**[32]** The Appellant raised 12 grounds of appeal in his Form F7 – Notice of Appeal, which were subsequently expanded upon in written and oral submissions. The grounds, as set out in the Notice of Appeal, are as follows:

> "*General*
>
> 1. The Deputy President erred, at law, by finding that the Applicant was an independent contractor and not an employee at [156] and [157] of the Decision.
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> 2. The Deputy President erred, at law, by finding that the express and implied terms set out in [113] and [115] of the Decision did not give rise to an employment relationship.
>
> *Post-contractual conduct*
>
> 3. The Deputy President erred, at law, by finding it was unnecessary to consider post-contractual conduct for proof of the terms of the contract, and the variation thereto, at [105] and [107] of the Decision, especially in circumstances where he found at [153] of the Decision that the contract, and the variation thereto, was not comprehensive.
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> 4. The Deputy President erred, at law, by refusing to consider conduct after the variation to determine whether there was an imposition of work practices by the Respondent that gave rise to a contractual right of control, either at the time of the variation, or subsequent to it, and that the Applicant had ceded to the Respondent's right to impose such practices (see [132], [133] and [136] of the Decision).
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> *Right of control*
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> 5. The Deputy President erred, at law, by finding at [135] that the evidence of the parties' conduct or work practices did not manifest an assumption by the Respondent of a right of control over the Applicant. Further, the Deputy President erred by focusing on whether an assumed right of control over the Applicant by the Respondent was 'sufficiently different' from the terms of the contract originally agreed.
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> 6. The Deputy President erred, at law, by finding that it was not an express or implied term of the contract that the Applicant was unable to reject a direction to perform duties, or a direction on how he should perform those duties, at [126], in circumstances where he found at [139] of the Decision that the Respondent could allocate other tasks to the Applicant to perform and at [142] that the work performed by the Applicant was directed by the Respondent and where Mr Haswell had agreed in cross-examination that he had control and direction over what the Applicant did while working for the Respondent (see [47]).
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> *Own business/employer's business dichotomy*
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> 7. The Deputy President erred, at law, by finding that the Applicant was not an employee, notwithstanding his finding at [150] that the Applicant was performing work more for the Respondent's business rather than a business of his own, his acceptance at [128] that the Applicant would not be working for anyone else on days he was working for the

Respondent and his acceptance at [78] that after the variation the Applicant made no attempt to seek other work save for 'sporadic' weekend work at weddings.

8. The Deputy President erred, at law, by failing to find that after the variation, the Applicant was not conducting his own independent business that was distinct from serving in the Respondent's business and that this was the consequence, and the intended effect, of the variation agreed by the parties.

*Variation*

9. The Deputy President erred, at law, by failing to find that the effect of the variation (whereby the Applicant's hours of work increased from part time to full time) materially increased the Respondent's right of control over the Applicant and limited the Applicant's capacity to work in his own business, such that the Applicant was, at least from the point of the variation, an employee of the Respondent.

10. Alternatively, the Deputy President erred, at law, by failing to consider and/or find that a further variation to the contract arose sometime after the January 2017 variation, which gave rise to an employment relationship, as contemplated in paragraphs 4 and 7 of the Applicant's Outline of Submissions.

*Labels and assumptions of the parties*

11. The Deputy President erred, at law, by giving unreasonably high regard to the label assigned by the parties at [152] - [155] of the Decision.

12. The Deputy President erred, at law, by finding that the mode of remuneration, the tax arrangements of that remuneration, the term for payment of a flat hourly rate and the lack of paid leave were each suggestive of an independent contracting relationship at [148] of the Decision."

## Principles on Appeal

**[33]** The Decision subject to appeal was made under Part 3-2- Unfair Dismissal – of the Act. Section 400(1) of the Act provides that permission to appeal must not be granted from a decision made under Part 3-2 unless the Commission considers that it is in the public interest to do so. Further, in unfair dismissal matters, appeals on a question of fact can only be made on the ground that the decision involved a 'significant error of fact' (s.400(2)). Section 400 of the Act manifests an intention that the threshold for a grant of permission to appeal is higher in respect of unfair dismissal appeals than the threshold pertaining to appeals generally.

**[34]** The public interest test in s.400(1) is not satisfied simply by the identification of error or a preference for a different result. In *GlaxoSmithKline Australia Pty Ltd v Makin*, a Full Bench of the Commission identified some of the considerations that may attract the public interest:

> "… the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or they result in counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters…"[4]

**[35]** It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated. This is so because an appeal cannot succeed in the absence of appealable error.[5] However, that the Member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.

**[36]** The Full Bench is satisfied that the grant of permission to appeal in this matter is in the public interest. We are of the view that the appeal concerns issues of importance and general application concerning the proper approach to interpreting and applying the High Court decisions of *Jamsek* and *Personnsel Contracting*. Permission to appeal is therefore granted in accordance with s.400(1) of the Act.

**Consideration**

**[37]** We have read and considered all the material filed by the Appellant and Respondent on appeal. We are not satisfied that the Appellant has identified any instance of appealable error in the Decision. We consider that the Deputy President's approach to dealing with the Appellant's application was correct and open to him on the facts and evidence before him. We agree with the Deputy President's ultimate conclusion that the Appellant was not an employee of the Respondent and therefore reject Grounds 1 and 2 of this appeal. Further, we are satisfied that the Deputy President properly applied the correct legal principles to determine whether the Appellant was an employee or independent contractor of the Respondent, as brought down in *Personnel Contracting* and *Jamsek.*

**[38]** However, given the appeal raises questions regarding the interpretation and application of the recent High Court approach to determining whether a person is an independent contractor or employee, in circumstances where the contract is entirely oral, we will address the Appellant's remaining grounds of appeal.

*Grounds 3 and 4: Post-contractual Conduct*

**[39]** Grounds 3 and 4 are, in our view, the most contentious grounds of appeal. Both grounds challenge the Deputy President's findings regarding recourse to post-contractual conduct. The Appellant alleges that the circumstances of the present appeal differ from *Personnel Contracting, Jamsek* and other High Court decisions as it relates to an unwritten contract which was partly oral and partly implied. The Appellant agrees that the approach taken in *Personnel Contracting* and *Jamsek* applies to oral contracts and submits that such an approach allows recourse to post-contractual conduct. Ground 3 alleges that the Deputy President erred by finding it was "unnecessary to consider post-contractual conduct for proof of the terms of the contract", especially as he found at [153] of the Decision that the contract was not comprehensive, although we consider that when paragraph [153] is read as a whole, it is apparent that the Deputy President used of the word "comprehensive" to indicate that the terms of the contract were not voluminous. The Appellant furthers this assertion by contending that post-contractual conduct *can* be relevant to construing and interpreting the terms of the contract. Specifically, Ground 3 alleges that the Deputy President erred by failing to find that wearing a uniform, attending staff meetings, needing approval for absences and other work practices were terms of the contract as varied in January 2017.

**[40]** The Respondent submits that the Appellant mischaracterised the Deputy President's reasoning. They say that the Deputy President reasoned, consistent with *Personnel Contracting* and *Jamsek*, that post-contractual conduct may only be relevant and available in limited exceptions. We agree with the Respondent. The Deputy President did not indicate that post-contractual conduct is "unnecessary". To the contrary, the Deputy President accepts that post-contractual conduct can be used when there is doubt about contract formation or whether it was a sham, to ascertain the scope of the terms of an oral contract and to prove variation in the contract. However, the Deputy President held that the terms of the contract, as varied in January 2017, cannot be added to, or subtracted from by reason of post-contractual conduct. We note that this would be, in effect, reverting back to the multi-factorial test which focuses on the indicia of employment as opposed to the parties' rights and duties under the contract as it was formed.

**[41]** In support of the Deputy President's approach, we have had regard to the recent Federal Court decision of *Secretary, Attorney-General's Department v O'Dwyer* [2022] FCA 1183. At [28]-[29], Goodman J confirmed that *Personnel Contracting* and *Jamsek* apply where there is no wholly written contract and expressly rejected the applicability of the multi-factorial approach in such cases. Accordingly, we are satisfied that the Deputy President's approach to post-contractual conduct in this matter is reflective of the High Court's reasoning in *Personnel Contracting* and *Jamsek* and we find no error as alleged in Ground 3.

**[42]** Ground 4 alleges that the Deputy President erred by refusing to consider conduct after the January 2017 variation to determine whether there was an imposition of work practices that gave rise to a contractual right of control. From the conclusion above, it follows that Ground 4 cannot succeed. We have confirmed the Deputy President's approach to post-contractual conduct was correct and therefore he did not err by failing to consider whether post-contractual conduct evinced a contractual right of control.

**[43]** Accordingly, we reject Grounds 3 and 4.

*Grounds 5 and 6: Right of Control*

**[44]** Ground 5 asserts that the Deputy President erred at [135] of the Decision by finding that the evidence of the parties' conduct or work practices did not manifest an assumption of a right of control over the Appellant. The Appellant submits that he was subject to the Respondent's authority and right to exercise control over his performance at work, for example, by performing the tasks he was directed to perform during a routine fulltime working week. The Respondent submits that Ground 5 is no more than a bare assertion that the Deputy President's conclusion with respect to this issue was wrong. We note that these submissions were already put to and dealt with by the Deputy President at first instance. The Deputy President's findings on this issue are set out at [134] and [135] of the Decision:

> "[134] I accept there were some work practices suggestive of an increased level of control or power. They included the Applicant's use of an email address and the (likely) wearing of a uniform. The regularity of Mr Muller's hours and the participation by Mr Muller in staff team meetings (c.f. 16 December 2016) are similarly suggestive of an increasing level of control. The meeting minutes of 16 December 2016 describe Mr Muller's role somewhat more broadly to include "Media Coordinator", which was not a task expressly referred to in the Contract (cf. photography, videography and marketing).

> [135] However, when assessed against the evidence as a whole during this period, I do not consider that the evidence of the parties' conduct or work practices during this period rises to such a level that it manifests an assumption of a right of control over Mr Muller by the Respondent that was sufficiently different from the terms of the Contract originally agreed.
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> [136] I do not consider that recourse to the post-contractual conduct occurring after the Variation assists, other than I have set out above. In those circumstances, I do not consider those matters appropriate to have regard to in characterisation of the Contract or the Variation.

**[45]** We find no error in the Deputy President's findings on this issue. We do not agree that the Deputy President erred by focusing on whether an assumed right of control over the Appellant by the Respondent was 'sufficiently different' from the terms of the contract as originally agreed. As we have stated above, the emphasis on the terms of the contract as originally agreed aligns with High Court precedent and reflects the Deputy President's approach to not consider post-contractual conduct in a way which amends the terms of the contract after it was varied.

**[46]** Ground 6 alleges that the Deputy President erred by finding that it was not a term of the contract that the Appellant was unable to reject a direction to perform duties or a direction on how he should perform those duties. The Appellant submits that this finding is inconsistent with the Deputy President's other findings at [139] and [142] of the Decision. Paragraph [142] of the Decision is set out as follows:

> "[142] The Applicant's submissions stated that the work performed was as directed by the Respondent. I consider that proposition is generally correct in *what* was to be performed and *when*. However, and relevantly, it was not the case that the Respondent dictated *how* the work was to be undertaken, other than it remained the case that work needed to be performed to a requisite standard."

**[47]** Having regard to the Appellant's second contention, we note that the Deputy President explicitly rejected at [142] that the Respondent dictated "*how"* the Appellant's work was to be undertaken, and we are of the view that such a finding was open to him on the evidence and is not infected with error.

**[48]** As for the Appellant's first contention, we do not consider that the Deputy President's finding that the Respondent directed "*what* was to be performed and *when*" contradicts the finding that there was no contractual term that the Appellant was unable to reject a direction to perform duties. Further, we do not agree that [142] evinces that such a term must exist in the contract. We consider that in both employment and contracting relationships, the Respondent would likely direct work to the Appellant and there would be general guidance about when such work would be performed. Having regard to [139], the Deputy President considered that it was likely that, in some circumstances, the Respondent might ask the Appellant to perform other tasks, incidental to the particular services the Appellant had been contracted to perform. We agree with the Deputy President that this often speaks to an employment relationship, but do not find that this contradicts the Deputy President's finding that the Appellant was unable to reject a direction to perform duties.

**[49]** Therefore, we do not find any error in Grounds 5 and 6 and we dismiss these grounds of appeal.

*Grounds 7 and 8: Own Business/Employer's Business Dichotomy*

**[50]** Grounds 7 and 8 allege that the Deputy President erred in failing to find that after the variation of the contract, the Appellant was not conducting his own business as distinct from serving in the Respondent's business. The Appellant points to the fact that the Deputy President found that the Appellant was performing more work for the Respondent's business than his own business and that the Appellant was not working for anyone else, except for sporadic weekend work at weddings. Further, the Appellant submits that the consequence of the variation and the Appellant's hours becoming full time is that the Appellant was subordinate to the Respondent's business.

**[51]** The Respondent rejects this proposition. The Respondent submits that by the initial contract terms, the Appellant was free to work elsewhere or for others, so long as it did not conflict with the contracted time which would be devoted to the Respondent's work. The Respondent submits that there was no term in the contract which required the Appellant to present himself as an employee of the Respondent or that the Appellant was required to work exclusively for the Respondent during weekdays. The Respondent contends that the effect of the January 2017 variation was that the Appellant's availability to perform work increased from three to five days and that there were no other express amendments.

**[52]** We agree with the Respondent. The Deputy President found that the only express contractual variation from January 2017 was that the Appellant's workdays increased from three to five. The Appellant's reliance on the fact that, after the variation, he was not working for anyone else is again an attempt to take post-contractual conduct into account. Accordingly, we are satisfied there is no inconsistency in the Deputy President's findings, and we find that the Deputy President did not fall into error. Grounds 7 and 8 are therefore dismissed.

*Grounds 9 and 10: Variation*

**[53]** Ground 9 alleges that the Deputy President erred in failing to find that the effect of the variation was that the Appellant's "hours of work increased from part time to full time" and that this materially increased the Respondent's right of control over the Appellant such that the Appellant's capacity to work in his own business was diminished. We are of the view that this ground is merely a rewording of the Appellant's previous grounds of appeal and submissions. We have dealt with the contractual right of control in Grounds 5 and 6 and the own business/employer's business dichotomy in Grounds 7 and 8. The Appellant has raised no new contentions that have not already been put to the Full Bench in other grounds and we see no utility in reventilating these issues. As discussed above, the Deputy President's findings on these matters are not infected by error and we dismiss this ground of appeal.

**[54]** Ground 10 asserts that the Deputy President either failed to consider or failed to find that there was a further variation to the contract after January 2017, and that this variation gave rise to an employment relationship. While the Appellant submits that they put this submission to the Deputy President at first instance, this was not asserted in their outline of submissions from first instance and in their final oral submissions at first instance, the Appellant confirmed their case relied on the terms of the contract as they existed at its inception and as at the January 2017 variation.[6] The Appellant has failed to identify any evidence that supports that a variation

of the contract after January 2017 occurred, and nor has the Appellant identified what terms of the contract might have been varied after January 2017. Therefore, apart from the Appellant seeking to advance a submission not made at first instance when there was the opportunity to do so, this ground of appeal is without substance and does not disclose any error, let alone appealable error, and is accordingly dismissed.

*Grounds 11: Labels*

**[55]** Ground 11 takes issue with the Deputy President's consideration of the labels used by the parties to describe the nature of their relationship. The Appellant asserts that the Deputy President erred at law by giving unreasonably high regard to the label assigned by the parties to their relationship at [152]-[155] of the Decision. The relevant paragraphs of the Decision are set out as follows:

> "[152] While the recent High Court authorities make it clear that recourse to the parties' description or "label" of the arrangement should be approached cautiously – and in many cases not at all – the case before me is a matter where I consider it appropriate to have regard to the parties' own characterisation of the Contract (unchanged upon the Variation). I do so not as a "tie breaker" nor as a determinative factor, but as a factor relevant to the "whole of the contract" and which, in this case, "can shed light on the objective understanding of the operative provisions of their contract".
>
> [153] Here, the contract is not comprehensive and – indeed – is entirely oral in relation to the limited express terms that were agreed, and the description given by the parties of their relationship in this context is not merely a label or descriptive gloss but, in the bargain struck by the parties before me, states in a short-hand way the very outcome that the parties were seeking to achieve.
>
> [154] The Respondent was originally recruiting for an employee. However, the bargain of the parties consciously proceeded in a different direction – at the Applicant's behest – where they agreed a "contractor" relationship would ensue. The context for this was that the Applicant was, at that time, working only as a contractor, he had his own existing business and customers, and he wanted to preserve and continue them. I consider that this context helps "assist in identifying the *purpose or object* of the contract" as it was made (and, other than the Variation, remained unchanged).
>
> [155] The absence of a formal documented agreement lends significance to the parties' own characterisation of the arrangement between them in these circumstances and reflects the purpose or object of the contract they sought to achieve. That object was for the Applicant to remain a contractor, but while working on fixed days for the Respondent." (citations omitted)

**[56]** The Appellant submits that the Deputy President gave "too high a regard to 'contractor' labels assigned by the parties" and incorrectly considered that labels were a "relevant factor" in construing the contract as a whole. The Appellant contends that the Deputy President should have instead "recognised that the terms of the contract were more in common with a traditional contract of employment and, further, were incomplete."

**[57]** The Respondent identified, correctly in our view, that the Appellant has not challenged the Deputy President's identification of the relevant principle in terms of the relevance of labels to determining whether a relationship is one of independent contractor or employee. We note that the Deputy President acknowledged that caution ought to be taken towards any

consideration of characterisation applied by parties to a work relationship at [96], [97] and [152] of the Decision. We are satisfied that the Deputy President applied such caution in the Decision and that he did not place too much weight on the parties' own description of their relationship. Accordingly, we find no error and dismiss this ground of appeal.

*Ground 12: Assumptions of the Parties*

**[58]** Ground 12 alleges that the Deputy President erred by finding that the mode of remuneration, tax arrangements, payment of a flat hourly and the lack of paid leave were each suggestive of an independent contracting relationship at [148] of the Decision. The Appellant submits that "these considerations are merely consequential upon the 'lay' labelling adopted by the parties about a contractor arrangement and are of no or little bearing." The Appellant relied on the following passage from *ACE Insurance Limited v Trifunovski (ACE)*[7] which the Full Bench considered had not been overtaken by *Personnel Contracting* in *Deliveroo Australia Pty Ltd v Franco*[8] at [41]:

> "It is also difficult, in my view, to give much independent weight to arrangements about taxation, or even matters such as insurance cover or superannuation. These are reflections of a view by one party (or both) that the relationship is, or is not, one of employment. For that reason, in my view, those matters are in the same category as declarations by the parties in their contract (from which they often proceed). They may be taken into account but are not conclusive. These matters are less important than the adoption by the parties (where this occurs) of rights and obligations which are fundamentally inconsistent with basic requirements of a contract of employment, such as the ability to delegate the discharge of obligations under a contract to another person, or where there is a lack of control over how work is done." (emphasis added)

**[59]** We have considered the Appellant's submissions and find no inconsistency between the Deputy President's findings and the reasoning in *ACE* above. We do not agree that *ACE* suggests that these aspects of the contract should be deemed to have little or no bearing or that they are simply a consequence of the parties' own labels of their relationship. Rather, we find that *ACE holds that* "[labels] may be taken into account but are not conclusive". Consistent with *ACE*, the Deputy President took these factors into account and found them to be suggestive of an independent contracting relationship. The Deputy President did not deem these factors were conclusive evidence that the Appellant was an independent contractor and not an employee. As is clear from the Decision, the Deputy President considered a myriad of evidence and aspects of the contract which pointed towards an independent contracting relationship, and importantly, he also considered other aspects which leaned towards an employment relationship. The Deputy President took all these considerations into account in characterising the contract and making his ultimate finding that the Appellant was not an employee. Therefore, we are satisfied that the Deputy President's findings are sound and disclose no error. We dismiss this ground of appeal.

**Conclusion**

**[60]** Given that we have found that the Deputy President did not err by finding that the Appellant is not an employee of the Respondent, there is no need for us to consider the alternate outcome posed in the Decision.

**[61]** Permission to appeal is granted.

**[62]** The appeal is dismissed.


VICE PRESIDENT

*Appearances*:

*Mr G. Lake*, of counsel for the Appellant.
*Mr T. Borgeest*, of counsel for the Respondent.

*Hearing details:*

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Microsoft Teams (Video).
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[1] [2022] FWC 1685.

[2] *John Holland Pty Limited v Kellogg Brown & Root Pty Ltd* [2015] NSWSC 4513 at [93]-[94]; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 442.

[3] *Personnel Contracting* at [175].

[4] (2010) 197 IR 266 at [27].

[5] *Wan v AIRC* (2001) 116 FCR 481 at [30].

[6] AB 221, Transcript 30 June 2022 at PN 608.

[7] [2013] 209 FCR 146 at [37] (Buchanan J, with whom Lander and Robertson JJ agreed).

[8] [2022] FWCFB 156.