



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Hayley Smith

v

Kohli Traders Pty Ltd
(U2024/11979)

COMMISSIONER CRAWFORD

SYDNEY, 5 FEBRUARY 2025

Unfair dismissal application – jurisdictional objection alleging not employee and no dismissal – engagement started before s.15AA inserted and continued after it commenced operating – separate assessments required – jurisdictional objection upheld – application dismissed.

BACKGROUND

[1] Kohli Traders Pty Ltd (**Kohli Traders**) operates a care services business for people with disability in New South Wales. Hayley Smith commenced performing work for Kohli Traders on 13 January 2023. Ms Smith filed an unfair dismissal application on 8 October 2024 which alleges she was dismissed by Kohli Traders on 3 October 2024. On 21 October 2024, Kohli Traders filed an employer response form which argued Ms Smith is not eligible to make an unfair dismissal application because she was an independent contractor and not an employee of Kohli Traders. Kohli Traders also argued its relationship with Ms Smith has not ended and hence that Ms Smith has not been dismissed. This decision concerns whether Ms Smith was an employee or an independent contractor, and whether she was dismissed by Kohli Traders.

[2] I issued directions for the filing of material and listed a determinative conference via video on 28 January 2025. Ms Smith represented herself. Mani Kohli (Director) represented Kohli Traders.

MATERIAL FILED

Kohli Traders

[3] Mr Kohli filed a statement with several documents attached on 23 December 2024. I marked the material filed by Mr Kohli **Exhibit R1**.¹ Mr Kohli was not required for cross-examination.

[4] The uncontested evidence relied upon by Mr Kohli includes:

- An Independent Contractor Agreement (**ICA**) between Kohli Traders and Ms Smith dated 11 January 2023. The terms of the ICA include that Ms Smith was free to engage in other business activities when not performing work under the ICA, payment under the ICA was at the rate of \$45 per hour inclusive of GST, Ms Smith was required to submit invoices to receive payments under the ICA, Ms Smith was required to provide her own equipment, and Ms Smith was required to source her own insurances.
- A list of invoices issued by Ms Smith to Kohli Traders for work performed from November 2023 to October 2024.
- A copy of two invoices issued by Ms Smith to Kohli Traders on 6 October 2024.
- An email from Ms Smith to Mr Kohli dated 23 May 2024 where Ms Smith gives notice of increases to her weekend and public holiday rates effective 10 June 2024.
- Several emails from Ms Smith to Mr Kohli where Ms Smith refers to being engaged as an independent contractor.
- Several emails concerning the breakdown of the relationship between Ms Smith and Kohli Traders.

[5] I have reviewed and considered all the evidence relied upon by Kohli Traders.

[6] Mr Kohli made oral submissions at the end of the determinative conference which I have considered.

Ms Smith

[7] Ms Smith filed an email containing her evidence with several documents attached on 10 January 2025. I marked the material filed by Ms Smith **Exhibit A1**. Ms Smith was not required for cross-examination.

[8] The uncontested evidence relied upon by Ms Smith includes:

- A schedule of maximum fees that can be charged for different types of services under the National Disability Insurance Scheme (**NDIS**).
- Text messages and emails concerning issues that Ms Smith experienced with a client of Kohli Traders in late September 2024. This was the same client Ms Smith had been assisting since January 2023.
- A copy of a professional indemnity, public, and products liability insurance policy sourced by Ms Smith from Gallagher Insurance dated 10 January 2023.
- A copy of the ICA.
- An email from Gallagher Insurance dated 14 November 2024 which confirms Ms Smith's policy does not cover the performance of cleaning work.

- A message sent by Mr Kohli to Ms Smith on 28 September 2024 which indicates making beds is part of Ms Smith’s support worker role.

[9] I have reviewed and considered all the evidence relied upon by Ms Smith.

[10] Ms Smith made oral submissions at the end of the determinative conference which I have considered.

FW AMENDMENTS – DETERMINING IF A PERSON WAS AN EMPLOYEE OR INDEPENDENT CONTRACTOR

[11] This case is complicated by the fact that the legal relationship between Ms Smith and Kohli Traders commenced on 13 January 2023 and seemingly ended on around 3 October 2024. The complication arises because the legal test for determining whether a person was an employee or independent contractor was significantly altered on 26 August 2024.² The FW Act was amended on 26 August 2024 to essentially override the High Court precedent established by the majority of the High Court in *Personnel Contracting*³ and *Jamsek*.⁴ This was achieved by inserting a new s.15AA into the FW Act the effect of which is to mandate consideration of the real substance, practical reality, and true nature of the relevant relationship, including by reference to how the contract was performed in practice, when determining if the person was an employee or independent contractor. The change nullifies the High Court’s previous determination that how the contract was performed by the parties is largely irrelevant when the rights and duties of the parties are comprehensively recorded in a written contract. New provisions allowing individuals to opt out of the legal impact of s.15AA were also inserted in ss.15AB, 15AC, and 15AD of the FW Act.

[12] The transitional provisions⁵ regarding the operation s.15AA of the FW Act are as follows:

1. Section 15AA applies following commencement to a relationship in existence on 26 August 2024 which was entered into prior to 26 August 2024, and to relationships entered into after 26 August 2024.⁶
2. When determining an individual’s length of service and period of employment under the FW Act, whether service prior to 26 August 2024 is to be counted as service as an employee is determined by reference to the High Court precedent in *Personnel Contracting* and *Jamsek*, and without reference to s.15AA of the FW Act.⁷
3. The amendments do not apply in relation to applications that were already “on foot”⁸ when the amendments commenced on 26 August 2024.⁹

[13] I consider the transitional provisions mean I must initially assess the relationship between Ms Smith and Kohli Traders for the period of 13 January 2023 until 25 August 2024, based on the High Court precedent in *Personnel Contracting* and *Jamsek*, and without reference to s.15AA of the FW Act.

[14] I must then assess the relationship again for the period of 26 August 2024 until around 3 October 2024, by applying s.15AA of the FW Act. This assessment is required because Ms Smith's application was commenced on 8 October 2024, it was not "on foot" when the amendments commenced on 26 August 2024.

CONSIDERATION – 13 JANUARY 2023 TO 25 AUGUST 2024 – PERSONNEL CONTRACTING AND JAMSEK

[15] Justice Wigney provided a summary of the principles established by the *Personnel Contracting* and *Jamsek* judgments in *JMC*,¹⁰ the accuracy of this summary was not contested on appeal.¹¹ His Honour identified the following six principles:

- i. Where the rights and duties of the parties are comprehensively recorded in a written contract, the legal rights and obligations established by the contract are decisive of the character of the relationship as long as there are no arguments that the contract was a sham, the contract has been varied or waived, or are subject to an estoppel.
- ii. A contract of employment must be construed in accordance with the established principles of contractual interpretation.
- iii. 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. As a result, the parties' subsequent conduct will generally be irrelevant when it comes to characterising the relationship.
- iv. Relevant contractual provisions for determining the nature of the relationship include mode of remuneration, provision and maintenance of equipment, obligation to work, hours of work, provision of holidays, the deduction of income tax, the delegation of work, and the right to exercise direction and control.
- v. There are often two key considerations for the characterisation. The extent of control the putative employer has regarding how, when, and where the work is performed. The other is the extent to which the putative employee can be said to be working in their own business, as distinct from the business of the putative employer.
- vi. A label given by the parties to their relationship is not determinative and will rarely assist in characterising the relationship.

[16] The ICA is a comprehensive written document that records the legal rights and obligations of Ms Smith and Kohli Traders.

[17] I have reviewed the terms of the ICA and find they are consistent with the existence of an independent contracting relationship. Ms Smith was free to perform work for other clients and businesses, and Ms Smith confirmed during the determinative conference that she did so while performing work for Kohli Traders. Ms Smith was required to submit invoices for her

work, source her own equipment, and source her own insurance. Ms Smith was permitted to subcontract out work to be performed under the ICA subject to the agreement of Kohli Traders, with agreement not to be unreasonably withheld. The ICA contemplates that Ms Smith may engage employees to undertake work under the ICA.

[18] I cannot identify any terms of the ICA that provide rights or obligations that are consistent with the existence of an employment relationship. Ms Smith did not refer to any relevant terms during the determinative conference.

[19] However, that is not the end of the matter because Ms Smith also submitted that the ICA constitutes a “sham”.

[20] Justice Lockhart provided the following summary of what constitutes a “sham” under Australian law in *Sharrment Pty Ltd v Official Trustee in Bankruptcy*:¹²

“A ‘sham’ is therefore, for the purposes of Australian law, something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true, but something made in imitation of something else or made to appear to be something which it is not. It is something which is false or deceptive.”

[21] This analysis was cited with approval in the judgment of Gaudron, Gummow, Kirby and Hayne JJ in *FCT v Montgomery*.¹³

[22] The Supreme Court of South Australia Full Court held in *Golden Plains Fodder Australia Pty Ltd v Millard* that:

“When directed to the topic of sham it is appropriate to receive evidence directly from the parties about their intentions. One inquiry is the terms of the arrangement. However, equally important, is whether the parties intended there to be a facade, a misrepresentation of the position or a falsehood”.¹⁴

[23] Ms Smith’s “sham” argument proceeded on the basis that she had only agreed to provide psycho-social support services under the ICA and not to perform support worker duties such as making the bed of a client. Ms Smith argued Mr Kohli “snuck” reference to support worker services into the Schedule of the ICA and that she did not initially query this because she prioritised her working relationship with Mr Kohli and her client.

[24] I accept the dispute about whether Ms Smith was required to perform tasks such as making the bed of a client under the ICA led to the relationship between Ms Smith and Mr Kohli breaking down. Mr Kohli was insisting Ms Smith had to perform these tasks. Ms Smith rejected this and highlighted that she did not have insurance coverage for cleaning work.

[25] However, I do not consider the dispute that emerged between Ms Smith and Mr Kohli about what services could be performed under the ICA has the legal effect of meaning the ICA is a “sham.” A dispute about the services that can be provided under the ICA does not mean the entire ICA is a “sham.”

[26] I also do not accept that Mr Kohli referring to other direct employees of Kohli Traders being required to perform cleaning tasks means that the ICA was a “sham.”¹⁵ The fact that there may be overlap between the work expected to be performed by a direct employee and by Ms Smith under the ICA is not sufficient to establish that the ICA was a “sham.”

[27] I consider that the ICA is a genuine independent contracting agreement that was deliberately negotiated by the parties to reflect that relationship. Ms Smith was fully aware of the independent contracting relationship and referred to the existence of this relationship in several emails to Mr Kohli.¹⁶ Ms Smith also unilaterally increased her rates for weekend work which is a step that could not be taken by an employee.¹⁷ Mr Kohli confirmed during the determinative conference that Kohli Traders has 30 direct employees including full-time, part-time, and casual employees and that the business also engages several independent contractors. Mr Kohli is clearly conscious of the distinction between the two types of relationships. The evidence establishes that Ms Smith and Mr Kohli were fully aware that they had entered into an independent contracting relationship. There was no intention from either party to establish a “facade”, “misrepresentation”, or “falsehood.”

[28] I find that Ms Smith was an independent contractor for the period of 13 January 2023 to 25 August 2024.

CONSIDERATION – 26 AUGUST 2024 TO AROUND 3 OCTOBER 2024 – s.15AA

[29] Given I have found that Ms Smith was an independent contractor for the period of 13 January 2023 to 25 August 2024, I do not strictly need to consider whether Ms Smith was an employee or independent contractor from 26 August 2024 to around 3 October 2024. Even if I conclude that Ms Smith was an employee during this period, Ms Smith would not be a person protected from unfair dismissal because she has not completed the minimum employment period of six months. As a result, I do not consider this is an appropriate case to delve deeply into the meaning of s.15AA of the FW Act and particularly whether the introduction of the statutory provisions alters in any way the multiple factor/indicia approach previously adopted by the High Court in *Stevens v Brodribb Sawmilling Co Pty Ltd*¹⁸ and *Hollis v Vabu Pty Ltd*.¹⁹

[30] In any event, I consider the real substance, practical reality, and true nature of the relationship between Ms Smith and Kohli Traders was that of an independent contracting relationship. The post-contractual performance of the contract was consistent with there being an independent contracting relationship. Ms Smith issued invoices to receive payment for work performed. Ms Smith and Mr Kohli repeatedly referred to the independent contracting arrangement in emails they exchanged. Ms Smith unilaterally increased her rates for weekend work. Ms Smith performed other work in the same industry when she wasn't providing services to Kohli Traders.

[31] The only factor I consider potentially weighs in favour of finding that there was an employment relationship was the degree of control Mr Kohli attempted to exercise in requiring Ms Smith to perform support worker duties, such as making the bed of a client, in September 2024. However, as referred to above, I consider a dispute arose between Ms Smith and Kohli

Traders in September 2024 in relation to what work Ms Smith was required to perform under the ICA. I do not consider the emergence of that dispute about the terms of the ICA demonstrates Ms Smith was an employee of Kohli Traders.

[32] I find that Ms Smith was an independent contractor for the period of 26 August 2024 until around 3 October 2024.

CONCLUSION

[33] Ms Smith is not eligible to make an unfair dismissal application because she was an independent contractor and not an employee of Kohli Traders.²⁰ That means there is no jurisdiction for the Commission to continue dealing with Ms Smith's application.

[34] Ms Smith's unfair dismissal application is dismissed.



COMMISSIONER

Appearances:

Ms Smith representing herself.

Mr Kohli representing Kohli Traders.

Determinative conference details:

2025.

Sydney (by video via Microsoft Teams).

28 January.

Printed by authority of the Commonwealth Government Printer

<PR783955>

¹ Page 42 to 71 of the Digital Hearing Book (DHB).

² The *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* amends the definition of “employee” under the FW Act. The new definition in s.15AA will expressly require consideration of how the contract is performed in practice. That in broad terms overrules the current High Court precedent on the issue.

³ *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 96 ALJR 89; [2022] HCA 1.

⁴ *ZG Operations Australia Pty Ltd v Jamsek* (2022) 96 ALJR 144; [2022] HCA 2.

⁵ *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024 (Amending Act)*, Schedule 1, Part 18.

⁶ Amending Act, Schedule 1, Part 18, clause 116.

⁷ Amending Act, Schedule 1, Part 18, clause 118.

⁸ Which is defined broadly in the Amending Act, Schedule 1, Part 18, clause 119.

⁹ Amending Act, Schedule 1, Part 18, clause 119.

¹⁰ *JMC Pty Ltd v Federal Commissioner of Taxation* [2022] FCA 750 at [16] to [27].

¹¹ *JMC Pty Ltd v Federal Commissioner of Taxation* [2023] FCAFC 76 at [8] and [9].

¹² *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449 at 454.

¹³ *Federal Commissioner of Taxation v Montgomery* (1999) 198 CLR 639 at [88].

¹⁴ *Golden Plains Fodder Australia Pty Ltd v Millard* (2007) 99 SASR 461.

¹⁵ Message from Mr Kohli to Ms Smith on 28 September 2024 (page 28 of the DHB).

¹⁶ Email sent by Ms Smith to Mr Kohli on 29 September 2023 (page 43 of the DHB); email sent by Ms Smith to Mr Kohli on 28 September 2024 (page 44 of the DHB); email sent by Ms Smith to Mr Kohli on 19 November 2024 (page 46 of the DHB).

¹⁷ Email sent by Ms Smith to Mr Kohli on 23 May 2024 (page 43 of the DHB).

¹⁸ (1986) 160 CLR 16.

¹⁹ (2001) 207 CLR 21.

²⁰ A person can only be “dismissed” within the meaning of s.386 of the FW Act if their employment was terminated.