[2018] FWC 1097

FairWork Commission

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

[redacted]
v
Audi Enterprises Pty Ltd T/A Audi Repair & Service Centre
(U2017/6357)

Maxim Zintchenko
v
Audi Enterprises Pty Ltd T/A Audi Repair & Service Centre
(U2017/6360)

COMMISSIONER CIRKOVIC MELBOURNE, 28 MARCH 2018

Application for an unfair dismissal remedy.

[1] [redacted] and Mr Maxim Zintchenko ("the Applicants") performed work for the benefit of Audi Enterprises Pty Ltd ("the Respondent"). The Respondent is a franchisee to the courier company, Couriers Please, and under this franchise agreement provides courier services to Couriers Please.[1] Couriers Please and the Respondent entered into five franchise agreements for five "runs" in different geographic locations.[2] The Respondent engages drivers to provide services to it; all of whom deliver parcels on behalf of Couriers Please.[3]

[2] The Applicants each operate two of these runs, one being Area 95 and the other Area 97.[4] [redacted] has been working for the Respondent's sole director, [redacted] since around September 2010,[5] and [redacted] since around July 2011. It is uncontested that before their work for Audi Enterprises, Mr Zintchenko and [redacted] had performed courier work for a company named KOTE Pty Ltd.[7] [redacted] was the sole director of KOTE Pty Ltd from 26 September 2006. The Applicants had provided invoices for their work with KOTE Pty Ltd.[8] It is also uncontested that [redacted] registered Audi Enterprises as a corporate entity on 3 March 2015.[9] Both of the Applicants have been engaged during these periods as courier drivers. The Applicants discovered that their services had been terminated on 24 May 2017 after speaking with the fleet manager, [redacted] from Couriers Please.[10] Therefore both Applicants consider their terminations as taking effect from 24 May 2017.[11] The Applicants submit that their dismissal was unfair because it should be considered harsh, unjust or unreasonable.[12]

[3] The Respondent contends that the Applicants were not, at any time, employed by the Respondent and, as a consequence, it is not open to the Applicants to pursue applications pursuant to section 394 of the *Fair Work Act 2009* (Cth) ("the Act").[13] Alternatively the

Respondent submits that if the Applicants are considered employees, a valid reason for termination arises relating to the capacity of the Applicants to perform their jobs.[14] Consequently the Respondent contends that the dismissals should not be deemed unfair.

[4] An application was made by the Applicants' solicitor that the matters concerning his two clients be heard together. Both parties confirmed at hearing that they agreed to the matters being heard jointly.[15] I granted the application and heard the two applications of [redacted] and Mr Zintchenko in the same sitting.[16]

[5] Hearings were held on 27 September 2017, 11 October 2017, 4 December 2017 along with a directions and mentions hearing held on 24 January 2018.

[6] Permission to appear was sought by Mr Lardi for the Applicants,[17] and Mr Champion for the Respondent.[18] I granted permission to both parties pursuant to s.596 of the Act.[19]

[7] During those hearings, evidence was given by:

- [redacted] an Applicant;
- Mr Zintchenko, an Applicant; and
- [redacted] the Respondent.

[8] Each witness was cross-examined extensively. I found that the witnesses generally gave their evidence in an open and forthright manner. In addition to the verbal evidence, each of these witnesses also provided a written witness statement.

The facts

[9] There is no real dispute between the parties in relation to the facts of this matter. The parties seek to rely on different aspects of their relationship to support their competing contentions as to the proper characterisation of the relationship between them. The parties helpfully provided the Commission with an Agreed Statement of Facts, reproduced in part below:

> "1. [redacted] is the sole director of Audi Enterprises Pty Ltd ("Audi Enterprises"). [redacted] oversees, and has direct control over, the entire operation of Audi Enterprises' business.
>
> 2. [redacted] registered Audi Enterprises as a corporate entity on 3 March 2015.
>
> 3. [redacted] has known Mr. Maxim Zintchenko for approximately 8 years and [redacted] for about 25 years.
>
> 4. Audi Enterprises has five franchisee agreements with Couriers Please. Each franchisee agreement is in identical terms but is for service of a specific geographic area. Couriers Please designates the geographic areas with a number (Couriers Please Agreements).

5. Under the Couriers Please Agreements, Couriers Please must give their approval for an individual to be a 'substitute driver'. Approval is only given once an individual has met the stringent requirements of Couriers Please including completion of various training and safety courses provided by Couriers Please.

6. Couriers Please also may, in their absolute discretion, require Audi Enterprises not to use a particular 'substitute driver' in the provision of the courier services.

7. Mr. Zintchenko was a substitute driver and responsible for Area 97, which was located in the Dandenong area. [redacted] was a substitute driver and responsible for Area 95, which was also located in the Dandenong area.

8. Before their work for Audi Enterprises, from about 2011, Mr. Zintchenko and [redacted] had performed courier work for a company named KOTE Pty Ltd. [redacted] was the sole director of KOTE Pty Ltd from 26 September 2006. The Applicants had provided invoices for their work with KOTE Pty Ltd.

9. There are no written agreements between the Applicants and Audi Enterprises.

10. The Applicants were never afforded paid annual leave, personal leave or superannuation.

11. Audi Enterprises paid a flat weekly rate to the Applicants for the provision of their services. As at May 2017 the flat rate was $1330.00 for a five day week. From this, Audi Enterprises deducted $200 for the van that was provided by Audi Enterprises and a $40 payment for comprehensive vehicle insurance. The same flat rate was payable however many hours it took the Applicants to perform their run and regardless of the quantity of deliveries they completed.

12. In order to incentivise the drivers, including the Applicants, to deliver as many deliveries as possible, Audi Enterprises offered a bonus system approved by Couriers Please. The Applicants would provide an invoice for their services to Audi Enterprises on a weekly basis which attached the invoice from Couriers Please to Audi Enterprises. Where the value of the deliveries made exceeded $2250.00 per week, Audi Enterprises would give 50% of any fee earned in excess of $2250.00 to the Applicants.

13. The Applicants had their own trolleys that they used for moving deliveries in and out of their van.

14. The Applicants paid for the fuel needed to operate the vans they used.

15. On 18 May 2017, [redacted] was informed by [redacted] and [redacted] of Couriers Please that there had been significant stock discrepancies in the deliveries that were designated to Mr. Zintchenko and [redacted] to deliver. Couriers Please alleged that [redacted] and Mr. Zintchenko had been involved in the theft of deliveries from the Couriers Please Depot and were on-selling the stolen goods to other customers of Couriers Please. In particular, a parcel containing $17,000 worth of cigarettes had gone missing from Mr. Zintchenko's designated deliveries, and Couriers Please alleged that it had been stolen.

16. [redacted] was shown CCTV footage from the day on which the package went missing, which allegedly showed Mr. Zintchenko and [redacted] taking the package.

17. [redacted] informed [redacted] that Couriers Please would conduct an investigation into the alleged theft.

18. On 19 May 2017, Couriers Please called [redacted] into another meeting with [redacted] During this meeting, [redacted] showed [redacted] stills from the CCTV footage and again alleged that they showed that Mr. Zintchenko and [redacted] had stolen the missing package. [redacted] was still not convinced by the stills which he did not feel showed what had happened to the missing delivery.

19. On 22 May 2017, [redacted] was asked to attend another meeting with [redacted] and [redacted] At this meeting, [redacted] showed [redacted] a range of evidence including more stills from the CCTV footage, a comparison of different boxes that had gone missing, and coupons from the missing items. [redacted] confirmed that Couriers Please viewed this incident as very serious and that Couriers Please intended to put the allegation directly to Mr. Zintchenko and [redacted] at a meeting on the same day.

20. [redacted] attended the meeting at Couriers Please Dispatch Centre on the same day, which Mr. Zintchenko and [redacted] were directed by Couriers Please to attend. [redacted] attended with other employees of Couriers Please. The allegation regarding the theft of the cigarettes was put directly to both Mr. Zintchenko and [redacted] Mr. Zintchenko and [redacted] denied that they had stolen the goods and professed to not know what was in any of the packages that they delivered. Mr. Zintchenko and [redacted] were told that they could continue to work but were required to attend a further meeting the next day.

21. On 23 May 2017, Mr. Zintchenko and [redacted] both attended a further meeting held by [redacted] and [redacted] of Couriers Please. [redacted] was present during the meeting but was not involved in the meeting. During the meeting, Couriers Please informed Mr. Zintchenko and [redacted] that they had footage of the alleged theft and believed that Mr. Zintchenko and [redacted] had not been honest in their responses to the allegation put to them at the 22 May 2017 meeting. Mr. Zintchenko and [redacted] were told that the footage would be provided to Victoria Police so that a Police Investigation could be undertaken. [redacted] told Mr. Zintchenko and [redacted] that they were not to attend Couriers Pleases' premises until an investigation into the alleged theft was completed by Victoria Police."[20]

Protection from Unfair Dismissal

[10] An order for reinstatement or compensation may only be issued where the Commission is satisfied the Applicant was protected from unfair dismissal at the time of the dismissal.

[11] Section 382 of the Act sets out the circumstances that must exist for the Applicants to be protected from unfair dismissal:

"**382 When a person is protected from unfair dismissal**

A person is ***protected from unfair dismissal*** at a time if, at that time:

(a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and

(b) one or more of the following apply:

(i) a modern award covers the person;

(ii) an enterprise agreement applies to the person in relation to the employment;

(iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

[12] There is no dispute, and the Commission, as presently constituted, is satisfied, the Applicants have completed the minimum employment period, and the sum of their annual earnings is less than the high income threshold.[21] The issue in dispute in this case is whether the Applicants were employees of the Respondent.

[13] Section 380 makes clear that "employee" in Part 3-2 of the Act in which s.382 is found means a national system employee. However, in the case of an employee in Victoria, as Victoria is a referring State within the meaning of s.30B of the Act, the extended meaning of national system employee in s.30C applies. In effect, with the exception of a limited number of senior public servants and office holders in Victoria, persons who are "employees" whether or not employed by a national system employer fall within the provisions of Part 3-2 of the Act.

Were the Applicants employees or independent contractors?

Approach to determining whether a person is an employee or independent contractor

[14] The required approach is conveniently summarised by the Full Bench of the Commission in *Jiang Shen Cai trading as French Accent v Michael Anthony Do Rozario* (*Cai v Do Rozario*)[22] as follows (footnotes omitted):

"[30] The general law approach to distinguishing between employees and independent contractors may be summarised as follows:

(1) In determining whether a worker is an employee or an independent contractor the ultimate question is whether the worker is the servant of another in that other's business, or whether the worker carries on a trade or business of his or her own behalf: that is, whether, viewed as a practical matter, the putative worker could be said to be conducting a business of his or her own of which the work in question forms part? This question is concerned with the objective character of the relationship. It is answered by considering the terms of the contract and the totality of the relationship.

(2) The nature of the work performed and the manner in which it is performed must always be considered. This will always be relevant to the identification of relevant indicia and the relative weight to be assigned to various indicia and may often be relevant to the construction of ambiguous terms in the contract.

(3) The terms and terminology of the contract are always important. However, the parties cannot alter the true nature of their relationship by putting a different label on it. In particular, an express term that the worker is an independent contractor cannot take effect according to its terms if it contradicts the effect of the terms of the contract as a whole: the parties cannot deem the relationship between themselves to be something it is not. Similarly, subsequent conduct of the parties may demonstrate that relationship has a character contrary to the terms of the contract.

(4) Consideration should then be given to the various indicia identified in *Stevens v Brodribb Sawmilling Co Pty Ltd* and the other authorities as are relevant in the particular context. For ease of reference the following is a list of indicia identified in the authorities:

- *Whether the putative employer exercises, or has the right to exercise, control over the manner in which work is performed, place or work, hours of work and the like.*

Control of this sort is indicative of a relationship of employment. The absence of such control or the right to exercise control is indicative of an independent contract. While control of this sort is a significant factor it is not by itself determinative. In particular, the absence of control over the way in which work is performed is not a strong indicator that a worker is an independent contractor where the work involves a high degree of skill and expertise. On the other hand, where there is a high level of control over the way in which work is performed *and* the worker is presented to the world at large as a representative of the business then this weighs significantly in favour of the worker being an employee.

"The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions." "[B]ut in some circumstances it may even be a mistake to treat as decisive a reservation of control over the manner in which work is performed for another. That was made clear in *Queensland Stations Pty. Ltd v Federal Commissioner of Taxation*, a case involving a droving contract in which Dixon J observed that the reservation of a right to direct or superintend the performance of the task cannot transform into a contract of service what in essence is an independent contract."

- *Whether the worker performs work for others (or has a genuine and practical entitlement to do so).*

The right to the exclusive services of the person engaged is characteristic of the employment relationship. On the other hand, working for others (or the genuine and practical entitlement to do so) suggests an independent contract.

- *Whether the worker has a separate place of work and or advertises his or her services to the world at large.*

- *Whether the worker provides and maintains significant tools or equipment.*

Where the worker's investment in capital equipment is substantial and a substantial degree of skill or training is required to use or operate that equipment the worker will be an independent contractor in the absence of overwhelming indications to the contrary.

- *Whether the work can be delegated or subcontracted.*

If the worker is contractually entitled to delegate the work to others (without reference to the putative employer) then this is a strong indicator that the worker is an independent contractor. This is because a contract of service (as distinct from a contract for services) is personal in nature: it is a contract for the supply of the services of the worker personally.

- *Whether the putative employer has the right to suspend or dismiss the person engaged.*

- *Whether the putative employer presents the worker to the world at large as an emanation of the business.*

Typically, this will arise because the worker is required to wear the livery of the putative employer.

- *Whether income tax is deducted from remuneration paid to the worker.*

- *Whether the worker is remunerated by periodic wage or salary or by reference to completion of tasks.*

Employees tend to be paid a periodic wage or salary. Independent contractors tend to be paid by reference to completion of tasks. Obviously, in the modern economy this distinction has reduced relevance.

- *Whether the worker is provided with paid holidays or sick leave.*

- *Whether the work involves a profession, trade or distinct calling on the part of the person engaged.*

Such persons tend to be engaged as independent contractors rather than as employees.

- *Whether the worker creates goodwill or saleable assets in the course of his or her work.*

- *Whether the worker spends a significant portion of his remuneration on business expenses.*

It should be borne in mind that no list of indicia is to be regarded as comprehensive or exhaustive and the weight to be given to particular indicia will vary according to the circumstances. Features of the relationship in a

particular case which do not appear in this list may nevertheless be relevant to a determination of the ultimate question.

(5) Where a consideration of the indicia (in the context of the nature of the work performed and the terms of the contract) points one way or overwhelmingly one way so as to yield a clear result, the determination should be in accordance with that result. However, a consideration of the indicia is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture of the relationship from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. The ultimate question remains as stated in (1) above. If, having approached the matter in that way, the relationship remains ambiguous, such that the ultimate question cannot be answered with satisfaction one way or the other, then the parties can remove that ambiguity a term that declares the relationship to have one character or the other.

(6) If the result is still uncertain then the determination should be guided by "matters which are expressive of the fundamental concerns underlying the doctrine of vicarious liability" including the "notions" referred to in paragraphs [41] and [42] of *Hollis v Vabu*."

[15] The extracts from the High Court decision in *Hollis* v *Vabu*[23] referred to above, are as follows (footnotes omitted):

"[41] In *Bazley v Curry*, the Supreme Court of Canada saw two fundamental or major concerns as underlying the imposition of vicarious liability. The first is the provision of a just and practical remedy for the harm suffered as a result of the wrongs committed in the course of the conduct of the defendant's enterprise. The second is the deterrence of future harm, by the incentive given to employers to reduce the risk of accident, even where there has been no negligence in the legal sense in the particular case giving rise to the claim.

[42] In general, under contemporary Australian conditions, the conduct by the defendant of an enterprise in which persons are identified as representing that enterprise should carry an obligation to third persons to bear the cost of injury or damage to them which may fairly be said to be characteristic of the conduct of that enterprise. In delivering the judgment of the Supreme Court of Canada in *Bazley v Curry*, McLachlin J said of such cases that "the employer's enterprise [has] created the risk that produced the tortious act" and the employer must bear responsibility for it. McLachlin J termed this risk "enterprise risk" and said that "where the employee's conduct is closely tied to a risk that the employer's enterprise has placed in the community, the employer may justly be held vicariously liable for the employee's wrong". Earlier, in *Ira S Bushey & Sons*, *Inc v United States*, Judge Friendly had said that the doctrine of respondeat superior rests:

> "in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities".

[16] I also note that the following extract from *Hollis* was relied upon by the earlier Full Bench of the AIRC in *Abdalla v Viewdaze Pty Ltd t/as Malta Travel (Abdalla)*[24] to illustrate the substance of the High Court decision:

> "[47] In classifying the bicycle couriers as independent contractors, the Court of Appeal fell into error in making too much of the circumstances that the bicycle couriers owned their own bicycles, bore the expenses of running them and supplied many of their own accessories. Viewed as a practical matter, the bicycle couriers were not running their own business or enterprise, nor did they have independence in the conduct of their operations. A different conclusion might, for example, be appropriate where the investment in capital equipment was more significant, and greater skill and training were required to operate it. The case does not deal with situations of that character. The concern here is with the bicycle couriers engaged on Vabu's business. A consideration of the nature of their engagement, as evidenced by the documents to which reference has been made and by the work practices imposed by Vabu, indicates that they were employees."

The indicia concerning the relationship

[17] Without detracting from the overall assessment of the relationship that is required, it is convenient to initially consider the various indicia under general headings adapted from those used by the Full Bench in *Cai v Do Rozario.*

Control

[18] This element of the indicia is concerned with the exercise or the right to exercise control over the manner in which work is performed. In considering these indicia in the context of the matter before me, it is important to acknowledge that the traditional mode of engagement involves two contracting parties. However, it is not uncommon in some circumstances, such as labour hire arrangements, to see an arrangement where the work is performed for and on behalf of a third party, primarily at the premises of that third party. Such is the case in this matter albeit in the context of a franchiser and franchisee arrangement between the Respondent and Couriers Please. I have considered all the material before me as to the work that was undertaken by the Applicants and the manner in which that work was performed. It is uncontroversial that the day to day activities of the Applicants was perhaps dictated by representatives of Couriers Please. In the context of the evidence before me, I have been assisted by the uncontested evidence as to the Applicants' working hours, which are set out in the witness statements of both Mr Zintchenko and [redacted].

[19] The Applicants each state in their own statements that:

> "A normal working day for me would consist of the following:
>
> (a) Arrive at the depot at 6.45am to pick-up items;
> (b) Deliver items then return to depot at 11am to pick-up again;
> (c) Deliver items then return to depot at 2pm to pick-up again;

(d) Deliver items and stay within my designated delivery area until 4pm;
(e) Return to the depot to drop of undelivered goods in the van; and
(f) Leave the depot at 6pm.

I worked an average of around 11 hours every day from Monday to Friday for almost 7 years. During that time my routine was not significantly altered at all.

Clearly there were set hours of work that I was required to adhere to. I could not pick and choose when I did my work because of the service schedule. The only choice I had regarding hours was to work overtime.

I was never told by [redacted] that my hours or work were not guaranteed and that they might cease. My colleagues and I worked consistent hours every week for anywhere between 7 and 10 years."[25]

[20] The Applicants were provided with a Couriers Please manual which they were required to adhere to and which set out the policies and procedures that governed the manner in which they performed work.[26]

[21] I accept the Applicants' submission that they had a "regimented schedule" to which they were required to adhere.[27]

[22] The obligation to attend work at a particular time and perform work in accordance with a regimented schedule is evidence of the kind of control that is commonly associated with employment. That the work was performed in part for the benefit of Courier Please does not detract from a finding that ultimately the Respondent was in the position of exercising control over the work performed by the Applicants. In my view it would be disingenuous to claim that the relationship left any doubt that the Respondent directed the Applicants to follow the directives of Couriers Please as to the manner in which the work was performed. In this case, this factor favours the conclusion that the relationship is one of an employer and employee.

Tools and Equipment

[23] In this case, both parties have sought to characterise the provision of the major tool of trade in a manner that supports their respective positions. The Respondent submits that the Applicants in substance provided the tools of trade.[28] Conversely, the Applicants claim that ultimately they could not have done their job without the tools of the trade provided by the Respondent.[29]

[24] It is uncontroversial that in this case the Applicants could not provide the services without vehicles and the costs associated with maintaining a vehicle such as registration, insurance, and other like expenses.

[25] It is uncontested that the Respondent provided the vehicles to the Applicants,[30] and the Applicants had $200 deducted from their weekly payment of $1330 in order to lease the van as well as $40 deducted for comprehensive vehicle insurance.[31] I also accept that the Applicants had their own trolleys that they used while doing deliveries.[32]

[26] I do not accept the Respondent's characterisation of the arrangement that the Applicants provided their own major equipment.[33] In my view, there is a significant difference between an arrangement where the "worker" enters the arrangement already in possession of the major requisite tools of trade and one where the "putative employer" provides the significant tools of trade to the worker albeit deducting lease or rental payments from a worker's income.

[27] When this factor is considered in light of the overall arrangement between the parties, and in particular the fact that the deductions were made from a guaranteed weekly payment of $1330, this factor favours a conclusion that the relationship is one of an employer and employee.

Uniform

[28] The Applicants were provided with Couriers Please uniforms and scanners.[34] The logos appearing on the vehicles were representing the business of Couriers Please. In the circumstances of this case and given that the vehicle logo and uniform represented the business of Couriers Please, I find this factor neutral.

Advertising of the services

[29] The Applicants submit that they did not advertise themselves as a business or offer their services for hire.[35]

[30] There is insufficient evidence before me to conclude that the Applicants advertised their services for their own business. This factor weighs in favour of a conclusion that the relationship is one of an employer and employee.

The right to exclusive services

[31] The Applicants submitted that as they were required to work around 11 hours per day, they were unable to work "for anyone else during business hours",[36] and that their ability was restricted because they were required to attend the depot three times per day.[37] Therefore in practical effect, the Applicants contend that the Respondent had the right to their exclusive services.

[32] The Respondent disputes this submission. The Respondent submitted that the Applicants were free to work for others if they so chose.[38] The Respondent pointed to [redacted] "side arrangement to unload another courier's parcels at day's ends" as evidence of this fact.[39]

[33] I have considered the Respondent's submission but ultimately, in this case on the evidence before me, I find this consideration neutral.

The right to delegate or subcontract work

[34] Given the absence of formality in recording the relationship between the parties, this entitlement is difficult to ascertain with precision. Suffice to say that I accept the Respondent's proposition that the evidence before me points to at least a limited right of delegation. The Respondent's submission relates to Mr Zintchenko delegating work to his

step-son.[40] However I find this right was exercised in a restricted sense considering that Mr Zintchenko's step-son only worked "on school holidays about two years ago,"[41] and he was not paid for the work.[42]

[35] [redacted] gives evidence that whilst he was never expressly told that he could not delegate, "the nature of the work'' was such that he "just couldn't bring anyone from the street."[43]

[36] In the context of this case, given the lack of significant evidence that Applicants were free to delegate the work as they pleased, this consideration is neutral.

Description of relationship

[37] It is uncontested that the arrangement was not recorded formally.[44]

[38] The Respondent maintains that the parties operated on the understanding that the arrangement was one of an independent contractor rather than an employer and employee relationship.[45] The Respondent stated during cross-examination that the Applicants "knew from day one they [were] contractors."[46] [redacted] could not recall this type of arrangement being spoken about in a conversation.[47] During cross-examination, the Respondent conceded that there was no explicit agreement between the parties that they were independent contractors.[48]

[39] It also undisputed that the Applicants performed their duties without challenging the validity of the relationship until such time as Couriers Please banned the Applicants from performing their roles. Admittedly the Applicants gave evidence that they agreed to the arrangement because the "terms of the Applicants' employment was not negotiable."[49]

[40] I accept that the parties' intentions on entering the arrangement favour a finding of an independent contractor arrangement but note that this factor is not determinative.

Remuneration

[41] The Respondent submits that the remuneration arrangements were consistent with an independent contractor arrangement.[50] In particular, the Respondent submits that tax deductions in income payments were not made and the Applicants operated under their own ABNs and charged GST in the invoices they lodged.[51]

[42] I accept that this factor is more consistent with an independent contractor arrangement.

Nature of payment

[43] The Respondent submits that the Applicants are paid "by results, not time",[52] which is a factor that normally favours a conclusion of an independent contractor arrangement. On the other hand, the Applicants submit that they were paid a "set base wage or salary every week."[53] The uncontested evidence before me is that the Respondent paid the Applicants a weekly flat rate of $1330 and the Applicants would split any weekly delivery fee equally with the Respondent that exceeded $2250.[54]

[44] I do not accept that the proper characterisation of the arrangement is as proposed by the Respondent. As stated above, the Applicants received a guaranteed payment of $1330 per week. The payment was not subject to the achievement of a "result" as contended by the Respondent. My finding in this regard is not disturbed by the uncontested evidence that where weekly delivery fees exceeded $2250, there was a "50/50 split" of fees between the Respondent and the Applicants.

[45] On the basis of the above, the arrangement is akin to a guaranteed weekly wage of $1330 and a potential bonus where parcel deliveries exceed $2250.

[46] This factor points to a conclusion that the relationship is one of an employer and employee.

Payment of holiday pay and sick leave

[47] It is uncontested that the Applicants were not entitled to paid holiday leave, sick leave or other provisions that would be consistent with an employment relationship.[55] This is more consistent with an independent contractor relationship.

Payment of business expenses

[48] It is uncontested that the Applicants paid for their own petrol.[56] The Respondent submits this factor as evidence towards an independent contractor relationship being found. The Applicants dispute this characterisation, submitting that they were "unhappy about having to pay for petrol for the vans that they did not own… [but] were reluctant to try and negotiate these terms or complain, because of fear of being replaced."[57]

[49] While I accept that the Applicants did not particularly favour this arrangement, it is still an arrangement under which they operated. Consequently I find this aspect of the relationship as being more consistent with that of an independent contractor arrangement.

The creation of goodwill and other saleable assets

[50] On the evidence before me there is limited, if any, opportunity for the Applicants to generate any form of goodwill, in the sense that it could be valued or sold to another person or business. This aspect is more consistent with an employer and employee relationship.

Overall conclusion having considered the relevant indicia

[51] The indicia discussed above are not exhaustive and need to be weighed according to their relative importance in the context of the circumstances being considered and in the context of the overall characterisation of the relationship.

[52] Ultimately the Applicants performed work on a regular basis, pursuant to a regimented schedule over which they had little, if any, input or control, in return for which they were guaranteed a payment of $1330. Their hours of work and place of work were structured and regular.

[53] There is an absence of significant evidence before me that the Applicants were working in a business environment for themselves and making significant business decisions.

That they were guaranteed weekly payments regardless of their output leads me to conclude that the arrangement was more akin to an employer and employee relationship. That they could avail themselves of a bonus payment in certain circumstances does not prohibit this finding. The other contrary factors discussed earlier in the decision are significant and relevant but in my view are not sufficient to impact the overall characterisation of the relationship.

[54] Having regard to the totality of the relationship, I am on balance satisfied that in relation to the work undertaken by the Applicants they were not conducting a business on their own, but rather were employees within the meaning of the Act.

[55] I am now satisfied that the requirements under s.382 are satisfied and the Applicants are persons protected from unfair dismissal. Therefore I must now consider whether the dismissal was unfair.

Was the dismissal unfair?

[56] A dismissal is unfair if the Commission is satisfied, on the evidence before it, that all of the circumstances set out at s.385 of the Act existed. Section 385 provides the following:

> "**385 What is an unfair dismissal**
>
> A person has been ***unfairly dismissed*** if the FWC is satisfied that:
>
> (a) the person has been dismissed; and
>
> (b) the dismissal was harsh, unjust or unreasonable; and
>
> (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
>
> (d) the dismissal was not a case of genuine redundancy.
>
> Note: For the definition of ***consistent with the Small Business Fair Dismissal Code***: see section 388."

[57] I am satisfied of the following:

- that the Applicants were dismissed in accordance with s.385(a);
- that the dismissal was not consistent with Small Business Fair Dismissal Code in accordance with s.385(c);
- and that the dismissal was not a case of genuine redundancy in accordance with s.385(d).

[58] With respect to s.385(c), Counsel for the Respondent submitted that the Respondent would not be asserting that the terminations were consistent with the Small Business Fair Dismissal Code.[58] In circumstances where the Respondent seeks to characterise the terminations of the Applicants as one based on capacity rather than conduct and given my

finding at paragraph [74], I am satisfied on the evidence before me that the Applicants' dismissals were not consistent with Small Business Fair Dismissal Code.

[59] It remains therefore, for me to consider whether the Applicants' dismissal was harsh, unjust or unreasonable in accordance with s.385(b). The matters that must be taken into account in assessing whether the dismissal was harsh, unjust or unreasonable are set out in s.387 of the Act:

Harsh, unjust or unreasonable

[60] Having been satisfied of each of s.385(a),(c)-(d) of the Act, the Commission must consider whether it is satisfied the dismissal was harsh, unjust or unreasonable. The criteria the Commission must take into account when assessing whether the dismissal was harsh, unjust or unreasonable are set out at s.387 of the Act:

> "**387 Criteria for considering harshness etc.**
>
> In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:
>
> (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
>
> (b) whether the person was notified of that reason; and
>
> (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
>
> (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
>
> (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
>
> (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
>
> (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
>
> (h) any other matters that the FWC considers relevant."

[61] The ambit of the conduct which may fall within the phrase 'harsh, unjust or unreasonable' was explained in *Byrne v Australian Airlines Ltd* [1995] HCA 24; (1995) 185 CLR 410 at 465 by McHugh and Gummow JJ as follows:

> ".... It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because

> the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted."

[62] I am under a duty to consider the matters set out in s.387 and have done so in reaching my conclusion.[59]

(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees)[60]

[63] The Respondent claims that the termination of the Applicants' employment was related to their capacity pursuant to s.387(a) of the Act.[61] The Respondent's submission rests on the basis that the Applicants could not perform the inherent requirements of their position given the imposition of the ban by Couriers Please.[62] In support of this proposition, the Respondent submitted the letter from Couriers Please that prohibited the Applicants from acting as substitute drivers. Part of the letter, dated 14 June 2017, is reproduced as follows:

> *"To the Director,*
>
> *After consultation with the director of Audi Enterprises between the 19th of May and 23rd of May 2017, it was agreed that* [redacted] *and Maxim Zintchenko were to be excluded from working with Couriers Please as a substitute driver for Audi Enterprises Pty Ltd effective from the 23rd of May 2017."*[63]

[64] The Applicants dispute this position and contest that they were terminated unfairly for reasons related to conduct.[64] It is not in dispute that the Applicants were accused of stealing a package of cigarettes worth $17,000.[65] It is also not in dispute that the Applicants attended a meeting on 22 and 23 May 2017 with the Respondent and representatives of Couriers Please.[66] Representatives of Couriers Please were not called to give evidence and the only evidence before me was evidence given by the Applicants and the Respondent as to what occurred during those meetings.

[65] To determine whether the dismissal relates to capacity or conduct, I am guided by the authorities that have considered these type of arrangements and in particular the decision of DP Asbury in *Kool v Adecco Industrial Pty Ltd T/A Adecco*,[67] the Full Bench in *Donald Pettifer v MODEC Management Services Pty Ltd*[68] and the recent Full Bench decision in *Tasmanian Ports Corporation Pty Ltd t/a Tasports v Mr Warwick Gee*.[69] I accept for reasons stated below that whilst the decisions have come to different conclusions, the principles established in each of the authorities are consistent with one another.

[66] The facts in this matter are most analogous to the facts in *Pettifer.* A significant factor in the Full Bench's determination that the labour hire company's dismissal of its employee related to capacity was the existence of the host employer's right under the contractual arrangement with the labour hire company to prohibit its worker from the host employer's site**.** The following extract provides a background to the contractual agreement in *Pettifer* (footnotes omitted):

"[36] Clause 18 of the contract between MODEC and BHPB which governed Mr Pettifer's hire to BHPB provided that:

> *"The Company Representative may direct the Contractor to have removed from the Site or from any activity connected with the work under the Contract, within such time as a Company Representative reasonably directs, any subcontractor or person employed in connection with the work under the contract, whose involvement the company representative considers not to be in the best interests of the project.*
>
> *The costs associated with removing such persons shall be borne by the Contractor. The person shall not be employed elsewhere on the Site or on activities connected with the work under the Contract without the prior written approval of the Company. Within a reasonable period of time those person who have been removed from the work under the Contract shall be replaced at the expense of the Contractor if the Company so requires by other suitable qualified persons Approved by the Company*"

[37] MODEC was therefore contractually obliged to remove Mr Pettifer from the BHPB Site if instructed to do so. This was the role which Mr Pettifer was employed to perform. No longer capable of performing the inherent functions of this role, MODEC sought to find alternative employment for Mr Pettifer. Only after exhausting these inquiries did MODEC rely on this reason to terminate Mr Pettifer's employment. In these circumstances the Full Bench is satisfied that MODEC had a valid reason relating to Mr Pettifer's capacity to terminate his employment and only exercised this reason because it genuinely was unable to find suitable alternative employment for him."

[67] Clause 4.7 of the franchise agreement between Audi Enterprises and Couriers Please stipulates the following:

"4.7 Exclusion

Any Substitute Driver must be approved by Couriers Please. Couriers Please may, **in its absolute discretion,** require the Franchisee not to use a particular Substitute Driver in the transaction of the Services."[70] (emphasis added)

[68] It is uncontested that this clause grants Couriers Please an unfettered right to stipulate to the Respondent that the Applicants are not to perform work for and on behalf of Couriers Please.

[69] However, it does not automatically follow that where a host employer exercises this right, a valid reason for dismissal relating to capacity arises. The Full Bench in *Pettifer* considered Deputy President Asbury's findings in *Kool* and in particular the failure of the employer in that case to "[establish] that there was a lack of alternative placements" for the employee.[71] This failure was a relevant circumstance that was considered when assessing whether a valid reason for termination related to capacity existed. As the Full Bench stated in *Pettifer:*

> "[40] … That principle is that, in the context of labour hire arrangements, the actions of an employer who dismisses an employee following the exercise of a host employer's contractual right to have the employee removed from the host site cannot rely exclusively on the actions of that third party as their defence to a claim of unfair dismissal. A discretion remains with the FWC to decide whether a particular dismissal is unfair in all the circumstances."

[70] The Full Bench in *Pettifer* found that the existence of a valid reason relating to capacity was aided by the fact that the employer had explored redeployment options with the employee.[72]

[71] The Full Bench in *Tasports* supported this conclusion in stating the following (footnotes omitted):

> "[34] Tasports went so far as to submit that Pettifer stood for the principle that a decision by a host employer in the context of a labour hire arrangement to have a worker supplied by a labour hire employer removed from its worksite meant that there was necessarily a valid reason for the worker's dismissal by the labour hire employer based on the worker's capacity for the purpose of s.387(a). That submission cannot be accepted. It is inconsistent with the statement of principle in Adecco which, like the Full Bench in Pettifer, we endorse. Even in the context of a labour hire arrangement, whether there is a valid reason for dismissal will depend upon all the circumstances of the case. Pettifer exemplifies that proposition because of the way in which its different facts resulted in a different outcome to that in Adecco, where the Deputy President found that there was no valid reason for the employee's dismissal related to her capacity or conduct and that the dismissal was unfair. That may be illustrated in three ways.
>
> [35] First, as the Full Bench pointed out, in Adecco the terms of the contract between the labour hire employer and the host employer were not disclosed, so that it was not clear what precise right the host employer had to remove the worker from the worksite. In Pettifer the Full Bench had before it the relevant provision of the contract, which made it abundantly clear that the host employer had the absolute right to remove the worker where it subjectively formed the view that the "involvement" of the workers was not "in the best interests of the project". There is no reason to assume that a provision of that precise nature is universal in labour hire contracts. If, for example, the labour hire contract permitted the host employer to request the removal of a worker only in the case of proven misconduct or non-performance of duties, entirely different considerations would arise. In that case the labour hire employer would have the contractual right to resist the removal of a worker by the host employer where substantiation of any allegation of misconduct or non-performance was not forthcoming. If, notwithstanding this, the labour hire employer simply acquiesced in the removal of the worker and proceeded to dismiss him or her, it is difficult to imagine that such a dismissal could be justified on the basis of the worker's incapacity, since the inability of the worker to continue working for the host employer would be the result of the labour hire employer's failure to insist upon compliance with its contract with the host employer rather than any incapacity on the part of the worker.

> [36] Second, in Adecco the labour hire employer simply acquiesced in the host employer's contention that the worker had engaged in misconduct without forming any independent view about whether this allegation was substantiated, in circumstances where the Deputy President found, on the evidence before her, that it was not. By contrast, in Pettifer Modec formed the independent conclusion that the worker had not done anything which warranted dismissal, as earlier stated. This distinction is significant because it demonstrates that where a labour hire employer dismisses a worker based on an endorsement of an allegation of misconduct by the host employer, it may be the case that the dismissal is better characterised as conduct-based rather than capacity-based, and its validity under s.387(a) is to be assessed on that basis.
>
> [37] Third, in Adecco the Deputy President did not, in connection with s.387(a), accept that the labour hire employer had established that there was a lack of alternative work placements for the employee in question, and pointed to evidence which suggested that in fact there may have been alternative work available. The Full Bench in Pettifer at paragraph [41] identified this as a further point of factual distinction, in that Modec had made exhaustive efforts to find alternative work for Mr Pettifer."

[72] On the evidence before me, Couriers Please had the unfettered right to prohibit the Applicants from working as drivers. The absence of evidence of this right in *Adecco* and *Tasports* was an important factor in the Deputy President and Full Bench's conclusion that there were no valid reasons for termination.

[73] I accept that the Respondent did not expressly consider redeployment.[73] I have considered this factor in the context of the evidence before me in this case and I am satisfied that the Respondent's business is of such a small size that no alternative employment opportunities with the Respondent existed. The cross-examination of [redacted] as to the issue of redeployment was that he did not expect to be allocated another job at the workshop and that he did not have mechanical trade qualifications.[74] Mr Zintchenko conceded during cross-examination that there was no alternative position available with the Respondent.[75] On the evidence before me I am satisfied that even if the Respondent had explored redeployment opportunities with the Applicants, the outcome would have been the same.

[74] On the basis of the evidence before me and my findings at paragraphs [72] and [73] above I am satisfied that there was a valid reason for the Applicants' dismissal related to their capacity.

(b) whether the person was notified of that reason

[75] In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account whether the person was notified of the reason.[76] Procedural fairness requires that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment.[77] The notification of the valid reason must be in explicit, plain and clear terms.[78]

[76] The Applicants submit that the "Applicants were never told by the Respondent that their employment was terminated."[79] Further they submit The Respondent ignored the Applicants when they were excluded by Couriers Please."[80]

[77] The Respondent concedes that it did not meet with the Applicants separately from its meetings with Couriers Please.[81]

[78] While the Respondent submits that any lack of procedural fairness should not be divorced from the substantive issues of the case,[82] in the context of this case I do not accept the Respondent's submission. Given my finding at paragraph [74] and the absence of evidence before me that the Applicants were made aware by the Respondent that Couriers Please had exercised its contractual right to prohibit the Applicants from being substitute drivers, the Respondent's failure to initiate its own dismissal process favours the finding that the Applicants were not notified of the reason for termination.

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person[83]

[79] The Respondent concedes he did not directly explain to the Applicants that they could no longer work as couriers for his business.[84] On the evidence before me this factor points in favour of a finding that the Respondent did not give the Applicants an opportunity to respond.

(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal

[80] In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal.[85] With respect to this consideration, the Explanatory Memorandum to the Act states:

> "This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them."[86]

[81] The Applicants made no submission directly related to this consideration. The Respondent submits this is a neutral factor.[87] I accept the Respondent's submission on this point.

(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal[88]

[82] Given my finding at paragraph [74], I do not consider this factor to be relevant.

(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal[89]

(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal[90]

[83] The Respondent submits that it is a "very small business."[91] I accept this submission. Given that the Respondent does not have any dedicated human resource management specialists, this consideration leads me to accept that it impacted on the ability of the Respondent to implement adequate procedural fairness. I have taken these matters into account in coming to my overall decision.

(h) any other matters that the FWC considers relevant

[84] In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account any other matters that the Commission considers relevant.[92]

[85] This section of the Act establishes a broad scope of matters for the Commission to consider in determining whether a dismissal is harsh, unjust or unreasonable. I have considered the parties' submissions in this regard.

[86] I have considered the respective lengths of service of both the Applicants for Audi and Kote Enterprises. This includes the fact that [redacted] began working for [redacted] around September 2010 and Mr Zintchenko began work for [redacted] around July 2011.[93] Furthermore it is uncontested that there were no significant performance issues during the Applicants' employment history with the Respondent and the Respondent states that they were "the best drivers ever."[94] I have taken this into account in my determination of this matter.

Conclusion

[87] Having made my finding at paragraph [54] that the Applicants were employees within the meaning of the Act, and taking into account all the matters set out above, including the personal circumstances of the Applicants, I must now consider whether the termination of the Applicants was harsh, unjust or unreasonable.

[88] Although I found a valid reason for termination related to capacity existed, it does not automatically follow that the dismissals were not unfair. The failure on the Respondent's behalf to explain to the Applicants that Couriers Please had exercised their unfettered right to prohibit them from being substitute drivers means that the Applicants were afforded a lack of procedural fairness.

[89] Balancing the factors in s.387 and in taking into account the matters referred to above, I have formed the view that the dismissals were unjust. It follows therefore that the termination of the Applicants' employment was unfair.

[90] Based on the evidence and submissions provided in the proceedings, I am unable to come to a concluded view about what remedy is appropriate. Directions on the filing of submissions dealing with remedy will be issued to the parties following this decision.

[2018] FWC 1097

COMMISSIONER

Appearances:

Mr S Lardi of Berrigan Doube Lawyers for the Applicants

Mr Champion of Counsel and *Mr Reiman* of HWL Ebsworth Lawyers for the Respondent

Hearing details:

2018

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2017

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Final written submissions:

Applicants' Submissions in Response to Respondent's 'Directions of 14 December 2017' Document, 31 January 2018

Annotated Applicants' Final Submissions, 18 January 2018

Annotated Respondent's Final Submissions, 18 January 2018

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[1] Agreed Statement of Facts, [4].

[2] Ibid [4] and [7].

[3] Ibid.

[4] Ibid [7].

[5] Ibid [22].

[6] Ibid [38].

[7] Ibid [8].

[8] Ibid.

[9] Transcript of Proceedings (27 September 2017), PN21-22.

[10] Agreed Statement of Facts, [26] and [42].

[11] Witness Statement – [redacted], [9], Witness Statement - Maxim Zintchenko [9].

[12] Annotated Applicants' Final Written Submissions, [68].

[13] Respondent's Annotated Final Written Submissions, [7](a).

[14] Ibid [7](b).

[15] Transcript of Proceedings (27 September 2017), PN21-22.

[16] Notice of listing, issued 14 August 2017.

[17] Transcript of Proceedings (27 September 2017), PN9.

[18] Ibid PN17.

[19] Ibid PN20.

[20] Agreed Statement of Facts, [1]-[21].

[21] Transcript of Proceedings (11 October 2017), PN771-PN774 and PN792.

[22] [2011] FWAFB 8307.

[23] *Hollis v Vabu Pty Ltd* [2001] HCA 44.

[24] (2003) 122 IR 215.

[25] Witness Statement – Maxim Zintchenko [28]-[31], Witness Statement – [redacted] [28]-[31].

[26] Agreed Statement of Facts, [33] and [49].

[27] Applicants' Outline of Argument (12 September 2017), [17].

[28] Annotated Respondents' Final Written Submissions, [33](c).

[29] Annotated Applicants' Final Written Submissions, [43](h).

[30] Agreed Statement of Facts, [11] .

[31] Ibid.

[32] Ibid [13].

[33] Respondent's Annotated Final Written Submissions, [33](c).

[34] Applicants' Outline of Argument (12 September 2017), [21].

[35] Annotated Applicants' Final Written Submissions [43](j).

[36] Ibid [43](f).

[37] Transcript (27 September 2017), PN461-467.

[38] Annotated Respondent's Final Written Submissions [33](a).

[39] Ibid.

[40] Ibid [33](d)

[41] Transcript of Proceedings (27 September 2017), PN437.

[42] Ibid PN439.

[43] Ibid PN276.

[44] Agreed Statement of Facts, [9].

[45] Annotated Respondent's Final Submissions, [32].

[46] Transcript of Proceedings (27 September 2017), PN669.

[47] Ibid PN333.

[48] Ibid PN670.

[49] Annotated Applicants' Final Written Submissions, [17].

[50] Annotated Respondent's Final Written Submissions, [33](f).

[51] Ibid.

[52] Annotated Respondent's Final Written Submissions, [33](b).

[53] Annotated Applicants' Final Written Submissions, [43](g).

[54] Agreed Statement of Facts, [11]-[12].

[55] Ibid [10].

[56] Annotated Applicants' Final Written Submissions, [43](j).

[57] Ibid [43](j).

[58] Transcript of Proceedings (11 October 2017), PN789.

[59] *Sayer v Melsteel* [2011] FWAFB 7498.

[60] *Fair Work Act 2009* (Cth) s. 387(a).

[61] Annotated Respondent's Final Written Submissions, [36].

[62] Ibid.

[63] Attachment KM-5.

[64] Annotated Applicants' Final Written Submissions [57].

[65] Agreed Statement of Facts, [15].

[66] Ibid [20]-[21].

[67] [2016] FWC 2278.

[68] [2016] FWCFB 5243.

[69] [2017] FWCFB 1714.

[70] Attachment KM-1.

[71] [2016] FWC 925, [72].

[72] [2016] FWCFB 5243, [37]-[42].

[73] Annotated Applicants' Final Submissions, [53].

[74] Transcript of Proceedings (27 September 2017) PN385.

[75] Ibid PN534.

[76] *Fair Work Act 2009* (Cth) s. 387(b).

[77] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151; *Gooch v Proware Pty Ltd T/A TSM (The Service Manager)* [2012] FWA 10626.

[78] *Previsic v Australian Quarantine Inspection Services* (unreported, AIRC, Holmes C, 6 October 1998) Print Q3730.

[79] Applicants' Outline of Argument (Filed 12 September 2017), [41].

[80] Ibid [44].

[81] Annotated Respondent's Final Submissions, [58].

[82] Ibid [59].

[83] *Fair Work Act 2009* (Cth) s. 387(c).

[84] Transcript of Proceedings (27 September 2017), PN674.

[85] *Fair Work Act 2009* (Cth) s. 387(d).

[86] Explanatory Memorandum, *Fair Work Bill 2008* (Cth) [1542].

[87] Annotated Respondent's Final Written Submissions, [61].

[88] *Fair Work Act 2009* (Cth) s. 387(e).

[89] Ibid s. 387(f).

[90] Ibid s. 387(g).

[91] Annotated Respondent's Final Written Submissions, [63].

[92] *Fair Work Act 2009* (Cth) s.387(h).

[93] Agreed Statement of Facts, [22] and [38].

[94] Transcript of Proceedings (27 September 2017), PN675.