WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **4845/20**
Applicant: **Masoud Jafarian**
Respondent: **Wildfire Interiors Pty Ltd**
Date of Determination: **8 January 2021**
Citation No: **[2021] NSWWCC 12**

The Commission determines:

1. The applicant was not a "worker" in the employ of the respondent within the meaning of section 4 of the *Workplace Injury Management and Workers Compensation Act 1998* as at 15 February 2018.

The Commission orders:

2. There will be an award for the respondent.

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

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 GLENN CAPEL, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Masoud Jafarian (the applicant) is 50 years old and was allegedly employed by Wildfire Interiors Pty Ltd (the respondent) as a painter.

2. There is no dispute that the applicant sustained injury to his neck and lower back when he blacked out and fell from a ladder on 15 February 2018. It appears that the applicant submitted a claim to icare workers insurance (the insurer) and it accepted liability in respect of a lumbar spine for medical expenses. There is no correspondence regarding what appears to have been a decision to pay medical expenses on a provisional basis. It is unclear whether the applicant was paid any weekly compensation.

3. On or about 17 August 2019, the applicant's treating neurosurgeon, Dr Khong, sought approval from the insurer to perform L5/S1 anterior lumbar interbody fusion. A quote for the surgeon's fees of $8,936.25 and associated expenses was submitted on or about 19 August 2019.

4. On 2 March 2020, the insurer issued a notice pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), disputing that the proposed surgery was reasonably necessary as a result of the injury sustained on 15 February 2018. The insurer cited s 60 of the *Workers Compensation Act* 1987 (the 1987 Act).

5. On 11 May 2020, the applicant's solicitor requested that the insurer review its decision regarding the proposed surgery.

6. On 25 May 2020, the insurer carried out a review pursuant to s 287A of the 1998 Act, and advised the applicant that it intended to maintain its decision.

7. By an Application to Resolve a Dispute (the Application) registered in the Workers Compensation Commission (the Commission) on 27 August 2020, and amended at the arbitration hearing, the applicant claims medical expenses in respect of proposed lumbar surgery pursuant to s 60 of the 1987 Act due to injury sustained on 15 February 2018.

PROCEDURE BEFORE THE COMMISSION

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

9. At the telephone conference before me on 25 September 2020, the respondent was granted leave to place "worker" in issue.

10. The matter was listed for a conciliation conference and arbitration hearing before me on 10 November 2020, but was adjourned to 22 December 2020, so that the respondent could obtain evidence to address matters raised by the applicant in a further statement and for further financial material to be exchanged and filed in the Commission.

ISSUES FOR DETERMINATION

11. The parties agreed that the following issues remain in dispute:

    (a) whether the applicant was a "worker" in the employ of the respondent on 15 February 2018 - s 4 of the 1998 Act;

    (b) the respondent's liability in respect of the payment of medical expenses – s 60 of the 1987 Act, and

    (c) whether the surgery proposed by Dr Khong, namely an L5/S1 fusion, and associated expenses, is reasonably necessary treatment as a result of the injury arising out of or in the course of the applicant's employment on 15 February 2018 – s 60 of the 1987 Act.

12. It was agreed that submissions would be confined to the "worker" issue, and in the event that the applicant was successful, the matter would be allocated a telephone conference to deal with the remaining issues.

EVIDENCE

Documentary Evidence

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

    (a) Application and attached documents;
    (b) Reply and attached documents;
    (c) Application to Admit Late Documents received on 2 November 2020;
    (d) Application to Admit Late Documents received on 3 November 2020;
    (e) Application to Admit Late Documents received on 16 November 2020;
    (f) Application to Admit Late Documents received on 1 December 2020, and
    (g) Application to Admit Late Documents received on 3 December 2020.

Oral Evidence

14. Neither party sought leave to adduce oral evidence or cross examine any witnesses.

REVIEW OF EVIDENCE

Applicant's statements

15. The applicant provided a statement on 15 June 2018. He stated that he was engaged by Adam Rujnic of the respondent as a contract painter in about July 2017. There was no written contract, and they negotiated a pay of $40 per hour. He worked 40 to 48 hours per week, usually from Monday to Friday from 7.00 am to 3:30 pm, and often on Saturdays. He was supervised by Mr Rujnic.

16. The applicant stated that one of the reasons he was working on an hourly rate was because he did not have enough money to secure big jobs of his own, because one needed about $50,000 to $60,000 up front. He invoiced the respondent through his business, Efficient Handyman Services Pty Ltd, ABN 216 005 824 01, (EHS) as a contractor. He maintained his own workers compensation policy with GIO, and he thought that this was later transferred to Employers Mutual Ltd.

17. The applicant stated that he completed a Safe Work Method Statement for the respondent, but not on the site where he was injured. He never received any training on safe working procedures, or safety or general training.

18. The applicant stated that on the day of the accident, he was five minutes late to work, and Mr Rujnic was angry. He advised that he was late at least once a week during the six months that he worked for the respondent. He advised that when he complained about the hot working conditions, Mr Rujnic told him to keep working. He described the circumstances of his injury and the aftermath.

19. The applicant indicated that Mr Rujnic asked him if he was going to claim on his own workers compensation policy. The applicant said that he would do so, but when Mr Rujnic visited him in hospital, he told him that he could make a claim on the respondent's policy because he was working on the respondent's job.

20. In his statement dated 17 August 2020, the applicant stated that he submitted invoices to the respondent under his business name, and the respondent would deposit the funds into his business account. He worked in various places for the respondent for approximately six months, and during this period, he had maybe one other small job.

21. The applicant stated that the respondent supplied all tools and resources, such as brushes, rollers and paint. On some occasions, he was given white work shirts. When he travelled to the jobs, the tools would already be on site. He was always instructed what to do on arrival. Mr Rujnic was his direct supervisor and he was generally present on all of the job sites.

22. In his statement dated 30 October 2020, the applicant indicated that he always felt that he was a typical employee and was subject to the direction and control of Mr Rujnic. He could not have sent someone else to do his job, and he was not able to decide when or where to work. He could not dictate the days or times that he worked. He exercised no independent judgement regarding the tasks that needed to be performed. He was directed what to do on a day to day basis.

23. The applicant stated that he obtained an ABN in or around 2009. He confirmed that he did some work as an independent contractor at the Hornsby RSL in January 2018. This involved repairing, patching, undercoating and painting some doors and walls in the function rooms and the corridor. He invoiced it for his labour, materials, tools and paint, and he added GST. This work was independent from work he did for the respondent.

24. The applicant stated that a friend of the respondent, Rob, called him and asked whether he could perform some work for him. He claimed that he told Rob that he would have to check with his boss, Mr Rujnic. Mr Rujnic had no problem with him doing this work. He performed this work for Rob on 18 January 2018 and 27 January 2018.

25. The applicant stated that he some work for Opal Painting, Talgat Abbas' company, and he invoiced him on 27 September 2017. Talgat was a friend of Mr Rujnic. He did one day's painting for Talgat and invoiced him on 22 December 2017. He had to ask Mr Rujnic for permission to undertake this work.

26. Finally, in his statement dated 12 November 2020, the applicant indicated that his accountant only completed a single tax return for the financial year ending 30 June 2018. There was only one BAS statement completed for that financial year.

ABN and ASIC Searches

27. The structure of the applicant's business concerns is confusing and the evidence is somewhat lacking. Accordingly, I have undertaken some independent internet research on the Australian Business Register.

28. An ABN search shows that the applicant obtained an ABN 74 055 907 351 on 4 August 2009. He conducted two business under this ABN as an individual/sole trader.

29. Masoud Jafarian t/as Efficient Handyman Services operated from 12 September 2012 until the ABN status was cancelled on 15 February 2018.

30. Masoud Jafarian t/as Top Quality Painting and Handyman operated from 22 March 2014 until the ABN status was cancelled on 12 November 2015.

31. The applicant, as an individual/sole trader, was registered for GST on 3 September 2013 and this was cancelled on 14 February 2018.

32. ABN and ASIC searches show that the applicant obtained an ABN 21 600 582 401 for his business, and it seems that it operated under a different name when it was first registered on 7 July 2014. The name of the prior business is unknown. The name was changed to Efficient Handyman Services Pty Ltd and it was registered for GST on 1 July 2015.

33. On 3 October 2017, ASIC issued a Notice of Proposed Deregistration under s 601AB(1) or (1A) of the *Corporations Act 2001*. These sections concern deregistration of a company where particulars or documents have not been, review fees have not been paid or ASIC suspects that the company is not carrying on a business.

34. Efficient Handyman Services Pty Ltd was deregistered on 3 December 2017. The ABN status was cancelled on 24 April 2018 and its GST registration was cancelled on 13 February 2018. The entity status was changed from “active” to “cancelled” on 24 April 2018.

Workers Compensation Insurance Policy documents

35. The applicant had a worker compensation policy (policy no. 124182801) with GIO in the name of EHS. The policy commenced on 31 October 2015, and at some stage was transferred to the insurer from GIO. The policy was due for renewal on 31 October 2017.

36. The insurer wrote to the applicant and advised that his premium for EHS for the next 12 months was $3,310.35. This was based on annual wages of $58,500.

37. Statements of coverage were issued on 5 October 2017 and 1 November 2017. These identified one employee, wages of $58,500 and coverage until 31 October 2018. A tax invoice for the premium was sent to the applicant on 1 November 2017, with the premium due for payment on 1 December 2017.

38. The insurer wrote to the applicant on 27 November 2017, reminding him that the premium was due for payment on 1 December 2017.

39. The insurer initially adjusted the premium to $2,546.41, based on estimated wages of $45,000. An earlier adjustment of premium to $175 based on wages of $100 must have been an error. On 26 June 2018, the insurer issued a statement of coverage. This identified one employee, wages of $45,000 and coverage until 31 October 2018.

40. The insurer again adjusted the premium, reducing it to $1,414.67, based on wages of $25,000. On 19 July 2018, the insurer issued a statement of coverage. This identified one employee, wages of $25,000 and coverage until 31 October 2018. The insurer also issued a tax adjustment note that identified a premium reduction of $1,131.74.

41. On 20 July 2018, the applicant completed a cancellation of policy request from, requesting that the policy for EHS be cancelled as from 15 February 2018 because the business ceased trading in New South Wales. The relevant forms were completed and returned to the insurer on 1 August 2018. There is a wage declaration that refers to the period 31 October 2017 to 15 February 2018, but it is otherwise blank.

42. On 24 September 2018, the insurer confirmed that the policy of EHS, which commenced on 31 October 2015 and was renewed on 31 October 2016 and 31 October 2017, was cancelled effective from 15 February 2018. In order to finalise the policy, the insurer requested the applicant to compete an actual wages declaration form.

43. On 24 September 2018, the insurer issued a tax invoice that showed a premium reimbursement of $1,239.67.

2017 and 2018 Calendars

44. The 2017 calendar shows that the applicant worked for two full weeks (12 days) from 31 July 2017 to 12 August 2017. He worked on a further seven days in August 2017.

45. The applicant only worked for one day in September 2017, 13 days in October 2017, 21 days in November 2017 and three days in December 2017. In January 2018, the applicant worked for seven days, and he worked a total of 10 days (including the date of the incident) in February 2018. Apart from the initial two weeks in July/ August 2017, the applicant rarely worked for a full week.

Applicant's Tax Invoices

46. The applicant submitted tax invoices to the respondent under the business, EHS, commencing on 5 August 2017. The applicant charged $45 per hour, not $40 per hour, and he also added GST. The rate was reduced to $40 per hour plus GST for all invoices issued after 15 September 2017.

47. There is reference to a business "Efficient Coating" of the same address on invoices 223678, 223679, 223687 and 223695. An ASIC search shows that this entity was apparently the trading name of the applicant's business from 26 July 2017 to 23 April 2018.

48. The tax invoices dated 19 August 2017 and 28 August 2017 both bear the invoice number 223670, so the second invoice most likely should had have been 223671.

49. The applicant issued invoice 223673 to Opal Painting/Talgat on 15 September 2017 for 24 hours work, invoice 223676 on 29 September 2017 for the equivalent of 48 hours work, invoice 223677 on 10 October 2017 for 16 hours work, and invoice 223688 for eight hours work on 22 December 2017. The rates were $40 per hour plus GST.

50. The applicant issued invoice 223675 to Caleb for 16 hours work at $40 per hour, plus GST on 23 September 2017.

51. The applicant issued invoice 223679 to Rob on 21 October 2017 for eight hours work, invoice 223681 on 29 October 2017 for nine hours work, invoice 223692 on 18 January 2018 for 40 hours work and invoice 223693 on 27 January 2018 for one hour of work. The rates were $40 per hour plus GST.

52. Invoice 223687 concerned one day's work for the respondent in the week ending 18 December 2017. This day is not reflected in the 2017 calendar.

53. The applicant issued invoice 223694 to Hornsby RSL on 31 January 2018. This related to the provision of labour for the equivalent of 54 hours at the rate of $40 per hour, plus GST. The applicant also charged the club $495 plus GST for materials, tools and paint. This is the only time that the applicant has included such a charge in an invoice.

54. Curiously, the final tax invoice submitted on 16 February 2018, the day after the accident, only referred to the provision of "20 hours Labour painters" at a cost of $800. According to the 2018 calendar, this related to work undertaken on 12 February 2018 and 14 February 2018. There was no GST levied on this amount.

Applicant's bank statements

55. The applicant's personal Westpac eSaver and Choice statements are in evidence, but of little relevance. The main operating account is the Westpac Business One account.

56. The Westpac Business One statement is in the applicant's name. The statements show that deposits were made by the respondent from 7 August 2017 to 19 February 2018, consistent with the tax invoices submitted by the applicant. The statements also show deposits made by other parties.

57. The applicant was paid $4,353.69 and $4,337.80 by James Clifford Constructions on 16 June 2017 and 19 June 2017 respectively.

58. The applicant was paid $7,810 by Hornsby RSL on 15 June 2017 and $2,920.50 on 22 February 2018.

59. Talgat Abbas paid the applicant $1,000 on 12 September 2017, $760 on 20 September 2017, $704 on 13 October 2017 and $400 on 29 December 2017.

60. There were deposits of $352 (invoice 223679) and $396 (invoice 223681) on 6 November 2017.

61. Joanne Hamid/ Caleb Strike deposited $704 on 16 November 2017.

Applicant's 2018 Tax Return and BAS Statement

62. The applicant's BAS statement for the financial year ending 30 June 2018 was submitted on the ABN 74 055 907 351, which was the applicant's individual ABN. This disclosed total sales of $37,324 and GST of $3,393, non-capital purchases of $14,178 and GST of $1,289. The applicant's GST liability was $2,104. It is unclear why the business ABN was not included.

63. The applicant's tax return for the financial year ending 30 June 2018 was in respect of the ABN 74 055 907 351 and the business Masoud Jafarian t/as Efficient Handyman Services. The main business activity was identified as "Other Residential Building Construction".

64. The return disclosed business income of $33,931, and expenses of $12,889, resulting in a net income of $21,042. These figures are consistent with the BAS statement. The adjusted taxable income was $21,154. The nature of the expenses is unknown as the expenses schedule is not in evidence. These figures seem to reflect the fees charged in the tax invoices issued by the company.

65. The Income Tax Return Tax Estimate is consistent with the tax return. It does not identify any wages paid or tax withheld, but includes PAYG Income Tax Instalments paid of $3,066.

66. The Notice of Assessment confirmed a taxable income of $21,154 and PAYG instalments as notified in activity statements. There is no evidence to explain this item.

Advertising

67. Copies of entries in the online Yellow and Pink Pages are in evidence. These were downloaded on 2 December 2020.

68. According to the Yellow Pages entry, EHS were painters and decorators located at Belmore in New South Wales. The mobile phone number matches that of the applicant and corresponds with the Commission's records. This advertisement was downloaded on 2 December 2020. An internet search by me showed that the advertisement has been removed.

69. The Pink Pages entry identifies EHS as offering handyman services in the Canterbury Bankstown region. The mobile number is only partially disclosed. An internet search by me showed that this business is still advertised and the applicant's full mobile number can be viewed.

Respondent's Financial Documents

70. The respondent's Profit and Loss Statement for the year ending 30 June 2018 showed payments of $125,075.65 to subcontractors. No wages were declared, but there were Director's Fees of $70,000.

71. The Company tax return for the year ending 30 June 2018 showed contractor, subcontractor and commission expenses of $125,076 and salary and wage expenses of $70,000, consistent with the Profit and Loss Statement.

72. The BAS statements showed salary, wages and other payments of $21,200, with PAYG tax withheld of $4,500 for the September 2017 quarter, salary, wages and other payments of $21,200, with PAYG tax withheld of $2,000 for the December 2017 quarter, salary, wages and other payments of $21,200, with PAYG tax withheld of $4,500 for the March 2018 quarter, and salary, wages and other payments of $16,100, with PAYG tax withheld of $6,500 for the June 2018 quarter. Therefore, there were declared salary, wages and other payments of $79,700 and PAYG deductions of $17,500, which differ slightly from the wages declared in the tax return.

Medical evidence

73. Given the discrete nature of the matter to be determined, I do not propose to summarise the medical evidence in any detail.

74. The histories recorded by the doctors do not shed any light on the "worker" issue, although in his initial clinical entry dated 28 May 2018 and his reports, Dr Calvache-Rubio indicated that the applicant "works for his employer as a painter/sole trader"[1]. In the medical certificates, the applicant was described as a "painter/sole trader".

Statements of Adam Rujnic

75. Adam Rujnic provided a statement on 20 June 2018. He confirmed that in July 2017, he contacted another painter, Talgat, and asked if he could recommend a painter. He was overloaded with work and he needed to take on another worker. Talgat recommended the applicant, who called him about a week later.

76. Mr Rujnic stated that the applicant asked him how much work he had and indicated that he could start in early or mid-August 2017. The applicant told him that he could work for him for a couple of weeks and then he had another job. He indicated that he did not intend to work for the respondent for any extended period. Mr Rujnic stated that according to the applicant's website, he had worked on a hotel on the central coast for James Clifford Constructions.

77. Mr Rujnic stated that he agreed to pay the applicant $40 per hour, a higher hourly rate compared to the other painters, because he had his own company. There was no written contract. The applicant invoiced the respondent each week for the work performed under the company name EHS. He confirmed that the applicant was not an employee of the respondent.

78. Mr Rujnic stated that the applicant told him that he had all the necessary insurances for himself through his company. The applicant usually worked Monday to Friday from 7.00 am to 3:00 pm, and on the occasional Saturday. He worked on a total of four sites.

[1] Application, p 75.

79. Mr Rujnic advised that the applicant did not receive any job specific or safety training. He supervised the applicant, and they worked in a team of three including a third painter, Elvir Mahmic. He would arrive on site and set up the job before the applicant and Mr Mahmic arrived. Most of the day was spent painting offices. The applicant's duties involved rolling, cutting, laying out drop sheets, masking skirting boards, and carrying paint tins and ladders.

80. Mr Rujnic stated that on the day of the accident, the applicant arrived approximately 30 minutes late. He told them what had to be done. He advised that the applicant probably complained about feeling hot and faint, but he would not have made him work if he was ill. He agreed that he moved the A frame ladder and the tools from the room after the incident.

81. Mr Rujnic stated that he contacted the applicant the following day and a week later when he was in hospital. The applicant told him that he was going to make a claim for his injury through his own workers compensation policy. He stressed that there was no discussion about a claim being made on the respondent's policy. Approximately two weeks later, the applicant told Mr Rujnic that he was fit to come back to work, but he advised him to rest.

82. Mr Rujnic provided a statement on 24 August 2020. He advised that when the applicant commenced work, he had told him that his work was slow and that he would likely only work for a few weeks. He had another job that he had to complete.

83. Mr Rujnic stated that the applicant worked for two full weeks from Monday to Saturday. Thereafter, he only worked sporadically. From 17 August 2017 to 17 October 2017, the applicant only worked for eight days. Mr Rujnic did not know what the applicant was doing on the days that he did not do work for the respondent.

84. Mr Rujnic stated that the applicant would usually advise him at the end of the week whether he was available to work during the following week. The applicant would invoice him on a weekly basis for the hours that he worked. The applicant submitted 19 invoices under the name EHS. The invoice numbers were not sequential.

85. Mr Rujnic indicated that he made payments by EFT to the business account of EHS. The applicant told him that he had his own ABN and insurances, and this was part of the reason why he agreed to pay him at a higher hourly rate than his employees. The applicant did not wear a uniform with the respondent's markings. He provided his own transport. On occasions, he used his own tools, brushes and rollers, but these items were provided on some jobs.

86. Mr Rujnic stated that the applicant only worked when he was available, and he set the times and dates that he could work. He continued doing work elsewhere for others when he was not working for the respondent.

87. Mr Rujnic provided a further statement on 30 October 2020. He confirmed that he contracted on behalf of the respondent for the provision of painting services with EHS in July 2017. This entity provided tax invoices from 31 July 2017 to 14 February 2018.

88. Mr Rujnic indicated that he was unaware that the applicant's company was deregistered on 3 December 2017, and he continued to receive tax invoices from EHS. As far as he was aware, the respondent was contracting with EHS for the provision of painting services. At no stage did the applicant inform him that the arrangement between the respondent and the applicant's company had changed. He was always under the impression that the contractual relationship for the provision of painting services with EHS was continuous from 31 July 2017 to 14 February 2018.

89. Mr Rujnic stated that the respondent intended to enter legal relations with EHS, and at no stage did the respondent intend to enter legal relations with the applicant as an individual. There was never any discussion or any agreement about the applicant being employed directly by the respondent. The painting services were always provided through EHS.

90. Mr Rujnic indicated that he paid EHS for the number of hours worked at an hourly rate plus GST. The respondent did not pay the applicant holiday, sick or long service leave, and it did not deduct PAYG tax or issue group certificates.

91. Mr Rujnic stated that he advised the applicant what work was to be done and he was not advised how to do that painting work. The applicant was an experienced painter and his company had been providing services to his company and others for an extensive period of time.

92. Mr Rujnic stated that the applicant was free to work any hours that he wished when work was available. He was able to turn down work and in fact he did so because he was performing painting services for others. There were no set hours. The respondent provided the applicant with paint and some tools on occasions. On other occasions, he would use his own equipment.

93. In his final statement dated 2 December 2020, Mr Rujnic reiterated many of the maters referred to in his previous statements. The applicant advertised for work through a website and the Yellow and Pink Pages.

94. Mr Rujnic stated that he would provide the applicant with details of the location of the job. He would show the applicant and other contractors what work needed to be completed. The applicant would determine how the job would be performed, and he was able to exercise his own judgement on a daily basis. He agreed that the work times would be between 7.00 am and 3.30 pm, as this suited the customers.

95. Mr Rujnic indicated that Rob was a friend and a painter in the painting industry. He sometimes provided services to the respondent. The applicant only knew Rob though the respondent and Talgat.

96. Mr Rujnic advised that when the applicant secured work with another company, he would advise that he could not perform any work for the respondent in that period. The applicant did not ask permission to work for Rob, but rather he would tell him that he was working for Rob and that he could not work for the respondent during that period . The same applied when the applicant was working for Talgat/Opal Painting Services.

97. Mr Rujnic stated that the applicant and Elvir Mahmic were independent contractors. Mr Mahmic had been providing painting services for over 10 years and he was given preference for any available work. Mr Mahmic was paid an hourly rate plus GST as a contractor and he was not paid wages.

98. Mr Rujnic stated that he was the only full time employee of the respondent. He received a weekly wage and a group certificate. No other group certificates are issued.

APPLICANT'S SUBMISSIONS

99. The applicant's counsel, Mr Tanner, submits that when one considers whether the applicant was a worker or an independent contractor, one must look at the substance of the relationship, notwithstanding the documentary evidence, having regard to s 354(3) of the 1998 Act, "to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal form".

100. Mr Tanner submits that in his initial statement, Mr Rujnic discussed the relationship in a natural way, but in his second statement, he described the relationship in terms conducive to the respondent's case. He indicated that he was overloaded with work and he needed to take on another worker. This shows the true employment relationship and should be the end of the case.

101. Mr Tanner submits that Mr Rujnic agreed to pay the applicant at a higher rate than the other workers because he had his own company. The others provided labour, and so this is a superficial distinction merely because he had a company. There was no contract. The respondent was providing work and Mr Rujnic was supervising the painters.

102. Mr Tanner submits that Mr Rujnic confirmed that the painters worked from Monday to Friday, from 7.00 am to 3.00 pm, which is consistent with the usual working day for tradesmen in the painting industry. He acknowledged that he supervised the applicant and Mr Mahmic. He retained the control, which would not be the case if the applicant was an independent contractor who was responsible for a specific service.

103. Mr Tanner submits that Mr Rujnic described the applicant's daily job of painting offices under the respondent's supervision. This is consistent with employment. The work was not a particular job at a particular place.

104. Mr Tanner submits that Mr Rujnic stated that "In the time that the claimant was working for me, we attended a total of four job sites". This is consistent with a working relationship, and there is no reference to the provision of services. The respondent also said that he showed the applicant and Mr Mahmic what they were doing. This shows that the respondent was in control and was directing duties.

105. Mr Tanner submits that in his initial statement, the applicant explained that he was paid at an hourly rate. This is consistent with employment, because he did not quote for the job. He said that he worked at an hourly rate because he did not have enough money to get big jobs on his own. This is distinct from a commercial agreement of an independent contractor.

106. Mr Tanner submits that in his second statement, the applicant confirmed that the respondent supplied him with tools and resources. The items were taken to the site by the respondent, where the applicant was instructed what he had to do. If the applicant was running a business, this would have been done by him.

107. Mr Tanner submits that the matters to be considered as to whether someone was running a business were discussed in great detail by the Federal Court of Australia in *On Call Interpreters and Translators Agency Pty Ltd v Commissioner for Taxation (No 3)*[2].

108. During his submissions, Mr Tanner quoted extensively from this decision, but I do not propose to repeat all of the quotes here. His submissions were recorded, and transcript will be available, if required.

109. Mr Tanner submits that there needs to be an assessment of the nature or the relationship the person has with the entity that takes the benefit of the work. The applicant had a relationship with the respondent who gained the benefit of his work. The applicant arrived at the place of work, where the tools and equipment were located. He did what he was told and worked from 7.00 am to 3.00 pm. The totality of the relationship needed to be considered.

110. Mr Tanner submits that the respondent says that there were contractual terms between the two businesses, but the work practices make it clear that the applicant was a worker under the control and direction of the respondent. One must look beyond and beneath the documents. In this matter, we should not be distracted by the business material which is a red herring. The applicant was providing personal services at an hourly rate, not services for hire.

[2] [2011] FCA 366, (*On Call Interpreters*).

111. Mr Tanner submits that,

> "when personal services are provided to another business, an independent contractor provides those services whilst working in and for his or her own business, whereas an employee provides personal services whilst working in the employer's business: at [40]. Unless the work is being provided by an independent contractor as a representative of that entrepreneur's own business and not as a manifestation of the business receiving the work, the person providing the work is an employee"[3].

112. Mr Tanner submits that one has to consider,

> "is the person was performing the work as an entrepreneur who owns and operates the business; and, in performing that work, is that person working in and for that person's business as a representative of that business and not of the business receiving the work?"[4].

113. Mr Tanner submits that it could not be said that the applicant was working in his own business as a businessman or entrepreneur. There was a contract between the respondent and the customer. He was required to provide an outcome. The applicant's role was to manifest the respondent's business to complete the contract.

114. Mr Tanner submits that the applicant had a business, as confirmed by the documents, but it could not be said that the work or the economic activity being performed was being performed in or for the applicant's business. He was not an entrepreneur.

115. Mr Tanner submits that the applicant did not acquire and use tangible and intangible assets in the pursuit of profit. It could not be said that the applicant was enhancing his company and acquiring goodwill. None of the benefits accrued to his company. He was merely submitting invoices, and the respondent's business was enhanced. There was no use of systems. The applicant needed to be told what to do, and he was paid at a fixed rate. There was no prospect of any profit. He only provided labour and there were no other features of any entrepreneurial capacity.

116. Mr Tanner submits that there were none of the indicia of a business. The applicant did not look for or manage a profit. He was only paid $40 per hour. He had no discretion and he worked solely for the respondent, at a fixed rate and under the respondent's supervision. There were no risks associated with equipment or assets as these were supplied. The respondent controlled and directed the manner in which the economic activity was carried out.

117. Mr Tanner submits that there was no suggestion that the applicant's business was being represented. He was part of a team of three painters, so he was integrated with the respondent's business activities. The applicant was financially dependent on the respondent's business. There is no evidence that the applicant was able to substitute or engage another person to undertake the painting or that he agreed to provide an outcome. He did not supply his own tools or equipment, and he was under the respondent's control.

118. Mr Tanner submits that the respondent said what he needed, namely, to take on another worker as part of his team, and the work was being performed in his business. There is an anomaly in the documents that suggest that the agreement was between two corporations. Nevertheless, one can be satisfied that the applicant was a worker performing work for the respondent and not his own business.

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[3] *On Call Interpreters*, [207].
[4] *On Call Interpreters*, [208].

RESPONDENT'S SUBMISSIONS

119. The respondent's counsel, Mr Robertson, submits that *On Call Interpreters* can be distinguished from the present matter as it involved substantial corporations and the facts are dissimilar.

120. Mr Robertson submits that in his statement, the applicant acknowledged that he established a business in 2017 and he had a workers compensation policy. The Statement of Coverage identified one worker and wages of $58,500. The policy was cancelled on 20 July 2018 when the applicant ceased trading, five months after the accident, to take effect from the date of injury.

121. Mr Robertson submits that it is clear that the applicant was operating a business, EHS. He advertised the business in the Yellow and Pink Pages, with his mobile number, email and website, and he maintained a business bank account.

122. Mr Robertson submits that according to the Westpac Business One statement, the applicant paid $469.72 for advertising with Sensis, so he was holding out and promoting his painting business. He was a skilled tradesman. He had a company that entered into an agreement with the respondent for the provision of painting services at an agreed hourly rate.

123. Mr Robertson submits that the applicant provided tax invoices in the name of EHS and Efficient Coating. The invoices included a business logo. It was significant from a commercial point of view that the respondent was negotiating with a corporation. The respondent did not pay the applicant sick leave, annual leave, wages or insurance premiums. Mr Rujnic agreed that he supplied the materials on occasions, but there were times when the applicant provided these. He stated that the applicant worked from time to time, and he dictated when he worked, not the respondent.

124. Mr Robertson submits that according to Mr Rujnic, he was not told what the applicant was doing on the days that he did not work for the respondent. The applicant would ask if there was any work available in the next week or so, and he would usually advise him at the end of the week if he was available the next week. He did not determine the days that the applicant worked or would not work. The applicant would decline to work if he had other jobs to perform. Therefore, the applicant controlled when he would work for the respondent.

125. Mr Robertson submits that in *Hollis v Vabu Pty Ltd* [5], the plurality noted that when the Court of Appeal allowed Mr Vabu's appeal, Meagher JA accepted that a person may supervise others without being their employer[6].

126. Mr Robertson submits that the applicant was an experienced painter and he was merely told what room to paint. The evidence does not disclose any more supervision by the respondent.

127. Mr Robertson submits that in *On Call Interpreters*, Bromberg J observed that the majority in *Hollis* noted that an independent contractor provides personal services whilst working in and for his or her own business, whereas an employee provides personal services whilst working in the employer's business. He submits that the applicant was not providing personal services, but the services were provided through EHS.

128. Mr Robertson submits that the applicant was a painter in his painting business. The business was EHS, or when it ceased to exist, with the applicant as an independent contractor. There was a benefit to the applicant's company and that was how it generated business and profit. He was generating income in an entrepreneurial way to the benefit of his company and to the benefit of the respondent.

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[5] [2001] HCA 44, (*Hollis*).
[6] *Hollis*, [19].

129. Mr Robertson submits that the respondent entered into a contractual arrangement with the applicant's company in July 2017. There was mutuality between the companies, and not between the respondent and the applicant.

130. Mr Robertson submits that the ASIC records show that the applicant's company was deregistered in December 2017, but this was never communicated to the respondent. The applicant continued to work for EHS and he continued to issue tax invoices.

131. Mr Robertson submits that the applicant generated goodwill by undertaking the work and getting a good reputation. His good work enhanced the business, so his actions were entrepreneurial. The agreement involved two small companies, and both were trying to make a profit.

132. Mr Robertson submits that some indicia are more important than others. The applicant dictated his hours. The evidence is silent as to whether there was someone to whom the applicant could delegate work. The respondent did not pay the applicant the statutory entitlements of an employee.

133. Mr Robertson submits that the applicant did not declare any wages or identify any employees in his tax return. He claimed expenses of $12,889, but details were not provided. He included GST in his tax invoices, which is indicative of the provision of services. This evidence is more consistent with an independent contractor.

134. Mr Robertson submits that the applicant only undertook work for the respondent for seven months. More than a third of his income came from others, such as Opal Painting/ Talgat. Prior to his injury, he worked for Hornsby RSL for 54 hours and he did other work for the club before he started work with the respondent. All of the tax invoices are consistent with the applicant being an independent contractor.

APPLICANT'S SUBMISSIONS IN REPLY

135. Mr Tanner submits that the nature of the business is not a material consideration when assessing the economic situation with the respondent. On the basis of the principles discussed in *On Call Interpreters*, one can be satisfied that the relationship was one between a worker and an employer, regardless of what happened elsewhere. The submission that the rate of pay was negotiated is misconceived.

136. Mr Tanner submits that there was no legal relationship between the applicant's company and the respondent when his company was deregistered. There was a direct relationship between the applicant providing work and the respondent gaining the benefit and securing profit from that work.

137. Mr Tanner submits that Mr Rujnic made comments in his initial statement that identified a relationship between the applicant and the respondent, but his evidence changed when he was made aware of the legal distinction that forms the basis of the respondent's defence. The respondent needed another painter due to being overloaded with work and Talgat recommended the applicant, not his company. The applicant, not EHS, called Mr Rujnic. Mr Rujnic asked the applicant whether he could start the following week, not whether EHS could start.

138. Mr Tanner submits that Mr Rujnic agreed to pay the applicant a higher rate to cover the loss of employee entitlements because he had a company. This was financially advantageous to the respondent so that he avoided paying statutory benefits. The respondent knew that the applicant would initially work for a couple of weeks. He was aware that the applicant had worked for James Clifford Constructions, and that he had not suffered an injury at any previous "employer".

139. Mr Tanner submits that Mr Rujnic admitted that the applicant did not sign any contract with him and that he invoiced him for the work he did for him. This shows the arrangement was between the applicant and Mr Rujnic. Mr Rujnic repeatedly referred to the applicant working for him. This contrasts with the respondent's later statements.

140. Mr Tanner submits that EHS was deregistered in December 2017, so as at the date of injury, there was no legal relationship between EHS and the respondent. There was superficially a relationship between EHS and the respondent, but not so in substance and criteria.

141. Mr Tanner submits that EHS received payment, but it was merely the entity that received the money. There was no benefit to EHS but to the applicant. The respondent was trying to make a profit, and there was no prospect of EHS doing likewise. The hours of work were dictated by the respondent's clients, and the applicant had to fit in with that agreement. EHS did not undertake any entrepreneurial activities when the applicant was working for the respondent. The tax returns and tax invoices cannot alter the reality of the relationship, merely because the economic activity was preferred by the respondent.

142. Mr Tanner submits that the workers compensation policy was available to the applicant if he was injured when conducting his business. When the applicant went to work for the respondent, he did not pursue his business and what he did elsewhere was not materially excessive. The applicant could be an employee during the week and then an entrepreneur in his business at night or on the weekends.

REASONS

Was the applicant a "worker" within the meaning of the 1998 Act?

143. Section 4 of the 1998 Act defines a worker as follows:

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

144. Therefore, for the applicant to be considered a "worker", there needs to be in existence a contract of employment between the applicant and the respondent.

145. Deputy President Roche discussed the principles regarding a contract of employment in *Drive Recruit Pty Ltd v Back*[7]*.* He stated that there could be no employment without a contract and the contract must involve work done by a person in performance of a contractual obligation to a second person because the essence of a contract of service was the supply of the work and skill of the worker. Further, there must be a wage or other remuneration, and there must be an obligation on one party to provide, and on the other party to undertake the work[8].

146. For a contract to exist, there must be an intention to create legal relations between a worker and an employer. In *Secretary, Department of Family and Community Services v Bee*[9], Deputy President Roche stated that the question of an intention to create legal or contractual relations required an objective assessment of the state of affairs between the parties[10]. Further, there also needed to be consideration for the agreement[11].

[7] [2013] NSWWCCPD 32, (*Back*).
[8] *Back*, [24].
[9] [2014] NSWWCCPD 66 (*Bee*).
[10] *Bee*, [42] – [43].
[11] *Bee*, [91] – [93].

147. In this matter, there is no dispute that there was an oral agreement or contract involving the applicant and Mr Rujnic. The substance of the arrangement was that the applicant would undertake painting for the respondent at an agreed hourly rate. Tax invoices were submitted by EHS for the applicant's labour and GST was added.

148. There is a dispute regarding the nature of that agreement or contract. This requires an analysis of the various indicia to establish whether an employment relationship in fact existed. The main criteria established in *Stevens v Brodribb Sawmilling Co Pty* Ltd[12] is the right of control by the purported employer over the worker.

149. In *Malivanek v Ring Group Pty Ltd*[13], Deputy President Roche considered the relevant indicia with reference to both *Hollis* and *On Call Interpreters*. He stated:

> "As Bromberg J explained in *On Call Interpreters*, while the majority in *Hollis* applied a multi-factorial approach, they provided a 'focal point around which relevant indicia can be examined'. His Honour added, at [207]:
>
> > 'That focal point has been elsewhere expressed as the 'ultimate question' posed by the totality approach: *Abdalla v Viewdaze Pty Ltd* (2003) 122 IR 215 at [34] (referred to with approval by Crispin P and Gray J in *Yaraka Holdings Pty Ltd v Gilgevic* [2006] ACTCA 6; (2006) 149 IR 339 at [303]); and see Sappideen C, O'Grady P and Warburton G, *Macken's Law of Employment*, (6th ed, Lawbook Co., 2009), at [2.80]. As Wilson and Dawson J in *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16 observed at 35 'the ultimate question' was posed by Windeyer J in *Marshall v Whittaker's Building Supply Co Ltd* [1963] HCA 26; (1963) 109 CLR 210 at 217, in a passage which the majority in *Hollis* strongly endorsed at [40]. The majority in *Hollis* (citing Windeyer J) said, the distinction between an employee and an independent contractor is 'rooted fundamentally' in the fact that when personal services are provided to another business, an independent contractor provides those services whilst working in and for his or her own business, whereas an employee provides personal services whilst working in the employer's business: at [40]. Unless the work is being provided by an independent contractor as a representative of that entrepreneur's own business and not as a manifestation of the business receiving the work, the person providing the work is an employee: *Hollis* [39], [40], [47], and [57] and see *Sweeney v Boylan Nominees Pty Ltd* [2006] HCA 19; (2006) 226 CLR 161 at [30]- [32]. The English courts have taken a similar approach. There the 'entrepreneur test' seems to be the dominating feature: Selwyn NM, *Laws of Employment* (2006) Oxford University Press at [2.34].
> >
> > [208] Simply expressed, the question of whether a person is an independent contractor in relation to the performance of particular work, may be posed and answered as follows:
> >
> > > Viewed as a 'practical matter':
> > >
> > > (i) is the person performing the work an entrepreneur who owns and operates a business; and,

[12] [1986] HCA 1; 160 CLR 16, [9] to [12] (*Stevens*)
[13] [2014] NSWWCCPD 4 (*Malivanek*)

> (ii) in performing the work, is that person working in and for that person's business as a representative of that business and not of the business receiving the work?
>
> If the answer to that question is yes, in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee.' (emphasis added)."[14]

150. The Deputy President added:

> "…. Suffice to say that, in cases of this kind in the future, the parties would be well advised to give careful attention the questions posed by Bromberg J in *On Call Interpreters*, which are based on the majority decision in *Hollis*. A consideration and balancing of the indicia is critical, but the focal point around which one examines the indicia is whether the applicant is working in the business of another, or in the business of the applicant."[15]

151. When one has regard the relevant indicia identified in authorities and particularly in *On Call Interpreters*, the critical question is and has always been whether the applicant was working for the respondent on the date of the accident on 15 February 2018. Accordingly, in order to assess the nature of the relationship between the applicant and the respondent, I need to consider the various indicia, look at the totality of the relationship and analyse the evidence before me. For the most part, the evidence consists of the statements, invoices and tax returns.

Contract of employment, manner of calculating remuneration, PAYG tax, superannuation and insurance

152. The nature of the relationship is described in the statements of the applicant and those of Mr Rujnic. There are some areas of agreement, but there are many matters that are disputed.

153. It is true that when one reads Mr Runjic's initial statement in isolation, some of the terminology might be suggestive of an agreement between the applicant as an individual and the respondent, but nevertheless, Mr Rujnic denied that the applicant was an employee.

154. In my view, it would be an error to look solely at Mr Runjic's first statement without recourse to his later statements and the other evidence. Even the applicant referred to being employed by Mr Rujnic, rather than the respondent, in some paragraphs of his initial statement. He brings his claim against the respondent, not Mr Rujnic as an individual.

155. The quality of a statement relies heavily on the ability of the interviewer to identify the issues, ask the relevant questions and use the correct terminology. More detailed and focussed statements are often drafted by the legal representatives, and that is certainly the case when one views the further statements relied upon by both parties in the present matter.

156. According to Mr Runjic's first statement, he sought a recommendation from Talgat regarding a painter, rather than a painting company, because he needed another worker. It seems that Talgat gave the applicant Mr Runjic's details, because it was the applicant who called the respondent. The applicant and Mr Rujnic both had companies and as the sole representatives of each entity, it is logical that they would speak to each other as individual.

[14] *Malivanek*, [183].
[15] *Malivanek*, [184].

157. One must keep in mind that there were only two real persons involved in the arrangement, with each having their own company structure. The reference to one or both of them as individuals in the statements does not necessarily mean that the companies were not involved.

158. It also seems that Mr Rujnic had made some enquiries about the applicant , because he checked out the applicant's website that showed he had worked for James Clifford Constructions. Presumably this was the website of EHS, rather than the applicant as an individual.

159. There was no written agreement in existence between the respondent and the applicant and/ or his company. According to the applicant, he was engaged by Mr Rujnic as a contract painter for $40 per hour plus GST in about July 2017. This is not disputed.

160. Mr Rujnic confirmed the financial arrangements and advised that one of the reasons he agreed to pay the applicant a higher rate of $40 per hour plus GST was because he had his own ABN and insurances. Obviously with such an arrangement, Mr Rujnic would not be obliged to pay the applicant the statutory benefits that employees are entitled to, or have workers compensation insurance for him. In my experience, this is a common practice in the construction industry and this often arises in "worker" disputes in the Commission..

161. The comment by Mr Rujnic in his statement dated 24 August 2020 to paying the applicant more than his "employees" is confusing, because Mr Rujnic said that he was the only employee of the business. The use of the term "employees" rather than "contractors" would seem to have an example of poor terminology and drafting by the investigator.

162. Mr Tanner submits that the agreement to pay an hourly rate is consistent with employment, because the applicant did not quote for the job as a whole. That may well be true in some instances, but in my experience, independent contractors often quote for the provision of labour as an alternative to an entire job quote.

163. The applicant indicated that he worked at an hourly rate because he did not have enough money to secure big jobs of his own. There is no evidence to challenge this assertion, but it seems that the applicant was able to secure a more substantial job with the Hornsby RSL in January 2018.

164. The applicant claimed that he worked 40 to 48 hours per week, usually from Monday to Friday from 7.00 am to 3:30 pm, and often on Saturdays. This is not in dispute. He submitted tax invoices to the respondent through his business, EHS, as a contractor, and payments were made into his business account. The applicant accounted for the GST payment by completing a BAS statement. None of these facts are disputed.

165. There is no doubt that the respondent gained some benefit from the applicant's work. He needed the applicant's assistance to complete the jobs. However, the applicant also benefited from the arrangement. For example, he was able to obtain work elsewhere with Rob. How he secured the work for Caleb/Julie is unknown.

166. The applicant acknowledged that he had his own workers compensation policy with GIO, which commenced on 31 October 2015, but he did not explain why he obtained one. The premium adjustments were based on annual wages that were ultimately reduced to $25,000, a figure not far removed from the applicant's declared income for the financial year ending 30 June 2018.

167. According to the applicant, Mr Rujnic told him that he could make a claim on the respondent's policy because he was working on the respondent's contract at the time of his injury. This has not been addressed by Mr Rujnic.

168. The applicant cancelled his workers compensation policy on 20 July 2018, to take effect from 15 February 2018 because the business ceased trading. This date concerned with the date of injury. None of these matters were mentioned or explained in the applicant's statements. He also failed to disclose any information about the conduct of any business as a sole trader under his individual ABN.

169. The respondent did not deduct any PAYG instalments from the funds deposited into the applicant's business account. There was no allowance for sick leave and annual leave, and there were no superannuation payments made or tax deducted by the respondent.

170. These facts tend to support the respondent's claim that the applicant's company was engaged to provide painting services as an independent contractor, rather than the applicant being employed as an individual.

Control and the right to dictate the place and hours of work

171. The applicant stated that he was instructed what to do by Mr Rujnic. He was subject to his direction and control. He was not able to decide when or where to work or the days or times that he worked. He claimed that he exercised no independent judgement. Significantly, he did not claim that he was directed how to do the painting tasks. Mr Rujnic challenges most of this evidence.

172. Mr Rujnic stated that he supervised the applicant and told him where the job was and what had to be done. He agreed that the work was undertaken between 7.00 am and 3.30 pm, as this suited the customers. There is nothing novel or unusual in these time frames.

173. In his initial statement, Mr Rujnic indicated that the applicant informed him that he could only work for a couple of weeks and this seems largely consistent with the 2017 calendar, which shows that the applicant worked for a little over three weeks from 31 July 2017 to 26 August 2017, and on only one day in September 2017. This has not been addressed by the applicant.

174. Mr Rujnic gave no explanation regarding the nature of the supervision and made no comment about the provision of tools and equipment. In the circumstances, it is not surprising that further statements were obtained from this witness.

175. In his later statements, Mr Rujnic stated that the applicant could decline work, and did so when he had work elsewhere. He told applicant what had to be done and not how it should be done, because he was an experienced painter. One could say that the painting activities undertaken by the applicant required some skill, which would be consistent with the pursuance of a profession or trade through a business, as identified in *On Call Interpreters*.

176. In *Zuijs v Wirth Bros Pty Ltd*[16] the High Court commented on the right of control as follows:

> "The duties to be performed may depend so much on special skill or knowledge or they may be so clearly identified or the necessity of the employee acting on his own responsibility may be so evident, that little room for direction or command in detail may exist. But that is not the point. What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters."[17]

177. In my view, it would be unlikely that Mr Rujnic would tell another painter with 32 years' experience how a task should be performed. The applicant merely said that he was under the control of Mr Rujnic and he did not provide any specifics. In my view these matters have not been adequately addressed by the applicant in his statements.

[16] (1955) HCA 73; 93 CLR 561, (*Zuijs*).
[17] *Zuijs*, [571].

178. It is true that the applicant worked as part of a team of three painters. One was the respondent and the other, an independent contractor, Mr Mahmic. That does not necessarily mean that the applicant was integrated with the others and was an employee.

179. The respondent secured the jobs and Mr Rujnic told the applicant where he had to go. The hours were specified. The applicant was an experienced painter and would not have required direction as to how to undertake the tasks.

180. In my view, the evidence discloses minimal, if any, control by the respondent over the applicant's activities when he was undertaking painting for him. This alone is not determinative. This evidence could lend some weight to an employer/employee relationship, but also to the applicant being an independent contractor.

Right to delegate work activities

181. According to the applicant, he was not entitled to delegate the work to others. Given that he was the sole employee of EHS, or was the only painter in his individual business of Efficient Handyman Services, one could infer that there was no one to whom he could delegate the work.

182. The respondent indicated that he engaged the applicant to do the painting when he had work to do and when the applicant was available. His preference was to use the services of another contractor, Mr Mahmic.

183. The applicant worked alone, so presumably Mr Rujnic expected him to personally do the work. Nevertheless, given the absence of evidence from Mr Rujnic regarding this, no conclusions can be drawn regarding the alleged employer/employee relationship based on this indicium.

Provision of equipment

184. Mr Rujnic confirmed that he would set up the site before the team members arrived on site. He maintained that the respondent provided the applicant with paint and some tools on occasions, and the applicant would use his own equipment on occasions.

185. The applicant used his own vehicle. He claimed that the respondent supplied tools and paint, so there is a lack of consensus, and one cannot come to any conclusion without appropriate independent corroboration.

186. One comment that I can make is that if Mr Rujnic was in fact the applicant's employer, one would not expect that he would attend to such menial tasks as setting up the site before the working day commenced, and he would leave that to his employees to sort out.

Right to exclusive services

187. The applicant did not mention that he did any work elsewhere in his initial statement. There were no tax invoices attached to the Application, but that is not surprising, as the "worker" issue was not raised until the telephone conference. The tax invoices in the Reply were presumably obtained from the respondent.

188. The 2017 calendar shows that the applicant worked continuously for the respondent from 31 July 2017 to 16 August 2017, and then for four days until 26 August 2017. He only worked for one day in September 2017, namely on 13 September 2017. One would have expected that if the applicant was in fact an employee of the respondent, he would have worked on a more regular basis for the respondent in the months of September 2017, December 2017 and January 2018, even allowing for the Christmas break.

189. In his second statement, the applicant confirmed much of the detail in his first statement, but he also acknowledged that he worked for the respondent for approximately six months, and during this period, he had "maybe one other small job". Clearly the applicant was understating his work activities.

190. The tax invoices show that the applicant did more than one small job elsewhere during the time that he was working for the respondent. He worked for Opal Painting/Talgat, Caleb Strike and Rob. Therefore, the applicant's evidence was incorrect and misleading.

191. The applicant subsequently acknowledged that he worked for Rob and Opal Painting/ Talgat. However, he again understated how much work he did for them, even when the tax invoices came to light. He said that he worked for Rob in January 2018, but he did not mention the work undertaken in October 2017. He claimed that he worked for Talgat in September 2017 and for one day in December 2017, but he failed to mention the work done in October 2017. The applicant did not mention the work that he performed for Caleb/Julie.

192. The applicant claimed that he had to ask Mr Rujnic for permission to work for Rob and Talgat. This has been disputed by Mr Rujnic, who said that he did not know what the applicant was doing on the days that he was not working for the respondent. He stated that the applicant would usually advise him at the end of the week whether he was available for work during the following week. This evidence has not been challenged by the applicant, who merely indicated that he was not afforded the opportunity to say when and where he worked.

193. The fact that the applicant did little work for the respondent in September 2017, December 2017 and January 2018 would tend to support the respondent's evidence that the applicant was free to choose when and where he could work. The evidence confirms that the applicant did not work exclusively for the respondent, and this is not consistent with an employer/employee relationship.

Right of dismissal

194. None of the statements address the situation as to whether the respondent had the right to dismiss the applicant. Therefore, it is not possible to draw any conclusions regarding the employer/employee relationship using this indicium.

ABN, tax invoices, tax returns and ASIC documents

195. Despite Mr Tanner's submission that the documentary can be dismissed, this material is of significant relevance to the current dispute. He described an "anomaly" in the documents that suggested that the agreement was between two corporations. In my view, the documents speak for themselves.

196. The applicant had his own ABN since 4 August 2009. He was registered as a sole trader, Masoud Jafarian t/as Top Quality Painting and Handyman, from 22 March 2014 until the ABN status was cancelled on 12 November 2015.

197. The applicant was also registered as a sole trader, Masoud Jafarian t/as Efficient Handyman Services, from 12 September 2012 until the ABN status was cancelled on 15 February 2018. This latter date coincides with the date of injury. He was registered for GST on 3 September 2013 and this was cancelled on 14 February 2018.

198. Therefore he was registered as a sole trader under the business name Efficient Handyman Services at the date of his injury. This was not disclosed in his statements. He also did not explain why he cancelled this ABN and its GST status as from 14 February 2018, the day before his accident.

199. The applicant had a different ABN for an unknown company, which was registered on 7 July 2014. The name was changed to EHS and registered for GST on 1 July 2015. Therefore, the company was established well before the applicant entered into the agreement with the respondent. The need to have an ABN and/or company was not motivated by the dealings that he had with the respondent after July 2017, unlike the situation in *Malivanek*.

200. The applicant submitted tax invoices that identified EHS as the provider of the services. The applicant claimed that the respondent agreed to pay him more because he had a company and an ABN, but he insisted that he was an employee. The suggestion that he was an employee is not consistent with the documentary evidence.

201. The applicant's tax invoices that were submitted to the respondent included the business ABN and a business logo. This differs from the facts in *Malivanek*, where the tax invoices were handwritten and no letterhead, business address or phone number.

202. The applicant initially charged $45 per hour, a figure that was not mentioned by either party or their legal representatives, and then $40 per hour plus GST. GST is only charged if a party is registered for GST and there is a provision of goods and services. GST is not payable in an employer/employee situation.

203. The only tax invoice to exclude GST was that dated 16 February 2018, the day after the applicant's injury. This seems to be an extremely odd coincidence, and this has not been explained by the applicant.

204. Similar tax invoices were issued to other parties. The applicant worked for Opal Painting/Talgat September 2017, October 2017 and December 2017 for a total of 96 hours at $40 per hour plus GST, 16 hours for Caleb/Julie in September 2017 at $40 per hour plus GST and he did 58 hours for Rob in October 2017 and January 2018 at $40 per hour plus GST. All the payments were made into the EHS business account, not the applicant's personal Westpac Choice or eSaver accounts.

205. The applicant admitted that he did some work as an independent contractor for Hornsby RSL. This is consistent with the tax invoice for 54 hours work that was submitted to the club. This included a charge for materials, tools and paint. He acknowledged that he worked for Rob, who called him, and for Opal Painting/Talgat. He claimed that he had to ask Mr Rujnic for permission to work for both parties. This has been disputed by Mr Rujnic.

206. The applicant's personal and business tax returns were combined into one. The return identified the business name of Efficient Handyman Services, and included the applicant's individual ABN. There was income of $21,154, so arguably there was a profit.

207. Common-sense suggests that someone would not intentionally conduct a business at a loss. There is also some risk involved in conducting any type of business. He not only worked for the respondent, but he worked for others. It is arguable that he managed his activities in order to maximise his profit.

208. The applicant claimed expenses of $12,889, which is well above the normal expenses that would usually be claimed by an employee. He did not provide an explanation regarding the absence of any declared wages in his tax return or the nature of the business expenses that were claimed. He was obviously spending money to earn his income, otherwise there would be no business deductions claimed.

209. In the tax return tax estimate, there were PAYG instalment deductions of $3,066. This has not been explained by the applicant. The Notice of Assessment indicated that this figure was notified in the BAS statements, but that is not consistent with the BAS statement that is in evidence. It could perhaps relate to income earned by the applicant as a sole trader, and there might be other BAS statements in respect of his sole trader business, but they are not in evidence. There is no explanation provided by the applicant.

210. Mr Rujnic stated that he was unaware that EHS had been deregistered. He thought that the contractual arrangement was continuing, given that he continued to receive tax invoices from the applicant's company. This is understandable.

211. It is true that the respondent continued to deal with the deregistered company, but it is clear that the applicant misrepresented the situation. He should have told the respondent about this but he failed to do so. More importantly, the applicant did not mention the deregistration of his company in his statements. The reasons why the company was deregistered are unknown. Further, the applicant did not explain why he continued to issue tax invoices in the business' name.

212. Mr Rujnic confirmed that the respondent contracted with EHS and not the applicant as an individual. This is disputed by the applicant, but the tax invoices suggest otherwise.

213. Mr Rujnic maintained that the applicant was a contractor, just like Mr Mahmic, who was paid an hourly rate plus GST as a contractor rather than wages. This is consistent with the lack of any reference to wages other than those of Mr Rujnic in the respondent's BAS statements and tax return.

214. In my view the documentary evidence of the applicant's financial arrangements and the tax documents are consistent with an intention to run a business as an independent contractor.

Advertising and the concept of being an entrepreneur

215. The applicant provided painting services to the respondent, who entered into contracts with clients. The respondent was required to provide an outcome for the client, but it could not be said that the applicant was not required to provide an outcome for the respondent.

216. Whether the applicant was conducting work for someone else is irrelevant, as we are concerned with the contract and the relationship that existed between the applicant and the respondent. The applicant was the business contact, and the business was engaged to paint offices. As far as his dealings with the respondent were concerned, the applicant was a presentative of his business, EHS, and this is consistent with him being an entrepreneur associated with his business.

217. The evidence is silent as to whether the applicant had any tangible or intangible assets. He had a vehicle, which is an asset, and he claimed business expenses, which most likely included the running costs of the vehicle and the purchase of paint and other items. The business bank statements show regular purchases of items at Bunnings, and some of the amounts are similar to the cost of four litre cans of paint. He would have had painting equipment, because he charged Hornsby RSL for materials, tools and paint. So it seems likely that he had tangible assets.

218. The applicant sought out Mr Rujnic when he was told about the availability of work by Talgat. It seems that the respondent recommended the applicant to Rob, so presumably the respondent was satisfied with the applicant's work. One would have thought that good work would have created a degree of goodwill and would have led to further job opportunities. The evidence does not disclose how the applicant secured the work with Hornsby RSL or Caleb/Julie. This might have been by word of mouth or via the advertisements.

219. The applicant did not mention that the business had a website and that it was advertised in the Yellow and Pink Pages. Mr Rujnic confirmed that he had viewed the website and noted that the applicant advertised the fact that he had worked for James Clifford Constructions. This distinguishes the present matter from *Malivanek*, where there was no advertising of any services. This advertising is consistent with the promotion of a business as an entrepreneur.

CONCLUSION

220. Each case must be considered on its own facts. No two matters are strictly identical as there will nearly always be some variants. Having regard to the principles referred to in *Malivanek* and *On Call Interpreters*, the critical question is whether the applicant was working in the respondent's business or in his own. The fact that the applicant worked elsewhere and submitted similar tax invoices is irrelevant, although it has some bearing on the indicium of exclusivity.

221. There is disagreement reading the applicant's ability to accept or refuse work, the level of control over the tasks to be done, and the provision of tools and paint. These are only some of the many matters that need to be considered. This contrasting evidence, which is largely uncorroborated, is not determinative. There are many other matters of relevance.

222. There is a great deal of evidence that suggests that the applicant was in fact conducting a trade or business in his own name. I have identified this evidence above, such as the tax invoices containing the business ABN, business address and inclusion of GST, the lack of exclusivity, the lack of the provision of statutory entitlements, superannuation payments and PAYG tax deductions, the claims for business deductions, the agreed rate of pay, the business website and the advertisements, the absence of employees, and a worker's compensation policy that only covered one person, namely the applicant.

223. There is no dispute about the applicant's working hours which coincided with the usual hours for tradesmen. The evidence does not disclose who was responsible for the quality of the work, warrantees and guarantees.

224. Mr Tanner submits one must look at the substance of the relationship, notwithstanding the documentary evidence. In my view, such a submission has no merit. If I ignored the significant documentary evidence, I would not be acting in accordance with the obligations identified in s 354(3) of the 1998 Act, and I would fall into error.

225. As discussed by the Deputy President in *Malivanek*, the focal point is whether the applicant was working in the business of respondent or in his own business. Having regard to the evidence and a consideration of the "totality of the relationship" in accordance with *Hollis*, I am satisfied on the balance of probabilities that the applicant was in fact undertaking work that was incidental to a trade or business regularly carried out by him for his company at the time that he sustained injury on 15 February 2018.

226. Further, I am satisfied that the applicant satisfies the "practical test" discussed by Bromberg J in *On Call Interpreters*, namely that the applicant was an entrepreneur who owned and operated a business and in performing the work, he was working in and for his business as a representative of that business, rather than in and for the respondent's business. Accordingly, there will be an award for the respondent.

FINDINGS

227. The applicant was a not a "worker" in the employ of the respondent within the meaning of s 4 of the 1998 Act as at 15 February 2018.

ORDERS

228. There will be an award for the respondent.