



DECISION

Fair Work Act 2009
s.604—Appeal of decision

Aspire 2 Life Pty Ltd

v

Jessica Tidmarsh

(C2024/1127)

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT SAUNDERS
DEPUTY PRESIDENT WRIGHT

BRISBANE, 20 JUNE 2024

Appeal against decision of Deputy President Roberts at Sydney on 5 February 2024 in matter number C2023/6640 – general protections application involving an alleged dismissal – employee or independent contractor.

Introduction

[1] Ms Jessica Tidmarsh is a disability support worker. On 27 October 2023, Ms Tidmarsh filed an application in the Fair Work Commission (*Commission*) pursuant to s 365 of the *Fair Work Act 2009* (Cth) (*Act*) in which she contended that she was dismissed by Aspire 2 Life Pty Ltd (*Aspire 2 Life*) in contravention of Part 3-1 – General protections of the Act.

[2] Aspire 2 Life objected to the application on the basis that Ms Tidmarsh was not dismissed because she was not an employee. Aspire 2 Life contended that it engaged Ms Tidmarsh as an independent contractor, with the result that she was not dismissed within the meaning of s 386 of the Act.

[3] Deputy President Roberts dismissed Aspire 2 Life’s jurisdictional objection on the basis that the relationship between Ms Tidmarsh and Aspire 2 Life was one of employee and employer.¹ Aspire 2 Life seeks permission to appeal against the Decision.

The Decision

[4] The Deputy President found that the terms and conditions of the contract pursuant to which Ms Tidmarsh performed work for Aspire 2 Life were set out in two documents. The first document is entitled “HRO03 Contractors Work Opportunity” (*Work Opportunity*) and the second document is a written agreement made between Ms Tidmarsh and Aspire 2 Life (*Agreement*).²

[5] Following the decision of the High Court in *CFMEU v Personnel Contracting Pty Ltd (Personnel Contracting)*,³ the Deputy President observed that the focus of his analysis had to be on the legal rights and obligations created by the contract between the parties, not the history of the parties’ dealings with one another during the course of their relationship.⁴

[6] The Deputy President reasoned as follows in relation to the rights and obligations conferred and imposed on Ms Tidmarsh and Aspire 2 Life by the contract:

- (a) The Agreement and the Work Opportunity describe Ms Tidmarsh as an independent contractor. Following the High Court in *Personnel Contracting* and a Full Bench of the Commission in *Deliveroo Australia Pty Ltd v Franco (Deliveroo)*,⁵ the Deputy President determined that terms of the contract describing Ms Tidmarsh as an independent contractor were to be given “little or no weight in the overall analysis”,⁶ as were other terms that were “merely consequential upon the labelling adopted in the agreement”.⁷
- (b) In assessing whether Ms Tidmarsh was conducting her own independent business as opposed to serving in the business of another, the Deputy President accepted evidence given on behalf of Aspire 2 Life that its business involved the operation of a case management, support coordination service for the elderly.⁸ The Deputy President also observed that Aspire 2 Life did not go so far as to contend that it was merely a “finder of labour”, as was the case in *Personnel Contracting*.⁹
- (c) The Deputy President found that various terms of the Agreement and the Work Opportunity created obligations that were consistent with the notion that Ms Tidmarsh was operating an independent business, including the requirement for Ms Tidmarsh to maintain her own Australian Business Number, be responsible for her own tax and superannuation payments, and maintain various insurances including insurance for workplace injuries. Although a number of these obligations followed on from the parties’ designation of their arrangement as being a contract for services, the Deputy President held that these factors could be taken into account but were not conclusive.¹⁰
- (d) Clause 23 of the Agreement provides that Ms Tidmarsh is responsible for providing any equipment, including safety equipment. The Deputy President found that this is a factor which in the overall assessment points to the relationship as being one of principal and independent contractor.¹¹ The Deputy President also observed that subclauses 3(e) and (f) of the Agreement required Ms Tidmarsh to have and maintain a valid driver’s licence, car registration and comprehensive car insurance, and the Work Opportunity lists the services to be provided to clients as including transport to medical practitioners.¹²
- (e) The Deputy President found that there were other key provisions in the Agreement and the Work Opportunity that pointed towards Ms Tidmarsh serving in and being integrated into the business of Aspire 2 Life. In particular, Ms Tidmarsh was required to provide “*the care services that the Respondent had contracted with others to provide ... [and] The work was provided to the Applicant in accordance with case plans the Respondent was contracted to manage*”.¹³ It was observed by the Deputy President that these services were at the core of Aspire 2 Life’s business and Aspire 2 Life delivered the services to its clients through Ms Tidmarsh.¹⁴
- (f) As to remuneration, the Deputy President found that clause 17 of the Agreement required Ms Tidmarsh to be paid on an hourly basis “according to rates and fees set by

the funding body from time to time”.¹⁵ The Work Opportunity prohibited Ms Tidmarsh from discussing with clients the amounts paid to her by Aspire 2 Life.¹⁶ The Deputy President found that the that fees charged to clients were, according to the Work Opportunity, “negotiated with the client by ... [Aspire 2 Life’s] Case Manager and Support Coordinator”.¹⁷ The Deputy President also made the following findings in relation to the contractual rights and obligations relating to payments which Aspire 2 Life was required to make to Ms Tidmarsh:

- (i) The Work Opportunity obliged Ms Tidmarsh to submit weekly timesheets to Aspire 2 Life’s bookkeeping for processing.¹⁸
 - (ii) Although clause 21 of the Agreement provides that Ms Tidmarsh can request Aspire 2 Life to provide bookkeeping assistance for the purpose of invoicing the funding body for care work undertaken, Ms Tidmarsh was not contractually obliged to do so. Further, clause 20 of the Agreement requires that all payments for care work undertaken by Ms Tidmarsh are to be made directly by Aspire 2 Life to Ms Tidmarsh.¹⁹
- (g) The Deputy President found that Ms Tidmarsh was constrained by the Agreement in relation to hours of work. Clause 14 of the Agreement provides that, once agreed, Ms Tidmarsh could not change her range of available hours other than on two weeks’ notice, Aspire 2 Life could allocate the work hours of its choosing to Ms Tidmarsh within the agreed range, and care services could not be provided by Ms Tidmarsh to clients other than during the hours agreed with Aspire 2 Life.²⁰
- (h) The Deputy President viewed the “contractual arrangements taken as a whole” to “leave little if any scope for entrepreneurship on the part of” Ms Tidmarsh.²¹ These matters, coupled with the control that Aspire 2 Life reserved for itself in relation to Ms Tidmarsh’s work, led the Deputy President “to the view that in the overall context of the Agreement and the Work Opportunity and the rights and duties created by them”, Ms Tidmarsh 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”.²² The Deputy President regarded this as a relevant but not determinative consideration.²³
- (i) As to control, the Deputy President found that the Work Opportunity reserved to Aspire 2 Life the right to direct Ms Tidmarsh’s work:²⁴

“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 needs*” (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. 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.”

- (j) Further as to control, the Deputy President observed that (i) Ms Tidmarsh was required by clause 9 of the Agreement to comply with any policies and procedures provided by Aspire 2 Life or the funding body, (ii) Aspire 2 Life was required by clause 4 of the Agreement to endeavour to arrange care work for Ms Tidmarsh in accordance with the Agreement and any case plans that Aspire 2 Life was contracted to manage, (iii) there was no contractual right for Ms Tidmarsh to determine what work she would do for any particular client or how that work would be done, (iv) Ms Tidmarsh was simply delivering the services that Aspire 2 Life had contracted to provide, and (v) Aspire 2 Life retained the contractual right to direct how that work was to be carried out to ensure that its own contractual obligations were met.²⁵
- (k) It was found by the Deputy President that the contract allowed Aspire 2 Life to determine for whom Ms Tidmarsh would work, subject to her ability to refuse care work offered by Aspire 2 Life or undertake other work.²⁶ The Deputy President also found that the capacity for Ms Tidmarsh to refuse work from Aspire 2 Life was severely constrained by other terms of the Agreement, notably the requirement for her to be available to work at the times agreed for six months and to provide two weeks’ notice of any change thereafter.²⁷
- (l) The Deputy President found that Aspire 2 Life had significant control over when the work would be done by Ms Tidmarsh. In particular, the hours of work were determined by Aspire 2 Life within the range of available hours agreed with Ms Tidmarsh.²⁸ The Deputy President also had regard to the fact that although clause 18 of the Agreement permitted Ms Tidmarsh to request Aspire 2 Life to provide a “scheduling service” to assist her with providing services, there was no contractual requirement for Ms Tidmarsh to use the “scheduling service”.²⁹
- (m) The Deputy President found that the capacity for Aspire 2 Life to direct and control the work of Ms Tidmarsh was central to Aspire 2 Life’s business of providing care services to its clients.³⁰
- (n) The Deputy President found that Aspire 2 Life’s business involved the delivery of care services and they did this by entering into contractual arrangements with disability support workers such as Ms Tidmarsh where the contracts reserved to Aspire 2 Life the right to determine the services that Ms Tidmarsh would provide to Aspire 2 Life’s clients and how those services would be provided.³¹

Summary of Aspire 2 Life’s appeal grounds and submissions

[7] Aspire 2 Life’s sole ground of appeal is that the Deputy President erred in the assessment of whether Ms Tidmarsh was an employee or contractor.

[8] Aspire 2 Life does not challenge the legal test applied by the Deputy President.

[9] Aspire 2 Life contends that the contract it made with Ms Tidmarsh was not properly considered by the Deputy President for three reasons. First, it is contended that the Deputy

President mischaracterised the nature of Aspire 2 Life’s business. In considering the control under the contract, the Deputy President observed that being directed to perform specific services for a client, without any say in which services to provide, was indicative of employment. However, it is submitted that a reading of the entirety of the contract reveals that Ms Tidmarsh was contracted to perform different classes of services: personal support, home cleaning, and gardening. When viewed in this way, Aspire 2 Life submits that the contract did no more than provide it with the ability to direct a contractor to perform a class of services for a particular client. There is no indication in the contract, so Aspire 2 Life contends, that it had the right to direct the manner in which the services were provided by Ms Tidmarsh. Further, it is submitted that the Deputy President reasoned that the requirement to comply with Quality Care Standards and safety directions was reminiscent of the control afforded under a contract of employment. Aspire 2 Life contends that there is no appellate authority which supports such a conclusion. It is submitted that a principal contractor is entitled to make compliance with national standards and work, health and safety law an essential term of the contract.

[10] Secondly, Aspire 2 Life contends that the Deputy President failed to take into account the following contractual indicia which favour a characterisation of the relationship as one of principal and independent contractor:

- (a) Ms Tidmarsh was required to provide her own “equipment, including specialised clothing or safety equipment”;
- (b) there was a requirement on the part of Ms Tidmarsh to hold a tertiary qualification in disability or aged care;
- (c) Ms Tidmarsh had the right under the contract to subcontract work to another person;
- (d) the contract provided that all rates of pay were inclusive of goods and services tax;
- (e) the contract did not restrain Ms Tidmarsh from providing services for, or being employed by, a competing business; and
- (f) Ms Tidmarsh had the right under the contract to its immediate termination.

[11] Thirdly, Aspire 2 Life contends that the Deputy President erred in finding that the contract required Ms Tidmarsh to be available to work at any time during the range of agreed available hours. It is submitted that this finding was used to reason that the contract was one that imbued a degree of control that was indicative of Ms Tidmarsh being an employee. However, it is contended that this observation is inconsistent with the words of the contract which gave Ms Tidmarsh the ability to “choose who [she] contract[ed] to”, did not oblige Ms Tidmarsh to “undertake any care work offered by” Aspire 2 Life to her, and provided that she was “free to undertake other forms of work (including care work)”.

[12] Aspire 2 Life submits that a proper examination of the obligations and duties of Ms Tidmarsh under the contract establishes a clear contract for services.

Summary of Ms Tidmarsh's submissions

[13] Ms Tidmarsh submits that there is no flaw in the Deputy President's interpretation or assessment of the contract. She contends that the Deputy President dutifully evaluated the totality of the arrangement between the parties, with the primary focus of the contract, and correctly concluded that the relationship between Ms Tidmarsh and Aspire 2 Life was one of employee and employer.

Consideration

[14] The question of whether Ms Tidmarsh was employed by Aspire 2 Life is not a discretionary decision. The correctness standard applies to this appeal. As a result, it is necessary for us to determine whether the Deputy President's conclusion concerning the existence or otherwise of an employment relationship was correct.³²

[15] There is no dispute as to the principles that must be applied in determining whether Ms Tidmarsh was employed by Aspire 2 Life. As the Deputy President observed,³³ those principles were conveniently distilled by Wigney J in *JMC Pty Limited v Commissioner of Taxation*.³⁴ We will apply those principles in our assessment of whether Ms Tidmarsh was engaged by Aspire 2 Life as an employee or an independent contractor.

[16] There is no challenge to the Deputy President's finding that the terms and conditions of the contract pursuant to which Ms Tidmarsh performed work for Aspire 2 Life were recorded in the Work Opportunity and the Agreement.³⁵ We agree with that finding.

[17] The Work Opportunity and Agreement provide 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>Monday</u>	<u>Tuesday</u>	<u>Wednesday</u>	<u>Thursday</u>	<u>Friday</u>	<u>Saturday</u>	<u>Sunday</u>
8am-6pm	8am-6pm	6am-8pm	6am-8pm	6am-8pm	6am-8pm	6am-8pm

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:”

“Agreement

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 Provider: Aspire 2 Life Pty Ltd ABN 95 636 793 34 of 38 Dougan Street, Point Vernon Qld 4655 (Email - 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] Aspire 2 Life’s first argument focuses on the nature of its business and the extent to which it had the right to control the manner in which work was undertaken by Ms Tidmarsh. It

may first be observed that Aspire 2 Life has not sought to challenge the Deputy President's finding, based on evidence given by Ms Sue Davidson, a director of Aspire 2 Life, that it "operated a case management, support coordination service for the elderly".³⁶ The Deputy President also described the nature of Aspire 2 Life's business and the work undertaken by Ms Tidmarsh in paragraphs [8] and [9] of the Decision:

"[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."

[19] We consider that the terms of the contract made between Aspire 2 Life and Ms Tidmarsh are consistent with this description of Aspire 2 Life's business. In particular:

- (a) Aspire 2 Life sources clients who are in need of care services. Aspire 2 Life's Case Manager and Support Coordinator negotiates with each client in relation to the services they require to meet their needs;³⁷
- (b) Aspire 2 Life's Case Manager and Support Coordinator negotiates with each client the fees to be paid by the client for the services;³⁸
- (c) Aspire 2 Life's Case Manager and Support Coordinator are responsible for the ongoing management of each client's "packages budgets and services". Any changes or additional hours/support required by a client must be approved by Aspire 2 Life's Case Manager and Support Coordinator;³⁹
- (d) Ms Tidmarsh was engaged by Aspire 2 Life to provide care services (personal support, home cleaning and gardening) to clients with whom Aspire 2 Life had negotiated the provision of such services;⁴⁰
- (e) Ms Tidmarsh agreed with Aspire 2 Life to be paid certain "rates" (mostly per hour of work performed) for the care services she provided to the clients.⁴¹ Ms Tidmarsh was not permitted to discuss those "rates" with the clients "as that is the role of Case Manager and Support";⁴²
- (f) Aspire 2 Life was obliged to pay Ms Tidmarsh for the care services she provided to the clients;⁴³
- (g) Ms Tidmarsh was obliged to be available to provide care services to the clients at any time during the range of available hours she agreed with Aspire 2 Life, but she could elect not to undertake work for a particular client.⁴⁴ Ms Tidmarsh could not change her

agreed available hours for at least six months and had to provide two weeks' notice of any such change;⁴⁵

- (h) Ms Tidmarsh was obliged to inform Aspire 2 Life's Case Manager and Support Coordinator "of any client changes, IE health, wounds, environment, hospitals. Etc";⁴⁶ and
- (i) Ms Tidmarsh was obliged to "comply with care standards and follow directions for client care by Case Manager and Registered Nurse to ensure client's safety and comply with Quality Care standards".⁴⁷ She was also obliged to "follow processes as per instructed to meet compliance with Contractor, Quality Standards, and Client's needs".⁴⁸ Ms Tidmarsh was further required to comply with Aspire 2 Life's policies and procedures.⁴⁹

[20] In light of these features of the contract made between Aspire 2 Life and Ms Tidmarsh, we do not accept the submission advanced on behalf of Aspire 2 Life that its business was limited to sourcing clients who wanted care services. In addition to sourcing the clients, Aspire 2 Life negotiated with those clients the particular services they would be provided and the fee for each such service. Further, Aspire 2 Life was responsible for the ongoing management of those services to the clients, which meant that it needed to know about any "client changes", including in relation to their "health, wounds, environment, hospitals etc".⁵⁰ Consistent with its ongoing role in managing the care services provided to clients, Aspire 2 Life had the contractual right to make policies and procedures and issue instructions to Ms Tidmarsh to "meet compliance with Contractor, Quality Standards, and Client's needs". Aspire 2 Life also had the right for its Case Manager and Registered Nurse to issue directions to Ms Tidmarsh for "client care". Although the giving of instructions to Ms Tidmarsh to "meet compliance with Contractor, Quality Standards" constitutes the giving of a direction to meet performance standards, which is consistent with an independent contracting arrangement,⁵¹ the right to give instructions to Ms Tidmarsh to meet a client's needs meant, in our view, that Aspire 2 Life had the right to control the way in which the care services were to be performed by Ms Tidmarsh.⁵² The fact that the Work Opportunity expressly contemplates that such instructions could be given by a Registered Nurse or Case Manager supports the conclusion that Aspire 2 Life had control over the mode of performance of the work, not Ms Tidmarsh.

[21] Having regard to the matters set out in the previous two paragraphs, we agree with the finding made by the Deputy President in the final two sentences of paragraph [46] of the Decision:

"...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."

[22] We also agree with the Deputy President's finding that it is apparent from the contractual rights and duties that Ms Tidmarsh did not operate an independent business on her own account; she was integrated into the business of Aspire 2 Life in a way in which a person employed as a personal care worker would be.⁵³ Although not determinative, this weighs in favour of a

conclusion that the relationship between Ms Tidmarsh and Aspire 2 Life was that of employer and employee.

[23] For the reasons explained, we do not accept Aspire 2 Life's contention that the Deputy President mischaracterised the nature of its business.

[24] In paragraphs [25] to [31] below we address Aspire 2 Life's contention that the Deputy President erred by failing to take into account specific contractual indicia which favour a characterisation of the relationship as one of principal and independent contractor.

[25] The Deputy President made specific reference in paragraph [38] of the Decision to clause 23 of the Agreement, which provides that the Contractor is responsible for providing any equipment, including safety equipment, and found that this weighed in support of a conclusion that the relationship was one of principal and independent contractor. The Deputy President did not err by failing to take into account that Ms Tidmarsh was required by the contract to provide her own equipment.

[26] Both the Opportunity Document and clause 3(h) of the Agreement required Ms Tidmarsh to "maintain a Certificate III or higher qualification in Aged Care or Disabilities". A Certificate III in Aged Care or Disabilities is an entry level qualification. It can be obtained from a training organisation (such as TAFE NSW) and does not have any entry requirements. That Ms Tidmarsh was required to hold this minimum level of qualifications does not weigh in support of a conclusion that the relationship was one of principal and independent contractor. The Deputy President did not err by failing to take into account this requirement under the contract.

[27] Aspire 2 Life relies on the following provisions in the Opportunity Document to support its contention that the Deputy President erred by failing to take into account that Ms Tidmarsh had the right under the contract to subcontract work to another:

- 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.

[28] Similarly, page one of the Work Opportunity states that Ms Tidmarsh is "responsible to ensure any time away from your client services is covered..." We do not consider that these provisions gave Ms Tidmarsh a right to subcontract work to another person. The provisions imposed an *obligation* on Ms Tidmarsh, if she needed time away or was otherwise unable to complete the work required by Aspire 2 Life, to inform Aspire 2 Life's Case Manager, so that the Case Manager could support Ms Tidmarsh to arrange other contractors to undertake the work, taking into account the client's right of preference. The contract does not expressly deal with what happens to payments for services provided by another contractor when Ms Tidmarsh has "time away" or is otherwise unable to provide the contracted services. However, clause 20 of the Agreement states that "All payments for care work provided by the Contractor will be made directly from the Service Provider to the Contractor". When Ms Tidmarsh has "time away" or is otherwise unable to provide the contracted services, she does not provide "care

work”. Accordingly, she does not have any right to be paid for the provision of services by another contractor to a client. The contractual arrangements are structured in such a way that the other contractor who provides the “care work” when Ms Tidmarsh has “time away” or is otherwise unable to provide the contracted services will be paid directly by Aspire 2 Life for undertaking that work. There is certainly no unilateral right under the contract for Ms Tidmarsh to subcontract the “care work” she is contracted to provide to any other person. Accordingly, we reject the contention that the Deputy President erred by failing to take into account that Ms Tidmarsh had the right under the contract to subcontract work to another.

[29] The Deputy President found that there were “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 ...”⁵⁴ The Deputy President also observed that a number of these terms of the contract “follow on from the designation of the arrangement as being a contract for services”.⁵⁵ We consider that the term of the Work Opportunity stating that “These rates are inclusive of GST” is one of the terms that does “follow on from the designation of the arrangement as being a contract for services”,⁵⁶ because the only reason for Aspire 2 Life to include GST in the payments it made to Ms Tidmarsh was as a result of the designation of Ms Tidmarsh as an independent contractor. We do not accept that the Deputy President erred by not taking into account the provision in the contract stating that rates of pay are “inclusive of GST”.⁵⁷

[30] Aspire 2 Life relies on clause 5 of the Agreement to support its contention that the Deputy President failed to take into account that the contract did not restrain Ms Tidmarsh from providing services for, or being employed by, a competing business.⁵⁸ Clause 5 provides that “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)”. The Deputy President referred to clause 5 of the Agreement in the first sentence of paragraph [47] of the Decision.⁵⁹ The Deputy President went on in paragraph [47] to make the point, correctly, that “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”. These aspects of the contract also constrained Ms Tidmarsh’s capacity to provide services to, or be employed by, a competing business. This was one of the matters that led the Deputy President to find, at [42]-[44], that the “contractual arrangements taken as a whole leave little if any scope for entrepreneurship on the part of the Applicant”. Further, the fact that Ms Tidmarsh was free to work with other entities including competitors of Aspire 2 Life is not determinative because it is not inconsistent with casual employment.⁶⁰ For these reasons, we reject the contention that the Deputy President erred by failing to take into account that the contract did not restrain Ms Tidmarsh from providing services for, or being employed by, a competing business.

[31] Aspire 2 Life relies on clause 26 of the Agreement to support its contention that the Deputy President failed to take to account that Ms Tidmarsh had the right under the contract to its immediate termination.⁶¹ Clause 26 provides that “Either party may terminate this agreement by notice in writing to the other”. We accept that, apart from setting out clause 26 of the Agreement in paragraph [17] of the Decision, the Deputy President’s reasons for decision do not make any reference to the right of either party to the Agreement to terminate it “by notice

in writing to the other”. In *Personnel Contracting*, Gordon J indicated (at [196]) that the fact that Mr McCourt could give such short notice (4 hours) “may be indicative of a relationship of casual employment”. The same may be said in the present case. Accordingly, we do not accept that the Deputy President erred by failing to take into account that Ms Tidmarsh had the right under the contract to its immediate termination.

[32] Aspire 2 Life’s third argument is that the Deputy President erred in finding that the contract required Ms Tidmarsh to be available to work at any time during the range of agreed available hours.⁶² Clause 6 of the Agreement provides:

“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.”

[33] The following provisions of the Work Opportunity are also relevant to this argument:

- “You choose the days you are available.
- ...
- Availability must be locked in for 6 months and we need to have 2 weeks’ notice for any changes. This is to ensure client care is not disrupted.”

[34] These provisions of the contract obliged Ms Tidmarsh to, first, inform Aspire 2 Life of her availability to undertake care work at particular times on particular days and, secondly, to “be available” to undertake care work during those times. The mandatory nature of this second aspect of the obligation is apparent from the expression “will be available” in the first sentence of clause 6 of the Agreement. Further, once Ms Tidmarsh’s availability was “locked in” she could not change it for six months and, even then, had to provide two weeks’ notice of any changes. It follows that we agree with the Deputy President’s finding that the contract required Ms Tidmarsh to be available to work at any time during the range of agreed available hours. This obligation on Ms Tidmarsh was not inconsistent with her right to (a) “choose who [she contracted to],⁶³ (b) not “undertake any care work offered” to her by Aspire 2 Life,⁶⁴ and (c) “undertake other forms of work (including care work).⁶⁵ In particular, Ms Tidmarsh could comply with her obligation to “be available” to undertake care work during her agreed times while at the same time choosing which clients she was willing to provide care work for during those times and undertaking other work at times outside her agreed available hours.

Conclusion

[35] We accept that it is in the public interest to grant permission to appeal because the appeal raises issues of widespread importance,⁶⁶ at least insofar as it concerns the “up to 1500 services per day” provided to clients sourced by Aspire 2 Life.⁶⁷ We also accept that this decision may have some impact on other businesses who provide, or arrange for the provision of, NDIS and other similar services in the community.

[36] For the reasons explained above, we do not accept that the Deputy President erred in any of the ways for which Aspire 2 Life contends. Having conducted a detailed review of the

contractual rights and obligations conferred and imposed on Ms Tidmarsh and Aspire 2 Life by the Agreement and the Work Opportunity, we have reached the same conclusion as the Deputy President. Our assessment is that the relationship between Ms Tidmarsh and Aspire 2 Life was one of employee and employer. Ms Tidmarsh undertook personal care work for clients sourced by Aspire 2 Life, for which she was paid an hourly rate by Aspire 2 Life. The right to control the nature of the services to be provided to clients, when those services were provided, and the way in which the personal care work was to be undertaken by Ms Tidmarsh lay in the hands of Aspire 2 Life, which is consistent with its ongoing responsibility to manage the services being provided to the clients. In many ways, Ms Tidmarsh was integrated into the business of Aspire 2 Life in a way in which a person employed as a personal care worker would be. She did not have the right to subcontract the care work to third parties. In our view, the aspects of the contract that point towards the existence of an employment relationship outweigh those that weigh in favour of an independent contracting arrangement.

[37] We order as follows:

- (a) Permission to appeal is granted.
- (b) The Decision is upheld.
- (c) The appeal is dismissed.
- (d) The matter will be listed for a conference on a date to be determined.



VICE PRESIDENT

Appearances:

Mr M Rawlings of counsel instructed by Rose Litigation Lawyers, for the Appellant.
Mr B Newman, for the Respondent.

Hearing details:

2024.
Sydney (By Microsoft Teams):
14 May.

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¹ [\[2024\] FWC 289](#) (*Decision*) at [52]

² Decision at [14]-[17]

³ [2022] HCA 1

⁴ Decision at [20] & [30]

⁵ [\[2022\] FWCFB 156](#) at [41]

⁶ Decision at [35]

⁷ Ibid

⁸ Decision at [36]

⁹ Ibid

¹⁰ Decision at [37]

¹¹ Decision at [38]

¹² Ibid

¹³ Decision at [39]

¹⁴ Ibid

¹⁵ Decision at [40]

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Decision at [41]

¹⁹ Ibid

²⁰ Decision at [42]

²¹ Decision at [43]

²² Decision at [44]

²³ Ibid

²⁴ Decision at [45]

²⁵ Decision at [46]

²⁶ Decision at [47]

²⁷ Ibid

²⁸ Decision at [48]

²⁹ Ibid

³⁰ Decision at [50]

³¹ Decision at [51]

³² *Gupta v Portier Pacific Pty Ltd* [\[2020\] FWCFB 1698](#) at [55]-[56]

³³ Decision at [30]

³⁴ [2022] FCA 750

³⁵ Decision at [31]

³⁶ Decision at [36]

³⁷ Work Opportunity – 7th bullet point under heading “Other things to know”

³⁸ Work Opportunity – 4th bullet point under heading “Ongoing Regulatory credential compliance and education”

³⁹ Work Opportunity – penultimate bullet point under heading “Other things to know”

⁴⁰ Agreement at clauses 2 and 14 and Schedule

⁴¹ Agreement at Schedule; Work Opportunity – 5th bullet point under heading “Ongoing Regulatory credential compliance and education”

⁴² Work Opportunity – provision immediately above “Availability times”

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- ⁴³ Agreement at clause 20
- ⁴⁴ Agreement at clauses 5 and 6
- ⁴⁵ Agreement at clause 6; Work Opportunity – 3rd last bullet point under heading “Other things to know”
- ⁴⁶ Work Opportunity – last bullet point under heading “Other things to know”
- ⁴⁷ Work Opportunity – 4th last bullet point under heading “Care Workers are independent Contractors and would need”
- ⁴⁸ Work Opportunity – immediately above Ms Tidmarsh’s name and personal details at the foot of the document
- ⁴⁹ Agreement at clause 9
- ⁵⁰ Work Opportunity – last bullet point under heading “Other things to know”
- ⁵¹ *Deliveroo* at [47]
- ⁵² *Ibid*
- ⁵³ Decision at [44]
- ⁵⁴ Decision at [37]
- ⁵⁵ *Ibid*
- ⁵⁶ *Ibid*
- ⁵⁷ *Deliveroo* at [41]-[42], applying *ACE Insurance Limited v Trifunovski* [2013] FCAFC 3 at [37]
- ⁵⁸ Aspire 2 Life’s submissions dated 28 March 2024 at [18(b)(v)] and footnote 26
- ⁵⁹ Decision at [47] and footnote 24
- ⁶⁰ *Deliveroo* at [44]
- ⁶¹ Aspire 2 Life’s submissions dated 28 March 2024 at [18(b)(vi)] and footnote 27
- ⁶² Decision at [48]
- ⁶³ Opportunity Document at page 1
- ⁶⁴ Agreement at clause 5
- ⁶⁵ *Ibid*
- ⁶⁶ Assuming the contracts entered into by Aspire 2 Life with its other “contractors” are in the same or similar terms as the Agreement and Work Opportunity considered in this case.
- ⁶⁷ Decision at [9]