

## Article Information

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## Contractor vs Employee: The label is not determinative

***A Full Bench of the Fair Work Commission (FWC) has recently been required to consider whether a worker, who had signed two contracts describing her as an independent contractor, was in fact an employee.<sup>[1]</sup> Although the terms of the contracts contained a number of factors that suggested the worker was an independent contractor, a detailed review of the contractual rights and obligations suggested that the worker was serving in, and was integrated into, the business.***

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### Original decision

Disability support worker, Jessica Tidmarsh (the **worker**), filed an application alleging that she was unlawfully dismissed by Aspire to Life Pty Ltd (**Aspire 2 Life**), a business providing home care and safety services, in contravention of the General Protections contained in the *Fair Work Act 2009 (Cth)* (**FW Act**). Aspire 2 Life challenged this argument on the basis that the worker was not an employee but in fact an independent contractor of the business.

Consistent with the High Court's decision in *CFMEU v Personnel Contracting*<sup>[2]</sup> (**Personnel Contracting**), Deputy President Roberts focused on the rights and obligations created by the contract between the parties, rather than the history of their dealings with one another during the course of their relationship. Although the contract described the worker as an independent contractor, and contained various terms that were consistent with such an argument (such as using an ABN, being responsible for her own tax, super and insurance, and providing her own safety equipment), there were other key provisions which suggested otherwise.

Following the High Court's decision in *Personnel Contracting* and a Full Bench FWC decision in *Deliveroo Australia Pty Ltd v Franco*<sup>[3]</sup>, the Deputy President determined that the description of "independent contractor" was to be given 'little or no weight in the overall analysis', as there were other terms that were 'merely consequential upon the labelling adopted in the agreement.'

The FWC found that the case could ultimately be distinguished from the High Court's ruling in *Personnel Contracting*, because Aspire 2 Life was not so much a general labour hire agency but were themselves in the business of delivering care services.

There were other key provisions in the contracts that pointed towards the worker serving in, and being integrated, into Aspire 2 Life's business. For example, she was required to provide "...the care services that [Aspire 2 Life] had contracted with others to provide... [and] The work was provided to the [worker] in accordance with case plans [Aspire 2 Life] was contracted to manage." These services were at the core of Aspire 2 Life's business, and it delivered these services to its clients through the worker.

Other key contractual provisions included:

- The worker was paid an hourly rate;
- The contracts obliged her to submit weekly timesheets to Aspire 2 Life's bookkeeping for processing;
- The worker could *request* bookkeeping assistance for the purpose of invoicing the funding body for care work undertaken, but she was not contractually obliged to do so. Further, all payments for care work undertaken were to be made directly by Aspire 2 Life to the worker;
- She was required by contract to be available to work at any time during the range of agreed available hours;
- The worker was required to comply with Aspire 2 Life's policies and procedures;
- Aspire 2 Life was required to endeavour to arrange care work for the her;

- The contract also constrained the worker's capacity to provide services to, or be employed by, a competing business, and;
- She had no ability to sub-contract or delegate the work.

The FWC viewed that the "contractual arrangements taken as a whole" left "little if any scope for entrepreneurship on the part of" the worker. Therefore, the contract was one that "imbued a degree of control" suggesting that she was an employee of Aspire 2 Life.

### The appeal

Aspire 2 Life applied for an appeal of the decision, alleging that the FWC had erred in finding that the worker was an employee. The Full Bench allowed the appeal stating that it raised issues of 'widespread importance', not only to Aspire 2 Life's clients but also to 'other businesses who provide, or arrange for the provision of, NDIS and other similar services in the community.'

The Full Bench applied the same principles as the Deputy President, being those outlined in the case of *JMC Pty Limited v Commissioner of Taxation*,<sup>[4]</sup> which focuses on the rights and obligations of the parties outlined in the contract, rather than on an aspect of the relationship between the parties that has no particular connection to the parties contractual obligations.

The FWC reached the same conclusion as the Deputy President, finding that the relationship between the worker and Aspire 2 Life was one of employee and employer. In dismissing the appeal, the Commission said that '*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 the worker was at the discretion of Aspire 2 Life, which is consistent with its ongoing responsibility to manage the services being provided to the clients. In many ways, the worker 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.

The Full Bench expressed that " *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.*"

### **Key Takeaways**

Determining whether a working arrangement is that of an employment relationship or contracting arrangement can often be a complex exercise.

Although the contract between the two parties contained aspects that fit the description of an independent contracting arrangement, with regard to the worker having her own ABN, providing her own equipment and maintaining her own tax, super and insurance, this case demonstrates that this alone is not always enough.

Even under the strict test established in recent years that the focus is on the contract, rather than any subsequent conduct of the parties, an analysis of the contract can still reveal that there is an employment relationship despite the worker being labelled as a "contractor."

It remains the case that the identity of the "contractor" (whether they contract as an individual sole trader or through a proprietary limited company), and the ability to delegate or sub-contract, remain the most important factors to consider when assessing the status of a working relationship.

Employers should note changes commencing on 26 August 2024 that will effectively reverse the decision in *Personnel Contracting* and require consideration of both the contract and the practical reality of the relationship when determining who is an employee. However, this test will only apply to claims made under the FW Act, such that the *Personnel Contracting* explanation of the test will still apply to non-FW Act claims (e.g., those relating to superannuation contributions or entitlements determined under State legislation, such as workers compensation). Please see our related articles [here](#) and [here](#) which discuss these FW Act changes further.

[1] *Aspire 2 Life Pty Ltd v Ms Jessica Tidmarsh* [2024] FWCFB 289.

[2] [2022] HCA 1. Please see our related article [here](#) and link to our podcast episode [here](#) which discuss this landmark decision in greater depth.

[3] [2022] FWCFB 156.

