



Administrative
Appeals Tribunal

DECISION AND
REASONS FOR DECISION

Division: GENERAL DIVISION

File Number: **2021/7478**

Re: **Richard McLean**

APPLICANT

And **Comcare**

RESPONDENT

DECISION

Tribunal: **Senior Member C. J. Furnell**

Date: **12 July 2023**

Place: **Melbourne**

The Tribunal affirms the decision the subject of review.



.....
[SGD]
Senior Member C. J. Furnell

Catchwords

COMPENSATION – claim for compensation for psychological injury under the Safety, Rehabilitation and Compensation Act 1988 (Cth) – depression and anxiety state – whether Applicant an employee of the Commonwealth, a Commonwealth authority or a corporation licensed under the Act as a self-insurer – where the Applicant was a registered National Disability Insurance Scheme provider – whether a contract of employment existed – objective circumstances surrounding formation of contractual relationship – held that Applicant was not an employee of the Commonwealth, a Commonwealth authority or a corporation licensed under the Act as a self-insurer – reviewable decision affirmed

Legislation

Acts Interpretation Act 1901 (Cth)

National Disability Insurance Scheme Act 2013 (Cth)

National Disability Insurance Scheme (Code of Conduct) Rules 2018 (Cth)

National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018 (Cth)

National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 (Cth)

Public Interest Disclosure Act 2013

Public Service Act 1999 (Cth)

Safety, Rehabilitation and Compensation Act 1988 (Cth)

Cases

Carnival plc v Karpik (The Ruby Princess) [2022] FCAFC 149

Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1

Drake v Minister for Immigration and Ethnic Affairs (1979) 2 ALD 60

JMC Pty Ltd v Commissioner of Taxation [2022] FCA 750

JMC Pty Ltd v Commissioner of Taxation [2023] FCAFC 76

Marshall v Whittaker's Building Supply Co [1963] HCA 26

Murphy v Chapple [2022] FCAFC 165

R v Jenkins; Ex parte Morrison [1949] VLR 277

Secretary, Attorney-General's Department v O'Dwyer [2022] FCA 1183

Shi v Migration Agents Registration Authority (2008) 235 CLR 286

Twin Rivers Developments Pty Limited and Commissioner of Taxation (Taxation) [2022]
AATA 887
ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2

Secondary Materials

Australian Government, 'Register for an Australian Business Number (ABN)',
Business.gov.au (Web Page, updated 7 March 2023)
<<https://business.gov.au/registrations/register-for-an-australian-business-number-abn>>

Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th Edition, 2019)

NDIS Quality and Safeguards Commission Enterprise Agreement 2019 – 2022

REASONS FOR DECISION

Senior Member C. J. Furnell

12 July 2023

1. The respondent may be liable under the *Safety, Rehabilitation and Compensation Act 1988* (the “Act”) to pay compensation to a person if the person suffered an injury as an employee of the Commonwealth, a Commonwealth authority or a corporation licensed under the Act as a self-insurer.
2. In May 2021, the applicant claimed that the respondent was liable to pay him compensation under the Act in respect of an injury he said he suffered in the period October 2019 to February 2021.
3. The applicant contended that he was then employed by either the National Disability Insurance Agency (the “Agency”) or the NDIS Quality and Safeguards Commission (the “Commission”).¹
4. The respondent was not satisfied that the applicant was so employed and determined to reject his compensation claim, a determination which it decided to affirm in August 2021.²
5. The applicant applied to the Tribunal for review of that August 2021 decision.
6. For the reasons which follow, I have decided to affirm that decision.

Material Before the Tribunal

7. The Tribunal directed that the question of whether the applicant was an employee for the purposes of the Act was to be addressed in the context of a preliminary hearing.

¹ The applicant later suggested that he was employed by the Department of Social Services.

² T29.

8. In considering that question in that context, the Tribunal is obliged to make “*the correct or preferable decision*” on the material before it.³
9. The material before the Tribunal included evidence adduced at a hearing on 6 April 2023 and certain documentary material lodged with the Tribunal.
10. As for evidence adduced at the hearing, the Tribunal heard from the applicant.
11. As for documentary material lodged with the Tribunal, it included:
 - (a) A 410-page bundle of documents lodged by the respondent with the Tribunal under s 37 of the *Administrative Appeals Tribunal Act 1975* (the “T” documents and marked as Exhibit R1);
 - (b) An email of 5 May 2022 from an officer of Services Australia outlining the results of a search conducted with respect to payroll related information from 30 June 2016 concerning the applicant (marked as Exhibit R2);
 - (c) An email of 31 March 2023 from an officer of the Department of Social Services (marked as Exhibit R3); and
 - (d) A copy of a letter of 27 March 2023 to the applicant from the General Counsel of the Federal Court of Australia (the “GC letter” and marked as Exhibit A1).
12. This was not the only documentary material lodged with the Tribunal, however.
13. Prior to the hearing on 6 April 2023, the applicant had lodged in excess of 60 discrete emails or bundles of material with the Tribunal. In addition, in the four business days following the hearing, under cover of over 11 emails, the applicant lodged with the Tribunal 47 separate documents or bundles of documents which he apparently considered to be of relevance to the question of his status as an employee.⁴

³ See *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60 at 68 (Bowen CJ and Deane J); *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at [96]–[98] (Hayne and Heydon JJ).

⁴ This occurred despite the applicant having been directed to lodge with the Tribunal in advance of the hearing a statement of his submissions and the material on which he wished to rely at the preliminary hearing.

14. On 12 April 2023 the applicant was given leave to lodge by 24 April 2023 a submission in relation to the documents he had so lodged with the Tribunal after the hearing and the respondent was given leave to lodge a submission in reply by 5 May 2023. The parties were then told, however, that any further material or submissions in relation to the employee question would not be considered, absent leave of the Tribunal.
15. On or before 24 April 2023, the applicant lodged with the Tribunal 16 additional documents. He lodged further documents after 24 April 2023. The respondent did not make a submission in reply.
16. I have not considered the material lodged by the applicant after 24 April 2023. Leave was neither sought nor obtained in relation to its lodgement. As for the material lodged by the applicant after 12 April 2023, it was considered only insofar as it might be said to comprise submissions in relation to the documents lodged by the applicant in the four business day period following the hearing.
17. Subject to the two qualifications just outlined, the Tribunal has endeavoured to distil from the voluminous material lodged by the applicant his contentions and submissions in relation to the employee question and, as well, identify the particular material on which he relied in support of those contentions and submissions.
18. The respondent provided an outline dated 12 May 2022 of its submissions on whether the applicant was an employee (the “R SFIC”). On 4 April 2023, it lodged a submission in response to the GC letter.

Aspects of procedural history and factual context

19. In April 2021, the applicant sought to lodge a workers’ compensation claim with the authority responsible for Victoria’s workers’ compensation scheme.⁵ He was advised that “*the employer noted on the claim form, NDIS/NDIA, is not covered under the Victorian*

⁵ T3.

WorkCover scheme".⁶ In May 2021, the applicant lodged a workers' compensation claim with the respondent.⁷

20. When those claims are read together, it is apparent that the applicant then claimed to have suffered a psychological injury⁸ while working at his home with victims of child sexual abuse in his capacity as an employee of either the Agency or the Commission.
21. He had, he said, been working for "*this employer*" since October 2019, for four days a week on different days, with his weekly hours of work varying from between seven and 24 hours. His usual place of work was said to be his home.
22. The applicant's usual occupation was said to be "*artist-life coach-therapeutic supports*" undertaken by him as a contractor and sole trader. The applicant said that the delay in reporting his injury was because he "*did not know sole traders were covered*".⁹ At the time of his claim the applicant stated that he had been a sole trader for two years.¹⁰
23. On 10 May 2021, the Agency denied that the applicant was an employee of the Agency.¹¹ In response to questions posed by the respondent, the Agency stated that:
 - (a) it did not pay the applicant wages from which it deducted tax and superannuation;
 - (b) it was not responsible for the supervision of the applicant;
 - (c) it did not control the manner in which the applicant completed his work; and
 - (d) the applicant was not subject to the "*APS Code of Conduct*" or any other internal department policies providing guidance and standards of behaviour.¹²

⁶ Page 4 of a 187-page bundle lodged by the applicant on 11 March 2022.

⁷ T4.

⁸ T15.

⁹ T3, p.9. In an email of 3 July 2022, the applicant claimed he was not a sole trader but was, instead, "*a company-so stick it in your pipe and smoke that-it changes the dynamic now doesn't it*": p.95 of a 97-page bundle lodged on 3 July 2022. While it is unclear why the applicant considered that being "*a company*" might assist his case, no other material before the Tribunal suggests that the relevant provider of supports registered with the Commission was a corporate entity.

¹⁰ T3, p.10.

¹¹ T10.

¹² T9.

24. In an email of 13 May 2021, the applicant stated that he wanted to “...*determine quite urgently if despite being a sole trader if I get paid by the NDIS does that mean or not mean I am employable and our insured by Commcare?*”¹³
25. As mentioned earlier, in August 2021, the respondent decided to affirm a determination it had made in May 2021¹⁴ rejecting the applicant’s claim to be entitled to compensation for an anxiety state and depressive disorder.¹⁵ The respondent was not satisfied that the applicant was an employee “...*of NDIA or another Australian Government agency, statutory authority or a self-insured organisation.*”¹⁶
26. In October 2021, the applicant applied to the Tribunal for review of that August 2021 decision. In that application, the applicant stated that he had worked for the National Disability Insurance Scheme (the “NDIS”).
27. As mentioned earlier, on 6 April 2023, a preliminary hearing was held to address the issue of whether the applicant was an employee at the relevant time.
28. As is apparent from my decision in this matter, I am not satisfied that he was.

Registration with Commission

29. The applicant claimed to have suffered the relevant injury in the period October 2019 to February 2021.¹⁷
30. In that period the applicant, trading as “... [the applicant], *Arts Therapist, Peer-Support Worker and Mental Health Advocate,*” was registered with the Commission as a provider of therapeutic supports under the NDIS.¹⁸ The applicant had commenced his registration with the Commission on 1 July 2019 utilising an Australian business number.¹⁹

¹³ T11.

¹⁴ T18.

¹⁵ T29.

¹⁶ T29, p.143.

¹⁷ In his claim, applicant stated that he was injured when “*caring for one of my clients whom I worked very closely with over one and a half years a few times a week*”: T4.

¹⁸ T5, T6.

¹⁹ T6.

31. The applicant's registration was subject to various conditions including that he:
- (a) comply with the NDIS Code of Conduct;²⁰
 - (b) comply with the NDIS Practice Standards;²¹
 - (c) comply with certain prescribed record-keeping rules;
 - (d) maintain a particular complaints management and resolution system;
 - (e) comply with certain prescribed requirements relating to complaints;
 - (f) maintain a particular incident management system;
 - (g) comply with certain prescribed requirements relating to reportable incidents;
 - (h) comply with Part 4 of the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018*; and
 - (i) comply with Parts 2 – 4 (as applicable) of the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018*.²²
32. Being registered with the Commission as a provider of therapeutic supports under the NDIS meant that the applicant was not precluded from being engaged to provide supports to those scheme participants whose funding for supports was managed by the Agency. In this regard, funding of supports provided to a participant in the NDIS can be managed in a variety of ways.²³ Where supports funding is Agency managed, however, only those who are registered can provide the relevant supports.²⁴

²⁰ See the *National Disability Insurance Scheme (Code of Conduct) Rules 2018*.

²¹ See the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018*.

²² T6.

²³ Section 42(2), *National Disability Insurance Scheme Act 2013* provides that management of supports funding can be by the relevant participant, a registered plan management provider, a plan nominee or the Agency.

²⁴ Section 33(6), *National Disability Insurance Scheme Act 2013*: "To the extent that the funding for supports under a participant's plan is managed by the Agency, the plan must provide that the supports are to be provided only by a registered NDIS provider." Further, rules made in relation to the scheme may require that certain classes of supports only be provided to scheme participants by persons registered to provide those classes of support: s 73B, *National Disability Insurance Scheme Act 2013*.

Employee for purposes of the Act

33. As mentioned earlier, the respondent may become liable under the Act to pay compensation to a person if the person suffered an injury as an employee of the Commonwealth, a Commonwealth authority or a corporation licensed under the Act as a self-insurer.²⁵
34. The Agency is a Commonwealth authority.²⁶ It is a body corporate incorporated for a public purpose by a law of the Commonwealth.²⁷
35. The Commission is a part of the Commonwealth.²⁸
36. For the purposes of the Act, the applicant will have been an employee of the Agency or the Commission (or, indeed, of the Department of Social Services, as the applicant later claimed to be the case²⁹) if he was such an employee under the general law. While the Act alters the ordinary concept of “employee” to a limited extent, the alterations so made are not, on the material before me, of relevance in this proceeding.³⁰
37. Whether a person is an employee of another under the general law is a function “*of the rights and obligations on which they have agreed.*”³¹ The employment relationship is a legal one.³²
38. In identifying rights and obligations which may have been agreed, “*[r]ecourse may be had to events, circumstances and things external to the contract which are objective, which are*

²⁵ Act, s 14. See also definition of employee in s 5(1).

²⁶ Act, s 4(1): “*Commonwealth authority*” defined so as to include “*a body corporate that is incorporated for a public purpose by a law of the Commonwealth, other than a body declared by the Minister, by legislative instrument, to be a body corporate to which*” the Act does not apply.

²⁷ As for the National Disability Insurance Agency, see ss 117 and 118 of the *National Disability Insurance Scheme Act 2013*.

²⁸ As for the Commission, it consists of a commissioner and the staff of the Commission. In a note to the provision under which it is established (s 181A *National Disability Insurance Scheme Act 2013*) it is said not to have a legal identity separate from the Commonwealth. Notes in an Act are part of the Act albeit subordinate to the Act’s substantive provisions: s 13 *Acts Interpretation Act 1901* and Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th Edition, 2019) p.202 [4.74].

²⁹ Applicant’s email of 2 April 2023.

³⁰ See, for example, Act, s 5(6), under which persons may be declared to be employees of the Commonwealth.

³¹ *Carnival plc v Karpik (The Ruby Princess)* [2022] FCAFC 149 at [143]. It is irrelevant whether the relevant contract is in writing or oral: *Secretary, Attorney-General’s Department v O’Dwyer* [2022] FCA 1183 at [33].

³² *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 at [44].

*known to the parties at the time of contracting and which assist in identifying the purpose or object of the contract.*³³ Hence, a “*wide-ranging review of the entire history of the parties’ dealings*” is neither necessary nor appropriate.³⁴ How contractual rights are, in fact, exercised or contractual duties performed is generally irrelevant.³⁵

39. Nevertheless, post contractual conduct is not entirely irrelevant. If the putative contract is wholly or partly oral, evidence of subsequent conduct can be of relevance in identifying the terms of the contract (amongst other things).³⁶ For example, a term of an oral (or partly oral) contract may be inferred from evidence of a course of dealing as long as the term is “*necessary for the reasonable or effective operation of the contract in the circumstances of the case.*”³⁷ Indeed, “*...subsequent conduct may be the best evidence of what, if anything, the parties have agreed orally.*”³⁸
40. The characterisation of any particular relationship as one of employment reflects what is “*ultimately an evaluative judgement*”, a judgement that ought not be approached “*...on the basis that there is some checklist against which ticks and crosses may be placed so as to produce the right answer.*”³⁹ Rather than a checklist, however, there are principles of relevance.⁴⁰ They include that:

³³ *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 at [175] per Gordon J.

³⁴ *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 at [59] per Kiefel CJ, Keane and Edelman JJ. See also Gordon J (with whom Steward J agreed) at [176]; compare, however, Gageler and Gleeson JJ at [143] where it is said that “*a court is not limited to considering the terms of a contract and any subsequent variation in determining whether a relationship established and maintained under that contract is a relationship of employment. The court can also consider the manner of performance of the contract.*” See, however, *JMC Pty Ltd v Commissioner of Taxation* [2022] FCA 750 at [19].

³⁵ *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 at [109].

³⁶ *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 at [177] per Gordon J: “*Of course, the general principle against the use of subsequent conduct in construing a contract wholly in writing says nothing against the admissibility of conduct for purposes unrelated to construction, including in relation to: (1) formation – to establish whether a contract was actually formed and when it was formed; (2) contractual terms – where a contract is not wholly in writing, to establish the existence of a contractual term or terms...*”. And again at [183]: “*...where the contract is oral, or partly oral and partly in writing, subsequent conduct may be admissible in specific circumstances for specific purposes – to objectively determine the point at which the contract was formed, the contractual terms that were agreed or whether the contract has been varied or discharged.*” See also *Murphy v Chapple* [2022] FCAFC 165 at [30].

³⁷ *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 at [190] per Gordon J, citing *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 442.

³⁸ *Twin Rivers Developments Pty Limited and Commissioner of Taxation (Taxation)* [2022] AATA 887 at [47].

³⁹ *JMC Pty Ltd v Commissioner of Taxation* [2022] FCA 750 at [27].

⁴⁰ *JMC Pty Ltd v Commissioner of Taxation* [2022] FCA 750 at [17]-[27] per Wigney J. Principles there outlined by his Honour were found to be accurate, on appeal: see *JMC Pty Ltd v Commissioner of Taxation* [2023] FCAFC 76 at [9]. See also *Secretary, Attorney-General’s Department v O’Dwyer* [2022] FCA 1183 at [17]-[27].

- (a) *“...regard may be had to the circumstances surrounding the making of the contract, as well as to events and circumstances external to the contract which are objective, known to the parties at the time of contracting and which assist in identifying the purpose or object of the contract.”*
- (b) The distinction between a contract of employment and one under which services are provided as an independent contractor usually turns on two, albeit not determinative,⁴¹ factors; the putative employer’s *“extent of control...over how, where and when”* the service provider works and *“the extent to which the putative employee can be seen to work in his or her own business as distinct from the business of the putative employer.”*⁴²
- (c) Indicia of an employment relationship include the *“right to have a particular person do the work, the right to suspend or dismiss the person engaged, the right to the exclusive services of the person engaged and the right to dictate the place of work, hours of work and the like.”*
- (d) Indicia of an independent contractor relationship include *“work involving a profession, trade or distinct calling on the part of the person engaged, the provision by him of his own place of work or of his own equipment, the creation by him of goodwill or saleable assets in the course of his work, the payment by him from his remuneration of business expenses of any significant proportion and the payment to him of remuneration without deduction for income tax.”*⁴³
- (e) *“contractual provisions that may be relevant in determining the nature of the relationship include, but are not limited to, those that deal with the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work, the provision for holidays, the deduction of income tax, the delegation of work and the right to exercise direction and control.”*⁴⁴

⁴¹ *JMC Pty Ltd v Commissioner of Taxation* [2022] FCA 750 at [23].

⁴² *Ibid* at [113].

⁴³ *Ibid* at [22], citing *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at [11] (Wilson and Dawson JJ).

⁴⁴ *JMC Pty Limited v Commissioner of Taxation* [2022] FCA 750 at [21].

Application of principles to the facts

Legal relationship

41. The applicant asserted that he had a legal, contractual relationship with the Agency or the Commonwealth.
42. As for the Commonwealth, it is clear that the applicant had a relationship with the Commission as a provider of particular supports under the NDIS, registered by the Commission. It is not clear to me, however, that the relationship the applicant so had might properly be characterised as contractual. Apart from making unsupported assertions, neither party addressed this issue in any detail.⁴⁵
43. The applicant submitted that he had a contract with the Agency because it could “*hire and fire*” him.⁴⁶
44. It is true that where the funding of supports provided to a NDIS participant is managed by the Agency it might be that the supports are purchased by the Agency.⁴⁷ Hence, therapeutic supports provided by the applicant to a particular NDIS participant might have been purchased by the Agency. This suggests a potential for there to have been services purchase contracts with the Agency for NDIS participants to whom the applicant provided services and whose supports funding was Agency managed.
45. In these circumstances, I am prepared to assume that the applicant and the Agency were in a contractual relationship. Indeed, given my findings in relation to the nature of any contractual relationship that might have subsisted, I am prepared to make a similar assumption in relation to the applicant and the Commission.

Objective circumstances

46. While I have assumed that the applicant was in a contractual relationship with each of the Agency and the Commission, I am not satisfied that the objective circumstances

⁴⁵ In the R SFIC at [39], it was asserted that there was no contract. That assertion was not supported by the respondent's prior submissions to the effect that there was no contract of service and no written contract.

⁴⁶ T13.

⁴⁷ *National Disability Insurance Act 2013*, s 42.

surrounding the establishment of any such relationship is supportive of the applicant's submission that the relationship was one of employment. Indeed, certain of those circumstances suggest that any such relationship was not of employment.

47. It is clear that in providing services in relation to the NDIS, the applicant was conducting his own business.
48. The applicant has on several occasions admitted that this was the case. In an email of 19 October 2022 outlining aspects of his career, he stated that he had run "...a *successful business as an allied health professional and artist-life-coach for the NDIS for nearly two years.*" In the context of his April and May 2021 claims to compensation, the applicant described his usual occupation as "*artist-life coach-therapeutic supports,*" an occupation undertaken by him as a contractor and sole trader. He said he had been a sole trader for two years. He attributed his delay in reporting the alleged injury to the fact that he "*did not know sole traders were covered*".⁴⁸ That injury, he said, was suffered when caring for "...one of my clients".⁴⁹
49. It is noteworthy that the applicant characterised those NDIS participants to whom he provided services as his clients. This reflects his evidence as to how he obtained work. According to the applicant, people were lining up to see him. People would approach him after seeing the website on which he advertised his services.
50. That the applicant was conducting his own business is apparent from the terms of his registration by the Commission in July 2019. The applicant was registered as a provider of therapeutic supports, "*work involving a profession, trade or distinct calling.*" Moreover, he was registered using an Australian Business Number. Such a number "... is a unique 11 digit number that identifies your business to the government and community...To get one you need to be running a business or other enterprise."⁵⁰

⁴⁸ T3.

⁴⁹ T4.

⁵⁰ See Australian Government, 'Register for an Australian Business Number (ABN)', *Business.gov.au* (Web Page, updated 7 March 2023) <<https://business.gov.au/registrations/register-for-an-australian-business-number-abn>>.

51. That the applicant was, in the context of his provision of services in relation to the NDIS, conducting his own business as an independent contractor is a significant,⁵¹ albeit not determinative,⁵² factor that weighs against a conclusion that any relationship pursuant to which those services were to be provided was one of employment. Indeed, the distinction between contractor and employee is “*rooted fundamentally in the difference between a person who serves his employer in his, the employer’s, business, and a person who carries on a trade or business of his own.*”⁵³
52. Here, like *Jamsek*,⁵⁴ the applicant’s only relevant association with the Commission and the Agency was in his capacity as an independent contractor. As “.... *there is no basis for holding that the ...[the applicant was] otherwise associated with the ...[Commission or the Agency], there is no basis for concluding that the ...[applicant was] employed by the...[Commission or the Agency].*”⁵⁵
53. As noted earlier, a factor of relevance in distinguishing between a contract of employment and one under which services are provided as an independent contractor is the putative employer’s “*extent of control... over how, where and when*” the services are provided. Of significance in considering this factor is any right of control as opposed to any exercise of control.⁵⁶ Regard is had to the existence or otherwise of a right to control the how, when

⁵¹ *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 at [35]-[39]. At [39] per Kiefel CJ, Keane and Edelman JJ it was said that while “...the “central question” is always whether or not a person is an employee, and while the “own business/employer’s business” dichotomy may not be perfect so as to be of universal application for the reason that not all contractors are entrepreneurs, the dichotomy usefully focusses attention upon those aspects of the relationship generally defined by the contract which bear more directly upon whether the putative employee’s work was so subordinate to the employer’s business that it can be seen to have been performed as an employee of that business rather than as part of an independent enterprise”.

⁵² *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 at [180] per Gordon J: “...the inquiry is not to be reduced to a binary choice between employment or own business. The question must always focus on the nature of the relationship created by the contract between the parties.”

⁵³ *Marshall v Whittaker’s Building Supply Co* [1963] HCA 26 at [37] cited at *Murphy v Chapple* [2022] FCAFC 165 at [29]. See also *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 at [60].

⁵⁴ *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

⁵⁵ *Ibid* at [60].

⁵⁶ *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 at [74].

and where of service provision, a right to control the doing of the relevant work⁵⁷ or how the relevant services should be performed.⁵⁸

54. The applicant's registration with the Commission (and his capacity to obtain renewal of his registration) was subject to a number of conditions. He was, for instance, required to observe various codes and standards. The applicant submitted the Commission was, as a result, vested with a right to control the manner in which he worked. He pointed to the fact that renewal of his registration with the Commission was subject to successful completion of a quality audit.⁵⁹ Additionally, the Commission's control of his work was said by the applicant to be reflected in the requirement that he "... *make progress reports, lease with different organisations and do risk assessments and additionally have to comply with 'reportable instances' within a definite timeframe.*"⁶⁰
55. As I see it, none of the requirements identified by the applicant operated to vest any relevant right to control how he was to provide his services to NDIS participants, whether in the Commission, the Agency or anyone else.
56. The independent contractor and extent of control factors are not the only factors of relevance in determining whether a particular relationship is one of employment. Other factors include the mode with which the applicant was remunerated, the place where his services were provided, the existence or otherwise of any obligation to provide services to a particular extent (such as hours of work) and the existence or otherwise of any right to holidays exercisable against a third party.⁶¹

⁵⁷ *Murphy v Chapple* [2022] FCAFC 165 at [29], where it was said that the legal character of a contract as one of employment was determined by "*the extent to which the contract itself gives the putative employer the right to control the doing of the work by the putative employee.*"

⁵⁸ *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 at [105].

⁵⁹ Page 62 of a 187-page bundle lodged on 11 March 2022. See also T13.

⁶⁰ T13, p.63.

⁶¹ *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 at [174] where it was said that the "...*way that the contractual terms address the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work, the provision for holidays, the delegation of work, and where the right to exercise direction and control resides may together show that the relationship is not one of employer and employee.*" At [187], reference is made to other factors of potential relevance, such as whether the putative employee provides equipment used in the provision of services and whether uniforms are worn. Wigney J in *JMC Pty Limited v Commissioner of Taxation* [2022] FCA 750 at [21], stated that "...*the contractual provisions that may be relevant in determining the nature of the relationship include, but are not limited to, those that deal with the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work, the provision for holidays, the deduction of income tax, the delegation of work and the right to exercise direction and control.*"

57. In terms of payment, the applicant submitted that, as his money “*came from the government*” for two years, he must be an employee.⁶² I do not accept that submission. Money paid to the applicant may well have been received by him in his capacity as an independent contractor. Indeed, that seems to have been the case when regard is had to a payment summary form in the material before me.
58. The form describes the applicant as the provider and identifies individual payment requests that the Agency had approved and the participant to whom the relevant supports were made available.⁶³ There is no suggestion in the form that any deduction for income tax was being made from payments to the applicant or reimbursement of business expenses he incurred in providing services to NDIS participants. I note that in Exhibit R2 a Services Australia search in 2022 of a database of salary, leave and other payroll related information from 30 June 2016 revealed no entries in relation to the applicant.
59. The applicant was asked to identify who paid him for services provided to a NDIS participant whose supports funding was not Agency managed. He initially refused to answer the question but then said that payments for NDIS supports were all ultimately paid for by the Commonwealth.
60. The applicant contended that payment to him was effected using a “*government website for reimbursement and wages*.”⁶⁴ What the applicant was apparently referring to was a Department of Social Services provider digital access portal for “*NDIA managed clients*”⁶⁵ called PRODA. The applicant provided a screenshot of the portal. Relying on that screenshot, he contended that he was an employee of the Department of Social Services.⁶⁶ In the screenshot the applicant is referred to as an employee. However, contrary to the applicant’s contention, that reference is not suggestive of him having been an employee of the Department. Instead, it would seem from the screenshot that he was being described simply as an employee of his own business (being the business registered to provide

⁶² T16, p.82.

⁶³ Document lodged on 11 April 2023 (Agency Monthly payment summary for November 2020).

⁶⁴ T27.

⁶⁵ T15 (statement of 16 May 2021).

⁶⁶ 22 August 2022 email.

services under the NDIS) and thereby authorised on behalf of his registered business to obtain access to the portal.⁶⁷

61. In March 2020, the Agency made an advance payment to the applicant, apparently to ameliorate the adverse financial effects of the COVID pandemic and of the measures taken to address it.⁶⁸ The applicant contended that he is, “*therefore*” an employee of the Agency.⁶⁹
62. The advance payment was not made to the applicant because he was an employee. It was made in implementation of a proposal “...*to support registered NDIS providers in light of the unprecedented coronavirus (COVID-19) pandemic.*”⁷⁰ In a May 2021 invoice seeking recovery of the advance, the applicant was not, as he contended, described as an employee but was, instead, characterised as a “*vendor*”.⁷¹
63. An element of the objective circumstances surrounding the making of any relevant contract included the *National Disability Insurance Scheme Act 2013*. Features of that Act are not supportive of any contention that the applicant was an employee. In particular, staff of both the Agency and of the Commission were required under that Act to be persons engaged under the *Public Service Act 1999*.⁷² The applicant was not a person so engaged.
64. Another element of the objective circumstances surrounding the making of any relevant contract included the industrial awards applicable to almost all staff of the Commission and the Agency.⁷³
65. For instance, under the NDIS Quality and Safeguards Commission Enterprise Agreement 2019 – 2022, the Commission was required to make certain superannuation contributions, the ordinary hours for a full-time employee were 7 hours and 30 minutes per day, a total of 37 hours and 30 minutes per week and 150 hours per four-week settlement period, those

⁶⁷ See for example at T34, p.158.

⁶⁸ T13.

⁶⁹ T16, p.81.

⁷⁰ Page 236 of a 591-page bundle of documents lodged by the Applicant on 11 March 2022 (Agency letter of 1 April 2020).

⁷¹ T13, p.61.

⁷² As for the Agency, see *National Disability Insurance Scheme Act 2013*, s 169. As for the Commission, see *National Disability Insurance Scheme Act 2013*, s 181U.

⁷³ As for the Agency award, see National Disability Insurance Agency Enterprise Agreement 2020-2023 in the bundle of documents lodged by the Applicant on 11 March 2022, p.338 of 591 pages.

hours to be worked between 7.00 am to 7.00 pm Monday to Friday. Standard hours of attendance for employees, other than shift workers, were said to be 8.30 am to 12.30 pm and 1.30 pm to 5.00 pm.

66. There is no material before me suggestive of the applicant having rights or obligations reflective of these award conditions. Indeed, I note that in his April and May 2021 claims, he said he worked for four days a week on different days, with his weekly hours of work varying from between seven and 24 hours. I also note the applicant's acknowledgement that superannuation contributions were not made on his behalf.⁷⁴
67. The flexibility inherent in the hours the applicant claimed to have provided services in connection with the NDIS is suggestive of him having no obligation to the Agency, the Commission or any other putative employer to provide services to a particular extent. Moreover, it is clear that, whatever the terms of any relevant contract, they did not dictate any place of work or, indeed, absolve the applicant from providing the place from which he provided his services (noting that his home was his usual place of work).
68. The applicant submitted that he qualified as a "*worker*" in relation to material published by the Commission⁷⁵ and that the concept of worker is synonymous with that of employee.⁷⁶ I accept the first part of that submission but reject the second. In the material, a worker is stated to be "*anyone who is employed or otherwise engaged to provide NDIS supports and services to people with disability.*" What the applicant's submission neglects is the sentence that immediately follows that statement. It provides that workers "*...can be paid or unpaid, and can be people who are self-employed, employees, contractors, consultants, and volunteers.*"
69. Lastly, the applicant sought to have the Tribunal adopt or accept an opinion expressed in the GC letter (being a March 2023 letter to the applicant from the General Counsel of the Federal Court of Australia). In the letter it is said that "[o]n the information you have provided me, I am satisfied that you are, or were, an employee of the Department of Social Services."

⁷⁴ Page 281 of 591-page bundle of documents lodged on 11 March 2022.

⁷⁵ T27, p.132.

⁷⁶ One example, see T33, p.153. See also email of 22 August 2022 from the applicant.

70. With respect, in the context of this proceeding, I do not attribute significant probative value to that opinion. Other than to say it was based on information provided by the applicant, how that opinion was arrived at is not identified. Like courts, the Tribunal “...*cannot be expected to act upon opinions the basis of which is unexplained.*”⁷⁷ Second, the context in which that opinion was expressed appears to differ markedly from that in which the Tribunal now finds itself. The issue that was there being addressed appears to have involved considering whether the applicant was a “*public official*” for the purposes of the *Public Interest Disclosure Act 2013*, a term defined so as to include employees of organisations which provide services under a Commonwealth contract. It is unclear whether the concept of employee in that context has the meaning it has under the Act. I note that in Exhibit R3 (an email of 31 March 2023 from an officer of the Department of Social Services), it was said that the Department has no record of the applicant ever being its employee.

Conclusion

71. I am not satisfied that at any relevant time the applicant was an employee of the Commonwealth, a Commonwealth authority or a corporation licensed under the Act as a self-insurer.
72. The Tribunal affirms the decision the subject of review.

*I certify that the preceding 72
(seventy-two) paragraphs are
a true copy of the reasons for
the decision herein of Senior
Member C. J. Furnell*

.....[SGD].....

Associate

Dated: 12 July 2023

⁷⁷ *R v Jenkins; Ex parte Morrison* [1949] VLR 277 at 303 per Fullagar J, citing an extra-judicial statement of Sir Owen Dixon.

Date of hearing:	6 April 2023
Advocate for the Applicant:	Suellen Green
Counsel for the Respondent:	Peter Woulfe
Solicitors for the Respondent:	HBA Legal