DECISION

Fair Work Act 2009
s.365—General protections

Allison Priolo
v
Derrimut Health & Fitness Pty Ltd
(C2024/1012)

DEPUTY PRESIDENT HAMPTON ADELAIDE, 7 AUGUST 2024

Application to deal with contraventions involving dismissal – jurisdictional objection – whether the Applicant was dismissed – whether the Applicant was an employee – objection dismissed.

1. What this decision is about

[1] This decision concerns an application by Ms Allison Priolo (**Applicant**) to deal with a general protections claim involving dismissal pursuant to s.365 of the *Fair Work Act 2009* (Cth) (**Act**). The Applicant is claiming that she has been adversely terminated for certain protected reasons including having allegedly raised a complaint. It is not necessary to deal with those grounds in the present matter.

[2] Ms Priolo commenced work with Derrimut Health & Fitness Pty Ltd (**Derrimut** or **Respondent**) in early October 2022 as a Pilates Instructor. During her time with Derrimut, she signed two agreements described as a "Group Fitness Instructor Independent Contractor Agreement", with the latest[1] executed on 5 June 2023 (**Agreement**).

[3] Ms Priolo conducted various Pilates classes on a regular basis for Derrimut at its Windsor Gardens fitness centre in suburban Adelaide. These were undertaken using the gym equipment, booking system and other facilities of the Respondent.

[4] On 16 January 2024, as she was about to commence her first class for the day, Ms Priolo was informed by her Manager that she was, in effect, "being let go with two weeks' notice." Later that morning, the Applicant received a letter informing her of the termination of the "independent contractor agreement", effective as of 29 January 2024.

[5] The s.365 application was filed by the Applicant in the Fair Work Commission (**Commission**) on 19 February 2024.

[6] Ms Priolo contends that she was an employee of Derrimut who was dismissed and is entitled to bring this application.

[7] The Respondent contends that the Applicant was not dismissed because she was not an employee, but rather, engaged as an independent contractor. The Respondent also contends that the Applicant's agreement was terminated due to her alleged behaviour and the attendance numbers at her Pilates classes. This is in dispute but given the limited nature of the present proceedings, it is also presently unnecessary for me to determine the reasons for the end of the relationship.

[8] Section 365 of the FW Act provides as follows:

> **"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 Commission for the Commission to deal with the dispute.

[9] The Commission's role with respect to an application of this kind under s.368 of the Act includes to:

- Conduct a conference for the purposes of dealing with the dispute (other than by arbitration) – s.368(1) and (2); and
- If satisfied that all reasonable steps to resolve the dispute (other than by arbitration) have been, or are likely to be unsuccessful – issue a (certificate) confirming this –s.368(3).

[10] A s.368(3) certificate is necessary for this application to proceed to the Court for determination,[2] or the Commission for consent arbitration.[3]

[11] A Full Court of the Federal Court[4] has determined that in a s.365 matter, the Commission must (where the Respondent employer has raised an objection of the nature present here) decide whether the jurisdiction exists for it to conduct a conference and issue a certificate as contemplated by s.368 of the Act. That is, in this case, I need to determine whether the Applicant has been dismissed.

[12] It is common ground that in order for this application to fall within the present jurisdiction of the Commission, the Applicant must have been dismissed within the meaning of s.386 of the FW Act. It is also common ground that the notion of dismissal under the Act will require that the relationship between the parties be that of employment. The dispute about this latter aspect has been dealt with as a jurisdictional objection. It is not relevantly in dispute that the relationship between the parties was terminated at the initiative of the Respondent.

[13] The Commission conducted a Hearing in person in Adelaide to enable the jurisdictional objection to be determined.

[14] I observe that the parties, correctly in my view, have conducted their respective cases by reference to the decisions of the High Court in *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1 – ***Personnel Contracting***; and *ZG Operations & Ors v Jamsek & Ors* [2022] HCA 2 – ***Jamsek***, collectively the **High Court decisions**. I will return to this as part of my consideration of the matter.

[15] As will become clear, having assessed all the circumstances of this matter and the relevant contractual arrangements and obligations, I have determined that the Applicant was an employee and accordingly was dismissed. The considerations leading to, and consequences of that finding, are outlined below.

2. The cases presented by the parties

2.1 Ms Priolo

[16] Ms Priolo represented herself in the hearing and submitted that she was employed by the Respondent.

[17] In relation to the applicable legal test, the Applicant submitted that I should approach the construction of the legal relationship by applying the approach taken in the High Court decisions. At the same time, she argued that I should adopt the former multifactorial approach largely applied by the Courts prior to the High Court decisions. Ms Priolo contended that this was appropriate because the contract:

- Was partly written and partly oral; and/or
- Had been varied; and/or
- Was a sham.

[18] The basis of these contentions variously included that:

- The requirement that any replacement for a class that could not be undertaken was to be organised by her and be drawn from the list of other instructors who would have their own direct contracts with the Respondent, was not consistent with being an independent contractor;
- There was a change such that there was an absence of an entitlement to payment if there were less than that 4 attendees in the class;
- The Agreement was not varied when the committed hours (number of classes) were increased;

- The notice provided of the cessation of the Agreement (2 weeks) was less than that set out in the Agreement itself (4 weeks);

- There were terms of the Agreement that were never intended to apply to a Pilates Instructor such as the provision of the tools and equipment and not requiring a Pilates instructor to provide personal training as personal trainers require a certificate and a separate contract for that;

- She had little control over the hours worked and changing classes, which is inconsistent with that of an independent contractor;

- Under 2.1.1 (a) and (b) the contractor is liable to pay all (other) personnel for the services provided under this agreement and the contractor must pay all relevant payroll tax. However, this is contrary to Derrimut paying all of their instructors, including those who may backfill for a "contractor", and the instructors sending their invoices themselves;

- The right to subcontract work to anyone who was qualified to perform the work was not outlined in the contract; and

- It is breach of the Act for an "employer' to misrepresent employment as being that involving an independent contractor.

[19] Ms Priolo contended that under the Agreement and in practice, the Respondent controlled how, when and where she performed her work. This included that she was required to teach her Pilates classes at a time and for a duration that were determined by the Respondent. Ms Priolo contended that she was allowed to make changes to the duration and time of the classes that had been set by the Respondent only in exceptional circumstances. Protocols such as the taking of attendance and class management were also determined by the Respondent.

[20] In addition, Ms Priolo pointed to various provisions of the Agreement which allowed the Respondent to require such other services as may reasonably be directed by it.

[21] The Applicant further contended that she was working in the business of the Respondent rather than her own. The Applicant relied on the following factors:

- The Respondent decided where and when her 'labour' was required and this was based upon their members' demand;

- There was no flexibility regarding when and where her work was performed; and

- The Respondent controlled how the Applicant conducted her Pilates classes including attendance record keeping, duration of the classes, start and finish times, member etiquette and class management protocols.

[22] Relying on *Jamsek*, Ms Priolo contended that the description of the Agreement as an 'Independent Contractor Agreement' is not a relevant consideration.

[23] Ms Priolo further contended that certain factors, arising from the multi-factorial approach, weighed in favour of a finding that she was employed by the Respondent. These included:

> "Control:
>
> - The classes were fixed at certain times and for a certain duration as per Derrimuts' published timetable. I was not permitted to make changes except due to unforeseen absence (e.g. illness) or planned absence (holidays).
> - I had to adhere to a particular class style and method of instruction as dictated by Derrimuts.
> - I had to use Derrimuts' procedures to confirm member attendance at classes.
> - I had to follow Derrimuts' protocol for latecomers.
> - I had to follow a specific protocol at the conclusion of each class to notify management of class numbers.
> - I had to ensure that members cleaned their reformers at the end of each class as per Derrimuts' procedures.
> - I was made to submit my invoices on a weekly basis in order to meet the pay run deadline for the week.
>
> Financial responsibility and risk
>
> - I carried no financial risk for the classes that I instructed on behalf of Derrimuts.
> - I was still paid regardless of whether Derrimuts made a profit or not.
> - Regardless of if members were financial or in arrears on their membership I was still paid.
>
> Tools and equipment
>
> - The reformer beds and every accessory were provided by Derrimuts and I was not permitted to bring in my own equipment.
> - I had to use the cleaning supplies provided by Derrimuts.
>
> Ability to delegate or subcontract work
>
> - Instructors' names were published on the timetable and we were expected to take our own classes. The only time that we could get ad hoc class cover would be due to unforeseen circumstances such as an illness. There was no subcontracting clause included in my contract.
>
> Hours of Work
>
> - My hours were set and ongoing, and they were identical from one week to the next. The 29 hours that I worked per week were assigned to the same timeslots and days each week. I was not permitted to vary my hours from week to week. There was

no specific task to complete, the classes were ongoing as per the timetable published by Derrimuts.

Expectation of Work Continuing

- The nature of my employment with Derrimuts was ongoing. There was no specific period or task. I was employed for 29 hours per week, week on week."[5]

[24] Ms Priolo provided a witness statement[6] and gave sworn evidence in the hearing.

2.2 Derrimut

[25] Derrimut submitted that the Applicant was an independent contractor and as such, was not dismissed within the meaning of the Act.

[26] The Respondent contends that Ms Priolo has been contracted to complete services under the terms of her contractual agreement, and this does not extend further than the services required under such agreement.

[27] Derrimut submits that the level of control imposed on Ms Priolo was simply that which a company provides to ensure consistency across each organisation, and contends that at no point did they force her to follow a particular routine, or procedure that would limit her ability to undertake services she was contracted to perform.

[28] Derrimut further contends that the Agreement represents a comprehensive written contract and under the approach arising from the High Court decisions, the characterisation of the relationship was to be undertaken by reference to its terms and conditions. It further asserts that a person's subjective understanding of a contract, and how it should play out, is very different to the manner in which it actually operates as a matter of law.

[29] Amongst other matters, the Respondent relied on three key clauses of the Agreement:

- **Clause: 2.9(a):** The Contractor is free to engage in other business activities at any time when the Services are not required to be performed under this Agreement provided that the provision of the Services by the Contractor under this Agreement is not affected or prejudiced in any way; or may create a potential conflict of interest.

- **Clause 2.10:** The relationship between the Contractor and the Company is that of principal and contractor. Nothing in this agreement is to be construed as constituting the Contractor or any employee of the Contractor and the Company as partners. Nor shall this agreement be construed as creating the relationship of employer and employee between the Contractor and the Company or between any employee or director of the Contractor and the Company.

- **Clause 5:** To obtain payment, the Contractor agrees to submit an itemised invoice, which complies with all relevant legislation, including but not limited to the law relating to taxation.

[30] Derrimut further contends that in accordance with clause 2.10 of the Agreement, Ms Priolo's provision of services beyond the Respondent was not restricted by way of any exclusivity clause. Therefore, Ms Priolo was at liberty to engage other service providers for the purposes of instructing Pilates classes.

[31] In addition, it submitted that it was clear that clause 2.10 expressly provides that nothing in this agreement will be construed as constituting a relationship of employer and employee. This is further supported by the conduct between the parties whereby Ms Priolo was not bound to work for the Respondent at times suitable to the Respondent. Ms Priolo would only instruct classes at times that she was available. In the event that she was not available, Ms Priolo would either find a replacement or be at liberty to cancel the class. To this extent, the Respondent was not reliant on reformer Pilate classes to keep the business operating.

[32] Finally, Derrimut contended that Ms Priolo was paid by way of invoices issued by reference to an ABN for the hours she worked (classes) each week. This was consistent with the terms of the Agreement and the Respondent was not providing Ms Priolo weekly wages, or the payment of superannuation and entitlements.

[33] Derrimut relied upon the witness statement[7] and oral evidence of Ms Simone Weeks, its Group Fitness Coordinator.

3. Observations on the evidence

[34] As to any factual conflicts, I prefer the evidence of Ms Priolo. Her evidence was consistent, based upon a detailed and direct recall of relevant events, and involved concessions that were not necessarily in her best interests.

[35] To the extent that Ms Priolo's 'evidence' went to matters that are properly for the Commission to determine, I have treated such as submissions.

[36] I accept that Ms Weeks gave her evidence honestly and attempted to assist the Commission. However, she was not present at the formation of the Agreement and was only at the workplace for a relatively limited time prior to the cessation of the Applicant's contract. There were also many obvious errors in the sequence and timing of events in her evidence. Ms Weeks was also directed to terminate Ms Priolo and some of her evidence was by definition, second-hand (hearsay). Ms Week's evidence about the sequences of events on the day of the termination was confusing at best. I treat her evidence with appropriate caution.

4. The Facts of the matter

4.1 The terms of the Agreement

[37] Without overlooking the entirety of the Agreement, the following provisions were relied upon by the parties or are informative of the nature of the arrangement.

> "1 Definitions

… …

Contractor means the Contractor as described in **Item 3** of the Schedule and includes all officers, employees, agents and contractors of the Contractor which have been formally approved by the Company to provide Services or to perform any Services on behalf of the Contractor.

… ….

Fee means the amount payable with respect to the Services set out at Item 6 of the Schedule.

… …

Personnel means, in the respect of the Services, the person/people that the Contractor employs in order to provide the Services, including subcontractors that the Contractor may engage.

Services means the services described in Item 4 of the Schedule.

2. CONTRACTOR'S OBLIGATIONS

2.1 Services

(a) The Contractor shall provide and perform the Services as described in Item 4 of the Schedule from the Commencement Date.
(b) Not undertake any Services which are not authorised or form part of this Agreement.

2.2 Belongings

(a) The Contractor shall be responsible for his or her own belongings.

2.3 Professional standard of care

(a) The Contractor must ensure that the Services are performed in a diligent and professional manner and to the standard of skill and care expected of a professional experienced in the provision of the type of services required by the Company under this Agreement. The Contractor must continually use its best endeavours to promote the interests and welfare of the Company.

2.4 Smoking Eating and Drinking

(a) The Contractor agrees and undertakes not to smoke on the Company's Premises.

(b) The Contractor shall only eat in areas designated as eating areas by the Company.
(c) The Contractor shall not at any time bring alcohol onto the Company Premises.
(d) A breach of this clause by the Contractor shall be considered a material breach of this Agreement which shall be terminated in accordance with clause 11.

2.5 Uniforms/Personal Appearance

(a) The Contractor must adhere to the Company's specifications of uniform and personal grooming and appearance as set out by the Company and no variation from such requirement is allowed.
(b) The Contractor will use reasonable endeavours to ensure that standards and specifications in relation to uniform and personal grooming and appearance are enforced.

2.6 Defective performance

(a) The Contractor guarantees that if there is a defect in the performance of the Services the Contractor will remedy the defect or redo the Services at no additional cost to the Company.
(b) Where the Contractor refuses or fails to remedy a defect in performance of the Services or redo the Services within an agreed timeframe, the Contractor agrees that the Company may arrange for the performance of the necessary remedial work and recover any costs from the Contractor.
(c) Provide in writing full particulars of all complaints received by or referred to the Contractor regarding the Services.

2.7 Licence/Qualifications

(a) The Contractor must ensure that it, together with its employees and subcontractors hold the requisite licence(s) and qualification(s) to legally perform the services.
(b) The Contractor has obtained and will continue to maintain all permits, visas and licences necessary for the lawful performance of the Services and agree to provide evidence of this to the Company upon request.
(c) The Contractor is required to hold and maintain the following:
    i Certificate III in Fitness (Group Fitness)
    ii Current First Aid Level 2 Certificate
    iii CPR First Aid Course.

2.8 Contractor knowledge of industry legislation

(a) The Contractor agrees that it will fully abide by the terms and conditions of the Company's policies and procedures relating to confidentiality, intellectual property, equal opportunity, and bullying and harassment.

2.9 Engagement in other activities

(a) The Contractor is free to engage in other business activities at any time when the Services are not required to be performed under this Agreement provided that the provision of the Services by the Contractor under this Agreement is not affected or prejudiced in any way, or may create a potential conflict of interest.
(b) The additional services to be provided by the Contractor at the Company's request are as follows:
    i service for the Company's members ie. provision of personal training services; new member program orientations; current member program updates; new and current member personal assessments;
    ii gym floor service ie. putting equipment and weights away where they belong after use; and
    iii such other services as the Company may reasonably direct from time to time

2.10 Contractor's relationship with the Company

(a) The relationship between the Contractor and the Company is that of principal and contractor. Nothing in this Agreement is to be construed as constituting the Contractor or any employee of the Contractor and the Company as partners. Nor shall this Agreement be construed as creating the relationship of employer and employee between the Contractor and the Company or between any employee or director of the Contractor and the Company.
(b) Ensure the proper use of the Company's Intellectual Property
(c) Perform tasks on a professional and ethical basis and at all times support and promote the Company so as to maintain the Company's reputation
(d) The Contractor shall not remove any Company property from the Company's Premises without permission
(e) Where the Contractor is authorised to remove Company property, the Contractor shall ensure that such property is maintained in good condition. The Contractor shall return such property to the Company in good condition upon the termination of this agreement.

2.11 Remuneration of Personnel

(a) The Contractor is liable to pay all Personnel for Services provided under this Agreement.
(b) The Contractor must pay all payroll tax due in respect of the Personnel who provide Services under this Agreement as required.

3. COMPANY'S OBLIGATIONS

3.1 The Company covenants and agrees to:

(a) Maintain high work and ethical standards amongst all Contractors
(b) Provide ongoing promotional and general advertising of the services
(c) Take reasonable action to protect the logos, trademarks, name, trade name and other intellectual property
(d) Provide staff development and guidelines
(e) Provide a gym membership to the Contractor for the use of the Company's facilities

… …

4.2 All Confidential Information remains the exclusive property of the Company and no rights in respect of Confidential Information are granted or conveyed to the Contractor. In the event that the Contractor is legally required to disclose any Confidential Information, the Contractor must immediately notify the Company of that fact.

… …

5. FEE

In consideration for the proper provision of the Services, the Company will pay the Contractor the Fee as described at Item 6 of the Schedule.

6 FEE REVIEW

6.1 The Company will review the fee structure at its discretion, and or, in writing from the contractor. In reviewing the fees, the Company may consider various factors including but not limited to the provision of services pursuant to this Agreement and market movements.

6.2 For the avoidance of doubt the Company is under no obligation to increase the Contractor's fees.

7. INVOICES

7.1 To obtain payment, the Contractor agrees to submit an itemised invoice, which complies with all relevant legislation, including but not limited to the law relating to taxation.

7.2 Invoices must be forwarded by the Contractor to the Company weekly and addressed to the person described in Item 8 of the Schedule and shall include:

(a) the title of the Services provided
(b) `the Company's full name

(c) sufficient detail to allow the Company to obtain a clear understanding of the work that has been performed and to which the charges relate
(d) all things necessary to ensure that the invoice is also a tax invoice for the purposes of any relevant GST which may apply, that enables the Company to claim input tax credits and
(e) the tax invoice must include:

i the Australian Business Number (ABN) of the entity that issues it
ii the price of the supply (inclusive of GST)
iii the words "tax invoice" prominently on the document
iv the date of issue of the tax invoice
v title of the service and
vi the number of days noted at Item 9 of the Schedule as the days for terms of payment.

7.3 On receipt of payment of the invoice from the Company, the Contractor must, if so requested, provide the Company with a written undertaking to confirm that it has paid its employees for the period to which the invoice relates.

7.4 The Company can withhold payment of any amount which it reasonably disputes and can set off from any payment to the Contractor any amount that the Contractor owes the Company under this Agreement or otherwise.

7.5 The parties agree that each party must immediately notify the other party if it ceases to be registered for GST purposes or for any other reason is unable to lawfully comply with this clause.

7.6 Contractors must provide invoice no later than 2 weeks from when the class was conducted. Failure to provide the Company an invoice within a month of conducted class on multiple occasions, may lead to the company considering termination of agreement.

8. EQUIPMENT AND EXPENSES

8.1 The Contractor is expected, at its own expense, to supply certain equipment necessary to perform the Services.

8.2 The Company may agree to provide the Contractor with tools and equipment required for the Contractor to carry out the Services. Any provision of tools and equipment will be taken into account when determining the Fee under this Agreement.

8.3 Where provided the Contractor must protect and keep safe and secure any and all tools, equipment, property, documents and other materials provided by the Company to the Contractor.

8.4 Upon the termination of this Agreement for whatever reason, the Contractor must promptly, and without further demand, return to the Company all Company Property which is in the Contractor's possession or control.

8.5 If the Contractor fails to return Company Property, the Company may withhold all or part of any payments which might otherwise be due to the Contractor until such time that the Company Property is returned.

9. CONTRACT HOURS

The Company expects that, consistent with industry practice, the Contractor will need to adopt a flexible approach to hours of work in order to meet the requirements of the Agreement.

10. TERMINATION OF AGREEMENT

10.1 The Company may terminate this Agreement without notice, in the event of a fundamental breach of this Agreement. In the event that the Company terminates this Agreement for a fundamental breach, the Contractor will:

(a) be paid any amount owing to the Contractor in respect of services provided up to and including the date of termination
(b) not be entitled to any notice of the termination or payment in lieu of notice of termination and
(c) not be entitled to any compensation other than as specifically provided for in this Agreement.

10.2 The Company may terminate this Agreement immediately if the Contractor becomes insolvent or bankrupt within the meaning of either section 9 of the Corporations Act 2001 (Cth) or the Bankruptcy Act 1966 (Cth).

10.3 The Company may terminate this Agreement at any time without cause by:

(a) giving the Contractor written notice equal to the Notice Period or
(b) in lieu of notice, paying the Contractor the Fees for the amount of work it would have performed during the Notice Period.

10.4 Contractor's continuing liability

(a) Termination of this Agreement by the Company will not release the Contractor from liability in respect of any breach or non-performance of any obligation under this Agreement.
(b) Termination of this Agreement by either party will not release the Contractor from the Confidentiality and Intellectual Property obligations of this Agreement.

Upon termination the Company will be entitled to reimbursement of the following costs:

(c) Property that is not returned in good working order immediately on termination of this Agreement and any overpayment or other monetary benefits.
(d) The Company may recover these amounts by setting-off against any amount owed to the Contractor by the Company.

10.5 The Contractor agrees that upon termination or expiration or this Agreement it shall immediately and permanently cease to use in any manner whatsoever any and all Confidential Information, trade secrets or confidential methods, procedures and techniques associated with the Company.

10.6 The Contractor agrees that upon termination of this Agreement it will deliver to the Company any uniforms, signs, notes, writings, intellectual property and all other documents or items relating to the Company's business and will immediately cease to use all and every such item. Any reusable item of value may be refunded to the Contractor at the Company's discretion.

… …

12. INSURANCE

12.1 The Contractor must provide the Company with copies of its certificate of currency for the insurance at the Commencement Date of this Agreement, Item 5.

12.2 Professional indemnity and public liability insurance

(a) The Contractor must obtain and maintain a policy of professional and public liability and indemnity insurance with an insurer with a limit of liability not less than the amount specified in Item 10 of the Schedule for the duration of this Agreement and for a period of 12 months after the termination, however caused, of this Agreement. On reasonable request by the Company, the Contractor must liaise with the Company to ensure the insurer is approved by the Company (which approval will not be unreasonably withheld).
(b) The policy must contain the following provisions:

i the minimum indemnity limit in aggregate for the Services as agreed between the Parties
ii one automatic reinstatement provision and
iii a description of the risk covered by the policy.

(c) Worker's compensation
Where required under law, the Contractor must obtain and maintain for the duration of this Agreement a workers' compensation and employer's

liability insurance policy covering liability for loss, damage, claims, and all direct or indirect costs and expenses arising at common law or under workers' compensation or employer's liability legislation in respect of persons employed or deemed to be employed by the Contractor.

12.3 The Contractor is required to report to the Company all claims or events which may or could lead to the cancellation of a policy or a refusal of cover under a policy.

12.4 The Contractor shall not bring to or do or keep anything on the building or the land which shall increase the rate of fire insurance on the building or which may conflict with the laws or regulations relating to fires or any insurance policy in respect of the building or the land or the regulations or ordinances of any public authority for the time being in force or use of chemicals, burning fluids, acetylene gas or alcohol in lighting the building or the land.

13. WARRANTIES AND INDEMNITIES

13.1 The Contractor warrants that:

(a) no conflict of interest exists which may prejudice the performance of its obligations under this Agreement and agrees to declare any conflict should it arise in the future and

(b) the Contractor has obtained and will continue to maintain all permits, visas and licenses necessary for the lawful performance of the Services and agree to provide evidence of this to the Company's satisfaction.

13.2 The Contractor must indemnify and keep the Company indemnified at all times against any Claim whatsoever against the Company by any person arising directly or indirectly out of the provision of the Services under this Agreement or out of any breach of this Agreement by the Contractor.

14. WORK HEALTH AND SAFETY

14.1 The Company is required to comply with health and safety laws to maintain a safe and healthy workplace.

14.2 The Contractor must notify the Company of any major incident, accident, injury or property damage which occurs in the performance of this Agreement.

14.3 The Contractor is required to adhere to the Company's work health and safety policies and procedures as amended from time to time.

14.4 The Company may monitor the Contractor's work activities for health and safety compliance and implement a corrective action report in the event of unsafe work activities.

14.5 The Company reserves the right to exercise a duty of care and halt any unsafe work activity. The Contractor agrees to remedy any unsafe practices or work activity at their own cost, to ensure health and safety compliance, before work is resumed.

15. SERVICE PROVIDERS CHECK AND COMPLIANCE

15.1 The Company is required at law to provide evidence that its service providers and contractors meet the legal minimum requirements under the Occupational Health, Safety Act, any other relevant legislation, as well as Government directions and mandates

15.2 The Contractor agrees to provide the information necessary to meet the Company's requirements in this clause at the Commencement Date of this Agreement and annually.

15.3 The information required to be provided by the Contractor to the Company will include but not be limited to evidence of:

(a) Current and adequate insurance cover
(b) Current and correct/relevant licences/registrations from the relevant authority
(c) Appropriate trade or professional accreditation where required
(d) Evidence of renewal of licences/registrations/insurances
(e) ABN/GST registration and compliance
(f) Other evidence to show that the Contractor conforms to legal requirements
(g) Current health related certificates in accordance of Government directions or mandates (digital COVID-19 certificate as an example)

… …

17. VARIATION

This Agreement is issued without alteration, deletion or erasure. By signing this Agreement, the Contractor acknowledges that no verbal variations have been or will be made to this Agreement and any variation must be made in writing and signed by both parties to this Agreement.

… …

Schedule

Item 4	Services	Yoga Reformer Pilates

Item 6	Fee	30 min class = $35.00 ex GST 45min or 60min class is $50.00 ex GST. Flat rate for everyone. Reformer Pilates = $75.00 ex GST Those with GST are to add GST on top Example: 30 min class at $35.00 become $37.50 with GST
Item 7	Notice Period	30 days
Item 9	Number of days for payment under invoice terms	Weekly Cycle – Monday to Sunday. Invoices to be sent by end of week, Sunday midnight. Any invoices received after the cut off will automatically be paid the following pay week.
Item 10	Professional and public liability requirement	$10,000,000

… …"

4.2 The formation and conduct of the relationship

[38] Ms Priolo commenced work with Derrimut at its Windsor Gardens Gym in October 2022 having signed what was described as an Independent Contractor Agreement executed on 11 October 2022.

[39] Derrimut is an Australian business with 28 gyms nationwide offering group classes, and personal training, among other services. Derrimut offers various fitness and other classes, including Pilates, to members and potentially to the public. It operates an on-line booking system for patrons to book into the classes. All classes conducted by Ms Priolo for the Respondent were advertised and booked using Derrimut's booking system and Derrimut collected the fees from membership or otherwise from those attending. These arrangements were objectively intended by the parties to form the basis for the provision of the services and represented a common objective assumption. Ms Priolo played no role in setting the fees (or memberships) charged for the classes and the payments made to her were set by the Agreement and potentially subject to policy changes made by the Respondent. I will return to this aspect shortly.

[40] The number of classes undertaken was set by verbal agreement between Ms Priolo and Derrimut. Once classes were scheduled, it was the general expectation that the schedule would be maintained, and it was not necessary for Ms Priolo to confirm her availability in accordance with the established schedule.

[41] Ms Priolo has been in the fitness industry for several decades in roles including group fitness instructor, yoga instructor and Pilates teacher.[8] Further, Ms Priolo had worked at a number of gyms prior to joining Derrimut under what have been described as "Contractor" and "employment relationships". Her subjective view was that there was no practical difference

between them and that entitlements such as superannuation were eventually paid for all such engagements. Whilst this sets some of the context, I place no weight upon that view for present purposes.

[42] With the Respondent, Ms Priolo was a Pilates instructor generally taking Reformer Pilates and initially teaching approximately 6 classes per week for Derrimut at its Windsor Gardens gym. Particularly during that initial period, Ms Priolo worked at a number of other gyms not connected with Derrimut, but undertaking classes that would not compete with the Respondent. She remained free to do so under the terms of the Agreement.

[43] At the request of Derrimut to teach more classes, Ms Priolo ultimately transitioned to teaching approximately 29 classes per week.

[44] All of the equipment used by Ms Priolo to conduct the classes was supplied by Derrimut. This included the substantial Reformer Pilates machines – which encompassed components known as "beds" or "carriages" used in Reformer Pilates.

[45] Ms Priolo obtained and carried professional indemnity and public liability insurance.[9] This was required by clause 12.2 of the Agreement.[10] Ms Priolo did not hold any form of workers compensation insurance. Given the terms of the Agreement, this would have only been required if she employed someone, which did not occur.

[46] Amongst other administrative requirements, Ms Priolo was required to complete and provide to Derrimut a sign-on sheet detailing the attendances at the classes.

[47] During February 2023, Derrimut introduced virtual Pilates classes, and these were often being played during her classes on screens in the part of the gym where the equipment was set up. Ms Priolo (and other instructors) were directed by Derrimut not to turn off the screens despite the significant distraction they represented.

[48] On 5 June 2023, the Applicant signed a new "Independent Contractor Agreement" dated 31 May 2023 which included a reference to teaching yoga in addition to Reformer Pilates. This agreement was broadly in the same terms as the original document, was executed on 5 June 2023 and commenced on 7 June 2023.[11] This agreement was in place at the time of the cessation of the relationship.

[49] Under the Agreement, Ms Priolo was required to send weekly invoices to the Respondent detailing the classes taught and related information. Ms Priolo held an ABN as required by the Agreement and the invoices were sent to Derrimut in her name.

[50] Between 13 September and 20 December 2023, Ms Priolo regularly communicated with the Respondent's Group Fitness Coordinator and Gym Manager about issues arising with the booking system. This included incorrect class information and timing of sessions being published to the App, and the incorrect reporting of the cancellation of classes.

[51] On 4 December 2023, Ms Weeks sent a group email providing information about varying "operational requirements". This included Derrimut's "policy" in relation to class

attendance, informing instructors that if there were fewer than 4 participants in the class, the instructor would not be paid. This stated:[12]

> "**4. Invoicing**
>
> Your invoice needs to be emailed direct to groupfitness@derrimut.com.au by Sunday of that week to ensure you get paid on time.
>
> **5. CLASS ATTENDANCE POLICY FOR GROUP FITNESS AND PILATES**
>
> Here at Derrimut we have a policy regarding class attendance for both Group Fitness and Pilates. Unfortunately if a class has fewer than 4 participants, instructors will not receive payment for that session.
>
> However, I want to emphasize that I am here to offer my full support in helping you maintain OPTIMAL class numbers. Together we can work on strategies to boost attendance and build your own personal profile, so you can create your own regular following.
>
> **6. Monthly Zoom Calls**
>
> In the new year I will be hosting monthly zoom calls for all instructors aimed at boosting motivation, sharing effective --"[13]

[52] Ms Weeks further advised Ms Priolo and other instructors of what was described as the 'find a cover' protocol in the following terms:[14]

> "2. **Find a Cover:** NOTIFICATION PROTOCOL
>
> **Step 1**
> Reach out to your fellow instructors to secure a cover for your class. WE MUST uphold our commitment to our members.
>
> **Step 2**
> If you are unable to find a cover and your class needs to be cancelled notify your location ASAP. To notify your location (**call the club and notify reception staff**). Their awareness of the change is crucial for member communication and facility logistics. Please notify me via text SIMONE (deleted)
>
> **Step 3**
> Please ensure the cancellation is posted in the social media groups.
>
> 3. **Sign in sheets**. The **Sign-In** sheets are located in each club at reception. There is a template created for both Group Fitness Classes and Pilates. These MUST be filled out after each class. Please be sure to write the number of participants."

[53] I find that many of these requirements were new and do not sit comfortably with the terms of the Agreement. I also observe that Ms Priolo was paid for all of her classes, however

there is a dispute as to whether this was because the attendances were all above 4 or the policy was not applied to her. The evidence does not enable me to properly determine that dispute.

[54] The requirements of Derrimut[15] in relation to finding replacements to undertake classes included that they be sourced from existing 'Contractors' or in effect, be approved by it as additional 'Contractors'. Further, the expectation was that the replacement workers would then invoice and be paid by Derrimut directly. This was also at odds with the terms of the Agreement.

[55] In mid-late December 2023, Ms Priolo complained to Ms Weeks on the gym floor in relation to Instructors not being paid on occasions where there were fewer than four attendees. Ms Weeks advised the Applicant she would speak to the State Manager about the issue.

[56] In late 2023, Ms Weeks sent email(s) to the Instructors, including Ms Priolo, reminding them of the various requirements, including the importance of screening clients, and providing modifications to them during classes.[16] These included:

> **"Class Cancellations**
> - We understand that emergencies happen, and in such cases, cancellations are unavoidable. However, consistent class cancellations can be disruptive and disappointing for our members who invest time and effort to attend. Let's pull together as a team to prevent this from happening.
>
> I am currently exploring the possibility of **utilizing** an App to maintain a list of cover options. This way, we can **minimize** disruptions caused by unexpected cancellations.
>
> If you are facing challenges due to a busy schedule or feeling overwhelmed with your workload please reach out. I am more than willing to assist in navigating your schedule to ensure a healthy balance.
>
> Together let's elevate our standards and build an incredible energy and atmosphere that will make 2024 an unforgettable experience here at Derrimut. As a collective strength we will propel to new heights. I am so excited to be working with such passionate fitness professionals.
>
> Let's do this!!
>
> Kind Regards,
> Simone Elizabeth Weeks"[17]
>
> … …
>
> "Hi Team,
>
> As we approach the new month, I would like to inform you about the upcoming changes to our Group Fitness Timetable. Please make sure you make any necessary adjustments to your personal schedule so you can commit to your Group Fitness Classes for the next 3 months and the classes you are responsible for.

Please make any modifications to the current timetable and report this to your club manager by Monday 29th January 5pm.

Once the changes are made there will be a three-month freeze on further alterations. Its crucial that you double check your schedule to ensure you can commit to leading the classes you are assigned to on our timetable.

The current frequency of changes is causing stress to the staff and I believe this three month stability period will alleviate that concern.

Thank you for adhering to these guidelines I appreciate it so much as it contributes to a more organize and efficient group fitness program. If you have any concerns please feel free to reach out to me. #believeinyourself

Kind regards,
Simone Elizabeth Weeks"[18]

… …

"Client Screening

Please take a moment at the beginning of each class to screen our members, especially those attending for the first time. Even those attending for the first time. Even though you have planned your session it will allow you to tailor class content to better suit the individuals (sic) needs. Identifying any existing injuries or health concerns will help identify any limitations and enable you to offer modifications or alternatives. This ensures that both beginners and advanced participants benefit from the session without feeling overwhelmed or under stimulated.

Springs Explanation

For our beginners its crucial to start with an appropriate level of resistance. The goal is not to overwhelm your muscles but rather establish a foundation and focus and proper form. Too much resistance can compromise balance and control making it too challenging to execute exercises with precision. Always consider steady safe progression for our members.

In classes featuring advanced exercise, always provide beginner friendly alternatives. Its essential to empower our beginners with options that challenge them appropriately, while also guiding advanced members how to push and challenge themselves.

Listening to the body

Members should be encouraged to listen to their own bodies throughout the session. While feeling muscle burn is good, pushing through pain in the wrong way is not good. Progression should only occur when individuals are ready and comfortable.

> Individual Progression
>
> Highlight the fact that participants may be at different fitness levels and reassure them that progression is a personal journey. Advise members to focus on their own growth and not compare with others.
>
> Thankyou for your commitment to delivering the best sessions possible and creating an extraordinary experience for our members. Our members love immersing themselves in a mindful and holistic experience as they escape the digitally dominated world for 45 minutes. Keep up the great work and please reach out if you have any questions regarding this. #believeinyourself
>
> Kind regards,
> **Simone Elizabeth Weeks"**[19]

[57] In January 2024, the Respondent engaged four new instructors to undertake Reformer Pilates at the gym.

[58] On 16 January 2024, prior to Ms Priolo entering her first teaching class of the day, Ms Weeks advised the Applicant she had been, or would be, "let go with two weeks' notice". Ms Weeks was expected to and did conduct the scheduled classes on that morning. Later that morning, the Applicant received a letter from Ms Weeks terminating the Agreement, with the termination effective from 29 January 2024.[20] This was inconsistent with the notice provisions of the Agreement. Further, Ms Weeks' explanation for the timing and justification for this in her evidence, beyond that she had been instructed to reduce the required notice period, was inconsistent and confusing.

[59] At some point after the termination, Ms Priolo spoke to Ms Weeks at her request and sought an explanation about the stated basis of the decision and whether there had been change of mind by management. Ms Priolo continued to undertake her classes for Derrimut during the "notice" period.

[60] On 17 January 2024, Ms Priolo sent a text message to Ms Weeks seeking clarification about whether she needed to work on 29 January or whether her last day would be 28 January 2024. Ms Weeks confirmed Ms Priolo's last day would be on Monday 29 January.[21]

5. The required approach to the determination of whether a person is an employee

[61] In *Chambers and O'Brien v Broadway Homes Pty Ltd*[22] a Full Bench of the Commission summarised the approach following the High Court decisions as follows:

> "[74] The key propositions relevant to this appeal which may be derived from Personnel Contracting are as follows:

(1) When characterising a relationship regulated by a wholly written, comprehensive contract which is not a sham or otherwise ineffective, the question is to be determined solely by reference to the rights and obligations under that contract. It is not permissible to examine or review the performance of the contract or the course of dealings between the parties.

(2) The subsequent conduct of the parties may be considered to ascertain the existence of variation of contractual terms.

(3) The multifactorial approach only has relevance in respect of the required assessment of the terms of the contract.

(4) It is necessary to focus on those aspects of the contractual relationship which bear more directly upon whether the worker's work was so subordinate to the employer's business that it can be seen to have been performed as an employee of that business rather than as part of an independent enterprise. The question is: whether, by the terms of the contract, the worker is contracted to work in the business or enterprise of the purported employer.

(5) Existence of a contractual right to control the activities of the worker (including how, where and when the work is done) is a major signifier of an employment relationship.

(6) The label or characterisation placed on the relationship by the contract is not relevant even as a "tie breaker", or at least it is not determinative."

[62] In order to ascertain the relevant rights and obligations, the written contract is to be construed in accordance with established principles of contractual interpretation generally.[23]

[63] Kiefel CJ, Keane and Edelman JJ observed in *Personnel Contracting*[24] that two key considerations of characterising the legal relationship of parties, each of which may involve questions of degree, are:

- the extent to which the putative employer has the right to control how, when and where the putative employee performs the work; and

- the extent to which the putative employee can be seen to be working in their own business as distinct from the putative employer's business.

[64] In *JMC Pty Limited v Commissioner of Taxation* [2022] FCA 750, Wigney J similarly distilled these principles, concluding:[25]

"The characterisation of a relationship as being either one of employer or employee, or one involving the engagement of an independent contractor, is ultimately an evaluative judgement 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 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."

[65] Given the other issues raised by Ms Priolo's application I would add the following elements of the post High Court decisions approach:

- The conduct and expectations of the parties after entering into the contract are not generally relevant to the assessment.[26]

- The manner in which the relationship is worked in practice may be relevant for certain limited purposes, such as to find contractual terms where they cannot otherwise be ascertained,[27] or to determine the nature of any variation to agreed terms.[28]

- It is permissible to have regard to objective events, circumstances and things external to the contract known to the parties at the time of contracting which assist in identifying the purpose or object of the contract.[29]

- The relative bargaining power of the parties is not relevant. That is, the fact that the arrangement was brought about by the superior bargaining power of the company has no bearing on the meaning and effect of the contract.[30]

- The notion of the generation of goodwill by the worker is not necessarily relevant or decisive.[31]

- When assessing the significance of a relevant fact in the characterisation process, the court (Commission) should consider the extent to which the fact bears directly or obliquely on whether the worker is contracted to work in the employer's business rather than part of an independent enterprise. The more directly it bears on that issue, the more significant it is.[32]

- Non-exclusive work may be consistent with casual employment and not just contracting. The fact that the worker was free under the contract to accept or reject any offer of work, and not precluded from working for others, are not necessarily contraindications of employment, since this is also commonplace for casual employees.[33]

- Terminability at short notice and the absence of a guarantee of work of any direction are not decisive given that they may also be indicative of casual employment.[34]

[66] I observe that the Act was recently amended to change the approach required by the Commission to establish the correct characterisation of a relationship. The *Fair Work Legislation Amendment (Closing Loopholes No. 2 Act* (Cth) in s.2 item 21, would in effect, require the Commission to ascertain the real substance, practical reality, and true nature of the

relationship. This overrides the common law as it has applied since the High Court decisions. However, the new law does not apply until 26 August 2024 and is therefore not relevant to this matter.

6. Was Ms Priolo an employee?

6.1 Was this a relationship regulated by a wholly written, comprehensive contract which is not a sham or otherwise ineffective?

[67] There is little doubt that the Agreement represents a comprehensive written contract seeking to regulate the arrangements between the parties. In substance, the issues raised by Ms Priolo are whether the contract was a sham or otherwise ineffective. I understand that Ms Priolo also indicates, in the alternative, that the Agreement may have been varied by conduct on some aspects. Given the integrated way these propositions were advanced, I will initially deal with the variation contentions in this part of the Decision. This will also inform whether the relationship is wholly regulated by the terms of the Agreement. I will then return to the broader notion that the Agreement was a sham, and therefore ineffective generally.

[68] The matters which were thrown against the Agreement by Ms Priolo have been outlined earlier in this Decision. Those matter that might reasonably be considered in the context of the variation contentions, and my findings on each, are set out below.

[69] There are 3 issues that have been raised by Ms Priolo that can conveniently be dealt with together. These concern the obligation or the capacity to find a replacement Instructor for a scheduled class and have been stated by Ms Priolo in the following manner:

- The requirement that any replacement for a class that could not be undertaken was to be organised by her and be drawn from the list of other Instructors who would have their own direct contracts with the Respondent;

- Under 2.1.1 (a) and (b) the contractor is liable to pay all (other) personnel for the services provided under this agreement and the contractor must pay all relevant payroll tax. However, this is contrary to Derrimut paying all of their instructors, including those who may backfill for a contractor, and the instructors sending their invoices themselves; and

- The right to subcontract work to anyone who was qualified to perform the work was not outlined in the contract.

[70] The starting point is the terms of the Agreement itself. The Agreement relevantly provides that:

- It is the Applicant's obligation to ensure that the services under the Agreement are provided – clause 2.1. This includes the standard of the services – clauses 2.3 and 2.6.

- The Applicant must ensure that (it and its employees) hold the requisite licenses and qualifications - clause 2.7.

- The Applicant is liable to pay (and meet all payroll tax for) the Personnel in respect of the services provided under the Agreement – clause 2.11. Where required under law, the Applicant is required to have a workers compensation insurance policy, including statutory and common law risk – clause 12.2(c).

[71] The import of these provisions is that Ms Priolo was responsible for meeting the services and this included finding, engaging and paying the replacement staff, and then invoicing the Respondent for the sessions when she was not willing or able to undertake them herself.

[72] This was not applied in practice and there is no indication that the Respondent expected this to happen. The requirements around this as applied by the Respondent and required of Ms Priolo were not consistent with the Agreement including with respect to the claimed obligation that they be sourced from existing 'Contractors' or in effect, be approved by it as additional 'Contractors'. Further, the expectation that the replacement workers would then invoice and be paid by Derrimut directly, was also at odds with the terms of the Agreement. Finally, the classes might be cancelled rather than the Agreement's obligation for the 'contractor' to supply the replacement.

[73] This was, in effect, a variation to the terms of the Agreement. It was a subsequent practice that was inconsistent with the terms of the Agreement but applied by agreement between the parties. It also demonstrates that the Agreement as varied and applied in that manner involved Ms Priolo personally performing the class and related work, at least where it was directly performed under the terms of the Agreement.

[74] In making this finding, I have considered the fact that the Agreement[35] required that any variation be made in writing and signed by both parties. The obligations and arrangements applied by Derrimut and Ms Priolo to this aspect were not agreed in writing. However, there is no doubt that the variation operated and was to be applied by the parties. The inconsistency with the process contemplated by the Agreement does not undermine the intended legal operation. That is, the terms of the variation and the consent of the parties is implied from their conduct and all terms of the Agreement, including the term which required any variation must be in writing, can itself be varied.

[75] I turn to the other issues raised by Ms Priolo that may be relevant to the existence of a variation. Firstly, the change such that there was an absence of an entitlement to payment of the Applicant if there were less than 4 attendees in the class. This 'policy' change was introduced unilaterally by the Respondent.

[76] There is no express terms of the Agreement that permitted this change. Clause 5 of the Agreement required that the Applicant be paid at the set rate for each class. Clause 6 provides for a review of the fee structure at the Respondent's discretion; however, it was not suggested by Derrimut that this permitted it to introduce a new condition for payment of this kind. Indeed, I note that Derrimut confirmed[36] that it had subsequently amended its contracts made after January 2024 to include this term.

[77] The change related to the minimum attendances at classes was apparently not applied in practice to Ms Priolo and was rejected by her. I do not consider that a legally effective variation was made.

[78] Secondly, that the Agreement was not varied when the committed hours (that is, the number of classes with the consequential hours of work involved) were increased. As the Agreement did not set the required classes or hours to be undertaken, it was not necessary that it be formally varied. Rather, these were intended by the Agreement to be set by subsequent agreements between the parties, with the fee payable linked directly to the number of classes.

[79] Thirdly, the notice provided by Derrimut of the cessation of the Agreement (2 weeks) was less than that set out in the Agreement itself (30 days). Given that there is no suggestion of a "fundamental breach"[37] here, it is apparent that this was a breach of the terms of the Agreement. However, this does not suggest a variation of any kind.

[80] Fourthly, it was never intended that the Applicant would provide the substantial reformer Pilates equipment required to conduct the classes as contemplated by clause 8.1. This is true. However, clause 8.2 of the Agreement expressly provides that Derrimut may agree to provide the tools and equipment for the (Applicant) to carry out the services. It has done so and presumably taken this into account in setting the fee in the Schedule to the Agreement. This practice did not therefore involve any variation to the Agreement.

[81] Finally, Ms Priolo relies upon the requirement that the bookings and related systems of Derrimut be utilised for the provision of the classes. The Agreement is silent on this aspect. However, there is no doubt that the parties objectively understood that this was the basis for the arrangements. This may not be a variation to the Agreement as such, however it is an indication that the Agreement was not intended to exclusively set out the terms of the contract.

[82] In terms of the potential variations outlined above, it is appropriate to apply the standard notions associated with the making and variation of enforceable agreements including an offer, acceptance, consideration, and the intention to create (vary) the legal relationship.[38] Further, as stated by the High Court in *Personnel Contracting*:

> "It is necessary to say something further about the admissibility of conduct. Where a wholly written contract has expired but the parties' conduct suggests that there was an agreement to continue dealing on the same terms, a contract may be implied on those terms (save as to duration and termination). The parties' conduct may also demonstrate "a tacit understanding or agreement" sufficient to show that there was a contract in the absence of an earlier express contract. In a dynamic relationship where "new terms [may] be added or [may] supersede older terms", it may also be necessary "to look at the whole relationship and not only at what was said and done when the relationship was first formed". The reference to the "whole relationship" should not be misunderstood. The inquiry remains an objective inquiry the purpose of which is to ascertain the terms the parties can be taken to have agreed. It is not an approach directed to inquiring into the conduct of parties which is not adduced to establish the formation of the contract or the terms on which the parties contracted. (references omitted)"[39]

[83] I am satisfied that these considerations apply to the potential variations in this case and lead to a variation in the requirements associated with the replacement Instructors, but not to the minimum class attendances or other alleged variations.

[84] Given my findings, there is a basis to establish that the Agreement was varied in that one respect. Further, the relationship was governed partly in writing by the terms of the Agreement and partly by oral contract. This means that the nature of the relationship is to be assessed having regard to all relevant elements. There may also be some implications arising from the non-agreed changes that reflect upon considerations such as control and whether the Agreement was a sham.

Was the Agreement a Sham?

[85] Ms Priolo has contended that the Agreement, or parts of it, were a sham. She does so in part by reference to, in effect, s.357 of the Act. Further, she argues that the Agreement was never intended to apply to a Pilates Instructor.

[86] This issue arises from the approach of the High Court in *Personnel Contracting*. In particular, the requirement to determine legal rights according to a comprehensive written contract, unless that contract is (amongst other factors) a sham. Gordon J also took the view that the Court may consider evidence of the reality of the working relationship for that purpose.[40] However, in *Jamsek*, Keifel CJ, Keane and Edelman JJ stated:

> "62. The circumstance that this state of affairs was brought about by the exercise of superior bargaining power by the company weighed heavily with the Full Court; but that circumstance has no bearing on the meaning and effect of the bargains that were struck between the partnerships and the company. To say this is not to suggest that disparities in bargaining power may not give rise to injustices that call for a legal remedy. The law in Australia does provide remedies for such injustices under both the general law and statute. Those remedies were not invoked in this case. As has been noted earlier, the respondents did not claim that the contracts with the partnerships were shams. Nor did they seek to make a claim under statute or otherwise to challenge the validity of the contracts that were made by the partnerships. In Australia, claims of sham cannot be made by stealth under the obscurantist guise of a search for the "reality" of the situation."

[87] Section 357 of the Act is relied upon by Ms Priolo and provides as follows:

> **"357 Misrepresenting employment as independent contracting arrangement**
>
> (1) A person (the employer) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.
>
> Note: This subsection is a civil remedy provision (see Part 4 1).

(2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:

(a) did not know; and
(b) was not reckless as to whether;

the contract was a contract of employment rather than a contract for services."

[88] The provision is part of the General Protections part of the Act and creates an offence but does not of itself provide guidance about the approach to be adopted to determining whether an arrangement itself is a sham.

[89] The traditional approach to the assessment of a sham contract is as follows:

- *Raftland Pty Ltd v Commissioner of Taxation* [2008] HCA 21, 238 CLR 516 at [34]:

  "A sham contract is one brought into existence as a "mere piece of machinery" to serve some purpose other than that of constituting the whole of the arrangement."[41]

- *Equuscorp Pty Ltd v Glengallan Investments* [2004] HCA 55; 218 CLR 471 at [46]:

  '"Sham' is an expression which has a well-understood legal meaning. It refers to steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any, legal consequences."

[90] In *Neale v Atlas Products (Vic) Pty Ltd*[42] the High Court considered a submission that 'the terms of a written agreement were a "sham". It was held that the written agreement, which "substantially set forth the conditions upon which each tiler was employed", was "the real measure of the relationship between the parties" and that "we should not be disposed to ignore it unless it can be said that the evidence establishes quite clearly that the conduct of the parties was inconsistent with it as the basis of their relationship" (references omitted)'.[43]

[91] The plurality of the High Court in *Personnel Contracting* also referenced[44] several other High Court decisions[45] that were consistent with the required approach on this aspect. This potentially permits assessment of the exercise of control in a relationship as part of the consideration of a contract as a sham. Further, there are other grounds upon which a contract can be impugned.[46]

[92] I should also add that a contract expressed to be an independent contractual arrangement (contract for services) may be correctly characterised as a contract of employment (contract of service) without there being any question of sham. In *Personnel Contracting*, there was no suggestion of sham,[47] but a majority of the High Court concluded that the contract, which was expressed to establish an independent contracting relationship, was properly construed to be a contract of employment.

[93] Amongst other factors, Ms Priolo contends that there were terms of the Agreement that were never intended to apply to a Pilates Instructor such as the provision of the tools and equipment and not requiring a Pilates instructor to provide personal training. I do not consider that these aspects meet the requirements for a sham. As set out earlier, the Agreement provided that Derrimut may supply the equipment and the drafting that may have been more applicable to other forms of instructors does undermine its apparent legal effect. Further, although there is tension between certain factors evident in how the relationship was carried out in practice, this does not rise to the point that the Agreement was a mere piece of machinery or not intended to have the apparent legal consequence of establishing the terms of the relationship.

[94] The description of its status within its own terms is also not conclusive and may ultimately be inaccurate, however this of itself also does not mean that the Agreement was a sham.

Summary of the status and role of the Agreement

[95] As a result, I find that this relationship was regulated by a partly written and partly oral contract. It was not a sham and was not otherwise ineffective. Further, given this finding, the characterisation of the relationship is to be determined by reference to the parties' rights and obligations set out in the Agreement as varied by the oral contract.

6.2 Two of the major factors and the overall consideration

[96] For reasons set out earlier, and subject to important caveats arising from *Jamsek* and *Personnel Contracting*, it is appropriate that the whole of the relationship between the parties is considered, provided it is applied to their legal rights and obligations. In that regard, it is convenient to initially deal with 2 particular aspects that remain apposite and provide context for that assessment.

Control

[97] In *Stevens v Brodribb Sawmilling Co Pty Ltd* (Brodribb) Mason J (as he then was) said:

> "...A prominent factor in determining the nature of the relationship between a person who engages another to perform work and the person so engaged is the degree of control which the former can exercise over the latter. It has been held, however, that the importance of control lies not so much in its actual exercise, although clearly that is relevant, as in the right of the employer to exercise it (*Zuijs v. Wirth Brothers Pty Ltd* [1955] HCA 73; (1955) 93 CLR 561, at p 571; *Federal Commissioner of Taxation v. Barrett* [1973] HCA 49; (1973) 129 CLR 395, at p 402; *Humberstone v. Northern Timber Mills* [1949] HCA 49; (1949) 79 CLR 389). In the last-mentioned case Dixon J. said (at p 404):
>
> > 'The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the

> performance of his work resided in the employer so that he was subject to the latter's order and directions.'
>
> … …"

[98] This is to be applied to the **right** to control **under** the relevant contract. The plurality in *Personnel Contracting* also stated:

> "73. Like the "own business/employer's business" dichotomy, the existence of a right of control by a putative employer over the activities of the putative employee serves to sensitise one to the subservient and dependent nature of the work of the employee, so as to assist in an assessment of whether a relationship is properly to be regarded as a contract of service rather than a contract for services."[48]

[99] There are elements of control evident in the Agreement as amended. These include:

- Although the Agreement was written on the basis that the work was to be undertaken by the Applicant or other personnel she might engage, the variation required, in effect, that she undertake the work personally or arrange for another person to perform the work, who would then form (or work under) a direct relationship with Derrimut. The Agreement as varied represents significant control over how the service obligations are to be met and this element is more consistent with that of employment. The obligation to, in effect, find her own replacement is less consistent with employment, but not significantly so, given that the classes could still be cancelled.

- There are elements of the Agreement that seek to control how the work is to be conducted. These included:

  - The work must be performed in a diligent and professional manner and the Applicant must use her best endeavours to promote the interests and welfare of the Respondent – clause 2.3;

  - The restriction on eating, drinking and consumption of alcohol – clause 2.4;

  - The requirement to adhere to the Respondent's specifications for uniforms, personal grooming and appearance – clause 2.5;

  - The requirements to hold and maintain stated licenses and qualifications – clause 2.7;

  - The obligation to fully abide by the terms and conditions of the Respondent's polices related to confidentiality, intellectual property, equal opportunity and bullying and harassment – clause 2.8; and

- The restriction on the performance of other business activities where such affects or prejudices in any way the provision of services under the Agreement, or which creates conflicts of interest – clause 2.9.

- The Agreement also provided considerable scope for the Respondent to determine what additional work (services) were to be performed, limited only to services for the Respondent's members ie. Personal training services, new member program orientations, current member program updates, new and current member personal assessment, gym floor service, and such other services as the Respondent may reasonably direct from time to time – clause 2.9(b). Given the broad manner in which the obligation to undertake these additional services was stated and in light of the obligations created elsewhere in the Agreement, this provision also gave power to Derrimut to largely determine how this work was to be undertaken. Although it is the right of control that is relevant, I observe by way of illustration that this right was exercised by Derrimut, including in relation to various requirements as to how the classes were to be conducted and some significant administration associated with those classes.

[100] In assessing the context and impact of this "control" I have taken into account the legal fact that all contracts have elements of control. In particular, those aspects which, in effect, require the performance of the work to a satisfactory standard, but this form of control does not by itself point to an employment relationship. There is nothing particularly unusual about a principal establishing and enforcing performance and quality standards in respect of independent contractors engaged to perform work. Further, the requirements about holding appropriate qualifications and accreditations are universally applied in the industry and are not of themselves indicative of control that might be more consistent with employment.

[101] In addition, the right to control certain matters that directly pertain to the Respondent's role as a person conducting a business or undertaking (PCBU) under the relevant work health and safety legislation,[49] such as those in clause 2.4 of the Agreement, would not necessarily be indicative of employment. That is, the relevant statutory obligations apply to "workers" in the workplace generally, and not simply to employees.

[102] Despite the contrary submissions of Ms Priolo, I do not consider that the Agreement as amended provided any extensive control to the Respondent over the extent of the Pilates classes work to be performed. Once the level of commitment was agreed, there was an expectation that the published classes would be conducted and that changes to the program would be limited. The capacity to cancel classes existed and these arrangements were not inconsistent with either employment or independent contractual relationships. Ms Priolo, subject to the important caveats in clause 2.9, retained the capacity to undertake other work. I observe that such freedom is also consistent with that of casual employment.[50]

[103] However, amongst other matters, the contractual rights and obligations providing the right of control to Derrimut about the performance of the work created by the variation, and clauses 2.5 and 2.9(b) of the Agreement, are significant and of direct relevance to the characterisation of the relationship.

Own business/putative employer's business and other related factors

[104] For reasons previously stated, the central question is always whether or not Ms Priolo was an employee. However, consideration of whether Ms Priolo's contractual role and her rights and obligations were so subordinate to the Respondent's business that it can be seen to have been performed as an employee of the business rather than as part of an independent enterprise, focuses the approach. That is, one of the purposes of this consideration is to assist in the assessment of the legal facts as they reveal the nature of the relationship. The more directly a factor bears upon this aspect, the more significant it is likely to be.

[105] As more recently stated by Full Court of the Federal Court in *EFEX Group Pty Ltd v Bennett* (***EFEX***):[51]

> "14 However, as a cautionary note, in some circumstances the proper analysis may be more nuanced than that. As Gordon J pointed out in Personnel Contracting at [181]-[183] (Steward J agreeing), asking whether a person is working for their own business may not always be a "suitable inquiry for modern working relationships", given that it may not take much for even a low skilled person to be carrying on their own business. Analysis based on this dichotomy may distract from the relevant underlying analysis of the totality of the relationship created by the contract. It may also direct attention to non-contractual considerations, which are not relevant unless forming part of the contract itself. The better question may be to ask whether, by the terms of the contract, the person is contracted to work in the business or enterprise of the purported employer, so as to maintain the correct focus. That is, if the contract does not lead to the conclusion that the person was working in the business of the asserted employer, then the person will not be an employee. This approach has some traction in this case."

[106] Ms Priolo work at Derrimut would be seen as an emanation of the Respondent's business, although this is of limited import in its own right.[52] However, there was only a limited sense in which it could be said that she was working in her own business in connection with her Agreement with Derrimut and the Agreement generally required that Ms Priolo work in the business of the Respondent. Ms Priolo was required to conduct the classes through the Derrimut systems and was also obliged to comply with its uniform and appearance standards. Further, there was an absence of any significant capital investment made by the Applicant to undertake the work. Derrimut provided all of the required equipment and systems to offer and conduct the classes, and there was an absence of any real direct financial incentive or risk to Ms Priolo associated with the success of the classes.[53] In so finding, I do not overlook the more indirect financial risk associated with the continuation of the relationship, or the reduction in work, in the context of low attendances. This form of indirect risk is common to employees and contractors.

[107] In relation to the form of required payment being made by reference to invoices with an ABN and its description as a fee, and the absence of superannuation payments, as stated in *ACE Insurance Limited v Trifunovski*:[54]

> "[37] 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. These matters are less important than the adoption by the parties (where this occurs) of rights and obligations which are fundamentally inconsistent with basic requirements of a contract of employment, such as the ability to delegate the discharge of obligations under a contract to another person, or where there is a lack of control over how work is done."

[108] In this matter, these arrangements also flow from how the designation of the relationship was made within the Agreement itself.[55] This is to be contrasted with circumstances where these aspects form part of the foundation of the parties and their agreement and reflect the very nature of the contract as intended by the parties.[56]

[109] Consistent with this approach, the description of the relationship between the parties in clause 2.10(a) of the Agreement as being that of principal and contractor, may be taken into account, but is not decisive or relevant, even as a tie breaker.

[110] I have accepted that Ms Priolo was, subject to the very broadly stated conflict of interests provision, able to work in other gyms. Whilst this is consistent with her potentially operating a business, this is a poor indicator of the status of the relationship. For reasons stated in various authorities, this arrangement is also consistent with the notion of casual or part-time employment.

[111] In this case, the mode of remuneration, leave provision and the arrangements as to the extent of work to be performed under the Agreement, are similarly a poor indicator of the true nature of the relationship given that these may be features of both independent contractual arrangements and casual employment.

6.3 Summary of conclusions about the nature of the legal relationship

[112] As is often the case in such matters, there are competing indicators. There are elements of control evident in the contractual arrangements that are clearly more consistent with employment, and some which sit comfortably with either form of relationship. In this case, those that are consistent with employment are more significant as indicators of that nature. These include, in particular, the contractual rights and obligations providing the right of control to Derrimut about the performance of the work created by the variation and clauses 2.5 and 2.9(b) of the Agreement.

[113] There are aspects of the Agreement in terms of the administrative arrangements that are more consistent with that of an independent contract including those associated with the payments to be made and insurances held. Further, the description of the relationship is expressly stated to be other than that of employment. These aspects are relevant; however, they are not decisive for reasons set out earlier.

[114] Under the terms of the Agreement as varied, Ms Priolo was contracted to work in the business or enterprise of the Respondent not just in a physical sense, but more importantly was

indivisibly integrated into Derrimut's business and operations. The indicators that she was working in her own business are weak, at best. Consistent with *Personnel Contracting*[57] and *EFEX*,[58] this consideration also reinforces the important legal factors, including that of control, which focus the present assessment.

[115] On balance, and when all of the contractual rights and obligations are assessed, I consider that Ms Priolo was employed by Derrimut as an employee within the meaning of the Act.

7. Conclusions and orders

[116] I have found that Ms Priolo was an employee. There is no dispute that the relationship was terminated by the Respondent.

[117] As a result, Ms Priolo was dismissed within the meaning of the Act.

[118] The jurisdictional objection is dismissed.

[119] The application will now be listed for the s.368 conference required by the Act.

DEPUTY PRESIDENT

Appearances:

A Priolo, the Applicant on her own behalf.

J Taleb of Spoken Legal Pty Ltd, with permission, for Derrimut Health & Fitness Pty Ltd, the Respondent.

Hearing details:

2024
June 5
Adelaide with MS teams video link.

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[1] Exhibit A4.

[2] Section 370(a) of the Act.

[3] Section 369(1)(a) of the Act.

[4] *Coles Supply Chain v Milford* (2020) 300 IR 146 [67] to [68].

[5] Applicant Outline of Submissions.

[6] Exhibit A1.

[7] Exhibit R1.

[8] Transcript PN1094.

[9] Transcript PN891.

[10] Exhibit A2.

[11] Exhibit A1 - AP-1.

[12] Exhibit A1 - AP - 2 and AP-13.

[13] Exhibit A1 - AP - 13.

[14] Exhibit A1 - AP-14.

[15] The evidence of Ms Weeks.

[16] Transcript PN186.

[17] Exhibit A1 - AP- 3.

[18] Exhibit A1 - AP - 4.

[19] Exhibit A1 - AP - 6.

[20] Exhibit A1 - AP- 19 and Transcript PN785.

[21] Exhibit A1 - AP - 20.

[22] [2022] FWCFB 129 at [74].

[23] *Personnel Contracting* [60]; *EFEX Group Pty Ltd v Bennett* [2024] FCAFC 35 at [6].

[24] *Personnel Contracting* including at [68] to [73].

[25] [2022] FCA 750 at [27]. This was recently endorsed by the Full Bench of the Commission in *Aspire 2 life Pty Ltd v Jessica Tidmarsh* [2024] FWCFB 289 at [15].

[26] Ibid.

[27] *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [42], [54], Gordon J at [177] - [178], [188] - [190].

[28] *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [46], [54].

[29] *Jamsek* per Kiefel CJ, Keane and Edelman JJ at [61].

[30] *Jamsek* per Kiefel CJ, Keane and Edelman JJ at [6], [8], [62] and *Personnel Contracting* at [81].

[31] *Jamsek* per per Kiefel CJ, Keane and Edelman JJ at [58].

[32] *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [39], *Jamsek* at [60].

[33] *Personnel Contracting* per Kiefel CJ, Keane and Edelman at [84].

[34] *Personnel Contracting* per Gordon J at [196].

[35] Clause 17 of the Agreement.

[36] Transcript PN628 to PN650.

[37] Clause 10.1 of the Agreement.

[38] See Australian Workplace Solutions Pty Ltd v P. Fox AIRC Print S0253 and *Damevski v Giudice* (2003) 133 FCR 438. See also *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [42] and [46] and the comprehensive discussion of Gordon J at [177] to [179].

[39] *Personnel Contracting at* [179].

[40] *Personnel Contracting* at [177].

[41] As summarised by Gordon J in *Personnel Contracting* at [177].

[42] [1955] 94 CLR 419.

[43] Cited in *Personnel Contracting* at [54].

[44] At [54].

[45] This included *Cam and Sons Pty ltd v Sargent* (1940) 14 ALJ 162, *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Ltd* (1959) 85 CLR 138.

[46] See also *Personnel Contracting* per Gordon J at [177] to [179].

[47] *Personnel Contracting* at [23] and [166].

[48] *Personnel Contracting* at [73].

[49] *Work Health and Safety Act 2012* (SA) – see s.5 and s.19.

[50] See *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [39], *Jamsek* at [60].

[51] [2024] FCAFC 35.

[52] Ibid at [42].

[53] See *Hollis v Vabu* [2001] HCA 44; 207 CLR 21 at [22], [56]; *Personnel Contracting* at [2].

[54] [2013] FCAFC 3, 209 FCR 146 at [37] per Buchanan J, with whom Lander and Robertson JJ agreed.

[55] See also *Aspire 2 Life Pty Ltd v Jessica Tidmarsh* [2024] FWC 289 at [29].

[56] See by contrast, *EFEX* at [46] to [47]. This included in that case the operation of trust arrangements which were used to receive and make payments in connection with the business and found by the Court to be fundamental to the relationship.

[57] *Personnel Contracting* at [39] and [73].

[58] *EFEX* at [14].