

CAN YOU JUDGE A RELATIONSHIP BY ITS CONTRACT?

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Legal Briefings - By **Natalie Gaspar, Rommo Pandit and Samara Cassar**

Australia's courts largely say yes in two employment disputes but context still matters.

The principles deciding if a worker is an employee or independent contractor are a perennial subject of employment disputes the world over. Some useful answers on the point came on 9 February 2022, when the Australian High Court delivered decisions in *CFMMEU v Personnel Contracting* [2022] HCA 1 (**Personnel Contracting**) and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 (**Jamsek**).

The worker in *Personnel Contracting* was found to be an employee, but the owner-drivers in *Jamsek* were held to be contractors. So what lessons can we learn?

CONTRACTS ARE KING, BUT WILL BE SCRUTINISED

The High Court reaffirmed the importance of a written contract when ascertaining a worker's status.

Consistent with the line of reasoning established in its earlier decision in *Rossato*,¹ the High Court confirmed that where the terms of the parties' relationship is reduced to a written contract, the legal rights and obligations established under the contract should be decisive of the character of the relationship. The conduct and expectations of the parties after entering into the contract is not relevant to the assessment.

Some commentators have bemoaned the decisions as the death knell of secure work. After all, most contractors do not enjoy many of the protections afforded to employees: minimum wages, protection from unfair dismissal, leave benefits and superannuation. Companies save on workers compensation and payroll tax.

So is this a *carte blanche* for businesses to engage all workers as contractors? Not quite.

Although the lead judgment in *Personnel Contracting* expressed concern regarding the ‘multifactorial’ test previously applied, some of the familiar ‘indicia of employment’ concepts remain. In particular, assessments relating to the degree of control exercised over the worker, and extent to which the worker operates an independent enterprise, will still feature in the analysis of a worker’s true status. What the High Court confirmed is that this analysis should be undertaken in respect of the written contract itself, rather than the parties’ conduct after agreeing to that contract.

The decisions are anathema to the ALP’s promise to increase forms of secure work if it is able to form government following the election. It remains to be seen what legislative reform might be on the agenda.

CFMMEU V PERSONNEL CONTRACTING [2022] HCA 1

Mr McCourt, a backpacker, had a written contract with a labour hire company, ‘Construct’. Pursuant to the terms of that contract, Mr McCourt was required to perform work for Construct’s clients. Construct had a separate contractual arrangement with its client, Hanssen, pursuant to which Construct would provide labour to Hanssen’s site. Importantly, there was no contract between Mr McCourt and Hanssen. This is typically known as an ‘Odco’ arrangement.

The agreement between Mr McCourt and Construct required Mr McCourt to cooperate with Construct’s clients, and to attend work at a nominated place and for a specified duration.

The agreement did not go so far as to control how a specific task would be carried out, as such a direction would be given by Hanssen.

Mr McCourt, along with the CFMMEU, brought a claim against Construct asserting that Mr McCourt was an employee of Construct and claiming entitlements as such.

INDICIA OF EMPLOYMENT ASSESSED IN THE CONTRACT

The lead judgment expressed concern over applying the ‘multifactorial’ test that has previously been applied in various courts, especially where its application extended to consideration of post-contract conduct.

Rather, given that the parties’ relationship was comprehensively reduced to a written contract, the rights and obligations set out in the contract would determine the character of the relationship (subject to a challenge to the validity of contract as a sham, or a variation to or waiver of the terms of the contract, or an estoppel).²

This does not mean that a worker will be found to be a contractor merely because the contract designates them as such. Rather, the assessment of the relationship needs to be undertaken based on the terms of the contract between the parties, and without regard to subsequent conduct.

Two factors remain particularly important:

- **Control:** the greater the degree of control by the principal/employer over the work performed, the greater the likelihood of an employment relationship existing. Key to the Court's decision was the fact that Construct could control Mr McCourt's work (or the provision of his labour to its clients) – Mr McCourt was effectively obliged under his contract with Construct to follow the direction of Construct's client, or else be liable to having Construct terminate his contract. The fact that Construct did not control Mr McCourt's day to day actions did not change the position.
- **Own business/employer's business:** the greater the degree of integration and subservience of the worker into the principal's enterprise, the greater the likelihood of an employment relationship existing. Conversely, the greater the pursuit by the worker of an independent enterprise, the more likely it is that the worker will be an independent contractor. The lead judgment considered the core of Mr McCourt's obligation under his contract with Construct was to work as directed by Construct or its client – the benefit of this obligation was the key asset of Construct's labour hire business, and it was 'impossible to say that Mr McCourt was in business on his own account.'

Although the Court did not consider it appropriate to undertake a fulsome analysis of the other 'indicia' of a contractor/employee relationship that has previously been considered by courts, it may be the case that a number of those indicia will fall within the scope of considering the two points above. Interestingly, the lead judgment gave little regard to both: the non-exclusive nature of Mr McCourt's engagement, on the basis that this could equally demonstrate a casual employment relationship; and, the fact that Mr McCourt could accept or reject work, on this basis that this was limited to accepting or rejecting overall assignments to clients rather than daily engagements.

ZG OPERATIONS AUSTRALIA PTY LTD V JAMSEK [2022] HCA 2

Mr Jamsek and Mr Whitby were initially engaged by the second appellant and then the first appellant (collectively referred to as the **company**) as employees engaged to drive company trucks. In or around 1985-1986 the respondents ceased to be employed by the company. Rather, they created partnerships with their wives, pursuant to which the partnerships entered into written contracts for cartage services with the company, and agreed to purchase and maintain trucks from the company. In addition, the partnerships were required to invoice for their cartage work and were paid by the company for that work.

Following *Personnel Contracting*, the Court determined that the nature of the relationship between the parties was to be determined by reference to the rights and obligations contained in the written contract. This contract was between the company and the partnerships. The truck drivers were found to be members of partnerships and not employees of the company. Further, the subsequent conduct of the parties and their 'expectations' regarding the work to be performed was irrelevant.

THE PARTIES TO THE RELEVANT CONTRACTS

The leading judgment in *Jamsek* placed significant focus on the parties to the relevant contract, being the partnerships and the company (rather than Mr Jamsek and Mr Whitby themselves). Insofar as any provisions of the contract contained obligations which related to an individual, the Court considered that those obligations applied to the members of the partnership, for whom the partnership was responsible.

Separately, although the Court did not consider it necessary or appropriate to make its decision based on the 'reality of the situation', in circumstances where:

- the partnerships contracted with the company and invoiced the company for delivery services;
- the partnerships earned income from the company, incurred expenses associated with the ownership and operation of the trucks, and took advantage of tax benefits of the structure; and
- the partnerships enjoyed the advantages of splitting the income generated by the business conducted by the partnerships with their fellow partners,

it was the case that the partnerships (and not the individuals) owned and operated the trucks, and the individuals were conducting a business of their own as partners.

Further, the Court determined that the contractual obligation on the truck drivers to undertake work 'as reasonably directed' did not change the characterisation of the relationship. This merely gave the company the power to give directions to make deliveries, rather than to direct *how* that should be done.

KEY TAKEAWAYS

1. The terms of the contract will be central to determining the nature of the relationship

between a principal/employer and contractor/employee, and the subsequent conduct of the parties is irrelevant. However, simply asserting in a contract that a worker is a contractor won't make it so – an assessment of the relationship still needs to be undertaken based on the terms of the contract. Central to the analysis are the questions of who controls the work (and how it is to be performed) and the extent to which a worker can be said to operate an independent enterprise.

2. Flowing from the above, companies should ensure, to the extent practicable, that the contract reflects that the contractor has control over the relevant work and how it is to be performed, and demonstrates that the contractor is running their own business rather than that of their principal. In saying that, there will necessarily be limits commercially on how much freedom a company is willing to provide their contractors.
3. There may be value in ensuring that contractor agreements contain some 'boilerplate' clauses which will assist to demonstrate that the agreement of the parties is contained wholly in the written contract. For example, clauses that state that the contract reflects the entire agreement of the parties, that variations to the contract must be in writing and that any waiver of the rights under the contract must be in writing, will assist to ensure that companies don't fall within one of the exceptions to the principle in the above cases (which may then result in a court looking beyond the terms of the contract itself).
4. It will be more difficult for contractors who have engaged with a principal through their own company to assert they are an employee. This is because the relevant contract will be between the principal and the contractor's company rather than the individual person performing the work, and there will not be a direct contractual relationship between the individual contractor and the principal.
5. The Opposition will likely seize upon the decisions in support of its reform agenda towards creating secure forms of employment for Australians. Legislative change may be on the horizon. We will keep you up-to-date as these occur.

1. *WorkPac Pty Ltd v Rossato* (2021) 95 ALJR 681, 694-5 [62]-64] ('*Rossato*').

2. [2022] HCA 1, 19 [43] (Kiefel CJ, Keane and Edelman JJ).

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