[2025] FWC 3373

DECISION

Fair Work Act 2009

s.365—General protections

Kerry Milne

v

Festoon Lighting Australia Pty Ltd

(C2025/416)

DEPUTY PRESIDENT BOYCE	SYDNEY, 11 NOVEMBER 2025

Application to deal with contraventions involving dismissal – jurisdictional objection - whether the applicant an independent contractor or an employee of the respondent - section 15AA of the Fair Work Act 2009 applied – in a s.365 application, the Commission is only required to determine whether or not Applicant was an employee as at the date of her purported dismissal – the Commission is not required to determine at what point in time applicant became an employee of the Respondent – applicant an employee of the respondent as at the date of her dismissal – not clear if terms of purported independent contracting arrangement transferrable to employment - jurisdictional objection dismissed

Ms Kerry Milne (**Applicant**) has filed a Form F8, general protections involving dismissal application (**Application**), under s.365 of the *Fair Work Act 2009* (**Act**). The Applicant alleges that she was dismissed by Festoon Lighting Australia Pty Ltd (**Respondent**) in contravention of Part 3-1 of the Act.

The Respondent says that the Application is jurisdictionally barred on the basis that the Applicant was not an "employee" of the Respondent for the purposes of Part 3-1 of the Act. In other words, if the Applicant was not an employee of the Respondent, it could never have dismissed her. The requirement for a "dismissal" (within the meaning of s.12 and s.386 of the Act) is a jurisdictional prerequisite to the making of a valid general protections involving dismissal claim.

The issue to be resolved in this case is whether the relationship between the Applicant and the Respondent was that of employee and employer, or independent contractor and principal. Section 15AA of the Act, which concerns itself with the real substance, practical reality, and true nature of the relationship when determining the meanings of employee and employer, applies to the resolution of these proceedings.

Directions were issued for the filing of submissions and evidence, and the listing of the matter for hearing. The parties complied with those Directions.

At the hearing, the Applicant was represented (with permission) by Mr *Simon Rogers*, of Counsel, instructed by Mr *Luke Francis*, Senior Associate, Quest Legal, and the Respondent was represented (with permission) by Mr *Troy Plummer*, ANZ Head of Legal, and Ms *Katie Jackson*, Solicitor, Irwell Law (formerly Employsure Law).

Factual findings

Based upon the evidence, I make the findings of fact set out in paragraphs [7] to [26] below.

The Applicant is the sole Director and Shareholder of GAP Strategic Marketing Pty Ltd (**GAP**), a management consultancy. GAP does not employ any employees, apart from the Applicant. GAP's website describes itself as "delivering business growth strategies" to businesses, and says that GAP specialises in "driving long-term growth, enhancing your bottom line, building powerful brands, and creating robust marketing strategies and business processes that deliver tangible results". It identifies only the Applicant, as Founder and Managing Director, and her cat, George, as being part of the GAP Team. In other words, GAP is the Applicant, and the Applicant is GAP. GAP states that it also partners with other businesses to project manage the delivery of broader services and results. There is no suggestion by GAP that when a business contracts or engages with it, such business will be working with anyone from GAP other than the Applicant. Nor is there any suggestion that the Applicant is an unskilled worker.

The Respondent is a small business. It creates (sells) custom lighting arrangements for various projects (from weddings, to festivals, to home lighting). Mr Andrew Logan and Mr Alex Peddie are each Co-founders (2019) and Directors of the Respondent. Mr Logan and Mr Peddie are also involved in another business delivering electrical contracting services to the market.

In 2023 the Respondent sought to engage an external consultancy to assist it with expansion and growth, mainly in the marketing space. GAP was one of three business interviewed for the provision of such consultancy services in October 2023, whereby GAP (through the Applicant) pitched itself to provide and deliver strategic marketing outcomes for the Respondent. Out of the three business interviewed, GAP was successful. Due to the

Applicant's own personal commitments, it was agreed that GAP would commence its work with the Respondent in February 2024.

The parties accept that the Respondent engaged GAP to provide its marketing consultancy services during the period 2 February 2024 to 30 April 2024 (**Contractor Marketing Engagement**). There was no formal written agreement between the parties in respect of the Contractor Marketing Engagement, however, the presentation provided by the Applicant (on behalf of GAP) to the Respondent (dated October 2023) sets out the nature and scope of the services to be provided by GAP to the Respondent (including as to proposed project timeframes, and costings). Mr Logan in his evidence, and the Applicant in her evidence, confirm that the Contractor Marketing Engagement ended on 30 April 2024.

In respect of the Contractor Marketing Engagement, GAP issued a tax invoice each month (February, March, April 2024) to the Respondent.

On 1 March 2024, during the term of the Contractor Marketing Engagement, the Applicant (on behalf of GAP), Mr Logan and Mr Peddie (on behalf of the Respondent) had a lunch meeting. At this meeting, a discussion was had as to growing the Respondent's business in a more holistic way (i.e. beyond the marketing services already being provided by GAP pursuant to the Contractor Marketing Engagement). These discussions progressed, after the 1 March 2024 meeting, whereby GAP (through the Applicant) put forward two different options to the Respondent. *Firstly*, for GAP to continue providing its marketing (or alike) services to the Respondent, and bring in other specialist contractors to provide additional and complementary growth/expansion type services (to be project managed, for a fee, by GAP). *Secondly*, and alternatively, the external recruitment and subsequent appointment of a General Manager (or alike type role) to lead and manage the Respondent's business (from the top) for an interim period of time.

Ultimately, it was agreed that the Applicant would be appointed as the General Manager (or fractional/interim Chief Executive Officer (**CEO**)) of the Respondent's business from 1 May 2024, for a period of 6 months, at which time a re-evaluation and reassessment was to occur, potentially extending the arrangement for a period of up to 12 months (**CEO Engagement**). There was no written agreement between the parties in relation to the CEO Engagement, beyond an email dated 9 April 2024. In terms of payment for the CEO Engagement, it was agreed between the Respondent and GAP that Respondent would pay GAP the amount of $17,000 per month (plus GST), for the Applicant to be engaged (through GAP) as the CEO of the Respondent's business.

In respect of the CEO Engagement, GAP issued a tax invoice each month (May to November 2024) to the Respondent, in the amounts of $18,700 (i.e. $17,000 + GST of $1,700) per month. This payment encompassed any work that the Applicant undertook as part of the CEO Engagement, and any hours that the Applicant undertook (be they ordinary or normal working hours, or any additional hours). It was up to the Applicant to do the hours she determined appropriate or necessary to fulfill the CEO Engagement.

In addition to the CEO Engagement, GAP also provided additional marketing services to the Respondent (during the period of the CEO Engagement), in June and November 2024 (**Further Marketing Engagement**). GAP issued tax invoices for the months of June and November 2024 in respect of the Further Marketing Engagement in the amounts of $4,852.50 (i.e. $4,411.36 + GST $441.14) and $5,500 (i.e. $5,000 + GST $500) respectively.

There was no discussion or agreement between the Respondent and GAP as to the Applicant being engaged as, or otherwise being, an employee of the Respondent, during the period of the CEO Engagement (or otherwise).

The Respondent did not pay the Applicant superannuation, or withhold taxation from any of the payments it made to GAP. The Applicant received superannuation payments from GAP. The Applicant was not provided with sick leave or annual leave, however, there is no suggestion that the Applicant was not paid for any time she took off to attend to personal issues or other appointments. Nor did the Applicant make any request for leave.

Upon her engagement as CEO, the Applicant was:

a. able to work her own hours, subject to touching base with either Mr Logan and/or Mr Peddie as to time off to attend personal issues or appointments (e.g. with a medical professional);

a. reimbursed for expenses incurred;

a. presented to the public, staff and clients as the Respondent's CEO; and

a. provided with the email address "kerry@festoon.com.au" for use in her communications with staff and clients.

The Applicant also took over the running of the day-to-day operations of the Respondent's business, with all staff reporting to her. She would consult with Mr Logan and Mr Peddie as to their or her recommendations in respect of business decisions, and the implementation of same, including the hiring of new staff, dealing with employee grievances and absences, making employees redundant, and finalising hybrid (i.e. mixed working hours from both home and office) arrangements for staff. There was no job description for the CEO Engagement.

There is no suggestion on the evidence that the Applicant was prohibited from running GAP (as a business) during the period of the CEO Engagement. Whilst the Applicant's time may have been consumed by the CEO Engagement and the Further Marketing Engagement, this is not the same as her being required by the Respondent to abandon her work with GAP during these engagements. In other words, it was up to the Applicant to prioritize the work (and the workload) that she had agreed to take on, on behalf of GAP (or on her own behalf), with the Respondent. If that resulted in the Applicant not being in a position to perform other work for GAP or GAP's clients, that was a choice that the Applicant made herself by agreeing to the CEO Engagement and/or the Further Marketing Engagement. One person can only take on so much work at once, and GAP did not employ anyone to further its business interests other than the Applicant.

There is no suggestion that any of the engagements between the Applicant and the Respondent, if she is found to be an employee, gave rise to any award coverage.

On 22 November 2024, the Applicant was issued with a “Confirmation of Suspension” letter, which reads:

“Dear Kerry,

The purpose of this letter is to formally advise you that a number of complaints of serious misconduct have recently been brought to our attention.

Due to the serious nature of these complaints, we confirm that you will be stood down and suspended from your normal duties pending the resolution of this matter.

This period of suspension should not be viewed as a disciplinary sanction in and of itself and you will of course continue to receive full pay and benefits during this period of suspension.

Whilst you are suspended you must not attend the office, or contact any client or fellow employee, without my prior express consent. Such consent will not be unreasonably withheld. Any failure by you to maintain confidentiality may lead to disciplinary action.

During this period of suspension, you should await the further instructions of the Company and be available to participate in any investigation process upon request.

If you have any enquiries in relation to this matter, please contact me.

Your sincerely

Andrew Logan

Director”

On 25 November 2024, the Applicant was issued with a “Invitation to Investigation Meeting” letter, which reads:

“Dear Kerry

Invitation to Investigation Meeting

The purpose of this letter is to formally advise you that we are investigating a grievance raised by Alex Kauler in relation to your employment with the Employer.

The specifics of the grievance raised against you are set out below:

i. On an ongoing basis you have told Alex and other employees that they have ADHD and specifically relating to Alex, you have told her that “her brain is her worst enemy and she needs to be on medication’;

i. During meetings between August and October you belittled Alex to the point she was reduced to tears. Your communication with Alex via WhatsApp is belittling and on occasion outside of work hours; and

i. During a meeting with Alex on 15 October 2024 Alex indicated she may resign and concentrate on her own business as a life coach. Your response was that Alex couldn’t manage her own life or this job so could she help other people.

In order to conduct our investigation, we wish to meet with you and obtain your response to these issues.

This investigation meeting is to be conducted at 11:30 am on 27 November 2024 at the Peninsula office, Level 14/108 St Georges Terrace, Perth WA 6000. You are expected to make every effort to attend this meeting.

We remind you that if any of the above issues are proven this behaviour may constitute bullying and could result in disciplinary action up to and including termination of your employment.

The Employer confirms a representative of Peninsular will be present at the meeting. The role of the Peninsular representative is to support/facilitate the meeting and to ensure procedural fairness.

You are of course welcome to bring a support person to this meeting should you choose.

If the above issues are found to be substantiated the Company will contact you to discuss any further action which may be required.

All matters and information relating to this grievance are strictly confidential and you are directed not to discuss them with any other person without my express prior consent. Any failure by you to maintain confidentiality may lead to disciplinary action.

If you have any enquiries in relation to this matter, please contact me.

Yours sincerely,

Andrew Logan

Director”

The Applicant advised that she would be responding to the foregoing allegations (raised against her) in writing, and provided that response (through her lawyers) on 13 December 2024. In short, the Applicant denied any wrongdoing on her part.

On 24 December 2024, the Applicant was issued with a “Termination of Verbal Independent Contractor Agreement” letter, which reads:

“Dear Kerry

TERMINATION OF VERBAL IDEPENDENT CONTRACTOR AGREEMENT

We refer to your verbal independent contractor agreement (**the Agreement**).

Festoon Lighting Australia Pty Ltd (**the Company**) would like to inform you that it will be terminating the Agreement due to operational reasons following the recent investigation. By way of clarification, the Agreement will cease to be effective as of Tuesday 24th December 2024.

Please note that you will be paid for any services provided up to and including the date of termination. You will not be entitled to any other compensation.

We would like to take this opportunity to remind you of your continuing obligations, which are not limited to:

- Carrying out services as agreed, up to and including the termination date.
- Immediately returning any Company Property you may have, in good working order.
- Maintaining the confidentiality of the Company’s confidential information. This includes client details, data and employee information
- Declaring and/or returning any intellectual property made or discovered during your engagement.
- Returning any amounts you have been overpaid by the Company.

The Company may take steps to enforce these obligations if the Company becomes aware of any breach by you.

Please do not hesitate to contact Elle Peddie if you have any questions in relation to this matter.

Yours sincerely,

Alex Peddie

Director”

Neither GAP nor the Applicant performed any work for the Respondent after 24 December 2024.

Legislative provisions

The terms “employee” and an “employer” carry their ordinary meanings. Section 15AA of the Act deals with how to determine the “ordinary meanings” of the terms “employee” and “employer”. It was inserted by the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024*, and commenced operation on 26 August 2024. It does not apply to an application that was already “on foot” before 26 August 2024, but does apply to applications filed after 26 August 2024, such as this one, with respect to relationships in existence or entered into before 26 August 2024.

Section 15AA of the Act reads:

- “(1)For the purposes of this Act, whether an individual is an **employee** of a person within the ordinary meaning of that expression, or whether a person is an **employer** of an individual within the ordinary meaning of that expression, is to be determined by ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person.

- (2)For the purposes of ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person:

    a. the totality of the relationship between the individual and the person must be considered; and

    a. in considering the totality of the relationship between the individual and the person, regard must be had not only to the terms of the contract governing the relationship, but also to other factors relating to the totality of the relationship including, but not limited to, how the contract is performed in practice.

- Note: This section was enacted as a response to the decisions of the High Court of Australia in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

- (3)Subsections (1) and (2) do not apply to the following provisions of this Act:

a. Divisions 2A and 2B of Part 13;

a. Part 31, to the extent that Part 31 applies only because of the operation of section 30G or 30R."

In determining whether the Commission's jurisdiction has been enlivened for the purposes of s.365 of the Act, the question in this case is whether or not the Applicant was an employee of the Respondent as at the date that the engagement between GAP (or her) and the Respondent came to an end on 24 December 2024, such that the Applicant was susceptible to being "dismissed" within the meaning of s.386 of the Act on that date. As to this task, Deputy President Roberts stated in *Murray v 239 Brunswick Pty Ltd*:

"Section 15AA(2) requires a consideration of the totality of the relationship which involves in turn a consideration of, amongst other things, the terms of the contract between the parties and an assessment as to how the contract is performed in practice. The approach to a consideration of the totality of the relationship under s.15AA is guided by the common law principles established by cases such as *Stevens v Brodribb Sawmilling Co Pty Ltd* and *Hollis v Vabu Pty Ltd* and involves a reversion to the multifactorial test that was well known and widely applied prior to the High Court decisions in *CFMMEU v Personnel Contracting* and *ZG Operations v Jamsek*.

The common law approach has been set out in numerous decisions of the courts and in decisions of this Commission. In *Jiang Shen Cai trading as French Accent v Do Rozario* the Full Bench summarised the approach to the determination of the employee/contractor issue including 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, the nature of the work performed and the manner of its performance, the identification and application of the relevant indicia to the circumstances, and the terms of the contract between the parties.

In the same decision, the Full Bench identified the various indicia that are ordinarily considered in an assessment as to the nature of the relationship. They include the actual exercise, or the right to exercise, control over the putative employee, whether the worker performs work for others, or provides tools and equipment, whether the work can be delegated, whether the worker is remunerated by periodic wages or salary or by reference to completion of tasks and whether the worker is presented to the world at large as an emanation of the putative employer's business. The Bench also cautioned 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."

Consideration

In determining whether or not the Applicant was an employee of the Respondent, I need to assess the true substance, practical reality and true nature of the relationship between the Applicant and the Respondent, having regard to the totality of the relationship between them, the terms of any contract between them, and how that contract was performed in practice.

There are clear differences between the Contractor Marketing Engagement and the CEO Engagement. This is reflected in the two options arising from the 1 March 2024 meeting (see paragraph [12] of this decision). That said, the evidence identifies that the Applicant was at all times an emanation of GAP.

The title of CEO, the presentation of the Applicant as an employee of the Respondent to staff, clients, and the public, and the nature of the work performed by the Applicant in the Respondent's business, are all indicative of an employment relationship.

In terms of the CEO Engagement, I do not accept that the hours worked by the Applicant (in or out of the office), or the duties performed by the Applicant, arise because of expectations by the Respondent as to those hours or duties. The working hours undertaken by the Applicant might equally be worked by an independent contractor or an employee. It is clear that it was a term agreed between the parties that the remuneration agreed to be paid by the Respondent to GAP was in compensation for any and all hours worked by the Applicant during the CEO Engagement, and for any and all duties or other work performed by the Applicant (i.e. whether such duties or work were indicative of a CEO role, or otherwise).

I accept that the Respondent had the right to direct the Applicant in the performance of her work as CEO. However, the evidence does not establish that such right to direct extended to a right to require "how" such work was performed.

Whilst it is also true that the work performed by the Applicant more than likely gave rise to the creation of goodwill in the Respondent's business, it can also be said that the Applicant was creating goodwill in her own business. For example, GAP's own marketing materials point to the Applicant's past experience as a Co-CEO and a growth specialist in the start-up community. There is no suggestion that the Applicant would not market her work and achievements at the Respondent when marketing or furthering GAP's own business interests moving forward to secure work from other clients.

The manner in which the Applicant was remunerated for the CEO role was via the payment of tax invoices issued by GAP to the Respondent. The Applicant never sought to be remunerated in any other manner. Indeed, the method of remuneration was based upon how the Applicant had chosen to structure her affairs, through GAP, including upon the provision of professional advice as to her taxation and financial affairs.

Another aspect of the Applicant's remuneration for the CEO role warrants mention. The evidence discloses that the parties reached an agreement for the Applicant, through GAP, to perform the CEO role on an interim basis, for the amount of $17,000 (plus GST) per month. What is not clear on the evidence is whether, if the parties had turned their mind to the Applicant being an employee, that the same remuneration would have been agreed.

In other words, it simply cannot be the case that the amount of $17,000 (plus GST) per month would have been agreed by the Respondent as a wage, or is to be converted to a wage, such that notice of termination, leave or other entitlements are to be applied at this figure. In short, s.15AA does not have the effect of converting payments made under invoices into wages, or converting terms agreed between the parties (that they thought applied to an independent contracting arrangement) into the terms of an employment contract. Rather, s.15AA is applied to determine the relationship between the parties. What terms actually apply after a (wrongly classified) independent contractor is found to be (as a matter of practical reality) an employee is up to a court to determine, including by reference to principles grounded upon estoppel. It certainly does not follow that the more beneficial terms of a wrongly classified independent contracting arrangement remain as terms of employment for the employee, whilst the less beneficial terms of the independent contracting arrangement are uplifted to more beneficial employment terms. There must be both upside and downside (or balancing) to any overall outcome, including the inherent risks that relevant terms and conditions of employment may end up being less than those to which the person enjoyed as an independent contractor.

The suspension of the Applicant, the subsequent investigative process, and the manner in which the relationship between the parties was brought to an end, all point to the Applicant being employed by the Respondent. These matters (or the approach adopted by the Respondent to these matters) were unexplained by the Respondent on the evidence.

As Deane J stated in *Stevens v Brodribb Sawmilling Co Pty Ltd*, there are always "a circumfluence of competing criteria and indicia" when determining whether a particular relationship is or was one of independent contractor and principal, or employer and employee. In this case, the criteria are very much finely balanced. That said, the manner in which the relationship was dealt with in December 2024, and brought to an end that month, points strongly in favour of the Applicant being an employee of the Respondent.

I am only required to determine whether the Applicant was an employee of the Respondent as at the date of her purported dismissal (i.e. 24 December 2024). In other words, it is not necessary for me to determine at what point in time the Applicant first fell within the s.15AA definition of employee. My overall impression of the true substance, practical reality and true nature of the relationship between the Applicant and the Respondent as at 24 December 2024 is that it was a relationship of employment. It follows that I also find that the Applicant was "dismissed" on 24 December 2024.

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Whether or not the Applicant was an employee of the Respondent throughout the term of the CEO Engagement is a matter for a court of competent jurisdiction to determine. As Beaumont DP stated in *Joel Minchin v Civmec Construction & Engineering Pty Ltd*:

"[46] It is worth outlining s.370 of the Act, which, in setting out the pre-requisites for the making of a general protections court application, provides an overview of the next steps for the conduct of the Applicant's application:

370. A person who is entitled to apply under s 365 for the FWC to deal with a dispute must not make a general protections court application (as defined in s 368(4)) in relation to the dispute unless:

(a) both of the following apply:

(i) the FWC has issued a certificate under paragraph 368(3)(a) in relation to the dispute;

(ii) the general protections court application is made within 14 days after the day the certificate is issued, or within such period as the court allows on an application made during or after those 14 days; or

(b) the general protections court application includes an application for an interim injunction.

[47] The precursor to the issuing of the required certificate under s.368(3)(a) is that the Commission must deal with the dispute by conducting a conference and reach a level of satisfaction 'that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful'. Hence for present purposes and as a result of my determination, this matter will now be listed for conference in order to explore the possibility of resolution. A notice of listing will be issued shortly.

[48] Finally, while I have determined the Applicant was dismissed by the Respondent and is therefore entitled to apply under s.365 of the Act for the Commission to deal with his dismissal dispute, it should be noted that the Full Court in *Coles Supply Chain Pty Ltd v Milford* made observations of the following nature regarding s.370 of the Act and the making of a general protection court application:

a. the Act establishes multiple alternate pathways for an applicant and prospective litigants;

a. Section 370 of the Act is to be interpreted against the background that while the Commission may determine the question of a person's entitlement to make an application to it, this may not be conclusive; and

a. this is because a Court may ultimately decline to recognise an 'application' or resulting certificate granted by the Commission as valid, if called upon by a Respondent to determine a subsequent objection to the competency of a general protections court application under s 370 of the Act."

I will order that the Respondent's jurisdictional objection be dismissed. The Application will now be listed for a Conference under s.368 of the Act, with a Notice of Listing to be issued separately by my Chambers in due course.

DEPUTY PRESIDENT

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Appearances:

Mr *Simon Rogers*, of Counsel, instructed by Mr *Luke Francis*, Senior Associate, Quest Legal, appeared (with permission) for Ms Kerry Milne (the Applicant).

Mr *Troy Plummer*, ANZ Head of Legal, and Ms *Katie Jackson*, Solicitor, Irwell Law (formerly Employsure Law), appeared (with permission) for Festoon Lighting Pty Ltd (the Respondent).