



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Anika Hamel, Gail Mercer, and Mellissa Bowyer

v

**Sharn Enterprise Pty Ltd ATF Kapoor Family Trust (T/A Little Ted's
Childcare)**

(U2025/8952, U2025/8953, U2025/8955)

COMMISSIONER SPENCER

BRISBANE, 23 DECEMBER 2025

*Applications for an unfair dismissal remedy – jurisdictional objection, small business
employer – associated entities – minimum employment period – regular and systematic casual
employees – jurisdictional objection dismissed.*

Introduction

[1] This jurisdictional decision is related to the unfair dismissal applications of Ms Anika Hamel (the First Applicant), Ms Gail Mercer (the Second Applicant), and Ms Mellisa Bowyer (the Third Applicant). Each made an application to the Fair Work Commission (the Commission) under s.394 of the *Fair Work Act 2009* (Cth) (the Act) for an order granting an unfair dismissal remedy. Each Applicant alleged that they had been unfairly dismissed from their employment at Little Ted's Childcare Centre, Oxley, operated by Sharn Enterprises Pty Ltd ATF Kapoor Family Trust (the Respondent/the employer/Little Ted's/Sharn Enterprises). Mrs Reena Kapoor and Mr Shailendra Kapoor were both Directors of Sharn Enterprises that owned and operated Little Ted's. Mrs Kapoor also owned and operated another childcare centre, Mine N Yours Childcare, Coopers Plains (Mine N Yours), as a sole trader. The Applicants' representative argued these 2 businesses were 'associated entities' with Mrs Kapoor exercising 'control' over both businesses.¹

[2] A joinder application was granted with the consent of the parties for the joint hearing of the jurisdictional objection as to whether the Respondent was a 'small business employer'. This jurisdictional decision is relevant to the 3 applications. The Applicants disputed the employer's submission that it was a 'small business employer' and argued that the employer had 15 or more employees at the time of Ms Hamel's cessation of employment. Ms Hamel's termination of employment occurred first out of the 3 Applicants.

[3] The original sale of the business by the former owner of Little Ted's to Sharn Enterprises occurred via a transfer of business (s.311) on 2 February 2025. Ms Hamel commenced her

employment on 3 February 2025 with Sharn Enterprises. It was an agreed fact that Ms Hamel's prior employment from 6 June 2024, as an Early Childhood Teacher, with the former owner of the business was recognised. Ms Hamel's full length of employment with Little Ted's was recorded as less than 12 months.

[4] In relation to Ms Hamel's s.394 application, it was argued by the Respondent that Little Ted's is a 'small business employer' as defined under s.23 of the Act and therefore in those circumstances (in accordance with s.383), the minimum employment period of 12 months employment applied. The employer argued that Ms Hamel had not met this 12 month minimum employment period and therefore the application was jurisdictionally barred and should be dismissed. The Applicants refuted that the Respondent was a 'small business employer'.

[5] Ms Mercer and Ms Bowyer had both been employed for longer than 12 months. This decision considers the jurisdictional objection; whether the Respondent is a 'small business employer'. In relation to Ms Hamel's and Ms Bowyer's applications, there is a further jurisdictional objection regarding whether a termination at the initiative of the Employer had occurred. This issue is interwoven with the merits of the matter and subject to this jurisdictional decision, would be heard with the merits of the s.394 arbitration. The parties sought for the applications to proceed in this manner.

[6] Ms Hamel, Ms Mercer, and Ms Bowyer were represented by Mr David Tuxworth, who indicated he had previously operated as a paid agent with Queensland Dismissals. He stated that he was not appearing in that capacity and that he was legally qualified but does not hold a current practising certificate. Mr Tuxworth set out that he was currently employed as an employee relations adviser at a mining company and was acting for the Applicants on a pro bono basis.

[7] The Respondent business was represented by Mrs Reena Kapoor, an owner of Little Ted's Childcare. In this matter it warrants noting that it was extremely difficult to obtain the relevant information from Mrs Kapoor for the consideration of the jurisdictional objection. The Respondent failed to fully comply with the Directions of the Commission and failed to provide responsive material. This caused delay in the matter. Mrs Kapoor continually indicated that she would need to discuss the matters with her accountant, Mr Tim Wilshire. Accordingly, a response was sought from Mr Wilshire to provide relevant information. Mr Wilshire is a certified Chartered Accountant. In that professional capacity, Mr Wilshire set out his assessment of the businesses given his familiarity with the businesses, having undertaken all accounting related work with both businesses and having worked closely with Mrs Kapoor.

[8] The Applicant's representative was given the right to respond in relation to Mr Wilshire's information on the businesses and it was open to him to cross-examine the accountant if that was sought.

Relevant Legislative Provisions of the Fair Work Act 2009 (the Act) and the Corporations Act 2001 (the Corporations Act)

[9] Section 382 of the Act sets out the eligibility criteria for making an unfair dismissal application:

“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.” (emphasis added)

[10] The jurisdictional objection to Ms Hamel’s application was with respect to her not having worked the ‘minimum employment period’ as defined in s. 383 of the Act, which states:

“383 Meaning of *minimum employment period*

The *minimum employment period* is:

- (a) if the employer is not a small business employer—6 months ending at the earlier of the following times:
 - (i) the time when the person is given notice of the dismissal;
 - (ii) immediately before the dismissal; or
- (b) if the employer is a small business employer—one year ending at that time.”

[11] In relation to Ms Hamel, the payroll records for employees for the week ending 11 May 2025 have been assessed in accordance with s.383(a)(i) or (ii). Ms Hamel provided a resignation on 9 May 2025 with a 1 week notice period. Further to that, the Employer sent a text message to Ms Hamel on 11 May 2025 making no reference to the resignation and stating ‘I will let you know what shifts you will be doing from tomorrow-so wait for my response before entering to [address] (for now stay away from the centre from tomorrow -if so I will take it as trespassing)...’. The First Applicant then submitted 11 May 2025, as the date of notification of dismissal and her dismissal date. For the purposes of the jurisdictional test in relation to the minimum employment period and a small business employer, the date of 11 May 2025 is used. This is appropriate to be used in assessing these tests given that the payroll records for the employer’s number of employees has been counted across that week and there is only 2 days between the nominated dates in terms of resignation, notification of termination and termination. The effect of these tests does not vary between these dates in terms of considering the associated entities and the number of employees.

[12] In assessing whether the Respondent was a ‘small business employer’ as defined in s.23 of the Act, which states:

“23 Meaning of *small business employer*

- (1) A national system employer is a *small business employer* at a particular time if the employer employs fewer than 15 employees at that time.

(2) For the purpose of calculating the number of employees employed by the employer at a particular time:

- (a) subject to paragraph (b), all employees employed by the employer at that time are to be counted; and
- (b) a casual employee is not to be counted unless, at that time, the employee is a regular casual employee of the employer.

(3) For the purpose of calculating the number of employees employed by the employer at a particular time, associated entities are taken to be one entity.

(4) To avoid doubt, in determining whether a national system employer is a ***small business employer*** at a particular time in relation to the dismissal of an employee, or termination of an employee's employment, the employees that are to be counted include (subject to paragraph (2)(b)):

- (a) the employee who is being dismissed or whose employment is being terminated; and
- (b) any other employee of the employer who is also being dismissed or whose employment is also being terminated." (emphasis added)

[13] In determining whether the Respondent is a 'small business employer', it is necessary to consider whether the employer's business has any 'associated entities'. Section 23(3) of the Act (extracted above) refers to 'associated entities', and draws on the definition of an associated entity contained within s.50AAA of the *Corporations Act 2001* (Cth) (Corporations Act) as follows:

"50AAA Meaning of associated entity

(1) One entity (the associate) is an associated entity of another entity (the principal) if subsection (2), (3), (4), (5), (6) or (7) is satisfied.

(2) This subsection is satisfied if the associate and the principal are related bodies corporate.

(3) This subsection is satisfied if the principal controls the associate.

(4) This subsection is satisfied if:

- (a) the associate controls the principal; and
- (b) the operations, resources or affairs of the principal are material to the associate.

(5) This subsection is satisfied if:

- (a) the associate has a qualifying investment (see subsection (8)) in the principal; and
- (b) the associate has significant influence over the principal; and
- (c) the interest is material to the associate.

(6) This subsection is satisfied if:

- (a) the principal has a qualifying investment (see subsection (8)) in the associate; and
- (b) the principal has significant influence over the associate; and
- (c) the interest is material to the principal.

(7) This subsection is satisfied if:

- (a) an entity (the third entity) controls both the principal and the associate; and
- (b) the operations, resources or affairs of the principal and the associate are both material to the third entity.

(8) For the purposes of this section, one entity (the first entity) has a qualifying investment in another entity (the second entity) if the first entity:

- (a) has an asset that is an investment in the second entity; or
- (b) has an asset that is the beneficial interest in an investment in the second entity and has control over that asset.” (emphasis added)

[14] Section 50AA of the Corporations Act defines ‘control’:

“50AA Meaning of *control*

(1) For the purposes of this Act, an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity’s financial and operating policies.

(2) In determining whether the first entity has this capacity:

- (a) the practical influence the first entity can exert (rather than the rights it can enforce) is the issue to be considered; and
- (b) any practice or pattern of behaviour affecting the second entity’s financial or operating policies is to be taken into account (even if it involves a breach of an agreement or a breach of trust).

(3) The first entity does not ‘control’ the second entity merely because the first entity and a third entity jointly have the capacity to determine the outcome of decisions about the second entity’s financial and operating policies.

(4) If the first entity:

- (a) has the capacity to influence decisions about the second entity’s financial and operating policies; and
 - (b) is under a legal obligation to exercise that capacity for the benefit of someone other than the first entity’s members;
- the first entity is taken not to ‘control’ the second entity.”

[15] Section 64A of the Corporations Act defines ‘entity’. Sections 50AAA and 50AA are not within Chapters 2E, 8A and 8B and therefore this is the applicable definition for entity under these provisions:

“64A Meaning of *entity*

Except in Chapters 2E, 8A and 8B, a reference to an entity:

(a) is a reference to a natural person, a body corporate (other than an exempt public authority), a partnership or a trust; and

(b) includes, in the case of a trust, a reference to the trustee of the trust.” (emphasis added)

[16] To determine the jurisdictional objection of whether Ms Hamel has completed the relevant minimum employment period, it must first be considered whether the Respondent is a ‘small business employer’ pursuant to s.23 of the Act. If it is concluded on the facts that the Respondent has an associated entity and has 15 or more employees, and therefore is not a ‘small business employer’, the 6 month minimum employment period provided by s.383(a)(i) applies. Ms Hamel’s s.394 application would then proceed to arbitration on the basis that her service is greater than the 6 month period. If it is concluded that the Respondent is a ‘small business employer’, the 12 month employment period provided by s.383(b) applies and the First Applicant’s substantive application must be dismissed on the basis that her period of employment, being less than 12 months, does not meet the applicable minimum employment period.

Consideration and Summary of the Parties’ Cases

[17] Directions were set for the filing of evidence and submissions on the jurisdictional issue. Relevant material to the jurisdictional test is summarised below.

Accountant’s Evidence

[18] Mr Tim Wilshire, the accountant for the Respondent, provided a statement. The Applicants’ representative submitted that this statement should be struck from the record. The Applicants’ representative referred to the decision in *Stanzel v Koureli Pty Ltd*² at [75] and submitted that the Commission had previously held that an accountant’s letter without supporting evidence does not discharge the evidentiary burden in relation to a jurisdictional objection.

[19] Mr Wilshire had operated as the accountant for Mr and Mrs Kapoor and demonstrated a familiarity with the financial aspects of both businesses. He provided his statement in response to the Directions. The statement was admitted in relation to this matter on the basis of his accounting knowledge of the businesses. Further, unlike the information provided in the case of *Stanzel*, Mr Wilshire provided a detailed response which included his consideration of the staff levels for each of the businesses as at 11 May 2025. Mr Wilshire detailed that his information was provided on the basis of his professional opinion. Further, the Applicants’ representative was able to seek to cross-examine the accountant if he elected to do so and was able to fully respond to the statement of Mr Wilshire; which he did so. It is noted that Mr Wilshire has given his opinion from an accounting perspective, and weight has been apportioned on the basis that his area of expertise is on accounting matters, rather than the provisions of the Act.

Background

[20] Mr and Mrs Kapoor purchased the Little Ted's business and a transfer of business occurred on 2 February 2025. Ms Hamel's prior employment with the business before the transfer was recognised as commencing on 6 June 2024, resulting in just less than 12 months of employment.

[21] The accountant confirmed the ABN information for Mine N Yours and stated that Mrs Kapoor operated this childcare business as a sole trader. He also confirmed that Sharn Enterprise owns and operates Little Ted's through the co-directorship of Mrs Kapoor and Mr Kapoor, both having a 50% holding.

[22] The Applicants' representative submitted that the two businesses (Little Ted's and Mine N Yours) should be considered as 'associated entities' pursuant to s.50AAA(3) or s.50AAA(4) of the Corporations Act.³

[23] The Respondent's accountant stated that Mine N Yours is a separate and unrelated entity to Little Ted's and that these two businesses are not 'associated entities' within the meaning of s.50AAA of the Corporations Act. Mrs Kapoor confirmed that Mr Kapoor and herself do 'not own any other business other than Little Ted's and Mine N Yours.' The statement of Mr Wilshire addressed a separately listed business Kwik Kerb by Sharn (which was raised by the Applicant's representative. The accountant confirmed that this business stopped trading in September 2023). Therefore, the consideration in relation to the 'associated entities' test is limited to only the business operations of Little Ted's and Mine N Yours.

Summary of the Parties' Submissions on the Number of Employees

[24] The Respondent submitted in a series of emails, the payroll records for Little Ted's for the week ending 11 May 2025, which included 9 employees. The Respondent argued that not all of the casual employees included in this number were employed on 'a regular and systematic basis'. Ms Hamel's employment finished after the payroll of 11 May 2025, therefore after this period, the employee numbers relevant to the 2 other Applicants would be adjusted accordingly.

[25] The Respondent also submitted the payroll record for Mine N Yours for the week ending 11 May 2025, which included 7 names. 2 of the names included were Mrs and Mr Kapoor, who were referred to as owners. Mr Kapoor is not an owner of Mine N Yours; Mrs Kapoor is a sole trader for Mine N Yours. However, Mrs Kapoor stated that in relation to the inclusion of herself and her husband on the payroll for Mine N Yours, that Mr Wilshire advised the Respondent that this was necessary for accounting and taxation purposes.

[26] Mrs Kapoor in a series of emails, confirmed that the 5 other named individuals on the payroll for Mine N Yours (except for herself and Mr Kapoor) were employed on a part-time and permanent basis. The Applicants submitted that Mr Kapoor should be considered as an employee of Mine N Yours, as he undertook work for this business. Mrs Kapoor stated that Mr Kapoor, 'was indirectly involved for Mine N Yours-he was to help with maintenance/repair/odd jobs. Shailendra Kapoor has no contact with Little Ted's'. The Respondent had also stated that he was the 'bus driver/repair/maintenance manager' with the Mine N Yours business. In relation to Mr Kapoor, payslips for his work at Mine N Yours were provided which showed an

employment relationship, and the accountant conceded that Mr Kapoor should be considered as an employee of Mine N Yours. This brought the number of employees at Mine N Yours to 6. On the Respondent's aggregate number of employees being 15, if the Respondent businesses are deemed to be 'associated entities' and all of the casual employees worked on a regular and systematic basis (which is confirmed later in this decision), accordingly there would have been a total of 15 employees.

Summary of the Parties' Submissions on 'Associated Entities'

[27] The First Applicant, Ms Hamel was employed by the Little Ted's business; she submitted that her employment ceased on 11 May 2025. If these businesses are not 'associated entities', then the consideration of the exact headcount for each business is not required to be undertaken on a combined basis and the headcount for Little Ted's on its own would be less than 15 employees based on the submissions of both parties. To be determined as 'associated entities', requires a link to be determined between the businesses by control, ownership, or significant influence.

[28] The Applicants submitted that Mine N Yours and Little Ted's should be determined to be 'associated entities' on the following basis:

"6. We submit that for the purposes of sub-section (3) Ms Reena Kapoor is the principal and controls Sharn Enterprises Pty Ltd (the Respondent) as the associate, as demonstrated by:

a. Little Ted's Childcare Centre is operated by Sharn Enterprises Pty Ltd. The ASIC search shows that Ms Reena Kapoor and Mr Shailrenda Kapoor are Company Directors. ... As a Director of Sharn Enterprises Pty Ltd, Ms Reena Kapoor exerts 'practical influence' (control) over the Company which operates Little Ted's Childcare Centre.

b. It is submitted the Corporations Act does not require that an entity has exclusive or absolute control over the associated entity as the accountant for Ms Kapoor (including Mine N Yours Childcare) and Sharn Enterprises Pty Ltd has opined.

...

d. There is no separation between Ms Reena Kapoor as an individual person and as a sole trader business; legally they are one and the same.

e. It is submitted that any exercise of control by Ms Kapoor is control exercised of both Little Ted's Childcare (i.e. Sharn Enterprises Pty Ltd) and Mine N Yours Childcare. This satisfies section 50AAA(3). The evidentiary basis to support this submissions is shown by:

i. Ms Kapoor has provided instructions to an accountant to advise and represent both businesses in the current proceedings, indicating that Ms Kapoor has financial and operational control over both businesses.

ii. By her own admission, Ms Kapoor is the 'nominated supervisor' for both Childcare Centres indicating that she has operational and practical 'control' over both businesses for children in her care. This is expanded at [7] and [8] below.

iii. There is no evidence to the contrary.

f. The rosters attached to the statement of the Applicant indicate that employees of Mine N Yours Childcare, Coopers Plains have been required to work at Little Ted's Childcare Centre, Oxley and are only employees of one entity thus demonstrating the mutual material relevance of both entities. ...

7. The nominated supervisor, Ms Kapoor, has control over the operating policies as required by the Childcare Regulations. See link to information sheet on the duties of a nominated supervisor ... as published by the Australian Children's Education and Care Quality Authority (ACECQA) ('Information Sheet'). ...

8. This Information Sheet provides that, Ms Kapoor, as the person responsible for the day-to-day management of an approved service, nominated supervisors have a range of responsibilities under the National Law and National Regulations including:

- Education programs.
- Supervision and safety of children.
- Entry and exit to the premises.
- Food and beverages.
- Administration of medication.
- Prescription and non-prescription drugs and alcohol.
- Sleep and rest.
- Excursions.
- Staffing.

Corporations Act 2001 - Section 50AAA (4)

9. In the alternative, if the Commission is not satisfied that Ms Kapoor as principal 'control's Sharn Enterprises Pty Ltd as the associate, it is submitted section 50AAA (4) of the Corporations Act 2001 is satisfied based on the submissions set out above, as the element of control is established, and the operations, resources or affairs of the principal are material to the associate.

10. Further, or in the further alternative, it is submitted they are mutually material to each other given the relative size of each business and the intimate involvement Ms Kapoor has in both businesses, particularly as evidenced by her as the nominated supervisor, with no separation as to the operation of both.”

[29] Mr Wilshire stated that (from an accounting perspective) there is a financial separation between Little Ted's and Mine N Yours. He stated that the businesses have separate bank accounts and ABNs, payroll systems, payments, liabilities, and the ATO obligations are all administered separately. On these assessments, Mr Wilshire stated that Mine N Yours and Little Ted's were separate businesses:

“Clear Separation of the Two Businesses

At the outset, it is important to make clear the fundamental distinction between the two entities:

- **Mine N Yours Childcare** is a **sole trader business** owned and operated exclusively by Mrs Reena Kapoor. It holds its own ABN, keeps separate financial records, and is responsible for meeting its own payroll and superannuation obligations.

- **Little Teds Childcare** is operated by **Sharn Enterprises Pty Ltd**, an incorporated company as trustee for Kapoor Family Trust. Sharn Enterprises Pty Ltd has **two directors – Mr and Mrs Kapoor**. Both directors participate in governance, which means that Mrs Kapoor does not hold unilateral ‘control’ over the entity.

Each business has always been treated, managed, and administered separately. They maintain separate bank accounts, separate employee contracts, separate payroll systems, and do not share rosters or human resources.”

[30] Mr Wilshire, then continued to state in terms of the ‘associated entities’ test and s.50AAA, that:

“None of the statutory tests are satisfied. The mere fact that both Mr and Mrs Kapoor are involved in the childcare sector does not establish association under the Corporations Act.

It is also relevant that, as Sharn Enterprises Pty Ltd has two directors, Mrs Kapoor does not hold “absolute control” over that entity. This distinction is important: ‘control’ is a precondition to aggregation under s.50AAA, and it is plainly not present here.”

[31] Mr Wilshire concluded on the basis of the accounting information that none of the tests in s.50AAA of the Corporations Act were satisfied. Mr Wilshire focused on the separation of the businesses from an accounting perspective. However, it is necessary to also consider the practical nature of the relationship of the entities, to determine if the required ‘control’ between the entities is present.

[32] The Applicants’ representative argued that Mrs Kapoor had ‘practical influence’ over the Respondent businesses in so far:

“as demonstrated by:

- a. Her role as an ‘approved provider’ at both Little Teds Childcare Centre and Mine N Yours Childcare. This role while a regulatory appointment requires that Ms Kapoor has practical control and influence over the Little Teds Childcare.
- b. Her instructions to an accountant in relation to both businesses during the conduct of the proceedings before the Commission demonstrating irrefutable financial control over both businesses.
- c. Ms Kapoor’s admission during cross-examination that she controls both businesses.
- d. Ms Kapoor’s admission during cross-examination that she has required employees of Mine N Yours Childcare to attend Little Teds Childcare to undertake work. These employees were paid by Mine N Yours Childcare to undertake work at Little Teds Childcare. This amounts to a practice or pattern of behaviour affecting the second entity's financial or operating policies.

7. Finally in Mr Wilshire’s letter/statement of 9 September 2025, he conceded that Mrs Kapoor has influence over Little Ted’s (but opined, without evidence, that control is shared with her husband). As previously submitted, the statutory test does not require

that an entity has ‘absolute or exclusive’ control over the other and Mr Wilshire has expressed his opinion on the incorrect test.”

[33] The determination of the ‘associated entities’ test is dependent on the current factual circumstances, as at the time that the First Applicant’s employment was ended. Pursuant to s.50AAA(1) of the Corporations Act, only one of the subsections (2)-(7) in s.50AAA needs to be satisfied for there to be a determination that the businesses are ‘associated entities’. There was a consensus between the parties that s.50AAA(2), (5) and (6) were not applicable to the circumstances. The Applicants’ representative however asserted that Mrs Kapoor had ‘control’ over the businesses.

Section 50AAA(7) of the Corporations Act – Mrs Kapoor as a ‘Third Entity’

[34] It is necessary to consider whether Mrs Kapoor could be considered to be a ‘third entity’ as a natural person in ‘control’ pursuant to s.50AAA(7) in terms of her ‘practical influence’ she exerts over the entities.⁴

[35] These current circumstances are analogous to the consideration of a natural person being a ‘third entity’, in the case of *Budden*. As per s.64A of the Corporations Act, the meaning of entity specifically includes a ‘natural person’. The question of whether a natural person, such as Mrs Kapoor, could be considered as a ‘third entity’ pursuant to s.50AAA(7) of the Corporations Act has previously been considered and answered in the affirmative by the Commission in the case of *Budden v Finke Enterprises Pty Ltd ATF M&L Carlson Family Trust T/A Fused Cafe Pender Place (Budden)* on the following basis:

“[21] Section 64A of the Corporations Act defines “an entity” to include “a natural person”. It follows, in my view, that Mrs Carlson is “an entity (the third entity)” within the meaning of subsection 50AAA(7) of the Corporations Act. My conclusion in this regard is supported by a decision of Judge Riley of the Federal Circuit Court of Australia in *Director of the Fair Work Industry Inspectorate v Vic Metro Brick and Blocklaying Pty Ltd* [2015] FCCA 2266. In that case, Judge Riley held (at [85]) that a natural person who was the sole director and shareholder of two corporations was “an entity [who] ‘control’s both the principal and the associate” within the meaning of subsection 50AAA(7) of the Corporations Act.”⁵

[36] Similarly, Mrs Kapoor in the current circumstances, can be considered a ‘third entity’ if the definition in s.50AA regarding ‘control’ is met. As outlined above, the Corporations Act provides a definition of ‘control’. In the current circumstances, the purported ‘third entity’, Mrs Kapoor, has the capacity to determine the outcome of decisions of the other entity’s financial and operating policies. It is confirmed that, as per this definition in s.50AA of the Corporations Act, that ‘control’ includes ‘*the practical influence the first entity can exert (rather than the rights it can enforce) is the issue to be considered; and any practice or pattern of behaviour affecting the second entity’s financial or operating policies is to be taken into account*’. The assessment of ‘control’ requires a consideration of what ‘practical influence’ is being exhibited between the businesses. Mrs Kapoor undertakes the ‘practical influence’ in discharging her statutory roles, under the *Education and Care Services National Law 2011* (Qld) legislation, of ‘approved provider’ and ‘nominated supervisor’. On this basis she is considered as a ‘third entity’ as per the relevant legislative test, controlling the businesses.

Section 50AA – Mrs Kapoor’s ‘Control’ of the Businesses

[37] Conducting a childcare business occurs in a highly regulated environment. Pursuant to s.161 of the *Education and Care Services National Law 2011* (Qld), approved providers operating an education and care service, which includes Little Ted’s and Mine N Yours, can only operate with at least one nominated supervisor. Nominated supervisors are responsible for a variety of duties under the National Law and Regulations, such as the supervision and safety of children (pursuant to ss.165-167), and staffing (pursuant to regulations 123-128). The Australian Children’s Education & Care Quality Authority describe nominated supervisors ‘[a]s the persons responsible for the day-to-day management of an approved service’.⁶ In terms of her actions as the ‘nominated supervisor’, Mrs Kapoor exerts a ‘practical influence’ over both of the businesses which results in a ‘control’ between both entities in terms of matters affecting their financial or operating policies. In considering s.50AA(2) of the Corporations Act (in terms of Mrs Kapoor’s control as a third entity), Mrs Kapoor has a statutory obligation regarding matters such as the staffing ratios at Little Ted’s and Mine N Yours. Regarding this requirement, Mrs Kapoor as evidence of her practical influence, had sought employees from Mine N Yours to volunteer to undertake work at Little Ted’s.

[38] In this case, Mrs Kapoor is the sole trader of Mine N Yours, and in this role, she has the capacity to determine the financial and operating policies of this business. As sole trader, Mrs Kapoor’s ‘control’ over Mine N Yours was conceded by Mr Wilshire.⁷ However, in relation to Little Ted’s, Mrs Kapoor is a co-director and 50% shareholder with Mr Kapoor. In the case of Little Ted’s, it has therefore been necessary for the Commission to look beyond this and consider the ‘practical influence’ that Mrs Kapoor exerts over Little Ted’s and the ‘practice or pattern of behaviour affecting [Little Ted’s] financial or operating policies’ in terms of the evidence of Mrs Kapoor, in compliance with ‘control’ as per s.50AA(2) of the Corporations Act.

[39] In further considering Mrs Kapoor as a ‘third entity’ in line with s.50AAA(7)(a) and (b), her actions need to be considered as to whether she ‘controls both the principal and the associate; and the operations, resources or affairs of the principal and the associate are both material to [her]’; in complying with her statutory obligations. Based on her actions in undertaking the duties aligned with her statutory roles for both entities, it was evident that she controlled both the principal and the associate and their operations, resources and affairs were material to her. There are parallels between this matter and the case of Mrs Carlson in *Budden*.⁸ In *Budden* it was determined that Mrs Carlson, as the ‘third entity’ pursuant to s.50AAA(7) was in ‘control’ of 2 businesses on the following basis:

“[12] The directors of Finke Enterprises are, and were on 21 September 2015, Mrs Lauren Carlson and Mr Michael Carlson. They are, and were on 21 September 2015, also the shareholders of Finke Enterprises.

[13] Mrs Carlson is, and was on 21 September 2015, the sole director of Carlson Group. The shareholders of Carlson Group are, and were on 21 September 2015, either Mrs Carlson or Mr and Mrs Carlson.

...

[16] It is not in dispute and I accept on the evidence that Mrs Carlson controls, and on 21 September 2015 controlled, both Finke Enterprises and Carlson Group. In particular, Mrs Carlson has overall responsibility for the management and financial operation of both Finke Enterprises and Carlson Group. Although managers are employed to work in each business, they report directly to Mrs Carlson and she is the person who prepares the rosters for employees to work in each business, decides who will be employed in each business, and has managerial and financial responsibility for each business. In addition, Mrs Carlson works in the Coffee Emporium three or four days per week for a few hours each day. Having regard to the practical influence Mrs Carlson can, and does, exert over both Finke Enterprises and Carlson Group, there is no question that Mrs Carlson has, and had on 21 September 2015, the capacity to determine the outcome of decisions about the financial and operating policies of both Finke Enterprises and Carlson Group.

[17] Mr Carlson undertakes the odd handyman job in each business and provides advice to Mrs Carlson from time to time on management and staff issues. His involvement in each business is very limited.” (emphasis added)

[40] The role of Mr Kapoor is similar to that of Mr Carlson as per paragraph [17] above in *Budden* and on a similar fact basis, there was no evidence that Mrs Kapoor shared ‘control’ of Little Ted with her husband, Mr Kapoor.

[41] Mrs Kapoor, during cross-examination, stated that she was the ‘approved provider’ for both childcare businesses as nominated under the legislation. She considered in her evidence she does personally ‘control’ both of the businesses. Her answers under cross-examination, reflected the ‘control’ that she had over both businesses. Mrs Kapoor answered as follows in terms of the ‘control’ she had in relation to both businesses:⁹

“PN60

As nominated supervisor with the childcare regulations, you have operational responsibility for the following programs: educational programs; supervision and safety of children; entry and exit to the premises; food and beverages; administration of medication; prescription and non-prescription drugs; sleep and rest for the children; excursions and staffing. That's correct, isn't it?---And more to that when you come in the office as a position of floor. If you're in the office as a centre director or nominated supervisor sitting in there, with that comes a lot of responsibility to meet the roster as well. So if your directed positions are to legally say what the nominated supervisor is, then all those listed things comes as a crucial point to be fulfilled for a nominated supervisor, but then if the nominated supervisor is sitting in the office for 37.5 hours per week, that means she is in the office of floor duties, and she has to be doing the office work with that.

PN61

Mrs Kapoor, in addition to the duties that I just stated under the Childcare Regulations, when you are at the centre, you also count for staff ratios; that's correct?---If you are needed to be, yes.”

[42] In considering Mrs Kapoor's 'practical influence' over the two entities, Mrs Kapoor had supplied the payroll information of both businesses to the Commission, and further as submitted by the Applicants' representative, Mrs Kapoor was able to provide instructions to Mr Wilshire, the accountant, to supply information in relation to both of the businesses. While the Commission has evidence of one email from the accountant going to both Mrs and Mr Kapoor, the evidence before the Commission of all other correspondence from the accountant only copies in Mrs Kapoor. At the Hearing, Mrs Kapoor was cross-examined on the instructions that she provides to the accountant. This further reflection of Mrs Kapoor's 'practical influence' and consequent 'control' over both entities, is demonstrated in her evidence at Hearing:

"PN51

MR TUXWORTH: Instructions to an accountant would mean that you provide information relating to your businesses and you request advice or provide directions to the accountant as to what type of work you need them to do for you?---I'm pretty sure everybody knows now that a business is legally required to have an accountant, so whatever the accountant needs to get it done for the ATO matters for any legal matters, accountant does his job, he knows his job, and whatever he needs for the business - - -

PN52

THE COMMISSIONER: Mrs Kapoor, Mrs Kapoor ---?--- --- then I give it to him. So then back to that answering with other - I instruct the accountant to do what he needs to do, I don't. We work together because he's an accountant of the business.

PN53

MR TUXWORTH: To use your words, you work together in relation to both businesses; that's correct, isn't it?---That's the legal terms, yes. Without me giving all the information to the accountant, how do you think accountant can come to any conclusion of anything?

PN54

Okay. So you have the same accountant for both businesses?---Yes." (emphasis added).

[43] As emphasised in the above, in relation to the accountant, Mrs Kapoor uses the language of 'me' and 'I' when referring to the business information that is given to the accountant. Mrs Kapoor did not give any indication of Mr Kapoor's involvement when it came to the accountant. Therefore, from the evidence at the Hearing combined with the correspondence of the accountant sent to the Commission, the conclusion drawn is that Mrs Kapoor is the representative of Little Ted's that has the majority of the interactions with the accountant. Given the relevance of the accountant to the financial aspects of the business, this indicates that Mrs Kapoor has a significant degree of 'practical influence' over the financial 'control' of Little Ted's pursuant to s.50AA of the Corporations Act.

[44] In further support of the satisfaction of s.50AAA(7) and of the 'control' in accordance with s.50AA, reference is made to the facts and circumstances whereby there are some Mine N Yours employees, who do work for Little Ted's. Mrs Kapoor during the Hearing was cross-examined on the shared use of employees between businesses at her direction:

"PN119

MR TUXWORTH: Thank you. And from time to time, you requested or required some of your employees from Mine N Yours Childcare Centre to attend and undertake work at Little Teds. That's correct, isn't it?---No. Mine N Yours Childcare was supposed to be closed over the April period because the Department of Education has closed the Coopers Plains school. So in order for me to staff - to come to - I had to take the children somewhere so then what I did, I sent my employees to do the orientation at Little Ted, and that Little Teds employees were doing their job but Mine N Yours employees staying with their children but just used our facility. And Department of Education has got records for it and the proof for it. So in order for them to do orientations, I had to send them to the centre to know the centre, know the staff, know where things are until they were actually being at the centre as the employees of Mine N Yours, just using the facility, if it makes clear.

...

PN121

MR TUXWORTH: So from time to time, you requested or required some of your employees from Mine N Yours Childcare to attend and undertake work at Little Teds Childcare. That's correct, is it?---As I said, before April, the only reason for them to come to Little Teds was to know Little Teds. And then after May when Melissa, Gail, Anika, everybody left that time, I can't just find employees just like that. So after May - you can see after May, then there is times where there will be employees but it doesn't mean that they were getting paid for it. They came and did volunteer work only for one day or two but they were not paid for it so they were not part of my employ. They were the volunteer system.

PN122

But they were paid by Mine N Yours Childcare?---They were volunteer. They were - Mine N Yours only pays for work they do at Mine N Yours but they - they come and help out during the few hours that I really needed somebody because that - that time when the three staff had gone, I did not have any time to rehire anybody. So then volunteers can come to any childcare. They don't have to get paid for it if they sign the paperwork. So that employees that you are addressing to that they have been working for Little Teds, they're not been working for - ask Melissa that. Melissa Bowyer will address to this. Let me speak, please. So the Little Teds only opened the door for Mine N Yours' staff to do orientation so that they can fulfil their job at - for Mine N Yours but from Little Teds, and the department have got all the authority for that. And they got paid not by Little Teds for those two or three weeks they worked there. They got paid by Mine N Yours and it's all been - and those three staffs are part of - - -

PN123

That answers my question. Thank you?---But that doesn't mean that they were working for Little Teds. They were still working Mine N Yours, if it makes sense, so don't mix them two.” (emphasis added)

[45] The evidence is that some employees in the employ of Mine N Yours, who at Mrs Kapoor direction, undertook work at Little Ted’s when required, but were paid by Mine N Yours for that work. Again, the language that Mrs Kapoor uses is the singular ‘I’ – *she* was the

one that ‘sent’ her staff from Mine N Yours to Little Ted’s, and *she* was the one who was responsible for the hiring of employees at Little Ted’s. That evidence indicated her daily ‘practical influence’ and ‘control’ of the operating policies of the businesses, including in relation to the staffing of the businesses in terms of rostering and making sure that there is enough staff for the required staffing ratios; these are important operating policies and legislative obligations in terms of the running of a childcare centre. The accountant stated that ‘[b]oth directors participate in governance’, however, no evidence was presented to the Commission that would indicate this. In fact, Mrs Kapoor provided evidence on different occasions that Mr Kapoor was not involved, as she was, with Little Ted’s in any capacity:

“Shailendra Kapoor has no contact with Little Ted’s”

and

“My husband is not affiliated directly with Little Ted’s -meaning he does not get paid nor gets in contact with any kids nor any aspects of Little Ted’s hence there is no records of him for Little Ted’s. He is 50% partner to me for the entity the business was bought under -Sharn Enterprise Pty Ltd.”

[46] In further demonstrating Mrs Kapoor’s actions as the ‘third entity’ exercising ‘control’ over Little Ted’s, it was Mrs Kapoor only that was involved in the Commission’s proceedings. It is recognised that Mrs Kapoor volunteered to represent both business; Mrs Kapoor did not make any reference to needing to defer issues to Mr Kapoor. The Commission had no interactions with Mr Kapoor, apart from when he very briefly walked into frame during the Hearing, and Mrs Kapoor stated ‘Sorry, my husband just had to get – sorry. Sorry, sorry’,¹⁰ and Mrs Kapoor pointed at him to move. The way Mrs Kapoor represented the businesses before the Commission is in line with the ‘practical influence’ she exerted demonstrating her ‘control’ over both businesses. There was no evidence of Mr Kapoor being involved at Little Ted’s.

[47] It is not in contention between the parties, that Mrs Kapoor as a sole trader has ‘control’ over Mine N Yours, and Mrs Kapoor conceded during the Hearing that she had ‘control’ of both businesses. This acknowledgement is supported by the other evidence before the Commission which indicates that it is Mrs Kapoor that has the ‘practical influence’ over the financial and operating policies of Little Ted’s. Even with the consideration of the Respondent’s submission of the co-directorship and 50% shareholder stake of Little Ted’s, this does not change the facts when the Commission examined the factual circumstances of the operations of the business, that it was Mrs Kapoor herself that was exerting the ‘practical influence’ and consequent ‘control’ over both businesses.

[48] Therefore, Mrs Kapoor meets the first subsection requirement of s.50AAA(7) in relation to her having ‘control’ as a ‘third entity’ over the two businesses. Consequently it is necessary to consider if ‘the operations, resources or affairs of the principal and the associate are both material to the third entity’.

Mrs Kapoor’s Financial Interest in the Entities

[49] Mrs Kapoor as sole trader of Mine N Yours, clearly has a financial interest in the success of the business. Further, as a 50% shareholder with Sharn Enterprises, Mrs Kapoor clearly also

has a financial interest in the success of Little Ted's. This financial viability and interest in both businesses is clearly material to Mrs Kapoor.

[50] Given Mrs Kapoor's practical 'control' over the financial and operating policies of Little Ted's and Mine N Yours, which was evident in the 'practical influence' she exerted over both business, which she conceded to at the Hearing. As well as confirming her financial interests in the outcomes of both entities. Having found that s.50AAA(7) is satisfied, the businesses are therefore treated as 'associated entities'.

[51] However, if it is determined that s.50AAA(7) was not satisfied, in the alternative, s.50AAA(3) as argued by the Applicants' representative, would similarly be satisfied. This provision is satisfied when the principal controls the associate. In this case, Mine N Yours (with Mrs Kapoor as sole trader of this entity), for the reasons above, can similarly be taken to 'control' the associate. For example, in her role as owner and 'nominated supervisor' of Mine N Yours, Mrs Kapoor directed employees (on a volunteer basis) to undertake work at Little Ted's in order to satisfy legislative obligations in relation to staffing ratios at Little Ted's. Staffing ratios are a key operating policy of childcare centres. This directly displays the 'practical influence' that Mine N Yours, through the directions of Mrs Kapoor, was exerting on Little Ted's. Therefore, I am similarly satisfied that s.50AAA(3) is met.

[52] In determining the businesses are associated entities, it is necessary then to consider the headcount of employees of each business, as to the combined total of employees.

Employee Headcount

[53] There is some disagreement over the headcount of each individual business. The Applicant submitted the following list of those employees they considered to be employees of both businesses at the time of 11 May 2025. This decision will only refer to the employees using their first name, for privacy purposes:

- 1) Amandeep
- 2) Anika Hamel (Applicant)
- 3) Chantelle
- 4) Gail (Applicant)
- 5) Connie
- 6) Haylee
- 7) Mellissa (Applicant)
- 8) Mitika
- 9) Priyanka
- 10) Avanika
- 11) Bhavanaben
- 12) Kaminiben
- 13) Nidheeba
- 14) Ravina
- 15) Mr Kapoor¹¹

[54] Haylee and Connie were casual employees of Little Ted's and evidence was provided that they had worked at this business for around 3 years. Mrs Kapoor submitted a summary of

the payslips for Connie and Haylee since she had taken over the business on 3 February 2025. An example of 6 rosters of Little Ted's was also filed with the Commission. From the sample, weekly rosters were sent either on the Thursday or the Friday the week before. The sample of rosters, demonstrates a difference in the working hours of Haylee and Connie where Connie's were consistently less than Haylee's. Mr Wilshire submitted a sample copy of 2 of Connie's payslips, these payslips provided that the year to date hours worked for Connie was 102.5 hours as at 27 April 2025. In that week, Connie had worked 15.5 hours, and in the previous week she had worked 20.5 hours. This is different to the hours scheduled for Connie to work in the rosters. For example, the roster for the week of 21 April to 25 April provides Connie with 1 shift of 7.5 hours, however her payslip for this week indicates she was paid for 15.5 hours (in another words, another 8 hour shift). Evidence was provided that Connie due to study commitments, was only available on Thursday and Friday, but that she would regularly pick up additional shifts where other staff were absent if her schedule allowed. This evidence appears to be consistent with the filed payslips, and her designated availability.

[55] A breakdown of the rostered shifts of Haylee and Connie from the rosters submitted by the Applicant is as follows:

Week of 24 March to 28 March 2025

Haylee rostered on:

Tuesday for 6.5 hours
Wednesday for 7.5 hours
Thursday for 6.5 hours
Friday for 7.5 hours
Total hours of 28 hours

Connie rostered on:

Thursday for 7.5 hours
Total hours of 7.5 hours

Week of 31 March to 4 April 2025

Haylee rostered on:

Monday for 8 hours
Tuesday for 8 hours
Wednesday for 8 hours
Thursday for 8 hours
Friday for 8 hours
Total hours of 40 hours

Connie rostered on:

Thursday for 8 hours
Friday for 8 hours
Total hours of 16 hours

Week of 14 April to 18 April 2025

Haylee rostered on:

Monday for 8 hours
Tuesday for 8 hours

Wednesday for 8 hours
Thursday for 8 hours
Total hours of 32 hours

Connie rostered on:
Thursday for 8 hours
Total hours of 8 hours

Week of 21 April to 25 April 2025

Haylee rostered on:
Tuesday for 7.5 hours
Wednesday for 7.5 hours
Thursday for 7.5 hours
Total hours of 22.5 hours

Connie rostered on:
Thursday for 7.5 hours
Total hours of 7.5 hours

Week of 28 April to 2 May 2025

Haylee rostered on:
Monday for 7.5 hours
Tuesday for 7.5 hours
Wednesday for 7.5 hours
Thursday for 7.5 hours
Friday for 7.5 hours
Total hours of 37.5 hours

Connie rostered on:
Thursday for 7.5 hours
Friday for 7.5 hours
Total hours of 15 hours

Week of 5 May to 9 May 2025

Haylee rostered on:
Tuesday for 7.5 hours
Wednesday for 7.5 hours
Thursday for 7.5 hours
Friday for 7.5 hours
Total hours of 30 hours

Connie rostered on:
Thursday for 7.5 hours
Friday for 7.5 hours
Total hours of 15 hours

[56] In looking at these rostered hours, The Respondent submitted that:

“The records indicate that both employees’ work hours were not systemic. For several weeks, [Haylee and Connie] did not receive any work hours; however, after February, due to changes in availability from applicants Gail Mercer and Anika Hamel ...both Haylee and Connie were given more shifts as they were available.”

[57] On the provided 6 weekly rosters, a staff member was unavailable to be rostered on each of these days. The Respondent submitted that the absences of other staff members is what lead to an increase in shifts being rostered to Haylee and Connie as they were available to work those shifts, however there are indications that Haylee and Connie would still receive shifts even if all of the other staff were available. From the evidence, the rosters were mainly scheduled in consideration of Haylee and Connie’s study commitments being undertaken. Haylee had just completed her studies, and Connie was still completing her studies where she attended TAFE on Monday, Tuesday, and Wednesday. Their availability and the shifts on which they were engaged presented a regularity in their rostering.

[58] This is in line with how the Full Bench summarised the consideration of what presented a regular and systematic engagement in *Chandler v Bed Bath N’ Table (Chandler)*,¹² relying on *Yaraka*:

“[11] ... In *Yaraka Holdings Pty Ltd v Giljevic*, the Court of Appeal of the ACT gave consideration to the proper construction of s 11 of the *Workers Compensation Act 1951* (ACT), which for relevant purposes deemed as workers for the purpose of that Act casual workers if their “engagement, under the contract or similar contracts, has been on a regular and systematic basis” taking into account a range of matters including the contractual terms, the working relationship and all associated circumstances, the period or periods of engagement, the frequency of work, the number of hours worked, the type of work, and the normal arrangements for someone engaged to perform that type of work. Crispin P and Gray J observed that the concept of employment on a regular and systematic basis was drawn from the *Workplace Relations Act 1996*, and went on to say (emphasis added):

“[65] *It should be noted that it is the "engagement" that must be regular and systematic; not the hours worked pursuant to such engagement.* Furthermore, the section applies to successive contracts and non-continuous periods of engagement. It is true that subs (3) provides that, in working out whether an engagement has been on a regular and systematic basis, a court must consider, inter alia, the frequency of work, the number of hours worked under the contract or similar contracts and the type of work. However, these statutory criteria relate to the decisive issue of whether the relevant engagement has been on a regular and systematic basis. *The section contains nothing to suggest that the work performed pursuant to the engagements must be regular and systematic as well as frequent.*

...

[67] Connolly J was right to conclude that the absence of any contractual requirements for the respondent to work at set times or of any assumption that he be present on a daily weekly or monthly basis unless told otherwise did not preclude a finding that his engagements had been regular and systematic.

[68] The term "regular" should be construed liberally. It may be accepted, as the Magistrate did, that it is intended to imply some form of repetitive pattern rather than being used as a synonym for "frequent" or "often". However, equally, it is not used in the section as a synonym for words such as "uniform" or "constant". Considered in the light of the criteria in s11 (3)(a)-(g), we are satisfied that the pattern of engagement over the years from 1995 to 2002 satisfied this description.

[69] *Mr Rares argued that the course of engagement over these years had not been shown to have been systematic because it had not been predictable that the respondent would be engaged to work at particular times, on particular jobs or at particular sites. Again, that is not the test. The concept of engagement on a systematic basis does not require the worker to be able to foresee or predict when his or her services may be required. It is sufficient that the pattern of engagement occurs as a consequence of an ongoing reliance upon the worker's services as an incident of the business by which he or she is engaged.*"

[12] Similarly, Madgwick J said (emphasis added):

"[89] ... a 'regular ... basis' may be constituted by frequent though unpredictable engagements and that a 'systematic basis' need not involve either predictability of engagements or any assurance of work at all.

[90] The respondent's work for the appellant was certainly frequent enough to be termed 'regular' within an acceptable understanding of that term, which may, even in ordinary speech, be used to denote 'frequent'.

[91] Engagement under contracts on a 'systematic basis' implies something more than regularity in the sense just mentioned, that is, frequency. The basis of engagement must exhibit something that can fairly be called a system, method or plan (cf the definition of 'systematic' in the Macquarie Dictionary, revised 3rd edn, 2001)."

[13] The reasoning in *Yaraka Holdings* has been applied to the concept of casual employment on a regular and systematic basis in the FW Act. In *WorkPac Pty Ltd v Skene*, the Federal Court Full Court favoured (without needing to finally adopt) the view that the construction in *Yaraka Holdings* should be applied to the definition of "long term casual employee" in s 12 of the FW Act (which includes a requirement that the employee has been employed "*on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months*"). The Commission in its own decisions has consistently applied *Yaraka Holdings* to s 284(2)(a), including in the Full Bench decisions in *Pang Enterprises Pty Ltd ATF Pang Family Trust v Sawtell* and *Bronze Hospitality Pty Ltd v Janell Hansson* as well as in numerous first instance decisions." (footnotes omitted) (underline emphasis added)

[59] In *Bronze Hospitality Pty Ltd v Hansson (Bronze)*,¹³ the Full Bench confirmed that in relation to s.23 of the Act, that a consideration of regular and systematic pursuant to this section

(as opposed to s.384(2) of the Act), does not include a consideration of whether the casual employee has a reasonable expectation of continuing employment.¹⁴

[60] In the current circumstances, the roster period that was examined was 6 weeks and, on the evidence, while Haylee and Connie may not have worked every week, they worked in line with their availability; the employer had accepted this as the way in which they could be rostered. Especially given that their studies were furthering their qualifications in relation to the childcare sector. For example, Connie's rostered shifts were worked around her study schedule. A roster was provided to the employees, including Haylee and Connie, each week where the evidence demonstrated that if Haylee was rostered she was generally rostered for 4 to 5 shifts while Connie, if she was rostered, was generally rostered for 1 to 2 shifts and otherwise was regularly picking up extra shifts when other staff members were absent.

[61] In order to be regular and systematic, a comparison of these shifts with the assessment by the Full Bench which denoted regular and systematic engagements, was that there need not be a clear pattern of rosters (the pattern here aligns with their availability). Accordingly, Haylee and Connie both engaged in regular and systematic engagements in line with the employer's understanding of their availability. There was a clear frequency to the amount of work they were undertaking at the childcare. Even if they worked more hours when other employees were on leave, this does not change the fact that they were rostered to work in a frequent and systematic manner. This is consistent with the Full Bench decision of *Chandler*, relying on *Yaraka*, where it was held that systematic means that '[t]he basis of engagement must exhibit something that can fairly be called a system, method or plan'. In the current circumstances, the shifts worked by Haylee were both regular and systematic given she had completed her studies and was working a high frequency of shifts. Further, the shifts worked by Connie, were regular and systematic; she was rostered in terms of her flexibility in terms of her studies and the requirements of the childcare business, which included a pattern in terms of covering other employees when they were on annual leave or sick leave. Haylee and Connie should be counted towards the aggregate number of the 'associated entities' businesses as both of these employees have been determined to work on a regular and systematic basis for Little Ted's. This produces a total of 9 employees for Little Ted's.

[62] Therefore, it is necessary in completing the 'associated entities' headcount, to turn to the employee headcount at Mine N Yours. On these numbers, Mrs Kapoor, who was directly involved in the staffing of her business, was insistent on the fact that (except for Mr Kapoor) that all employees were employed on a permanent part-time basis. On balance, the evidence before me in relation to the employment status of the employees, is that the 5 employees of Mine N Yours¹⁵ should be taken to be permanent part-time employees. Accordingly, in addition to Mr Kapoor, the numbers of employees for Mine N Yours is a total of 6.

[63] As set out, pursuant to s.50AAA(7) of the Corporations Act (or in the alternative s.50AAA(3)), these two entities (Little Ted's and Mine N Yours) should be considered as 'associated entities' whereby the employee headcount is to be combined. It is determined that Little Ted's has a total of 9 employees and Mine N Yours has a total of 6 employees. On this basis, there is an aggregate of 15 employees as at 11 May 2025 (as such, Little Ted's was not a 'small business employer' in relation to Ms Hamel's application). Accordingly, Ms Hamel meets the minimum employment period of 6 months and her application is not jurisdictionally barred.

[64] In turning to consider the time of the cessation of the other 2 Applicants, Ms Mercer and Ms Bowyer, the finalisation of their employment post-dated the end of Ms Hamel's employment. Accordingly, the aggregate number, once Ms Hamel is removed from the headcount pursuant to s.23 of the Act, is 14 and Little Ted's must be considered to be a small business on that basis. However, unlike Ms Hamel, Ms Mercer's and Ms Bowyer's length of employment was longer than 12 months commensurate with the minimum employment period for a 'small business employer'. Accordingly, they are not jurisdictionally barred.

Conclusion

[65] Based on the reasoning set out above, none of the applications are jurisdictionally barred; they have all met the requisite minimum employment period (for Ms Hamel this period is 6 months under s.383(a) of the Act). For Ms Hamel, the Respondent will not be treated to be a 'small business employer', but for Ms Mercer and Ms Bowyer, the Respondent will be considered as a 'small business employer', subject to the Small Business Fair Dismissal Code.

[66] Therefore, in relation to all 3 of these applications (Ms Hamel, Ms Mercer, and Ms Bowyer), none of the applications are jurisdictionally barred and all are able to proceed to arbitration.

[67] I Order accordingly.

[68] Relevant Directions will be set for the matters to proceed to arbitration for the s.394 applications for all 3 employees.



COMMISSIONER

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¹ Ms Hamel's Further Submissions in Reply.

² [\[2024\] FWC 2467](#).

³ Applicant's Further Submissions in Reply.

⁴ Corporations Act, s.50AA.

⁵ [\[2015\] FWC 8675](#).

⁶ *Australian Children's Education & Care Quality Authority*, National Quality Framework | Information Sheet: Nominated Supervisors <<https://www.acecqa.gov.au/sites/default/files/2018-03/InformationSheetNominatedSupervisor.pdf>>.

⁷ Statement of Mr Wilshire.

⁸ [\[2015\] FWC 8675](#).

⁹ PN62.

¹⁰ PN115.

¹¹ Mr Kapoor was conceded by Mr Wilshire to be a regular and systematic casual employee for Mine N Yours A sample of Mr Kapoor's payslips were filed by Mr Wilshire, each show him working 40 hours a week; a portion being taken out for tax, payment of superannuation, and an accrual of annual leave.

¹² [\[2020\] FWCFB 306](#).

¹³ [\[2019\] FWCFB 1099](#).

¹⁴ Ibid at [13].

¹⁵ Avaniika, Bhavanaben, Kaminiben, Nidheeba, and Ravina.