DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Mr Mark Feldschuh
v
Strong Room Technology Pty Ltd
(C2024/924)

DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT ANDERSON
DEPUTY PRESIDENT EASTON

MELBOURNE, 7 MAY 2024

Appeal against decision [2024] FWC 216 of Commissioner Connolly at Melbourne on 25 January 2024 in matter number C2023/6110 – permission to appeal refused

Background

[1] Mark Feldschuh (Mr Feldschuh or the Appellant) has lodged a Notice of Appeal, for which permission to appeal is required, against a decision and order made by Commissioner Connolly on 25 January 2024 (Decision).[1] The Respondent to the appeal is Strong Room Technology Pty Ltd (Strong Room Technology or the Respondent).

[2] The Commissioner decided that Mr Feldschuh was not an employee of Strong Room Technology and thus not dismissed within the meaning of the *Fair Work Act 2009* (Cth) (FW Act). Accordingly, the Appellant's general protections application under s 365 of the FW Act was dismissed on jurisdictional grounds.

[3] On 15 May 2024, this Full Bench conducted a hearing on whether to grant Mr Feldschuh permission to appeal, and on the merits of the appeal. The Appellant and Respondent were legally represented, with permission.

The decision under appeal

[4] The Commissioner commenced (at [7]) by setting out the following uncontested facts:

- "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 the 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:

    - 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 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."

[5] The Commissioner received evidence from Mr Mito and Mr Feldschuh, both of whom were cross examined. After summarising the submissions, the Commissioner made observations on the evidence. He preferred the evidence of Mr Mito to Mr Feldschuh where there were conflicts.[2]

[6] The Commissioner commenced his consideration by referring to two recent judgments of the High Court of Australia in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [3] and *ZG Operations Australia Pty Ltd v Jamsek*[4] which consider whether a person was an employee at common law.

[7] The Commissioner stated that "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".[5] On this issue, the Commissioner made the following findings:

> "[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."

[8] The Commissioner further observed:

> "[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"…
>
> [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."

[9] The Commissioner concluded:

> "[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."
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> . . .
>
> "[86] …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."

[10] On the issue of whether the events of August 2021 constituted a separate employment agreement, the Commissioner found:

> "[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."

[11] After observing that the agreement was not a sham, the Commissioner then considered the terms of the written agreement, including variations to terms concerning the payment method and the agreement's duration.[6]

[12] On the issue of whether a contractual right to control existed, the Commissioner found:

> "[96] …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."

[13] The Commissioner's overall conclusion was:

> "[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.
>
> …
>
> [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."

Appeal grounds and contentions

[14] By its notice of appeal lodged on 15 February 2024, the Appellant advances six grounds of appeal, all but one contend error "in failing to attach any, or sufficient, weight" to one or more particularised matters. The Appellant contends the Commissioner failed to attach weight, or attach sufficient weight, to the following:

- evidence that the Appellant's role was that of an executive director and that such engagement is only consistent with an employment relationship (appeal ground 1);

- evidence that the Appellant received payslips, superannuation, had accumulated annual leave and was presented for tax purposes as an employee (appeal ground 2);

- evidence that the August 2021 shareholder resolution described the increased compensation as "salary" (appeal ground 3);

- evidence that, according to the Appellant, the written agreement had ceased to operate by at least August 2022 and did not exist at the time of termination (appeal ground 4); and

- evidence that the quantum of work performed by the Appellant exceeded that which was contemplated by the written agreement (appeal ground 5).

[15] By appeal ground 6 the Appellant contends error because the Commissioner failed to find that an employment relationship existed.

[16] The Appellant submits that it is the public interest to grant permission because sufficient doubt exists as to the correctness of the decision, and to facilitate consideration by a Full Bench of an issue of importance, namely the employment status of executive directors.

[17] The Respondent submits:

- there is no error of fact in the decision;

- the Commissioner took into account all relevant facts including the factual matters raised in the Notice of Appeal, and ascribed to the relevant facts an appropriate degree of weight in determining the matter;

- there was no misstatement of relevant legal principles or misapplication of the law to the facts;

- labels and terminology used by parties is not determinative of the substance of a relationship; and

- there is no public interest engaged by the appeal as no error is established and no question of broader importance about the status of executive directors arise given that whether an employment relationship exists is determined on the facts.

[18] The principles enunciated in *House v the King*[7] apply to appellate review of a "discretionary" decision. A discretionary decision is one where the legal criterion to be applied tolerates a range of outcomes.[8] This is to be contrasted with a decision which permits only one

correct outcome, even if that outcome is to be reached by an evaluative process as to the application of a value-laden criterion.[9] The ultimate decision the subject of this appeal is that the Appellant was not dismissed for the purposes of s 365 of the FW Act within the meaning of s 386. The reason for that conclusion was that the appellant was not an employee of the respondent. That decision tolerates only one correct answer, and no discretion is here involved. This appeal is therefore to be determined by the correctness standard.

Appeal principles

[19] An appeal under section 604 of the FW Act is an appeal by way of rehearing. The Commission's powers on appeal are only exercisable if there is error on the part of the primary decision maker.[10] There is no right to appeal. Permission is required. Without limiting when permission may be granted, the Commission must grant permission if it is in the public interest to do so. Although not an exhaustive indication, the grant of permission to appeal may be in the public interest if the appeal raises issues of importance and general application, or if there is a diversity of decisions at first instance for which guidance from an appellate full bench is required, or if the decision at first instance manifests an injustice, or the result is counter intuitive, or the legal principles applied appear disharmonious.[11] Assessing whether it is in the public interest to grant of permission to appeal involves a broad value judgment.[12]

[20] Permission to appeal is rarely granted if an arguable case of appealable error is not shown, because appeals cannot succeed in the absence of appealable error.[13] An error by a Member at first instance will not always provide a sufficient basis for the grant of permission.[14]

[21] In this matter we have had the benefit of arguments directed to both permission to appeal and the merits of the appeal.

Consideration

[22] We are not persuaded that the Commissioner erred in concluding that Mr Feldschuh was not an employee and therefore was not dismissed within the meaning of the FW Act.

[23] The law[15] to be applied to the issue raised this appeal is as enunciated in *Personnel Contracting* and *Jamsek* and in particular the judgments in *Personnel Contracting* of Kiefel CJ and Keane and Edelman JJ, and Gordon J (with whom Steward J agreed as to the relevant principles but not the outcome).

[24] The principles their Honours outlined have been conveniently summarised by the Full Bench in *Chambers and O'Brien v Broadway Homes Pty Ltd*:[16]

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 contract or the course of dealings between the parties.[17]

2. The subsequent conduct of the parties may be considered to ascertain the existence of variation of contractual terms.[18]

3. The multifactorial approach only has relevance in respect of the required assessment of the terms of the contract.[19]

4. It is necessary to focus on those aspects of the contractual relationship which bear more directly upon whether the worker'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.[20] The question is: whether, by the terms of the contract, the worker is contracted to work in the business or enterprise of the purported employer.[21]

5. Existence of a contractual right to control the activities of the worker (including how, where and when the work is done) is a major signifier of an employment relationship.[22]

6. The label or characterisation placed on the relationship by the contract is not relevant even as a "tie breaker",[23] or at least it is not determinative.[24]

   [Footnotes in the original]

[25] The Commissioner properly identified these legal principles and properly applied them to the matter at hand.

[26] The decision discloses that the Commissioner took into account and gave appropriate weight to the relevant facts. Whilst the appeal grounds assert errors of fact, we find no such errors.

[27] The essential contention on appeal is that whilst Mr Feldschuh was a shareholder and director of Strong Room Technology, there was a parallel employment relationship from at least the time Mr Feldschuh performed duties said to be those of an 'executive director'.

[28] For the following reasons we conclude that the Commissioner correctly rejected this contention. In doing so we address the appeal grounds raised by the Appellant, though not in the order presented in the Notice of Appeal.

[29] Firstly, we agree with the Commissioner's finding at [90] that the only written agreement between the parties is the Non-Executive Director Agreement dated 20 December 2020.

[30] By the terms of the Non-Executive Director Agreement the parties expressly agreed to "formalise" Mr Feldschuh's appointment "as a Director of the Company's Board of Directors" and, amongst other matters, agreed that:

- Mr Feldschuh's position was subject to the Constitution of the Company;

- Mr Feldschuh would devote such time and attention as is necessary for the proper discharge of his responsibilities as director and the effective performance of his duties;

- Mr Feldschuh would spend not less than one day a month in the discharge of his duties; and

- Mr Feldschuh "may from time to time be consulted by other directors on matters to which [his] experience, knowledge or skills are of relevance".

[31] The terms of the Non-Executive Director Agreement were stated to have effect on and from 20 December 2019, being the day that Mr Feldschuh was appointed as a director.

[32] Secondly there is nothing in the terms of the Non-Executive Director Agreement that suggest that Mr Feldschuh and Strong Room Technology entered into an employment relationship on 20 December 2020. Similarly, there was no declaration or even an assertion in 2020 that Mr Feldschuh was an employee or had been an employee during the preceding year. The agreement does not confer a right to control Mr Feldschuh's performance of functions (as a director or otherwise), nor does it specify the time at which any work was to be performed or services were to be rendered. Rather the agreement referred to engagement on matters drawing on Mr Feldschuh's experience as being "subject to [his] availability".

[33] Thirdly, by a special majority resolution of shareholders on 25 August 2021 the directors resolved to "renew the agreement for Mark Feldschuh for the next 12 months". The Commissioner properly found that the reference in this resolution to the "agreement" was to the Non-Executive Director Agreement of 20 December 2020. There was no evidence of a separate contract or agreement between Mr Feldschuh and Strong Room Technology.

[34] Fourthly, there was no evidence that parallel relationships were intended or entered into before or after that date.

[35] For these reasons, we reject appeal ground 6 and the proposition that the Commissioner erred in not finding an employment relationship to have existed.

[36] We now turn to appeal ground 5 in which it is said that the Commissioner failed to take into account, or give appropriate weight to, the fact that the quantum of work performed by the Appellant exceeded that which was contemplated by the written agreement made in 2020.

[37] We take into account, as did the Commissioner, the evidence that Mr Feldschuh undertook functions associated with the operational management of the business, and that these functions became substantially more extensive than contemplated by the written agreement as the months and years transpired, resulting in Mr Feldschuh commonly engaging in full time work.

[38] We agree with the Commissioner that these were functions and duties beyond that of a director merely attending board meetings and providing oversight and participating in strategic decision making. As the Commissioner observed, they added material value to the business. However, the evidence also indicated that whilst Strong Room Technology secured benefit from these services (drawn largely from Mr Feldschuh's industry experience and networks) it was mutually productive and had developed this character before Mr Feldschuh and the company agreed to "formalise" their relationship in the terms of the 20 December 2020 agreement.

[39] The fact that a director may, in a given set of circumstances, also be an employee in parallel to their directorship is well established and non-controversial. A managing director is an obvious example. However, not every director providing executive services associated with

the conduct of a business of which they are a director is necessarily an employee by virtue of doing so. The particular facts matter.

[40] We accept, as the Commissioner observed, that the governance of Strong Room Technology left much to be desired by allowing the delivery of, and reliance on, business services by Mr Feldschuh to progressively increase yet remain conducted under the auspices of the agreement. Notwithstanding this, to find the existence of a parallel employment relationship between Mr Feldschuh and the Respondent would require clear evidence given that the question is to be determined solely by reference to the rights and obligations under the terms of the contract entered into between the parties. Those terms were set out in the agreement of 20 December 2020. We find no evidence that the agreement of 20 December 2020, as varied by the shareholder's resolution of August 2021, was not a reflection of the entire relationship between the parties. We reject appeal ground 5.

[41] We now turn to appeal grounds 2 and 3. We take into account, as did the Commissioner, that Strong Room Technology provided payslips that referred to superannuation, leave accruals and a "salary", and that the special resolution of directors of 25 August 2021 stated that a "salary is recommended to be $200,000 per annum salary or equivalent value of shares at 20% discount of the current valuation". However, that same resolution referred to the subject matter of the motion as "directors compensation" requiring a "special majority approval from shareholders". This evidence falls short of permitting a conclusion that the shareholders resolved, in agreeing to increase compensation to Mr Feldschuh from $120,000 to $200,000 in August 2021 evidently in his capacity as a director, to enter an employment relationship with him. We reject appeal grounds 2 and 3.

[42] We now turn to appeal ground 1 which asserts that the Commissioner failed to take into account, or attach sufficient weight to, the Appellant performing functions in, that which the Appellant says, was an executive director role.

[43] We take into account, as did the Commissioner, that the founder and current CEO, Mr Mito, described in his evidence that Mr Feldschuh was, from the date of the shareholder resolution in 2021, an "executive director" and that he had a business card to this effect.[25] The Appellant submits that this evidence points to an employment relationship having then been created given, it is said, that a distinction exists in corporate governance between a non-executive director and an executive director. We agree that this evidence, limited though it is, points somewhat in this direction. However, two factors mitigate its value. Firstly, it cannot be safely concluded that Mr Mito was using the expression "executive director" in the context of an employed director. A fair reading of Mr Mito's evidence on this point suggests that he was referring to a director who performed executive services for the benefit of the business beyond mere participation in board meetings. Secondly, as noted, it does not necessarily follow that a director who provides nominated operational or executive services does so pursuant to a parallel contract of employment.

[44] The issue before the Commissioner was whether an employment relationship existed, not whether services the Appellant performed fitted into some particular notion (defined or undefined) of an executive director as distinct from a non-executive director. The Commissioner rightly turned his mind to the relevant question. We reject appeal ground 1.

[45] Finally, we turn to appeal ground 4 in which it is said that the Commissioner failed to find that the written agreement had ceased to operate by at least August 2022 and did not apply

at the time of termination. We reject this ground of appeal. We do so for two reasons. Firstly, determining whether a relationship was one of employer and employee is assessed by reference to the character of that relationship at its point of creation or subsequent variation, not at the time of termination. Self-evidently, an act of termination does not re-characterise the true nature of a relationship. Secondly, the relationship which existed between Mr Feldschuh and Strong Room Technology at the time of termination was the relationship entered into by the written agreement of the parties in December 2020 as varied following the shareholder's resolution of August 2021. That relationship continued beyond its stated term given that rights and obligations under it continued to be exercised. Mr Mito's evidence was that he had authority to do so for up to three years.[26] No evidence was before the Commissioner of it having ceased to operate. As we have noted, the Commissioner correctly found that no evidence of a parallel contract existed.

Conclusion

[46] The Commissioner concluded that the evidence was insufficient to establish that an employment relationship existed. We agree with that conclusion.

[47] As we do not find that the Commissioner erred in finding that Mr Feldschuh was not an employee of Strong Room Technology it follows that the Commissioner was correct in dismissing the general protections application on jurisdictional grounds.

[48] Although the factual scenario before the Commissioner was somewhat unusual, as we have found that the Commissioner applied the correct legal principles to the facts in an orthodox manner, and reached the correct conclusion, we see no broader issue of principle arising that would warrant granting permission to appeal. As we have observed, each case turns on its own facts, including where it is required to characterise the relationship between a company and a director of a company who performs specified executive functions.

Disposition

[49] Permission to appeal is refused.

DEPUTY PRESIDENT

Appearances:

R. Miller of counsel, for Mr Mark Feldschuh

A. Denton of counsel, for Strong Room Technology Pty Ltd

Hearing Details:

2024.
Melbourne:
April 15.

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[1] [2024] FWC 216; PR770672

[2] At [54]

[3] [2022] HCA 1

[4] [2022] HCA 2

[5] At [66]

[6] At [89] – [95]

[7] (1936) 55 CLR 499

[8] *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 [47]-[49] (Gageler J); *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 [37]-[40]

[9] *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 [40]; *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 [49] (Gageler J); *Scenic Tours Pty Ltd v Moore* [2018] NSWCA 238 [254]; *Murakami v Wiryadi* [2010] NSWCA 7 [33]-[34]

[10] This is so because on appeal the Commission has power to receive further evidence, pursuant to s 607(2); see *Coal and Allied Operations Pty Ltd v AIRC* [2000] HCA 47, 203 CLR 194, 74 ALJR 1348, 174 ALR 585, 99 IR 309, [17] per Gleeson CJ, Gaudron and Hayne J

[11] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343, 197 IR 266 at [24]-[27]

[12] *O'Sullivan v Farrer* [1989] HCA 61, 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* [2011] HCA 4, 243 CLR 506, 85 ALJR 398, [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* [2011] FCAFC 54, 192 FCR 78, 207 IR 177, [44]-[46]

[13] *Wan v AIRC* [2001] FCA 1803, 116 FCR 481, [30]

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

[15] Noting that legislative changes to the definition of "employee" for the purposes of the FW Act have recently been enacted by the legislature (through the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024*) but not yet come into operation and so do not inform this matter

[16] [2022] FWCFB 129, [74]

[17] [2022] HCA 1, 398 ALR 404, 312 IR 1, [40]-[62] per Kiefel CJ, Keane and Edelman JJ; [172]-[178] per Gordon J; [203] per Steward J

[18] Ibid at [42], [45] per Kiefel CJ, Keane and Edelman JJ; [177]-[178], [188]-[190] per Gordon J; [203] per Steward J

[19] Ibid at [33]-[34], [47], [61] per Kiefel CJ, Keane and Edelman JJ; [174], [186]-[189] per Gordon J; [203] per Steward J

[20] Ibid at [39] per Kiefel CJ, Keane and Edelman JJ

[21] Ibid at [180]-[186] per Gordon J, [203] per Steward J

[22] Ibid at [73]-[74] per Kiefel CJ, Keane and Edelman JJ, [113]-[114], [121] per Gageler and Gleeson JJ

[23] Ibid at [58], [63]-[66], [79] per Kiefel CJ, Keane and Edelman JJ

[24] Ibid at [127] per Gageler and Gleeson JJ, [184] per Gordon J, [203] per Steward J

[25] Transcript PN 72 to PN 82

[26] Transcript PN 271 to PN 275