# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** **954/18**
**Applicant:** **Elias Bader t/as Genuine Kitchens**
**First Respondent:** **Workers Compensation Nominal Insurer**
**Second Respondent:** **Botros Abdelahad**
**Date of Determination:** **25 October 2019**
**Citation:** **[2019] NSWWCC 350**

The Commission determines:

1. The applicant was an exempt employer, within the meaning of s155AA of the *Workers Compensation Act 1987* between 1 July 2014 and 24 October 2014.

2. The applicant is deemed to have obtained from the first respondent, and the first respondent is deemed to have issued, a policy of insurance in accordance with s155 of the *Workers Compensation Act 1987* for the period between 1 July 2014 and 24 October 2014.

3. The applicant is not estopped from arguing that he was an exempt employer with respect to the notice issued by the first respondent on 15 January 2018, pursuant to s145(1) of the *Workers Compensation Act 1987*.

4. The applicant's claim for an order that he not be liable to reimburse the first respondent with respect to the notice issued by that respondent on 14 August 2015 under s145(1) of the *Workers Compensation Act 1987* is refused.

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

Michael Perry
**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 MICHAEL PERRY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
**As delegate of the Registrar**

# STATEMENT OF REASONS

## BACKGROUND

1. On 20 October 2014, Botros Abdelahad, the second respondent (the worker), was in the course of his employment with Elias Bader (the applicant) as a carpenter. He was assisting the applicant install a kitchen when a circular saw cut his left thumb. The applicant did not then hold a workers compensation policy of insurance. Thereafter, the workers compensation nominal insurer (the first respondent) made payments of $30,815.82 in compensation to the worker pursuant to the *Workers Compensation Act 1987* (the 1987 Act).

2. On 14 August 2015, the first respondent served a notice on the applicant under s145(1) of the 1987 Act, claiming reimbursement of those payments (the 2015 notice). The applicant then filed an application, pursuant to s145(3) of the 1987 Act, claiming he was not required to obtain such a policy as he was an "exempt employer" pursuant to s155AA of the 1987 Act (the 2015 Application). This application was discontinued by a "Certificate of Determination – Consent Orders" dated 2 February 2016 (the 2016 Consent Orders); which also noted:

> "The following is not a determination of the commission, however, I note … parties have agreed that the applicant will repay the respondent the sums claimed in the notice under s145 … as follows … $5,000 within 14 days … $1,075.64 per month for … 24 months …" (Amended Miscellaneous Application 18 April 2019 "AMA" page 33.

3. On 15 January 2018, the first respondent issued another notice to the applicant under 145(1) of the 1987 Act seeking reimbursement of $70,188.02 (the 2018 notice). He then filed another miscellaneous application on 22 February 2018 (MA). He again claimed he was an exempt employer during the financial year in which the worker was injured. He also filed an application seeking reconsideration of the 2016 consent orders (RA) and sought orders to terminate the agreement in the 2016 orders.

## PROCEDURE BEFORE THE COMMISSION

4. The MA and RA were opposed by the first respondent and the worker, and determined by a Commission arbitrator on 1 August 2018 (the 2018 arbitration). The arbitrator decided the applicant was not an exempt employer, and declined to either reconsider, or terminate the agreement in, the 2016 consent orders (the 2018 arbitration decision).

5. The applicant then appealed the 2018 arbitration decision. The appeal was determined by Deputy President Elizabeth Wood on 18 December 2018 (*Elias Bader t/as Genuine Kitchens v Workers Compensation Nominal Insurer* [2018] NSWWCCPD 54) (the appeal decision).

6. The appeal decision revoked the 2018 arbitration decision and remitted the matter to another arbitrator for re-determination on the sole basis of the applicant having been denied procedural fairness in not being afforded the opportunity to address concerns, expressed by the arbitrator, about the reliability of the evidence of his accountant, Mr Shenouda – when neither respondent had adduced any evidence, or made any submission, challenging it. The Deputy President found that the risk of an adverse finding, based on an inference drawn from the facts about that evidence, would not have been apparent to Mr Bader (at [142-147]).

7. The matter was then listed for conciliation and arbitration on 5 April 2019 before me. Mr I Latham of counsel appeared for the applicant, instructed by Mr J Antoun, solicitor. Mr A Combe of counsel, instructed by Mr D Cooper, appeared for the worker. Mr A Davis of counsel appeared for the worker, instructed by Ms L Armstrong. The applicant applied for an adjournment on the basis that his solicitor had only recently received new documentation from the first respondent relating to financial or wages material that were said to be likely relevant to the "exempt employer" issue.

8. There was said to be voluminous such material that had only been received in recent days, in circumstances where the applicant had been formally seeking such information without success for months. Having regard to the history of the case, the consent to the application by the first respondent, and lack of opposition from the worker, the adjournment was granted. More detailed reasons were given by me in a certificate of determination dated 5 April 2019.

9. The matter was next listed for conciliation and arbitration on 7 June 2019. The appearances were as announced on 5 April 2019, except Mr M Short then instructed Mr Davis for the worker. In the meantime, the AMA had been lodged. The hearing proceeded and included cross examination of the applicant by counsel for the first respondent. The case was unable to be concluded on that day and resumed on 5 July 2019 with appearances as on 7 June 2019. Issues and documents were identified and the worker was cross examined by Mr Latham. That cross examination was objected to by both respondents on the basis that the respective cases had "closed". I gave leave for it to occur. Oral reasons were recorded.

10. It was established at this stage that the applicant was not proceeding with any RA as he had prior to the appeal decision. Nevertheless, there were still issues raised by counsel for both respondents as to the extent to which the applicant still wished to pursue those parts of the claim, still appearing in the AMA, relating to the "consent orders… 2016 … be terminated" and that "the applicant withdraws from the agreement reached on 2 February 2016" – given no reconsideration application now existed.

11. On 5 July 2019, the applicant sought, over objection, to put an affidavit from Mr Antoun, of 6 June 2019, into evidence. The affidavit related to orders made on 6 February 2019 directing production of the documents referred to in paragraphs 7- 8 above and seemed to relate only to communications between the parties about the process of that production. I was unsatisfied about the relevance of this material and rejected its admission into evidence.

12. I have used my best endeavours in attempting to bring the parties to a settlement acceptable to each on 5 April 2019, 7 June 2019 and 5 July 2019. I am satisfied they have had sufficient opportunity to explore settlement. They were unable to agree.

## ISSUES FOR DETERMINATION

13. The issues for determination were identified by the parties at the 5 July 2019 conciliation and arbitration hearing, and in their subsequent written submissions, as follows:

    (a) Whether the applicant was an exempt employer pursuant to s155AA of the 1987 Act;

    (b) Whether the applicant was estopped from arguing that he was an exempt employer, and

    (c) Whether there should be an order that the applicant not be liable to reimburse the first respondent pursuant to the 2015 notice.

## EVIDENCE

### Documentary Evidence

14. The following documents were in evidence before the Commission and taken into account in making this determination (in these reasons, numbers immediately following the abbreviated references to a document in (a) - (h) below refer to page numbers of that document):

    (a) The AMA and attached documents;

(b) An application to admit late documents by the applicant dated 6 May 2019 and attachments (ALD);

(c) Reply by first respondent (RFR) dated 28 February 2018;

(d) Application to admit late documents by first respondent dated 25 March 2019 (R1LD March 2019) and attachments;

(e) Application to admit late documents by first respondent dated 30 May 2019 (R1LD May 2019) and attachments;

(f) Reply by the worker dated 13 April 2018;

(g) Application to admit late documents by the worker with attached documents dated 30 May 2018 (WLD 2018). I was unable to see this being lodged with the Commission. Mr Davis provided me with a hard copy. Each other party had been served with this document and did not allege prejudice; and

(h) Application to admit late documents by the worker with attached statement of worker dated 6 June 2019 (WLD 2019).

**Review of the Evidence**

*Applicant's Statements of 10 December 2004 (RFR 17-20) and 21 February 2018 (AMA 34 -35)*

15. These two statements are identical to those in evidence in the 2018 arbitration proceeding. There is no issue about the summary of both in the Appeal decision (at [16-39]). I have read both statements and respectfully agree with and adopt that summary.

16. There is also a letter from the applicant to the WorkCover Authority of NSW (Workcover) dated 14 September 2015. It is also summarised in the appeal decision (at [63]). Again, there is no controversy about that summary and I respectfully agree with and adopt it for the present proceeding. However, I also note the applicant included the following:

> "I have been in business for 48 years having owned companies such as Apollo Kitchens, Tip Top Kitchens …Acme Kitchens and over that time had employed many people … always had them covered for workers compensation so I am well aware of my obligations… (RFR 21)".

17. The applicant also swore an affidavit on 1 May 2019 (ALD 220-263). It reiterates his earlier statements about his first contact with the worker, that the worker had been referred to him by a relative in Lebanon and as someone who would be able to help the worker find a job when he came to Australia. He told the worker he had sold his business a couple of years before and had only just started a small business, working only for a few select clients "to keep me from getting bored … told him I did not need any help and was not looking for any workers …". This was in about May 2014. He then told the worker he was going to Lebanon in June and coming back in August 2014. He did not expect to hear from the worker again, but after he returned to Australia in August, the worker called him again. He again told the worker he had no need for any employees, but the worker begged him for work. He then told the worker he could give him 3 to 4 weeks of work to use as a reference to get other work in the industry. He specifically told the worker that he could not keep him on for long.

18. The applicant stated the worker commenced work for him on 1 September 2014, that his "work was okay" to begin with, but that he became a poor employee, talking on the phone while operating power tools, starting late and being lazy. But he bore in mind he agreed to keep the worker on for 3-4 weeks. After four weeks the applicant told him to finish at the end of the week. The worker "did not respond … (he) just smiled". The worker "came back the following week...did not ask him to". The applicant did not know what to do. The worker was allowed to stay for another week. The applicant spoke to his wife and daughter about it. He then decided the worker be asked to:

> "not come back the next week … decided I should give … written notice, ending his work with me if he came back to try and continue work … wrote the notice out in Arabic over the weekend to give him on the Monday in case he turned up … notice gave him to the end of the week to leave and finish work with me … he came to the factory on the Monday and I gave him the notice in the morning before we went to a job at Hurlstone Park ... drove both of us out … told him … I don't have enough work and I don't need you … do not come back after this week … (ALD 224)".

19. The applicant paid wages directly into the workers Commonwealth Bank (CBA) account. The CBA statements show payments made, totalling $3,850 in cheque or cash deposit between 12 September and 17 October 2014. Other than those amounts, and those appearing in the wages book, he did not pay the worker any other money, cash or otherwise (ALD 226). He was shown a cash deposit slip forming part of the workers statement to the Allianz Insurance (Allianz) investigator – noting the worker said this was a pay slip he was given. He denied it was a pay slip. He said the 17 October 2014 deposit slip was for a cheque deposit of $550, which was equal to the weekly wage he paid the worker after tax; and that it corresponded to a debit against his own ANZ account. He attached a cheque butt paying the worker $550 (ALD 226). On 17 October 2014, after dropping the worker off at his car and telling him not to come back next week, he went to the bank and "deposited his last pay cheque into his account" and was given a deposit receipt. While he was at the bank, he decided to pay Philip Kass, a contract installer he sometimes used. He rang Mr Kass "and used the back of the deposit slip to work out what I owed him". This was $1,000 for 5 days work. He "was going to pay him $600 leaving $400 owed to be paid when he finished the job … also owed him … for some extra work totalling $100 … the writing on the deposit slip sets out my calculations of what I owed Philip and had nothing to do with Abdelahad … (ALD 227)".

20. On Monday 20 October 2014, the worker turned up at the factory despite the applicant telling him, on the previous Friday, not to come back. He said he "then gave him the deposit slip with my writing on the back … then said … prepared you a written notice in case you came back … then gave him the letter I wrote in Arabic, formally ending his work with me… I told him … the letter says you finish at the end of the week … he then got in the car with me and we went to Hurlstone Park … (ALD 227-228)".

21. The applicant was contacted by "a representative from the insurance company" in early November 2014 who told him he had the worker with him and asked the applicant if "I will go to a meeting and if I would take him back … told him … employment had been terminated on 20 October 2014 … did not want him back …" He said a similar thing happened in late December 2014 or early January 2015 – he was contacted by somebody from the insurance company asking him if he would talk about the worker coming back to work. He again said that he had terminated the worker's employment. He also said that he was "never asked by the insurer what my intention was while Abdelahad was employed by me …".

22. When interviewed by Mr John Gottstein, investigator for Allianz on 10 December 2014, he was asked questions about the workers employment and injury and answered them. They were mainly about the injury. He was not asked any questions about his:

"exempt employer status or my intention. Had I been asked, I would have said my intention was not to have any employees and Mr Abdelahad was only a short term employee … aways my intention to only employ Abdelahad for a short period to give him some experience ... no intention of employing him or anyone else full time or at all … only employed Abdelahad because of my wife's relatives in Lebanon and to keep my wife happy and … to give him some experience … only intended to be a short period of 3-4 weeks …" (ALD 229).

23. The applicant never left the worker at a job site by himself. But he would leave him alone at the factory sometimes. The worker's hours were as stated in the wage book, 7.30am to 4pm. The worker never worked 60 hours per week and never worked weekends with him.

24. The applicant's insurance broker asked him to fill in an employer injury form for the injury. On that form, dated 19 November 2014, the applicant set out the worker's wages of $600 per week, and also noted on the form "never return to work". He had terminated the worker and never wanted a long term employee. He ticked the "full time" and "permanent" boxes on the form because at the time the worker was employed, he was full time and permanent - for the short period he had agreed to give the worker a job. This was not to say he wanted the work to extend beyond the short period he originally agreed to.

25. The applicant was also cross-examined in the 2018 arbitration. A transcript of this was summarised by the Deputy President in the appeal decision (at [31-39]). That transcript also became part of the evidence in the present proceedings (R1LD March 2019). Again, there is about the adequacy of that summary. I have considered that transcript and respectfully agree with and adopt the summary of it in the appeal decision for the purposes of this proceeding.

*Further documents attached to the AMA*

26. This category of evidence is indexed at AMA 7, and relevantly includes:

- Time, pay and wages book for Genuine Kitchens indicating hours worked between 7.30am and 4pm, 5 days per week from 1 September 2014 to 20 October 2014 inclusive, noting workers compensation was to be paid from 21 October 2014 until 30 October 2014. The wages were recorded as $600 per week less $50 tax (see also appeal decision summary at [47(a)]).

- The applicant's tax return for the financial year ending 2015.

- The 2015 notice and the 2018 notice under s145(1) of the 1987 Act seeking the reimbursements of $30,815.82 (on 14 August 2015) and $70,188.02.

- Letter from the applicant to the worker : "19-10-2014 … Elias Bader … Notice to finish work …"(notice to finish). It is written in Arabic. The translation reads: :

  "Dear Botros,

  I am so sorry to ask you to leave work with us by the end of this week. The only reason is that I do not want to expand business, and I do not have enough work. It has been just an opportunity for you to start from here, and the purpose was for you to be with me for 2 or 3 weeks. Having told you once and again to leave work, and given that you have ignored what I said, I now have to write this notice in order for you to understand that it is serious. Thank you for having been with us".

- Letter from Nashat Shenouda, accountant. This content is similar to the affidavit of Mr Shenouda made 27 August 2018 (ALD 213).

- The worker's CBA Smart Access account (number ending 4123) showing transactions from 1 December 2014 to 30 June 2015.

- The NAB Saver account for the worker (ending with account number 7181). This statement starts 9 September 2015 and ends 4 March 2016.

- A "notice to suspected employer" from the first respondent (21 January 2015). It attaches a schedule with questions answered by the applicant on 28 February 2015 . One question is "What are the estimated gross wages or salaries to be paid by the employer for all employees for the current financial year?" He answered "Small employer … annual wages less than $7,500 …". Another question asks for a description of the nature of the working relationship. He answered "Temporary" (AMA 24 - 31).

*Further documentary evidence in ALD*

27. On 31 October 2014, Leah Harris, Allianz officer, requested an investigation, and noted:

> "Issues: Employer is claiming to be… exempt … (total wages under $7,500) … worker has indicated he was in receipt of $1,200 per week and was employed on a full time basis and had commenced employment approximately 2-3 months prior. Employer and worker information is conflicting … please obtain all information possible regarding workers contract of employment, commencement date and wages paid each week and amount IW has received … If IW was paid in cash, please obtain any evidence IW has to support these payments were made by his employer … please obtain evidence as to whether the employer pays himself a weekly wage … please obtain information regarding any other employees that are employed by the employer …" (ALD 44).

28. Report of Mr Chady Aoun, psychologist, to Allianz, dated 17 November 2014, based on an assessment of the worker on 6 November 2014 noting, *inter alia*, the worker stated that he was advised "by his employer to use a circular saw to cut an object in his opinion is to be cut on a table saw … was threatened by …employer to follow … request … whilst attempting to cut the object in requested [sic] … severed his left thumb to the bone … (ALD 48)".

29. In the "EMPLOYER INJURY CLAIM FORM" (the claim form) to Allianz, dated 19 November 2014, the applicant wrote, *inter-alia*, "never return to work". He also wrote that the worker was paid under the "Joinery Award" and the minimum weekly wage under that award was $600; and that the worker started working for him on 1 September 2014 (ALD 56-57).

30. On 19 November 2014, Allianz wrote to the applicant noting the acceptance of provisional liability, and "based on the information received from yourself and Mr Abdelahad, we have identified … your injured worker's PIAWE … $600 … uisng verbal advice from yourself and Mr Abdelahad … if…rate … incorrect, please contact … case manager …(ALD 66)".

31. On 17 December 2014, Alex Donovan of WorkCover, emailed his superior, Mr Mark Vale (Mr Vale), noting that Allianz had written to WorkCover that morning stating they believe the case should be managed under the Uninsured Liability Scheme. The Allianz email stated:

> "…from the worker's evidence it appears… he migrated to Australia in February 2014 … worked for another employer for approx. 3 months to approx. May 2014 … worker asserts it was 20 days after he ceased this employment that he commenced employment with Bader … would be approx. 2nd June 2014 … time period for employment with … Bader from 1/06/14 – 20/10/14 is 20 weeks … 16 week period exceeding … threshold … if … worker's evidence is … accepted, he would have been paid $1,000 a week for 16 weeks … equates to $16,000 … worker is claiming he was paid a partial … in cash … employer has been uncooperative with both return to work and investigation attempts … only evidence the employer has provided is a PIAWE form indicating … worker commenced employment on 1/09/2014 at a rate of $600 per week … in the absence of any evidence to the contrary … worker's evidence that he was employed on a full time basis … should be accepted which, over the course of a financial year, paying $600 … reasonably accepted to exceed the threshold … also have a copy of … worker's handwritten slip from the employer confirming he was paid $1,000 for 5 days outlining what was paid to his bank and what was not …". (ALD 74).

32. Mr Vale wrote back to Mr Donovan (ALD 73-74) with this:

> "Could you please ask Allianz to provide the following evidence … documents or case notes that show … Abdelahad was employed from 1 June 2014 … information provided below by Briet that it is likely Mr Abdelahad commenced employment on 1 June 2014 is an inference that does not appear to have been specifically questioned in the statement? Did … Allianz … ever ask Mr Abdelahad when he commenced employment with Genuine Kitchens …".

33. On 14 January 2015, Allianz emailed WorkCover to note "the team has now provided the responses as requested". Those responses (ALD 81-82) include:

> "…worker was asked…. how long he had worked for the employer … did not give an exact date however … was approximately 2-3 months … worker …since provided bank statements which show deposits for wages since July 2014 however it does not appear …these… were made by the employer in question … have sought clarification today via phone … worker has advised the deposits are for a different employer but maintains that he also worked approximately 3 months prior to injuring with the employer but at the start it was a trial period and he was paid in cash … difficult to communicate with the worker even via an interpreter … worker's word vs the employer's word .. when employment … commenced …accept that the documentary evidence supports the worker commenced paid employment (on the books at least) from 1/09/2014 … if … accept the worker's advice that he was employed for 3 months prior to the injury, even at $600 a week … exemption threshold would have been exceeded prior to the injury … if we accept the employer … that the worker commenced employment 1/09/2014 the worker was working for the employer in question for 7 weeks prior to sustaining the injury … documentary evidence … supports that the worker was employed on a full time permanent basis and had the injury not been sustained … exempt threshold would have been well exceeded during the financial year … worker has provided a statutory declaration in support of his claims that he was paid additional monies above the $600 per week cash in hand … supported by documentary evidence provided to the … investigator in the form of a handwritten deposit slip from the employer confirming the amount paid into the worker's bank account and additional monies paid for overtime work…".

34. Allianz made a decision on the applicant's exempt employer claim on or about 16 January 2015 (the claims decision), noting the worker had been employed from 1 September 2014 for 40 hours per week at an ordinary gross hourly rate of $15 per hour with earnings of $600 per week. These reasons were then given for the decision that the employer did not have reasonable grounds for believing the total wages payable during the 2015 financial year would not be more than the exemption limit (at ALD -88):

> "… employment commenced…1 September 2014 … full time basis …40 hours per week … this indicates wages for … 2015 financial year … that will be payable by the employer … would have been $26,040 … more than … exemption limit … employer would have to … prove he intended to terminate … employment before he had paid $7,500 … worker had worked … for at least 7.2 weeks … charged with … responsibility of opening the factory each morning and commencing work without supervision at 7.30am … only terminated … employment after … injury … no evidence … had… definite date of termination before the injury … probable … employment would have continued past the date of injury, but for the injury … he has not made himself available to provide a statement about the injury or the employment of Mr Abdelahad … to date … has not been prepared to assist with enquiries … by Allianz … future actions … once a claim is commenced in claims operations … following actions need to occur … statements need to be obtained from Bader … need to address the following lines of enquiry … was it expected that … employment would be ongoing … if not when was it expected that … employment would have been terminated and … reason … as at 20 October why did … Bader believe … total amount of wages … would not be more than $7,500 … further statement needs to be obtained from … employee … did … (he)… expect … his employment … would be ongoing … if not … when did he expect … employment would have been terminated and (for) what …reason … ".

35. On 25 July 2016, iCare wrote to BH Investigations (BH) requiring a factual investigation, noting "lines of enquiry as including details about employment from date of injury to present". BH then made enquiries and reported on 29 August 2016 noting, *inter alia*:

> "… employee reports in the presence of his supervisor … Bader … operating a circular saw … saw kicked back … was in poor repair with no safety guard … reports he was employed … with Genuine Kitchens … in approximately July 2014 … have not interviewed either of the employers … employee confirmed he commenced working for Genuine Kitchens some 4 months prior to … accident on 20 October 2014 (ALD 131-139)".

*Affidavit of Nashat Shenouda, 27 August 2018*

36. He had been the accountant for the applicant since 2010 when the applicant had sold his original business. In 2013, the applicant sought his advice about starting a new business, after not working for two years. The applicant told Mr Shenouda that his intention was to take on a small number of jobs to occupy his time and it was not his intention to employ anyone.

37. Mr Shenouda asked the applicant to seek further advice from an insurance broker about workers compensation insurance. Later the applicant told him that an insurance broker had "confirmed that he did not need insurance if he was a sole trader and did not pay wages over $7,500 for the financial year". In late 2014 the applicant informed Mr Shenouda that he was intending to employ a family friend on a casual basis for about three to four weeks; there was a discussion about what would be paid to the worker and how long the applicant would employ him so that he would not exceed the threshold. Mr Shenouda states the applicant was clear that it was a short term employment.

*Statement of Philip Kass, 29 April 2019*

38. In handwriting, he notes "…hereby confirm that these numbers appearing on the right of this paper are common between Mr … Bader and I. We were discussing the amounts that he wants to deposit in the Commonwealth Bank. Mr Elias was writing some numbers on a piece of paper. I told him not to put the money in the bank at the moment until I finish the job … at … location … Telopea". The "numbers appearing on the right" are those discussed at paragraph 19 above.

*Affidavit of Mary Lahoud, 1 May 2019 (the applicant's daughter)*

39. She swears that after her father had been working in the kitchen industry for a long time, and "as he got older", she and her mother convinced him to retire. He did that. But it did not last. He was bored. Then, after "…conversations we decided … he would re-open a little workshop and work for his old clients …he liked… at his own pace …by himself and only take enough work to keep himself busy. He did not want any employees" (ALD 218). The applicant told her he had received a phone call from her mother's relatives in Lebanon asking him to employ the worker. The applicant told her he did not need anyone and did not want to employ the worker, but offered to help him find a job. Not wanting to let the worker, or his relatives down, he agreed to give him work for "a couple of weeks until he could find him another place". After about a month, the applicant told her he had asked the worker to leave, but the worker never seemed to take it seriously. Then, the applicant consulted her mother and her and they decided the worker should be given formal written notice.

*The Applicant's oral evidence*

40. The applicant was cross-examined by counsel for each respondent on 7 June 2019 with the benefit of an Arabic interpreter. He agreed with Mr Coombe when it was put to him that he swore his affidavit without the benefit of an interpreter. It was put to him that he did not need an interpreter, had successfully conducted a business for at least 20 years, and it did not appear he was "struggling" with English. The applicant said he was not educated and while he could get by with English to a point, when it came to situations such as this examination, he did need assistance and did "struggle". Mr Coombe put to him that he was able to give his evidence in the 2018 arbitration without an interpreter. The applicant said "I thought I could".

41. Mr Coombe noted the applicant's affidavit stated that he left the worker on 17 October 2014, went to the bank to deposit the worker's last pay cheque into his account, gave the worker a deposit receipt, then also decided to pay Mr Kass (ALD 227). It was put that he had never given this evidence in any previous statement. The applicant did not deny this but said the investigator put down "whatever he wanted to say". It was put that he was an experienced businessman and knew the importance of business records. He indicated such was the case only up to a point, that he was not educated, and was not expert in business records; with employed assistance having previously been given for that aspect of his previous business.

42. Mr Coombe put to the applicant that he stated to the investigator, in December 2014, that he deposited wages into the worker's bank account and provided a deposit slip as a receipt for his wages. The applicant agreed. It was then put that this statement was given at a time when the relevant events were still fresh in his mind – yet he made no mention of the payments to Mr Kass now referred to in his affidavit. The applicant said he was not then asked about such detail. It was put that the reason he did not then mention such payments was because that evidence was false and recently invented. The applicant denied that.

43. Mr Coombe then put that there was no mention of Mr Kass in the letter to WorkCover of 14 September 2015 (RFR 21). The applicant said Mr Kass worked with him occasionally but that he had nothing to do with the case involving the worker; that he gave answers to questions he was asked, indicating he was not asked about this then. Mr Coombe also put that there was no mention of Mr Kass in the applicant's statement of 21 February 2018 (AMA 34-35). The applicant said he did not know that matter was an issue. Mr Coombe then put that the applicant nevertheless knew there was an issue about whether or not the worker was only to be employed for a short period of time. The applicant agreed. It was put that his statement of 10 December 2014 also noted that "at the time … I work alone and do not really need an employee" (RFR 18) and that such could not have been a true as he also needed the assistance of Mr Kass. The applicant said that the only used Mr Kass occasionally.

44. Mr Coombe noted the applicant swore the worker begged him for a job, he said he would give the worker three to four weeks work, the worker could use him as a referee but he could not keep him on long as he did not have the work, and did not want a lot of work or a big business again (ALD 222). Mr Combe put that this was not true, because there was enough work to give Mr Kass. The applicant said Mr Kass was only engaged "5, 6 or 7 times".

45. Mr Coombe then took the applicant to his letter of 21 February 2015 to the worker, stating that he believed that the worker intentionally injured himself on 20 October 2014 as eight kitchen jobs were scheduled for the following day. He said he and the worker had done two of those installations and Mr Kass had done the rest. Mr Coombe put that this meant he was busy enough to employ Mr Kass to do the other installations. He said "…Kass didn't work at the factory …we bought him in to do some of the installations". Mr Coombe then asked why the applicant had then referred to the eight kitchen jobs scheduled for the following day in the letter. The applicant said that those jobs had been done before. Mr Coombe then asked him whether that meant that part of the letter was a lie. He said it was not a lie, but "the dates are wrong". He did not deny he wrote the letter as a type of "revenge" against the worker.

46. Mr Coombe took the applicant to the statement of Mr Kass (ALD 216). He noted that, unlike other evidence in the applicant's case, it was not by affidavit, was only a signed statement, and was not "witnessed". The applicant said "he signed it in front of me". It was put that the document was a fabrication and of recent invention. The applicant denied that and said "you can ring him up, he'll tell you".

47. Mr Coombe took the applicant to his affidavit, noting he swore "the writing on the deposit slip sets out my calculations of what I owed Philip and had nothing to do with Abdelahad …". He put that the writing on the top right side of the statement of Mr Kass, including and beside the amounts ($1,000, $600, $400, $100, $500) was the applicant's writing. The applicant agreed.

48. Mr Davis took the applicant to Mr Kass' comments that "… these numbers appearing on the right of this paper are common between … Bader and I …" Mr Davis then asked him whether it was just coincidence that he happened to write details relevant to Mr Kass on the back of a deposit slip which correlated with what the worker said was paid. He agreed. Mr Davis put it to him that he was lying when he then said that he did not give, but only showed, that deposit slip to the worker, and that the worker took it the Monday, when he came back to work after Friday 17 October 2014. The applicant said there were no other deposit slips which the worker would have had. Mr Davis put that the writing on the back of the deposit slip was meant for the worker, not Mr Kass. The applicant denied that.

49. Mr Davis then put to the applicant that his evidence that the worker was inexperienced in his job was inconsistent with what he said to the investigator on 10 December 2014 – noting "when he commenced employment he was a good worker and an experienced cabinet maker … did not require any training". The applicant said he had always said that the applicant was a good worker with some things and inexperienced in others.

*Reply by the First Respondent dated 28 February 2018*

50. The Reply attaches the 2015 application, the 2015 notice and the 2018 notice. Otherwise, there are various documents attached which are replicated elsewhere, in particular in the AMA and ALD. As such, I summarise below relevant documents not otherwise dealt with.

*All States Investigations (Mr John Gottstein) report dated 3 December 2014*

51. This report was engaged by Allianz. The author noted the worker had stated, *inter alia:*

    - The applicant would pay $600 gross, take out $50 per week tax and pay $550 directly into his CBA account. The applicant then paid him $400 cash in hand. When he worked overtime, the applicant paid him at the rate of $25 per hour cash (Reply 35).
    - He was paid weekly and provided with a handwritten payslip each week. He only had one pay slip on hand, dated 17 October 2014, which is written on the back of the CBA deposit receipt – and the applicant deposited the money into the worker's account, was given a receipt from the bank, then he wrote the pay details on the back of the receipt.

    - He was not able to prove he was paid cash in hand. But he would not be able to survive on $550 per week as he supports his family in Lebanon from his earnings. He advised that he deposited money every 15 or 20 days into Western Union and the money was transferred to Lebanon where his wife collected it. He provided a Western Union receipt for the sum of US $1,000 dated 11 October 2014 (Reply 36). He did not have any other source of income.

    - There were no other workers "in the company, only Elias Bader and myself" (Reply 41).

52. There is a further report of 15 December 2014, following an interview with the applicant on 10 December 2014. Mr Gottstein noted the applicant provided the following information:

    - The worker had telephoned him advising he was a qualified cabinet maker and knew one of his relatives in Lebanon. He informed the worker that he was not looking for an employee, however would employ him on a "causal" basis to give him a start to enter the workforce (Reply 52). The worker's hours were between 7.30am and 4pm Monday to Friday. He did not work overtime. There was not enough work (Reply 52). One of Mr Gottstein's "findings" was that "the claimant was verbally employed on a casual basis …" (Reply 54).

    - The applicant did pay the worker $600 gross and took out $50 a week tax – paying $550 directly into the CBA account and providing the worker with a bank deposit slip as proof. He was adamant he did not pay the worker cash in hand.

53. On 21 January 2015, WorkCover wrote to the applicant requiring further information pursuant to s141(2) of the 1987 Act. This (notice to suspected employer) attached a schedule of questions. In answer to a question about "nature of … working relationship" – the applicant wrote "Temporary" (on 28 February 2015 (see paragraph 26 above & Reply 66 and 70).

54. The applicant also provided copies of various documents titled "Pay slip" with respect to the worker, dated 5 September 2014, 12 September 2014, 19 September 2014, 26 September 2014, 3 October 2014, 10 October 2014, 17 October 2014 and 24 October 2014. Each of these showed gross wages of $600 per week with $50 deducted for tax and net wages paid as $550 – except for the last slip showing net wages paid of $400 (Reply 71-79).

*The First Respondent's May 2019 Late Documents (R1LD May 2019)*

55. Other than certain documents in this category overlapping with, or being repeated in other categories of the evidence, these documents largely comprise medical certificates and/or reports from medical or rehabilitation practitioners regarding the worker's medical and rehabilitation and file notes from officers of Allianz or the first respondent. However, I understand there is no issue in this regard.

*The Worker's Evidence*

56. WLD 2018 was also in evidence for the 2018 arbitration – and was summarised in the appeal decision (at [59-60]). This includes the "Western Union" records of money transfers from Australia to Lebanon by the worker; his CBA records between 31 May and 30 December 2014 (including 3 deposits from Custom Designed Kitchens totalling $2,200 in June 2014); and further bank records in relation to a different account recording transactions between August 2014 and February 2015. Also included is a letter from the applicant to the worker dated 21 February 2015. I have considered these documents, and respectfully agree with and adopt the summary of them in the appeal decision. There was no issue raised by any party about that being other than a fair and accurate summary.

57. The worker also provided a statement of 12 November 2014 (Reply p40 - 43). It was also in evidence in the 2018 arbitration and was summarised in the appeal decision (at [50-56]). He also made a statutory declaration on 1 December 2014 (Reply 44). This too was summarised in the appeal decision and was part of the evidence in the 2018 arbitration (at [57]). Again, I respectfully agree with and adopt those summaries in the appeal decision. Again, there was no issue about that summary being other than fair and accurate.

58. The worker made another statement on 6 June 2019 (WLD 2019). He stated that following his injury, he did return to some work with another kitchen business that he believed was Custom Kitchens, in about February 2015, but was unable to remember the precise dates. He worked at that business for a few months but had problems coping; he was unable to lift and had problems holding things. He had to give the work up after a few months, and there was no "other injury". He stated that he "may have done a few more weeks work later in 2015 … and could not cope … at the knowledge of the insurer …"

*Oral evidence of the worker*

59. Leave was also granted for applicant's counsel to cross-examine the worker on 5 July 2019. It was put to the worker that, with respect to his work with employers other than the applicant, he had been paid at least partly in cash and he had not put that cash into his account. He denied that. It was also put to him that he had told Allianz that he had worked with the applicant between 1 June 2014 and 20 October 2014 and that such was not true. He said he started working with the applicant about a month before his accident.

60. The worker was then asked about work he did, or employers he worked for, before or after the accident on 20 October 2014 – including High Life Kitchens and Custom Designed Kitchens. With respect to the former, he said he could not remember when he worked for them but only did about a week's work to help dismantle some kitchens. It was then put to him that he worked for Custom Designed Kitchens between June and early August 2014. He said he could not remember the dates. The cross examination then finished, but the worker asked whether he could clarify something. I gave him permission to do so. He then spoke in English, without the benefit of the interpreter, to say "When he give me pay slip, he send the money to the bank he pay $550 and then he put $600 in cash". This evidence was given over objection by Mr Latham (on the basis of it not arising from cross examination). I did allow it in the exercise of my discretion subject to weight. However, there was no interpretation of what he said by the interpreter, and the evidence was delivered in broken English.

**Written Submissions**

61. Counsel for each party prepared detailed written submissions. Counsel for the applicant made written submissions in reply. It is unnecessary to trace through all submissions. I have considered and taken into account all of them. However, the following is noted.

*Applicant's submissions*

62. The relevant test requires a determination of the applicant's belief and then to find whether there were reasonable grounds for it. The first step is based upon the subjective belief of the applicant. The second is whether there were reasonable grounds being an objective test. To determine those tests, there would be a likely need to make a credit finding in relation to both the applicant and the worker. The investigation should have been about what the applicant's state of mind was for the period that he employed the worker.

63. The financial records of the worker indicate there are significant periods where he lived off income other than that paid into his bank account. He opened his bank account on 31 May 2014 and transferred amounts of just over $1,000 to Lebanon on three occasions in May, July and August of 2014. During that entire period, he withdrew $400. His incoming payments could cover his transfers to Lebanon, although not by a great margin, although it is odd that he seems not to have withdrawn money from his account to pay for those transfers – leading to the inescapable inference that he has some alternative source of income.

64. The worker's evidence is self-contradictory and often self-serving. He has not told the full truth in relation to his period of employment and payment by various employers. He made an admission in cross examination that he worked with the applicant just a month and a bit before the accident, contrary to earlier accounts he gave to the investigator and WorkCover.

65. As to the applicant's 10 December 2014 statement, he has maintained that he answered questions put to him by the investigator, and if he was not asked a question, he did not have the opportunity to provide further information. The applicant noted also "he asked me many questions and I answered them" noting "this is the first time for person to be injured".

66. There was a failure to properly investigate the question of exempt employer. Allianz and the first respondent relied almost solely on the version given by the worker, as unsatisfactory as it was. There ought to have been a re-investigation and there was none. While those failures are not determinative of the test, the evidence of the applicant alone would give rise to that conclusion. The worker "displayed a consistent looseness with the truth as to the length of his employment, the identity of his employers and the money received from them". His bank accounts do not indicate his income, his declaration to the Tax Office was false, he denied periods of employment which clearly existed and his account of the wages as $1,200 per week was false.

67. The wages of the worker were, and were to be, less than the threshold of $7,500 per year, meaning that the employer was exempt under s 155AA. The evidence of the applicant is that he paid $550 into the worker's account on a weekly basis –and this was consistent with the time, pay and wages book, pay slips, claim form, PIAWE calculation, the s141 declaration and subsequent statement and correspondence.

68. The applicant received advice from his accountant as to the need to ensure he did not exceed the wages level that would trigger the need for insurance, and from his insurance broker to the effect that he did not require insurance. He described the worker as temporary, and had made it clear to the worker that it would be a short-term employment contract. He tried to terminate the worker prior to the injury, and issued him with a notice to finish on 20 October 2014, before the injury, requiring the worker to cease work on 24 October 2014. The evidence shows the applicant did reasonably believe that he was exempt under s 155AA.

69. The worker's financial records indicate he continued to earn income after his injury even though he had claimed he had no capacity to work and sought and gained weekly payments on that basis. This "throws into doubt both the question of injury and economic incapacity. On the other hand … may indicate a further injury and application for determination".

70. On 17 December 2014, Allianz had written to WorkCover stating that the employment with the applicant was from 1 June – 20 October at a confirmed rate of $600 per week. The applicant had claimed, 11 days after the injury, 31 October 2014, that he was an exempt employer (ALD 44).

71. On 24 February 2015, Custom Designed Kitchens (Fay Mahfoud) stated that the worker was currently employed (ALD 92) – although this was later denied (ALD 92).

72. The applicant knew of the exemption threshold. Both his and Mr Shenouda's evidence support this. His daughter also stated the applicant had discussed the engagement of the worker with her and her mother, on the basis that the worker was given an opportunity for a couple of weeks until he could find other work.

73. The applicant had told the worker that he had to finish after four weeks' work. The worker did not respond "just smiled … came back the following week, even though I did not ask him to". The applicant then discussed the situation with his wife and daughter and told the worker to "leave again at the end of the week".

74. The insurer ought to have asked about how long the applicant believed the worker was going to work for him and how much he was going to pay for that period. The answer would have been three to four weeks for the first question and $600 per week for the second. Two days later, the claims assessor reached a similar conclusion – advising that a statement needed to be obtained from the applicant as to whether it was expected the employment would be ongoing and if not, when it was expected that the worker's employment would have been terminated, and what would have been the reason for any such termination; and why he believed the total amount of wages paid by Genuine Kitchens during the relevant financial year would not be more than $7,500, as at 20 October 2014. These questions were never asked.

*75.* There is no basis to the employer's estoppel argument. The applicant sought the "orders in the initial application".

*First respondent's submissions*

76. The applicant had discontinued any application under s 350 of the *Workplace Injury Management and Workers Compensation Act 1998* in respect of the 2016 consent orders. It followed that there was no jurisdiction to revisit those orders. The 2016 consent orders noted "a private agreement …to reimburse the sum sought in the notice … this was an admission of the liability to reimburse…".

77. The statutory test about "reasonable grounds for believing" in s 155AA was not a "test … mixed with objective and subjective elements", and what the applicant believed is irrelevant. The test is wholly objective.

78. Contrary to the applicant's submissions, the "issue of the termination of the worker" is relevant - the cross examination of the applicant was relevant to his credit. That the worker was only employed on a temporary basis was an essential element of the applicant's case.

79. The first respondent carries the onus to prove liability under s 145 of the 1987 Act. The certificate issued under s 145(5) is *prima facie* proof of the liability "unless proven otherwise". The question is whether the first respondent can establish the legal onus that the applicant did not have reasonable grounds for believing that the total amount of wages payable during the financial year would not exceed $7,500. Such onus has been discharged at least to a *prima facie* level with the certificate under s 145(5) of the 1987 Act. The applicant must disprove the *prima facie* evidence in the certificate. This has not been done.

80. The applicant ultimately bears the evidentiary onus of proving that the employment was only to be on a temporary basis, including that his notice to finish was issued on the morning of 20 October 2014. The onus has not been discharged. The evidence of the applicant should be rejected where it conflicts with the worker on key issues of how much was paid to the worker and whether the "notice to finish" was provided to him. He was evasive and not honest in his oral evidence. He adduced evidence that was recently invented. The notice to finish was not mentioned in his statement to the investigator on 10 December 2014. He then made no mention of Mr Kass, who was mentioned for the first time on 6 May 2019.

81. The applicant also gave contradictory evidence about the receipt for $1,000 written on the back of the bank deposit slip dated 17 October 2014. He initially told investigators he wrote the worker's pay details on the back of deposit slips, then in his affidavit of 1 May 2019, asserted this handwriting was for a payment to Mr Kass. This had not been previously put. It defied common sense.

82. The applicant also gave evidence under cross examination using an interpreter yet he had not previously given evidence using an interpreter. None of his statements or his affidavit were created using an interpreter. His evidence should be given no weight, it was entirely self-serving and contradicts the information he provided to the first respondent in the employer injury claim form which nominated employment as "full time" and "permanent".

83. The claim form was completed before the applicant was aware he may be liable as an uninsured employer. The determination of liability did not occur until the email from the first respondent of 14 January 2015, something the applicant was inferentially put on notice about on 21 January 2015 (the notice under s 141(2) of the 1987 Act). In this document, he nominated employment as "temporary". This was plainly self-serving.

84. The worker was a straightforward witness, although unsophisticated. He needed an Arabic interpreter. There was no dispute he suffered a significant injury. He gave consistent evidence he worked for another cabinet maker before being employed by the applicant and that he was paid by the applicant $1,000 per week made up of $600 less $50 tax plus $400 cash in hand. He also said a proportion of his income was transferred to his wife in Lebanon via Western Union, he produced a bank deposit slip with the handwritten receipt on the reverse and Western Union transfers to confirm his evidence. It defies common-sense that he would be employed at only $550 per week and still be able to send significant sums to Lebanon. The submission that he had other employment should be rejected. It is irrelevant to determining the issues in the case. The worker had no reason to lie. His claim had been accepted. This issue does not affect the worker.

85. The Allianz email of 14 January 2015 (Reply 80 - 81) shows the first respondent considered the evidence of both the applicant and the worker and concluded on both versions that there were no such reasonable grounds for the applicant to believe he was an exempt employer.

86. The evidence of the subjective belief of the applicant – as communicated to Mr Shenouda – was not considered by Allianz, as such had not been provided prior to 14 January 2015. The first evidence from Mr Shenouda is in his letter of 13 February 2018. That evidence is also inconsistent with the applicant's evidence when he says the applicant informed him that "he was intending to employ a family friend on a casual basis for approximately 3 to 4 weeks" - after the business was established and advice has been received from an insurance broker about the $7,500 threshold. The applicant's 21 February 2018 statement did not refer to such information being given to Mr Shenouda. His evidence as to what he told Mr Shenouda was "limited to seeking advice from an insurance broker about the $7,500 threshold".

87. The applicant's evidence about his dealings with his accountant and broker in 2013 shows he knew that if the wages were more than $7,500 per annum then he would need insurance. This militates against his credit as he did not inform the investigator of this advice in his 10 December 2014 statement, nor that the worker was employed on a temporary basis. This makes the omission to refer to such basis more striking, meaning his evidence was false.

88. The evidence of Mr Shenouda should also be given little weight or is irrelevant as the test is an objectively based (*Kula Systems Pty Ltd v Workers Compensation Nominal Insurer* [2018] NSWWCCPD 10 (*Kula*)). It speaks to the applicant telling Mr Shenouda about his own subjective beliefs. Also, it does not appear until three years after the first respondent considered the "exempt employer" status. Thirdly, the evidence of Mr Shenouda was not included in the MA filed with respect to the 2015 notice. The applicant also made no mention of the alleged conversations with Mr Shenouda in his letter to the first respondent of 14 September 2015, nor in his 10 December 2014 statement. Mr Shenouda's evidence is not consistent with the applicant marking "full time" and "permanent" in the claim form. He was an experienced business person and the distinction between the markings were known or should have been known given his experience and access to accounting advice.

89. The affidavit of Mary Lahoud is also not relevant. It does not constitute the knowledge of the applicant for the purposes of s 155AA. It was not included in the 2018 arbitration. She is the applicant's daughter and is motivated by family loyalty to give evidence to support her father.

90. What is solely relevant is the information available to the applicant during the period he employed the worker, establishing wages payment of $250 a day or $1000 per week and employing the worker on a permanent, full time basis. The applicant stated in December 2014 that he told the worker he would search for more work to support both himself and the worker, that he was contracting work out to Mr Kass prior to 20 October 2014, and that he had ongoing work for the worker beyond 20 October 2014 (as referred to in the letter of demand of 21 February 2015).

91. The applicant's evidence that his business was meant to provide him only a "basic income", and therefore not able to support the worker on a permanent basis should be rejected as his 2015 tax return reports total business income for the financial year to be $234,935 with "contactor, sub-contractor and commission expenses" at $45,572 and total salary or wages to be $4,800. This permits an inference that the business was busy, had substantial income and significant monies were paid to contractors. It shows a reasonable person could not possibly have reasonably believed he was relevantly exempt.

92. The applicant's 10 December 2014 statement was in close temporal proximity to the date of injury and is the most reliable evidence of the information available to the applicant, or a reasonable person in his position, at that stage. It makes no reference to employing the worker on a short term contract for three or four weeks or seven weeks. It shows the worker was employed 40 hours a week and that the worker would have to work on his own while the applicant searched for more work.

93. The statement also refers to the applicant's usual practice of paying the worker into his CBA account and providing a bank deposit slip with a handwritten receipt for wages on the reverse of the slip. The receipt provided to the investigator shows wages of $1,000 – written on the reverse of the CBA bank deposit slip of 17 October 2014 (Reply 35-36 & 79). It should be found that the sum paid to the worker in wages was $1,000 per week.

94. The applicant asserts in his affidavit that the CBA deposit slip receipt records payments to Mr Kass. There is no explanation as to why this document was provided to the worker if it recorded payments to another person. The evidence that the receipt was for payment to Mr Kass should be rejected given that no mention was made of this in the applicant's 10 December 2014 statement, the letter to the first respondent of 14 September 2015, nor in his 21 February 2018 statement. The evidence this was a payment to a contractor should also be rejected as there is no evidence of GST paid and no ABN referred to – the sum of $1,000 is consistent with a wage paid to the worker for five days work.

95. The statement of Mr Kass should be rejected as having little weight. He is not mentioned in the applicant's 14 September 2015 letter to WorkCover. The statement is not witnessed despite the evidence of other witnesses being put in affidavit form. Even if it is accepted, the payment of $1,000 is consistent with the conclusion that the applicant would not have had reasonable grounds to believe he was an exempt employer. The applicant's claim he did not have enough work for the worker is inconsistent with the fact that he was retaining Mr Kass as a contractor and also with the evidence of the tax return of significant sums paid to contractors in the 2015 financial year.

96. There is an inconsistency between the applicant's evidence that there was insufficient work to employ the worker for more than three to four or seven weeks and his letter of demand of 21 February 2015 (making a claim for damages). This letter refers to an installation of eight kitchens the day after the injury. Installing eight kitchens also suggests a large project, inconsistent with the applicant's evidence of insufficient work to continue to employ the worker. His responses to questions about this in cross examination count against his credibility.

97. It is disingenuous for the applicant to assert that he was not asked about the notice to finish by the investigators, given that he was asked about the circumstances of the injury and gave evidence in his 10 December 2014 statement about the employment agreement (at [9]-[11]).

98. The worker's statement of 12 November 2014 contradicts the applicant's assertion that he was employed on a temporary basis (Reply 40-43). He stated he was employed on a "full time basis" working Monday to Saturday and he was told he would be paid $200 per day – consistent with the employer injury claim form nomination of "full time" and "permanent" as completed by the applicant.

99. The applicant should not be permitted to raise the defence of "exempt employer" in any event on the basis of an *Anshun* estoppel. He is running the exempt employer argument in circumstances where that "was abandoned" in the proceedings leading to the 2016 consent orders. That abandonment was "by discontinuance with an agreement to pay the prior s 145 notice in full by instalments".

*The Worker's submissions*

100. The submissions for the first respondent are embraced by the worker. There is no basis to assert that the injury suffered by the worker was not significant, or to contradict his evidence as to the reasons for his inability to work, nor is it an issue for determination.

101. The present proceedings have become overly complicated considering the true issue for determination – which requires an assessment as to whether there is liability on the part of the applicant to pay amounts to the first respondent. The applicant has obfuscated and confused the true issue in the proceedings. The financial arrangements of the worker are not relevant, nor are whether he worked elsewhere or not. Any alleged credit issues relating to the worker are not relevant. The issue is only whether the applicant is an exempt employer.

102. If necessary, the Commission would have no difficulty in finding the worker was engaged by the applicant "for a period of time and was earning an agreed amount of $1,000 per week". Any assertion that the worker had some other form of employment or income is not supported by the evidence and is irrelevant to the determination of the issues.

103. The applicant has deliberately set out to modify his evidence in a manner to "plug gaps". This is evident, for example, from evidence advanced seeking to explain the handwriting on the back of the ATM receipt that totals an amount that is now said to be a portion of an amount owed to another contractor. It is an incredible coincidence that the part-payment contemplated to be made that day, but was not, just happened to represent precisely what the worker asserts was to be paid to him. For the first time also, it was alleged by the applicant that this receipt was "snatched" by the worker from him. This is inconsistent with the applicant's own evidence in his original statement (paragraph 12) that he would give the receipt to the worker as a receipt for his wages. The applicant had not explained this inconsistency.

104. The evidence of Mr Kass demonstrates the applicant had sufficient work to be retaining the services not only of the worker but also him – inconsistent with the assertions made that he only had enough work for himself and no one else. It is also inconsistent with the assertion that he needed to terminate the services of the worker because he had no work.

*Submissions of the applicant in reply*

105. Contrary to the submission for the first respondent, the test in *Kula* does, in the factual circumstances here, involve consideration of the applicant's state of mind. The applicant in *Kula* had not turned his mind to the relevant question informing whether or not he was an exempt employer. There was no space there for a subjective test. In the applicant's case now though, there was a subjective belief. The Commission must determine what that subjective belief was and, secondly, whether it was reasonable.

106. The applicant's statement on 10 December 2014 was drafted by an insurance investigator, then signed by an unsophisticated person without legal advice. The first respondent now seeks to use it as a comprehensive statement of legal effect. The investigation dealt with the injury and surrounding circumstances – not into the status of the applicant as an exempt employer. The same may be said of the claim form. Contrary to the submission for the first respondent, it cannot be said that the applicant ought to have known the distinction between the concepts of full time, permanent and temporary employment. Such terms are ambiguous. Their meaning is contextually determined, and can involve degrees of legal complexity.

107. The first respondent's submission that the applicant's letter of demand of 21 February 2015 leads to a conclusion that the worker's employment was to continue beyond October is wrong. The worker had already performed the work complained of and the applicant had discovered mistakes in production by the worker's wrong cutting – the letter merely asserted that the applicant was put to the cost and time of rectifying the mistakes the worker had made during the manufacture of the eight kitchens. The applicant did that additional work by himself. The worker was not the installer of those kitchens. The applicant gave evidence that they were manufactured and installed before that date. Mr Kass was the installer. Mr Kass did not work in the factory. He was called in as a contractor to do the installation.

108. The first respondent's submission about the applicant's 2015 tax return pointing towards a sufficiently large business to contradict the applicant's evidence is wrong. The "significant monies" submitted by the first respondent amounted to less than $1000 per week. The business was small. The first respondent also seeks to have it both ways in its submissions about the applicant's tax return – dismissing the validity of it when it relates to wages paid, but seeking to use it to show that the business was busier than said by the applicant.

109. The first respondent submitted that "the applicant initially told investigators he wrote the worker's pay details on the back of deposit slips" but the applicant made no such statement – his statement rather was "I provided him with a bank deposit slip as a receipt for his wages".

110. As to the *Anshun* estoppel, there would be no conflicting judgement on the same facts in circumstances where the previous proceedings were simply discontinued.

**Principles**

111. As to who carries the onus, I am bound by *Kula* (at [190-193]). It is important to then focus on the content of this: or exactly what needs to be shown. The words of s 155AA of the 1987 Act include: "… is an **exempt employer** … while the employer has reasonable grounds for believing…". In *Prior v Mole* [2017] HCA 10, (*Prior*)Nettle J stated (at [73]):

> "… the test of reasonable grounds for a belief is objective. But, depending upon the circumstances, belief may leave "something to surmise or conjecture", and as … stated in *George v Rockett*, while the objective circumstances necessary to found reasonable grounds to believe must point sufficiently to the subject matter of that belief, they need not be established on the balance of probabilities …"

112. Gordon J also stated the following in *Prior* (at [98-100]):

> "… When a statute prescribes that there must be "reasonable grounds" for a state of mind, it requires the existence of facts to induce that state of mind in a reasonable person. It is an objective test. The question is not whether the relevant person thinks they have reasonable grounds ... (99) …In explaining the connection between the "reasonable grounds" and requisite "belief", this court in *George v Rockett* stated … ' the objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof ' … (100) … Belief is not certainty … is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending upon the circumstances, leave something to surmise or conjecture …"

113. In *Kula*, Keating P had these principles in mind. He referred (at [150 and footnote 31]) to each of the passages from Nettle and Gordon JJ in *Prior* referred to above. While these principles apply to the ultimate question of whether there were "reasonable grounds for believing", the underpinning evidence for that does need to be proved on a more likely or probable basis. In relation to the applicant's assertions, I will assess them on that basis. I also note and take into account the discussion by Keating P in *Kula* in relation to "the test of … reasonable grounds …" (at [150-157]), and "wages that will be payable" (at [158-187]).

## FINDINGS AND REASONS

### Issue 1 – Was the applicant an exempt employer?

114. The first respondent submits (at paragraph 34) that the applicant's10 December 2014 statement was in close temporal proximity to the date of injury and is the most reliable evidence of the information available to him for the purposes of assessing whether a reasonable person would believe he was an exempt employer. While that submission was made in the context of an analysis of the financial and wages material, there is other material, more proximate than 10 December 2014 (or even the 19 November 2014 claim form) which refers to claims, by or for the applicant, that he was an exempt employer.

115. Leah Harris of Allianz noted on 31 October 2014, 11 days post-injury, that the applicant was "…claiming to be … exempt … total wages under $7,500 …" (ALD 44). The claims decision on 16 January 2015 also refers (at ALD 84) to "an early incident notification … reported to WorkCover on 28 October 2014 … the broker indicated when making the notification that the employer … was an exempt employer pursuant to s 155AA of the 1987 Act …".

116. I infer it likely that such notification by the broker was in accordance with the applicant's instructions. This is also consistent with the applicant swearing in his affidavit that "the day after Abdelahad injured himself I rang my broker and told him what happened … cannot remember whether I rang the insurance company or the broker did … but I do remember talking to Leah Harris … a few times" (ALD 230). So Allianz was informed, within eight days of the injury, that the applicant was claiming he was an exempt employer.

117. There is only one basis for exemption in s 155AA: the total amount of wages payable by the employer during the financial year to workers employed by the employer will not be more than $7,500. I infer from this evidence that the applicant made a representation (even if through his broker), between eight and eleven days after the injury, that he was "exempt". This meant that by then he had informed Allianz that he was claiming that he believed the total amount of wages that would be payable by him to his employees during the 2015 financial year would be no more than $7,500.

118. This of course does not, of itself, show he had the "reasonable grounds for believing". But it is a factor that appears to have been overlooked in the submissions for each respondent. This also applies to the applicant having told Mr Gottstein on 10 December 2014 (before the claims decision), that *he informed* the worker that he would employ him on a *casual* basis to give him a start to enter the workforce; *after* having been telephoned by the worker who was seeking employment on the basis of a referral from one of his relatives in Lebanon. Mr Gottstein found that the applicant was employed on a casual basis. This is a factor pointing towards the requisite "reasonable grounds for believing" existing. This evidence also has the ring of truth about it in my opinion for at least the following reasons.

119. *The worker* does not dispute that he *contacted the employer seeking employment* and did so through the applicant's relatives who he knew in Lebanon. The applicant's statement of 21 February 2018 confirms that he previously operated a large business, but two years after selling it, he commenced Genuine Kitchens in about 2013 – with the intention to do small jobs for selected clients to keep himself interested and earn an income. He intended to work on his own without employees. He was not seeking to expand (see appeal decision at [25]). That he was 71 years old in 2014 is relevant. Most people have retired by that age. It is clearly implicit in the applicant's evidence that he did not intend, and was unlikely to, employ any other person for the remainder of the financial year ending 30 June 2015. There is no evidence to the contrary about that. I do not see these matters as necessarily inconsistent with the way he has described the history of his businesses in the 10 December 2014 statement (see appeal decision at [17]) even though the same level of detail does not appear in that statement. I do not think the content of that statement militates against his credit. And there is no evidence to contradict his evidence in this respect.

120. These circumstances are, in my opinion, consistent with the applicant, indeed, telling the worker, before the injury, that he would employ him on a casual basis to give him a start to enter the workforce. If, say, there were other employees; or, say, it was the applicant who had sought out the labour of the worker – whether through advertising or word of mouth approach – I may not have been so persuaded. Also important is the absence of any, at least express, denial of this evidence from the worker. The first respondent has submitted that the worker's statement of 12 November 2014 contradicts the applicant's assertion that the employment was to be on a temporary basis. It refers to the whole three pages of the worker's statement of 12 November 2014 as supporting such proposition. But I do not see any such contradiction; after reading the whole of it. Certainly it does not specifically deny the evidence of the applicant that he was told that he would be put on as a casual.

121. I bear in mind that the reference to "casual" does not necessarily equate to temporary employment – and that the applicant has ticked both the "permanent" box on the claim form. However, one of the main criticisms of his evidence is his failure to include any reference to the worker being employed on a "temporary basis" in his 10 December 2014 statement, and his failure to tick the available "temporary" box on the claim form. It is submitted that the failure of the applicant to do these things means his evidence "has no credit". I do not agree.

122. As for the claim form, the applicant provided an explanation in his letter to WorkCover on 14 September 2015. He said that he was sent some claim forms to fill in after the accident and he "inadvertently ticked the box full time permanent insteed [sic] of casual … did not realise my mistake until I received your correspondence …". The submission for him in this respect is that he is unsophisticated, and descriptions of permanent or temporary, full time or casual have different and subtle meanings even in a legal context. Although he operated businesses with many employees over many years, he said he employed two women who did the office work, his English was poor, and that while he was able to speak English, he was not confident when filling in forms (appeal decision at [38]). I accept his evidence in this respect.

123. My reasons for doing so overlap with the aspect of the attack upon the applicant's credit because he used the services of an interpreter when being cross examined. I have observed him being robustly cross examined by two experienced counsel and think it was appropriate that he utilised an interpreter. I also take into account the aspect of this criticism of his credit on the basis that he did not use an interpreter when he was being cross-examined in the 2018 arbitration. That does not change my opinion. All it does is to raise a question as to whether there ought to have been an interpreter used in that proceeding as well. In my opinion, the applicant did not seek to use the benefit of the interpreter for any reason other than to assist him when he needed it. At times, he answered questions directly in English without using the interpreter, perhaps when he could or should have. He has conceded that he is able to speak English, but it is not his native tongue. It has long been the practice in workers compensation cases for applicants, whether workers or employers, to have the benefit of an interpreter in these circumstances. Also, to the limited extent that assessment of demeanour is relevant, I did not form an unfavourable impression of his evidence.

124. In all the circumstances, I believe it is likely he did inadvertently fail to tick the "temporary" box. I accept his evidence in that respect too. Even when he sought to remedy such claimed inadvertence in the 14 September 2015 letter, he still would not have ticked the "temporary" box. Even by that stage, when each respondent says he was "on notice of liability" about the claims decision, it appears he still thought the appropriate box was "casual". This is in context of him saying that he "…told Botros that I could only employ him for approximately 7 weeks as I was fully aware of the … regulations for … regarding part-time employment…". He has used the concepts "part-time" and "permanent", "full-time" and "casual" in ways that show he does not fully understand their legal meanings. That is unsurprising. I agree with the submission for him that it can often be a matter of legal argument as to what, in the circumstances, these terms precisely mean. He described the employment as "Temporary"

on 21 January 2015 (see paragraph 53 above). But this only serves to persuade me that it is more likely that his comment on 14 September 2015 (quoted in paragraph 122 above) is guileless, otherwise it seems likely he would have referred to intending to tick the "Temporary" box.

125. In this context, it is significant that the applicant informed Mr Gottstein, on 10 December 2014 (before the claims decision), that he *told* the worker he would employ him on a *casual* basis to give him a start to enter the workforce. This also appears in his statement on that day. It is consistent with him saying (14 September 2015) that he ticked the box "full time permanent insteed [sic] of casual". Importantly, the relevant context of him using the term "casual" was that he had told the worker that he could only employ him for about 7 weeks, i.e. temporarily.

126. The applicant does not expressly refer to the employment being temporary in his 10 December 2014 statement. But I think his position – that he just answered the questions he was asked and he was not specifically asked about this – has a basis. For example, this statement does not attempt to specifically deal with this critically important question – as it was properly formulated in the decision form as "Future Actions" that were *necessary*. But none of what the applicant states on 10 December 2014 is necessarily inconsistent with his present position, and some of it is at least potentially consistent with it; such as:

- "Currently I am the only worker" (with no mention one way or the other as to whether he was an employee);
- Genuine Kitchens had been established for only 18 months, with the applicant having owned other cabinet making businesses since 1967
- He did not know the worker prior to the worker telephoning him; advising that the worker knew one of his relatives in Lebanon;
- The worker commenced on 1 September 2014 on a casual basis – "informed me he wanted a start to get into the industry in Australia";
- He told the worker that he works alone and did not really need an employee – "gave him a start to assist him to get into the workforce";
- "When he commenced … told him I did not have enough work for the two of us and that he would have to work alone at times whilst I searched for more work".

127. This evidence, which is either agreed or un-contradicted, assists, in concert with the matters identified at paragraphs 117-120 above, in allowing me to be satisfied, on a likely basis, that the applicant was telling the truth when he stated in the 14 September 2015 letter that he had informed the worker that he could not employ him on a permanent basis, and that there was at least more than one warning about that. This also applies to, and points towards, a reasonable person reasonably believing the total amount of wages that would be paid by that person during the 2015 financial year to *employed* workers would not be more than $7,500. I have emphasised the word "employed" above to the intent that care must be taken not to conflate reference to an employee with a contractor. I appreciate the extended definition of "contractor" in the legislation. However, the question is about what a person would have *reasonably* believed. The applicant was clearly entitled to classify the worker as an employee rather than contractor. Equally clearly, he did not regard, or treat, Mr Kass as an employee, referring to Mr Kass as a contract installer he sometimes used.

128. The first respondent's submitted that "there is no evidence of GST being paid on the amount asserted by the applicant to represent a payment to Mr Kass", noted on the back of the CBA deposit slip of 17 October 2017. But this issue was not explored in any detail. This was only put for the first respondent in the context of the issue about the CBA deposit slip. Also, it is clear enough that, at least in the broad sense, the applicant was employed, and properly categorised as such by the applicant. Mr Kass was not. The worker was working full time, at least five days a week, and would usually commence by going to the factory. The worker also agrees "there were no other workers in the company only Elias Bader and myself". I accept that this evidence is also relevant to the assessment of the applicant's credit and I do take it into account in the assessment of his credit in the CBA deposit slip context**.**

129. The facts do give rise to circumstances where there was "something to surmise or conjecture" as noted in *Prior.* Before 1 September 2014, the applicant had no employees, he did not even have a company employing himself. This had likely been the case for about 18 months. The worker then approached him and specifically asked for a job, using contacts in Lebanon as a reference. The applicant informed or told the worker that he would give him a start to get into the workforce, but it was to be on a casual (intended to mean temporary) basis for the purposes of assisting him to "get into the workforce". Given this, there was always going to be a limited amount of money the applicant could pay the worker before crossing the threshold. The amount of money being paid, and the length of time the worker continued working for the applicant, were factors that would have been subject to some surmising or conjecture. Objectively viewed, this is also consistent with the applicant being concerned to terminate the employment by about early October 2014. I take into account the forceful case put for the first respondent ("embraced" by the worker) to the contrary, including the point that one would have expected the applicant to specifically mention that concern in his statement. But in all the circumstances, I think it is more likely that the applicant is telling the truth about that concern.

130. There is no express or clear evidence, if there is any at all, from the worker to contradict the applicant's evidence that he was told that the employment would be on a casual (in context, temporary) basis to give him a start to enter the workforce. It is also not a situation where this can be answered by noting such information would have *only* been within the applicant's mind. He stated that he told the worker this. The first respondent had an opportunity to clarify this, from 14 September 2015. It also at least knew the applicant claimed to have told the worker the employment was on a casual basis from about 10 December 2014.

131. There is also no express or clear evidence, if there is any at all, from the first respondent dealing with the "Future Actions… (that)…need to occur" noted in the claims decision (ALD 87- 88) – obtaining statements from the applicant and worker about whether the worker's employment was expected to be ongoing, and if not, why that would be so, why the applicant believed the total amount of wages payable by Genuine Kitchens for the 2015 financial year would not be more than $7,500, whether the worker expected that his employment would be ongoing, and if not when he expected it would have been terminated, and why.

132. These are now the most important questions in the case. The first respondent did not give the applicant an adequate opportunity to address them in early 2015. Evidence from him about these matters has existed, at least clearly so, since 14 September 2015. But there is no evidence from the worker in relation to these critical questions for the "Future Actions". One thing referred to was the need for a further statement from the worker, specifically asking him whether he expected that his employment with Genuine Kitchens would be ongoing, and if not, when he expected he would have been terminated, and what would have been the reason for that.

133. I am entitled to draw inferences, but they must be *probable* or *likely* ones. The highest the worker's evidence gets is in his statement of 12 November 2014: that he "…commenced …employment … on a full-time basis.." I am not prepared to infer from this that he has given evidence that his employment would be ongoing. The questions that were posed for the "Future Action" on 16 January 2015 were never answered by the respondents. They were only answered to the extent that the applicant has clarified his case.

134. Again, I recognise that any deficiencies in the investigation is not determinative. I must determine the question of whether the applicant was an exempt employer in accordance with the principles set out in *Kula*. But it does assist to go back to this very early stage of the first respondent's analysis of the applicant's claim (that he was an exempt employer; made within about 8 days of the injury) to see how that analysis has been conducted. To a significant extent, the present position of, and submissions for, the first respondent iterates the claims decision. I do accept that there has been a forceful denial of and challenge to the credit of the applicant and his claim that he was an exempt employer. In the result though, I do accept

his evidence, on the balance of probabilities, to a sufficient extent to allow me to be satisfied that he has proved, on the *Prior* standard, that he is a relevantly exempt employer.

135. One of the criticisms of the applicant by the first respondent was that he failed to cooperate with the investigation. I do not agree. The Allianz email of 17 December refers to him being "uncooperative with both return to work and investigation attempts (ALD 74)". The return to work part is clear: he noted "never return to work" on the claim form. But that is not inconsistent with his claim to be an exempt employer. Otherwise, there is no, at least adequate, evidence to support a lack of co-operation. There was a failed attempt to interview him in early December 2014, but he said that was because his wife was sick. There is no evidence that statement was incorrect. Yet, one of the supporting reasons for the claims decision on 16 January 2015 was "the employer has not been willing to assist Allianz in their enquiries into the claim… (ALD 86)" – and despite the applicant having signed a statement on 10 December 2014, apparently co-operating with Mr Gottstein.

136. I also do not agree with the first respondent's submission that the content of the applicant's tax return for the year ending 30 June 2015 shows that a reasonable person could not possibly have believed the wages payable for the financial year ending 30 June 2015 would not exceed $7,500. I do not think it is likely the tax return shows that. While total business income is noted at $234,935, total expenses come to $234,421.These expenses include the contractor/ subcontractor payments of $45,572, but they also include rent expenses of $28,000, motor vehicle expenses of $7,312 and "all other expenses" of $153,537. I do not see any detail of those other expenses. I may be able to assume that in a business such as kitchen installation, the cost of building materials and structures would be high. But I do not need to make any such assumption. There was no deeper analysis of this tax return by either party. Partly for this reason, I do not see the tax return is of assistance either way. Assuming the regularity of the claimed expenses, and there is no evidence otherwise, it may be that $234,935 per annum for total business income is consistent with the applicant's position that he worked alone and did not really need an employee. This amount equates to about $4,500 per week *including all* expenses. Also, the reference to the applicant not really needing an *employee* in his 10 December 2014 statement (paragraph 8) is not inconsistent with him requiring occasional assistance from contract installer(s). $45,572 equates to an average $876 per week. It is unclear, and was unexplored in the evidence, whether the whole of that amount went to Mr Kass or there were other contractors.

137. The applicant relies on the tax return too, noting that it refers to "total salary and wage expenses" at $4,800. This assumes the worker was not paid for any overtime. That is consistent with the applicant's evidence in that respect too. But the first respondent says the applicant has given contradictory evidence about the receipt for $1,000 written on the back of the bank deposit slip of 17 October 2014 – initially telling investigators he wrote the pay details on the back of deposit slips, then in his affidavit of 1 May 2019, asserting this was for payment to Mr Kass. It is submitted for the applicant that he made no such statement – he only stated "I provided him with a bank deposit slip as a receipt for his wages". The submission for the applicant is correct on a literal basis. As to whether there is a real difference though, I am unsure. The evidence of the applicant in this regard is unsatisfactory.

138. I agree with the submissions for each respondent to the extent that it is difficult to understand how the worker came to have in his possession the 17 October 2014 deposit slip, containing pay details that were consistent with what he says he was paid at that time. That the worker was paid cash for overtime worked also rings true to me. However, what is not clear is how much cash was paid, and or how regularly the overtime was worked. The evidence does not allow me to make a finding one way or the other about that; although I would doubt it would have amounted to as much as $400 and every week. Therefore, I am not persuaded by the evidence of the applicant, or Mr Kass, about the 17 October 2014 deposit slip.

139. Despite my misgivings about the applicant's evidence in this respect, I do not believe it necessary to make a finding one way or the other about this sub-issue. Ultimately, it essentially goes only to the question of the quantum of wages being paid to the worker. Both he and the applicant agree that $550 per week was paid into his CBA account during the employment. He said he performed overtime and was paid cash, but also says "I am not above to prove that". Despite that belief, it may, as counsel for each respondent has said, that the evidence regarding the 17 October 2014 deposit slip does constitute proof; as does the evidence from the worker that he would not have been able to survive on $550 per week.

140. The reason I believe it unnecessary to decide this is because even if I were to find that the worker was paid, as is submitted for each respondent, $1,000 per week, every week, I still believe there would have been reasonable grounds for believing in all the circumstances, objectively viewed, that the total amount of wages would not exceed $7,500. This assumes the applicant's evidence is accepted that he would have required the worker to leave by the end of the working week commencing 20 October 2014. I do accept his evidence in that respect and believe it is more likely than not, when all of the circumstances of the case – leading up to that point – are taken into account. I recognise that a precise calculation in this respect could *possibly* put the total wages at $8,000. But again, even that assumes he was always paid at least that amount every week; and I cannot be sure that is likely. More importantly, it is not a mathematical exercise; it is a question about whether a belief has reasonable grounds at a particular point.

141. The same analysis applies to the category of evidence dealing with the worker's Western Union money transfers, the bank statements and the wages book.

142. I still believe it likely the applicant did tell the worker he could only employ him for a short term to assist him to get into the workforce; and that he had given the worker more than one notice that he was wanting the worker to leave; and that the worker should be trying to find another job. He had come out of retirement, established a business which was relatively restricted in its operation compared to his earlier businesses and he had no employees. Then he was asked, through family references, to engage the worker. None of this contradicted by the worker. It is also corroborated by the evidence from his daughter. I accept her evidence.

143. I take into account the submission for the respondents about family loyalties and I treat the evidence of his daughter with care. That her affidavit did not appear in the 2018 arbitration proceeding causes me to consider whether it could be recent invention for the purposes of assisting her father's case. However, I am satisfied it is not. There could be a number of reasons why an affidavit was not obtained from her before; and there is insufficient reason to find otherwise. I am also significantly influenced by the background and circumstances leading up to the injury to the worker on 20 October 2014, as set out above and I think her evidence is consistent with that history. For reasons expressed earlier, and also taking her evidence into account, I believe the applicant was becoming more concerned about the worker remaining in employment by about late September / early October 2014.

144. The first respondent has submitted that Ms Lahoud's evidence is not relevant as it does not constitute knowledge of the applicant for the purposes of the test. That is beside the point. I am utilising it for the purposes of corroboration of the applicant's evidence in circumstances where his evidence has been called into question and my own assessment of his evidence is that there are, as I have identified, some unsatisfactory features about it. I have looked to other evidence as well to test it and compare it against, or with. It is also submitted that Ms Lahoud's affidavit contradicts the applicant's own information in the claim form in relation to the worker being described as "full time" and "permanent". I disagree with this submission for the same reasons that deal with the applicant's inadvertence in that regard.

145. A similar consideration applies to the category of evidence dealing with the worker's Western Union money transfers, the bank statements and the wages book.

146. As to the "Notice to Finish" document dated 19 October 2015, it has been submitted for the first respondent that it is disingenuous for the applicant to assert that he was not asked about such letter by the investigator, leading to his 10 December 2014 statement. Again, the applicant's response was that he answered the questions put to him by the investigator and "… he didn't put down all … what I said … didn't tell him what to write down, the question he asked me I answer put down all … I said…". It is also submitted for the first respondent that the applicant's evidence that the said notice was issued on the morning of 20 October has been contradicted by the evidence of the worker and the cross-examination of the first respondent (at page 8.30 transcript 30 May 2018). Again, I do not believe the worker does contradict this evidence. There is no reference in the submission as to where such evidence may be found. Also, I do not agree that the passage of the applicant's evidence referred to in the submission does, at least adequately, contradict his assertion. That passage reads:

> "… Q … put it to you that you never gave Botros a letter dated 19 October 2014?
>
> …A… Okay. Probably be the following day…
>
> … Q… 20 October?
>
> … A … Well I … (not transcribable) thought maybe if he wanted to come back as he usually come back, after 3 weeks in a row I thought he didn't have to come. I said if he wants to come on Monday I want to give it to him in writing.
>
> …Q … If you had given him that letter, you would have referred to it in your statement dated 10 December 2014 …?
>
> … A … Probably … (not transcribable)"

147. The applicant may have been confused here, as to whether the question referred to a letter being given, rather than prepared, on 19 October or 20 October. I do not see a concession that he did not give the letter to the worker. It would not be fair, let alone safe, to assume the last answer constituted a concession given only one word was transcribable; and because that would have been strikingly inconsistent with his position otherwise in such respect.

148. I agree with the submission for the respondent that it is a matter of concern that there was no mention in the statement of 10 December 2014 about the notice to finish work. But again, the applicant has stated that the control and direction of the 10 December 2014 statement was with the investigator. He has stated that he was never asked any questions about his "…exempt employer status or my intention. Had I been…would have said my intention…to only employ for a short period…".This rings true to me. He had already claimed, in late October 2014, that he was exempt, he had stated on 10 December, that the worker was employed "…on a casual basis…told me [sic] I work alone and do not really need an employee. I gave him a start to assist him get into the workforce…" For reasons earlier given, I also accept his reference to "casual" included the employment being temporary. In cross examination on 7 June 2019 he also stated that "this is the first time for a person to be injured". In viewing the whole of the evidence, including the lack of evidence contradicting this, I also accept such evidence. It is consistent with him stating he was not particularly sophisticated with these types of issues.

149. Contrary to the first respondent's submission, there is no evidence, including from the worker, to contradict the applicant that he gave the notice to the worker. A submission has been made about it by the worker's solicitor in a letter on 21 May 2018, stating that the worker maintains he did not receive "… letter conveniently dated 19 October 2014 …"

150. I accept that the worker's solicitor would not have made that submission without instructions from him. But it is not evidence. Procedure before the Commission is to be conducted with as little formality and technicality as proper consideration of the matter permits. But conclusions still need to be drawn from satisfactory material, in the probative sense, to ensure they are not seen to be capricious, arbitrary or without proper foundation or material (*OneSteel Reinforcing Pty Ltd v Sutton* [2012] NSWCA 282 at [2] (*OneSteel*). This matter affects serious questions about the credit of a witness. It needs to be dealt with carefully.

151. However, even if one were to accept that this submission from the worker's solicitor could be taken as a denial of the worker receiving the notice to finish, such submission still does not extend to deny the evidence of the applicant that he had already requested, on more than one occasion, for the worker to find other work and that he needed to terminate the worker's employment. If this evidence from the applicant is accepted, and I do accept it, it would still be enough for me to be persuaded, taking all other circumstances into account as well, that there were the requisite "reasonable grounds for believing…", because it would have been clear enough that the applicant was intending to terminate the employment, whether by way of the "notice to finish" or not. In this regard, and again assuming acceptance of his evidence, he did not need to prove such belief on the balance of probabilities, and some surmising or conjecturing could be acknowledged (*Prior*).

152. In the applicant's 21 February 2018 statement, the applicant said that he "was forced to issue … a termination notice on 24th of October …notice was in Arabic…". While it appears that this is intended to mean that the applicant gave the worker the notice on 24 October 2014, a full reading of the context clearly enough shows the applicant has made an unintended error about that date. The notice obviously could not have been issued on the Friday after the injury on 20 October 2014. I do not think anything turns on this inconsistency. While less obvious, I also do not think it likely that inconsistencies in his evidence about the number of weeks he expected to employ the worker are of real consequence; or at least of sufficient significance to change the opinion I otherwise have that he probably employed the worker on a "casual" basis, and only for a period of time to assist the worker to get into the workforce. The reference to 7 weeks (14 September 2015 letter), 2 to 3 weeks (2018 oral evidence) and one month (21 February 2018 statement) are relatively minor inconsistencies. The main factors in this analysis are, and I accept, that the employment was intended by the applicant to be short term and that he became increasingly conscious of the need to formally terminate it as each week passed after on or about the end of September and early October 2014.

153. The worker's evidence is not totally reliable either. He initially indicated, on 12 November 2014, that he commenced employment with Genuine Kitchens in about June of 2014. An investigation in 2016 by the first respondent noted his position as having "commenced working for Genuine Kitchen some 4 months prior to the accident on 20 October 2014" (paragraph 35 above). He had earlier informed Allianz that he worked for the applicant for approximately two. He then provided bank statements showing deposits for wages since July 2014. When Allianz noted these statements did not appear to belong to the applicant, and asked him to clarify, he said that those deposits were for a different employer - but maintained he also worked for the applicant about three months prior to injury, although at the start it was a trial period and he was paid in cash. It was then noted that the investigator found it difficult to communicate with the worker even via an interpreter (see paragraph 33 above). On 5 July 2019, he gave oral evidence that he started employment with the applicant on 1 September 2014.

154. There is also reference to the worker having asserted that he was in receipt of $1,200 per week (ALD 44). This is contrary to other statements he has made about it being $1,000 per week. The submissions for each respondent assert that the Commission ought find that the evidence supports a payment to the worker of $1,000 per week. Yet, after cross examination finished, he sought to add, without being asked, that the amount of cash he was paid was $600 per week. I do not accept that evidence. It is inconsistent with other evidence from him that the cash payment(s) for overtime was $400; and the relevant submission put for him.

155. I do not think the worker was being deliberately deceptive. Nor am I inclined to make any adverse findings about the other criticisms of his evidence by the applicant. It would be neither necessary or appropriate to do so because such matters, essentially going to alleged inconsistencies about periods of employment with other employers, or his tax return, are either not directly relevant or necessary for what I need to decide to dispose of the issues, or I have not been persuaded about such criticisms. Nevertheless, there is sufficient doubt about his evidence being totally reliable to warrant care needing to be taken with it.

156. In all the circumstances, including the lack of evidence for each respondent to contradict the applicant, I find it more likely than not that the applicant did give the notice of finish to the worker on 20 October 2014. I also find that the applicant did, indeed, raise with the worker his concern about the worker needing to look for other employment, and to leave (or prepare to do so), on more than one occasion prior to 17 October 2014, because he believed he could not keep the worker employed for much longer as the exemption limit may be crossed. I believe this likelihood to be consistent with the preponderance of the evidence.

157. The applicant's 21 February 2015 letter to the worker does not change my view about the core issue to be decided: whether "the employer (had) reasonable grounds for believing… the total amount of wages… payable… during the (2015) financial year… (was)… not more than the exemption limit…". This letter is a side issue. The applicant claimed $6,600.00 in damages from the worker on the basis of his belief that the worker "did not follow the cutting list measures and instructions". The first respondent says this letter "suggests a large project, inconsistent with the applicant's evidence of insufficient work to continue to employ the worker". This is on the basis of the letter referring to "an installation of eight kitchens the day after the injury". It is unnecessary, and would not be appropriate, for me to conduct an analysis of the rights and wrongs of this letter – except to the extent such is relevant to the issues that remain in this case. The applicant's response to questions about this matter were not persuasive to me (see paragraph 45 above). But I do think there was significant emotion involved; not only having regard to the manner in which the claim was put, but also because of the allegation that the worker "intentionally inflicted this injury on yourself since… installation of the eight kitchens job was to commence the next day…". Such allegation has never been an issue between the parties as far as I am aware; and appropriately so.

158. However, with reference to the main issue in the case, this letter really only amounts to the worker having more work after 20 October 2014 – but only specifically referring to the next day. This is not inconsistent with my earlier analysis and findings that the applicant had intended to finally force the termination of the workers employment by 24 October 2014.

159. The affidavit of Mr Shenouda falls into a similar category to the evidence of Ms Lahoud. He says he has been the accountant for the applicant since 2010. He has then referred to the applicant's "original business … Acme kitchens…", Noting that after he sold that business, that there was a two-year period where the applicant did not work. I do not take notice of what Mr Shenouda understood the applicant to do or not do during that two-year period, but otherwise such history is consistent with the other evidence and it is uncontradicted. This also applies to his comment that the applicant came to see him in 2013 wanting to start up a business again as a sole trader. He said that in these circumstances he utilises a checklist and one of the items on the checklist is workers compensation, any did discuss that with the applicant. I think it is likely this did occur. It is at least not inconsistent with the other evidence, and I believe it is consistent with the weight of evidence.

160. I do not take notice of his statements about what the applicant said to the worker, or the worker said to the applicant, when the applicant came to see him later in 2014, nor his statements about what the applicant's intentions were.

161. It can be seen that in these reasons, I have largely accepted the evidence of the applicant, particularly on the critical issues. It can also be seen that there are aspects of his evidence that I have either not accepted or found unsatisfactory or of concern. These mainly relate to the unpersuasive evidence of the applicant and Mr Kass surrounding the 17 October 2014 deposit slip, and the total amount of wages declared in the applicant's 2015 tax return not including reference to some cash payments for overtime worked. Both categories of evidence essentially go to the cash payments alleged by the worker. These do not outweigh or dislodge the satisfaction I otherwise have, for reasons already given, in accepting the applicant's evidence.

162. I also find, objectively viewed, that the applicant had reasonable grounds for believing that the total amount of wages that would be payable by him during the 2015 financial year, to workers employed by him, would not be more than $7,500.00. Again, the standard of proof used for the "reasonable grounds for believing" aspect is as discussed in *Prior*. However the standard of proof used for assessing the applicants evidence for purposes other than the "reasonable grounds for believing" aspect is what was or is more likely or probable.

163. There is no requirement to accept the whole of the evidence of any one witness. As noted by Campbell JA in *Chanaa v Zarour* [2011] NSWCA 199 (at [86]):

> "…The criminal law requires certain types of evidence to be corroborated … in the civil law corroboration is not a technical term, or a legal requirement … task of the judge is to decide, on the basis of the whole of the evidence (denials and all) what he or she accepts. In doing that, there is no requirement … to accept the whole of the evidence of any one witness".

164. I nevertheless apply the principle that although this Commission is not bound by the rules of evidence, it is still required to draw its conclusions from satisfactory material, in the probative sense, to ensure such conclusions are not seen to be capricious, arbitrary or without proper foundation or material (*OneSteel*).

**Is the applicant estopped from arguing that he was or is an exempt employer?**

165. I note the submissions for the first respondent, both on 13 June 2018 and 2 August 2019, in this respect. However, I disagree that there is an estoppel. It is asserted on the basis of the applicant having consented, in the 2016 orders, "to a payment of a s.145(1) Notice to Reimburse in Full, thereby accepting a liability to the Nominal Insurer".

166. As noted in paragraph 2 above, there was this notation in the 2016 consent orders: "the following is not a determination of the commission, however, I note ... parties have agreed …". The only subject of the determination was the discontinuance. So much seems to be accepted for the first respondent, given that the basis put for the estoppel is the decision of the High Court in *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45; (1981) 147CLR 589 (*Anshun*). Counsel for the first respondent has set out this passage in *Anshun* (at [602-603]):

> "There will be no estoppel unless it appears that the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it. Generally … it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff's claim … it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding. In this respect, we need to recall that there are a *variety of circumstances, some referred to in the earlier cases, why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigates the issue in another proceeding, e.g. expense, importance of the particular issue, motives extraneous to the actual litigation, to mention but a few* … generally been accepted that a party will be estopped from bringing an action which, if it succeeds, will result in a judgement which conflicts with an earlier judgement (emphasis added)"

167. Firstly, the ability of the applicant to raise the exempt employer issue in the present case does not conflict with any earlier judgement. Secondly, I do not think it was unreasonable not to rely on that issue in the proceedings leading to the 2016 Consent orders. In *Anshun*, the majority (at 603) made reference to "illustrations" given in *Cromwell v County of Sac* (1876) 94US351 at 356; (1876) 24 L Ed 195 (at [199]) as to why a party may justifiably refrain from litigating an issue in earlier proceedings. These observations appear in that case (at 356):

> "… various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defence in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of litigation and his own situation at the time. A party acting upon considerations like these ought not be precluded from contesting in a subsequent action other demands arising out of the same transaction."

168. The 2015 notice involved a relatively (to the size of the 2018 notice) small amount of $30,815.82. The proceeding was settled. It is well accepted policy in the law that parties should be encouraged so far as possible to settle their disputes without resort to litigation (e.g. *Jireh International Pty Ltd t/as Gloria Jean's Coffee v Western Export Services Inc (No. 2)* [2011] NSWCA 294 at [45]).

169. In light of the above principles, and for those reasons, I do not believe it was unreasonable of the applicant to not raise the exempt employer defence in the proceedings leading up to the 2016 orders. I infer, on a likely basis, that at least one of the significant reasons for settling that earlier case by agreeing to pay the 2015 notice in full, involved him taking into account the evidentiary landscape, in concert with what may have been perceived to be a lack of authoritative legal principle applying to s155AA of the 1987 Act (*Kula* was not decided until 2018). The length and complexity of the present proceeding also bears witness to this.

170. I have also taken into account the decision of the High Court in *Tomlinson v Ramsey Food Processing* [2015] HCA28; (2015) 256CLR507 in this regard. Relevantly, and for the same reasons appearing above, I do not think the applicant's present reliance upon the exempt employer defence constituted an abuse of process.

**Should an order be made that the applicant not be liable to reimburse the first respondent pursuant to the 2015 notice?**

171. It is common ground that there is no RA pursued now. If I am wrong about that, there were no submissions put for the applicant referring to the reconsideration power or any of the relevant principles. Nevertheless, it appears the applicant still seeks a remedy in respect of the 2015 notice – despite the 2016 consent orders containing a notation that the applicant had agreed, on 2 February 2016, to pay the amount claimed in the 2015 notice in full. It is totally unclear as to the basis upon which the applicant asks the Commission to make such an order. There are no submissions in support of such claim either. In those circumstances, I see no basis to make the order sought in this respect.

172. Even if I am wrong about understanding that the RA is no longer on foot, I would still refuse to make the order sought. As the first respondent correctly submitted, the 2015 notice was the subject of a private agreement. I therefore doubt whether the Commission would have jurisdiction to deal with this, even with a RA. But it is not necessary to decide that. It is sufficient to state that on the evidence before the Commission in these proceedings, I would not make such order. The agreement noted in the 2016 orders clearly enough was intended to finalise the claim by the first respondent in the 2015 notice. Finality in litigation is of course an important policy in the law.

**SUMMARY**

173. I find that between 1 July 2014 and 24 October 2014, the applicant had reasonable grounds for believing that the total amount of wages that would be payable by him during the financial year ending 30 June 2015 would not be more than $7500.

174. The applicant is not estopped from arguing that he was an exempt employer with respect to the notice issued by the first respondent on 15 January 2018 pursuant to s145 (1) of the 1987 act.

175. The applicant's claim for an order that he not be liable to reimburse the first respondent with respect to the notice issued by that respondent on 14 August 2015 under s145 (1) of the 1987 act, is refused.