[2024] FWC 216 [Note: An appeal pursuant to s.604 (C2024/924) was lodged against this decision.]

DECISION

Fair Work Act 2009
s.365 - Application to deal with contraventions involving dismissal

Mr Mark Feldschuh
v
Strong Room Technology Pty Ltd
(C2023/6110)

COMMISSIONER CONNOLLY MELBOURNE, 25 JANUARY 2024

Application to deal with contraventions involving dismissal – jurisdictional objection – whether the applicant was dismissed – whether the applicant was an employee – applicant not an employee – applicant not dismissed – jurisdictional objection upheld – application dismissed.

[1] On 6 October 2023, Mr Mark Feldschuh (the Applicant) lodged a general protections application against Strong Room Technology Pty Ltd (the Respondent or Strong Room) under s.365 of the *Fair Work Act 2009* (the Act) alleging that on 15 September 2023, he was dismissed in contravention of the general protection provisions of the Act.

[2] On 27 October 2023, the Respondent filed a Form F8A Employer Response and raised a jurisdictional objection, asserting that Mr Feldschuh had not been dismissed. The Respondent contended that Mr Feldschuh was not an employee, but a director of the company and consequently could not have been dismissed.

[3] As a result of the decision in *Coles Supply Chain Pty Ltd v Milford*,[1] I am required to determine the jurisdictional objection, whether the Applicant was dismissed, before I can exercise powers under s.368 of the Act to deal with the dispute about whether the dismissal was in contravention of the general protections provision.

[4] On 3 November 2023, Directions were issued for the filing of material in respect of the jurisdictional objection, and a Hearing was scheduled for 28 November 2023.

[5] In summary, I have found that whilst Mr Feldschuh's relationship with Strong Room was of value to both himself and the Respondent, this did not constitute an employment relationship and, consequently, cannot be the case of a dismissal within the meaning of s.386 of the Act.

[6] The basis of this finding and the Order made by the Commission are set out in this decision.

Background

[7] The relevant background and uncontested facts in the matter are as follows:

- The Respondent in this matter, Strong Room Technology Pty Ltd (**Strong Room**) is a platform technology company founded in 2017 largely operating in the pharmaceutical, health and aged care industries.

- Towards the end of 2019, the Applicant was introduced to Mr Max Mito, one of the founders of the Respondent, (the current CEO and Executive Director) because of his experience and expertise with businesses in the pharmaceutical and associated industries.

- The Applicant, Mr Mark Feldschuh, is a former proprietor of pharmacies with extensive expertise, experience and connections within the pharmaceutical and associated health care industries.

- Following this introduction, Mr Feldschuh undertook an informal business assessment of company which he provided to Mr Mito.

- In approximately December 2019, Mr Feldschuh was presented with an opportunity to become a Director of the Respondent and to purchase, and be granted, shares in the company, which he accepted.

- Subsequently, Mr Feldschuh actively undertook his duties with the Respondent, making a positive and valuable contribution to the rapid period of growth for company.

- In December 2020, the company Board agreed to formalise Mr Feldschuh's appointment as a Board Director by entering into written agreement with him. The terms of this agreement were set out in a formal Non-Executive Director Agreement dated 20 December 2020 and signed by both Mr Mito and Mr Feldschuh.

- Schedule 1 of this Agreement specified the duties of the Applicant under the Agreement as:[2]

    - *Technology fully integrated partner (example FRED NXT)*

    - *Supply agreement with a group of more than locations (example Direct Chemist Outlet, Ramsey Health etc…)*

    - *Independent contracts of 30 supply agreement (example supply agreement with independent pharmacies such as David Nolte Pharmacy)*

    - *Investment group to commit at least $200,000 AUD within the 24 month period.*

- Mr Feldschuh successfully engaged in discharging these duties, exceeding each of the expectations over the period of his engagement with the Respondent.

- In August 2021, the company shareholders agreed to a twelve month extension of Mr Feldschuh's appointment as a director.

- On the 12 September 2023, a circulating resolution of the directors of the company unanimously resolved that Mr Feldschuh be removed as a director of Strong Room. Mr Feldschuh's relationship with the company officially came to an end on the 15 September 2023.

- During the course of his engagement with the Respondent, Mr Feldschuh was paid for his services, at an initial agreed amount of $120,000 per annum which had increased to $200,000 by the time the relationship had come to an end.

Legislation

[8] Section 365 of the Act provides:

"**365 Application for the FWC to deal with a dismissal dispute**

If:

(a) a person has been dismissed; and

(b) the person, or an industrial association that is entitled to represent the industrial interests of the person, alleges that the person was dismissed in contravention of this Part;

the person, or the industrial association, may apply to the FWC for the FWC to deal with the dispute."

[9] Section 386 of the Act provides the meaning of dismissed:

"**386 Meaning of dismissed**

(1) A person has been dismissed if:

(a) the person's employment with his or her employer has been terminated on the employer's initiative; or

(b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer."

The Hearing

[10] A Hearing was conducted in person, on 28 November 2023, commencing at 10:00 AM. Both the Applicant and the Respondent sought leave to be represented pursuant to s.596 of the

Act, permission was granted. The Applicant was represented by Mr Rohan Millar (of Counsel), and the Respondent was represented by Mr Anthony Denton (of Counsel).

[11] A digital court book, containing all materials filed by the parties was compiled and distributed to the parties prior to the Hearing. I received the entirety of the digital court book into evidence, subject to appropriate weight being given to the evidence that was tainted by opinion, irrelevance or hearsay.

The Respondent's Submissions

[12] The principal submission of the Respondent is that in order for Mr Feldschuh to be able to proceed with this application he must first establish if he was an employee within the meaning of s.335 of the Act. It is the Respondent's position that the Applicant was not an employee within the meaning of the Act, but rather a Non-Executive Director as set out in their written agreement of 20 December 2020. On this basis, the Respondent asserts the application should be dismissed.

[13] Advancing this position, the Respondent has presented written submissions, and submissions in reply along with witness statements from Mr Max Mito supported by associated documents.

[14] Section 335 of the Act defines an "employee" to have its ordinary meaning. Section 15 of the Act provides a reference that an employee with its ordinary meaning "includes a person who is usually an employee". The Respondents submits there is no legal basis that a non-executive director appointed pursuant to a company constitution is usually an employee and that therefore the ordinary meaning of the term "employee" is the meaning at common law.

[15] On this basis the Respondents relies on the consideration of whether Mr Feldschuh was an employee at common law as set out by the High Court in *Construction, Forestry, Maritime, Mining and Energy Union v* ***Personnel Contracting*** *Pty Ltd*[3] and *ZG Operations Australia Pty Ltd v* ***Jamsek***[4]; [2022] HCA 2.[5]

[16] Consistent with these authorities, the Respondent submits that test to be applied to determine if Mr Feldschuh is an employee or not at common law can be summarised as follows:[6]

- Whether the rights and duties of the parties are contained in a written contract (and the contract is not a sham), the obligations established by that contract are decisive.

- To ascertain the relevant rights and obligations, the written contract is to be construed in accordance with established principle of contractual interpretation.

- The characterisation of the relationship between the parties depends on their contractual rights not on the circumstances, facts, or events that do not affect those rights meaning that a "wide ranging review of the entire history of the parties dealings is neither necessary nor appropriate for the purpose of characterising the relationship.

- Once the contours of the legal relationship are identified, its characterisation often hinges on the degree to which the putative employer has right to control how, when and whether the putative employee performs the work.

- As Keifel CJ, Keane and Elderman JJ state in *Personnel Contracting* at [73]; 'the existence of a right of control by a putative employer over the activities of a putative employee serves to sensitise one to the subservient and dependent nature of the work of an employee, so as to assist in an assessment of whether a relationship is properly to be regarded as a contract of service rather than a contract for services."[7]

- The contractual provisions likely to be relevant include those that deal with the mode of remuneration, provision and maintenance of equipment, the obligation to work and hours of work, provision for holidays, deduction of income tax, whether work can be delegated, and the right to exercise discretion and control.

- The label that the parties attach to their relationship is not determinative and rarely of assistance.

[17] Advancing this position, the Respondent contends that the Non-Executive Director Agreement exhaustively records the agreement reached between the parties by virtue of Clause 7.3 of the Agreement; that the agreement is not a sham and that, as required by the High Court authorities, the obligations established by the agreement are decisive of the character of the relationship.

[18] The Respondent proceeds with an analysis of the written agreement between the parties, a summary of which is set out below:[8]

- The background and surrounding circumstances include the Applicant making a financial investment in the business and that there as an awareness of the companies constitution and the duties of a director who is *"appointed",* distinct from those of an employee who is *"engaged",* at the time the relationship commenced in December 2019.

- Clause 1 expressly provides for the Applicant's appointment, not *"employment"* or *"engagement*".

- Clause 2 provides the Applicant is responsible for making himself *"aware"* of his duties and obligations, and that the only obligation on the Applicant is to devote *"such time and attention as is necessary"* for the proper discharge of his duties. There is no provision for the Respondent to "direct" the Applicant how, when or where this is to occur, only provision that the Respondent *"anticipates"* the Applicant spend not less than one day a month discharging his duties and that he was to use his *"best endeavours"* to attend meetings.

- Clause 3 provides for fees and expenses to be paid for the Applicants role as a Director and that share options may also be granted as approved by the Board, but makes no reference to Applicant earning a *"salary"* or *"wage"*.

- Clauses 4 imposes obligations of confidentially consistent with s.183 of the Corporations Act and Clause 5 requires the provisions of information by the Applicant to allow compliance with the statutory requirements governing corporations and directors.

- Clause 6 provides for the termination of the Applicant's "appointment" as a Director and makes no reference to "employment", "dismissal", or "minimum notice" periods as are typically owed employees on a termination of their employment.

- Clause 7 provides that the company property belongs to it and that the agreement "***constitutes the entire agreement and understanding"*** between the parties as to the Applicants appointment as a director.

[19] On this analysis, the Respondent submits that nothing in the written and complete agreement between the parties supports a finding that the Applicant was a ***"employee"*** within the meaning of the Act. That all terms of this agreement are consistent with the contractual relations that the parties intended to create, being the appointment of the Applicant as director to its board. Further, there is no right of control of the Respondent over the Applicant, no obligation of obedience or any term in the document that would be expected in a contract of employment.

[20] On this basis, the Respondent submits that the application should be dismissed for want of jurisdiction, with costs.

[21] In support of these submissions, Mr Max Mito, Co-Founder and CEO of the Respondent, provided two witness statements and gave sworn evidence in proceedings. In summary, Mr Mito's evidence is consistent with that set out above. His experience of the relationship between the Applicant and the Respondent is as has been recorded in the Non-Executive Director Agreement reached between the parties as was intended.

[22] His evidence is that at no time has this changed. While acknowledging that Mr Feldschuh has been successful in the discharge of his duties, providing significant value to both him individually and the business, and that there were periods where Mr Feldschuh certainly did work full time hours or more, Mr Mito maintains that this was always in performance of the specific duties set out in their agreement or other ordinary duties required of him as a director that were also applicable to other directors.

[23] In his evidence, Mr Mito submits that at the time of his first meeting with the Applicant, both he, his colleagues and their business was at its formative stage. It was a startup business in the technology sector, both himself and his co-founders were not long out of university and not skilled, aware or experienced in business, the pharmaceutical industry, employment or corporate law.

[24] In particular, he submits, that he was not acutely aware of the distinctions between an employee and a director. In this context, he concedes that Mr Feldschuh's experience, contacts and expertise in the pharmaceutical industry was of particular interest and of value to a developing Strong Room. Further, that it was in recognition of learning from and capturing this value that the company proposed entering into the agreement with the Applicant that he join

the board as a non-executive director, paying him shares during this period for the performance of his duties and providing him an opportunity to make an investment in the business. It was also agreed that Mr Feldschuh would be described as a "Co-Founder" of the company.[9]

[25] Despite this context, Mr Mito maintains that the agreement the company and Mr Feldschuh entered is the one defined and provided by the written agreement. Further, he indicates that as the business developed and become more mature over the next 12 months, the board of the company resolved to formalise Mr Feldschuh's appointment as director in a written agreement.

[26] However, Mr Mito stresses at no time was it ever discussed or agreed that Mr Feldschuh's role would change from his initial appointment as a non-executive director and Co-Founder.

[27] It is Mr Mito's evidence that the relationship continued and developed on this basis up to 25 August 2021 when the company shareholders agreed at an annual shareholder meeting to renew Mr Feldschuh's agreement for a further 12 months on the existing terms, save for Mr Feldschuh receiving remuneration of $200,000 per annum in respect of his appointment or the equivalent value in shares. The motion also provided a capacity for this arrangement to be extended at the discretion of the CEO for a period of up to 36 months.

[28] Mr Mito submits that Mr Feldschuh requested to be paid in cash for his service on the board as it best suited his personal needs, which he then usually used to buy shares in the company at a 20% discount. He submits that, at no time did the Applicant raise with him, or anyone else to his knowledge, that the agreement between Mr Feldschuh and Strong Room was anything other than that provided for by the written Non-Executive Director Agreement.

[29] Further, that throughout his term up appointment as a director there was no expectation on Mr Feldschuh to work or perform any other services for the company other those set out in their written agreement. He never discussed with the Applicant that he become an employee and never considered Mr Feldschuh anything other than a director for the entire period of their relationship.

[30] In reply to the Applicant's submissions, Mr Mito reasserts his position above that he engaged with Mr Feldschuh as any other member and director of the board who had made an early investment in, and significant contribution to Strong Room during a period of rapid growth and success. He asserts that he *"did not have any control or capacity to influence Mr Feldschuh'*[10] in respect of his involvement with Strong Room. His position is that he requested Mr Feldschuh to act as a mentor to one other employee during his term of appointment and acknowledges he was also mentored by the Applicant.

[31] With regard to the KPIs, wage discussions and meetings, his evidence is that any KPIs and meetings were requested and initiated by Mr Feldschuh. That in any event he was not required to either attend or comply, and that any discussions as to remuneration were only ever in relation to the performance of Mr Feldschuh's duties under the Non-Executive Director Agreement.

[32] Further, that his use of language referring to Mr Feldschuh as "*employed directly by me"* was imprecise wording in an internal document prepared to identify internal and external resources available within the business.[11]

[33] Finally, that the generation of payslips including annual leave and superannuation records for Mr Feldschuh was a consequence of payroll system requirements arising as Mr Feldschuh had requested to be paid in cash not shares. That the payroll system did not distinguish between employees and directors for the purposes of generating payment records.

[34] His evidence is that these were mere labels, like the reference of Mr Feldschuh as Co-Founder, and "Executive Director" and that they are not an accurate reflection of the relationship between the Applicant and Strong Room, which was nothing more, or less, than that articulated in the written agreement between the parties.

The Applicant's Submission

[35] Mr Feldschuh's principal submission is that at all material times from December 2019 to the termination of his employment on 15 September 2023, he was an employee of the Respondent. Advancing this position, the Applicant has presented written submissions, and submissions in reply, along with witness statements from Mr Mark Feldschuh supported by associated documents.

[36] It is the Applicant' argument that s.386(1) of the Act provides that a person has been dismissed if their employment has been terminated on the employer's initiative or they have been forced to resign because of the conduct of their employment. Importantly "termination" at the employer's initiative requires the termination of the employment relationship, not simply the contract of employment.[12]

[37] The Applicant acknowledges the High Court authorities in *Construction, Forestry, Maritime, Mining and Energy Union v* ***Personnel Contracting*** and *ZG Operations Australia Pty Ltd v* ***Jamsek*** on the primacy of the written contract in determining whether a person is an employee at common law.[13]

[38] However, they submit that in the absence of a written contract or where the contract has not "comprehensively committed the terms of the relationship [between the parties]" the multifactorial test established in *Stevens v Brodribb Sawmilling Co Pty Ltd*[14] should be used to analyse the circumstances of the relationship and determine whether an employment relationship exists and what contractual terms apply.

[39] With reference to the High Court's decision in *Hollis v Vabu Pty Ltd*[15] as confirmation that the *"totality of the relationship"* between the parties is to be considered in determining whether an employment relationship exists, the Applicant submits that the facts of this case require an analysis on this basis as the Applicant's relationship with the Respondent was not limited to, or comprehensively defined within the written agreement between them.[16]

[40] Supporting this position, the Applicant submits he commenced working with the Respondent in December 2019 when he was invited to become an Executive Director and provided with an opportunity to be granted shares or options. Up until 20 December 2020 there

was no signed contractual document governing the terms of the relationship between the parties. At this time, the Applicant signed a written agreement governing terms of his appointment as a non-executive director for the company.

[41] It is the Applicant's case that this agreement was only limited to the Applicant acting in his capacity as a director, and it did not comprehensively govern the entirety of the relationship between the parties. That from the commencement of the relationship, the Applicant performed duties that extended well beyond those ordinarily performed by an executive director, including business development, staff managing and mentoring, sales and client liaison duties. That he reported only to Mr Mito either orally or in writing and no other employee or the Board of Directors. Further, that from early 2021 he was working well over 40 hours a week over at least 5 days a week.[17]

[42] On this basis, the Applicant submits that there was a "employment contract" that operated alongside the written Directorship Contract between the parties and that, therefore being an employment relationship between the parties, the application must be allowed to proceed by the Commission as a person can be both an employee and a director. [18]

[43] Supporting its submissions that an examination of the *"totality of the relationship between the parties"* reveals the existence of an employment relationship, the Applicant's evidence is that:[19]

a) The Respondent made superannuation payments of the Applicant;

b) The Respondent made annual leave payments to the Applicant;

c) The Applicant was listed on the Respondent's payroll documentation and payroll summaries reported to the Australian Tax Office

d) The Respondent recorded the Applicant was paid "wages";

e) The Respondent exercised a significant degree of control over the Applicant and how he performed work on an ongoing basis, including amongst other things - setting and measuring performance against KPI's; directing the Applicants work and activities; subjecting him to discipline and performance management; and requiring attendance at meetings.

f) The Respondent explicitly referred to the Applicant was being *"employed directly"* by the CEO and referred to the Applicant as an employee on several internal reports.

g) The Respondent provided the Applicant with numerous pay slips referring to the Applicant as has having been paid *"salary"* and *"wages"* and using other terminology associated with employment like *"employment details"*, *"annual leave"* and *"PAYG"*

h) Providing the Applicant with a business card referring to him as Executive Director and Co-Founder;

[44] In its submissions in reply, the Applicant reinforces its position that the first step in determining the existence of employment relationship is to ascertain *"whether the rights and duties of the parties are… found exclusively within a written contract"* and whether the *"terms of the parties relationship are comprehensively committed to a written contact"* not simply determining a written contract exists or otherwise.

[45] Noting it being well established that contracts of employment may be *"partly oral and partly in writing"* and that there may be cases where *"subsequent agreement or conduct effects a variation to the terms of the original contract*" the Applicant maintains that the written agreement between the partes in this case has not exhaustively committed the rights and duties between them into writing.[20]

[46] Further, that the written agreement between the parties is expressly limited to formalising the Applicant's appointment as a Director with the express anticipation that *"you will not spend less than one day a month in the discharge of your duties".*[21]

[47] The Applicant's evidence is that he worked in excess of 40 hours a week for the Respondent on duties extending well beyond those contained in the written agreement between them. That he was paid in dollars, when the agreement expressly states otherwise. That the constitutions of the company provided in evidence prohibits payment to non-executive directors and that on this basis it can be clearly established the "entire agreement" provided for by Clause 7.3 of the Non-Executive Director Agreement is limited to the subject matter of the non-executive director appointment not the entire relationship between the parties.

[48] In the alternative to the Commission not being satisfied that there was a separate and distinct employment relationship operating in parallel to the written agreement between the parties, the Applicant provided an analysis of the written non-executive agreement, submitting that a reading of the terms of the agreement consistent with the established principles of contractual interpretation support a conclusion that the Applicant was an employee in any event.[22]

[49] In oral submissions, the Applicant further submits with reference to the Respondent's evidence that a meeting of the shareholders of the Company on 25 August 2021 agreed to an extension of the directors agreement (for 12 months) arguing that the terms of this extension amounted to a variation of the original agreement rendering it void. The Applicant submitted and it was not challenged that the changes made to the agreement at this time were an increase in the remuneration paid to Mr Feldschuh to $200,000 per annum and by Mr Mito's own evidence an agreement to refer to him as Executive Director.

[50] It is the Applicant's evidence that the undisputed use of the term 'Executive Director' confirmed and clarified that at the very least from this time, the Applicant was performing additional "Executive" and managerial duties for the Respondent in addition to his duties as an appointed director and an employed member of the Executive team.

[51] Further, the Applicant submits that the evidence of the Respondent that the company resolution purporting to extend the term of Mr Feldschuh's appointment for 36 months from 21 August 2021 cannot be relied upon. The Applicant contends that the evidence indicates the agreement was only extended for 12 months and had therefore expired at the time the

Applicant's relationship with the Respondent came to an end and was nevertheless varied by virtue of the above.

[52] On these various submissions, the Applicant maintains the Commission can be satisfied that the Applicant was an employee of the company from the commencement of his relationship with them in December 2019. That the terms of the written agreement between the parties was limited to the non-executive director appointment and not the sperate employment relationship. Alternatively, that the terms of this agreement when read properly in fact provide for an employment relationship. Moreover, that the terms of this agreement were changed in August 2021 such that the Applicant's appointment was extended on the basis of him becoming an Executive Director and employee of the company.

Observations on the Evidence

[53] There are sharp and significant factual differences between the principal witnesses in this case. The submissions of the Applicant differs markedly and materially to that of the Respondent's. The fact that the principal witnesses of both parties, Mr Feldschuh and Mr Mito (respectively) are the key participants in the circumstances of case make this more significant, particularly as there have been no other witnesses called to provide evidence to assist these proceedings.

[54] Turning to the evidence of Mr Mito, I found it to be consistent, measured, and credible. I accept his evidence where it conflicts with that of the Applicant. His recollection of the details, his tone, and character with which he presented before the Commission appeared to me to be reliable. My assessment of his relationship with the Applicant is that he has significant respect for Mr Feldschuh and highly values the role and contribution that he has played in the success of his enterprise. While he is in no doubt frustrated by the relationship breakdown evidenced by these proceedings, I did not observe this to have diminished his overall view of the Applicant.

[55] On observation however, it is clear to me that Mr Mito still has a level of inexperience and informality in his approach to the structure and governance of his enterprise and relationship with key participants, including Mr Feldschuh. This is apparent on the evidence of the informality of the commencement of his relationship with the Applicant from the start and the attention given to the formal relationship and structures, including employment and governance relationships, required of operating a business in this jurisdiction.

[56] Whilst I accept his evidence that things have improved and become more formal over the life of Strong Room as it has developed, I am not convinced that there is no room for improvement. Whilst there may be some discrepancies in his submissions overall, I am satisfied that in material terms and sentiment, the details of the relationship between himself and Mr Feldschuh are, in general terms, as was agreed between the parties and as he has described them.

[57] My observations of Mr Feldschuh are that he has been placed in a difficult position pursing this application. My assessment of his evidence is that he has clearly enjoyed and valued the opportunity and benefit of being able to make a contribution to the development of

Strong Room as a successful enterprise. He is clearly disappointed and aggrieved that this relationship and its opportunities have come to an end and would prefer this not to be the case.

[58] That said, however, I did not observe that he harbours any malice or ill intent towards Mr Mito or the enterprise that together they have made successful. Clearly, however, he is seeking an opportunity for the significant value and contribution he has made to the company's current position to be more adequately recognised.

[59] On the evidence available to me, he seems legitimately entitled to be of this position. Ultimately, however, despite formal submissions, my observations of Mr Feldschuh's evidence is that on the critical question of the nature of his relationship with Mr Mito and Strong Room it does not fundamentally differ from that of the Respondent.

[60] Whilst I do not completely discount his evidence and believe he has at all times sought to be of assistance to the Commission in its deliberations, I am not satisfied that it supports a construction of a relationship other than that of a committed and active director as was intended by the parties.

Consideration

[61] I have considered all the evidence and submissions made by the parties in this matter. As identified by both parties, as a consequence of the Respondent's objection, the key question for the Commission to determine is whether or not Mr Feldschuh was an employee within the meaning of the Act for his application to be able to proceed.

[62] In determining whether Mr Feldschuh was an employee or not, both the Applicant and Respondent agree the question is whether the Applicant was an employee at *"common law"* and that the relevant authorities are ***Personnel Contracting*** and ***Jamsek***.

[63] It is the Respondent's principal submission that on an analysis of the written and signed Non-Executive Director Agreement between the parties that informally commenced in December 2019; was formalised in December 2020; extended in August 2021 and did not change and constituted the *"entire agreement between the parties",* the Commission can be satisfied Mr Feldschuh was not an employee in reliance on these authorities and dismiss his application.

[64] The Applicant's position is that before the Commission can be satisfied these High Court authorities apply it must first be satisfied that *"the rights or duties of the parties are .... found exclusively within a written contract"* and "*whether the terms of the parties relationship are comprehensively committed to a written contract".*

[65] The Applicant argues that Mr Feldschuh was both a director and an employee from the commencement of his relationship with the Respondent and that the terms of the employment relationship were not included or provided for in the written director's agreement between the parties. It was not disputed, and it is accepted that a person can be both a director and an employee and accordingly have access to relevant employee rights and protections under the Act. [23]

[66] In determining the primacy of a written contract when considering the existence of an employment relationship it follows that I must first be satisfied that the rights and duties of the parties have been comprehensively committed to the written contract.

[67] Whilst made in broad terms, and with the assistance of clause 7.3 of the agreement referring to it as the "entire agreement between the parties", I am satisfied that the written agreement indicates that no such employment relationship that is contended by the Applicant was in existence. The Applicant has not provided any evidence to the contrary and there is nothing before me to suggest that this written agreement did not accurately record the duties Mr Feldschuh was engaged in for the duration of his time as a Director of the Respondent.

[68] I am satisfied that Schedule 1 of the written agreement outlines the principal activities the Applicant was engaged to perform and that any other duties that the Applicant may have been engaged in were either; (1) duties required of him in the performance of his role as a director of the company, as provided and specified in the written agreement; (2) duties that were also required of all other directors; (3) activities engaged in at his own initiative that were not requested or required of him.

[69] Further, I am not satisfied that, being sophisticated and informed parties, the Applicant and Respondent were unaware of the nature of this written agreement, their respective positions and what was agreed upon and committed to.

[70] It is clear to me that the situation Mr Mito finds himself and his company in with regard to its relationship with Mr Feldschuh is a consequence of his poor relationship management and inexperience. I accept that he now understands his failure to inform himself of the relevant employment law and corporate governance principles required of him to deal with the challenges of not only commencing a start-up business in a challenging environment, but to also sustain it.

[71] Whilst I have considered the Applicant's submissions which references *"wages, salary, annual leave", "being employed"* and other terminology associated with an employment relationship, I am not convinced however, that the agreement he initially reached with the Applicant in December 2019; confirmed in writing in December 2020 and extended in August 2021 was ever anything more than a relationship between a Director and a company in both intent and practice for its duration.

[72] While advancing the proposition that he was engaged directly as an employee of Mr Mito and that he worked directly for Mr Mito, Mr Feldschuh was unable to provide any compelling evidence of an explicit conversation where he was confirmed or offered any other position than that of an Executive Director. His evidence is that *"he was asked to help"* and *"did help"* and that he *"thought"* he did a good job.

[73] Critically there is no compelling evidence from the Applicant that he was required or expected to perform work other than as set out in the "written agreement". In oral evidence, Mr Feldschuh conceded that his alleged roles "were mixed" and involved *"managerial"* and *"executive"* duties but was unable to provide any further detail or specific clarity of when he was performing work as an employee and when he was performing work as a Director.

[74] While maintaining there was a separate and distinct employment relationship implicitly operating alongside the written directors agreement, he has presented no evidence that this separate employment contact was orally made, made partly orally or partly in writing. Nor did he dispute that the written agreement was freely entered and agreed to.

[75] He accepts that in December 2019 when he began working for the Respondent , Mr Mito invited him to *"become an executive director of the Respondent"* and that at the same time *"he was provided with an opportunity to be granted shares or options as a director"*.[24] Further, that the Non-Executive Directors Agreement entered into in December 2020 is an accurate record of this agreement and the intention of the parties regarding the Director relationship.

[76] When pressed in cross examination on whether he was required to attend meetings as alleged and the frequency with which he attended, Mr Feldschuh accepted that he was not in fact required to attend meetings, other than board meetings, and that in fact he attended company meetings from time to time. He also accepted that the KPI and performance measures claimed to be a requirement of his position were *"likely"* requested by him.

[77] With regard to the provision of pay slips, reference to being an *"employee"*, *"Co-Founder"* and *"Executive Director"*, Mr Feldschuh did not present any additional compelling evidence to suggest a conclusion other than that these were mere "labels" used inaccurately and out of inexperience. Furthermore, he did not present any evidence regarding the accrual of annual leave on pay slips, that he had made requests for leave or that such leave was approved, denied or taken.

[78] On this basis, I am satisfied that the relevant relationship between the Applicant and the Respondent is the relationship recorded in the written agreement reached between them and signed in December 2020.

[79] The Applicant has asserted that this being the case, the Commission should find there was a variation of this contract and the creation of an employment relationship as Executive Director by virtue of the resolution of August 2021. Further, that the term of this variation was clearly only for 12 months and had therefore expired by the time of the Applicant's removal from the Board indicating that the written agreement had clearly ended by this time and the relationship that ended included the separate employment relationship.

[80] I am not satisfied that the agreement that was extended in August 2021 was anything other than the written agreement made the previous year, but for an increase in the remuneration awarded for services provided, and that there was no change to this agreement at this or any other time.

[81] Despite being at the August 2021 meeting and recalling in evidence that he abstained from voting on the resolution pertaining to himself, Mr Feldschuh was unable to recall whether or not the meeting agreed to extend his appointment or otherwise.

[82] There is also no evidence that 12 months after the said expiration of the extension either party engaged in a discussion on ending or extending the relationship. Whilst conveniently Mr Feldschuh may assert this is because he was now an employee, I am not satisfied this is the case. Rather, the evidence before me suggests that the broad Director relationship between the

parties was in fact extended for up to 3 years at this time. In this regard, I am convinced the circumstances identified by Gordon J at [178] in *Personal Contracting* are relevant:

> *"Where a wholly written contract has expired but the parties conduct suggest that there was an agreement to continue dealing on the same terms, a contract may be implied on these terms (save as to duration and termination)."*[25]

[83] Whilst I believe that Mr Feldschuh may have made his dissatisfaction with the overall governance, record keeping and administration of the company known a number of times and that this included delays in him being paid for his services, he did not assert that this extended to him requesting or "*wanting"* to change the relationship between himself and the Respondent.

[84] I am of the view that this amounted to him simply raising his frustrations by making it clear to Mr Mito that he was *"fed up"* with not being paid in a timely manner and that he requested and *"wanted to be treated and paid"* like others at the company for his services.

[85] I am satisfied that as a matter of course Mr Mito acquiesced to these requests out of deference to him and the value and contribution he had made to the company and that he did so without any intention to, or consideration of, a change to the agreement he and Mr Feldschuh had reached.

[86] This evidence supports this conclusion, and I am satisfied that the written agreement reached between the parties comprehensively records the nature of their relationship. There is no contrary evidence before me to suggest that the written agreement should be interpreted as an employment agreement or that the variation of the written agreement in August 2021 constituted the creation of an employment agreement.

[87] Accordingly, I am satisfied of the primacy of the written agreement as to describing the whole nature of the relationship between the parties and that the rights and duties of the parties have been comprehensively committed to the written agreement.

[88] The Full Bench of the Commission considered the key propositions of ***Personal Contracting*** relevant to this case in *Broadway Homes Pty Ltd [2022] FWCFB 129 at 74* as follows:

(1) When characterising a relationship regulated by a wholly written, comprehensive contract which is not a sham or otherwise ineffective, the question is to be determined solely by reference to the rights and obligations under that contract. It is not permissible to examine or review the performance of the contact or the course of dealings between the parties.

(2) The subsequent conduct of the parties may be considered to ascertain the existence of variation of contractual terms.

(3) The multifactorial approach only has relevance in respect of the required assessment of the terms of the contract.

(4) It is necessary to focus on those aspects of the contractual relationship which bear more directly upon whether the workers work was subordinate to the employer's business that it can be seen to have been performed as an employee of that business rather than as part of an independent enterprise. The question is: whether, by terms of the contract, the worker is contracted to work in the business or enterprise of the purported employer.

(5) Existence of a contractual right to control activities of the worker (including how, where and when the work is done) is a major signifier of an employment relationship.

(6) The label of characterisation placed on the relationship is not relevant even as a "tie breaker", or at least it is not determinative.

[89] There is no suggestion, and it is accepted by both parties that the written document between them is not a sham. Therefore, the obligations established by the agreement are decisive of the character of the relationship.

[90] I have considered the submissions of both the Applicant and the Respondent and reviewed the details of written agreement between the parties and consider that it strongly points to a conclusion that the only agreement between them was one for the performance of duties as a Director of the company.

[91] The agreement explicitly refers to the *"appointment"* of the Applicant as Director. It makes no reference to *"employment"* or *"engagement"* (Clause 1). It describes the duties of the Director and broad general terms and provides no right of control for the Respondent to direct how, when or where the duties of the director it sets out are to be discharged and there is no reference to *"wages"* or *"salary"* in the agreement but payment in *"shares"* or *"options"* (Clause 2 & 3).

[92] The obligations imposed on the Applicant of confidentiality and disclosure are consistent with those required for compliance with the relevant statutory requirements (Clause 4 & 5). The termination provisions at Clause 6 explicitly provide the mechanisms for the termination or resignation of the appointment of the *"Director".* Clause 7 provides, amongst other things, that *"the agreement constitutes the entire agreement and understanding between the parties with respect of the subject matter…".* Schedule A sets out the specific duties of the Applicant that, as indicated above, have been acknowledged as the principal scope of the activities he was engaged in for the Respondent.

[93] It is also necessary to consider any subsequent variation of the written agreement document between the parties. In the present case, it is clearly the case a variation has occurred in relation to the payment method – from *shares or options to cash*; and the extension of the agreement that was formally agreed to in August 2021.

[94] There is no compelling evidence before me to support the Applicant's version of the circumstances of this variation. Furthermore, a review of the pay slips provided indicates payment was made approximately on a quarterly basis and not weekly, fortnightly or even monthly as is usually the case in employment relationships. Moreover, references to PAYG deductions and superannuation payments are not exclusively relevant for employees, being often used to account for Director's superannuation and taxation arrangements.

[95] No additional evidence has been provided to support that, notwithstanding these variations, there was any substantive changes to the rights and obligations of the parties under the agreement. This being the case, I am not satisfied that there have been any substantive variations to the agreed terms between the parties.

[96] Having considered the evidence in this case, the terms of the written contract between the parties and being satisfied there has been no substantive variation to these terms, I have also been satisfied that Mr Feldschuh was in no way subordinate to Strong Room or that the company had any right to control how, where and when he engaged in the performance of his duties as a Director other than those set out in the written agreement between them.

[97] Therefore, the final consideration is whether the labels of *"employed", "co-founder", "annual leave"* and etc which were applied to Mr Feldschuh can in any way be determinative of the character of his relationship with the Respondent.

[98] As indicated by the Full Bench in *Broadway*, it is clear that this cannot be the case. I am satisfied the evidence of Mr Mito as to the use of these labels being a mistake and un-intentional is an accurate reflection of what has in fact occurred in this matter and what was both intended and understood by the parties.

Conclusion

[99] Ultimately, I have not been satisfied that Mr Feldschuh was an employee within the meaning of s.335 of the Act and that as a consequence, this cannot be the case of a dismissal pursuant to s.386.

[100] As I have indicated in this decision; I have found that on the evidence before me neither the Applicant nor the Respondent harbour malice or ill intent towards the other. While I have not found in Mr Feldschuh's favour on the question before me, in the circumstances I encourage both parties to reflect and acknowledge the value of what they have clearly achieved together by collaboration.

[101] For the reasons set out above, the Commission lacks the jurisdiction to allow the Applicant's s.365 application to proceed. The Application must be dismissed.

[102] An Order[26] reflecting this decision will be issued separately.

COMMISSIONER

Appearances:

Mr R. Millar *on behalf of the Applicant.*
Mr A. Denton *on behalf of the Respondent.*

Hearing details:

2023.
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[1] [2020] FCAFC 152.

[2] Witness Statement of Mr Mark Feldschuh, MF 2, page 28 of Digital Court Book.

[3] (2022) 96 ALJR 89; [2022] HCA 1.

[4] (2022) 96 ALJR 144.

[5] Respondent's Outline of Submissions at [9], page 112 of Digital Court Book.

[6] Ibid at [10], page 112-113 of Digital Court Book.

[7] Respondent's Outline of Submissions at [11], page 113 of Digital Court Book.

[8] Respondent's Outline of Submissions at [15]-[21], pages 114-115 of Digital Court Book.

[9] Witness Statement of Mr Max Mito, pages 117-122 of Digital Court Book.

[10] Witness Statement of Mr Max Mito in reply at [8], page 278 of Digital Court Book.

[11] Ibid, pages 278-279 of Digital Court Book.

[12] Applicant's Outline of Submissions at [5]-[6], page 4 of Digital Court Book.

[13] Ibid at [7].

[14] 1986 AILR 106.

[15] (2001) 50 AILR.

[16] Ibid at [8]-[10], pages 4-5 of Digital Court Book.

[17] Ibid, pages 5-10 of Digital Court Book.

[18] Applicant's Outline of Submissions citing authorities of McKinnon C in *Mark Tonner-Joyce v Sales Fix Pty Ltd, [2019] FWC 7552*; Hudson J in *Lincoln Mills Ltd v Gough [1964] VR 193.*

[19] Applicant's Outline of Submissions at [21]-[22], pages 6-9 of Digital Court Book.

[20] Applicant's Submissions in reply citing the HCA Authority in *Personal Contracting* at [3], pages 90-91 of Digital Court Book.

[21] Ibid at [4(b)], page 91 of Digital Court Book.

[22] Ibid at [6], pages 92-94 of Digital Court Book.

[23] See *McKinnon C [2019] in Mark Tonner-Joyce v Sales Fix Pty Ltd.*

[24] Witness Statement of Mr Mark Feldschuh at [14]-[15], page 14 of Digital Court Book as amended in proceedings.

[25] Gordon J, [178] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 96 ALJR 89; [2022] HCA 1.

[26] PR770672.