WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

Matter Number: **2558/19**
Applicant: **Nicole Elizabeth Prince**
Respondent: **Seven Network (Operations) Limited**
Date of Determination: **25 September 2019**
Citation: **[2019] NSWWCC 313**

The Commission determines:

1. The applicant was a worker employed by the respondent within the meaning of section 4 of the *Workers Compensation Act 1987*.

2. The applicant suffered a psychological/ psychiatric injury in the course of her employment with the respondent, with a deemed date of injury of 17 May 2017.

3. The matter is remitted to the Registrar for referral to an Approved Medical Specialist to determine the level of permanent impairment arising from the following:

   Date of injury: 17 May 2017 (deemed)
   Body system referred: Psychological/ psychiatric injury
   Method of assessment: Whole person impairment

4. The respondent is to pay the applicant's reasonably necessary medical and treatment expenses pursuant to section 60 of the *Workers Compensation Act 1987* upon production of accounts, receipts and/ or Medicare Australia Notice of Charge.

A brief statement is attached setting out the Commission's reasons for the determination.

Cameron Burge
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Ms Nicole Prince (the applicant) brings proceedings against Seven Network (Operations) Limited (the respondent) seeking weekly benefits, payment of medical expenses and lump sum compensation in respect of an alleged psychiatric injury with a deemed date of injury of 17 May 2017. The claim for weekly benefits was discontinued at the hearing, and the applicant seeks only a general order in relation to medical expenses pursuant to section 60 of the *Workers Compensation Act 1987* (the 1987 Act).

2. The factual background to this matter is unusual. On 11 September 2016, the applicant and Ms Fiona Taylor applied as contestants for the respondent's television program known as "House Rules." Over the next two to three weeks, the applicant and Ms Taylor filmed some pieces to camera, had promotional photographs taken, attended a physical and a psychological assessment (the latter conducted over Skype) and were told they had been selected for the show.

3. In early November 2016, the applicant and Ms Taylor attended a briefing in Sydney with all of the other teams. House Rules is a home renovation reality TV show which pitches pairs of contestants against others in order to win a prize at the end of the show.

4. The applicant and Ms Taylor each signed an agreement and release which was prepared by the respondent. That document is attached to both the Application to Resolve a Dispute (the Application) and the Reply at page 74 and page 41 respectively. The contents of the agreement will be discussed later in these reasons, however, there is no doubt the applicant was paid the sum of $500 per week together with a further allowance of $500 per week during her time as a contestant on the show. Teams are regularly voted off the show as the competition progresses.

5. The applicant has provided no fewer than three statements and three responses to the statements of lay witnesses who have provided evidence for the respondent. In her first statement which was provided to the respondent's insurance investigator on 19 June 2017, the applicant noted she had been part of House Rules from 7 November 2016 to 26 May 2017, and was remunerated by Channel Seven with a flat rate of pay.

6. The applicant states she was fit and healthy at the time she commenced her involvement on House Rules.

7. In her first statement, the applicant recounts suffering a fall whilst filming and suffering physical injury to her lower back, right hip and left leg Those alleged physical injuries were not actively pursued in this matter, which dealt only with the applicant's alleged psychological/psychiatric injury.

8. According to the applicant's second statement, she and Ms Taylor were advised on 28 September 2016 they had been selected for the program. They were flown to Sydney on 6 November 2016 for four days of hair, makeup, budget scheduling, a test on power tools and some filming. On 10 November 2016, they were flown home to wait until they were told what the next step would be.

9. On 11 November 2016, the applicant and Ms Taylor were informed that the first renovation would take place at Ms Taylor's house and would begin on 15 November 2016. They were told to drive to Stawell and stay the night. On 16 November 2016, the applicant and Ms Taylor were told to be dressed and ready to commence filming at 7.00am. They filmed at the house until 4.00pm at which time they drove back to Melbourne.

10. The work at Ms Taylor's house continued between 16 and 24 November 2016. According to the applicant, on Friday 18 November 2016, she and Ms Taylor were informed by Marissa Warren from the respondent that they would be moving to Ararat for the night of 23 November 2016. When they arrived at that location, Ms Taylor and the applicant apparently advised the respondent that the motel was dirty and mouldy, and reminded Ms Warren that Ms Taylor has an anaphylactic allergy to mould. Ms Warren apparently requested that the applicant and Ms Taylor be moved, however, the answer was that everyone was working hard in substandard conditions and they should stop being so ungrateful. Nevertheless, the applicant and Ms Taylor were moved on this one occasion, but were informed this would not happen again.

11. The contestants moved to Sydney on 26 November 2016. They arrived on set on 1 December 2016 at 7.00am, and according to the applicant she and Ms Taylor were isolated from the other working teams, all of whom were couples. The applicant stated from paragraph 13 and following of her statement dated 26 September 2018:

> "13. I felt her harassed and bullied during the filming. This continued throughout all of the renovations. It was not only condoned by the producer, but it was aggravated even encouraged by them.
>
> 14. During every camera interview both myself and Fiona complained on film that we were being subjected to isolation, bullying and harassment by the other teams.
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> 15. On one occasion I witnessed Fiona be physically assaulted. When I complained to Channel Seven, I was then threatened that Fiona and I would be portrayed negatively.
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> 16. True to their threatening words, Channel Seven portrayed Fiona and I as bullies in the episode (edited by Channel Seven) featuring our team which went to air on or around 17 April 2017. After our episode was aired I was subjected to online abuse on the Channel Seven Facebook page, including receiving threats of serious physical assault. I have been fearful for my safety ever since.
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> 17. Since our episode and program aired I have not been able to obtain work and have been informed this was due to how I was portrayed as a bully. I am no longer offered interviews for jobs and work, which before my work injury I did not have any trouble obtaining interviews and successfully getting the work and job. I feel devastated and worthless about the loss of my career and working life.
>
> 18. After my episode aired I wanted to kill myself and I started drinking more alcohol in an attempt to self-medicate my injury."

12. The applicant went on to say that she feels anxious about leaving her home for fear of being recognised by people, and has regular incidents of negative reactions from complete strangers. She said she experiences flashbacks of the workplace conflict and she is also concerned about exposure to asbestos during the renovation in New South Wales, which was part of the production and program. She says she feels nauseous when faced with reminders of the show.

13. In her supplementary statement dated 8 March 2019, the applicant refers to arriving at the respondent's set in Sydney on 1 December 2016, and being isolated with Ms Taylor from the other contestants. She said:

> "As soon as Fiona and I entered the studio for the scoring of the teams' work we could see and feel the hatred from the other teams. We did not understand where all of it was coming from. We discovered months later that the "reveal footage" that was shown to the other teams only contained our negative comments about their renovation work and none of the positive things that we had said. They later told us that they had felt hurt and upset that we didn't seem to care how hard they had worked, and they thought we were the nastiest people on the planet.
>
> 6. The portrayal of us by Channel Seven employer continued with the media releases. As part of the contract we had to do phone interviews. And I was interviewed once by New Idea and asked about why we gave the other working teams such low scores. I answered that we didn't and that all of our scores except the one were either the same or higher than the judges. New Idea however still printed that we had been mean and scored all of the other working teams low."

14. The applicant completed a worker's compensation claim form which noted she had reported her injury to the respondent on 5 May 2017. Under the description of how the injury occurred, the claim form stated:

> "Injury caused by employers [sic] systematic isolation of myself and encouragement of bullying by co-competitors resulting in the following injuries: adjustment disorder, anxiety disorder, depression and PTSD."

15. On 22 May 2018, the respondent's insurer issued a section 74 notice declining liability in relation to the applicant's claim on the following basis:

    (a) The applicant was not a worker or deemed worker pursuant to section 4 and schedule 1, clause 15 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act);

    (b) The applicant did not suffer a psychological injury arising out of or in the course of employment as required by section 4 of the 1987 Act;

    (c) Employment was not a substantial contributing factor to any alleged psychological injury as required by section 9A of the 1987 Act.

16. A review of the respondent's insurer's decision was requested on 15 November 2018, and on 12 December 2018 the respondent's insurer gave notice it was maintaining its denial of liability. The respondent's insurer again placed in issue the question of whether the applicant was a worker or deemed worker, whether she sustained a psychological injury arising out of or in the course of her employment, whether she suffered any incapacity as a result of any work related injury and whether the medical treatment sought by her is reasonably necessary as a result of a work related injury.

17. On 28 May 2019, the applicant's solicitors filed an Application to Resolve a Dispute and commenced these proceedings.

ISSUES FOR DETERMINATION

18. The parties agree that the following issues remain in dispute:

    (a) Whether the applicant was a worker or deemed worker;

    (b) Whether the applicant suffered an injury pursuant to section 4 of the 1987 Act;

(c) Whether her employment (if found) with the respondent was a substantial contributing factor to her injury pursuant to section 9A of the 1987 Act or alternatively the main contributing factor to the aggravation, exacerbation and/or acceleration of a disease (section 4(b)(ii) of the 1987 Act), and

(d) Whether the medical treatment undertaken by the applicant was reasonably necessary as a result of any work injury 9section 60 of the 1987 Act).

19. It is common ground that if a finding on the question of liability is made in favour of the applicant, then her injury will be referred for assessment to an Approved Medical Specialist (AMS) for determination of the permanent impairment arising from it.

20. It is noted that at the hearing of this matter, the pleaded claim for weekly benefits was discontinued and that the applicant sought a general order for medical and treatment expenses under section 60.

21. It was also noted at the hearing that whilst the pleaded date of injury is 1 December 2016, the actual date for the purposes of the deeming provisions of the Act would be 17 May 2017, that is the date the applicant attended the grand final of the program, and the claim would relate to workplace stress placed upon the applicant from 1 December 2016 to 17 May 2017.

PROCEDURE BEFORE THE COMMISSION

22. The parties attended a hearing on 1 August 2019. At the hearing, Mr C Tanner of counsel appeared for the applicant and Mr D Saul of counsel appeared for the respondent.

23. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary Evidence

24. The following documents were in evidence before the Commission and taken into account in making this determination:

(a) Application and attached documents;

(b) Reply and attached documents;

(c) The respondent's Application to Admit Late Documents (AALD) dated 24 July 2019 and attached documents; and

(d) A statement of Amanda Reynierse dated 7 February 2019, admitted into evidence and marked exhibit 1.

Oral Evidence

25. There was no oral evidence called at the hearing.

SUBMISSIONS

The Applicant's Submissions

Worker

26. Mr Tanner addressed the question of whether the applicant was a worker for the purposes of the Workers Compensation legislation. He took the Commission to the agreement and release form between the applicant and the respondent which was attached to the application at page 74. He noted that at paragraph 1.3, the agreement states:

> "You agree that you will be available for production of the program during the period from 7 November 2016 to 26 May 2017 (the "production period"). The exact dates of when you will be required during the production period for the filming of the competition (or as indicated in clause 1.4 below), will be provided to you by Seven. You acknowledge that the production period may be extended. You further agree that if you are eliminated or removed from the program during the production period you will be available for the finale of the program on dates to be advised by Seven."

27. Mr Tanner also noted that paragraph 1.4 of the agreement required the applicant to be available on dates other than those on which the program was being filmed, for the purposes of recording and filming a biographical package for use in pre-broadcast promotions. The agreement said that if the applicant failed to make herself available for any reason whatsoever during the production period or otherwise, the respondent may choose not to include her in the program, and neither the respondent nor its affiliates would be liable to her for any costs incurred or loss or damage suffered as a result of her exclusion from the program.

28. Mr Tanner noted that the agreement and release was a document drafted by the respondent which dictated the terms of the applicant's engagement. He noted the document reserved the right to change the terms of the agreement in Seven's favour as it saw fit.

29. The applicant also submitted that paragraph 1.5 of the agreement was indicative of a large degree of control on the part of the respondent. That paragraph stated:

> "You acknowledge, understand and agree that during the production period (and any ad hoc filming days) you will be required to travel interstate. This will mean that you will be absent from your job or business, your premises, your family including your children if any, during this period."

Mr Tanner submitted that the worker had, during this period, no capacity to perform any other job and that what was required of her by the respondent was complete submission to the respondent for every minute of every day and week for the duration of the filming and contract.

30. Paragraph 1.7 of the agreement, Mr Tanner submitted, noted the decisions of Channel Seven as being final and the applicant's agreement not to dispute any of them. He submitted that paragraph was consistent with the abandonment of control by the applicant to the respondent, consistent with an employment relationship and noted the respondent vested in itself the sole discretion to decide not to proceed with completing or broadcasting the program and to stand a contestant down from it.

31. The extent of the control which the respondent allegedly had over the applicant was, according to Mr Tanner, further exemplified by paragraph 1.10 of the agreement which noted the applicant agreed to abide by and carry out all reasonable directions of the respondent's producers and presenters. Moreover, Mr Tanner noted the respondent had the sole and exclusive right to determine the content and design of the program, and had no obligation to make or exploit the program or to use the applicant in the program. The respondent had the right to terminate or suspend the applicant's participation in the program at any time without advanced notice. At paragraph 1.11 of the agreement, there is a direction that says the applicant will not bring any claim against the respondent for any costs, loss or damage including for loss of opportunity in relation to the program. Mr Tanner submitted that if it was to be suggested by the respondent that that clause meant the applicant had no rights under the Workers Compensation Act, it would in effect be an attempt to contract out of the legislation and therefore ineffective.

32. Mr Tanner further took the Commission to paragraph 1.14 of the agreement and noted the respondent's stipulation that the applicant would not wear any clothing that features any company logos during any filming of the program or any promotional activities relating to it unless that clothing was provided by the respondent.

33. Mr Tanner then addressed the following matters under the heading "Rights" in the agreement. At paragraph 2.1, he noted the respondent had the right to film the applicant on a 24 basis during the production period and for any additional periods to which the agreement applied. The agreement also noted at paragraph 2.3 that the applicant's appearance in the program may be edited at the respondent's discretion and noted that the manner of editing is a material feature of the problem experienced by the applicant and her partner on the show. It is the applicant's position that she was edited in an adverse light and this facilitated the problems with her public perception and that of other contestants.

34. According to the agreement, the applicant was to be paid a fee of $500 per week for the period when she was actively competing in the competition. In circumstances where the applicant was required on an ad hoc basis, she would be paid a pro rata daily fee which was based on the weekly fee. If she was eliminated during a week, she would be paid a pro rata daily fee also based on the weekly fee up until the date of elimination. At paragraph 3.5, the agreement stipulates that the respondent would also provide a meals and incidentals allowance of $500 per week for each week that the fee was payable. The clause required the applicant's acknowledgement and agreement that all other costs incurred by her during her participation in the program would be borne by her.

35. In summary, Mr Tanner submitted it is apparent from the terms of the agreement that the applicant would be paid $1,000 per week made up of the fee and the allowance during her time on the show, but she would also be provided with breakfast, lunch and accommodation during her participation on the show.

36. At paragraph 3.7, the agreement provided:

> "You acknowledge that your participation in the program is not employment, does not create an employer/employee relationship between Seven and you and is not subject to any award or collective bargaining or workplace agreement and does not entitle you to any wages, salary, corporate benefits, superannuation, workers compensation benefits or any other compensation."

Mr Tanner submitted this was an attempt by the respondent to oust any rights as a worker which the applicant may have had, however, it's the success or otherwise of those attempts to do so does not detract from the reality of the situation, which was one of employer and employee.

37. The rules of the program (found from page 56 of the Reply) clearly state that failure to comply with them may result in disqualification from the competition. Mr Tanner drew the Commission's attention to the following rules:

> "3. Contestants must comply with any and all instructions given to them by the House Rules production team.
>
> 4. You can be filmed at any time of day or night.
>
> 5. Confidentiality.
>
> 6. Producers must be kept informed of plans, movements and whereabouts at all times.
>
> 7. You may only socialise with other contestants when on site or in the presence of producers and/or camera crews. Private socialising under any circumstance is strictly prohibited.
>
> 8. You may not remove your microphone or turn your audio transmitter off at any time and if a contestant wished to go to the toilet they should inform their sound recordist.
>
> 9-11. Sunglasses, smoking and the playing of music may only occur with the producers prior approval.
>
> 13. When contestants are dealing with the public they are representing the production, so must behave accordingly.
>
> 14,15. Whenever a contestant is out and about with a camera crew it is their responsibility to remain with them and keep them informed of their intentions. This must happen even if a contestant is in a rush, and the instructions of the producers and camera crews must be followed at all times.
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> 17,18. Contestants must record at least one video diary every evening and may only use vehicles provided to them by the production team, no other vehicle could be used without the prior express approval of the producers.
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> 23. Whenever contestants are in the car, they must turn the car radio off and only use communication devices such as phones, tablets and laptops provided to them by the production team.
>
> 24, 26-29. No talking to any tradespeople or entering the building site until given permission by a producer; all meals must be prepared and eaten on site; only leave the site with a producers permission; contestants may never share, nor ask anyone else to share, images of any of the renovations with anyone outside their own team; any alcohol served or consumed must be done in a responsible manner and any injury no matter how minor must be reported to the production team immediately."

38. In terms of the renovation activities carried out on the show, the rules provide the work must be carried out by the contestants, rather than professionals or labourers paid to do the for them. Any tradespeople whom contestants wish to hire must be approved by the project manager and paid for from the contestants' allocated budget for their renovation. Contestants were also only allowed to use tools which they are qualified to operate and could only use the tools provided to them. Mr Tanner submitted that this was markedly different to cases of genuine independent contractors where the contractor brings their own tools to site. He submitted the provision of tools by the respondent was consistent with an employment relationship.

39. Mr Tanner noted the rules provided that at least one member of each team needed to be on site during working hours for all demolition and construction work unless permission was granted by the producer to leave, and contestants were not permitted to have any visitors on or near the building site or at their accommodation without express approval. Mr Tanner noted the respondent reserved the right to change the rules or implement new rules in relation to the program at any time.

40. Mr Tanner referred to rule 62, which provided that contestants must have a balanced budget at the completion of each renovation. He submitted that if the arrangement between the applicant and respondent were truly a commercial one between independent contractor and principal, then there would be no concern as to whether the applicant balanced her budget at the end of a renovation. He cited rules 64, 66 and 68 as further examples of there being no independent decision making made by contestants in the applicant's position at all. He also referred to rules 70-72, which prohibited mention or promotion of any given supplier, goods and/or services on the program, a prohibition against contacting any retail stores in advance and undertaking any renovation and a further reservation of the respondent's right to change the rules at any time.

41. The code of conduct, which is found from page 61 of the Reply was, Mr Tanner submitted, strict and controlling of the applicant and other contestants. It provided that they could not collude with other contestants or members of the production team in an attempt to influence the outcome of the series, could not socialise with the crew, host, judges or any other individuals nominated by the respondent, could not take photographs or any audio visual recordings of themselves during production or any facet of the production without express permission and could not discuss or disclose the results of the scoring with anyone outside of the production.

42. Mr Tanner submitted that the code of conduct was indicative of an employer and employee relationship. He noted rule 12 which stated, "You must not unlawfully harass or bully any other member of the cast of crew" and noted that was a one-way prohibition, with no clause in favour of the applicant against being bullied by the respondent, it's employees or agents.

43. Mr Tanner submitted a simple reading of the terms of engagement would satisfy the Commission that the applicant was a worker subordinate in every way to the respondent. He submitted that the applicant was a worker in not only the substantive sense, but also fulfilled the requirements for a deemed worker under the 1987 Act.

44. In relation to the question of employee as opposed to independent contractor, Mr Tanner took the Commission through a number of decisions including that of Justice Bromberg in *On Call Interpreters and Translators Agency Pty Limited v Commissioner of Taxation (No 3)* [2011] FCA 366 (*On Call*). He noted that this decision was referred to with approval by Deputy President Roche in *Malivanek v Ring Group Pty Limited* [2014] NSWWCCPD 4 (*Malivanek*) and submitted that the indicia set out in those decisions apply to this case. Mr Tanner noted that the rate of remuneration was set and applied by the respondent, and that the applicant was engaged in home renovation for a television program, which was the very service which the respondent was making available to the public. Mr Tanner submitted that as in *On Call*, the applicant here is an integral part of the show and essential to it, in that the success of the show was dependent upon the applicant's and other contestants' activities.

45. Mr Tanner also submitted that the applicant was exclusively retained by the respondent for the duration of the program, and was encumbered to it for every hour of every day whilst shooting continued. In terms of the applicant representing the show, he noted that the respondent had the power to veto the applicant wearing certain clothes at any time it wished and could control the appearance of the contestants. He submitted that the applicant was the public face of the respondent's business, just as the translators were in *On Call.*

46. In relation to the indicia of control, Mr Tanner submitted that in the current matter there is direct supervision and control of the applicant by the respondent. The respondent notified the applicant of its expectations in matters such as turning off mobile phones, controlling attire and following all reasonable and lawful orders. He submitted the rules in this matter as set out by the respondent were very punitive and there was an ever-present threat to eliminate or remove contestants if they did not adhere to the rules and code of conduct.

47. Mr Tanner submitted there was an obligation to carry out work in the arrangement between the applicant and the respondent, and that obligation included a requirement to be subject to the control of the respondent at all times. The applicant was not able to retain other people to carry out her duties, and had to carry them out herself. All of the equipment was provided by the respondent, and relevant insurances were taken out by the respondent rather than the applicant. Likewise, Mr Tanner submitted that matters of expenses and allowance were paid for by the respondent. The respondent was responsible for the costs of travel, food, accommodation and allowances to buy dinners which it paid to the applicant and other contestants.

48. In summary, Mr Tanner submitted that the relationship between the applicant and respondent was even more strongly aligned to that of employer and employee than the interpreters and translators in the *On Call* case, who themselves had been found to be employees rather than independent contractors. Mr Tanner submitted this was particularly the case where the agreement gave rise to an obligation in the applicant to be subject to the control of the respondent at all times.

49. The applicant referred to the High Court decision in *Hollis v Vabu Pty Limited* [2001] HCA 44 (*Hollis*) and noted that the substance or reality of the relationship between the parties must be emphasised, and the terms of any contract are not themselves determinative of the relationship. Mr Tanner noted it was not just the terms of the contract but also the system which was operated and the work practices partaken of which establish the totality of the relationship. He said the totality of the relationship must be examined. As Bromberg J noted in *On Call* at [207]:

> "The majority in *Hollis* (citing Windeyer J) said, the distinction between an employee and an independent contractor is "rooted fundamentally" in the fact that when personal services are provided to another business, an independent contractor provides those services whilst working in and for his or her own business, whereas an employee provides personal services whilst working in the employer's business: at [40]. Unless the work is being provided by an independent contractor as a representative of that entrepreneur's own business and not as a manifestation of the business receiving the work, the person providing the work is an employee; *Hollis* [39], [40], [47], and [57]".

50. In this matter, Mr Tanner submitted it cannot seriously be suggested the applicant was working in and for her own business. He noted she had no skills in renovation, was not in the reality TV business and was providing a service to Channel Seven in its business of making reality TV shows for profit. In essence, Mr Tanner submitted the applicant was a manifestation of Channel Seven and therefore, when examining the totality of the relationship, she was an employee.

51. Mr Tanner took the Commission to the two-stage test set out by Bromberg J in the *On Call* case from [209]. The first question is whether the person has a business. The second is whether the work or the economic activity being performed is being performed in and for the business of that person. As to the first element, Mr Tanner submitted there was no suggestion at all that the applicant was carrying on a commercial enterprise or going concern of her own with any name/brand/goodwill attached to it. He noted there was no risk being taken by the applicant as an entrepreneur, rather she was simply supplying her labour.

52. Mr Tanner set out the indicia of a business as referred to in *On Call* from [217]. The relevant matters to take into consideration are:

    (a) Does the putative business engage in a repetitive and continuous manner with purchasers of its services?

    (b) Does the putative business employ or engage persons other than the owner/operator to carry out its economic activities?

    (c) Is goodwill (name, brand and reputation) being created by the economic activities of the putative business?

    (d) Is the putative business promoted as a business to the public through advertising or other promotional means?

    (e) Does the putative business have tangible assets such as buildings and equipment which are utilised to support its economic activities?

    (f) Does the putative business have the basic transactional systems that are common of a business of that kind, for instance invoicing systems, standard rates and terms of conditions of trade, insurance coverage et cetera?

    (g) Do the services provided by the putative business involve the provision of labour of sufficient skill to be suggestive of the pursuance of a profession or trade through a business?

    (h) Are the regulatory requirements of a business being met by the putative business?

    Mr Tanner submitted that none of the elements of a putative business are found in the applicant. Not even the single requirement of providing skilled labour was to be found in this matter, given the contestants were all amateurs and novices who are unskilled in building and home renovation.

53. In relation to the second element, the question is, in whose business is the activity being performed in? That element raises the following indicia for consideration, as set out by Bromberg J in *On Call* from [218]. Those indicia are:

    (a) Does the provision of the economic activity provide an opportunity for profit and involve the risk of loss?

    (b) In relation to profit, to what extent is the reward for the provision of the activity negotiable and negotiated commercially and to what extent does the putative business owner have the capacity to manage the activity so as to maximise the potential for profit?

    (c) In relation to risk, to what extent is the agreed payment contingent upon the person providing a satisfactory result, that is are there financial consequences for poor performance, and who bears the risks associated with providing any equipment or assets required for the performance of the activity?

    (d) Does the putative business control and direct or have the capacity to control and direct the manner in which the activity is carried out?

    (e) Is the economic activity represented or portrayed as the activity of the business?

    (f) To what extent is the person providing the economic activity integrated with the business receiving the activity?

(g) To what extent is the person providing the economic activity financially self-reliant from, as opposed to economically dependent upon or organisationally tied to the business receiving the activity?

(h) Is the person providing the economic activity free to employ his or her own means to produce the activity or must that person personally perform the work?

(i) To whose businesses does any good will created by the economic activity attach?

(j) In contracting to provide the economic activity has the person agreed to provide an outcome or result?

(k) To what extent is the person providing the economic activity doing so with his or her own tools and equipment?

(l) If the person is providing their own equipment, to what extent can the person be directed in the management and control of that equipment?

(m) Have the parties involved characterised the economic activity as that of owner/entrepreneur being performed in and for that person's business, or alternatively as part of the receiving business, and to what extent does that characterisation reflect the reality.

(n) Whether or not income tax has been withheld and whether annual, long service or sick leave is afforded are also often relevant indicators.

54. Mr Tanner submitted that whilst no income tax was payable or leave entitlements accrued as a result of the relationship between the applicant and the respondent, every other indicia pointed towards the relationship being one of employer and employee. He submitted that in this case the applicant was plainly not engaged in a business for profit, and the relationship between her and the respondent can only be categorised as that of employee and employer.

55. In relation to deemed worker, Mr Tanner submitted the applicant fell within the definition of a deemed worker under schedule 1 of the 1998 Act and in particular, the definition of "other contractors". Mr Tanner noted that the value of the work received by the applicant was greater than $10 and payment was received for work which was not incidental to a trade or business normally carried on by her. He submitted that the applicant's work for the respondent in attending to renovations between December 2016 and April 2017 is in no way incidental to a trade or business which she carried on in her own name. Accordingly, Mr Tanner submitted the applicant satisfied the requirements to be deemed as a worker.

Injury

56. In relation to injury, Mr Tanner submitted that both the applicant and Ms Taylor corroborate each other. He referred to Ms Taylor's statement found at page 5 of the Application. He noted that at paragraph 2 of her statement, Ms Taylor said once on set, one of the show's producers, Ms Amanda Reynierse (referred to as Mundy in various witness statements) said to Ms Taylor that the show was a competition and she had to find faults with the rooms and not be so loving of the effort put in by other contestants to renovate her home. She said at paragraph 3:

> "Following this items/faults were pointed out in which [the applicant] and myself were to comment on. We were asked is this contemporary country, which we had to reply to. As we did not write the rules this within itself was difficult to answer. Mundy pointed out tin under the vanity in the bathroom, which I would never have seen. This can only be seen whilst standing in the shower, no other part of the bathroom exposes this fault.

> 4. From the prompting and editing these negative comments were then shown to the other team members (who had already formed relationships and alliances). Knowing how much work had gone into my home and the fact Nicole and I were so ungrateful the exclusion and bullying commenced."

57. Mr Tanner submitted the fact of the tension between the other contestants and the applicant and Ms Taylor is enough to explain the basis for her injury. He emphasised there was no need to find fault, merely that there were real events to which the applicant suffered a psychological or psychiatric reaction. Mr Tanner submitted there were ample circumstances which form the basis for the applicant's injury, such as those set out in Ms Taylor's statement at paragraph 6 concerning the deterioration of the applicant and Ms Taylor's relationship with other contestants.

58. The evidence of Ms Taylor is that the applicant and she were essentially told to be as negative as possible surrounding the efforts of other contestants. For example, at paragraph 13 she states:

> "In Tasmania, I was once again told to go into the house and "give it to Harry like you did in New South Wales". I ended up getting very emotional and asked to take the camera away but it was continually in my face. I broke down, as I couldn't handle the constant pressure or bullying. In Tasmania, we were told which heater was in stock and we were not to have a choice. We started to communicate better with the other team members who started to realise Nicole and I weren't the women we were made out to be from the onset."

59. At paragraph 14 of her statement, Ms Taylor sets out a physical altercation between her and New South Wales team member Bec. Mr Tanner submitted that the clear evidence is the environment on the set of the show was overwhelmingly hostile and adversarial, and forms a reasonable basis for causing the applicant's injury.

60. Mr Tanner submitted that the circumstances surrounding the applicant and Ms Taylor's eviction from the show as set forth at paragraph 16 of Ms Taylor's statement also explains the manipulative editing which was designed to make the applicant and Ms Taylor look and feel alienated from other contestants. He noted that version of events is not disputed by any of the evidence relied upon by the respondent.

61. Mr Tanner noted the applicant's response to the statement of Evan Wilkes dated 15 January 2019. Mr Wilkes is an executive producer of House Rules, however, Mr Tanner submitted Mr Wilkes' attendance on set was very limited. He noted the applicant's evidence at page 10 of the Application to the effect that contestants were given iPads and iPhones which were connected to Channel Seven so the production team would have access to all of the contestants' phone calls, messages and emails. He noted the contestants were instructed what time to arrive on site and when they had to leave.

62. Referring to the applicant's response to Mr Wilkes at page 11, Mr Tanner noted the applicant corroborates Ms Taylor's version of events as to Mundy's request that the applicant and Ms Taylor find fault with the work carried out by other contestants.

63. Mr Tanner submitted that the proliferation of social media comments which were nasty and vindictive towards the applicant and Ms Taylor is part of the respondent's business model, even including those which contained threats of violence. He also noted that the applicant and Ms Taylor's allegations relating to the editing of the footage could be contradicted by the respondent if they produced unedited footage, however, the respondent maintains that that footage has been destroyed.

64. Mr Tanner noted the concession in Mr Wilkes' statement reproduced at page 31 of the Application to the following effect:

> "48. At this stage before anything has been set in concrete the contestants are also required to undergo a session with a psychologist. The psychologist has duty of care for the contestants, they are told they are going to be on a television show, that there will be pressure on them and it will be stressful, we enquire into their history and anything we need to be aware of. The contestants are also told that they may receive negative feedback, particularly on social media."

65. Mr Tanner submitted that the presence of a psychologist in the process of filming the show suggests that the workplace is a stressful one and confirms the nature of the very experience which the applicant and Ms Taylor underwent.

66. Mr Tanner submitted the Commission would not accept Mr Wilkes' evidence that the footage of the reveals which was shown to the other contestants was unedited. He noted the evidence of both the applicant and Ms Taylor to the effect that the walkthroughs of the home after the work had been carried out took hours, but the other contestants were only shown the small snippets which were eventually aired. He submitted that regardless of whether the respondent had acted in an unfair manner or not, it was apparent there was a breakdown in the relationship between the applicant and Ms Taylor on the one part and the other contestants, and that this breakdown together with the reaction of posters on social media readily explains the applicant's psychological injury.

67. Moreover, Mr Tanner submitted that Mr Wilkes admission at paragraph 100 of his statement that:

> "I vaguely remember them saying they felt bullied by another team, however this was aired to the best of my recollection (I do not recall the situation). If they did have any complaints it would have come to me through our reporting channels."

is sufficient to corroborate her version of events, and even if that is not the case, it is certainly sufficient to ground a finding that there were problems in the workplace to which the applicant has had a reaction which has caused her injury.

68. Mr Tanner then referred to the statement of Katerina Sarlas dated 23 January 2019. At page 51 of the Application, Ms Sarlas noted:

> "25. When the show went to air, both Nicole and Fiona received an extremely negative response from the viewing public. Social media comments were very negative, including the creation of hate pages...
>
> 27. Nicole and Fiona wrote to the talent coordinator, Marisa Warren, to advise her about incidents involving members of the public, when they were spat on, people were shouting at them, and people trespassed on Fiona's property. These letters were then forwarded to myself and to our executive producers to respond."

69. At paragraph 29 of her statement, Ms Sarlas noted that after she received an email in reply from the talent coordinator, advising of the problems which the applicant and Ms Taylor were having, the executive producers arranged for both the applicant and Ms Taylor to consult psychologists to set up payment plans to ensure ongoing counselling for as long as it was required.

70. Mr Tanner noted that Ms Reynierse provided a statement, however, that statement did not contradict what the applicant and Ms Taylor had said concerning Ms Reynierse telling them to look for faults and be negative as they examined the renovations at their premises. Mr Tanner submitted that Ms Reynierse's evidence would compare unfavourably to that of the applicant and Ms Taylor, whose statements by comparison contain a great deal of detail as to the circumstances surrounding the conflict on the sites. Nevertheless, Ms Reynierse does concede a physical confrontation took place between Ms Taylor and another contestant, however, she describes that confrontation as minor.

71. In relation to the medical evidence, Mr Tanner submitted it was overwhelmingly in favour of a diagnosis of a psychological injury arising from the applicant's employment with the respondent. He noted Ms Gough, treating psychologist provided a report on her eight appointments with the applicant over the course of a year, and contrasted that report with the views of Dr Roberts, who merely consulted with the applicant over Skype. He noted Dr Akers, treating psychiatrist, also diagnosed the applicant with anxiety and depression, and relied upon the PIRS assessment of Dr Takyar, Independent Medical Examiner (IME) contained in his report dated 24 October 2018. Mr Tanner submitted the Commission would have no difficulty in finding there was a psychological injury caused in the course of the applicant's employment with the respondent, and would accordingly refer the matter to an Approved Medical Specialist.

72. Mr Tanner said the Commission would place no weight on the report of Dr Roberts, IME for the respondent, who has indicated he is unable to diagnose a psychological or psychiatric condition in the applicant. Mr Tanner noted that there were three other professionals who could make such a diagnosis, one of whom had consulted with the applicant for over 12 months.

73. In summary, Mr Tanner submitted the Commission would find:

    (a) The applicant is a worker employed by the respondent;

    (b) If the applicant is not found to be a worker she is a deemed worker;

    (c) The applicant was treated abominably by the respondent, including but not limited to being portrayed in a negative light, and noted that there were a number of extremely negative social media posts relating to the applicant and Ms Taylor which, despite having been drawn to the respondent's attention, were allowed to remain on their social media pages.

74. Mr Tanner submitted there could be no surprise the applicant had suffered an injury in those circumstances, and the existence of that injury was supported by two treating doctors and an independent medical examiner. He submitted the only contrary report is that of Dr Roberts, and that his report was nonsensical.

75. Mr Tanner discontinued the applicant's claim in relation to physical injuries and sought the following orders:

    (a) The respondent pay the applicant's reasonably necessary medical and treatment expenses pursuant to section 60 of the 1987 Act; and

    (b) The matter be referred to an AMS for assessment of the permanent impairment pursuant to section 66 of the 1987 Act.

The Respondent's Submissions

76. For the respondent, Mr Saul noted that this was an unusual matter and an unusual claim. He noted the applicant was a highly qualified person who runs her own business, however, none of those qualifications are needed, wanted or utilised by the respondent.

77. Mr Saul submitted that the concept of "contestant" comes nowhere near that of worker. He said there is no contract of service in this matter, and rhetorically posed the question what is the service?

78. The respondent's primary contention was there was no service which Channel Seven required of the applicant. Rather, the applicant applied with Ms Taylor in the hope of winning a windfall of $200,000 which would be paid to them if and only if they were successful in the competition. Mr Saul said this did not constitute a service of any kind.

79. Mr Saul conceded that Channel Seven did obtain some benefit, namely that if the show does well, then they would obtain revenue from advertising sales. Certainly, Mr Saul submitted there was no benefit to the respondent from the newly renovated homes.

80. Mr Saul submitted the Commission would ask what is the service which was sought and received by the respondent from the applicant. He noted she had no renovation skills nor experience. He said there was no suggestion the applicant was a deemed worker under the entertainer provisions of the legislation, because whilst the show is made for entertainment there's no suggestion the applicant was performing as an entertainer on it.

81. It was not in issue, Mr Saul submitted, that there were many rules and regulations in relation to appearing on the show, nor was it in issue the show was a stressful environment. Nevertheless, he emphasised the applicant was a contestant. She was not there to earn $1,000 per week, but rather was there to try to win $200,000.

82. Mr Saul submitted the contract was neither one for service nor of service, because no service was provided by the applicant to the respondent. Rather, there was simply a payment for allowances because the applicant was giving up her normal circumstances and had to live in some way while participating in the competition.

83. In relation to the agreement, Mr Saul submitted that all contracts must be looked at for their intention. He submitted the intention of this agreement was not to create an employment relationship, because the applicant was at all times a contestant rather than a worker.

84. Mr Saul accepted the proposition the respondent cannot contract out of workers compensation legislation, however, submitted that this contract makes it clear there is no employment relationship being established. He submitted it is quite possible to have a contract with many controlling features, however, this does not mean an employment relationship is created.

85. The respondent submitted the authorities to which Mr Tanner had referred such as the *On Call* case, are irrelevant. Mr Saul submitted that in that case, the job of the translators was to interpret and therefore a contract either for services or of service as an interpreter is created. He submitted that situation was not analogous to the present matter, where there is no skill involved. Rather, this was simply a competition which the applicant had entered.

86. Mr Saul impressed upon the Commission that rather than examine whether the contract is one of service or for services, it is important to recognise that in fact there are no services being provided in this matter. He submitted the applicant was neither a worker, nor did she fall within the deemed worker provisions under schedule 2 of the 1998 Act.

Injury

87. Mr Saul noted that despite the applicant's alleged complaints of bullying, there were no complaints in relation to her mental health until 4 May 2017, despite the applicant having been eliminated from the competition in March 2017. He therefore submitted that if there is an employment relationship at present, the advent of the applicant's symptoms did not occur while she was employed, nor did they arise out of that employment. Rather, Mr Saul submitted that the applicant's injury arose from the hateful material posted on social media over which Channel Seven had no control. Therefore, even if there was an employment relationship, there is no causal link between the applicant's employment by the respondent and the injury which she suffered.

88. In relation to the question of editing of footage, Mr Saul noted the respondent disputed that assertion, and referred to the email correspondence between the respondent's solicitors and the applicant's solicitors to the effect that Channel Seven did not keep old unedited footage.

89. Mr Saul said that when it comes to analysing the indicia of an employment relationship, the first step is to determine whether there is any service being provided. He said in this case there is no such service, and accordingly it is unnecessary for the Commission to go further. Nevertheless, in the event the Commission found there was such a service, Mr Saul submitted the contract did not provide for an employment relationship. He said there was no certainty as to the length of tenure, no tax was taken out and the applicant could leave whenever she liked. He said this did not in any way represent a contract of employment and was rather one of an independent contractor.

90. In summary, Mr Saul submitted:

    (a) Neither worker nor deemed worker was satisfied;

    (b) There is no need for the Commission to examine the nature of any "service" contract, as no service was provided by the applicant to the respondent;

    (c) If the Commission did decide to examine the indicia of employment, they did not apply in this situation;

    (d) If the Commission is satisfied there was an employment relationship then in any event the injury did not arise out of employment.

    (e) The respondent relies upon the report of Dr Roberts.

The Applicant's Submissions in Reply

91. Mr Tanner submitted the applicant clearly provided a service to the respondent, namely the renovation of premises while being filmed for a television program. He submitted that in applying the everyday definition of the word, there can be no doubt the applicant undertook the action of helping or doing work for the respondent.

92. The applicant was, Mr Tanner submitted, clearly being paid for carrying out work. The fact she was engaged in the guise of a competition did not detract from the fact the applicant was paid a regular sum each week and given a weekly allowance, regardless of whether she ultimately won the prize at the end of the show. He submitted it was an explicit clause in the contract and the rules of the program that the applicant would carry out work on different premises.

DISCUSSION

Worker

93. I do not accept Mr Saul's submission that no service was provided by the applicant to the respondent.

94. The contract between the applicant and respondent provided that she would engage in home renovations, which were the basis for the respondent's television program. In doing so, she not only gave up her time, but had to relinquish her other vocation and even had to relocate to where the respondent directed her during the course of filming. In my view, it is incorrect to characterise the relationship as one devoid of any service provision by the applicant.

95. As Mr Saul quite properly conceded, the respondent derived benefit from the applicant giving her time and engaging in the home renovations for the television show. Without the contestants, the production would not take place, and if the show was successful, the respondent would derive benefit by way of advertising revenue during its screening.

96. Having determined the applicant provided a service, it is necessary to then consider whether the contract was one of service, which would make the applicant a worker, or one for services, in which case she would be categorised as a contractor.

97. The workers compensation legislation provides that a "worker" is entitled to compensation benefits. The entitlement is contained in s 9 of the 1987 Act, which provides:

> "A worker who has received an injury … shall receive compensation from the worker's employer …"

98. The first step then is to establish whether the injured person was a "worker". "Worker" is defined in s 4 of the 1998 Act as follows:

> "worker means a person who has entered into or works under a contract of service or a training contract with an employer (whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, and whether the contract is oral or in writing) …"

99. Establishing a contract of service involves principles of contract law such as offer and acceptance, consideration and mutual obligation. A contract of service requires a mutuality of obligation in the formation of the contract with the intention to create legal relations: *Dietrich v Dare* (1980) 30 ALR 407. If there is clear evidence that a person offered services for reward, and the proposed employer accepted the offer on the basis that payment for those services would be made, there will be an intention to enter into legal relations, and a contract of employment will exist.

100. There are four essential features of a contract of employment, which may be summarised as follows:

    (a) There can be no employment without a contract (*Lister v Romford Ice & Cold Storage Co Ltd* [1956] UKHL 6; [1957] AC 555 at 587);

    (b) The contract must involve work done by a person in performance of a contractual obligation to a second person (*Abdalla v Viewdaze* (2003) 122 IR 215 at [23]). That is because the essence of a contract of service is the supply of the work and skill of the worker;

    (b) There must be a wage or other remuneration, otherwise there will be no consideration (*Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515);

    (c) There must be an obligation on one party to provide, and on the other party to undertake, work. The obligation required to constitute a contract of employment is that:

> "… the putative employer be obliged to pay the putative employee in accordance with the terms of the contract for services reasonably demanded under it, and that the putative employee be obliged to perform such services. That is as much so where the service consists of standing and waiting as where it is active" (*Forstaff Pty Ltd v Chief Commissioner of State Revenue* [2004] NSWSC 573; (2004) 144 IR 1 at [91]; see also *Wilton v Coal & Allied Operations Pty Ltd* [2007] FCA 725; (2007) 161 FCR 300 at [162]).

101. It is often unclear whether a relationship is one of employment. There exists however a number of criteria, or indicia, by which to gauge whether an employment relationship exists. The facts in each case must be carefully considered in order to balance the indicia both for and against a contract of employment.

102. The principal criterion remains the employer's right of control of the person engaged but it is not the sole determinant. In more recent times, the courts have favoured looking at a variety of criteria. As Ipp JA said in *Boylan Nominees Pty Ltd t/as Quirks Refrigeration v Sweeney* [2005] NSWCA 8:

> "The control test remains important and it is appropriate, in the first instance, to have regard to it (albeit that it is by no means conclusive) because, as Wilson and Dawson JJ said in *Stevens v Brodribb Sawmilling Company Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16 (Stevens) (at 36):
>
> > '[I]t remains the surest guide to whether a person is contracting independently or serving as an employee.'" (at [54])

103. In Stevens, the High Court set out a number of relevant indicia. These include, but are not limited to, the following:

    (a) The mode of remuneration;
    (b) The provision and maintenance of equipment;
    (c) The obligation to work;
    (d) The timetable of work and provision for holidays;
    (e) The deduction of income tax;
    (f) The right to delegate work;
    (g) The right to dismiss the person;
    (h) The right to dictate the hours of work, place of work and the like, and
    (i) The right to the exclusive services of the person engaged.

104. The task of identifying who is a "worker" by applying the indicia is not always straightforward. Hollis is a case in point. Vabu Pty Ltd operated a courier business known as "Crisis Couriers". Mr Hollis was injured when a "Crisis Courier" bicycle struck him, and he sued Vabu Pty Ltd for damages. The trial judge found that the bicycle couriers were independent contractors. Factors in favour of this finding included:

    (a) The couriers had to provide their own transport and pay their own running costs;
    (b) In earlier proceedings between Vabu Pty Ltd and the Commissioner of Taxation it was determined that the couriers should be taxed as independent contractors, not as employees;
    (c) The couriers received commissions, not wages, and
    (d) The couriers were permitted to operate through their own companies.

105. The finding was made despite evidence of a significant degree of control over couriers by the company. That evidence included requirements for the couriers:

    (a) To wear uniforms provided by the company;
    (b) To start work at a certain time and to work certain hours;
    (c) To accept the work given to them by the company;
    (d) To work in a manner directed by the company, and
    (e) To take leave only when permitted by the company.

106. Ultimately the High Court upheld Mr Hollis' claim, stating that too much weight had been placed on the fact that the bicycle couriers owned their own bicycles. They had little control over the manner of performing their work and, looking at the relationship as a whole, it should properly be characterised as one of employment.

107. It is important to remember that it is the "totality" of the relationship that must be considered. The factors set out in *Stevens* are merely a guide to establishing the nature of the relationship.

108. A decision which usefully explains the process of balancing the indicia is *Gerob Investments Ballina Pty Ltd t/as Beach Life Homes v Compton* [2007] NSWWCCPD 180. Mr Compton was a qualified carpenter. For about 35 years he was in partnership with his wife under the name "I L & L S Compton". For 34 of those years he worked exclusively for Beach Life Homes. He did not advertise his services elsewhere, and Beach Life Homes delegated work by way of a purchase order, which set out the nature of the job and a fixed price. That company also supplied all materials (except nails which Mr Compton bought and for which he was later reimbursed). At the conclusion of the job, Mr Compton submitted an invoice that included GST. He paid his own tax and had his own ABN.

109. The Arbitrator found that Mr Compton was a "worker". That finding was upheld on appeal. The Arbitrator said factors weighing against a finding of "worker" included:

    (a) The financial arrangements between the applicant and the respondent including the facts that the applicant invoiced the respondent in the name of a partnership, charged GST and had his own Australian Business Number;

    (b) There was no provision for holiday pay, sick pay or superannuation;

    (c) The applicant's representations to the Australian Taxation Office that he was in receipt of partnership income;

    (d) The business expense claims for his vehicle and tools made by the applicant in his tax return;

    (e) The applicant's renewal of his carpenter registration;

    (f) The lack of a requirement for the applicant to work for set hours for the respondent, and

    (g) The provision by the applicant of his own work vehicle and tools.

110. However, factors weighing in favour of the existence of an employment contract and a finding of "worker" included:

(a) The applicant worked solely for the respondent for 34 years;

(b) The applicant accepted work from the respondent at rates set from time to time by the respondent;

(c) The applicant wore the respondent's supplied uniform when working;

(d) The applicant began and completed jobs as directed by the respondent;

(e) The respondent exercised a supervisory role over the applicant;

(f) The applicant did not employ labour;

(g) The applicant has worked for no other employer for 34 years;

(h) The applicant had made no attempt to find other work because as he put it during cross-examination "they kept me in work" and "there was always constant work";

(i) The respondent was responsible for the provision of materials, supplied some tools and scaffolding;

(j) The respondent paid the applicant a nail allowance;

(k) The respondent's approval being required for any variation to the work specified in the "purchase order";

(l) The respondent could call the applicant off one job to work on another, and

(m) The respondent in its paperwork regarded its contractual relationship as being with the applicant personally.

111. Specific findings made by the Arbitrator and confirmed on appeal were:

(a) The right to set the commencement date and finish date for a project and to set remuneration for a project was evidence of ultimate control being vested in the appellant employer;

(b) Mr Compton's relationship with the taxation office was not determinative of the employment relationship;

(c) When looked at in the totality of the arrangement and particularly the evidence that the Beach Life Homes saw the relationship as being with Mr Compton personally, the fact that Mr Compton was in partnership with his wife should be disregarded as an indicator of the form or nature of the employment relationship, and

(d) Control alone was not determinative but when taken together with the long-term nature of the relationship and the provision of a uniform, the factors in favour of finding an employment contract outweighed those in favour of an independent contractor relationship.

112. Whether a contractor is a "worker" requires consideration of all the indicia referred to above. An independent contractor is a person who carries on a business of his own and works under a contract for services. The following are some examples of cases where claimants have been found to be independent contractors, rather than workers.

113. An extensive discussion on the law in relation to "worker" is included in *Malivanek v Ring Group Pty Ltd* [2014] NSWWCCPD 4 (*Malivanek*): 'Control' at [123]-[128]; the provision of tools at [129]-[137]; employment of workers at [138]-[150]; and indicia at [151]-[174]. In his conclusion, Roche DP referred to the case of *On Call Interpreters* and *Translators Agency Pty Ltd v Commissioner of Taxation* (No 3) [2011] FCA 366, and the following passage of Broomberg J (at [208] of that decision):

> "That focal point has been elsewhere expressed as the 'ultimate question' posed by the totality approach: *Abdalla v Viewdaze Pty Ltd* (2003) 122 IR 215 at [34] (referred to with approval by Crispin P and Gray J in *Yaraka Holdings Pty Ltd v Gilgevic* (2006) 149 IR 339 at [303]); and see Sappideen C, O'Grady P and Warburton G, *Macken's Law of Employment*, (6th ed, Lawbook Co., 2009), at [2.80]. As Wilson and Dawson J in *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16 observed at 35 'the ultimate question' was posed by Windeyer J in *Marshall v Whittaker's Building Supply Co Ltd* [1963] HCA 26; (1963) 109 CLR 210 at 217, in a passage which the majority in Hollis strongly endorsed at [40]. The majority in Hollis (citing Windeyer J) said, the distinction between an employee and an independent contractor is 'rooted fundamentally' in the fact that when personal services are provided to another business, an independent contractor provides those services whilst working in and for his or her own business, whereas an employee provides personal services whilst working in the employer's business: at [40]. Unless the work is being provided by an independent contractor as a representative of that entrepreneur's own business and not as a manifestation of the business receiving the work, the person providing the work is an employee: Hollis [39], [40], [47], and [57] and see *Sweeney v Boylan Nominees Pty Ltd* [2006] HCA 19; (2006) 226 CLR 161 at [30]-[32]. The English courts have taken a similar approach. There the 'entrepreneur test' seems to be the dominating feature: Selwyn NM, *Laws of Employment* (2006) Oxford University Press at [2.34].
>
> Simply expressed, the question of whether a person is an independent contractor in relation to the performance of particular work, may be posed and answered as follows:
>
> Viewed as a 'practical matter':
>
> (i) is the person performing the work an entrepreneur who owns and operates a business; and,
>
> (ii) in performing the work, is that person working in and for that person's business as a representative of that business and not of the business receiving the work?
>
> If the answer to that question is yes, in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee." (at [183])"

Mr Malivanek was held not to be a worker, but was found to be a deemed worker.

114. As already noted, Mr Tanner made extensive submissions as to the nature of the relationship between the applicant and respondent, including the relevant elements of the relationship between the parties.

115. He noted that the respondent had a great deal of control over the applicant's activities whilst engaged on the show. She had to make herself exclusively available to the respondent, had to carry out tasks set for her by the respondent, only use tools given to her and was at all times made aware she was representing the show and the respondent.

116. In my view, having regard to the relevant factors set forth in the authorities discussed above, the relationship between the applicant and respondent is appropriately categorised as that of employee and employer.

117. In reaching this finding, I note the following:

    (a) The rate of remuneration was set by the respondent;
    (b) The applicant was an integral part of the show and essential to the very product and business in which the respondent was engaged;
    (c) The respondent had exclusive use of the applicant for every hour of every day during which the show was being filmed;
    (d) The respondent had the power to veto the applicant wearing certain clothes, and she was unable to wear any items which displayed business or brand names;
    (e) The rules of the show provided the applicant was a public face of the respondent's business;
    (f) The respondent paid the applicant an allowance for her weekly expenses, paid on a pro rata basis;
    (g) The applicant took no risk as an entrepreneur in the running of her own business. Rather, she was paid a weekly rate which was set by the respondent;
    (h) The activity being carried out by the applicant (and Ms Taylor and the other contestants) was done for the benefit of the respondent's business, rather than any enterprise of her own. Any goodwill arising from that activity vested in the respondent's enterprise, rather than in the applicant;
    (i) The applicant commenced and completed tasks when directed by the respondent;
    (j) The respondent provided tools and materials for the applicant to use;
    (k) The applicant employed no one else to carry out the work for them, and to the extent she retained tradespeople, they were approved by the respondent and the cost of them was taken from a budget allocated to the applicant by the respondent.

118. Whilst I acknowledge the respondent did not withhold income tax for the applicant and she was not entitled to annual leave, sick leave or superannuation; the cases make it clear that these aspects of the relationship are not determinative of its nature, but are instead only individual factors to be taken into consideration when examining the totality of the relationship.

119. In taking into account the relevant indicia and examining the totality of the relationship in this matter, I am satisfied on the balance of probabilities it was one of employee and employer. In my view, the relevant indicia are overwhelmingly in favour of the relationship giving rise to the applicant being a worker. In no way can it be said the applicant was performing work as an entrepreneur who owns and operates her own business. Rather, she and the other contestants were representatives of the respondent's business while they were engaged on the show, and indeed afterwards when they were required to carry out promotional activities.

Deemed Worker

120. In the event the applicant is not a worker, in my view she qualifies as a deemed worker pursuant to Schedule 1 of the 1998 Act as set out under the heading "Other Contractors." There is no issue the applicant earns greater than $10 per week, and the work she carried out for the respondent was not work incidental to a trade or business which she normally carried on. Accordingly, in my view the applicant satisfies the requirements of a deemed worker.

Injury

121. There is little doubt the applicant was placed in a hostile and adversarial environment in the course of her employment with the respondent. It is not the role of the Commission to find fault or negligence with an employer. Rather, it is enough if the applicant's injury was as a result of her own perception of real events in or arising out of her employment.

122. There can be no doubt there was conflict between the applicant and Ms Taylor on the one part and the other contestants on the show. I accept the evidence of Ms Taylor and the applicant, uncontested as it is by any of the witnesses for the respondent, that there was editing of the footage from the program in such a selective manner as to portray them in a certain negative light.

123. Moreover, I accept the respondent had the power to edit and control the content of and comments to its social media platforms such as its Facebook page. The evidence is unequivocal that the respondent had the control of those pages. Mr Wilkes conceded as much in his statement. There is also no doubt the applicant drew the respondent's attention to the comments posted on those pages.

124. I find it extraordinary, in circumstances where the respondent was made aware by the applicant of hateful comments posted on its social media platforms, that it did not take steps to either remove those comments or to close the comments on its own posts. The failure to do so represents, in my view, a factor to which the applicant has reacted and which has contributed to her injury.

125. I accept Mr Tanner's submission that the availability of a retained psychologist is suggestive of the program being a contentious and psychologically fraught working environment.

126. In summary, there is nothing contained within the lay evidence of the respondent which suggests the conflict and tension in the workplace to which the applicant refers did not take place, or that it was in anyway not real. Regardless of any notion of fault on the part of the respondent (or indeed any other party), the breakdown in the applicant's relationship with other contestants, together with the impact of her portrayal on television and social media, in my view explains the onset of her psychological injury.

127. In my opinion, the respondent's lay evidence that the other contestants regarded the applicant as a bully is itself indicative of the break down in the relationships on the set of the show which I accept were, along with the editing of the program and social media posts, the main contributing factor to the onset of the applicant's injury.

128. The fact that each of the contributing factors arose out of or in the course of the employment relationship satisfies me on the balance of probabilities, in adopting a common-sense approach to the cause of the applicant's condition, that her employment with the respondent was not only a substantial contributing factor to her injury, but was the main contributing factor to its development. There is no suggestion of any relevant history of pre-existing psychological or psychiatric injury or illness on the part of the applicant.

129. In relation to the medical opinions, I reject the view of Dr Roberts, whose opinion is diametrically opposed to the preponderance of the medical evidence. In his report, Dr Roberts makes reference to other medical opinions and quotes from the diagnoses contained in those reports, then dismisses them because of an investigation report apparently showing the applicant having registered her children for a casting call. At page 17 of his report, Dr Roberts says:

> "Most inconsistent with the account given is the information provided by Procare relating to the claimant registering her interest in attending a casting call on 5 July 2017 looking for children who are outgoing, of the comment being made is of interest that she had registered her children for a casting call given her own claimed experiences in the industry.
>
> On reasonable psychiatric grounds if this activity is assumed this would be such a major inconsistency that it would render the totality of her account untenable, since it would be less than believable that a mother who had experienced such negative results from participating in a television show that she would risk her children receiving similar consequences."

Dr Roberts does not provide any reason as to why, on psychiatric grounds, such actions by the applicant would render invalid any basis for complaint of injury on her part. Rather, in my view, Dr Roberts has simply taken that single allegation made by an investigator and used it as a basis for discrediting the applicant, having not put that allegation to her, nor provided a medical basis for his conclusion as to why such a step by the applicant would serve to invalidate what is otherwise a medical consensus between treating and medico-legal practitioners.

130. By contrast, the applicant's treating specialists took a consistent history from the applicant, as did Dr Takyar, IME for the applicant. Dr Akers, treating psychiatrist, took the following history:

> "Nicole reported that her symptoms arose after being a contestant on Channel 7s program "House Rules" which filmed in December 2016 and aired in April2017. Nicole reported that she and her friend were isolated from other contestants and bullied during filming, including her friend being physically assaulted. Nicole reported that when they complained to the producer they were threatened with being portrayed negatively. Nicole reported that she and her friend were portrayed as bullies in the aired program. She reported that after the program aired she had been subjected to online abuse on the Channel 7 Facebook page, including receiving threats of serious physical assault. Nicole reported having been fearful for her safety. She also reported that since the program aired she has not been able to obtain work, and had been informed this was due to her portrayal as a bully. She described no longer being offered interviews for jobs she had previously had no trouble obtaining interviews and positions for. Nicole described themes of worthlessness related to the loss of her career.
>
> Nicole reported that since the filming and program airing she has been anxious about leaving the house for fear of people's reaction if she is recognized. She described several incidents of negative reactions from others. Nicole described flashbacks of conflict on set after she realized there was exposure to asbestos, and described physical symptoms of nausea when faced with reminders of the program. There was no history of full panic attacks. She has avoided leaving the house whenever possible, and shops at times when others are not around. Nicole also described depressed mood, with reduced energy and motivation, poor sleep (initial and middle insomnia), reduced enjoyment in activities. She described suicidal thoughts after the program initially aired, but denied ongoing suicidal ideation, intent or plan. Nicole described an increase in alcohol intake to self-medicate her symptoms, which she has subsequently reduced to 3 standard drinks every second day. There is no other substance use. There is no history of elevated mood suggestive of mania/hypomania and no history of psychotic symptoms."

Dr Akers diagnosed major depressive episode and some features consistent with Post-Traumatic Stress Disorder (PTSD).

131. Ms Gough, treating psychologist also provided a report. She noted the applicant's symptoms started in December 2016 during filming of the show and increased significantly in April 2017 after the show was aired. Ms Gough made the following diagnosis:

> "Nicole's symptoms are consistent with Major Depressive Episode with some symptoms associated with Post-traumatic Stress Disorder (DSM -IV American Psychiatric Association, Washington DC,). Currently her symptoms cause her significant distress and impairment in her social functioning and have limited her ability to undertake employment as a result of her low self-esteem and ongoing exhaustion. Nicole is experiencing difficulty falling to sleep and frequent waking during the night. She reports feeling revulsion and nausea on briefly seeing an episode aired on television."

132. Dr Takyar, IME for the applicant, took a detailed history of the onset of the applicant's symptoms during and after filming of the show. After setting out her symptoms and undertaking a mental state examination, Dr Takyar diagnosed the following:

> "On review, she continues to experience moderate-grade depressive symptoms consistent with a major depressive episode along with intermittent anxiety reflective of an adjustment disorder with anxiety, both attributable to her experiences during filming but also in the aftermath of the show airing and how she was portrayed and the effects of this."

133. It is apparent from an examination of the medical material in this matter that every practitioner aside from Dr Roberts has found the applicant to be suffering from a major depressive episode attributable to her employment with the respondent. I accept the preponderance of medical opinion in this matter and as noted, I reject the views of Dr Roberts, who has sought to discredit the applicant's claimed condition and symptoms on the basis that some years after her experience, she put her children's names forward for auditions on a television program. I prefer the view of Dr Takyar, supported as it is by treating practitioners, Dr Akers and Ms Gough, who have all taken into account the history of what transpired on the show and afterwards, and have reached a consistent diagnosis of the applicant's conditions, and all attribute it to her employment with the respondent.

Section 60 expenses

134. The dispute in relation to the reasonable necessity of medical expenses arose because of the denial of both employment and injury. There was no criticism of the actual treatment modalities of the applicant's practitioners. This being so, and given both my findings on liability and that the applicant has only sought a general order, I find in favour of the applicant ion her claim for section 60 expenses.

SUMMARY

135. For the reasons advanced above, the Commission will make the following findings and orders:

    (a) The applicant was a worker employed by the respondent within the meaning of section 4 of the 1987 Act;

(b) The applicant suffered a psychological/ psychiatric injury in the course of her employment with the respondent, with a deemed date of injury of 17 May 2017;

(c) The matter is remitted to the Registrar for referral to an AMS to determine the level of permanent impairment arising from the following:

Date of injury:	17 May 2017 (deemed)
Body system referred:	Psychological/ psychiatric injury
Method of assessment:	Whole person impairment

(d) The respondent is to pay the applicant's reasonably necessary section 60 expenses upon production of accounts, receipts and/ or Medicare Australia Notice of Charge.