

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2019 WAIRC 00748

CORAM : COMMISSIONER T B WALKINGTON

HEARD : WEDNESDAY, 15 MAY 2019; THURSDAY, 6 JUNE 2019

DELIVERED : THURSDAY, 10 OCTOBER 2019

FILE NO. : U 152 OF 2018

BETWEEN : ANNIE DERKACS
Applicant

AND

TETYANA PODKAS TRADING AS PHOENIX PODIATRY
Respondent

CatchWords : Termination of employment - whether dismissal harsh, oppressive or unfair - whether applicant an employee or independent contractor - consideration of indicia of employment - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i)

Legislation : *Industrial Relations Act 1979* (WA)

Result : Application dismissed

Representation:

Applicant : In person

Respondent : Mr C Beetham (of counsel)

Case(s) referred to in reasons:

Abdalla v Viewdaze Pty Ltd; (2003) 53 ATR 30; (2003) 122 IR 215

ACE Insurance Ltd v Trifunovski [2013] FCAFC 3; (2013) 235 IR 115

Blyth Chemicals Limited v Bushnell (1933) 49 CLR 66

Bruce v AWB Ltd (2000) 100 IR 129; [2000] FCA 594

Hollis v Vabu Pty Ltd (2001) 207 CLR 21; [2001] HCA 44

Jiang Shen Cai trading as French Accent v Michael Anthony Do Rozario [2011] FWAFB 8307; (2011) 215 IR 235

John Lysaght (Australia) Pty Ltd v Federated Ironworkers Association (1973) 15 AILR 323

Neale v Atlas Products (Vic) Pty Ltd (1955) 94 CLR 419

On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3) [2011] 214 FCR 82; (2011) 206 IR 252

Paul Ernest Dallaston v Canon Foods [2005] WAIRC 01978; (2005) 85 WAIG 2999

Personnel Contracting Pty Ltd t/as Tricord Personnel v The Construction Forestry Mining and Energy Union of Workers [2004] WASCA 312; (2004) 85 WAIG 5

Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497

Stevens v Brodribb Sawmilling Company Pty Ltd (1986) 160 CLR 16; [1986] HCA 1

The Director of The Fair Work Building Industry Inspectorate v Linkhill Pty Ltd (No 7) [2013] FCCA 1097

Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1985) 65 WAIG 385

Yaraka Holdings Pty Ltd v Giljevic (2006) 149 IR 339

Reasons for Decision

- 1 On 16 December 2018 Ms Annie Derkacs made application for a claim that she had been harshly, oppressively or unfairly dismissed by Tetyana Podkas trading as Phoenix Podiatry.
- 2 The Respondent, Phoenix Podiatry, contends that the relationship of the parties was one of a principal and independent contractor and not that of employer and employee and objects to the Commission determining the claim.
- 3 As a question of the Commission's jurisdiction has been raised it is necessary to consider this matter before considering the circumstances of the termination of the relationship.

Background

- 4 Between March 2015 and November 2018, Ms Annie Derkacs (the Applicant) worked as a podiatrist at Phoenix Podiatry (the Respondent). Phoenix Podiatry is owned by Ms Tanya Podkas and is a small practice.
- 5 On 28 November 2018, Ms Derkacs and Ms Podkas engaged in an exchange that resulted in Ms Podkas advising Ms Derkacs that her services were no longer required.
- 6 Ms Derkacs says she was unfairly dismissed. However, Ms Podkas says she was entitled to terminate the relationship because Ms Derkacs was an independent contractor and not an employee.

The Question to be Decided

- 7 The question that I must answer is was Ms Derkacs an employee of Phoenix Podiatry?

Principles

- 8 Section 29 of the *Industrial Relations Act 1979* provides the Commission with power to determine claims brought by employees and provides as follows:

29. Who may refer industrial matters to Commission

- (1) An industrial matter may be referred to the Commission —
 - (a) in any case, by —
 - (i) an employer with a sufficient interest in the industrial matter; or
 - (ii) an organisation in which persons to whom the industrial matter relates are eligible to be enrolled as members or an association that represents such an organisation; or
 - (iii) the Minister;and
 - (b) in the case of a claim by an employee —
 - (i) that he has been harshly, oppressively or unfairly dismissed from his employment; or
 - (ii) that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of employment,by the employee.

9 Section 7 defines an “employee”:

7. Terms used

(1)

...

employee means —

- (a) any person employed by an employer to do work for hire or reward including an apprentice; or
- (b) any person whose usual status is that of an employee; or
- (c) any person employed as a canvasser whose services are remunerated wholly or partly by commission or percentage reward; or
- (d) any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner, whether wholly or partly, of any vehicle used in the transport of goods or passengers if he is in all other respects an employee,

but does not include any person engaged in domestic service in a private home unless —

- (e) more than 6 boarders or lodgers are therein received for pay or reward; or
- (f) the person so engaged is employed by an employer, who is not the owner or occupier of the private home, but who provides that owner or occupier with the services of the person so engaged;

- 10 In *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16; [1986] HCA 1, the High Court held that determining whether a relationship is that of an employer and employee or principal and independent contractor requires the consideration of a number of factors including, but not limited to, control, mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision of holidays, the deduction of income tax and the delegation of work.
- 11 The principles set out in *Stevens v Brodribb* have been adopted and applied by this Commission in *Personnel Contracting Pty Ltd t/as Tricord Personnel v The Construction Forestry Mining and Energy Union of Workers* [2004] WASCA 312; (2004) 85 WAIG 5. *Abdalla v Viewdaze Pty Ltd* (2003) 53 ATR 30; (2003) 122 IR 215, provides a useful summary of the factors or indicia to be considered when determining the nature of the relationship.
- 12 The question to ask when determining whether a worker is an employee or contractor is ultimately whether the worker is a servant of another in that other's business, or whether the worker carries on a business of her or her own account. The answer to the question comes from an examination of the relationship as a whole as established in *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 [24]; [2001] HCA 44. That includes not merely any terms formally agreed by the parties, but the ‘actual work practices’ they have adopted as per *ACE Insurance Ltd v Trifunovski* [2013] FCAFC 3; (2013) 235 IR 115 [107] - [108].

Contract

- 13 In relation to the assessment of the extent of control one party has over another, in *Stevens v Brodribb* (29) it was held that the test has shifted from the actual exercise of control to the right to exercise which may ‘only in incidental or collateral matters’.

Delegation

- 14 In *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)* [2011] 214 FCR 82; (2011) 206 IR 252, the Federal Court at [283] considered the right to delegate and held that:

the mere right to delegate in the absence of the likelihood or actuality of delegation occurring may be of little consequence: *Neale v Atlas Products (Vic) Pty Ltd* (1955) 94 CLR 419 (428)

citing *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 (515), the Federal Court observed that limited or occasional delegation may not preclude a finding that the relationship is one of employee and not a contractor.

A Business, Working for Others and Advertising for Alternate Practice

- 15 In *Paul Ernest Dallaston v Canon Foods* [2005] WAIRC 01978; (2005) 85 WAIG 2999, the Full Bench of the Commission held that it was correct to find that Mr Dallaston was an independent contractor because Mr Dallaston in purchasing a round of business clients from another person engaged by Canon Foods and in attempting to sell his own round including the goodwill of a purported business and equipment Mr Dallaston was conducting a business of his own. In addition, the equipment provided by Mr Dallaston was a van with a freezer unit, which involved a comparatively large capital outlay.
- 16 The existence of a separate location for the operations of a business indicates an independent contractor as considered in *Stevens v Brodribb* (37) and similar to the inclusion in an industry directory in *Abdalla v Viewdaze* [35] the promotion of their own business will point to an independent contractor.
- 17 Where an employee is able and does work for others this may point towards an independent contractor. However, a casual employee or part time employee may also be entitled to work for others as found in *Yaraka Holdings Pty Ltd v Giljevic* (2006) 149 IR 339 [34].

Payment, Taxation, Superannuation and Benefits

- 18 Payment by results or completion of a task may be indicative of a contractor however it is not uncommon for employees to be paid commissions as in *ACE Insurance v Trifunovski*. Payment on submission of an invoice suggests a business but carries less weight if the employer provides the form and dictates the content. *The Director of The Fair Work Building Industry Inspectorate v Linkhill Pty Ltd (No 7)* [2013] FCCA 1097.
- 19 The non-payment of superannuation contributions, workers compensation levies, deductions of income tax, holiday pay or sick leave is dependent on the view taken by the putative employer, and whether these are done depends on the whether the relationship is viewed as one of employment and not the other way around as established in *ACE Insurance v Trifunovski* [37].

The Contract Itself

- 20 In *Abdalla v Viewdaze* [34] the Full Bench of the Australian Industrial Relations Commission held that:
- (3) The terms and terminology of the contract are always important and must be considered. However, in so doing, it should be borne in mind that the parties cannot alter the true nature of their relationship by putting a different label on it. In particular, an express term that the worker is an independent contractor cannot take effect according to its terms if it contradicts the effect of the terms of the contract as a whole: that is, the parties cannot deem the relationship between themselves to be something it is not. Similarly, subsequent conduct of the parties may demonstrate that relationship has

a character contrary to the terms of the contract. If after considering all other matters, the relationship is ambiguous and is capable of being one or the other, then the parties can remove that ambiguity by the very agreement itself which they make with one another.

- 21 Subsequently the Full Bench of the Fair Work Commission (FWC) in ***Jiang Shen Cai trading as French Accent v Michael Anthony Do Rozario*** [2011] FWAFB 8307; (2011) 215 IR 235, considered the principles articulated in ***Abdalla v Viewdaze*** and the apparent tension between the consideration of the description of the relationship in a written agreement where an assessment of all other matters results in a conclusion that is ambiguous and the alternative test, in the face of ambiguity, of being:

- (5) ... guided primarily by whether it can be said that, viewed as a practical matter the individual in question was or was not running his or her own business or enterprise with independence in the conduct of his or her operations as distinct from operating as representative of another business with little or no independence in the conduct of his or her operations. [10].

In this matter the FWC found that the absence of a reference to a dealer arrangement in the written contract between the two parties supported the finding that there was an additional separate business arrangement with the employee to that of the relationship between them of employer and employee [39].

Consideration

- 22 At the commencement of their relationship the parties' own discussions about the nature of the relationship were superficial, with limited details of the arrangements having been agreed.

- 23 Ms Derkacs made the following arguments in support of her contention that she was an employee:

- (a) There was no written contract in relation to her engagement;
- (b) Ms Derkacs considered herself to be an employee at all times;
- (c) Phoenix Podiatry exerted control over the hours that she worked;
- (d) Phoenix Podiatry bore the risk in relation to the work that she performed;
- (e) Ms Derkacs was not able to nominate another podiatrist to perform her hours of work;
- (f) Ms Derkacs was representing Phoenix Podiatry when working at the clinic, her name appeared on promotional materials such as the website and business cards with no distinction being made in respect of being an independent contractor nor business; and
- (g) Phoenix Podiatry provided all the equipment, instruments and specialist supplies needed.

- 24 Phoenix Podiatry maintained that the nature of the relationship was that Ms Derkacs was at all times an independent contractor, based on the following contentions:

- (a) At the commencement of their relationship Ms Derkacs indicated that her preference was to be engaged as a contractor;
- (b) Throughout her engagement with Phoenix Podiatry, Ms Derkacs also provided podiatry services at other establishments;
- (c) Ms Derkacs was paid according to the revenue she generated through client treatments and products sold;

- (d) Phoenix Podiatry did not determine Ms Derkacs' hours of work, as they were agreed between the parties;
- (e) Phoenix Podiatry did not deduct income tax or make superannuation contributions on behalf of Ms Derkacs;
- (f) Phoenix Podiatry never paid Ms Derkacs for periods of leave that she took in relation to both illness and recreation;
- (g) Phoenix Podiatry did not pay for Ms Derkacs' training and professional development;
- (h) The personal nature of the services provided would not create goodwill for Phoenix Podiatry; rather business would be created for Ms Derkacs as an individual whom clients would follow to another practice;
- (i) In 2015 Ms Podkas provided a draft of an Agreement that characterised the relationship as an independent contractor to Ms Derkacs; and
- (j) Subsequently in 2017 and again in 2018 Ms Podkas provided a draft of an Agreement to Ms Derkacs which included terms that defined Ms Derkacs as a contractor. When Ms Derkacs entered into negotiations on the terms of the Agreement, she sought changes to some of the terms but did not seek to change the description of her as a contractor.

25 It is useful to initially consider the various indicia under general headings to inform the overall assessment of the relationship.

Control

- 26 Ms Derkacs agreed that generally in the day to day conduct of her practice she was not closely supervised, was not instructed on the nature of treatments of clients and was left largely on her own (ts 47).
- 27 Ms Derkacs says the hours of work were set by Phoenix Podiatry and that Ms Podkas was able to instruct that Ms Derkacs not attend at the clinic when there were insufficient clients booked (ts 94). Ms Podkas says that Ms Derkacs was able to choose her own hours within their agreed arrangements established for the practical requirements of a podiatry practice (ts 94). That is, the times in which a client could make a booking were dependent on the hours of the clinic: being the times when the Receptionist attended the clinic for the taking of bookings and the hours for treatments were during the advertised hours of the practice (ts 87). The days on which Ms Derkacs worked were discussed and agreed on a longer-term basis to facilitate clients repeat bookings and the nature of a podiatry practice (ts 89). The days of attendance at the clinic were agreed subject to the availability of Ms Derkacs, the availability of a room in the clinic and sufficient bookings (ts 86). The days and hours of service varied during the engagement – one day a week to three days a week – these were set by agreement between Ms Podkas and Ms Derkacs based on bookings by clients. Ms Podkas advised Ms Derkacs that she would need to cancel some days she was rostered to work as there were insufficient bookings (ts 92-94). I find that the days and hours Ms Derkacs worked were agreed between the two parties as a result of negotiations held to accommodate the needs of each party and the overall parameters of the days and hours of operation in which Ms Derkacs worked were made by Ms Podkas.
- 28 Where there were no client bookings for Ms Derkacs on a particular day or the first booking was for some time after the usual opening time of the clinic, Ms Podkas would text Ms Derkacs

to advise her of the lack of bookings or later start time. This arrangement, whereby the lack of bookings resulted in Ms Derkacs' services not being required, is more consistent with that of a contractor (ts 95-96).

- 29 Ms Derkacs says she was required to seek permission to be absent from Phoenix Podiatry (ts 49). Ms Podkas says Ms Derkacs discussed any periods of proposed absences with her but did not seek approval for periods of absences. Instead Ms Podkas says Ms Derkacs would notify that she was not available rather than request leave. Ms Podkas would make arrangements to ensure clients were attended to during Ms Derkacs absences. (Witness Statement of Tetyana Podkas (TP [38, 83])). Ms Derkacs says she sought approval from Ms Podkas for any extended absences from the practice (ts 69). I find that Ms Derkacs did not request approval for leave and extended absences and the communication provided to Ms Podkas concerning leave and extended absences is more appropriately described as notification. Given the effect of Ms Derkacs being absent resulted in receiving no income for that period. These circumstances are similar to that of an independent contractor however they are also similar to that of a causal employee.
- 30 Ms Derkacs contends that Ms Podkas controlled the allocation of patients and that Ms Podkas had allocated some clients who had requested an appointment with Ms Derkacs to another podiatrist (ts 47-48). Ms Derkacs says she discussed this with Ms Podkas, however Ms Podkas could not recall the conversation (ts 101). Phoenix Podiatry contend that Ms Derkacs was able to decline to attend to particular clients and cited two occasions (TP [46-47]). Ms Derkacs says the first occasion was the result of the client being aggressive toward her and the second occasion was as a result of the client running late and the usual practice was for the client to be rebooked at another time. On this occasion the client was re-booked with Ms Podkas. I find that the two examples do not demonstrate that Ms Derkacs controlled the allocation of her own clients.
- 31 There are some elements of control more consistent with that of an employment relationship, however, the absence of any direct supervision over her work must be taken into account.

Business Goodwill, Working for Others and Advertising for Alternate Practice

- 32 Ms Derkacs says she was free to work at other locations and did so in other practices and in her own business (ts 24, 45). Ms Derkacs also advertised her services at least for one alternative location (ts 46).
- 33 Ms Derkacs says the repeat bookings by clients she attended at Phoenix Podiatry was goodwill for that practice and not for herself or any alternate practices she worked in (ts 48). It is Ms Podkas' evidence that it was agreed with Ms Derkacs at the start of their relationship that any goodwill generated in the form of clients at Phoenix Podiatry would remain with Phoenix Podiatry (TP [15]).
- 34 Ms Derkacs did not supply equipment or specialised supplies and Phoenix Podiatry supplied all equipment and specialist supplies.
- 35 In her evidence in chief Ms Derkacs refers to operating her own business (ts 24, 42). However, under cross examination Ms Derkacs contradicts her evidence saying she does not have a business (ts 44). I found Ms Derkacs to be evasive when being cross examined and her attempts to paint her own business operations as something different unpersuasive.
- 36 Ms Derkacs worked at other practices, advertised her services independently of Phoenix Podiatry and operated her own business which suggests that she was a contractor. However,

Ms Derkacs did not provide a significant investment through the provision of capital or equipment for the operation of a practice at Phoenix Podiatry indicating an employment relationship. The goodwill generated at Phoenix Podiatry was for that practice and not for Ms Derkacs personally or any business owned by her suggests that Ms Derkacs was an employee.

Delegation

- 37 Ms Derkacs says she did not delegate or sub-contract her work at Phoenix Podiatry to any other person. Ms Derkacs says while Ms Podkas ‘makes quite plain that I was free to sub-contract I refused to believe that she would ever let a third party take over my patient for a given shift’ (ts 24). It is not known if Ms Podkas would have prevented any delegation only that Ms Derkacs held the belief that she would have. Ms Podkas agrees that Ms Derkacs did not sub-contract another podiatrist at any time, however she says that Ms Derkacs had the right to do so (ts 101). Similar to *On Call Interpreters v Federal Commissioner of Taxation* the right to delegate in the absence of acting upon it is of little consequence in assessing the nature of the relationship between Ms Derkacs and Phoenix Podiatry. On the one occasion Ms Podkas requested that Ms Derkacs arrange for an alternative podiatrist to cover her absence, Ms Derkacs declined to do so (ts 101). Whenever Ms Derkacs was unable to attend at Phoenix Podiatry, it was Ms Podkas who arranged for another podiatrist to attend (ts 101-102) and I infer the relationship would be between Ms Podkas and the alternate podiatrist and not with Ms Derkacs.
- 38 An assessment of this factor points towards the relationship being that of employer and employee.

Integration

- 39 Ms Derkacs’ name was listed on the website as one of the team of Phoenix Podiatry and on Phoenix Podiatry’s business cards along with other podiatrists at the practice. The website and business cards were designed and provided by Phoenix Podiatry (ts 32).
- 40 Ms Derkacs says she had a name badge which displayed the logo of Phoenix Podiatry. Ms Podkas says Ms Derkacs’ name badge only had her name on it and did not contain a reference to Phoenix Podiatry. Ms Derkacs’ badge was not produced however a client recalls that Ms Derkacs’ badge displayed a logo that she mistakenly took for a dog’s face when it actually was a bird (ts 136). I infer this would be the Phoenix Podiatry logo.
- 41 Phoenix Podiatry did not have a uniform or corporate wardrobe and Ms Derkacs wore casual clothes without a logo.
- 42 Clients seen by Ms Derkacs were followed up by Phoenix Podiatry if they, or Medicare, failed to make payments for services. Monies not able to be recovered were not deducted from Ms Derkacs payments nor did Ms Derkacs pay Phoenix Podiatry the loss (ts 23, 104).
- 43 An assessment of these factors suggests Ms Derkacs was an employee.

Payment, Taxation, Superannuation and Benefits

- 44 Phoenix Podiatry did not deduct income tax from any remuneration paid to Ms Derkacs (ts 24) and when cross examined on matters concerning taxation arrangements Ms Derkacs was evasive, however Ms Derkacs did concede that she reported her income to the Australian Taxation Office as business income (ts 45).

- 45 Phoenix Podiatry paid Ms Derkacs on submission of an invoice by Ms Derkacs that was calculated by using a day sheet completed by the Receptionist. Ms Derkacs says the invoice included an ABN number because Ms Podkas requested that it do so (ts 37). Ms Derkacs received payment for treatment of a client regardless of whether the client paid Phoenix Podiatry (ts 23).
- 46 Phoenix Podiatry also did not make any superannuation contributions for Ms Derkacs (ts 24).
- 47 Ms Derkacs did not receive paid holiday leave nor paid sick leave (TP [31]).
- 48 The non-deduction of income tax from remuneration, payment of an invoice supplied by Ms Derkacs to a financial institution account under a business name point towards Ms Derkacs being a contractor. The non-payment of superannuation contributions, along with the non-receipt of holiday pay and sick leave also suggests Ms Derkacs was a contractor and not an employee. However, these conclusions need to be considered with some caution as in *ACE Insurance v Trifunovski* [37] and other indicia will have more weight.

Express declaration of the Parties

- 49 Ms Podkas says that the arrangement between Phoenix Podiatry and Ms Derkacs was discussed between them in 2015 and it was agreed that it would be one of contractor or an arrangement akin to a partnership. Ms Podkas says that Ms Derkacs requested that the relationship be that of an independent contractor (TP [20-25]). Ms Podkas confirmed this under cross examination when she says 'Ms Derkacs insisted she wants to be a contractor' (ts 110). Ms Derkacs did not refute Ms Podkas' evidence that it was Ms Derkacs who expressed a preference to be a contractor because this was beneficial to her (TP [24]). When cross examined Ms Podkas confirmed this to be the case and that she agreed as a result of their close friendship and because the arrangement was to be trialled (ts 110).
- 50 Ms Podkas says she first provided a draft Agreement to Ms Derkacs in August 2015 (TP [67]). Ms Podkas says she raised the draft Agreement with Ms Derkacs on several occasions until November 2015 when she retrieved the draft Agreement from Ms Derkacs' correspondence tray and placed it on Ms Derkacs' desk with a note requesting that she email any issues before the end of the week (TP [70-71]). Ms Podkas says as a result of medical concerns she did not pursue this matter until June 2017 when she reminded Ms Derkacs about the Agreement. Ms Podkas' recollection is that at that time Ms Derkacs advised she wished to discuss the termination restriction (TP [75]).
- 51 Mr MacHunter says he saw the draft Agreement in Ms Derkacs' correspondence tray a number of times until November 2018 (Witness Statement of Paul Anthony MacHunter [12]).
- 52 Ms Derkacs says she was not provided with a written draft Agreement before August 2017 which she found on her desk on return from a holiday (ts 26).
- 53 On 11 August 2017 Ms Podkas texted Ms Derkacs requesting Ms Derkacs outline any issues she had with the draft Agreement so that they could discuss them (TP [76-77]). Ms Derkacs did not respond, and Ms Podkas did not pursue the matter because on 19 August 2017 Ms Derkacs advised that she was resigning from Phoenix Podiatry providing twelve weeks' notice (TP [78]). Subsequently, in October 2017, Ms Derkacs advised that she would continue until Easter 2018 (TP [79]). In fact, Ms Derkacs did not terminate her relationship with Phoenix Podiatry at Easter and continued to work until November 2018.

- 54 On 14 November 2018 Ms Podkas requested Ms Derkacs look at the draft Agreement and there was a discussion about superannuation contributions. Ms Derkacs advised that she would not be able to look at the draft Agreement for a further few weeks.
- 55 On 19 November 2018, Ms Podkas sent Ms Derkacs a text message advising she would email the Agreement and requested that Ms Derkacs look at the draft Agreement and finalise their negotiations by 21 November 2018. As Ms Derkacs responded by text message that she would not have time before 21 November 2018, to review the draft Agreement Ms Podkas advised, by text message, that she would block the appointments for a period in the afternoon to enable Ms Derkacs to be free for this task.
- 56 Ms Podkas emailed Ms Derkacs an amended draft Agreement with reduced terms, on 19 November 2018 reiterating her text messages to contact her with any amendments to be done by the end of the day on 21 November 2018.
- 57 Early on 21 November 2018 Ms Derkacs emailed Ms Podkas saying it was unfair to demand that the Agreement be signed in a short period of time and that she would review it on the weekend, call her with any issues and have it back by the next week. Ms Podkas responded by text advising she had blocked appointments for forty minutes in the morning and she would pay Ms Derkacs normal rates for this time. Ms Derkacs responded by text saying she would not be looking at the draft Agreement that day and claiming Ms Podkas was bullying ‘your employee into rushing to sign your document!’ (TP [98]). Ms Podkas responded by text saying Ms Derkacs was not an employee but a contractor (TP [99]).
- 58 On 26 November 2018, Ms Derkacs emailed Ms Podkas requesting changes to the draft Agreement for remuneration, period for notice and the restrictions on termination (TP [100]). Ms Podkas responded by email accepting two of the proposed changes and rejecting the proposed change to the restrictions on termination (TP [101]).
- 59 The two versions of the draft Agreement described the relationship as one of contractor and principal. Ms Derkacs did not raise the issue of the description of the nature of the relationship in 2017 nor in 2018. In proposing changes to the draft Agreement in November 2018, Ms Derkacs did not seek to change the description of the relationship to that of an employee.
- 60 In addition, Phoenix Podiatry contend that Ms Derkacs considered herself a contractor as she described her relationship as a ‘locum’ on the invoices submitted for payment (ts 43).
- 61 I find that initially in 2015 the parties characterised their relationship as that of a principal and contractor, albeit the details of the arrangements were scant. I am persuaded by Ms Podkas’ evidence that at the time Ms Derkacs expressed a preference to be engaged as a contractor. I find that the draft Agreement and subsequent variations described Ms Derkacs as a contractor. I find that Ms Derkacs did not seek to be classified as an employee during her engagement with Phoenix Podiatry of three years and eight months, only expressing her concerns that she was in fact an employee latterly in circumstances in which it is apparent the negotiations to document their relationship were increasingly tense. However, as in *Abdalla v Viewdaze* and *Jiang Shen Cai v Michael Anthony Do Rozario*, the parties in this matter cannot deem the relationship to be something it is not, and their descriptions of their relationship is one consideration along with a range of other factors.
- 62 In answering the question of whether Ms Derkacs is a servant of another and whether Ms Derkacs carried on a business on her own behalf in the context of her engagement with Phoenix Podiatry, I have assessed the multiple factors. Viewing the totality of the relationship is a practical matter and I am on balance satisfied that in relation to work undertaken at

Phoenix Podiatry, Ms Derkacs was not conducting a business of her own. I find that Ms Derkacs was working within the business established as Phoenix Podiatry and her services were provided as part of that business.

Question to Be Determined – Unfair Dismissal

- 63 Having found that Ms Derkacs was an employee the question is whether the termination of Ms Derkacs' employment was harsh, oppressive or unfair.

Principles

- 64 An employer has a right to terminate an employee's employment provided the termination is not an abuse of the contractual right to terminate as established in *Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385.
- 65 The power to summarily dismiss depends upon first, determining whether there has been a breach by the employee of the express or implied terms of the contract or demonstrated intention not to be bound by those terms and secondly, an assessment of whether the breach is sufficiently serious to allow summary termination of the contract *Bruce v AWB Ltd* (2000) 100 IR 129 [15]; [2000] FCA 594.
- 66 *Blyth Chemicals Limited v Bushnell* (1933) 49 CLR 66 (81-82) establishes that it is the conduct of the employee that must be considered:
- “Conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal.....But the conduct of the employee must itself involve the incompatibilities, conflict, or impediment, or be destructive of confidence.”
- 67 In *John Lysaght (Australia) Pty Ltd v Federated Ironworkers Association* (1973) 15 AILR 323 it was found that abusive language at the workplace may be sufficiently serious to warrant dismissal when directed toward challenging the authority of a supervisor or employer.

Consideration

- 68 In this matter on 28 November 2018 Ms Derkacs says she arrived at work expecting to attend to clients. However, Ms Podkas informed her that she was required to immediately sign the draft Agreement otherwise she would not be working at the clinic and in effect would terminate her employment unless the Agreement was signed (ts 31). Ms Podkas' version of events differs from that of Ms Derkacs. Ms Podkas says that on arrival at the clinic Ms Derkacs asked how she was and Ms Podkas had responded that she was not good because they had not as yet agreed on the Agreement (TP [105]) and that she had come into the clinic to discuss the Agreement and that until they could arrive at signed agreement Ms Derkacs was suspended (TP [106]). Ms Podkas says she had attended at the clinic that morning with the intention of discussing the one issue in the draft Agreement that she had understood remained to be settled between them, intending to compromise on this matter, and if necessary, treat a client booked with Ms Derkacs to enable Ms Derkacs to have that time to consider the terms and sign the Agreement (ts 116). The differences in the recollections of these exchanges are important and I find that Ms Podkas' version is preferable. Ms Podkas' written and oral evidence was consistent and not diminished under cross examination. Ms Derkacs' evidence was muddled and inconsistent and, at times, evasive.

- 69 In response to being told she was not to see clients, Ms Derkacs raised her voice to the level of a shout and swore at Ms Podkas. Ms Derkacs shouting for another member of staff to witness their exchange loudly demanded Ms Podkas say she was firing her (TP 108-110]). A client who overheard the exchanges says Ms Derkacs was yelling at Ms Podkas in a disrespectful, abusive, intimidating and threatening manner. (Witness Statement of Kerry Valentine).
- 70 Ms Podkas responded by asking Ms Derkacs to return her keys to the clinic and leave the premises (TP [111]). Ms Derkacs briefly left the clinic to retrieve her keys from her vehicle remarking with profanities to a client as she passed through the waiting area that she had been sacked (TP [114]) (ts 66).
- 71 In this matter I conclude that Ms Derkacs was not dismissed unfairly, harshly or unreasonably in the circumstances. Ms Derkacs did not comply with a lawful direction from her employer to not attend clients of the clinic, in order to use that time to consider a revised draft Agreement and further discuss any issues in response to Ms Podkas' instructions. Ms Derkacs used abusive language to directly challenge her supervisor and employer. I find Ms Derkacs' conduct was destructive of the necessary confidence between employer and employee.
- 72 I find that Ms Podkas was entitled to summarily terminate the contract of employment and I dismiss the application.