



# DECISION

*Fair Work Act 2009*  
s.394—Unfair dismissal

**Peter Hobbs**

v

**The Salvation Army**  
(U2023/9386)

DEPUTY PRESIDENT BELL

MELBOURNE, 12 MARCH 2024

*Application for an unfair dismissal remedy - jurisdictional objection - not an employee – no intention to create legal relations – jurisdictional objection upheld – application dismissed.*

[1] The applicant, Mr Peter Hobbs, served as an officer for The Salvation Army for many years, beginning in 2009. He was dismissed from his role with The Salvation Army on 6 September 2023. On 26 September 2023, Mr Hobbs made an application to the Fair Work Commission (Commission) for relief from unfair dismissal under s.394 of the *Fair Work Act 2009* (Cth) (the Act).

[2] While The Salvation Army disputes that any dismissal was unfair, it also contends that Mr Hobbs was not an “employee” and therefore is not a person capable of obtaining a remedy for unfair dismissal under the Act. This decision addresses the question of whether Mr Hobbs is an employee or not, as that is a question that goes to the Commission’s jurisdiction to make any order for an unfair dismissal remedy.

[3] In short, The Salvation Army’s objection raises two issues:

- First, was there any intention by the parties to create binding contractual relations between them; and
- Second, if so, was the contract between the parties a contract of employment?

[4] For the reasons that follow, I am satisfied that there was no intention to create binding contractual relations between the parties and, therefore, it is unnecessary to answer the second question. It also follows that Mr Hobbs’ application for an unfair dismissal application must be dismissed.

[5] Upon the matter being allocated to me, I issued directions for the filing of evidence and submissions. Mr Hobbs filed a witness statement on his own behalf. The Salvation Army filed witness statements for Colonel Wendy Walters (Head of Officer Personnel at The Salvation Army Australia), Colonel Kelvin Merrett (Divisional Commander of the Victoria Division of The Salvation Army Australia), Mr Frank Piscioneri (the Payroll Manager for The Salvation Army Australia), and Major Peter Walker (Area Officer for Southwest Victoria, for The

Salvation Army Australia). At the hearing, The Salvation Army also tendered a letter, without objection, dated 29 November 2009 that had been inadvertently omitted from its witness evidence. Each statement was tendered and no witnesses were required for cross-examination.

[6] The parties each filed written submissions, as well as their counsel making oral submissions, which I record were of significant assistance.

### **Factual background and findings**

[7] As Mr Hobbs' written submissions succinctly state<sup>1</sup>, The Salvation Army as an institution needs little introduction. While in more contemporary times in Australia, that observation is plainly correct regarding The Salvation Army's charitable activities, its Christian core and structure is perhaps less well known.

[8] As stated by Colonel Walters, The Salvation Army is an international Christian organisation which seeks to spread the message of Jesus Christ through is evangelical and social work. It is an organisation established by its founder, William Booth, in London in 1865.

[9] In evidence before me were The Salvation Army "Orders and Regulations for Officers" (Officer Regulations), a lengthy document whose various parts were tendered and relied upon by both parties. In Volume 0, Chapter 2, of the Officer Regulations, the core mission statement for the respondent was stated as follows:

"The Salvation Army, an international movement, is an evangelical part of the universal Christian Church.

Its message is based on the Bible.

Its ministry is motivated by the love of God.

Its mission is to preach the gospel of Jesus Christ and to meet human needs in his name without discrimination."

[10] In 'Volume 2 – Procedures', Part 1, Chapter 1 of the Officer Regulations, the character and purpose of the Salvation Army is described as follows:

**1. The Salvation Army defined.** The Salvation Army is a movement composed of people who know their sins forgiven, and who are united in love to God and people for the common purpose of bringing others to Jesus Christ.

**2. Its purpose - Salvation.** The word 'salvation' indicates the purpose of the movement: namely, to persuade all people to accept the salvation provided for them in Christ and submit to God the Father as their supreme ruler. Such a commitment involves embracing God's laws and rendering loving service whenever opportunity arises.

**3. Its character - an Army.** The word 'Army' indicates that the movement is a fighting force, constantly at war with the powers of evil, and also that, in certain features of its structure and government, it resembles a military force.

4. **Official name.** The official name of the movement is 'The Salvation Army'. Its exclusive right to this name is, in many countries, recognised by law.”

[11] There was no dispute that The Salvation Army, as the “movement” described above, is in legal parlance an unincorporated association. In the material before me, there was reference to the ‘Salvation Army Australia’, which I understood to simply be a reference to the part of The Salvation Army located in Australia, although whether it constitutes its own unincorporated association is not a matter that affects my decision. Unless otherwise described in these reasons, a reference here to ‘The Salvation Army’ respondent is a reference to it in Australia.

[12] Historically, The Salvation Army was divided into two Territories, being the Australia Eastern and the Australia Southern Territories, although since 1 December 2018 there is now a single Australia Territory led by a Commander who reports directly to International Headquarters (in London).

[13] Colonel Walters’ evidence was that the Church arm of The Salvation Army comprises of a number of ‘Corps’ (which she also described as ‘congregations’) across the country. The Corps are unincorporated.

[14] Organisationally, the structure of The Salvation Army is reflective of an “army” chain of command. In Australia, the Territorial Commander (who reports directly to International Headquarters) heads the chain of command. The order of command is then the Chief Secretary, Assistant Chief Secretary, Divisional Commanders, Area Officers and Corps Officer / Officer. This will be described further, below.

[15] Separate to The Salvation Army are various property trusts. There are seven property trusts reflecting the six Australian States and Northern Territory. Each trust is supported by a statute from the relevant jurisdiction. In Victoria, where Mr Hobbs was based, the property trust is called ‘The Salvation Army (Victoria) Property Trust’ and is a body corporate established by *The Salvation Army (Victoria) Property Trust Act 1930 (Vic)*.

[16] The respective incorporated and unincorporated structures have been described above, because Mr Hobbs’ submissions in reply contained an application to name *The Salvation Army (Victoria) Property Trust* in the alternative to the named respondent, *The Salvation Army*. The application was made “in the event that the Commission finds [the property trust entity] is the employer”. That application appears to have been made out of an abundance of caution, and no objection was taken by the respondent. Nonetheless, neither party contended that the property trust was the proper entity as the putative employer and both parties contended that the putative employer (if there was one) was The Salvation Army, a view which I share. As such, the application to amend the identity of the proper respondent is refused.

[17] Mr Hobbs’ indirect and direct dealings with The Salvation Army comfortably predated his formal commencement as an army officer of the respondent on 25 November 2009.

[18] Mr Hobbs was raised by parents who were themselves members of The Salvation Army. From December 1999, Mr Hobbs worked for The Salvation Army as a Communications Journalist and Video Producer.

[19] In January 2004, Mr Hobbs made an application to The Salvation Army for ‘Training and Service as a Lieutenant in The Salvation Army’. That application contained a number of matters (many of a personal and religious nature) that required information. For example:

- The form sought details of marital status, including divorces or whether ‘Courting’ a person (and, if so for the latter, whether courting with a possible view to engagement).
- In relation to the spouse or intended spouse, the form asked “Is this person a Salvationist?”
- The form asked what was the “intention of your spouse/intended spouse regarding Salvation Army service”.
- The form required details of any divorce and of Mr Hobbs’ family history.
- In the Personal Details part of the form, Mr Hobbs was asked about prior consumption of intoxicating drink, tobacco, or illicit drugs. The form asked about any experience with the occult, whether he was a Freemason or a member of any secret society.
- The form asked for details about education and employment history albeit, the former included details of books and periodicals read in the last 6 months, and the latter included any employment history with The Salvation Army.
- The form asks for Salvation Army affiliation and experience. That included the place and date of conversion, the date sworn in as a senior soldier, whether the applicant was previously a member of another denomination, details of involvement in Salvation Army work, and details of local officer positions held or previously held.
- The section of the form titled Personal History asks the applicant to give a brief account of:
  - the applicant’s Life History,
  - Account of Conversion,
  - Personal Experience of Holiness,
  - Accounts of efforts made to win others to Christ and to serve those in need,
  - The applicant’s understanding of the aim and purpose of The Salvation Army and the role of the Lieutenant/Officer in the world today.

[20] Contemporaneously, Mr Hobbs signed on 10 January 2004 a document titled “Undertakings Entered Into By A Lieutenant Of The Salvation Army” (2004 Undertakings). Other than the signature block, the 2004 Undertakings were as follows:

**“UNDERTAKINGS ENTERED INTO BY A LIEUTENANT OF THE SALVATION ARMY**

The relationship between The Salvation Army and its lieutenants is sacred. This needs to be cherished and preserved as a means of achieving God-given common spiritual purposes. Therefore, in addition to the promises made on becoming a soldier, a Salvationist is appointed as a lieutenant on condition that the following promises and declarations are made:

1. Having a sense of vocation to spiritual service in The Salvation Army, I give myself of my own free will to be a lieutenant of The Salvation Army and to engage in its ministry, for a term of years, in keeping with orders and regulations. As a lieutenant I acknowledge that, although I am not a commissioned and ordained officer of the

Army, the fundamental nature of my relationship to the Army and of the Army to me is spiritual.

2. I understand and agree that there is no contract of service or of employment nor any other legal relationship between the Army and me. Accordingly the Army shall have no legal claims upon me nor I upon the Army.
3. I understand and agree that although I may expect to receive, and every attempt will be made to provide, allowances according to an official scale no allowance is guaranteed to me. I accept that any such allowance is not a wage, salary, reward or payment for services rendered but is a means of freeing me from the need to engage in secular employment.
4. I will observe the orders and regulations of The Salvation Army as issued from time to time, in particular *O&R for the Lieutenants System*. I recognise that the Army seeks to create and administer orders and regulations in a manner consistent with Christian principles.
5. I declare my belief in the truths to the doctrines of The Salvation Army. I will teach them faithfully and will seek to make my life a reflection of those truths.
6. I will look to my leaders in the Army to be sensitive to the guidance of God in giving me appointments and responsibilities. I will accept the direction of my leaders under the appointments system knowing that they will try to place me where I can best advance the cause of Jesus Christ. I will faithfully fulfil all the requirements of my appointments.
7. I will trust my leaders in the Army to provide me with opportunities for personal development in order to enhance my service and its effectiveness. I will use responsibly and wisely all such opportunities, accepting that my leaders have a duty to encourage me, enlarging my vision of all I can become in Christ.
8. I will expect my leaders to evaluate periodically my progress and personal effectiveness in ministry. I acknowledge that I am accountable to them under God for the mature and proper discharge of my duties. I will accept and act upon formal recommendations for my improvement, knowing that persistent ineffectiveness could lead to the termination of my service.
9. Unless clearly authorised by my leaders in accordance with orders and regulations, I will not engage in secular employment, paid or unpaid, accepting that I must be totally involved in the sphere of Army service to which I am appointed.
10. I will respond wholeheartedly to efforts by my leaders to encourage me in the use and development of my creative abilities. I agree to place any such abilities at the disposal of the Army for the furtherance of its mission, and in accordance with orders and regulations.

11. I will not seek or encourage any presentation, gift or testimonial to myself, or use my position as a lieutenant for personal gain.
12. I undertake to account for all monies and other assets entrusted to me and to keep and make available for inspection and audit purposes all records, accepting my responsibilities as a Christian steward of the resources placed under my control.
13. I will conform to the Army's requirements in my territory of service regarding the wearing of uniform.
14. Supported by the pastoral care and respect of my leaders, I will seek to be a worthy lieutenant of the Army. I will avoid in word or action anything likely to injure the body of Christ or that part of it which is The Salvation Army.
15. I recognise that I may be required to officiate at Salvation Army ceremonies, with the possible exception of marriage ceremonies, which are subject to local legal requirements and territorial policy.
16. I accept that when my lieutenant service ends, I will cease to use the designation and insignia of lieutenant. I will return to the Army all its monies and other assets entrusted to me, and will vacate any accommodation which may have been provided for me.
17. When my lieutenant service ends, as a faithful soldier I promise that I will prayerfully and carefully consider my future service for Christ in the Army, and that I will be obedient to the leadings of the Holy Spirit."

**[21]** As events transpired, Mr Hobbs did not commence training at that point. In about 2006, he took 18 months off and travelled overseas working with his wife before returning to Australia to train to be an Officer.

**[22]** In 2007, Mr Hobbs accepted a call to Officership with The Salvation Army and, on 27 February 2007, he applied to enter training as an Officer of The Salvation Army. It is unnecessary to set the details of that application out but it is similar to, although shorter in form, the application from January 2004 described above. One aspect of that form required completing by a Corps Officer, who attested his belief that Mr Hobbs was worthy of consideration for the following reasons:

"Peter is a dedicated christian and committed Salvationist with a passion for ministry & mission. He is fervent about his calling and possesses excellent leadership qualities."

**[23]** On 26 June 2007, Mr Hobbs made a formal application for 'Training and Service as an Officer in The Salvation Army' (2007 Officer application). The form was similar, although not identical, to, the form submitted in January 2004 and described above. It is unnecessary to recite its details here, although I briefly record it required responses for sections on Marital Status, Courtship (where not married), Personal Data, Education, Salvation Army Affiliation, Salvation Army Experience, Employment, and Personal History. The 'Personal History' section was broadly as set out in the 2004 application form described above.

[24] The signing page of the 2007 Officer application had a prominent heading that asked “Do you believe in and accept the doctrines of The Salvation Army?” The doctrines listed were as follows:

**“DO YOU BELIEVE IN AND ACCEPT THE DOCTRINES OF THE SALVATION ARMY?”**

1. WE BELIEVE that the Scriptures of the Old and New Testaments were given by inspiration of God, and that they only constitute the divine rule of Christian faith and practice.
2. WE BELIEVE that there is only one God who is infinitely perfect, the Creator, Preserver, and Governor of all things, and who is the only proper object of religious worship.
3. WE BELIEVE that there are three persons in the Godhead - the Father, the Son, and the Holy Ghost, undivided in essence and co-equal in power and glory.
4. WE BELIEVE that in the person of Jesus Christ the divine and human natures are united, so that He is truly and properly God and truly and properly man.
5. WE BELIEVE that our first parents were created in a state of innocence, but by their disobedience they lost their purity and happiness, and that in consequence of their fall all men have become sinners, totally depraved, and as such are justly exposed to the wrath of God.
6. WE BELIEVE that the Lord Jesus Christ has by His suffering and death made an atonement for the whole world so that whosoever will may be saved.
7. WE BELIEVE that repentance towards God, faith in our Lord Jesus Christ, and regeneration by the Holy Spirit, are necessary to salvation.
8. WE BELIEVE that we are justified by grace through faith in our Lord Jesus Christ and that he that believeth hath the witness in himself.
9. WE BELIEVE that continuance in a state of salvation depends upon continued obedient faith in Christ.
10. WE BELIEVE that it is the privilege of all believers to be "wholly sanctified", and that "their whole spirit and soul and body" may "be preserved blameless unto the coming of our Lord Jesus Christ" (1 Thessalonians 5:23).
11. WE BELIEVE in the immortality of the soul; in the resurrection of the body; in the General judgment at the end of the world; in the eternal happiness of the righteous; and in the endless punishment of the wicked.”

[25] On 4 July 2007, Mr Hobbs made a declaration making fresh undertakings (the 2007 undertakings) which were in similar, but not identical, form to the 2004 undertakings. Given their significance to the matter before me, I set them out in full.

**“UNDERTAKINGS ENTERED INTO BY AN OFFICER OF THE SALVATION ARMY**

The relationship between The Salvation Army and its officers is sacred. This needs to be cherished and preserved as a means of achieving God-given common spiritual purposes. Therefore, in addition to the promises made on becoming a soldier and those in the officers' covenant, a Salvationist is commissioned and ordained as an officer on condition that the following promises and declarations are made:

1. In response to the call of God, I give myself of my own free will to be an officer of The Salvation Army and to engage in its ministry. As an officer I acknowledge that the fundamental nature of my relationship to the Army and of the Army to me is spiritual.
2. I understand and agree that there is no contract of service or of employment nor any other legal relationship between the Army and me. Accordingly the Army shall have no legal claims upon me nor I upon the Army.
3. I understand and agree that although I may expect to receive, and every attempt will be made to provide, allowances according to an official scale, no allowance is guaranteed to me. I accept that any such allowance is not a wage, salary, reward or payment for services rendered but is a means of freeing me from the need to engage in secular employment.
4. I will observe the orders and regulations of The Salvation Army as issued from time to time. I recognise that the Army seeks to create and administer orders and regulations in a manner consistent with Christian principles.
5. I declare my belief in the truths of the doctrines of The Salvation Army. I will teach them faithfully and will seek to make my life a reflection of those truths.
6. I will look to my leaders in the Army to be sensitive to the guidance of God in giving me appointments and responsibilities. I will accept the direction of my leaders under the appointments system knowing that they will try to place me where I can best advance the cause of Jesus Christ. I will faithfully fulfil all the requirements of my appointments to the best of my ability.
7. I will trust my leaders in the Army to provide me with opportunities for personal development in order to enhance my service and its effectiveness. I will use responsibly and wisely all such opportunities, accepting that my leaders have a duty to encourage me, enlarging my vision of all I can become in Christ.
8. I will expect my leaders to evaluate periodically my progress and personal effectiveness in ministry. I acknowledge that I am accountable to them under God



for the mature and proper discharge of my duties. I will accept and act upon formal recommendations for my improvement, knowing that persistent ineffectiveness as an officer could lead to the termination of my service.

9. Unless clearly authorised by my leaders in accordance with orders and regulations, I will not engage in secular employment, paid or unpaid, knowing that I have committed all my days and hours to Salvation Army officer mission and ministry.
10. I will respond wholeheartedly to efforts by my leaders to encourage me in the use and development of my creative abilities. I agree to place any such abilities at the disposal of the Army for the furtherance of its mission, and in accordance with orders and regulations.
11. I will not seek or encourage any presentation, gift or testimonial to myself, or use my position as a Salvation Army officer for personal gain.
12. I undertake to account for all monies and other assets entrusted to me and to keep and make available for inspection and audit purposes all records, accepting my responsibilities as a Christian steward of the resources placed under my control.
13. I will conform to the Army's requirements regarding the wearing of uniform.
14. Supported by the pastoral care and respect of my leaders, I will seek to be a worthy minister of Christ's gospel and officer of the Army. I will avoid in word and action anything likely to injure the body of Christ or that part of it which is The Salvation Army.

#### **DECLARATION**

1. PRAYERFULLY RESPONDING TO THE GUIDANCE OF GOD, AND WILLINGLY ACCEPTING THE UNDERTAKINGS ENTERED INTO BY AN OFFICER, I MAKE THIS APPLICATION FOR TRAINING AND SERVICE AS AN OFFICER OF THE SALVATION ARMY.
2. IN MAKING THIS APPLICATION, I AM UNAWARE OF ANY CIRCUMSTANCE WHICH, IF KNOWN, WOULD PREVENT MY ACCEPTANCE BY THE SALVATION ARMY.
3. I DECLARE IT TO BE MY INTENTION, AS GOD SHALL HELP ME, TO GIVE LIFELONG SERVICE AS A GOOD AND FAITHFUL OFFICER OF THE SALVATION ARMY. SHOULD UNFORESEEN CIRCUMSTANCES COMPEL MY WITHDRAWAL, I DISCHARGE THE SALVATION ARMY FROM ANY OBLIGATION.

**RE-AFFIRMATION**

(To be signed at the Training College, prior to commissioning)

AT THE CONCLUSION OF MY TRAINING AS A CADET, I AM HAPPY TO CONFIRM THE UNDERTAKINGS PREVIOUSLY GIVEN, AND LOOK FORWARD TO GOD'S BLESSING ON A LIFE OF DEDICATED SERVICE AS AN OFFICER OF THE INTERNATIONAL SALVATION ARMY."

[26] The part of the above document signed by Mr Hobbs in 2007 was at the Declaration, set out above. While the Re-Affirmation text was part of the document, it was not signed at the time.

[27] On 29 January 2008, Mr Hobbs began his training as a 'Cadet'. He completed two years at training college, a Diploma in Theology, and a Certificate of Officer Training.

[28] By November 2009, Mr Hobbs had qualified for his grant of Officer's Commission with The Salvation Army.

[29] On 12 November 2009, Mr Hobbs signed the "Re-Affirmation" part of the 2007 undertakings.

[30] On 25 November 2009, Mr Hobbs signed an "Officer's Covenant" and received his Officer's Commission.

[31] The Officer's Covenant was in the following terms:

**"Called by God**

To proclaim the gospel of our Lord and Saviour, Jesus Christ  
as an officer of the Salvation Army.

**I bind myself to Him in this solemn covenant:**

to love, trust and serve Him supremely all my days;  
to live to win souls and make their salvation the first purpose of my life;  
to care for the poor, feed the hungry, clothe the naked, love the unloveable,  
and befriend those who have no friends;  
to maintain the doctrines and principles of The Salvation Army and,  
by God's grace, to prove myself a worthy officer.

Done in the strength of my Lord and Saviour this the Twenty-fifth day of November,  
2009."

[32] As Colonel Walters describes in her evidence, officers within The Salvation Army are ordained ministers who have entered into a covenant relationship with God and The Salvation Army, committing their time to the service of The Salvation Army.

[33] The Officer Regulations<sup>2</sup> are matters that Mr Hobbs had expressly agreed to observe upon the giving of the 2007 undertakings. It is simply not practicable to set that document out in full or even to attempt to summarise it, given its length. I will extract some parts relied upon by the parties.

[34] In Volume 2 (Procedures), Part 1 (The Salvation Army), Chapter 4 (Government), the Officer Regulations describe the General (which is now a body corporate, established by legislation, seated in London) at the apex of the Church hierarchy.

#### “Section 4. The Generalship

1. **The General in control.** According to its legal Constitution, the Army shall always be under the oversight, direction and control of the General (see *Chapter 2, paragraph 2(a)* of this Part).

2. **How appointed.** Each General shall be elected by a High Council.

3. **In case of difficulties.** Means are provided for removing a General who is found to be unfit for office, and also for the election of a General by a High Council whenever, from any cause, there should, in fact, be no General.

4. **Extent of the General's control.** The control of the General extends to every part of The Salvation Army, and to every phase of its operations throughout the world. In particular, the General:

- (a) directs all existing work;
- (b) orders or approves all extensions both in regard to work in new countries and new kinds of service in countries where the Army already exists;
- (c) appoints TCs and other leading officers;
- (d) authorises the commissioning of officers and their promotions;
- (e) either directly promotes or approves promotion to higher ranks;
- (f) regulates the literature, music and songs of the Army;
- (g) approves all titles and uniform.

5. **The General's means of control.** The chief means by which the General controls the world-wide operations of the Army are through:

- (a) orders and regulations which all officers and soldiers are under obligation to obey;
- (b) appointing officers to represent the General according to the requirements of the salvation war;
- (c) receiving reports regularly;
- (d) sending specially selected representatives to examine the work, consult with officers and submit reports;
- (e) personal visits;
- (f) communications in various Army publications.

6. **The General's authority.** The strength of the General's position is fourfold:

- (a) The General is the international leader of The Salvation Army;

- (b) The General approves all regulations and directs Army operations throughout the world;
- (c) The General derives confidence through being personally submissive to the leadings of the Holy Spirit;
- (d) The General enjoys the loyalty and obedience of Salvationists throughout the world.”

[35] In Volume 1 (Principles), Part 2 (The Officer’s Principal Responsibility – Soul Winning), Chapter 1 (Introduction), the Officer’s Rules state:

“1. **Primary purpose.** Salvationists believe that God raised up The Salvation Army primarily to call people to repentance and faith in Jesus Christ as Saviour and Lord. In this belief Salvationists seek to obey the command of Jesus to his disciples as recorded in the Gospel of Matthew (28:19, 20).

2. **The first duty of an officer.** Regardless of appointment all officers are charged to give priority to this task and by teaching and example to encourage their fellow-Salvationists to the same commitment.

3. **Take priority.** There will be other responsibilities making claims upon an officer's time such as the pastoral care of people, business and administrative procedures, organisation, fund-raising and many more. Nothing, however, should be allowed to take priority over the task of calling people to submit to Jesus Christ and helping them grow in the faith.”

[36] Financial arrangements for Officers are described in Volume 2 (Procedures), Part 7 (An Officer in Relation to the Army), Chapter 1 (Officership in the Army). Section 6 of that chapter states (some parts omitted for brevity):

“**Section 6. Financial Arrangements**

1. **Provision for basic needs.** An officer voluntarily undertakes to work for God, in Salvation Army service, without guaranteed financial provision of any kind. However, the Army seeks to make provision for an allowance (as distinct from a wage or salary) sufficient for basic needs and in accordance with an official scale which is periodically adjusted in each territory. Arrangements for the payment of an allowance are not made on a commercial or legal basis, nor paid as a reward for services rendered. Such service for the salvation of the world, rendered in response to the call of God, cannot be subject to any material compensation. Rather is the allowance given to relieve an officer of the need to engage in secular employment, and for the purpose of freeing those who have consecrated the whole of their time and energies to Christ in this way from the need to earn a livelihood.

2. **Official scale.** The basic allowance will be on the same scale for officers of a territory regardless of the appointment or qualifications which they hold. The years of service of the longer-serving spouse will be used as a calculating base for allowances for married officers.

3. **Quarters.** In addition to a direct allowance an officer is provided with either Salvation Army-owned accommodation or given a rent allowance to cover alternative accommodation.

4. **Implications of buying or owning a house.** When an officer builds or purchases a house for personal use, no special consideration can be given to the officer concerned with regard to future appointments. Officers owning their own houses are fully responsible for all the expenses incurred.

5. **No unauthorised remuneration.** An officer may not supplement official allowances by engaging in any trade, profession or money-making occupation.

6. **Remuneration to SA funds.** ...

7. **No gifts to be solicited.** ...

8. **What legacies are permitted.** ...

9. **Widows, widowers, divorced persons.** ...

10. **Widow's, widower's allowance.** ...

11. **Termination grant.** An officer who resigns or is dismissed will receive a termination grant. The provision of such grant will be in accordance with territorial policy as approved by IHQ.

12. **'Tent-maker' ministry.** At territorial discretion, in exceptional circumstances, designated officers may be allowed by the territorial commander to engage in part-time paid secular employment in order to further the Army's mission. The following conditions will be observed: ... ”

[37] Mr Hobbs' evidence was that, upon becoming an Officer, his duties were largely focussed upon developing The Salvation Army's presence in the Bellarine Peninsula region. Mr Hobbs' official title within The Salvation Army was Corps Planting Officer. Mr Hobbs explained that, as a Planting Officer, his role was “to do just that – to plant something new, and establish a brand new expression of the Respondent in that Community.”

[38] Mr Hobbs says his duties as an Officer were “fundamentally very different” to that of a regular corps church-based Officer. He described his role as “98% community-based”. Throughout his time as an Officer (i.e. 2009 to 2023), he describes various duties he undertook as including family support, supporting people affected by family violence, working with isolated people, beginning an outreach van service, school mentor work, some chaplaincy work for a local primary school, working with youth and well-being groups, coordinating for The Salvation Army's emergency services support, managing three thrift shops.

### **Applicable principles – intention to create legal relationships**

[39] The starting point – and, for reasons I explain below – I consider the end point for consideration of whether enforceable contractual relationships were established in a matter such as this one commences with the High Court of Australia’s decision in *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95 (*Ermogenous*).

[40] In *Ermogenous*, the High Court considered the circumstances where Archbishop Ermogenous had made a claim against the Greek Orthodox Community of SA Inc for unpaid annual leave and long service leave, both of which required him to be an employee.

[41] As stated by the High Court plurality (Gaudron, McHugh, Hayne and Callinan JJ) at [24]:

““It is of the essence of contract, regarded as a class of obligations, that there is a voluntary assumption of a legally enforceable duty.” To be a legally enforceable duty there must, of course, be identifiable parties to the arrangement, the terms of the arrangement must be certain, and, unless recorded as a deed, there must generally be real consideration for the agreement. Yet “[t]he circumstances may show that [the parties] did not intend, or cannot be regarded as having intended, to subject their agreement to the adjudication of the courts”.” (footnotes omitted, emphasis added).

[42] The High Court makes clear that in relation to the last-mentioned item regarding an intention to subject their agreement to the adjudication of the court, the inquiry “*may take account of the subject matter of the agreement, the status of the parties to it, their relationship to one another, and other surrounding circumstances*”<sup>3</sup>. It is because of the nature of that inquiry that there cannot be rules prescribing the “kinds” of cases where an intention should, or should not exist.

[43] The overriding inquiry is the intention of the parties. That intention is not the subjective intentions of the parties (let alone one of them). As stated in *Ermogenous* at [25] (emphasis added, footnotes omitted):

“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.”

[44] The Court then continued to explain that “presumptions” said to exist in particular types of cases are at best of no utility and at worst a distraction from the proper inquiry.

[45] At this point, there was some divergence between the parties regarding the application of court or tribunal decisions decided before *Ermogenous* and more generally.

[46] There were two decided cases brought to my attention specifically dealing with The Salvation Army, albeit not in Australia. The first case was *Rogers v Booth* [1937] 2 All ER 751

(Greene MR, Romer and Scott LJJ) (*Rogers*). The second was *Below v The Salvation Army New Zealand Trust* [2017] NZEmpC 87 (*Below*).

[47] The Salvation Army relied upon a decision of the Commission in *Fihaki v Uniting Church Australia Property Trust (Q)* [2023] FWC 1650<sup>4</sup> (*Fihaki*).

[48] In relation to cases decided before *Ermogenous*, counsel for Mr Hobbs emphasised that much of that jurisprudence is now to be approached with caution, as it was submitted those cases were decided in circumstances where the “presumption”, now eschewed by the High Court in *Ermogenous*, was either decisive or influential.

[49] The Salvation Army’s position was clearly reliant on the 2007 Undertakings and what it described as the fundamentally “spiritual” relationship between the parties. As to the undertakings, the second undertaking provided that:

“2. I understand and agree that there is no contract of service or of employment nor any other legal relationship between the Army and me. Accordingly the Army shall have no legal claims upon me nor I upon the Army.”

[50] There was no dispute between the parties that the relevant time in which the parties’ intention was to be assessed was in November 2009<sup>5</sup> or very shortly after when Mr Hobbs commenced work as an Officer. For this reason, I have not sought to address aspects of the evidence directed at how Mr Hobbs undertook work in practice, beyond the brief summary earlier.

[51] Mr Hobbs submitted there were three separate reasons why there should be found to be an employment relationship, notwithstanding the terms of the 2007 undertaking.

[52] The first is that the undertaking purporting to disclaim any employment relationship is simply inconsistent with the reality of the arrangements between the parties. The Officer Regulations are said to control the “minutia” of the arrangement between the parties, which speaks of a strongly “legalistic and regimented” set of rules between the parties. Adopting the memorable language of Gray J in *Re Porter; Re Transport Workers Union of Australia* (1989) 34 IR 179 at 184, Mr Hobbs submitted parties “cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck.”

[53] *Re Porter* was a decision concerning the (relatively) more familiar legal problem regarding the classification of a contract as contract of service or a contract for service, the highest authority for which is now in two High Court decisions in 2022.<sup>6</sup> As I did not understand either party to suggest that the principles in those decisions – as distinct from *Ermogenous* – were applicable to the question of whether there was an intention to subject their arrangement to the adjudication of the court, I say nothing further on them.

[54] In support of Mr Hobbs’ first proposition, he relies upon cases extending as far back as *Ellison v Bignold*<sup>7</sup> addressing whether a covenant would remain enforceable despite a purported disclaimer that it was not, a view reached after “laying aside the nonsense about agreeing and declaring without covenanting.”

[55] The above proposition was considered in a commercial context by the Privy Council in *Rose and Frank Company v J. R. Crompton and Brothers Limited & ors* [1925] AC 445 (*Rose and Frank Co*). *Rose and Frank Co* involved commercial dealings between three parties for the exclusive supply and purchase of carbonising paper, which was recorded in a written arrangement dated 8 July 1913. The arrangement was expressed to last for three years, subject to six months' notice. In August 1918, by correspondence, the arrangement was extended for a further three years.

[56] Notwithstanding the ostensible commercial contract in place between the parties, the arrangement contained what their Lordships described as a "remarkable clause", which was as follows:

"This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the Law Courts either of the United States or England, but it is only a definite expression and record of the purpose and intention of the three parties concerned, to which they each honourably pledge themselves with the fullest confidence-based on past business with each other-that it will be carried through by each of the three parties with mutual loyalty and friendly co-operation."<sup>8</sup>

[57] There was "no explanation upon the record" for such a clause and otherwise "no suggestion" as to its provenance or purpose. Notwithstanding its "remarkable" character, the Privy Council stated it "remains for the Courts to give proper effect to it."<sup>9</sup>

[58] Despite those arrangements, the parties made specific purchase orders, rendered invoices, made deliveries and made payments from time to time. It was in 1919, when relations between the parties were fractured, that the purchaser under the arrangements sought to enforce the exclusivity of the supply arrangement in the threat of a vendor selling directly to a customer.

[59] The Privy Council held that the 1913 memorandum, as restated in 1918, was unenforceable. The position was different for specific orders of supply, which gave rise to specific contractual obligations for each instance of supply. But as to the unenforceability of the primary arrangement, Lord Phillimore stated at 454:

"... I was for a time impressed by the suggestion that as complete legal rights had been created by the earlier part of the document in question, any subsequent clause nullifying those rights ought to be regarded as repugnant and ought to be rejected. This is what happens for instance in cases where an instrument inter vivos purports to pass the whole property in something either real or personal, and there follows a provision purporting to forbid the new owner from exercising the ordinary rights of ownership. In such cases this restriction is disregarded. But I think the right answer was made by Scrutton L.J. It is true that when the tribunal has before it for construction an instrument which unquestionably creates a legal interest, and the dispute is only as to the quality and extent of that interest, then later repugnant clauses in the instrument cutting down that interest which the earlier part of it has given are to be rejected, but this doctrine does not apply when the question is whether it is intended to create any legal interest at all. Here, I think, the over-riding clause in the document is that which provides that it is to be a contract of honour only and unenforceable at law."



[60] As to the instances of supply and purchase between the parties, Lord Phillimore stated at 455 (emphasis added):

“According to the course of business between the parties which is narrated in the unenforceable agreement, goods were ordered from time to time, shipped, received, and paid for, under an established system; but the agreement being unenforceable, there was no obligation on the American company to order goods or upon the English companies to accept an order. Any actual transaction between the parties, however, gave rise to the ordinary legal rights; for the fact that it was not of obligation to do the transaction did not divest the transaction when done of its ordinary legal significance. This, my Lords, will, I think, be plain if we begin at the latter end of each transaction.”

[61] Returning to the case before me, Mr Hobbs observes “there is tension between establishing a hierarchical structure along military lines, with expectations of strict compliance with orders made, and a contention that there is no legal relationship”. Mr Hobbs’ first submission is that “the self-serving attempt to deny legal relations should be put aside in favour of the reality of the relationship”. This proposition invokes the general principle stated by the Privy Council, being the “complete legal rights” had been established between the parties and the purported attempt to deny any employment relationship “ought to be regarded as repugnant and ought to be rejected”.

[62] Mr Hobbs’ second submission was that even if an employment relationship did not arise upon his commissioning as an Officer, it commenced once Mr Hobbs started being paid. On this submission, Mr Hobbs’ position was described as analogous with the position taken by Deputy President Colman in *Woldeyohannes v Zion Church in Melbourne Australia Inc* [2020] FWC 4194 (*Woldeyohannes*) at [38] – [39], where the employment relationship did not commence with ordination but upon being paid.

[63] The final – and as described by Mr Hobbs “perhaps most satisfactory” – way of addressing the relationship between the parties advanced by Mr Hobbs was that the relationship between the parties reflected in the undertakings of Officer’s Covenant were concerned with the “spiritual” relationship between the parties. Consistent with *Ermogenous* and *Woldeyohannes*, such a spiritual relationship can co-exist with an employment relationship, particularly where the bare indicia of an employment relationship requires little beyond “*identifying the parties, an agreement to serve, and the basic remuneration of the employee.*”<sup>10</sup>

[64] In the latter two categories, the New Zealand case of *Below* is illustrative of subsequent or separate dealings being capable of bespoke contractual arrangements (although not necessarily an *employment* arrangement). While the court in *Below* rejected the existence of any employment relationship, given the significant differences arising from the statutory definition of employment in the matter, that decision provides little assistance on the application of Australian law. However, the court was minded to acknowledge that (limited) contractual arrangements for training services might have existed.<sup>11</sup>

[65] I accept the various legal propositions advanced by Mr Hobbs. Where an arrangement establishes complete legal rights as recorded in the document in question, any subsequent clause nullifying those rights is repugnant. Similarly, it is undeniable that an employment relationship

can arise alongside a spiritual relationship. The issue for determination, however, is whether any of those outcomes were objectively intended.

[66] As was the case in *Rose and Frank Co*, the intention of the parties before me was expressly and unambiguously stated in the 2007 undertakings, and that intention disclaimed any employment. The objectively ascertainable subject matter of the agreement, the status of the parties to it, their relationship to one another, and other surrounding circumstances<sup>12</sup> all support that conclusion. Here, the Officership within The Salvation Army was a manifestly religious “calling”. It was a calling for life, eschewing material gain and outside employment, among many other matters.

[67] The Salvation Army would provide Mr Hobbs’ “basic needs” only. He was not paid a wage or salary, nor did he have defined hours but the fundamental relationship was that an “officer voluntarily undertakes to work for God, in Salvation Army service, without guaranteed financial provision of any kind.” This is but one example of the commitments made by an officer of The Salvation Army. These factors are supportive of the intention expressed by the 2007 undertaking (as reaffirmed), which was to deny the existence of an employment relationship or adjudication of disputes in a secular court.

[68] This is not a case where the critical term was buried in fine print or presented on a ‘take it or leave it’ basis. In Mr Hobbs’ case, he gave express undertakings that disavowed any legal relationship between the parties. There is no reason to doubt the sincerity of the parties in relation to those undertakings and good reasons to accept that the parties meant what they committed to solemnly, before God, and in accordance with the tenets of their religious beliefs.

[69] Contrary to Mr Hobbs’ submission that the undertakings and Officer’s Covenant were directed at the *spiritual* aspect of the parties’ relationship, those undertakings specifically eschewed “*employment*”. In this case, the undertakings and the Officer’s Covenant also contained a clear commitment to abide by the Officer Regulations. The subject matter of those regulations leaves little practical scope for the subject matter of an employment contract, even a barely stated employment contract for unspecified service. While I accept that the bare elements of an employment relationship are potentially *capable* of coexisting alongside a more prescriptive spiritual regime, the question remains whether that was *intended*. Analogously to a jar filled with sand, the fact that water *can* be poured into the jar and to sit conformably next to the sand does not mean the parties objectively intended to do so. The parties did not intend to do so here.

## Conclusion

[70] Returning to the issue posited by the High Court in *Ermogenous*, I find that the parties did not intend, or cannot be regarded as having intended, to subject their agreement to the adjudication of secular courts. It follows that there is no employment relationship between the parties and that Mr Hobbs’ application must be dismissed. An Order<sup>13</sup> giving effect to these reasons will be issued separately.



DEPUTY PRESIDENT

*Appearances:*

*R. Millar* of Counsel instructed by *T. McCredie* of Mazzeo Lawyers for the Applicant  
*M. Shand KC* of Counsel instructed by *R. Huntley* of Mills Oakley for the Respondent

*Hearing details:*

2023.  
Melbourne:  
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<sup>1</sup> Applicant's Outline of Submissions, [4].

<sup>2</sup> Attachment I to Colonel Walter's statement.

<sup>3</sup> *Ermogenous* at [25].

<sup>4</sup> An application seeking permission to appeal was refused: *Fihaki v Uniting Church Australia Property Trust (Q)* [2023] FWCFB 167.

<sup>5</sup> Transcript PN174 – PN175.

<sup>6</sup> *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1; *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

<sup>7</sup> (1821) 2 Jac & W 503 at 510.

<sup>8</sup> *Rose and Frank Co* at 451.

<sup>9</sup> *Rose and Frank Co* was referred to with approval by Dixon J in *Cohen v Cohen* (1929) 42 CLR 91 at 96, in *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556 by Barwick CJ (at 569) and Kitto J (at 584-585), with the latter cited with evident approval in *Tepko Pty Limited v Water Board* [2001] HCA 19 (2001) 206 CLR 1 at [140] (Kirby and Callinan JJ).

<sup>10</sup> Relying upon M Irving 'The Contract of Employment' at para 3.48.

<sup>11</sup> *Below*, [87] – [92].

<sup>12</sup> *Ermogenous* at [25].

<sup>13</sup> [PR770434](#)