



# DECISION

*Fair Work Act 2009*

s.394 - Application for unfair dismissal remedy

**Paul Mifsud**

v

**Fire and Rescue NSW Band Incorporated**

(U2023/10046)

**Jason Webster**

v

**Fire and Rescue NSW Band Incorporated**

(U2023/10192)

DEPUTY PRESIDENT WRIGHT

SYDNEY, 3 APRIL 2024

*Application for unfair dismissal remedy – jurisdictional objection raised by employer – applicants found not to be employees – applications dismissed*

## Introduction and outcome

[1] Mr Paul Mifsud and Mr Jason Webster have both made applications to the Fair Work Commission (**Commission**) under s.394 of the *Fair Work Act 2009* (Cth) (**FW Act**) for an order granting a remedy, alleging that they have been unfairly dismissed from their employment with the Fire and Rescue NSW Band Incorporated (**Respondent**).

[2] In their applications, Mr Mifsud and Mr Webster stated that their employment ended on 29 September 2023. The applications have been made within the 21-day period prescribed by s.394(2) of the FW Act.<sup>1</sup>

[3] On 31 October 2023, the Respondent filed a Form F3 – Employer response to unfair dismissal application in relation to both applications (**responses**). The responses claimed that Mr Mifsud and Mr Webster have never been employees of the Respondent and that they were volunteers. This is a matter related to whether Mr Mifsud and Mr Webster are protected from unfair dismissal and as such, I am required to consider this before the merits of the applications by s.396(b) of the FW Act.

[4] In summary, I have found that Mr Mifsud and Mr Webster were not employed by the Respondent and therefore are not protected from unfair dismissal. The applications are dismissed.

### **Directions conference**

[5] On 23 November 2023, the matters were listed for a case management conference. I made directions for the filing and serving of materials and set the matter down for determinative conference/hearing at 10:00am on 3 January 2024.

[6] On 7 December 2023 Mr Mifsud and Mr Webster filed evidence and submissions.

[7] On 21 December 2023 the Respondent filed evidence and submissions.

[8] After taking into account the views of Mr Mifsud, Mr Webster and the Respondent, and whether a hearing would be the most effective and efficient way to resolve the matter, I considered it appropriate to hold a hearing in accordance with s.399 of the FW Act.

### **Factual Background**

[9] The Fire and Rescue NSW Band (the **FRNSW Band**) formed in 1891. The Band receives funding from Fire and Rescue NSW (**FRNSW**) and performs at various events, such as ceremonies, parades, concerts, festivals, and community engagements, to promote FRNSW and its values.

[10] On 26 May 2022, the Respondent was established when the FRNSW Band was incorporated at the request of FRNSW pursuant to the *Associations Incorporation Act 2009* (NSW). The Constitution of the Respondent relevantly provides at paragraph 3:

#### **Objects of the Association**

The objects of the Association are to:

- 3.1 Promote the heritage, traditions and public image of Fire and Rescue NSW;
- 3.2 Promote the presence of Fire and Rescue NSW and create public awareness in respect of fire safety;
- 3.3 Provide appropriate music at Fire and Rescue NSW ceremonies, parades, marches and concerts and at other functions as may be determined by the Commissioner from time to time;
- 3.4 Provide an entity to satisfy the musical ethos of the Association and its members;
- 3.5 Provide venue, facilities and instruments for, and to conduct band practices and rehearsals; and
- 3.6 Provide public relations support to Fire and Rescue NSW.

[11] In relation to membership of the Respondent, paragraph 4 of the Constitution provides that if a person was a member of the unincorporated body immediately before registration of the Association, that person will be taken to be a member of the Association upon incorporation.

In relation to the management of the Respondent, paragraph 16 of the Constitution provides that the business and management of the Respondent is vested in the Committee which comprises four office bearers and at least one ordinary member. Committee members are elected at an Annual General Meeting of the Respondent.

[12] Paragraph 47 of the Respondent's Constitution refers to the Band Protocol and provides as follows:

47.1 The Band Protocol outlines the rules and requirements for a Band member.

47.2 The Committee may from time to time, amend the Band Protocol as it sees fit.

47.3 Any breach by a Band member of the Band Protocol will be deemed to be a breach by that member of this Constitution.

[13] Mr Mifsud plays the sousaphone. Mr Mifsud explained that he had left school in 1984 and commenced performing in the Army Reserve Band two years before that. In 1984, he commenced performing in the NSW Corrective Services Band. In 1986, Mr Mifsud was invited to join the FRNSW Band because there were vacancies, and the FRNSW Band was looking to fill these vacancies in preparation for an overseas trip to the United States that was planned for 1987.

[14] Mr Webster plays the tenor horn. He started performing for the FRNSW Band in about 2016 after seeing the FRNSW Band performing at a festival in Bowral. He became aware of a vacancy in the FRNSW Band through his father who knew the conductor. Mr Webster said he joined the FRNSW Band partly because it was a good band and partly because band members were paid. The conditions were more onerous than other bands he had been in such as the uniform, but this was balanced out by the payment. Mr Webster did not receive payment in any of the other bands he had performed in (including the Salvation Army band). Mr Webster received \$15 per hour throughout the period that he performed with the FRNSW Band and said that it did not occur to him to ask for an increase to this rate.

[15] Mr Mifsud submitted material in which he explained that there are generally two categories of bands. Community Bands are purely social and voluntary with no payment received whereas, in NSW Government Service Bands, members are paid for their time and service. Mr Mifsud says that the FRNSW Band is similar to other NSW Government Service Bands including the NSW Police Band, NSW Corrective Services Band and the NSW Ambulance Band.

[16] Mr Mifsud said that when he was with the NSW Corrective Services Band he was paid an hourly rate for attending performances and rehearsals equivalent to the rate of pay received by a NSW Correctional Officer. Mr Mifsud produced a Facebook post dated 17 May 2021 by the Corrective Services NSW Band which stated that members of that band are employed on a casual basis pursuant to s.43(4) of the *Government Sector Employment Act 2014* (NSW).

[17] Mr Mifsud explained that when he first started in the FRNSW Band, there were at least six firefighters in the band who were paid the same hourly rate that he was. Mr Mifsud

understood that prior to 1985, firefighters in the FRNSW Band accrued time in lieu in relation to time spent rehearsing and performing. This was changed to a regular hourly payment in 1985.

[18] Mr Mifsud was initially invited to attend a Thursday night rehearsal at FRNSW headquarters at Chullora, then asked to attend an audition about a week later. He has attended weekly rehearsals ever since that time. Mr Mifsud first performed with the FRNSW Band in December 1986.

[19] Mr Mifsud said that he was paid more to play in the NSW Corrective Services Band but it was more prestigious to play in the FRNSW Band. Mr Mifsud continued to perform in the Army Reserve Band, the NSW Corrective Services Band and the FRNSW Band until 1987. At that time, NSW Corrective Services said to Mr Mifsud that he needed to make a choice about which band he played in as both the NSW Corrective Services Band and the FRNSW Band required him to play on Anzac Day. Mr Mifsud decided to leave the NSW Corrective Services and Army Reserve Bands and stay in the FRNSW Band.

[20] Mr Mifsud explained that the FRNSW Band was not his main source of income and that he worked for Telstra for 33 years until his position was made redundant in March 2016. At the time of the redundancy, Mr Mifsud was a Senior Project Manager. Since that time, he owned and operated a franchise for a short time and more recently has worked as a gardener and lawn mower for NDIS clients 2-3 days per week for the last 4-5 years.

[21] Mr Webster is ordinarily employed as a Business Analyst and his main source of income comes from activities outside of the Band. Since 2016, he has mainly performed in the FRNSW Band but performed in another band about twice a year for some of that time. He said that members of the FRNSW Band were required to get permission to perform in other bands.

[22] When Mr Mifsud started performing with the FRNSW Band in 1986, he received \$10 per hour for attending rehearsals and performances. This amount was eventually increased to \$15 per hour. Mr Mifsud attended rehearsals every Thursday night apart from when the FRNSW Band had a break from rehearsals during the Christmas and Easter periods each year. The rehearsals took place from 8pm to 10pm. When band members attended performances, they met at the headquarters of FRNSW, now allocated at Greenacre, and a bus would transport them to and from the performance. Band members received the hourly rate of \$15 from the time that the bus left Greenacre to the time it returned.

[23] The FRNSW Band performed on Anzac Day, at firefighter graduation ceremonies, FRNSW's annual ball, FRNSW stations, Christmas Carol events, car shows, with school bands and at community events. Prior to the COVID pandemic, the FRNSW Band were engaged privately from time to time to perform at shopping centres, private celebrations and for tourists at the Casino. The FRNSW Band also went on overseas trips every two to four years. The cost of these trips was subsidised by the income received from private engagements. The FRNSW Band also raised money for the trips through fundraising activities. Band members did not get paid when performing overseas, however many members used the opportunity of the subsidised airfare to extend their trips and have a holiday.

[24] Prior to the COVID pandemic, the FRNSW Band usually performed on about 2-3 occasions per month. In the last year, this has decreased to about one performance per month.

The performances usually took place during the weekend, however firefighter graduation ceremonies usually occurred from 10am to midday on a weekday. Band members were expected to attend performances on the weekend but not during the week, unless they were available. When Mr Mifsud was working at Telstra, he was usually able to perform at firefighter graduation ceremonies as he would take a half day flex leave. Mr Webster did not attend the firefighter graduation ceremonies due to work commitments.

[25] Mr Mifsud said that he attended about 98% of rehearsals and the only occasions that he did not attend was when he was sick. There were 35 band members and usually about 70% of them attended rehearsals at any one time. There was an expectation that band members attend at least 80% of rehearsals however it was 'up to the individual at the end of the day'. The FRNSW Band never had any problems getting enough musicians for performances. Mr Mifsud said that the band master usually made announcements about upcoming performances at rehearsals and musicians would indicate their availability by a show of hands.

[26] According to Mr Mifsud, after incorporation, the Respondent had greater expectations regarding attendance at rehearsals. There were concerns raised about poor attendance. There continued to be 70% of band members attending rehearsals however Mr Mifsud believed that the Respondent applied the Band Protocol inconsistently, with some members permitted to not attend while others faced action if they missed rehearsals. Mr Mifsud said there had been about three versions of the Band Protocol since he joined the band but the changes made to successive versions of the document were not significant.

[27] Mr Webster said that attendance at rehearsal was compulsory and that band members were expected to be at most engagements. Most people were at rehearsals. He signed two Band Protocols during the period that he was a band member which stated that there was an expectation of 80% attendance. Mr Webster said that band members were told that they did not have to sign the Band Protocol but if they did not, they were not in the band. Mr Webster said that during each weekly rehearsal, there would be a break, during which announcements were made about performances and uniforms. Usually a list of upcoming performances was circulated to band members on a monthly basis by email. However if an organisation requested a performance at short notice, this was announced at rehearsals to ascertain the availability of band members. Mr Webster said band members were expected to attend all weekend performances apart from those which were organised at short notice.

[28] Mr Webster said that after the FRNSW Band was incorporated, he became very unhappy as he felt that band members were not being looked after. During cross examination he accepted that he did not attend every rehearsal but also said that he did not always sign the attendance register.

[29] Mr Mifsud and Mr Webster both gave evidence that they did not receive a group certificate or payment summary from the Respondent and for this reason they did not declare the moneys received for playing in the FRNSW Band as income. Mr Mifsud said that he spoke to his tax accountant who advised that because the amount received was less than \$10,000 per year and that Mr Mifsud could claim deductions against this amount, he would be likely to be declaring a loss in relation to this income. In these circumstances and because Mr Mifsud did not receive a payment summary, the tax accountant advised Mr Mifsud not to declare the amounts received.

[30] As well as performing in the FRNSW Band, Mr Mifsud was the Band Librarian from December 1986. In October 1986, the person who was performing the Band Librarian role stood down and there was an invitation to all members of the Band to express interest in the role. No one expressed interest so Mr Mifsud, noting that there was an allowance paid in relation to the role indicated that he would like to do the role. There was a two month handover period so Mr Mifsud officially commenced in the role in December 1986.

[31] Mr Mifsud explained that every year the Band had an AGM and at the AGM, the Librarian role was declared vacant and any member of the Band who wanted to perform the role could nominate. Mr Mifsud was usually the only person to express interest so he performed the role continuously from 1986. If more than one person had expressed interest, the AGM would determine who was to be appointed to the role by majority vote. After the Band was incorporated in May 2022, the appointment of the Librarian became a decision of the Committee.

[32] The duties of the Librarian comprised organising sheet music for each of the band members which included photocopying the music and collating it into folders. Mr Mifsud was allocated ten hours per month to carry out this role and could attend the Band room at FRNSW headquarters when it suited him to do the work, usually on weekends. Mr Mifsud said that he always received direction from the Band Conductor (who was like a Chief Executive Officer) in relation to what was required but that the Band Conductor '[did not] care when it [was] done.' Mr Mifsud was paid a Librarian allowance of \$15 per hour to do this work. In his written material, Mr Mifsud said he was also paid a retainer of \$2000 per year. During busy periods, the FRNSW Band paid for Mr Mifsud to have an assistant for 5 hours per month who was also paid \$15 per hour. From time to time, Mr Mifsud was allocated additional paid hours to get the work done.

[33] When the Band was incorporated in 2022, the new Band Manager Mr Colin Druery restricted the ability of the Band members to attend the band room outside of rehearsal times. Mr Mifsud was informed at this time that he was required to perform Librarian duties from 7pm-8pm on Thursday nights immediately before rehearsals commenced. On 24 August 2023 the Band Committee unanimously agreed that Mr Mifsud should relinquish the Librarian position.

[34] In relation to Librarian duties, the Band Protocol states:

5.20 The Librarian duties shall be to keep a record of the music library, ensure the safe keeping and good condition of the same and to make instrumental parts available to members as required. In the capacity of Librarian, they will work in close co-operation with the Musical Director.

5.21 Nominations for the position of Librarian shall be called at the AGM from persons interested in holding the position for the coming 12 month period or may be appointed by the Association. At their first meeting, the Association Band Committee will appoint the Librarian from those that nominated at the AGM. The position is declared vacant, and if there are no other interested

persons, the current holder may remain in the position or an alternate appointed by the Association.

[35] The most recent Band Protocol signed by Mr Mifsud and Mr Webster relevantly provided:

### **MEMBERSHIP**

- 6.1. Membership of the Band shall be limited to a maximum number of forty (40) playing members (including percussionists)
- 6.2. Application for membership of the Band is open to persons eighteen (18) years of age and over, having music ability to satisfactory perform with a Brass band, an ability to work harmoniously in a band situation, and a physical capability of marching and carrying out other duties associated with the functions of the band.
- 6.3. A vacancy of any position in the band shall be declared by the Musical Director.
- 6.4. Application for membership of the Band shall be made in person to the Secretary/Manager. The application should contain an undertaking to observe such rules that may be applied to the Fire and Rescue NSW from time to time.
- 6.5. All applicants will be assessed by way of audition and must meet a standard satisfactory to the Musical Director or persons delegated by the Musical Director to carry out that functions.
- 6.6. Before appointment to the Band is confirmed, the applicant shall first be invited to 'sit in' with the Band at rehearsals for at least two (2) consecutive rehearsals. The prospective member will then be appointed on six (6) months probation, at the end of the which period, the Musical Director shall determine the musical ability, punctuality, deportment and attendance. On this information, the Musical Director and Secretary/Manager will make a decision on full membership of the member.
- 6.7. A Band member shall achieve a minimum 80% attendance of band hours for rehearsals and band engagements, assessed on aggregate of both within any twelve (12) month period, not including normal annual and sick leave.
- 6.8. Failure to meet the minimum standard of attendance will require the member to show cause to the Musical Director and Secretary/Manager why his [sic] appointment to the band should not be terminated.
- 6.9. Absences incurred by illness shall not be recorded against a member provided the cause is legitimate.
- 6.10. Notices of intended absences of approved leave shall be given to the Musical Director not less than two (2) weeks before it is due.

- 6.11 A Band member may apply to the Musical Director and Secretary/Manager for a leave of absence not exceeding six (6) months without renewal.
- 6.12 A Band member shall be expected to give first loyalty to the Fire and Rescue NSW Band in respect to musical activities. Absences because of commitments to other musical or recreational pursuits will not be acceptable unless authorised by the Musical Director.
- 6.13 It is the duty of every member to obey promptly and willingly, all lawful instructions and orders given at any time by the person in charge of the Band.
- 6.14 Members of the Band shall submit to the disciplines of the Band in rehearsal and at engagements. Breaches of discipline will be dealt with by the Association Committee and/or the Musical Director and Secretary/Manager. Repeated breaches could result in dismissal from the Group should the Association Committee or Musical Director and Secretary/Manager feel such action is warranted. Members should conduct themselves in such a manner as not to bring discredit on the service by unacceptable behaviour.
- 6.15 Any part of the Band uniform shall not be worn by a member at rehearsal, when on leave or when off duty other than when travelling to or returning from Band engagements unless otherwise determined by the Musical Director.
- 6.16 Applications for membership of the band give permission for the Association to obtain Police Probity Check prior to acceptance of the person as a member.

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## **HONORARIUMS**

- 14.1 Members of the group are recompensed in accordance with rates of pay as determined by the Executive Officer

The following offices shall be paid a special rate determined by the Executive Officer:

- Bandmaster/Musical Director
- Secretary/Manager
- Assistant Secretary Manager
- Librarian
- Public Relations Officer

- 14.2 Attendance at rehearsals and engagements is recorded by the Secretary/Manager, or person delegates, on an attendance sheet. Ex gratis payments are made from these records monthly. Each member is to be given a



pay envelop or appropriate notification of hours credited for the month, rate of remuneration and the amount. Members are entitled to request to view their times and amounts by approaching the Secretary/Manager.

- 14.3 Should any monies be owed to General Funds by a member (e.g. spouse accommodation, return of uniform or equipment etc) such monies will be deducted from the members' monthly remuneration. The amount deducted will be clearly shown on the remuneration advice.

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[36] On 29 September 2023, Mr Mifsud and Mr Webster were advised that the Committee met on 29 September 2023 and unanimously resolved to expel them from the Respondent under Clause 14 of the Constitution, with immediate effect. Clause 14 of the Constitution makes provision for the disciplining of members. It provides that a complaint can be made to the Committee by any person that a member of the Respondent has engaged in specified conduct. It outlines the process that the Committee is required to follow in dealing with the complaint. It states the action that the Committee can take after following the process which includes expelling the member at 14.4.4. There is a right to appeal against action taken by the Committee to a general meeting of the Respondent.

### Legislation

[37] Section 396 of the FW Act requires the Commission to decide a number of matters relating to an application for an order under Division 4 before considering the merits of the application including whether the person is protected from unfair dismissal.

[38] Section 382 of the FW Act provides:

#### **382 When a person is protected from unfair dismissal**

A person is *protected from unfair dismissal* at a time if, at that time:

- (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
- (b) one or more of the following apply:
  - (i) a modern award covers the person;
  - (ii) an enterprise agreement applies to the person in relation to the employment;
  - (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

[39] The issue between the parties is whether Mr Mifsud and Mr Webster were employees as required by s.382(a) of the FW Act. Section 380 states that an employee means a national

system employee as defined by s.14 of the FW Act. Section 30D extends the meaning of national system employer to include any person in a State that is a referring state so far as the person employs or usually employs an individual.

## Submissions

### *Mr Mifsud and Mr Webster*

[40] Mr Mifsud and Mr Webster relied on the following matters in support of their contention that they were employees:

- They were paid \$15 per hour in cash for rehearsals and performances. Mr Mifsud was paid a Librarian allowance of \$150 per month in cash and a retainer of \$2000 per year by cheque. The cash payments were made monthly in a pay envelope summarising the total amount of hours worked during the preceding month.
- Mr Mifsud and Mr Webster were required to sign a Band Protocol in July 2023 after the Band was incorporated in May 2022 as a condition of remaining in the Band.
- They were required to sign an attendance sheet at each rehearsal as a condition of being paid.
- Clauses 6.7 and 6.8 of the Band Protocol provide that there is a clear expectation of attendance. If attendance drops to below 80%, band members appointments may be ‘terminated’. This clearly suggests employment status. Clause 6 of the Respondent’s Constitution provides that a person ceases to be a member of the Respondent if the person does not achieve a minimum 80% attendance of band hours for rehearsals and engagements. This further supports the submission that Mr Mifsud and Mr Webster are employees as there is a minimum requirement for attendance. If they were volunteers, there would be no such obligation.
- The reference to annual and sick leave entitlements, also implies employment status.
- The requirements in Clause 6.9 of the Band Protocol, in relation to absences due to illness suggests an employee-employer relationship. A volunteer does not need to substantiate personal illness or be requested to provide any such supporting documentation to validate illness preventing attendance at work. Furthermore, all band members have been instructed to notify the Band Manager via SMS when they are unable to attend rehearsals and/or performances.
- Clauses 6.10 and 6.11 of the Band Protocol refer to leave which strongly suggests employment status. A volunteer would not be required to apply for leave.
- Clause 6.12 states that members are expected to show loyalty towards the Fire and Rescue NSW Band, and prohibits unauthorised absences from band due to ‘other musical or recreational pursuits’. Clause 6.13 requires band members to obey all instructions given to them promptly and willingly. These obligations are suggestive of an employee relationship.
- The provision of uniforms, the requirement to wear specific uniforms on particular occasions and the ability of the Band leadership to reprimand employees for not adhering to the uniform requirements are all matters which establish an employment relationship.
- The Respondent:
  - determines the venue, date, time and duration for each performance.
  - provides free transport from the Band headquarters to performances.

- provides free overnight accommodation with most meals provided at no cost when required to participate in various long-distance travel to NSW/Interstate Country Festival Venues.
- provides all necessary equipment to Band employees including uniforms, which they are required to wear when attending performances, and also issues Instruments.
- On 18 June 2022 Mr Colin Druery sent an email to Mr Webster in which he stated that ‘Members of the Association can therefore receive reasonable remuneration for services rendered to or for the Association.’ The reference to ‘services rendered’ suggests that the payment was wages for services performed as an employee.
- Mr Mifsud produced a trial balance of the Respondent for the eleven month period from 1 July 2022 to 31 May 2023. The trial balance showed that grant income for this period was \$180,000 and payments to volunteers were \$163,000. Mr Mifsud and Mr Webster submit that it is clear from this evidence that payments for band labour is not only significant, but also the grant's main purpose. If the band was truly a community band filled with volunteers as they claim, the ‘payments to volunteers’ would be a significantly smaller percentage of total outgoings.

### *The Respondent*

**[41]** The Respondent submitted that since its inception, the Band members have always been regarded as volunteers who give their time to promote the heritage, traditions and public image of Fire and Rescue NSW. As time progressed the NSW Fire Brigade and then later Fire and Rescue NSW has provided a yearly grant to the band to pay for instruments, uniforms, travel costs and other ancillary costs that allow the Band to play at a schedule of FRNSW events and occasional other events. The largest costs to come out of this grant is the honorariums for the musicians to help cover their costs. These honorariums are prescribed through a Service Level Agreement with FRNSW.

**[42]** All band members sign the Band Protocol. This Protocol has never had any legal intent to be a contract of employment. Rather it is in place so that all Band members know what is required of them as volunteer members of the Band. The Protocol outlines the Mission of the Band and the structure of the Incorporated Association as well as membership and responsibilities. Clause 13 outlines Honorariums/Pay and Clause 13.3 states attendance at rehearsals and engagements is recorded by the Manager or the person delegated to do so, on an attendance sheet.

**[43]** Ex-gratis payments are made from these records monthly. An ex-gratia payment is considered voluntary because the party making the payment is not obligated to compensate the individual.

**[44]** The Respondent has no employment contracts with any members of the FRNSW Band and the band members are not employed under a modern award or an enterprise agreement. The Respondent does not deduct income tax payments, superannuation or any other deductions from these ex-gratia payments as they are not regarded as wages or salary but voluntary payments to cover the costs of the Band members.

[45] The legal intent of the Protocol is to provide the mission of the Band and structure and directions on how to achieve this; it has never been considered as any form of employment contract.

### **Consideration**

[46] I have considered the submissions made by the parties and all the evidence in my determination of this matter and the conclusions I have reached.

[47] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd (CFMMEU)*<sup>2</sup> and *ZG Operations Australia Pty Ltd v Jamsek (ZG Operations)*<sup>3</sup> are the most recent High Court authorities in relation to the employment relationship.

[48] These cases held that where the parties' relationship was comprehensively committed to a written contract, the validity of which was not challenged as a sham, and the terms of which were not varied, waived or the subject of an estoppel - the question of whether a person was an employee or an independent contractor was to be resolved solely by a consideration of the terms of the contract and not by reference to performance of the contract.<sup>4</sup>

[49] Where the terms of the relationship between the parties has not been committed comprehensively to a written agreement, the characterisation of a relationship as being either one of employment or one of principal and independent contractor is to be determined by reference to "the totality of the relationship between the parties".<sup>5</sup> In examining the totality of the relationship between the parties, relevant matters include whether the putative employee's work was so subordinate to the employer's business that it can be seen to have been performed as an employee of that business rather than as part of an independent enterprise<sup>6</sup> and the existence of a right of control by a putative employer over the activities of the putative employee.<sup>7</sup>

[50] Other matters which may be relevant in determining the nature of the relationship include the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work, the provision for holidays, the deduction of income tax and the delegation of work.<sup>8</sup>

[51] In the current case, the dispute is not whether Mr Mifsud and Mr Webster performed work for the FRNSW Band as employees or independent contractors, but rather whether Mr Mifsud and Mr Webster were employees or volunteers.

[52] It is well established that an employment relationship exists only where a person agrees to perform work pursuant to a 'contract of service' or contract of employment. If there is no contract of employment identified between the parties, then Mr Mifsud and Mr Webster cannot be employees of the Respondent.<sup>9</sup>

[53] Numerous decisions of this Commission refer to the basic essential requirements for an agreement to be legally enforceable as a contract as being:

- The parties must have reached agreement as to the terms of the contract.
- The agreement must involve the provision of "consideration" by each party.

- The agreement must be intended by the parties to be legally enforceable.
- The terms of the agreement must be certain and complete and there must be no element of illegality or any other vitiating factor that would deprive the agreement of legal effect.<sup>10</sup>

[54] Prior to the Respondent being incorporated on 26 May 2022, the FRNSW grant money that was used to pay band members was administered by the Band Manager and Conductor. Mr Mifsud submits that he was an employee of the FRNSW Band from October 1986. However this is not possible because at that time, the FRNSW Band was not a legal entity, but a group of individuals who were led by the Band Manager and Conductor.

[55] Mr Mifsud and Mr Webster do not allege that prior to 26 May 2022, their employer was the Band Manager and/or Conductor, or any other person. There is no evidence before me which establishes that there was a contract of employment between each of Mr Mifsud and Mr Webster and another legal person. I have therefore considered the matter on the basis that the alleged employment relationship commenced when the FRNSW Band was incorporated on 26 May 2022.

[56] The effect of incorporation appears to be that Mr Mifsud and Mr Webster became members of the Respondent on 26 May 2022 as existing band members were regarded as members of the ‘unincorporated body’ immediately before registration of the Respondent and as such were taken to be a members of the Respondent upon incorporation under paragraph 4 of the Constitution. The Constitution does not appear to limit membership of the Respondent to band members only, however it appears from reading both the Band Protocol and Constitution together that all band members are members of the Respondent.

[57] Mr Mifsud and Mr Webster claim that the contract of employment is the Band Protocol. The Band Protocol has been revised a number of times since Mr Mifsud and Mr Webster have been members of the FRNSW Band and existed prior to the Respondent being incorporated. Mr Webster’s evidence is that he signed two Band Protocols, whereas Mr Mifsud said he had signed about three Band Protocols. Mr Mifsud’s evidence was that the changes that have been made to the various versions of the Band Protocol over the years have not been significant. The most recent version of the Band Protocol which is in evidence came into existence after the FRNSW Band was incorporated.

[58] The Band Protocol is referred to in the Respondent’s Constitution. The Constitution provides that the Band Protocol outlines the rules and requirements for a Band member, that the Committee may from time to time amend the Band Protocol as it sees fit and that any breach by a Band member of the Band Protocol will be deemed to be a breach by that member of the Constitution. Mr Mifsud has raised issues in relation to the validity of the Constitution however there is no evidence before me that establishes the Constitution is invalid.

[59] On the face of the document, the Band Protocol is not a contract of employment. It is not the product of a negotiation between each of Mr Mifsud and Mr Webster and the Respondent which has resulted in an offer being made by the Respondent which has been accepted by Mr Mifsud and Mr Webster.

**[60]** The Band Protocol is an instrument created by the Respondent pursuant to paragraph 47 of the Constitution. Its purpose is to outline the rules and requirements for each band member. It was devised, apparently without input from its members, and presented to members as an obligation of joining or remaining in the Band. As the Constitution permits the Committee to amend the Band Protocol from time to time, the Respondent is able to do this unilaterally. This is different to a contract of employment, which can only be varied by agreement between the parties. According to the evidence, Mr Mifsud and Mr Webster and other Band members were informed that there was no obligation to sign the Band Protocol, but if they did not, they could not be in the Band.

**[61]** The Band Protocol refers to ‘membership’ of the Band, not employment. It provides for ‘honorariums’ rather than wages. Whether an agreement is intended by the parties to be legally enforceable depends upon the objective intentions of the parties.<sup>11</sup> The evidence shows that it was the intention of the Respondent to create a legal entity to satisfy the funding requirements of FRNSW and for band members to participate in the Band as members of the Respondent rather than employees. Both Mr Mifsud and Mr Webster had performed in bands before joining the FRNSW Band. They both clearly have a love for music and performance. Mr Mifsud said that the FRNSW Band was more prestigious than other bands that he had performed in and Mr Webster spoke of wanting to be in the FRNSW Band because it was regarded as a good band. Although Mr Webster was partly attracted to playing in the Band because of the payment provided, both Mr Webster and Mr Mifsud confirmed that the playing in the Band was not their major source of income. They both worked in roles outside of the music and live performance industry. The Respondent produced evidence that shows Mr Mifsud was paid \$2,460 for the 2021/2022 financial year and \$3,510 for the 2022/2023 financial year and further that Mr Webster was paid \$855 and \$1,455 for the same periods.

**[62]** There is no evidence that supports a finding that Mr Webster and Mr Mifsud each commenced playing in the band with the intention of entering into a legally enforceable contract. Further this is simply not possible given that the Band was not a legal entity until May 2022. There is no evidence that at the time of incorporation, Mr Webster and Mr Mifsud decided at that stage that they would enter into a legally enforceable contract with the Respondent or that there was any negotiation between each of them and the Respondent in relation to terms and conditions of employment.

**[63]** In relation to Mr Mifsud’s role as Librarian, Mr Mifsud’s evidence was that a person was ‘elected’ to this position at every AGM until incorporation, then a person was appointed to this position by the Committee. Clause 5.2.1 of the Band Protocol provides that nominations for the position of Librarian will be called for at the AGM from persons interested in holding the position for the coming twelve month period or may be appointed by the Respondent. Since at least 1986, the role of Librarian was treated by both the FRNSW Band (then the Respondent when it came into existence) and Mr Mifsud as an office rather than an employee.

**[64]** Mr Mifsud ceased being the Librarian when he was removed from that position by the Committee on 23 August 2023. Mr Mifsud and Mr Webster ceased performing in the FRNSW Band when they were expelled as members from the Association under Clause 14 of the Constitution. Although there is a dispute between the parties about whether the expulsion was justified or warranted, there is a clear power under the Constitution for the Respondent to expel members. It is this power that the Respondent relied upon in removing Mr Mifsud and Mr

Webster from the FRNSW Band. The Respondent did not purport to terminate the employment of Mr Mifsud and Mr Webster.

[65] I accept the submissions of Mr Mifsud and Mr Webster that some of the obligations under the Band Protocol are akin to the obligations of an employee towards their employer. These include requirements in relation to attendance, following directions, taking leave and the wearing of a uniform. I also accept that the payment of expenses, and provision of equipment (such uniforms and instruments) are common features of an employment relationship.

[66] However, there were aspects of the arrangement which were inconsistent with the existence of an employment relationship, such as the payment of honorariums rather than wages and the fact that these payments were not declared to the Australian Tax Office by either Mr Mifsud or Mr Webster. The honorariums were set at a fixed rate which did not increase for many years and were significantly less than the amount that would be paid to Mr Mifsud or Mr Webster if they were employees. In this regard, I note that the minimum hourly rate for a casual musician in Clause 40.1 of the *Live Performance Award 2020* is \$59.41. The quantum of the honorarium was determined by the Executive Officer under Clause 14.1 of the Band Protocol. It was not subject to negotiation in the way that remuneration would be in an employment relationship.

[67] The Respondent did not deduct tax from the payments or pay superannuation. The expected attendance rate at rehearsals was 80%, not including leave. This is in contrast to an employee who would be expected to attend work if not taking approved leave and would be likely to face disciplinary action in circumstances of any absences while not on approved leave. There was also evidence that although employees were expected to advise the Respondent if they were not attending a rehearsal, this did not always occur which is inconsistent with the usual expectations of an employment relationship.

[68] In any event, matters which may be indicia of an employment relationship are of no consequence if the existence of a contract of employment cannot be established.

[69] In my view the only aspect of the relationship between the parties which supports a contractual relationship was the provision of 'consideration' by each party. This requirement was met by the Respondent's payment of \$15 per hour to Mr Mifsud and Mr Webster for rehearsals and performances and the payment of \$15 per hour and a \$2000 annual retainer to Mr Mifsud in relation to Librarian duties.

[70] However I do not accept that the parties reached agreement as to the terms of the contract, that the terms of the agreement are certain and complete and that the agreement is intended by the parties to be legally enforceable. This is because Mr Mifsud or Mr Webster rely upon the Band Protocol as being the contract in circumstances where the Band Protocol is an instrument created by the Respondent under the Constitution which can be unilaterally varied and which applies to members rather than employees. In my view the Band Protocol is not a contract between each of Mr Mifsud and Mr Webster and the Respondent. Mr Mifsud and Mr Webster have not pointed to any other written documents or verbal agreements that they say constitutes a contract of employment.

## **Conclusion**

[71] As I have found that the basic requirements for an agreement to be legally enforceable as a contract have not been met, it follows that there was no contract of employment between each of Mr Mifsud and Mr Webster and the Respondent. Mr Mifsud and Mr Webster were therefore not employees of the Respondent and are not protected from unfair dismissal. I dismiss the applications, but in doing so, wish to make some final observations in relation to the applications.

[72] The circumstances that bring these matters before the Commission are most unfortunate. It appears that problems started to emerge in the FRNSW Band after it was incorporated as a requirement of receiving ongoing funding from FRNSW. Given that FRNSW is a NSW government agency, it is likely that the requirement for incorporation was to ensure that the funds it provides to the FRNSW Band were accounted for in accordance with contemporary governance and compliance standards.

[73] There were always rules and requirements that Band members were required to follow in relation to attendance, rehearsals and uniform in various versions of the Band Protocol. However, with incorporation came a Committee which had powers that previously were not able to be exercised by the FRNSW Band leaders. These powers were used to expel Mr Mifsud and Mr Webster from the Band. For Mr Mifsud, this ended a 37 year association with the Band which started soon after he left school. Whatever the reasons for the expulsion, it is likely that it caused significant distress to both Mr Mifsud and Mr Webster. While it may be understandable that Mr Mifsud and Mr Webster wish to challenge the decision to expel them the Commission is not the appropriate forum, given my findings that Mr Mifsud and Mr Webster were not employees. However these findings should not be construed by the Respondent or FRNSW as endorsing their approach to engage band members as volunteers.

[74] The FRNSW Band has a long history and has been financially supported by FRNSW for many years. It is clear from the objects of the Respondent's constitution that the FRNSW Band plays an essential role in promoting FRNSW, creating public awareness in respect of fire safety and performing at FRNSW ceremonies, parades, marches and concerts and at community functions. This is highly skilled, valuable and important work and raises the question of whether it is appropriate to have volunteers undertaking such work particularly as other NSW Government agencies have adopted an employment model with respect to the engagement of band members. At a time that FRNSW has sought to modernise the structure of the FRNSW Band, it may be appropriate to review its approach to the remuneration and engagement of its musicians, without whom the FRNSW Band would not be able to continue making its significant contribution to FRNSW and the wider community.





DEPUTY PRESIDENT

*Appearances:*

Mr Mifsud and Mr Webster for the Applicants

Mr Claxton and Mr Day for the Respondent

*Hearing details:*

2024

January 3

Sydney

*Final written submissions:*

2024

January 11

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<sup>1</sup> Mr Mifsud's application was made on 14 October 2023. Mr Webster's application was made on 18 October 2023.

<sup>2</sup> [2022] HCA 1.

<sup>3</sup> [2022] HCA 2.

<sup>4</sup> *CFMMEU* [2022] HCA 1, [43]; *ZG Operations* [2022] HCA 2, [8].

<sup>5</sup> *CFMMEU* [2022] HCA 1, [34]; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 29; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 33 [24].

<sup>6</sup> *CFMMEU* [2022] HCA 1, [39].

<sup>7</sup> *CFMMEU* [2022] HCA 1, [42]; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 41-45 [47]-[57].

<sup>8</sup> *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 24.

<sup>9</sup> *Adam Barbour v Mementaz Derbas T/A Derbas Lawyers* [2021] FWC 1718, [67].

<sup>10</sup> See for example *Susan Bergman v Broken Hill Musicians Club Ltd T/A Broken Hill Musicians Club* [2011] FWA 1143; *Mark Pitt; Sharon Campione v The Scout Association of Australia Queensland Branch* [2021] FWC 63, approved on appeal in [2021] FWCFB 1241; *Adam Barbour v Mementaz Derbas T/A Derbas Lawyers* [2021] FWC 1718.

<sup>11</sup> *Teen Ranch Pty Ltd v Brown* (1995) 87 IR 308, 310.