## IN THE HIGH COURT OF AUSTRALIA PERTH REGISTRY

BETWEEN:

No. P38 of 2015

## FAIR WORK OMBUDSMAN

Appellant

and

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CONTRACTING SOLUTIONS PTY LTD THE REGISTRY MELBOURNE

QUEST SOUTH PERTH HOLDINGS PTY LTD (ACN 109 989 531)

First Respondent

(ACN 099 388 575)

Second Respondent

PAUL KONSTEK

Third Respondent

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## APPELLANT'S CHRONOLOGY

PART I: The Appellant, the Fair Work Ombudsman (FWO), certifies that this chronology is in a form suitable for publication on the internet.

## PART II:

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Date	Event	Appeal Book Reference	
Background Facts			
At all material times	Quest South Perth Holdings Pty Ltd ( <b>Quest</b> ) operates a serviced apartment accommodation business.	AB AJ <sup>1</sup> [7]	
2007	Quest employs Margaret Best ( <b>Best</b> ) and Carol Roden ( <b>Roden</b> ) as housekeepers.	AB AJ [7]	

<sup>&</sup>lt;sup>1</sup> Appeal Judgment.

Date: 18 September 2015

Filed on behalf of the Appellant

Prepared by Justin L. Bourke QC and Jenny Firkin of Counsel

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	Date	Event	Appeal Book Reference
10	18 March	Quest employs Jessica Buttrum-Virco ( <b>Buttrum-Virco</b> ) as a part-time receptionist.	AB
	2009		TJ <sup>2</sup> [41]
	October 2009	Quest enters into a "Hiring Agreement" with Contracting Solutions Pty Ltd (Contracting Solutions).	AB
			AJ [18]
	•	Contracting Solutions carry on a contract labour hire	AB
		business.	AJ [8]
		Under the "Hiring Agreement", Contracting Solutions	AB
		is to supply independent contractors to perform work for Quest.	AJ [18]
	From late	Contracting Solutions on behalf of Quest takes steps	AB
20	October 2009	to "convert" the employees of Quest into independent contractors under Contracting Solutions' system.	AJ [21] and [23]
	30 October	Best and Roden each sign Contracting Solutions'	AB
	2009 or thereafter	"Contractor Application".	AJ [25] and [31]
	From 2	Quest represents to Best and Roden that they are performing work at Quest as independent contractors under a contract for services with Contracting Solutions.	AB
30	November 2009		AJ [240] and [335]
<b>U</b> -	From 2	Best and Roden:	
	November 2009	er      continue to perform precisely the same work at	AB
		Quest in exactly the same way as they had always done;	AJ [48]
		are, in truth, employees of Quest;	AB
40			AJ [230] and [309]
		each work under a contract of employment with	AB
		Quest, such contract being implied.	AJ [222] and [331]
	29 November	Ashvin Luchmaya ( <b>Luchmaya</b> ), Quest's on-site	AB
	2009	manager, tells Buttrum-Virco that if she does not sign the "Contractor Application" she will not be paid.	TJ [47] and [54]

<sup>&</sup>lt;sup>2</sup> Trial Judgment.

	Date	Event	Appeal Book Reference		
	1 December 2009	Buttrum-Virco signs the "Contractor Application".	AB TJ [55]		
10	From 1 December 2009	Buttrum-Virco is not offered any further shifts at Quest.	AB TJ [55] and [56]		
	28 November 2009	Best ceases working at Quest due to a non-work related injury.	AB AJ [44]		
20	14 November 2010	After Luchmaya departs from Quest and a new owner takes over Quest's business, Quest decides that it will stop using Contracting Solutions and will in the future pay its housekeepers, including Roden, directly.	AB AJ [43]		
- 1		The First Instance Proceeding			
	27 May 2011	The FWO files an Application in the Federal Court of Australia.			
	16 August 2011	In its Amended Statement of Claim, the FWO claims (relevantly for the purposes of this appeal) that:			
30		<ul> <li>Quest has breached s.357 of the Fair Work Act 2009 (Cth) (FW Act) by making representations to Best and Roden that they would be (and later that they were) not its employees but independent contractors of Contracting Solutions.</li> </ul>	AB ASOC <sup>3</sup> [11] and [12] to [14(a)]		
		The FWO further claims, amongst other things, that:			
40		• Contracting Solutions and Paul Konstek (Konstek), who acted for Contracting Solutions in a managerial capacity, are liable as accessories for Quest's breach of s.357 by reason of s.550 of the FW Act;	AB ASOC [5], [14(b)] and [14A]		
		• Quest has breached s.358 of the FW Act by threatening to dismiss Buttrum-Virco, in order to engage her as an independent contractor to perform the same, or substantially the same, work under a contract for services;	AB ASOC [7] and [8(a)]		
		Luchmaya is liable as an accessory for Quest's	AB		

<sup>&</sup>lt;sup>3</sup> Amended Statement of Claim.

	Date	Event	Appeal Book Reference
***************************************		breach of s.358 by reason of s.550 of the FW Act.	ASOC [8(b)]
10	16 to 18 October 2012 and 16	Trial before McKerracher J in the Federal Court of Australia.	
	November 2012	Whilst Quest and Luchmaya file and serve a Defence in the proceeding, they do not appear at the trial.	AB TJ [35]
	14 June 2013	Justice McKerracher delivers his reasons for judgment, in which his Honour found that:	
20		<ul> <li>Quest, Contracting Solutions and Konstek had not contravened s.357 of the FW Act because Best and Roden each became independent contractors voluntarily;</li> </ul>	AB TJ [255]
20		<ul> <li>Quest and Luchmaya, as an accessory, had contravened s.358 of the FW Act in threatening to dismiss Buttrum-Virco in order to engage her as a contractor to perform the same work as a receptionist.</li> </ul>	AB TJ [252] and [253]
	26 July 2013	Orders were made by McKerracher J:	AB
20		<ul> <li>declaring that Quest and Luchmaya had contravened s.358 of the FW Act;</li> </ul>	1
30		<ul> <li>listing the determination of any penalties to be imposed for directions;</li> </ul>	
		otherwise dismissing the FWO's claim.	
		The Appeal in the Full Federal Court	
	15 August 2013	The FWO files a Notice of Appeal in the Federal Court of Australia, which contends that:	
40		Justice McKerracher erred in dismissing the FWO's application for a declaration that Quest contravened s.357 of the FW Act in relation to Roden and Best (ground 1);	AB
		<ul> <li>as a consequence, McKerracher J erred in dismissing the FWO's application for a declaration that Contracting Solutions and Konstek were involved in Quest's contravention (grounds 2 and 3).</li> </ul>	AB
	25 February	Justices North, Bromberg and Barker hear the appeal	

	Date	Event	Appeal Book Reference
	2014	in the Federal Court of Australia.	
	17 March 2015	The Full Federal Court of Australia dismiss the appeal.	AB
10		Justices North and Bromberg in joint reasons for judgment and Barker J in separate reasons for judgment hold, amongst other things, that:	
20		<ul> <li>Quest did not contravene s.357(1) of the FW Act, because the provision applies only if an employer's representation mischaracterises the true contract of employment between the employer and employee as a contract for services made directly with the same parties, the provision having no application if a third party is involved in the purported contract for services;</li> </ul>	AB AJ [75] to [77], [100] and [307]
		Contracting Solution and Konstek were not liable	AB
		as accessories in any event.	AJ [274] and [339]
	Proceedings in the High Court of Australia		
30	14 April 2015	The FWO files an application for special leave to appeal from that part of the judgment of the Full Federal Court of Australia where it was concluded that Quest did not contravene s.357 of the FW Act.	AB
		The FWO does not seek to disturb those parts of the judgment of the Full Federal Court of Australia that related to the accessorial claims against Contracting Solutions or Konstek.	
40	12 May 2015	Justice McKerracher stays the determination of any penalties to be imposed against Quest and Luchmaya for contraventions of s.358 of the FW Act pending the resolution of the High Court appeal.	AB
	14 August 2015	The High Court (constituted by French CJ and Nettle J) grant the FWO special leave to appeal to the High Court.	AB
		The FWO gives an undertaking to the Court to pay Contracting Solutions' costs of the appeal as a party if it participates as a contradicting respondent.	
	27 August 2015	The FWO files a notice of appeal in the High Court.	AB

DATED: 18 September 2015

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JUSTIN L. BOURKE QC

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