



# DECISION

*Fair Work Act 2009*  
s.604 - Appeal of decisions

**Gang Ma**

v

**Yan Massage Wynnum West Pty Ltd**

(C2024/3958)

VICE PRESIDENT GIBIAN  
DEPUTY PRESIDENT EASTON  
DEPUTY PRESIDENT GRAYSON

SYDNEY, 5 NOVEMBER 2024

*Appeal against decision [\[2024\] FWC 1329](#) of Deputy President Lake at Brisbane on 28 May 2024 in matter number U2023/12107 – Application for unfair dismissal remedy – Appellant engaged as a masseur – Whether independent contractor or employee – Deputy President found that appellant was an independent contractor and dismissed application – No written agreement between the parties – Even in the absence of a written contract, nature of the relationship must be assessed based on the legal rights and obligations of the parties – Necessary to infer the terms of the agreement from circumstances and conduct of the parties – Whether grounds to displace findings as to primary facts made at first instance – Assessment finely balanced – Permission to appeal granted – Appeal dismissed.*

## Introduction

[1] Mr Gang (Mark) Ma (**appellant** or **Mr Ma**) has lodged a notice of appeal under s 604 of the *Fair Work Act 2009* (Cth) (the **Act**), for which permission is required, from a decision of Deputy President Lake of the Fair Work Commission (the **Commission**). The decision concerns an application made by Mr Ma for an unfair dismissal remedy under s 394 of the Act. The application was dismissed by the Deputy President because he concluded that Mr Ma was an independent contractor and therefore not entitled to apply for an unfair dismissal remedy by virtue of ss 382 and 386 of the Act.

[2] The background to the application is as follows. Mr Ma worked as a masseur for Yan Massage Wynnum West Pty Ltd (**respondent** or **Yan Massage**) in a shopping centre in Brisbane. The massage parlour is operated by Mr Bill Chen, who appeared for the respondent in these appeal proceedings and gave evidence in the proceedings before the Deputy President. Mr Ma commenced working at Yan Massage in or around 26 April 2022 and was terminated on 5 December 2023. Mr Ma lodged his unfair dismissal application the next day.

[3] Yan Massage filed its response to the application on 9 January 2024, and raised a jurisdictional objection on the basis that Mr Ma was an independent contractor rather than an employee and as such, is not a person protected from unfair dismissal pursuant to s 382(1)(a)

of the Act. The respondent also contended that Mr Ma had not been dismissed within the meaning of s 386(1) of the Act.

[4] In accordance with s 396 of the Act, the Deputy President issued directions for the parties to file evidence in relation to whether Mr Ma was an employee or an independent contractor as a preliminary matter. That question was listed for hearing on 14 March 2024 and the Deputy President conducted a determinative conference on that day.

### **The Decision**

[5] On 28 May 2024, the Deputy President handed down his decision upholding the respondent's jurisdictional objection.<sup>1</sup> The Deputy President concluded that the arrangement between Mr Ma and the respondent was an independent contracting relationship rather than an employment relationship.<sup>2</sup>

[6] The Deputy President began by referring to decisions of the High Court of Australia in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1; (2022) 275 CLR 165 (***Personnel Contracting***) and *Jamsek v ZG Operations Pty Ltd* [2022] HCA 2; (2022) 275 CLR 254 (***Jamsek***) which, at least until recent amendments to the Act, set out the test to be applied when assessing whether a person is an employee or contractor. The Deputy President noted that, as a consequence of those decisions, the characterisation of the relationship is to be determined by reference only to the parties' legal rights and obligations.<sup>3</sup>

[7] The Deputy President observed that, where a comprehensive written contract is in place, this will be the primary source of the parties' legal rights and obligations, and it will be decisive in characterising the relationship. However, the Deputy President noted that the situation was different if there was no comprehensive written contract in place. The Deputy President said (at [7]) (footnotes omitted):

Where no comprehensive written contract is in place, the High Court stated in *Jamsek* that the "multifactorial" test remains appropriate in identifying the applicable legal rights and obligations which is not derived from the post contract conduct. Therefore, a multifactorial approach is to be adopted. In reliance on a considerable body of case law developed, general legal principles are applied to specific circumstances. Multiple indicia are to be considered, though none alone are determinative. Analysis of the totality of the relationship between the parties is required to determine whether the relationship was one of an employee or independent contractor.

[8] The Deputy President then referred to a number of authorities which predate *Personnel Contracting* and *Jamsek*, including the decision of the Full Court of the Federal Court in *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* [2010] FCAFC 52; (2010) 184 FCR 448 and the summary of relevant factors set out in the decision of the Full Bench of this Commission in *Cai (t/as French Accent) v Do Rozario* [2011] FWAFB 8037; (2011) 215 IR 235.

[9] The Deputy President confirmed that this matter was one in which there was no comprehensive written contract between the parties, but referred to an advertisement for the role ultimately taken up by Mr Ma dated 22 April 2022.<sup>4</sup> However, the Deputy President

concluded that, given that the parties have not formally entered into a written agreement, ‘the advertisements cannot be relied upon as the primary source of the Applicant’s and Respondent’s legal obligations’. The Deputy President stated that ‘other indicia will need to be explored to determine whether the Applicant is an employee or independent contractor’.<sup>5</sup>

[10] The Deputy President then considered the way in which the parties conducted themselves during the period in which Mr Ma had worked for the respondent. The Deputy President stated that ‘the Applicant had sufficient control’ with regard to his commissions, working hours and breaks and that the evidence suggested that he ‘had significant breaks during some periods compared to some of the other workers ... [which] indicated the Applicant’s level of control of how much work he wished to perform’.<sup>6</sup> The Deputy President noted that there were matters over which Mr Ma did not have control including ‘booking clients, or the rates to perform the massage’ and that Mr Ma submitted that there were some duties that were required if he was not performing a massage.<sup>7</sup>

[11] The Deputy President did not find evidence given by Mr Ma to the effect that he was unable to work for others ‘particularly credible’ The Deputy President concluded that, on the evidence before him, it appeared Mr Ma was not constrained by the respondent from working for others ‘if he wished’ and that this factor indicates that Mr Ma was an independent contractor.<sup>8</sup> The Deputy President also was not satisfied that Mr Ma had demonstrated that he advertised his services to the world at large as an employee of the respondent, nor that he was required to wear a uniform while he was providing massages.<sup>9</sup>

[12] Finally, the Deputy President concluded that the fact that Mr Ma was not provided annual leave and income tax was not deducted from his remuneration in combination with the requirement that the applicant provide an ABN and insurance ‘indicates a slight finding towards the Applicant being a contractor.’<sup>10</sup>

[13] The Deputy President expressed his ultimate conclusion in the following terms:<sup>11</sup>

In considering the indicia above and the evidence that has been provided the Commission, I am satisfied that the reflection of the arrangement between the Applicant and Respondent is an independent contracting relationship rather than an employee. Therefore, the Applicant is not a persons protected from unfair dismissal under s. 396 of the Act. The Respondent’s jurisdictional objection is upheld, and the Application is dismissed. I order accordingly.

### **Grounds of Appeal and Submissions**

[14] Mr Ma has sought permission to appeal from the Deputy President’s decision. The grounds set out in the notice of appeal are lengthy and assert various factual matters which are said to support a conclusion that he was engaged as an employee. We understand Mr Ma’s essential ground of appeal to be that the Deputy President erred in finding that he was an independent contractor and that, in fact, he worked as an employee in the company. Mr Ma says that the respondent’s jurisdictional objection should have been dismissed.

[15] Mr Ma claims that the Deputy President erred in his determination of a number of the indicia set out in his decision. The submissions of both parties on appeal addressed the following factors:

- **Working Hours:** Mr Ma submits that he was required to attend the respondent's premises during scheduled working hours and did not have the freedom to work at his own will. Mr Ma submits that he was required to fulfil other duties such as cleaning in between tasks. The respondent submitted that the appellant could go home between tasks if there would be gaps on the schedule between customers and that the appellant took a significant amount of time off to prepare for his citizenship test.
- **Tools:** Mr Ma submits that all necessary equipment was provided by the respondent. The respondent alleged that Mr Ma was required to provide his own tools and consumables although it accepted that Mr Ma had used the equipment at the premises and had not been charged for doing so.
- **Salary:** Mr Ma submits that he was paid a 'minimum wage' of \$150 a day and that he would receive a commission if his daily turnover exceeded that amount. Mr Ma submitted further that the respondent could deduct from that minimum wage for lateness, early departure and absences but that no deductions were made as he did not violate the respondent's policies. The respondent says the applicant was paid a 'daily fee' of \$150 and a commission of 60% if the earnings for the day exceeded that amount.
- **Control:** Mr Ma submitted that all advertising, pricing and scheduling for his work were arranged and provided by the company and that he did not have any role in those parts of the business.
- **Alternative employment:** Mr Ma submitted that the Deputy President erred on the question of whether he was able to work for other companies and that he did not work for others during the period he worked for the respondent. The respondent submitted that Mr Ma did work at other massage locations during the period he worked for the respondent.
- **ABN and insurance:** The respondent submitted that Mr Ma held and used an ABN and professional insurance as an independent contractor. Mr Ma submitted that he provided an ABN on the request of the respondent and that he believed it was required in the industry to hold professional insurance independently of the nature of employment.

[16] Mr Ma additionally advanced that the Deputy President erred in determining that the multifactorial test weighed in favour of finding that the appellant was an independent contractor. Mr Ma asserted that he worked for the company at its shop and that he felt like an employee and not a contractor

## Legal Framework

[17] The method of ascertaining the ordinary meaning of the expressions 'employee' and 'employer' for the purposes of the Act has now been amended in response to the decisions of the High Court in *Personnel Contracting* and *Jamsek*.<sup>12</sup> Those amendments were made by the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) and commenced on 26 August 2024. However, the Act as it existed prior to those amendments applies to an application made, or proceedings on foot, as at the commencement of the amendments as well as an application for review of, or an appeal relating to, such an application or proceedings.<sup>13</sup> As such, the approach outlined in *Personnel Contracting* and *Jamsek* is to be applied in this appeal.

[18] The approach dictated by *Personnel Contracting* and *Jamsek* involved a fundamental change from the understanding of the law commonly applied prior to those decisions when

ascertaining whether a person was engaged as an employee or an independent contractor. The approach is easy to state if not always to apply. Where the rights and duties of the parties are ‘comprehensively committed to a written contract’ the validity of which is not challenged on the basis it is a sham and the terms of which have not been varied, waived or the subject of an estoppel, the rights and obligations established by the contract are determinative as to the legal character of the relationship.<sup>14</sup> The characterisation of the relationship does not require or involve a ‘wide ranging review of the entire history of the parties dealings’.<sup>15</sup>

[19] That does not change the fact that it is necessary to consider the ‘totality of the relationship between the parties’ by reference to the various indicia of employment that are identified in the authorities. However, for a matter to bear upon the ultimate characterisation of the 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.<sup>16</sup>

[20] The task becomes more complex in circumstances in which there is no written contract at all, or the contract is partly written and partly oral. In either of those circumstances, it is likely to be necessary for a court or tribunal adjudicating the question to consider the conduct of the parties for the purpose of ascertaining the nature of the legal rights and obligations that the parties have taken on. That is likely to be required where the evidence as to the nature of any oral agreement is scant and it is necessary to infer the substance of the agreement between the parties from their conduct.

[21] The Full Court of the Federal Court recently considered such a case in *EFEX Group Pty Ltd v Bennett* [2024] FCAFC 35; (2024) 330 IR 171 (*EFEX Group*). In that matter, Mr Bennett performed sales and related work for EFEX Group under a purely oral contract. Mr Bennett applied to the Commission for an unfair dismissal remedy after being terminated and it became necessary for the Commission to consider whether he was engaged as an employee or as an independent contractor. The finding of the Commission that Mr Bennett was an employee of EFEX Group was challenged by way of judicial review in the Federal Court.

[22] Katzmann and Bromwich JJ explained that, in the absence of a comprehensive written contract, it is necessary to examine the conduct of the parties in order to ascertain the nature and terms of the contract they have made. Their Honours said (at [7] and [9]):

This case did not involve any written contract at all, much less a comprehensive written contract. It was a wholly oral contract, with sparse details of the agreement reached expressed in the lead up to its formation. In the absence of a written contract and no evidence of a particular conversation during which the contract was made, “evidence of the parties’ conduct must necessarily be considered in order to draw inferences as to whether the meeting of minds necessary to create a contract has occurred and what obligations they have thereby undertaken”: *Personnel Contracting* at [177] per Gordon J (Steward J agreeing), as summarised in *Chiodo v Silk Contract Logistics* [2023] FCA 1047 at [9].

...

The terms of an oral contract may be able to be inferred from the circumstances, including in whole or in part from the parties’ conduct or a course of dealing between them, or implied where necessary for business efficacy: *Realestate.com.au Pty Ltd v Hardingham* (2022) 97 ALJR 40 at [21]-[22] per Kiefel CJ and Gageler J.

[23] However, that does not mean the approach adopted prior to *Personnel Contracting* and *Jamsek* is revived where there is no comprehensive written contract.<sup>17</sup> Although it may be necessary in such a case to have regard to the conduct of the parties, the focus of the analysis is different. Even where there is a purely oral contract, the nature of the relationship between the parties is determined by the legal rights and obligations created by the contract. The parties' conduct, including the way in which the contract is performed, is only relevant to the extent that it assists in ascertaining the terms of the contract, express or implied. The conduct of the parties is irrelevant if it does not touch upon, or provide a basis for inferring, their legal rights and obligations.

[24] In *EFEX Group*, Katzmann and Bromwich JJ referred to the judgment of Kennett J in *Chiodo v Silk Contract Logistics* [2023] FCA 1047 (*Chiodo*) which also concerned an entirely oral contract. In *Chiodo*, Kennett J explained the manner in which the conduct of the parties should be considered as follows (at [8]-[9]):

Where there is not a written contract, the identification of the parties' contractual rights must proceed somewhat differently but the fundamental task is the same: the parties' contractual rights and obligations are to be ascertained and characterised. The question remains what the parties' legal rights and obligations were, rather than how they behaved in the performance of their contract (*Secretary, Attorney-General's Department v O'Dwyer* [2022] FCA 1183; 318 IR 216 at [29]-[33] (Goodman J)). However, that distinction obviously becomes more complicated where the contract is not written and its terms are to be inferred in whole or in part from the parties' conduct. The terms of an oral contract may not be limited to express terms; terms may be inferred from the circumstances, including a course of dealing between the parties, or implied where necessary for business efficacy: *Realestate.com.au Pty Ltd v Hardingham* [2022] HCA 39; 406 ALR 678 at [21]-[22] (Kiefel CJ and Gageler J).

Where there is no written contract and no evidence of a particular conversation in which a contract was formed orally, evidence of the parties' conduct must necessarily be considered in order to draw inferences as to whether the meeting of minds necessary to create a contract has occurred and what obligations they have thereby undertaken (see *Personnel Contracting* at [177] (Gordon J, Steward J agreeing)).

[25] Whether the relationship between the parties is one of employment or not turns upon an examination of their legal rights and obligations. Those rights and obligations might either be set out in a written contract or, alternatively, must be ascertained from evidence of the terms that were agreed orally or which can be inferred from evidence as to the circumstances of the making of the contract and the course of dealing between the parties. Conduct that has no connection to the contractual obligations of the parties must be disregarded.

[26] Once the terms of the contract have been ascertained, it is necessary to characterise the relationship created by the contract. Two considerations will often be critical in the task of characterisation: the extent to which the putative employer has the right to control how, when and where the putative employee performs the work; and the extent to which the putative employee can be seen to be working in their own business as distinct from the putative employer's business.<sup>18</sup> The way that the contractual terms address the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work, the provision for holidays, the delegation of work, and where the right to exercise direction and

control resides may also be relevant to whether the relationship is one of employer and employee.<sup>19</sup>

### **Permission to Appeal**

[27] Section 604(1) of the Act makes it clear that there is no right to appeal, and an appeal may only be made with the permission of the Commission. Other than with respect to certain decisions of a delegate, or the General Manager of the Commission, the question of permission to appeal must be decided by a Full Bench.<sup>20</sup> Generally, the Full Bench must grant permission to appeal if satisfied that is in the public interest to do so.<sup>21</sup> Otherwise, the Full Bench has a broad discretion as to whether permission to appeal should be granted.<sup>22</sup>

[28] The discretion of the Commission to grant permission is more confined in case of an application for permission to appeal from a decision of the Commission made in unfair dismissal proceedings under Part 3-2 of the Act. Section 400 of the Act provides:

- (1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under this Part unless the FWC considers that it is in the public interest to do so.
- (2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under this Part can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact.

[29] Relevantly, s 400(1) manifests an intention that the threshold for a grant of permission to appeal is higher in respect of unfair dismissal appeals than that pertaining to appeals generally.<sup>23</sup> Permission to appeal can only be granted if the Full Bench is satisfied it is in the public interest to do so and no general or residual discretion exists if that threshold is not met.

[30] Mr Ma did not make extensive submissions on the question of permission to appeal in either written or oral submissions. However, the Full Bench has decided to grant permission to appeal in this matter because the Deputy President does not appear to have adopted the approach required by *Personnel Contracting* and *Jamsek*. It is in the public interest that permission to appeal be granted to permit the Full Bench to explain the proper approach to be adopted in circumstances in which there is no comprehensive written contract and to consider whether the outcome arrived at by the Deputy President was correct adopting that approach.

[31] In his decision, the Deputy President asserted that, where no comprehensive written contract is in place, ‘a multifactorial approach is to be adopted’.<sup>24</sup> The Deputy President then referred, and extracted passages from, a number of decisions that predate *Personnel Contracting* and *Jamsek*. Those authorities encouraged an examination of the conduct of the parties, and the way in which the contract was performed, in a manner that was not necessarily connected with the task of ascertaining the legal rights and obligations created by the contract. As we have explained, *Personnel Contracting* and *Jamsek* require that the characterisation of the nature of the relationship consider only the legal rights and obligations of the parties. Even in the case of a wholly oral contract, the manner in which the contract is performed is only relevant to the extent that it demonstrates the terms of the contract between them.

[32] When considering the factors that might be relevant in characterising the relationship between Mr Ma and the respondent, the Deputy President concentrated on the conduct of the parties without drawing conclusions as to the legal rights and obligations thereby created. For example, the Deputy President referred to the dispute as to whether Mr Ma had, in fact, performed work for another business whilst engaged by the respondent and whether Mr Ma's services were advertised to the world at large as an employee of the respondent.<sup>25</sup> Those matters might be relevant, but only to the extent the conduct of the parties is reflective of the rights and obligations they had committed to as terms of the contract between them. The decision contains no analysis of that question.

[33] In those circumstances, we are satisfied it is in the public interest to grant permission to appeal. It is appropriate that permission to appeal be granted in order for the Full Bench to consider for itself whether the conclusion reached by the Deputy President as to the nature of the relationship between Mr Ma and the respondent was correct.

### **Consideration of the Appeal**

[34] If permission to appeal is granted in an appeal such as the present, it is necessary for the Full Bench to determine for itself whether the primary decision-maker's conclusion concerning the existence or otherwise of an employment relationship was correct.<sup>26</sup> Although it may involve matters of impression and evaluation upon which reasonable minds might differ, the determination of whether a person is an employee is not a discretionary decision. Either the Commission has jurisdiction to hear and determine Mr Ma's application for an unfair dismissal remedy because he was an employee, or it does not.<sup>27</sup> That question has only one correct answer.

[35] The question of whether Mr Ma was an employee of the respondent is not, however, easy to answer. Endeavouring to answer the question requires consideration of the totality of the relationship created by the contract between the parties. There was relatively scant material before the Deputy President from which to deduce the rights and obligations taken on by Mr Ma and the respondent in the contract between them and, in substantial part, it is necessary to attempt to infer the contractual terms from the conduct of the parties. Recalling that it is necessary to focus only on the legal rights and obligations created by the contract, it is appropriate to consider a number of potentially relevant indicia in turn.

#### *Payment arrangements*

[36] It is appropriate to start with what evidence there was as to the agreement formed at the commencement of the relationship. An advertisement for the role taken up by Mr Ma was put into evidence by the respondent at first instance. As set out in the decision of the Deputy President, the advertisement was in the following terms:

##### **B: Quality Massage Parlor Seeks Partnership**

###### **Store Description:**

Located in a large shopping mall in Brisbane's East End, with a high flow of people, a good customer base and a very high-quality clientele. The store is well decorated and has an excellent working environment. The atmosphere in the store is relaxing and harmonious and there are opportunities for immigration.



Payment:

Basic share 50%-60% Opportunity to increase commission every 6 months Therapists with a 60% commission will be eligible for partner benefits and company dividend.

[37] The Deputy President recorded that Mr Ma asserted that he responded to a different advertisement and tendered another advertisement which he said reflected the one to which he responded. The Deputy President recorded that there were some differences in the second version of the advertisement. The subject line stated ‘Good quality massage shop really needs staff on Saturday and Sunday’ and it referred to training and a support salary.<sup>28</sup>

[38] The fact that the relationship was described in the first version of the advertisement as a ‘partnership’ is not, in itself, important and can be put to one side. It is more significant that both versions of the advertisement offered an arrangement in the nature of a profit share, that is, that Mr Ma would receive a percentage of the fees derived from his work. Although not determinative, a contractual agreement for a worker to receive a part of the revenue of a business might suggest that Mr Ma was taking on some of the risk involved in the business and that he would have an interest in attracting and retaining clients. That type of arrangement might support a conclusion that the contract between the parties did not involve Mr Ma merely working in the business of the respondent as an employee.

[39] The evidence indicated that Mr Ma applied for the position in or around 22 April 2022 and commenced performing work for the respondent on 26 April 2022. The basis on which Mr Ma was paid in the initial period of his engagement is not clear from the findings of the Deputy President. However, the evidence indicated that, in early July 2022, Mr Ma proposed a change to his payment arrangements such that he would receive 60 percent commission plus a daily rate of \$150 per day. At least by the time his engagement came to an end, Mr Ma was receiving 60 percent of the fees derived from the work he performed with a minimum payment of \$150 per day.

[40] The picture presented by the payment arrangements is mixed. Mr Ma received both a minimum time-based payment of \$150 per day and a commission payment based on a proportion of the fees derived from his work. The evidence of both parties indicated that the \$150 payment was absorbed into commission payments earned by Mr Ma. Although regular time-based payment may be more indicative of an employment relationship, a worker may be an employee despite being remunerated by commission, or by a share of the employer’s income or profit.<sup>29</sup> Nonetheless, the assumption of part of the risks associated with the conduct of a business by means of payment entirely or substantially by way of a share of the fees derived from the clients to whom Mr Ma provided services provides some support for the view that Mr Ma was engaged as an independent contractor.<sup>30</sup>

[41] On balance, although not determinative of the character of the relationship, the fact that the contractual agreement in relation to payment involved a share of fees paid by clients for whom Mr Ma provided services, albeit at least from July 2022 with a minimum daily payment, is somewhat suggestive of an independent contractor relationship.

### *Control*

[42] The existence of a contractual right on the part of the putative employer to control when, where, how and what work is to be performed represents an important consideration in

ascertaining the nature of the relationship created by the contract. 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'.<sup>31</sup>

[43] Consistent with the focus on legal rights and obligations required by *Personnel Contracting* and *Jamsek*, the analysis must involve consideration of whether there was a contractual right of control rather than merely the exercise of control in practice.<sup>32</sup> In the absence of a comprehensive written contract, it is necessary to examine whether the existence of a right of control may be inferred from the conduct of the parties. If, in practice, the putative employer assumes the detailed direction and control of the worker in the daily performance of his or her work and the worker tacitly accepts a position of subordination to authority and to orders and instructions as to the manner in which they carry out their duties, that may provide a basis for inferring that the contractual agreement involved submission to direction by the employer.<sup>33</sup>

[44] Whether evidence of the exercise of control provides a sufficient basis to infer contractual agreement to submit to direction and supervision may be difficult to assess. In this matter, the evidence going to exercise of control by the respondent was disputed. Mr Ma submitted that he was required to undertake duties when he was not performing massage work. A document was in evidence containing what the Deputy President referred to as 'store regulations' which recorded as follows:

The daily responsibilities of the person on duty include but are not limited to:

- Folding towels and rewashing them with hot water.
  - Dumping rubbish
  - Sweeping and mopping floor
  - Maintaining clean and tidy work environment
  - Supplying disposable water cups
- 
- Refilling water
  - Hanging some towels in advance before finishing work to use as dry towels the next day

Store regulations:

- Keep quiet and do not make loud noises, especially when there are customers.
- Speak to customers with a lower voice. Do not disturb customers in other rooms
- Those who argue or fight in the store shall be directly dismissed
- No one is allowed to use the computer except for the receptionist on that day
- Massagists should arrive at the store at 9:15 the latest. For special reasons, please ask for leave from the receptionist in advance.
- The person who refuses to be on duty will deduct \$10 from their daily salary and give it to the employee who helps to be on duty.
- The last person who leaves the store shall make sure to turn off all power, especially the electric blanket and towel machine.
- After seeing off customers, the massagists shall tidy up the room that was used.
- Do not eat food with strong smell in the store
- Couches should be returned to its original position in a timely manner after foot therapy
- Do not steal items from store.

[45] The Deputy President indicated that it was not clear whether the reference in the ‘store regulations’ to the term ‘duty’ was limited to duties undertaken by the receptionist. Nonetheless, the document indicates that the respondent purported to exercise a degree of control over massage therapists, including in relation to their conduct whilst at work, time of attendance and the manner of the performance of work. The respondent also reserved the right to discipline the workers in the event of infractions of the listed instructions, including by deductions from the ‘daily salary’ or dismissal. Those matters suggest an assumption of a contractual right of control consistent with an employment relationship.

[46] On the other hand, the Deputy President made findings that Mr Ma had control of the days which he worked and that he appeared to have had significant breaks during his work periods compared to other workers.<sup>34</sup> The Deputy President further concluded that Mr Ma ‘had the freedom not to work or take a massage if he had wished’ and ‘was able to freely take off time, such as study for this citizenship without resistance from the Respondent’.<sup>35</sup>

[47] The basis of these findings is not entirely clear from the Deputy President’s reasons. However, the findings appear to involve acceptance of the evidence of Mr Chen, who gave evidence for the respondent, over the evidence of Mr Ma. Mr Chen’s evidence included that the respondent did not control the days or hours that Mr Ma performed his services, and that Mr Ma was not required to give notice of periods when he would not provide the services. The Deputy President conducted a determinative conference at which evidence was received. In those circumstances, there is not a sufficient basis for the Full Bench to displace the factual findings made by the Deputy President.<sup>36</sup>

[48] In light of the factual findings made by the Deputy President, it is not possible to infer from the conduct of the parties that the respondent possessed a contractual right to control the days or hours on which Mr Ma performed work. The conduct of the parties is, however, consistent with an inference that Mr Ma submitted to the authority and direction of the respondent when he did attend and perform work in relation to the nature of the duties to be undertaken and the standards of conduct expected of him. In those circumstances, consideration of the extent to which the respondent possessed a contractual right of control also presents a mixed picture.

#### *Other factors*

[49] A number of other factors emerge from the evidence that are potentially relevant to an overall assessment of the nature of the relationship between Mr Ma and the respondent. Firstly, there was a factual dispute as to whether Mr Ma had performed worked for another business known as ‘Wonderful Massage’ during the period he had been engaged by the respondent. Mr Ma submitted he had not and that, at least after the initial period of his engagement, he was unable to work for any other business because he was engaged full-time by the respondent.

[50] The Deputy President did not find the evidence of Mr Ma in this respect credible.<sup>37</sup> It is unnecessary for the Full Bench to resolve that issue. Even if it is accepted that Mr Ma was practically unable to perform work for other businesses, that matter is still neutral in the task of ascertaining the nature of the relationship between him and the respondent. In *EFEX Group*, for example, Katzmann and Bromwich J observed (at [43]):

The practical preclusion of the performance of other work as a matter of available time is also often going to be intractably neutral when it comes to the more limited ascertainment of contractual rights and obligations than it had under a multifactorial analysis not confined to the terms of the contract. That is especially so when there was no contractual prohibition on subcontracting of tasks, in particular those of an administrative or otherwise rote or routine nature. As the High Court reminds us in *Jamsek*, an “expectation” that a person direct the bulk of their time to work for a particular customer, and a practical inability to perform work for others given that time constraint, might say little more than the fact that the customer has high demands for such services: see *Jamsek* at [54]-[55].

**[51]** Even if there would have been practical difficulties in Mr Ma taking on other work, there is no basis upon which it could be inferred that Mr Ma was subject to a contractual prohibition on engaging in work for other business during the period he was engaged by the respondent. That matter is ‘intractably neutral’. Having said that, the mere fact that a worker is not contractually constrained from engaging in other work does not preclude a finding of employment. Employees are not generally prevented from engaging other work in their spare time unless to do so would give rise to a breach of the duty of fidelity and good faith.<sup>38</sup> In the circumstances of this matter, whether Mr Ma had performed work for another business when engaged by the respondent, or whether he could have done so, does not assist in resolving the question raised in the appeal.

**[52]** Secondly, there was a dispute as to whether Mr Ma wore a uniform when performing work for the respondent and thereby presented to the world as its employee or representative. Mr Ma contended that he did wear a uniform whereas the respondent submitted that he did not have to wear a uniform and provided CTV footage of Mr Ma not wearing a uniform on one occasion at least. Looked at through a contractual analysis, whether Mr Ma, as a matter of practice, wore a uniform says little, let alone anything decisive, about the nature of the legal relationship in place.<sup>39</sup> We can discern no basis to infer that Mr Ma was contractually obliged to wear a uniform or otherwise present as an emanation of the respondent’s business.

**[53]** Thirdly, there was evidence as to the use of tools and equipment by Mr Ma. Mr Ma indicated that all the tools and supplies for his work were provided by the respondent. The respondent’s evidence was that Mr Ma was required to provide his own equipment and tools, such as needles and alcohol wipes. Mr Chen’s evidence was that Mr Ma sometimes used the respondent’s equipment and that he had decided not to charge him even though that would be the usual practice. The Deputy President did not resolve this conflict. Again, adopting a contractual analysis, we do not believe this evidence assists. There is no basis in the evidence to infer either party had a contractual obligation to provide the necessary tools and supplies to permit the performance of work by Mr Ma.

**[54]** Finally, Mr Ma was not provided with annual leave, income tax was not deducted from the remuneration he was paid, and he was required to provide an ABN and his own insurance. Most of these matters are, in the circumstances of this matter, not of great weight. It is, in our view, difficult to give much independent weight to arrangements about taxation, or even matters such as insurance cover or superannuation, as they are likely to be reflections of the subjective view by one party (or both) as to the nature of the relationship.<sup>40</sup>

## **Conclusion**

[55] For the reasons set out above the approach adopted by the Deputy President did not properly reflect the guidance of the High Court in *Personnel Contracting* and *Jamsek*. Permission to appeal should be granted so as to allow the Full Bench to assess for itself whether Mr Ma was as employee of the respondent.

[56] The resolution of the question of whether Mr Ma was engaged as an employee, or an independent contractor, is finely balanced and influenced by the factual findings made by the Deputy President. In the absence of a written contract, it is necessary to infer the rights and obligations the parties took on as part of their contract from the circumstances of the engagement and the conduct of the parties. In relation to a number of matters, the evidence does not permit firm inferences to be drawn as to the nature of the contractual obligations taken on by the parties. Furthermore, there are considerations that point in different directions.

[57] In our opinion, although the conduct of the parties provides a basis to infer that the respondent assumed a contractual right to direct and supervise the way Mr Ma performed his work, the combined effects of the fact that Mr Ma was paid by reference to a percentage of the fees derived from the services he provided to clients and the findings made by the Deputy President to the effect that Mr Ma was not subject to control as to the days and times at which he attended for work favour the conclusion that he was engaged as an independent contractor. The other factors which arise from the evidence are, in our opinion, neutral and do not assist in resolving the character of the relationship.

[58] It must follow that, although our reasoning differs from that of the Deputy President, we agree that Mr Ma was not a person protected from unfair dismissal for the purposes of s 382 of the Act or dismissed for the purposes of s 386 because he was not an employee of the respondent. The appeal must, accordingly, be dismissed.

[59] The Full Bench makes the following orders:

- (a) Permission to appeal is granted; and
- (b) The appeal is dismissed.



VICE PRESIDENT

*Appearances:*

*G Ma*, appellant appearing for himself.  
*B Chen*, operator of the respondent.

*Hearing details:*

2024.  
Sydney (via video link):  
12 August 2024.

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<sup>1</sup> *Gang Ma v Yan Massage Wynnum West Pty Ltd* [\[2024\] FWC 1329](#).

<sup>2</sup> [\[2024\] FWC 1329](#) at [26].

<sup>3</sup> [\[2024\] FWC 1329](#) at [6].

<sup>4</sup> [\[2024\] FWC 1329](#) at [10].

<sup>5</sup> [\[2024\] FWC 1329](#) at [12].

<sup>6</sup> [\[2024\] FWC 1329](#) at [13]-[16].

<sup>7</sup> [\[2024\] FWC 1329](#) at [17].

<sup>8</sup> [\[2024\] FWC 1329](#) at [23].

<sup>9</sup> [\[2024\] FWC 1329](#) at [24].

<sup>10</sup> [\[2024\] FWC 1329](#) at [25].

<sup>11</sup> [\[2024\] FWC 1329](#) at [26].

<sup>12</sup> *Fair Work Act 2009* (Cth), s 15AA.

<sup>13</sup> *Fair Work Act 2009* (Cth), Schedule 1 clause 119(1).

<sup>14</sup> *Personnel Contracting* at [43]-[44] and [59] (Kiefel CJ, Keane and Edelman JJ) and [183] (Gordon J, Steward J agreeing).

<sup>15</sup> *Personnel Contracting* at [59] (Kiefel CJ, Keane and Edelman JJ) and [185]-[189] (Gordon J, Steward J agreeing).

<sup>16</sup> *Personnel Contracting* at [61] (Kiefel CJ, Keane and Edelman JJ).

<sup>17</sup> *Secretary, Attorney-General's Department v O'Dwyer* [2022] FCA 1183; (2022) 318 IR 216 at [29]-[33] (Goodman J).

<sup>18</sup> *Personnel Contracting* at [36]-[39] and [73] (Kiefel CJ, Keane and Edelman JJ), [113] (Gageler and Gleeson JJ) and [180]-[183] (Gordon J, Steward J agreeing); *Chiodo* at [4](d) (Kennett J); *EFEX Group* at [13] (Katzmann and Bromwich JJ) and [54] (Lee J).

<sup>19</sup> *Personnel Contracting* at [113] (Gageler and Gleeson JJ) and [174] (Gordon J, Steward J agreeing); *Chiodo* at [4](e) (Kennett J).

<sup>20</sup> *Fair Work Act 2009* (Cth), s 613(1)(a).

<sup>21</sup> *Fair Work Act 2009* (Cth), s 604(2).

<sup>22</sup> *Wan v Australian Industrial Relations Commission* [2001] FCA 1803; (2001) 116 FCR 481 at [30] (Spender, Kiefel, Dowsett JJ); *Ferryman Pty Ltd v Maritime Union of Australia* [\[2013\] FWCFB 8025](#); (2013) 238 IR 258 at [9]-[12].

<sup>23</sup> *Coal & Allied Mining Services Pty Ltd v Lawler and others* [2011] FCAFC 54; (2011) 192 FCR 78 at [34] (Buchanan J); *Workpac Pty Ltd v Bambach* [2012] FWAF 3206; (2012) 220 IR 313 at [14]; *Barwon Health – Geelong Hospital v Colson* [\[2013\] FWCFB 4515](#); (2013) 233 IR 364 at [6].

<sup>24</sup> [\[2024\] FWC 1329](#) at [7].

<sup>25</sup> [\[2024\] FWC 1329](#) at [22]-[24].

<sup>26</sup> *Sammartino v Foggo* (1999) 93 IR 52 at [8]-[10] (Marshall and Moore JJ); *Gupta v Portier Pacific Pty Ltd* [\[2020\] FWCFB 1698](#); (2020) 296 IR246 at [55]-[56] (Ross P and Hatcher VP).

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<sup>27</sup> *Damesvski v Giudice* [2003] FCAFC 252; (2003) 133 FCR 438 at [115] and [117]-[128] (Marshall J) and [175]-[176] (Merkel J).

<sup>28</sup> [\[2024\] FWC 1329](#) at [11].

<sup>29</sup> *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR 395 at 406 (Stephen J); *Connolly v Wells* (1994) 55 IR 73 at 77 (Gleeson CJ) and 87-88 (Kirby P).

<sup>30</sup> *Roy Morgan Research Pty Ltd v Commissioner of Taxation* [2010] FCAFC 52; (2010) 184 FCR 448 at [47] (Keane CJ, Sundberg and Kenny JJ).

<sup>31</sup> *Personnel Contracting* at [73] (Kiefel CJ, Keane and Edelman JJ).

<sup>32</sup> *EFEX Group* at [40] (Katzmann and Bromwich JJ).

<sup>33</sup> See, for example, *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138 at 151 (Dixon, Fullagar and Kitto JJ); *Personnel Contracting* at [50]-[51] (Kiefel CJ, Keane and Edelman JJ) and [190] (Gordon J).

<sup>34</sup> [\[2024\] FWC 1329](#) at [14]-[16].

<sup>35</sup> [\[2024\] FWC 1329](#) at [20].

<sup>36</sup> See approach in *Aldi Foods Pty Ltd v Moroccan Oil Israel Ltd* [2018] FCFC 93; (2018) 261 FCR 301 at [45] (Perram J, with whom Allsop CJ and Markovic J agreed).

<sup>37</sup> [\[2024\] FWC 1329](#) at [23].

<sup>38</sup> *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169 at 173.

<sup>39</sup> See approach in *EFEX Group* at [42] (Katzmann and Bromwich JJ).

<sup>40</sup> *ACE Insurance Ltd v Trifunovski* [2013] FCFC 3; (2013) 209 FCR 146 at [37] (Buchanan J).