



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Ms Joanna Pascua

v

Doessel Group Pty Ltd

(U2024/3881)

DEPUTY PRESIDENT SLEVIN

SYDNEY, 26 SEPTEMBER 2024

Application for an unfair dismissal remedy – Jurisdictional Objection - objection that Applicant not dismissed – whether Applicant an employee or independent contractor

[1] Ms Joanna Pascua alleges that she was unfairly dismissed by Doessel Group Pty Ltd (Doessel). She seeks an unfair dismissal remedy pursuant to s 394 of the *Fair Work Act 2009* (Cth). Doessel objects to the application on the basis that Ms Pascua was not dismissed because she was not an employee. Doessel contends that Ms Pascua was engaged as an independent contractor.

[2] An application for an unfair dismissal remedy under s 394 can only be made by a person who has been dismissed. Subsection 386(1) of the Act sets out the circumstances in which a person is taken to have been “dismissed” for the purposes of s 394. A person can only be dismissed when their *employment* comes to an end in one of the circumstances described in s 386(1). In the absence of a relationship of employer and employee, there is no employment, and a person is not dismissed for the purposes of s 394. This decision deals with the issue of whether an employer and employee relationship existed between the Ms Pascua and Doessel.

Background

[3] Ms Pascua performed work as a legal assistant for MyCRA Lawyers which is the trading name of Legal Practice Holdings Group Pty Ltd. MyCRA Lawyers represents itself as the only specialist credit repair lawyers in Australia. It operates from Queensland. Ms Pascua lives in the Philippines. She performed work remotely from her home. The work for MyCRA Lawyers was performed under a contract Ms Pascua had with the Doessel Group.

[4] Ms Pascua commenced these proceedings against Legal Practice Holdings Group Pty Ltd. Doessel and Legal Practice Holdings Group Pty Ltd are related entities. At the hearing of the matter Ms Pascua sought to amend the application to identify Doessel Group Pty as the employer. I granted the application on the basis that Doessel Group Pty Ltd was the correct respondent and there was no prejudice in doing so. The respondent had prepared responded to the claim and prepared its material for the hearing on the jurisdictional objection on the basis that there was a legal relationship between Ms Pascua and Doessel Group Pty Ltd but it was

not an employment relationship as the work was performed under a contract for services. It relied upon the contract between those parties and accepted that there was no need for further material to be provided as a consequence of the amendment.

[5] The issue was also raised that Ms Pascua worked in the Philippines. The issue being that she may not be a national system employee. Section 380 provides that the protection from unfair dismissal in Part 3-2 of the Act apply to national system employees. Submissions were invited on this point. Doessel was content to rely on its argument that there was no employment and so the issue did not arise. For completeness in the absence of any argument to the contrary I am satisfied for the purposes of s 14 of the Act that Doessel is a constitutional corporation so far as it employs persons and that if Ms Pascua is an employee then she was, for the purposes of s 13, employed as described in section 14 by a national system employer and meets the description of national system employee.

[6] The contract is dated 21 July 2022. Ms Pascua commenced work under the contract for MyCRA Lawyers on 21 July 2022. The work performed was paralegal work. MyCRA Lawyers represents clients in disputes over credit arrangements with financial institutions. It charges clients a flat fee for that representation. Mr Doessel explained that the flat fee was charged even if the costs associated with a file exceeded the fee. An example of this occurring was said to be when specialist tax advice was required and it was sourced from a tax advisor.

[7] Ms Pascua described the work as involving working from her computer, at home, at times that matched business hours in Australia. She was allocated files by email each day and was required to liaise with clients of MyCRA Lawyers and with banks and other credit agencies on behalf of those clients. She did so by telephone and email. She described the work as involving investigating credit claims on clients' behalf.

[8] She was provided with a device, referred to as a pbx phone unit which made it appear when she used her phone that she was in Australia. She had an email address which had the domain name "mycralawyers" and the signature block on her emails identified her as a paralegal for MyCRA Lawyers. When Ms Pascua commenced performing the work she was supervised by a solicitor. Within 12 months the work was unsupervised and she conducted written communications using correspondence based on pro forma documents which she would modify as necessary. She also took on the work of training others in conducting investigations.

[9] Ms Pascua said that for the last 7 months she performed the work she was the only one conducting investigation work.

[10] Ms Pascua was paid \$18.00 an hour. She provided weekly invoices using a pro forma electronic invoicing system provided by the respondent. The invoices set out the hourly rate, stated that time was capped at 8 hours per day across 5 days and recorded a default amount of \$720. Any 'downtime' was to be recorded. Where downtime was recorded that time was multiplied by \$18.00 and the result subtracted from \$720 to give a total amount. All figures were in Australian dollars. The respondent provided a table summarising the amounts paid to Ms Pascua during the time that she performed the work. The table shows that of the total of 83 invoices submitted 55 were for payment at the maximum of 40 hours, resulting in a payment of \$720 on each occasion. The other 28 invoices resulted in payments ranging from \$432 to \$709.20.

[11] Ms Pascua described the last 7 months working for the respondent as difficult. She was supervised by the firms principal, Mr Doessel. She described Mr Doessel as being overly critical of her work, overworking her, setting unreasonable expectations and refusing to approve overtime.

[12] On 20 March 2024 Mr Doessel sent Ms Pascua an email asserting that she had breached her contract and that the contract had been terminated. The breaches were said to be unlawfully copying company information and client information to her personal drive. Ms Pascua denies copying the material to her personal drive. Ms Pascua had spoken to Mr Doessel about the issue and her account of the conversation was that Mr Doessel had taken during the call Mr Doessel locked her out of her computer and started controlling it remotely. She was unaware that he was able to do this and was concerned. She contends that the respondent had caused her to install software on her computer which without her knowledge allowed Mr Doessel remote access and the ability to control her computer. Ms Pascua asserts if any copying of material had occurred it must have been done by someone else using the remote access software.

Submissions

[13] Ms Pascua contends that she was an employee and that she was unfairly dismissed. The respondent contends that Ms Pascua was contracted to perform work as an independent contractor and so was not dismissed.

[14] The respondent relied upon the contract which described the relationship as one of independent contractor. It also relied upon the conduct of the parties during the course of the contract including the manner of payment through weekly invoices. The respondent explained that the invoices were paid on a separate cycle to salaries. The respondent submitted that while the contract required that a certain number of hours or a certain type of work was performed, it was up to the applicant whether or not she worked those hours. It contends that the invoices show there were a number of weeks where the applicant took time off. The respondent submitted that the applicant was also working for other credit repair agencies. This assertion was made on the basis that others had informed Mr Doessel this was the case and Ms Pascua had set up a social media account identifying herself as a credit repair specialist.

[15] The Respondent also submitted that as it had fewer than 15 employees it was exempt from an unfair dismissal claim. This claim has no basis in the legislation which has specific provisions concerning small businesses but does not exclude small businesses from claims under Part 3-2.

[16] The Respondent was invited to make any submission it wished on the question of whether Ms Pascua was a national system employee. It declined to do so on the basis that MS Pascua was not an employee at all.

[17] Both parties took me to the manner in which the work was performed under the contract and the way in which the contract was administered. For example, Ms Pascua focussed on the manner in which respondent supervised the work and controlled the way in which the work was performed. The respondent pointed to matters such as the flexibility afforded to the applicant

in performing the work and in particular that the applicant was free to work fewer hours than the 40 hour maximum provided for in the contract.

Authorities

[18] The High Court considered the question of when a contract involves employment in the decisions of *CFMMEU v. Personnel Contracting Pty Ltd* [2022] HCA 1 (*Personnel Contracting*) and *ZG Operations Pty Ltd and Jamsek* [2022] HCA 2 (*Jamsek*). The principles set out in those decisions were summarised by Wigney J in *JMC Pty Limited v Commissioner of Taxation* [2022] FCA 750 at [17]–[27] (*JMC*). *JMC* was appealed. On appeal it was accepted that his Honour’s statement of the principles was accurate¹. That summary was as follows:

[17] First, where the rights and duties of the parties are comprehensively committed to a written contract, the legal rights and obligations established by the contract are decisive of the character of the relationship provided that the validity of the contract has not been challenged as a sham, or that the terms of the contract have not been varied, waived or are subject to an estoppel: *Personnel Contracting* at [43], [44], [47], [59] (Kiefel CJ, Keane and Edelman JJ), [172] (Gordon J, Steward J relevantly agreeing at [203]). The task is to construe and characterise the contract made between the parties at the time it was entered into: *Personnel Contracting* at [174] (Gordon J).

[18] Second, in order to ascertain the relevant legal rights and obligations, the contract of employment must be construed in accordance with the established principles of contractual interpretation: *Personnel Contracting* at [60] (Kiefel CJ, Keane and Edelman JJ), [124] (Gageler and Gleeson JJ), [173] (Gordon J). In that respect, regard may be had to the circumstances surrounding the making of the contract, as well as to events and circumstances external to the contract which are objective, known to the parties at the time of contracting and which assist in identifying the purpose or object of the contract: *Personnel Contracting* at [174]-[175] (Gordon J); *Jamsek* at [61] (Kiefel CJ, Keane and Edelman JJ), referring to *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352. The nature of the specific job that the putative employee applied for and the nature and extent of any tools or equipment they have to supply for that job may also be relevant: *Personnel Contracting* at [175] (Gordon J). It is, however, generally not legitimate to use in aid of the construction of a contract anything which the parties said or did after it was made: *Personnel Contracting* at [176] (Gordon J).

[19] Third, and flowing from the first two principles, the characterisation of the relationship between the parties is not affected by circumstances, facts or occurrences arising between the parties that have no bearing on their legal rights: *Personnel Contracting* at [44] (Kiefel CJ, Keane and Edelman JJ), [173]-[178] (Gordon J); *Jamsek* at [109] (Gordon and Steward JJ). A “wide-ranging review of the entire history of the parties’ dealings” is neither necessary nor appropriate: *Personnel Contracting* at [59] (Kiefel CJ, Keane and Edelman JJ); see also [185]-[189] (Gordon J). For a “matter to bear upon the ultimate characterisation of a relationship, it must be concerned with the rights and duties established by the parties’ contract, and not simply an aspect of how the parties’ relationship has come to play out in practice but bearing no necessary connection to the contractual obligations of the parties”: *Personnel Contracting* at [61] (Kiefel CJ, Keane and Edelman JJ) (emphasis added).

[20] It follows that the fact that the parties' subsequent conduct may not have precisely aligned with their contractual rights and obligations, or the fact that a particular contractual right may have never been exercised or utilised, will generally be irrelevant when it comes to characterising the relationship. That is so unless the manner in which the parties conducted themselves after entering into the contract was such as to establish that the contract was a sham, or that the contract had been varied, or that certain rights under the contract were subject to an estoppel.

[21] Fourth, the contractual provisions that may be relevant in determining the nature of the relationship include, but are not limited to, those that deal with the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work, the provision for holidays, the deduction of income tax, the delegation of work and the right to exercise direction and control: *Personnel Contracting* at [113] (Gageler and Gleeson JJ); [174] (Gordon J), referring to *Brodribb* at 24 (Mason J); see also 36-37 (Wilson and Dawson JJ).

[22] In *Brodribb*, Wilson and Dawson JJ said (at 36-37) that the indicia which suggested an employment relationship included "the right to have a particular person do the work, the right to suspend or dismiss the person engaged, the right to the exclusive services of the person engaged and the right to dictate the place of work, hours of work and the like", whereas those that suggested a contract for services included "work involving a profession, trade or distinct calling on the part of the person engaged, the provision by him of his own place of work or of his own equipment, the creation by him of goodwill or saleable assets in the course of his work, the payment by him from his remuneration of business expenses of any significant proportion and the payment to him of remuneration without deduction for income tax". Their Honours were, however, careful to note (at 37) that "any attempt to list the relevant matters, however incompletely, may mislead because they can be no more than a guide to the existence of the relationship of master and servant". It should also be emphasised that the list of possible indicia must now be approached on the basis that the focus is on the parties' contractual rights and obligations relevant to those matters, at least where the contract is wholly in writing, not on the way in which the work was actually carried out.

[23] Fifth, the characterisation of the relationship as one of service or employment involving an employer and employee, as opposed to a relationship involving an independent contractor providing services to a principal, often hinges on two considerations. The first consideration is the extent to which the putative employer has the right to control how, where and when the putative employee performs the work: *Personnel Contracting* at [73]-[74] (Kiefel CJ, Keane and Edelman JJ); [113] (Gageler and Gleeson JJ); see also *Brodribb* at 24 (Mason J) and 36-37 (Wilson and Dawson JJ). The second is the extent to which the putative employee can be seen to work in his or her own business, as distinct from the business of the putative employer – the so-called "own business/employer's business" dichotomy: *Personnel Contracting* at [36]-[39] (Kiefel CJ, Keane and Edelman JJ); [113] (Gageler and Gleeson JJ); cf [180]-[183] (Gordon J). Neither of those considerations are determinative and both involve questions of degree.

[24] As for the element of control, "the existence of a right of control by a putative employer over the activities of a putative employee serves to sensitise one to the subservient and dependent nature of the work of an employee, so as to assist in an assessment of whether a relationship is properly to be regarded as a contract of service

rather than a contract for services”: *Personnel Contracting* at [73] (Kiefel CJ, Keane and Edelman JJ).

[25] As for the “own business/employer’s business” dichotomy, it also “usefully focusses attention upon those aspects of the relationship generally defined by the contract which bear more directly upon whether the putative employee’s work was so subordinate to the employer’s business that it can be seen to have been performed as an employee of that business rather than as part of an independent enterprise”: *Personnel Contracting* at [39] (Kiefel CJ, Keane and Edelman JJ); cf [180]-[182] (Gordon J). Another way of framing the question, which focusses more directly on the terms of the contract, is whether the person “is contracted to work in the business or enterprise of the purported employer”: *Personnel Contracting* at [183] (Gordon J) (emphasis in original). One consequence of answering that question in the negative may be that the person is not an employee.

[26] Sixth, a “label” which the parties may have chosen to describe their relationship is not determinative of the nature of the relationship and will rarely assist the court in characterising the relationship by reference to the contractual rights and duties of the parties: *Personnel Contracting* at [63]-[66] (Kiefel CJ, Keane and Edelman JJ); [127] (Gageler and Gleeson JJ); [184] (Gordon J). The parties’ “legitimate freedom to agree upon the rights and duties which constitute their relationship” does not “extend to attaching a ‘label’ to describe their relationship which is inconsistent with the rights and duties otherwise set forth” – to permit otherwise would elevate the freedom to “a power to alter the operation of statute law to suit ... the interests of the party with the greater bargaining power”: *Personnel Contracting* at [58] (Kiefel CJ, Keane and Edelman JJ).

[27] The characterisation of a relationship as being either one of employer and employee, or one involving the engagement of an independent contractor, is ultimately an evaluative judgment that takes into account the totality of the parties’ contractual rights and obligations. The exercise may not necessarily be straightforward because, in some cases at least, the parties’ contractual rights and obligations may point in different directions. The evaluative exercise also should not be approached on the basis that there is some checklist against which ticks and crosses may be placed so as to produce the right answer. Some degree of uncertainty is unavoidable, particularly in the case of many modern-day work or service contracts.

[19] Consistent with that summary, the Full Bench of the Commission in *Chambers and O’Brien v Broadway Homes Pty Ltd* [2022] FWCFB 129 made clear that after the High Court’s decision in *Personnel* the test does not turn on the manner in which the parties conducted themselves while the contract was on foot. The Full Bench summarised the key propositions at [34] as follows:

- (1) When characterising a relationship regulated by a wholly written, comprehensive contract which is not a sham or otherwise ineffective, the question is to be determined solely by reference to the rights and obligations under that contract. It is not permissible to examine or review the performance of the contract or the course of dealings between the parties.
- (2) The subsequent conduct of the parties may be considered to ascertain the existence of variation of contractual terms.

- (3) The multifactorial approach only has relevance in respect of the required assessment of the terms of the contract.
- (4) It is necessary to focus on those aspects of the contractual relationship which bear more directly upon whether the 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. 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.
- (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.
- (6) The label or characterisation placed on the relationship by the contract is not relevant even as a "tie breaker", or at least it is not determinative.

(Footnote omitted)

[20] Drawing from the cases, the assessment of the legal nature of the relationship between the parties is to be determined by evaluating the nature of the contractual obligations of the parties arising from their contract. What is required is an evaluative judgment of that contract which will be informed by various indicia, some of which may suggest an employment relationship and others a relationship of independent contractor.

Consideration

[21] In this case the parties committed the terms of their relationship to writing. The terms were contained in the contract signed on 21 July 2022. The true character of the relationship will be determined by reference to the rights and duties created by that document.

The terms of the contract

[22] The contract is headed "Independent Contractor's Agreement". The contract describes the parties as the Doessel Group Pty Ltd (the Company) and Ms Pascua (the Independent Contractor). The title of the contract and the manner in which it describes the parties are not determinative of the legal relationship. In other places the contract refers to the relationship as employment and to Ms Pascua as an employee.

[23] The contract comprises 10 sections with 2 annexures.

[24] Section 1 describes the engagement as to render services, and deliver reports as described in annexure A. Annexure A is as follows:

Tasks:

- Legal research
- Drafting legal documents

- Case preparation and investigation
- Administration
- Meeting Key Performance Indicators (KPIs)
- Following up clients via email and SMS
- General compliance review of matters
- Ad Hoc duties as required from time to time
- Full documentation of all work and tasks

Key Performance Indicators:

- Complete a minimum of 20 productive tasks per day (to actively move the matter forward) OR
- 4 hours per day billable; OR
- \$2000 in disbursements added per day.

As well as:

- 10% of matters that you are working on removed per week; AND
- All tasks assigned for the day should be completed the same day
 - If there is a reason that the assigned tasks could not be completed (E.G a priority matter was worked on for the whole day and not other matters) then you must notify your supervisor immediately when it becomes apparent that you are unable to fulfil your assigned tasks
- All ad hoc duties to be completed within a reasonable timeframe as directed but no longer than 24 hours without prior written approval from management on a case-by-case basis.

[25] The work is paralegal work. The contract later describes Ms Pascua as a paralegal. It is not work involving a profession, trade or distinct calling.

[26] The first three tasks and the tasks described as “General compliance review of matters” and “Full documentation of all work and tasks” do not suggest either a relationship of contractor of employee. They could be performed by either. The tasks identified as “Administration”, “Following up clients via email and SMS”, “ad hoc duties as required from time to time” suggest employment. Administration, following up clients and performing ad hoc duties as required suggest work being done within another’s business rather than within an independent business being conducted by Ms Pascua.

[27] The respondent submitted that the key performance indicators of ‘completing a minimum of 20 tasks per day’ or ‘4 hours per day billable’ meant that Ms Pascua was free to provide services to other entities at any time. This was so because they were daily targets. These requirements however cannot be read in isolation. Reading them in context I do not read the key performance indicators in this way. Meeting those targets were one of the tasks required in annexure A. They were measures of the service provided and they must be read together with other targets such as 10 % of matters being removed per week which indicated an ongoing working relationship not a daily one. Similarly, tasks on a particular matter could go over to the following day and ad hoc duties were also to be performed over 24 hours or longer, suggesting that work was required to be done on an ongoing basis whether it was in relation to a particular matter, a broader caseload, or on ad hoc tasks.

[28] The arrangements put in place at the commencement of the contract for Ms Pascua to use a pbx phone account and which identified her as calling from the MyCRA Lawyers office and the use of a MyCRA Lawyers signature block on her emails suggest also suggest that the work was being performed in a business other than an enterprise conducted by Ms Pascua. The requirement to perform ad hoc duties as required, read with the key performance indicator that such duties be completed within a directed timeframe, suggest a level of control being exercised over the work being performed that is consistent with employment.

[29] In *Personnel Contracting* Kiefel CJ, Keane and Edelman JJ at [42] said:

A contract of employment may be partly oral and partly in writing, or there may be cases where subsequent agreement or conduct effects a variation to the terms of the original contract or gives rise to an estoppel or waiver. In such cases, it may be that the imposition by a putative employer of its work practices upon the putative employee manifests the employer's contractual right of control over the work situation; or a putative employee's acceptance of the exercise of power may show that the putative employer has been ceded the right to impose such practices.

[30] Their Honours observed at [73]:

Like the "own business/employer's business" dichotomy, the existence of a right of control by a putative employer over the activities of the putative employee serves to sensitise one to the subservient and dependent nature of the work of the employee, so as to assist in an assessment of whether a relationship is properly to be regarded as a contract of service rather than a contract for services.

[31] The analysis of the relationship in *Personnel Contractors* at [76] – [77] is also instructive. Their Honours considered the putative employee's agreement to work in accordance with day to day directions meant that the work was subordinated to a right of control. A similar situation is evident in relation to Ms Pascua's contract. The nature of the work required under the contract was subordinate to the business of MyCRA Lawyers such that it can be seen to have been performed as an employee of that business rather than as part of an independent enterprise conducted by Ms Pascua.

[32] Section 2 deals with remuneration and states that payment will be made on a 'time and material basis' although it only sets an hourly rate. There is no provision for the payment for materials supplied. No doubt because Ms Pascua was not required by the contract to provide materials. The hourly rate is described in Section 2 A. i) as follows:

AUD\$18 per hour Salary all inclusive as a Full Time Employee.

[33] On its face the rate is remuneration for full time employment indicating that the relationship was not one of independent contractor.

[34] The mode of remuneration is a factor relevant to the whether the putative employee can be seen to work in his or her own business as distinct from the business of the putative employer². This includes the manner of payment. The arrangements in place at the time the contract was entered into was that Ms Pascua would invoice in accordance with the proforma

electronic invoice which set a maximum number of hours at 40 and required an indication of any unworked hours. The invoicing arrangements are set out in Section 2 A. ii) a. of the contract. The invoices were to be forwarded weekly for the previous week's work. Weekly payments, calculated on an hourly rate, with a set number of hours, albeit payment could be reduced in a given week if hours were not worked, is an indication that the relationship was one of employment.

[35] Further, and going to the level of remuneration, the description of the work in the contract accords with work performed under industrial instruments, in particular the work to be performed meets the description of at least a Level 2 and possibly a Level 3 Legal Clerical and Administrative employee under the *Legal Services Award*. Taking the lower of these two awards classifications, and using the award rates of pay at the time the contract was entered into, the award hourly rate for a full time Level 2 employee was \$24.76 per hour. As the contract does not provide for annual leave, sick leave or other entitlements associated with full time employment, even though the rate is said to be for full time employment, the casual rate is the better comparator. The casual rate for a level 2 employee was \$30.95 per hour.

[36] The hourly rate in the contract is very low, and less than the minimum rates payable under the relevant award for employees performing the same work. Remuneration for persons engaged in their own business, as contractors, is usually in excess, and often well in excess, of wages paid to employees who may perform the same work. The rate of pay does not suggest that the respondent engaged Ms Pascua due to specific expertise nor to provide a specialist service that was such as to warrant payment of a high rate of pay for the work. This may be contrasted with the example Mr Doessel gave during the proceedings of the use of taxation law specialists in the business. A cost that the business absorbed, as its clients were charged a fixed fee. There was no indication that the work performed by Ms Pascua was specialist work in that sense.

[37] I consider the rate set in the contract as a strong indication that Ms Pascua was not engaged to provide specialist services on a contract basis but rather was remunerated on an hourly basis to perform work as directed consistent with employment.

[38] Section 3 of the contracts reads:

SECTION 3:

ASSURANCE OF SERVICES

A. Independent Contractor will assure that the following individuals (the "Key Employee/s") will be available to perform, and will perform, the Services hereunder until they are completed (identify by title and name as applicable):

Joanna Pascua – Paralegal

B. The Key Employees may be changed only with the prior written approval of the Company, which approval shall not be unreasonably withheld.

[39] This provision requires Ms Pacua to be available to perform, and to perform, the work. The right to have a particular person do the work indicates a contract of service rather than a contract for services.³

[40] Section 4 is headed Independent Contractor Relationship. The term records that Ms Pascua has agreed to perform the work solely as an independent contractor and records the parties' recognition that the contract does not create an actual or apparent agency, partnership, franchise or employment relationship. This is similar to the earlier description of the contract as one of independent contractor. It is a label that will not be determinative. The section also states that Ms Pascua is not entitled to any other benefits or remuneration other than those specifically provided for in the contract. It also states that Doessel Pty Ltd shall not be liable for matters such as taxes, worker's compensation, unemployment insurance, employer's liability, social security or other entitlements and that all such costs are to be borne by Ms Pascua. On their face these term suggests a relationship of independent contractor. The respondent relies upon them. I will return to this issue.

[41] Section 5 deals with proprietary rights. It makes clear that Ms Pascua had no rights such as copyright or publishing rights, rights to use, reproduce property arising from the work performed under the contract. Such a term is not unusual in an employment context and it is not determinative in resolving the question of whether the contract was one of service or for services.

[42] Section 6 deals with the obligations associated with the company's confidential and proprietary information, providing that such information will be subject to the terms and conditions of a Non-Disclosure Agreement which is annexed to the contract as Annexure B. Annexure B assumes that the relationship is one of employment. It is headed 'Employee Non-Disclosure Agreement'. It states that "(f)or good consideration, and in consideration of being employed by Doessel Group Pty Ltd" Ms Pascua acknowledges that during "the course of her employ" there may be disclosed trade secrets including technical information, processes, computer programs and the like, business information such as customer lists, pricing data and other information. Ms Pascua also agreed that "at or at any time after the termination of my employment" she would not use, disclose or divulge to others that information. The Agreement also required that "upon termination of my employment" Ms Pascua shall return documents and property of the company and the company may notify any future "employer" of the existence of the agreement and be entitled to injunctive relief for any breach. The non-disclosure agreement on its face indicates employment. The label employment and employee here though is also not determinative just as the use of the term independent contractor elsewhere is not.

[43] Section 7 deals with warranties and indemnities. It provides that Ms Pascua warrants that she the services be provided in accordance with law. It refers to material being provided to a certain standard. Again, the provision is incongruous given the description of the work does not include supplying materials and no payment is made for such. Ms Pascua also warrants that she has authority to enter into the contract and that she will perform the services in accordance with the company's specifications. The company provides similar representations about having full power to enter into the contract. The contract frees the company of liability for any injury or death occurring in the course of performing the contract. It also requires Ms Pascua to indemnify the company from any damages, claims, liabilities, and costs which may arise from the performance of the work under the contract. Section 7 suggests an independent contractor arrangement with Ms Pascua taking on liability for any matter that may go awry in the performance of the work.

[44] Section 8 deals with the term and termination of the contract. The term is set as the period commencing on 21 July 2022 until Ms Pascua satisfactorily completes performance of the work or it is terminated. The description of the work however is ongoing and so the contract was to continue until terminated. It was an ongoing relationship rather than a contract limited by time or event such as the completion of a project. The termination provision allowed either party to provide 15 days' written notice if the other party breaches or is in default of any obligation in the contract and the default has not been cured within the notice period or it could be by company for any reason on 10 days' notice. I do not consider the termination provision as determinative of the relationship.

[45] Section 9 deals with damages and remedies giving the company rights to recover any property or material in the event of the contract terminating and freeing it of liability in the event of losses associated with the termination of the contract. Ms Pascua waived any right to injunctive relief in any dispute with the company but could have the dispute determined at law.

[46] Section 10 sets general terms which specifies the laws of the state of Queensland applicable to contracts as governing the contract and specifies the state and federal courts in Queensland as having exclusive jurisdiction. It requires notices under the contract to be in writing and sets the means for service of those notices. The company was free to assign the contract. Ms Pascua was not without the written consent of the company. Waivers of a breach of a provision of the contract was not to be regarded as a waiver of subsequent breaches. Rights arising prior to termination of the contract survived the expiration or termination of the contract. The section also provides that the contract represents the entire agreement between the parties and may not be amended except by signed written agreement.

Overall Assessment

[47] Having considered the terms of the contract I am required to make an overall assessment of the nature of the relationship by reference to the rights, obligations and duties created by it. My overall assessment of the rights and obligations created by the contract is that the arrangement entered into was an employment arrangement, not one of principal and independent contractor. The contract required Ms Pascua to perform work in the business of another. The work could not be assigned to someone else. The contract required that she perform it. The nature of the work was paralegal work. It was not work involving a profession, trade or distinct calling. It was paid at a rate below the minimum wage.

[48] Ms Pascua was not conducting her own business. She was paid an hourly rate of pay that was described as a salary as a full time employee. She took daily instruction as to the work to be performed and was to be supervised in performing the work. The arrangement was ongoing unless terminated in accordance with the terms of the contract. The description of the arrangement as that of independent contractor belied the actual nature of the contract. The contract, in a number of places, referred to the arrangement as employment.

[49] The respondent relied upon provisions excluding matters such as the payment of income tax, the provision of worker's compensation, the absence of paid annual leave or sick leave or other entitlements as decisive. The Full Bench of this Commission in *Deliveroo Australia Pty*

Ltd v Diego Franco [\[2022\] FWCFB 156](#) made the following observation about similar arguments:

[41] We also place little weight on those provisions of the 2019 Agreement which are merely consequential upon the labelling adopted in the agreement. In this respect, we rely upon the following passage in the Federal Court Full Court decision in (*ACE Insurance Ltd v Trifunovski* ([2013] FCAFC 3) which, insofar as it proceeds on an analysis of the contractual terms, has not we consider been overtaken by *Personnel Contracting*:

“[37] It is also difficult, in my view, to give much independent weight to arrangements about taxation, or even matters such as insurance cover or superannuation. These are reflections of a view by one party (or both) that the relationship is, or is not, one of employment. For that reason, in my view, those matters are in the same category as declarations by the parties in their contract (from which they often proceed). They may be taken into account but are not conclusive. These matters are less important than the adoption by the parties (where this occurs) of rights and obligations which are fundamentally inconsistent with basic requirements of a contract of employment, such as the ability to delegate the discharge of obligations under a contract to another person, or where there is a lack of control over how work is done.”

[50] Similar observations were made in *Personnel Contracting* at [58] and I take the same approach and consider the statements in the contract about meeting the obligations consequent upon the labelling of the arrangement as one of independent contractor to have little weight in determining the true nature of the relationship.

Conclusion

[51] For the foregoing reasons I find that the relationship was an employment relationship. Accordingly, the Respondent’s objection is dismissed.

[52] Ms Pascua’s application for an unfair dismissal remedy will be listed for programming on the merits of her unfair dismissal claim.



DEPUTY PRESIDENT

Appearances:

J. Pascua, for the Applicant

G.Doessell, for the Respondent

Hearing details:

2024

2 July
Via Microsoft Teams

Printed by authority of the Commonwealth Government Printer

<PR779643>

¹ see *JMC Pty Ltd v Commissioner of Taxation* [2023] FCAFC 76 at [9].

² *Personnel Contractors* at [113]

³ *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 36 - 37