



# DECISION

*Fair Work Act 2009*

s.365 - Application to deal with contraventions involving dismissal

**Ms Jessica Tidmarsh**

v

**Aspire 2 Life Pty Ltd**

(C2023/6640)

DEPUTY PRESIDENT ROBERTS

SYDNEY, 5 FEBRUARY 2024

*Application to deal with contraventions involving dismissal – objection that Applicant not dismissed – whether Applicant an employee or independent contractor*

[1] The present matter concerns an application by Ms Jessica Tidmarsh (Applicant) pursuant to s.365 of the *Fair Work Act 2009* (Cth) (the Act) in which she has alleged that she was dismissed by Aspire 2 Life Pty Ltd (Respondent) in contravention of Part 3-1, General Protections, of the Act.

[2] The Respondent has objected to the application on the basis that the Applicant was not dismissed by the Respondent because the Applicant was not an employee of the Respondent. The Respondent contended that at all material times, the Applicant was an independent contractor engaged by the Respondent.

[3] Section 365 of the FW Act provides:

***365 Application for the FWC to deal with a dismissal dispute***

*If:*

*(a) a person has been dismissed; and*

*(b) the person, or an industrial association that is entitled to represent the industrial interests of the person, alleges that the person was dismissed in contravention of this Part;*

*the person, or the industrial association, may apply to the FWC for the FWC to deal with the dispute.*

[4] In order for the Commission to be able to deal with a dispute arising from an application under s.365 it must determine that the Applicant has been dismissed within the meaning of s.365.<sup>1</sup> The Commission must conclude that the relevant dismissal has actually occurred as a matter of jurisdictional fact. It is not sufficient that the applicant merely alleges that they were dismissed. If there is a contest as to whether the alleged dismissal, the subject of the application

has occurred, this is an antecedent question which has to be determined before the powers to deal with the dispute conferred by s.368 can be exercised.<sup>2</sup>

[5] Section 386 of the Act sets out the circumstances in which a person is taken to have been “dismissed” for the purposes of s.365. That section provides, relevantly, as follows:

*386 Meaning of dismissed*

(1) A person has been **dismissed** if:

(a) *the person’s employment with his or her employer has been terminated on the employer’s initiative; or*

(b) *the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.*

[6] As is apparent from the terms of s.386(1) above, a person can only be dismissed when their *employment* comes to an end in the circumstances described. In the absence of a relationship of employer and employee, a person cannot be dismissed within the meaning of s.386 and an application under s.365 can proceed no further. This decision deals with the issue of whether an employer and employee relationship existed between the Applicant and the Respondent.

## **Background**

[7] Much of the background was uncontested and can be briefly summarised.

[8] The Applicant was engaged as a support worker with the Respondent, commencing in February 2023. She was engaged to provide home care services to various clients. Those clients were generally elderly persons in need of some form of domestic assistance. The services they require included personal care, manual handling, cleaning and gardening.

[9] The Respondent provides a support coordination service for the elderly in the Fraser Coast region of Queensland. The business assists in the order of 200-300 clients and provides up to 1500 services per day to those clients through what the Respondent described as approximately 45 contractors. The clients that the Respondent delivers services to are allocated funding through various state and federal government agencies to allow them to be provided with various care services. The Respondent enters into contracts with these government agencies to obtain access to funding to deliver care services to the clients.

[10] The Applicant applied for the position with the Respondent by responding to an advertisement and attending an interview with Ms. Sue Davidson, a director of the Respondent, and another person on 19 January 2023. After the meeting, the Respondent sent the Applicant a copy of a document titled *Contracted Service Provider Agreement* (Agreement) which the Applicant and the Respondent both signed. The commencement date of that document was 6 February 2023. The Applicant was also sent a document titled *Contractor Work Opportunity*

(Work Opportunity) which she signed. The Applicant commenced working with the Respondent shortly thereafter.

[11] By October 2023 the Applicant had become concerned about her working arrangements with the Respondent and contacted the Fair Work Ombudsman (FWO) about those concerns. The Applicant said she raised her concerns with Ms. Davidson and told her that she had been in touch with the FWO about those concerns. On 9 October 2023 Ms. Davidson sent an email to the Applicant terminating her contract citing “irreconcilable differences”.

## **Evidence and Submissions**

### **Advertisement**

[12] The advertisement to which the Applicant responded in January 2023 was in the following terms:

#### ***Aged Care Support Workers***

*Aspire 2 Life PTY LTD*

*Hervey Bay, Hervey Bay & Fraser Coast QLD*

*Aged & Disability Support (Community Services & Development)*

*Contract/Temp*

*\$ \$40- \$54.99 per hour*

*Posted 4 Jan 2023*

#### ***More jobs from this company***

*Aspire 2 life is looking for Reliable and Dedicated **Aged** Care in home support workers to join our team, located in South East Queensland. Based in Hervey Bay, Aspire 2 life services Hervey Bay, Maryborough and surrounding areas.*

*Our Support model is based around Consumer-directed care, servicing Aged care clients 7 days a week 6am-8pm. Our personal Care Workers provide high quality, client centered (sic) care, encouraging physical and social independencies.*

*We have a wonderful, large **Ageing** client base with various funding types, which gives our care support team a great variety of work. Our clients enjoy vibrant, fun and caring workers who are keen to be helpful, responsive and supportive of each individual client's needs.*

*Our Client base and needs for Support workers are both growing rapidly. Services include:*

- **Personal Care** - e.g., showering, dressing, medication assistance, manual handling*
- **Domestic Assistance** - e.g., cleaning, cooking, laundry, shopping*
- **Companionship** - e.g., providing company through friendships, interests, and activities*

- **Driving and Community Access** -e.g., driving to appointments, shops, outings if needed
- **Home Administration** - e.g., booking appointments, organizing special events, support with technology.

**Must have:**

- **Cert III or IV in Aged Care or Disability**
- Previous community experience desirable in Aged Care
- National Police check
- ABN
- Public Liability and Professional indemnity insurance (both \$10 million)
- Current first aid and CPR
- Reliable car with insurance and driver's license.
- Reliable and Flexible availability. Availability on Evenings and weekends a bonus
- Must love to laugh and use initiative

*Join a revolution in home care and dare to be different. This is for our Aged Care in the Home clients.*

*Send your cover letter, application and resume to [2care@aspire2life.com.au](mailto:2care@aspire2life.com.au)*

**Employer questions**

*Your application will include the following questions:*

*Do you have a current Police Check (National Police Certificate) for employment?*

*Which of the following statements best describes your right to work in Australia?*

*How many years' experience do you have as a Care Support Worker?*

*Which of the following First Aid accreditations do you currently hold?*

*How far are you willing to travel for work?*

*Have you completed a qualification in aged care?*

**Interview**

[13] The Applicant gave evidence about the interview on 19 January 2023 with Ms. Davidson. The Applicant said she was told that if she wanted the position, she had to apply for an Australian Business Number (ABN) which she did later that day. She said the Respondent told her that she “will be able to take on other clients.” The Applicant later confirmed her ABN details with Ms. Davidson. She underwent a police check and provided other documentation to the Respondent. This included the Applicant’s resume, a copy of the Applicant’s Certificate IV in aged care support, a signed aged care code of conduct acknowledgement and a professional indemnity and public liability insurance certificate of currency in the Applicant’s name.

[14] After the interview, the Applicant was sent two documents by the Respondent. The first was the Work Opportunity document. It provided as follows:

***HRO03 Contractors Work Opportunity***

- *To work independently within the community, supporting Community Care Clients at various stages of their life.*
- *Providing care services including the following: services expected of a Cert 3 or above in aged care- Personal care, Domestic Assistance, Social Supports, Respite, transport to GP and specialists.*
- *Think out of the box and you can have a great lifestyle working with the Clients as well.*
- *Home Care Package Clients provider is Trilogy Care.*
- *NDIS Clients: Contractors will be offered clients via A2L.*
- *As an independent Contractor you are able to choose who you contract to, and you are free to take on other roles according to your needs.*

***Care Workers are independent Contractors and would need:***

- *Your own ABN, Individual Sole Trader -- Register on the ABR free of charge*
- *Your own Public Liability and Professional indemnity with \$10 million cover for each policy - we have been using BizCover and find it the easiest.*
- *National Police Check (3 yearly) – current*
- *Cert 3 or higher in aged care*
- *First Aid (3 yearly) and CPR (yearly)*
- *Current Driver's License*
- *Comprehensive vehicle insurance*
- *As an independent contractor you are required to meet your own Superannuation and Taxation obligations.*
- *Supply your own equipment. e.g., PPE, gloves, aprons,*
- *Being a contractor, you still need to comply with care standards and follow directions for client care by Case Manager and Registered Nurse to ensure clients safety and comply with Quality Care standards.*
- *You will be responsible to ensure any time away from your client services is covered and assistance will be given via bookkeeper.*
- *Your Contract will not be commenced until all credentials are completed.*
- *For NDIS contractors will you need blue and yellow cards. And must complete the NDIS Code of Conduct competency.*

***Other things to know:***

- *For Aged Care package clients (Home Care Package), you will be contracted to A2L and their Service Agreement will need to be completed, documents to be attached with.*
- *For NDIS, DVA Community Nursing, TCP, and Private Clients you will be contracted to Aspire 2 Life.*
- *As we grow, other opportunities may present themselves for further Contracting work.*
- *Case Manager and Support Coordinator will endeavour to refer clients to each Contractor matching the Clients preferences and Contractor's skill mix.*

- *You will send your weekly timesheets to the Bookkeeper, for processing of your invoices.*
- *A2L Bookkeeper will invoice you for \$28.50 per week (plus GST) for supporting you with your weekly invoicing administration, and your daily schedules. You can elect for us to take this from your weekly remittance or set up the weekly direct deposit. This cost also covers the monthly fee for your Rostering APP Shiftcare*
- *Services are negotiated to meet clients' needs initially by Case Manager and Support Coordinator.*
- *We advise you talk to an Accountant to guide/support you with your ABN, Tax and Super contributions.*
- *You choose the days you are available.*
- *As a contractor you are required to liaise with the Case Manager to approach other contractors if you are unable to complete the work required or for fill (sic) your duties for all or some of your contracted work.*
- *When you need any form of time away, you are required to inform the Case Manager who will support you to arrange other suitable contractors to do all or some of your work. Taking in mind the clients right of preference.*
- *This care work is based on Consumer Directed Care, we are guided by the client's needs and wants as to hours and work required by the individual client.*
- *Availability must be locked in for 6 months and we need to have 2 weeks' notice for any changes. This is to ensure clients care is not disrupted.*
- *Case Manager and Support Coordinator, via Aspire 2 Life, are responsible for the ongoing management of client's packages budgets and services. Contractors MUST inform and gain approval from Case Manager and Support Coordinator of any changes or additional hours/support required.*
- *You will need to inform the CM and SC of any client changes, IE health, wounds, environment, hospitals. Etc.*

***Ongoing Regulatory credential compliance and education:***

- *Your ongoing training and keeping your credentials are your responsibility*
- *Please ensure when you update your credentials and education you send a copy the bookkeeper*
- *From time to time, we will send you suggested training opportunities via email that you can complete.*
- *Schedule of Fees are negotiated with the client by Case Manager and Support Coordinator:*
- *These rates are inclusive of GST:*
  - *Weekday daytime 6am to 8pm - \$40 per hour without Certs/ Domestic*
  - *Weekday daytime 6am to 8pm - \$46.50 per hour with Cert 3 of above*
  - *Weekday evening 8pm to 6am not sleeping - \$57.50 per hour*
  - *Overnight any day 10pm to 6 am (sleeping) - \$212 per night*
  - *Saturday all day- \$57.50 per hour*
  - *Sunday all day - \$82.50 per hour*

- *Public holidays - \$102 per hour*
- *KM fee for taking clients out - \$1 per kms*

*Registered Nurse: \$90 per hour*

***NOTE these prices are not to be discussed with clients as that is the role of Case Manager and Support***

*Availability Times: please put your times in the box below the day you are available.*

<u><b>Monday</b></u>	<u><b>Tuesday</b></u>	<u><b>Wednesday</b></u>	<u><b>Thursday</b></u>	<u><b>Friday</b></u>	<u><b>Saturday</b></u>	<u><b>Sunday</b></u>
<i>8am-6pm</i>	<i>8am-6pm</i>	<i>6am-8pm</i>	<i>6am-8pm</i>	<i>6am-8pm</i>	<i>6am-8pm</i>	<i>6am-8pm</i>

***Accountant: you need to find one that suits you and your needs***

***Agreement:***

*I have read and understood all areas of this agreement and will follow processes as per instructed to meet compliance with Contractor, Quality Standards, and Client's needs.*

***Contractors Name: Jessica Tidmarsh***

***Contractors Signature:***

*Date: 20/01/2023*

***Aspire 2 Life: Managing Director/Clinical Care Manager/Case Manager: Sue Davidson***

*Signature*

*Date:*

[15] The Applicant signed this document on 20 January and returned it to the Respondent. Ms. Davidson’s evidence was that the Applicant completed the section of the document relating to hours of the Applicant’s availability by indicating that the Applicant would be available to work seven days per week at the times set out above. I accept that to be the case.

[16] The Work Opportunity document is an important document and more than just descriptive of the role that the Applicant was to perform. It repeats key rights and obligations that are also referred to in the Agreement discussed below, including rates of pay. It also creates other rights that are not dealt with in detail in the Agreement, including the Applicant’s available working hours. It commits the Applicant to “follow processes as per instructed to meet compliance with Contractor, Quality Standards, and Client’s needs.” It also prohibits the Applicant from discussing rates of pay with clients. The document in evidence was not signed by the Respondent, but it was put in evidence by the Respondent who did not dispute that its terms were binding upon them. I regard the Work Opportunity document as creating rights and obligations that are relevant to the assessment as to whether or not an employment relationship existed between the parties.

[17] The second document provided to the Applicant by the Respondent was the Agreement. The terms of that Agreement, omitting personal details, are set out below.

***BETWEEN: Aspire 2 Life PTY LTD ABN 95 636 793 34 of 38 Dougan Street, Point Vernon Qld 4655 ("Service Provider")***

AND: *Jessica Tidmarsh*

1. *The Service Provider is contracted to arrange for the provision of certain services to clients of various Government and government funded bodies.*
2. *The Contractor has contracted with the Service Provider to provide the services.*
3. *The Contractor will: -*
  - (a) *have and maintain their own ABN;*
  - (b) *be responsible for payment of their own tax and any superannuation.*
  - (c) *have and maintain professional indemnity insurance and public liability insurance and provide copies of current insurance certificates to the Service Provider when requested.*
  - (d) *maintain first aid and CPR qualifications every three (3) and annually respectively.*
  - (e) *have and maintain a valid driver's licence and car registration.*
  - (f) *have and maintain current comprehensive car insurance.*
  - (g) *undergo a National Police check every three (3) years that satisfies the Aged Care Standards requirements.*
  - (h) *maintain a Certificate III or higher qualification in Aged Care or Disabilities.*
  - (i) *Other areas will have various qualifications and not limited to the following areas:*
    - i. *Enrolled Nursing -AHPRA Registration (Enrolled Nurse/Division 2);*
    - ii. *Registered Nurse -AHPRA Registration (Registered Nurse/Division 1)*
    - iii. *Support Coordinator -- Certificate IV or higher*
  - (j) *Contractor will be responsible for own work injury insurance*
4. *The Service Provider will endeavour to arrange care work for the Contractor in accordance with this agreement and in accordance with any case plans that the Service Provider is contracted to manage.*
5. *The Contractor is not obliged to undertake any care work offered by the Service Provider to the Contractor and is free to undertake other forms of work (including care work).*
6. *The Contractor will keep the Service Provider informed of the Contractor's availability to undertake care work including days and hours during which the Contractor will be available and the type of work the Contractor is available to undertake. Once availability is set in we need to ensure consistence and support is sustained for our clients. We ask that Availability not be changed for 6 months once set in and 2 weeks' notice must be given as we need to ensure the clients are cared for.*
7. *The Contractor is obliged to maintain all necessary qualifications as specified in this agreement and the Service Provider may provide assistance or opportunities to*



*the Contractor to maintain those qualifications or obtain further qualifications, however, the Contractor is not obliged to undertake any programs offered by the Service Provider.*

8. *The Contractor will maintain all appropriate insurances including accident compensation cover, professional indemnity insurance of not less than \$10m and public risk insurance for not less than \$10m. Registered Nurse requires \$20 million.*

9. *The Contractor will comply with any policies and procedures provided by the Service Provider or the funding body.*

10. *The Contractor will not sell or promote any products, including raffle tickets, political or religious material or beliefs whilst undertaking care work.*

11. *The Contractor during the term of and following minimum of twenty-four (24) months of termination of this agreement cannot approach, persuade or solicit (i.e., lure consumers away) consumers for additional work, or solicit consumers to a competing business, or solicit consumers with the intention of establishing a competing business. Similarly accepting approaches from consumers amounts to solicitation and the contractor agrees to decline such approach and raise with the relevant case manager or support coordinator. A breach of this clause may result in relevant legal action and remedy.*

12. *The Contractor will maintain and respect the rights of any consumers for whom they perform care work including their right to privacy, dignity, and confidentiality.*

13. *The Contractor acknowledges that in the course of their engagement at Aspire 2 Life PTY LTD, they may have access or become acquainted with the written materials, confidential information and other confidential health information, and agrees:*

- a. To maintain the confidence of the confidential information and to prevent unauthorised disclosure to or use by any other person, firm or company;*
- b. To only use confidential information for the purpose of carrying out their duties whether that be during engagement or after it has ceased;*
- c. Not to remove any part of the confidential information from Aspire 2 Life PTY LTD without written consent of Aspire 2 Life PTY LTD;*
- d. Not for any reason appropriate, copy, memorise or in any manner reproduce or part with any confidential information; and*
- e. On termination of their engagement or else when required to do so by Aspire 2 Life PTY LTD, return any and all of the confidential information including any copy of that information, in whatever form that could be.*
- f. When borrowing manuals/information they will return it wholly and in good condition at the time required by Aspire 2 Life PTY LTD*
- g. A breach of confidentiality may result in appropriate action or recourse being taken.*

14. *The Contractor will only provide the care and services which they are contracted to provide during the hours that have been agreed to.*

15. *The Contractor will carry out the care work in a safe manner so as not to endanger the health, safety and wellbeing of themselves or the client for whom the care work is being provided.*
16. *The Contractor will immediately report and document any hazards, incidents, accidents, injuries, abuse, or suspected abuse of any client that occurred during the provision of care work by the Contractor.*
17. *The Contractor will be paid on an hourly basis according to the rates and fees set by the funding body from time to time and the Service Provider will inform the Contractor of any changes to those rates.*
18. *The Contractor can request that the Service Provider provide a Scheduling Service to the Contractor to assist the Contractor with providing the services, however, the Contractor is not obliged to do so.*
19. *Should the Contractor retain the Service Provider to provide the Scheduling Service then the Contractor agrees to pay to the Service Provider the amount of **\$3 per week** for such services. Note this is included in the weekly Bookkeeping fee.*
20. *All payments for care work provided by the Contractor will be made directly from the Service Provider to the Contractor.*
21. *The Contractor can request that the Service Provider provide bookkeeping assistance to the Contractor for the purpose of invoicing the funding body for care work undertaken by the Contractor, however, the Contractor is not obliged to do so.*
22. *Should the Contractor retain the Service Provider for bookkeeping purposes including scheduling and invoicing of the funding body then the Contractor agrees to pay to the Service Provider **\$25.00 per week plus GST** total for such services as per the terms of the Service Engagement Agreement- Bookkeeping Service Assistance.*
23. *The Contractor is responsible for providing any equipment, including specialised clothing or safety equipment to carry out the care work.*
24. *This agreement does not constitute any company, partnership, or joint venture between the parties for any purpose.*
25. *Nothing in this agreement constitutes a relationship of employer and employee.*
26. *Either party may terminate this agreement by notice in writing to the other*

#### **SCHEDULE**

*Service:* *Aspire 2 Life Pty Ltd ABN 95 636 793 34 of 38 Dougan Street,  
Point Vernon Qld 4655 (Email - [2care@aspire2life.com.au](mailto:2care@aspire2life.com.au))*

*Contractor:* *Full name: Jessica Tidmarsh  
Address:*

Phone no:

Email:

ABN: 27854851661

Commencement Date:

06 / 02 / 2023

Services Provided:

Personal Support  Home Cleaning  Home

Maintenance  Gardening  Other

• Registered Nurse

(Signature of Service Provider)

(Signature of Contractor)

Schedule of fees for the Contractor: as of 1/10/2022

Monday to Friday 6am to 8pm: \$46.50 per hour

Saturday 6am to 8pm: \$57.50 per hour.

Sunday 6am to 8pm \$82.50 per hour.

Public Holiday 6am to 8pm \$102 per hour.

A2L fee for admin, scheduling, bookkeeping: \$28.50 plus GST. This can be taken from your remittances is required.

[18] The Applicant's evidence was that she asked at the interview about the number of hours she would be working. She said the Respondent did not specify any particular number of hours but instead told her that she should be able to earn between \$2,000 and \$2,500 per week working a five- or six-day week.

[19] Other evidence was given by both parties about the realities of the working relationship that developed between them. The Applicant said she had no real say in the manner in which the work was undertaken. She said she was directed in what to do by Ms. Davidson and another manager Ms. McQueen. She said she was allocated shifts in advance through a phone app called 'ShiftCare'. She said that allocated shifts could change at any time up until the morning of the allocated shifts. The Applicant said she was required to give two weeks' notice of any change in her availability and that this made it very difficult to change her availability. The Applicant said that the instructions that she was given by the Respondent in respect of each client varied. In some cases, there were detailed instructions about the client's needs and in others, there were no instructions and she simply attended and did whatever work the client required of her. The Applicant submitted weekly timesheets to the Respondent and was paid for her work in the following week. The Applicant said the only equipment she supplied herself was gloves.

[20] The decision of the High Court in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*<sup>3</sup> (Personnel), discussed further below, means that I am constrained as the extent to which the history of the parties' dealings can be taken into account in determining the issue at hand.<sup>4</sup> The focus of the analysis must be on the legal rights and obligations created by the contract between the parties.

[21] The Respondent relied on the advertisement for the Applicant's position which referred to the requirement to have an ABN. They said the Applicant's contractor status was made clear to her at the interview and was confirmed by the contract that she entered into on 6 February

and the Work Opportunity document, which she also signed. Ms. Davidson's evidence was that, amongst other things, the Applicant was told at the interview that her work would be undertaken as a contractor and that the Applicant should see an accountant before she started working.

[22] The Respondent said that their contractors simply provided their availability and were allocated work according to that availability. The Respondent gave evidence that it provided a "scheduling service" to its workers by providing a weekly allocation of clients who required the services of those workers. The Respondent said they were charged a monthly fee for access to the ShiftCare app and required their workers to pay a weekly fee for the "scheduling services" which approximated the cost of that fee. The Respondent said that it also charged a weekly fee from its workers for "bookkeeping services" under which it received the workers' invoices and processed them with the government funding body. They said it was either not possible or extremely difficult for workers to invoice these bodies directly for their work and if they did, the workers ran a risk that they would not be paid for a month or more. The Respondent said the Applicant was given a description of the needs of each client, with greater or lesser levels of detail.

[23] The Respondent also referred to an email from the Applicant which they say confirmed her status as an independent contractor and her acceptance of that status. The email said:

*On Sun, Apr 23, 2023 at 4:27 PM Jessica Tidmarsh wrote:*

*Hi Sue,*

*I'm just trying to find more private clients close to my place and in Urangan kind of area so I'm not driving so much. It's becoming pretty expensive for all the fuel and travel time not paid. Everything is so expensive and I'm just trying to reign in the budget. While on the topic, am I able to start invoicing you as I do with other clients as a contractor, so I'm not required to pay that weekly admin fee? My accountant is confused by the fee as I am a contractor and has asked me to clarify it with you.*

*If the clients are only in Urangan Friday afternoons, I'll do after 2:30pm for now.*

*Thank you.*

[24] The Applicant said that the email was sent because she was trying to make it seem as if she already had some private clients so that it was more likely she would get the time off and feel more respected as a worker. She said that in reality, she did not have any private clients.

[25] The Respondent said they did not provide any equipment to their workers and that cleaning products and first aid kits were provided by the clients themselves.

[26] There was no evidence of any contractual relationship between the Applicant and the various elderly people that the Applicant performed work for.

## **Submissions**

[27] The Applicant submitted that the Respondent had misrepresented the true nature of the relationship as being one of principal and independent contractor when it was in truth an employment relationship. They said the Applicant was not free to seek out and attract new business in her own right and was at all material times, a participant in the typical employer/employee relationship. The Applicant said she was not permitted to seek alternative or additional work during the tenure of her employment with the Respondent. She said there was evidence of the Respondent's control over the manner of the Applicant's work and her work hours including the allocation of work through the rostering system. The Applicant said that she had not previously held an ABN or run a business and did not understand the nature of the "sham arrangement" that had been entered into.

[28] The Respondent submitted that the Applicant was operating an independent business of her own. They said she provided skilled labour that required special qualifications and controlled the manner in which the work was performed. They said that other than scheduling work as requested by the Applicant, the Respondent did not have significant actual control over the activities of the Applicant. They pointed to the fact that a company uniform or name/company label of the Respondent was not required and that no equipment was supplied to the Applicant for her use in performing services. The Respondent said they did not supervise the finances of the Applicant, other than the Applicant agreeing to some scheduling and invoicing assistance by the Respondent for a fee pursuant to the Agreement. The Respondent said that the Agreement outlined the terms of the contract and in practice, the terms of the Agreement were followed.

### Consideration

[29] The *Fair Work Act* regulates many aspects of workplace relationships and interactions in great detail. It leaves the fundamental issue of who is an employee to the common law.<sup>5</sup>

[30] The High Court has relatively recently considered that question in the decisions of *CFMMEU v. Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Pty Ltd and Jamsek* [2022] HCA 2. The principles set out by the Court in those decisions have been conveniently distilled<sup>6</sup> by Wigney J in the matter of *JMC Pty Limited v Commissioner of Taxation* [2022] FCA 750 as follows:

*First, where the rights and duties of the parties are comprehensively committed to a written contract, the legal rights and obligations established by the contract are decisive of the character of the relationship provided that the validity of the contract has not been challenged as a sham, or that the terms of the contract have not been varied, waived or are subject to an estoppel: Personnel Contracting at [43], [44], [47], [59] (Kiefel CJ, Keane and Edelman JJ), [172] (Gordon J, Steward J relevantly agreeing at [203]). The task is to construe and characterise the contract made between the parties at the time it was entered into: Personnel Contracting at [174] (Gordon J).*

*Second, in order to ascertain the relevant legal rights and obligations, the contract of employment must be construed in accordance with the established principles of contractual interpretation: Personnel Contracting at [60] (Kiefel CJ, Keane and Edelman JJ), [124] (Gageler and Gleeson JJ), [173] (Gordon J). In that respect, regard may be had to the circumstances surrounding the making of the contract, as well as to*

*events and circumstances external to the contract which are objective, known to the parties at the time of contracting and which assist in identifying the purpose or object of the contract: Personnel Contracting at [174]-[175] (Gordon J); Jamsek at [61] (Kiefel CJ, Keane and Edelman JJ), referring to Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337 at 352. The nature of the specific job that the putative employee applied for and the nature and extent of any tools or equipment they have to supply for that job may also be relevant: Personnel Contracting at [175] (Gordon J). It is, however, generally not legitimate to use in aid of the construction of a contract anything which the parties said or did after it was made: Personnel Contracting at [176] (Gordon J).*

*Third, and flowing from the first two principles, the characterisation of the relationship between the parties is not affected by circumstances, facts or occurrences arising between the parties that have no bearing on their legal rights: Personnel Contracting at [44] (Kiefel CJ, Keane and Edelman JJ), [173]-[178] (Gordon J); Jamsek at [109] (Gordon and Steward JJ). A “wide-ranging review of the entire history of the parties’ dealings” is neither necessary nor appropriate: Personnel Contracting at [59] (Kiefel CJ, Keane and Edelman JJ); see also [185]-[189] (Gordon J). For a “matter to bear upon the ultimate characterisation of a relationship, it must be concerned with the rights and duties established by the parties’ contract, and not simply an aspect of how the parties’ relationship has come to play out in practice but bearing no necessary connection to the contractual obligations of the parties”: Personnel Contracting at [61] (Kiefel CJ, Keane and Edelman JJ) (emphasis added).*

*It follows that the fact that the parties’ subsequent conduct may not have precisely aligned with their contractual rights and obligations, or the fact that a particular contractual right may have never been exercised or utilised, will generally be irrelevant when it comes to characterising the relationship. That is so unless the manner in which the parties conducted themselves after entering into the contract was such as to establish that the contract was a sham, or that the contract had been varied, or that certain rights under the contract were subject to an estoppel.*

*Fourth, the contractual provisions that may be relevant in determining the nature of the relationship include, but are not limited to, those that deal with the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work, the provision for holidays, the deduction of income tax, the delegation of work and the right to exercise direction and control: Personnel Contracting at [113] (Gageler and Gleeson JJ); [174] (Gordon J), referring to Brodribb at 24 (Mason J); see also 36-37 (Wilson and Dawson JJ).*

*Fifth, the characterisation of the relationship as one of service or employment involving an employer and employee, as opposed to a relationship involving an independent contractor providing services to a principal, often hinges on two considerations. The first consideration is the extent to which the putative employer has the right to control how, where and when the putative employee performs the work: Personnel Contracting at [73]-[74] (Kiefel CJ, Keane and Edelman JJ); [113] (Gageler and Gleeson JJ); see also Brodribb at 24 (Mason J) and 36-37 (Wilson and Dawson JJ). The second is the extent to which the putative employee can be seen to work in his or her own business,*

*as distinct from the business of the putative employer – the so-called “own business/employer’s business” dichotomy: Personnel Contracting at [36]- [39] (Kiefel CJ, Keane and Edelman JJ); [113] (Gageler and Gleeson JJ); cf [180]-[183] (Gordon J). Neither of those considerations are determinative and both involve questions of degree.*

*Sixth, a “label” which the parties may have chosen to describe their relationship is not determinative of the nature of the relationship and will rarely assist the court in characterising the relationship by reference to the contractual rights and duties of the parties: Personnel Contracting at [63]- [66] (Kiefel CJ, Keane and Edelman JJ); [127] (Gageler and Gleeson JJ); [184] (Gordon J). The parties’ “legitimate freedom to agree upon the rights and duties which constitute their relationship” does not “extend to attaching a ‘label’ to describe their relationship which is inconsistent with the rights and duties otherwise set forth” – to permit otherwise would elevate the freedom to “a power to alter the operation of statute law to suit ... the interests of the party with the greater bargaining power”: Personnel Contracting at [58] (Kiefel CJ, Keane and Edelman JJ).*

*The characterisation of a relationship as being either one of employer and employee, or one involving the engagement of an independent contractor, is ultimately an evaluative judgment that takes into account the totality of the parties’ contractual rights and obligations. The exercise may not necessarily be straightforward because, in some cases at least, the parties’ contractual rights and obligations may point in different directions. The evaluative exercise also should not be approached on the basis that there is some checklist against which ticks and crosses may be placed so as to produce the right answer. Some degree of uncertainty is unavoidable, particularly in the case of many modern-day work or service contracts.*

**[31]** In this case the parties committed the terms of their relationship to writing. The terms were contained in the Agreement and the Work Opportunity. There was some limited evidence about the discussions prior to the signing of the documents. In this respect I accept the evidence of Ms. Davidson that she told the Applicant at the interview that her work would be undertaken as a contractor and that the Applicant should see an accountant before she started working. This is consistent with what the Applicant said she was told at the interview about the requirement to have an ABN. I also accept the Applicant’s evidence that there was no verbal agreement about working any particular number of hours and that the income the Applicant would earn would vary depending on the hours worked. Those are matters that were ultimately dealt with in writing. Beyond this, the evidence about these discussions, such as it was, did not in my view, disclose any additional oral terms which were inconsistent with the written contract that was agreed at the point at which the contract was entered into.

**[32]** The Respondent referred to and relied on the advertisement for the position that was taken on by the Applicant. Whilst it can be relevant to consider matters external to the contract which are objective and known to the parties at the time the contract is entered into for the purpose of identifying the purpose or object of the contract,<sup>7</sup> I regard the terms of the advertisement to be of limited assistance here given the matters referred to in it are dealt with in the Agreement and the Work Opportunity. I note however that the advertisement supports the view that the Respondent was in the business of supplying client support services to persons

it regarded as its clients and that the services provided to clients included driving and community access.

**“Sham”?**

[33] The Applicant submitted that the Respondent had misrepresented the true nature of the relationship and was engaging in a “sham arrangement.” I regard this submission as being to the effect that the legal nature of the relationship between the parties was that of employer and employee rather than a submission that the contractual arrangements were a sham in the sense discussed in *Personnel*.<sup>8</sup> It was not argued in that case that the contract in question was invalid as a sham and I do not take the submission here to mean that the validity of the contract or legal obligations created by the written terms was challenged. In any event, I do not think the evidence in this matter goes so far as to show that the validity of the contract itself could be successfully challenged on that basis. Nor was it argued that the legal effect of the written terms was affected by a variation, waiver or estoppel. I turn then to consider the nature of the legal rights and duties created by the written terms to determine the true character of the relationship between the parties.

[34] I consider that the terms of both the Agreement and the Work Opportunity create the relevant rights and duties that bound both parties for the purpose of characterising the relationship between them. I have considered those terms in their totality.

[35] The Agreement and the Work Opportunity describe the Applicant as an independent contractor. The Agreement also says that nothing in the Agreement constitutes a relationship of employer and employee. The plurality in *Personnel* said that generally speaking, the opinion of the parties on a matter of law is irrelevant and that it is erroneous in point of principle to use the parties’ description of their relationship to resolve uncertainty.<sup>9</sup> I regard these terms as having little or no weight in the overall analysis. I also give limited weight to other terms that are of a kind which the Full Bench in *Deliveroo Australia Pty Ltd v. Franco* described as “merely consequential upon the labelling adopted in the agreement.”<sup>10</sup> There the Bench cited with approval the decision of the Full Court of the Federal Court in *ACE Insurance Ltd v Trifunovski*<sup>11</sup> where it was said:

*It is also difficult, in my view, to give much independent weight to arrangements about taxation, or even matters such as insurance cover or superannuation. These are reflections of a view by one party (or both) that the relationship is, or is not, one of employment. For that reason, in my view, those matters are in the same category as declarations by the parties in their contract (from which they often proceed). They may be taken into account but are not conclusive.*<sup>12</sup>

**“Own business/employer’s business” dichotomy**

[36] It was accepted by the plurality in *Personnel* that although not determinative, the question of whether someone is conducting their own independent business as opposed to serving in the business of another could be a useful framework to guide the characterisation of the relationship.<sup>13</sup> The Respondent in this matter did not go so far as to contend that they were merely a “finder of labour” as was put in *Personnel*. Ms. Davidson gave evidence as to the



nature of the Respondent's business. She said the Respondent operated a case management, support coordination service for the elderly. I accept that to be the case.

[37] There are various terms of the Agreement and the Work Opportunity that create obligations that are consistent with the notion that the Applicant was operating an independent business. These include Clause 3 of the Agreement which requires the Contractor to maintain their own ABN, be responsible for their own tax and superannuation payments, and maintain various insurances, including insurance for workplace injuries.<sup>14</sup> Clauses to similar effect featured in the *Personnel* matter.<sup>15</sup> A number of them follow on from the designation of the arrangement as being a contract for services as described in paragraph [34] above. They can be taken into account but are not conclusive.

[38] Clause 23 of the Agreement provides that the Contractor is responsible for providing any equipment, including safety equipment. This is a factor which in the overall assessment, points to the relationship as being one of principal and independent contractor. Sub clauses 3(e) and (f) require the Applicant to have and maintain a valid driver's licence, car registration and comprehensive car insurance. The Work Opportunity lists the services to be provided to clients as including transport to medical practitioners. There is no express obligation in either the Agreement or the Work Opportunity for the Applicant to supply and use her own vehicle to provide the services. That requirement was central to both the agreement and the services in *Deliveroo*. However, given the other terms of those documents relating to licensing and insurance,<sup>16</sup> and the need to give efficacy to the contract, I regard it as an implied term of the Agreement that the Applicant would supply and use her own vehicle to at least transport herself to her various work locations. Whether a term can and should also be implied to the effect that the Applicant was contractually obliged to use her vehicle in all cases where transportation was required in the provision of services to the clients is a more difficult matter. There was no evidence that such a term was discussed and agreed upon. Had the parties turned their minds to the issue it is difficult to know whether such a clause would have been the result. Courts and tribunals are slow to imply terms, particularly where there is a detailed written contract.<sup>17</sup> Ultimately, I think it is necessary to give efficacy to the contract to conclude that a term would be implied that where transport services were required by clients and the clients requested use of the Applicant's vehicle, the Applicant would make a vehicle of her own available to provide those services. I also note however that although transportation was an aspect of the services to be provided under the contractual arrangements, it was not the central service as it was in *Jamsek* and *Deliveroo*.

[39] There are other key provisions in the Agreement and the Work Opportunity that point to the Applicant serving in and being integrated into, the business of the Respondent. The Applicant was to provide *the* care services that the Respondent had contracted with others to provide.<sup>18</sup> The work was provided to the Applicant in accordance with case plans the Respondent was contracted to manage.<sup>19</sup> It is these services which are at the core of the Respondent's business. The Respondent delivered the services to its clients through the Applicant.

[40] As to remuneration, the Agreement provides (at clause 17) that the Applicant was to be paid on an hourly basis "*according to* rates and fees set by the funding body from time to time." It may be that the funding bodies have a schedule of fees for the purpose of their dealings with companies such as the Respondent, however I do not take clause 17 to mean that the hourly

rates ultimately paid to workers such as the Applicant were determined by the funding bodies. The Work Opportunity makes it clear that the fees are negotiated with the client by the Case Manager and Support Coordinator. The Work Opportunity also prohibits the Applicant from discussing the amounts paid to the Applicant with clients and says that it is the Case Manager and Support Coordinator who negotiate the contracts and rates with the clients. I take this to mean that ultimately, the rates applying to the Applicant at the point of engagement set out in both documents were determined by the Respondent, presumably after some negotiation with third parties, and passed on to the Applicant.

[41] The Work Opportunity obliges the Applicant to submit weekly timesheets to the Respondent's bookkeeper for processing. Although clause 21 of the Agreement provides that the Applicant can request the Respondent to provide bookkeeping assistance for the purpose of invoicing the funding body for care work undertaken, the Applicant was not contractually obliged to do so. Further, clause 20 of the Agreement says that all payments for care work provided by the Applicant are to be made directly from the Respondent to the Applicant. The Respondent retained for itself the capacity to pay the Applicant at an hourly rate for work done based on weekly timesheets that the Applicant was required to submit.

[42] The Applicant was constrained by the Agreement in relation to hours of work. Once agreed, the range of available hours could not be changed other than on 2 weeks' notice. The Respondent could allocate the work hours of its choosing to the Applicant within the available range. Care and services could not be provided by the Applicant to clients other than during the hours agreed with the Respondent.<sup>20</sup>

[43] Whilst the plurality in *Personnel* cautioned that not all contractors are entrepreneurs,<sup>21</sup> the utility of the "own business/employer's business" dichotomy was nonetheless accepted. I am of the view that the contractual arrangements taken as a whole leave little if any scope for entrepreneurship on the part of the Applicant.

[44] These matters, in combination with the control that the Respondent reserved for itself relating to the Applicant's work, discussed below, lead me to the view that in the overall context of the Agreement and the Work Opportunity and the rights and duties created by them, the Applicant did not operate an independent business on her own account but was integrated into the business of the Respondent in a way in which an employee would be. Whilst this may not be a sufficient indication to conclude that the relationship is one of employment, it is a relevant consideration.

## Control

[45] The terms of the Work Opportunity reserve to the Respondent the right to direct the Applicant's work. It provides that the Applicant is obliged to comply with care standards "*and follow directions for client care by Case Manager and Registered Nurse to ensure clients safety and comply with Quality Care standards*" (emphasis added). The document also provides that the Applicant is to "*follow processes as per instructed to meet compliance with Contractor, Quality Standards and Client's need.*" (emphasis added). Further, the Work Opportunity makes it plain that the services that are provided to clients are determined and managed on an ongoing basis by the Respondent.<sup>22</sup> The Applicant does not have any contractual right to determine the services that are to be provided. As was the case in *Personnel*, the obligation of the Applicant

is not directed towards the carrying out of any particular task or the bringing about of any specific result. Rather, the overarching obligation of the Applicant under the Agreement is to deliver the (particular) services to clients which the Respondent has itself contracted to provide to those clients.<sup>23</sup>

[46] Under clause 9 of the Agreement, the Applicant is also required to comply with any policies and procedures provided by the Respondent or the funding body. Clause 4 of the Agreement provides that the Respondent is to endeavour to arrange care work for the Applicant in accordance with the Agreement and any case plans that the Respondent is contracted to manage. There was no contractual right for the Applicant to determine what work she would do for any particular client or how that work would be done. The Applicant was simply delivering the services that the Respondent had contracted to provide, and the Respondent had retained the contractual right to direct how that work was to be carried out to ensure its own contractual obligations were met.

[47] Subject to the Applicant's capacity to refuse care work offered by the Respondent or undertake other work,<sup>24</sup> the contractual arrangements also allow the Respondent to determine for whom the Applicant would work.<sup>25</sup> The plurality in *Personnel* said that the primary judge in that matter had erred in concluding that the capacity to accept or reject work, or work for others, were contraindicators of an employment relationship and pointed out that such arrangements were consistent with the concept of casual employment. In this case, the capacity for the Applicant to refuse work is severely constrained by other binding terms of the Agreement, notably the requirement to be available to work at the times agreed for 6 months from the date of agreement and to provide 2 weeks' notice of any change thereafter.

[48] The Respondent had significant control over when the work would be done by the Applicant. The Applicant was required to be available to work at any time during the range of agreed available hours. Within this range, the hours of work were determined by the Respondent. Clause 18 of the Agreement says that the Applicant can request the Respondent to provide a "scheduling service" to assist the Applicant with providing services. There is no express term that describes how the Applicant would be allocated work in the absence of such scheduling service, but given the overriding obligation of the Respondent to endeavour to arrange work for the Applicant in clause 4, I consider that in the absence of the "scheduling service" a term would be implied that would require the Respondent to take necessary steps to convey those work allocation details to the Applicant to give efficacy to the contract. It is noteworthy that unlike the circumstances in *Deliveroo*, there was no contractual requirement for the Applicant to use the scheduling service. Once the work was allocated to the Applicant, the Respondent had the various contractual rights referred to above that confer a right to direct what work was to be done and how it was to be carried out.

[49] As is mentioned above, the Agreement also limited the Applicant's ability to provide the care and services to the hours of work that had been agreed to. The Work Opportunity obliged the Applicant to inform and gain approval from the Respondent for any changes to hours or additional hours and to liaise with them where work was incomplete.

[50] The capacity for the Respondent to direct and control the work of the Applicant was in my view central to the Respondent's business of providing care services to its clients. In *Personnel* Keifel CJ, Keane and Edelman JJ concluded:

*...In referring Mr McCourt to Hanssen, Construct was exercising, and commercialising, its right to control the work that Mr McCourt would do and how he would do it. The marketability of Construct's services as a labour-hire agency turned on its ability to supply compliant labour; without that subservience, that labour would be of no use to Construct's clients. That right of control was therefore the key asset of Construct's business. Its significance was not diminished by the circumstance that the minutiae of Mr McCourt's performance of daily tasks were at the direction of Hanssen. Indeed, the right of control held by Construct over Mr McCourt explains why there was no need for any contractual relationship between Mr McCourt and Hanssen in order to support Hanssen's ability to issue day-to-day directions to Mr McCourt.<sup>26</sup>*

[51] The present matter is distinguishable from *Personnel* in that the Respondent was not so much a general labour hire agency but were themselves in the business of delivering care services. They did this not by imposing a contractual obligation on the Applicant to comply with the Respondent's directives *and* the minutiae of directions from a third party. Nor did they do it by detailed contractual provisions which effectively delegated the delivery of the totality of Respondent's own contractual obligations to an independent business. Rather, they did it by contractual arrangements that reserved to themselves the right to determine the services that the Applicant would provide to the Respondent's clients and how they would be provided. The various contractual provisions described above are, in my view, supportive of a conclusion that the relationship was one of employer and employee.

[52] The determination as to whether a person is an employee or independent contractor is a question of law. Having taken into account the various rights and obligations that the parties created for themselves by their contractual arrangements, I am of the view that the relationship between the Applicant and Respondent in this case was one of employee and employer.

[53] The Respondent's objection is dismissed. The matter will be relisted for conference on a date to be determined.



DEPUTY PRESIDENT

*Appearances:*

Mr. Newman for the Applicant.

Mr. Thompson for the Respondent.

*Hearing details:*

By Video using Microsoft Teams on Monday, 18 December 2023.

*Final written submissions:*

Respondent filed closing written submissions on 22 December 2023.

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<sup>1</sup> *Coles Supply Chain Pty Ltd v. Milford* (2020) 279 FCR 591 and see *Lipa Pharmaceuticals v Jarouche* [\[2023\] FWCFCB 101](#).

<sup>2</sup> *Lipa* op cit at paragraph [4].

<sup>3</sup> [2022] HCA 1.

<sup>4</sup> *Ibid*. See for example at [57], [59], [61] and [172] and following. See also *Muller v. Timbecon Pty Ltd* [\[2023\] FWCFCB 42](#) at [40].

<sup>5</sup> There are some minor statutory amendments to the common law, none of which are presently relevant or in issue. See Gordon J in *Personnel* at [161].

<sup>6</sup> See also *Chambers and O'Brien v Broadway Homes Pty Ltd* [\[2022\] FWCFCB 129](#) at [74].

<sup>7</sup> See Gordon J at [175].

<sup>8</sup> See Gordon J at [177] and Keifel CJ, Keane and Edelman JJ at [54].

<sup>9</sup> *Ibid* at [66] and [79].

<sup>10</sup> [\[2022\] FWCFCB 156](#) at [41].

<sup>11</sup> [2013] FCAFC 3.

<sup>12</sup> *Ibid* at [37] per Buchanan J, with whom Lander and Robertson JJ agreed.

<sup>13</sup> *Personnel* op cit at [35].

<sup>14</sup> See also clause 8.

<sup>15</sup> See clauses 1(e) and 3(c) at [14].

<sup>16</sup> The advertisement also refers to a reliable car as a “must have” for applicants and the services as including driving and community access.

<sup>17</sup> *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 per Mason J at [6].

<sup>18</sup> Agreement clause 2.

<sup>19</sup> *Ibid* clause 4.

<sup>20</sup> Agreement clause 14.

<sup>21</sup> At [39].

<sup>22</sup> The document provides at page 2: “*Services are negotiated to meet clients' needs initially by Case Manager and Support Coordinator*” and “*Case Manager and Support Coordinator, via Aspire 2 Life, are responsible for the ongoing management of client's packages budgets and services.*”

<sup>23</sup> Agreement, clauses 1 and 2.

<sup>24</sup> Agreement clause 5.

<sup>25</sup> Agreement clause 1, 2 and 4.

<sup>26</sup> At [76].