Article Information

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Natural Persons Only: Federal Court Clarifies Superannuation Entitlements in Jamsek v ZG Operations Australia

In *Jamsek v ZG Operations Australia Pty Ltd (No 3)* (Jamsek No 3) [1] the Full Federal Court confirmed that only natural persons are entitled to superannuation guarantee contributions, which excludes workers providing services through corporations, trusts, and partnerships. The case involved truck drivers who owned and supplied their own trucks, and contracted through their partnerships with ZG Operations. The Court found they were not considered employees under the extended definition in superannuation legislation, despite being paid by the hour.

On 24 March 2023, the Full Federal Court of Australia (**Court** or **Federal Court**) delivered their judgment in the case of *Jamsek FFC*. The parties were previously before the High Court[2] where they were found not to be common law employees. However, the High Court remitted the case on the discrete issue of whether Mr Jamsek and Mr Whitby were captured by section 12(3) of the *Superannuation Guarantee (Administration) Act 1992* (Cth) (**SGA Act**) and the *extended definition* of an employee, thus rendering ZG Operations Australia Pty Ltd (**ZG**) liable to make superannuation contributions on the workers' behalf.

Section 12(3) of the SGA Act says:

> *"(3) If a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract."*

The Court was constituted by the same bench as in the case *Dental Corporation Pty Ltd v Moffet* (**Moffet**),***[3]*** and they applied the same three part test to answering whether someone is an employee under section 12(3):[4]

1. That there is a "*contract*";
2. That the contract is wholly or principally "*for*" the labour of a person; and
3. That the person must "*work*" under that contract.

All three parts of the test must be satisfied in order for a worker to be considered an employee for the purpose of section 12(3).

<u>*Contract Element*</u>

The Court found that Mr Jamsek and Mr Whitby's argument failed immediately because there was not a contract of the kind needed for the SGA Act to have work to do. Such a contract sets up a "*bilateral exchange of promises for labour and payment between two sides of the contract"*.[5]

It is relevant to note that there is no such requirement that there are *only* two such parties to the contract – as was seen in *Moffet* where Dr Moffet, the corporate trustee of the Moffet Family Trust, and Dental Corporation Pty Ltd were also parties.

But what is required, as argued by the Commissioner of Taxation who intervened in the remitted proceedings, is that the

party who works under the contract, is a natural person. The Court accepted this argument, and found it is implicit to the words "*works under a contract*", as only a natural person can perform such work.[6]

The Court said:

> *"We accept the submission of the Commissioner that s 12(3) only has application where the putative "employee" is an identified natural person who is a party to the contract in their individual capacity, rather than in any other capacity such as a partner or trustee of a personal service trust."*

The Court were firm on this position, finding that sections 11(1)(ba) and 19(1) of the SGA Act demand such an interpretation to make sense, and that this position is consistent with the purpose of the superannuation scheme as a whole – "*to provide for adequate living standards in retirement for natural persons, individual workers and employees*".[7]

Because Mr Jamsek and Mr Whitby were not party to the contracts in their individual capacity, but only as partners with their wives, the Court found the first prong of the test was not satisfied, and they were not entitled to have superannuation contributions made on their behalf.

Wholly or Principally "For" Element

Next, the Court considered whether the relevant contracts were *wholly or principally for* Mr Jamsek or Mr Whitby's labour. Though the Court found the contracts *were for* the provision of labour, they also found they were for the provision of trucks.[8]

In answering this question, the Court again referred to their reasons in *Moffet* and confirmed that what the contract is *for* is to be determined from the perspective of the putative employer and based on the terms of the contract.[9]

The Court found the contracts were not to produce a given result. This was evidenced by the fee structure being "*based on hours worked, rather than items delivered*", with a minimum of 9 hours nominally allocated to each day of work.[10] This was in favour of the contracts being *for* their labour.

Further, of individual significance to Mr Whitby, when his marriage ended in 2012, he commenced invoicing ZG in his individual name rather than his partnership, and the invoices were paid by ZG. In the High Court, it was found that this implied a new contract as between Mr Whitby as an individual natural person, and ZG.[11]

The Federal Court accepted this reasoning, and went onto consider a period in which Mr Whitby started using a utility vehicle, which he originally purchased for personal use, for smaller deliveries to metropolitan locations. Mr Whitby argued that at this time he was contracting in his individual capacity, and because his use of a ute was not specialist equipment, the contract was for his labour. Ultimately, the Court found that while ZG had accepted Mr Whitby *could* use the ute for some deliveries, the new contract was still *for* a truck delivery service as certain items would not fit in the ute.[12]

Despite the above factors in favour of Mr Jamsek and Mr Whitby, the multitude of factors *against* their case were ultimately overwhelming:

- the partnerships were able, by the terms of the contracts, to delegate the work to third parties to perform the delivery work, albeit with the approval of ZG. A contract that can be delegated, cannot be *for* any particular person's labour;
- the trucks were considered "*substantial capital asset(s)… for which the partnerships were wholly responsible*", including in relation to insurance, risk, fuel, and servicing. In distinguishing the case from *Hollis v Vabu Pty Ltd,**[13]*** unlike a bicycle in that case, the Court found the trucks were "*specialist equipment*";
- the benefit provided by the partnerships was that of a delivery service. The Court found that each contract could not be divided into its component parts (labour and trucks) as without one, the other could not be provided; and
- in contemplating the delivery service, the Court found that labour was not the whole or principal purpose of the contract.

There was no disagreement as to whether Mr Jamsek and Mr Whitby *worked under* the contracts, however, because they failed both the "*contract*" and the "*for*" elements of the extended definition test, their cases failed.

Justice Wigney provided separate reasons to Anderson and Perram, JJ, but reached the same result. Of note, Wigney J expressed doubt that the ability of Mr Whitby and Mr Jamsek to sub-contract the work was determinative of whether the contracts were not *for* their labour,[14] pointing to a passage in his Honour's earlier judgment in *JMC Pty Limited v Commissioner of Taxation* (**JMC**).[15]

In *JMC*, his Honour found that a right to delegate the entirety of the work, but only with the written approval of the recipient, was not an "*unlimited*" or unfettered right of delegation, and was in any case, not conclusive of whether the contract was *for* the putative employee's labour.[16] By contrast, his Honour later went to find that JMC's right to refuse a nominated alternative sub-contractor was "*unfettered*",[17] which told in favour of the contract being *for* the individual.

Overall, the recent decisions clarifying the three-part "*extended employee*" test offer businesses an opportunity to more easily assess their contracting arrangements and consider strategies to mitigate potential unintended superannuation liability. By taking a thoughtful approach to contracting arrangements, in particular ensuring any arrangements are properly documented, businesses can manage their superannuation obligations with better certainty.

Key Takeaways

- It still remains legally safest to only contract with non-natural person entities both from a superannuation perspective, but also to ensure a worker is not unintentionally found to be an employee;
- If contracting with sole traders (natural persons) is essential, consider whether:
  - there is any specialised equipment necessary, and whether the labour still provides the principal benefit to the putative business; and/or
  - the contract is clearly drafted to provide for a result rather than for labour.
- Businesses should be aware that not all delegation rights are equal, unless the independent contractor is completely unfettered in their right to sub-contract, the mere inclusion of a delegation clause of itself, will not determine superannuation liability.

[1] [2023] FCAFC 48.

[2] *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

[3] [2020] FCAFC 118.

[4] Ibid, [111] – [117].

[5] *Jamsek No 3*, [31].

[6] *Jamsek No 3,* [33].

[7] *Jamsek No 3*, [37] – [40].

[8] *Jamesek No 3*, [54].

[9] *Jamsek No 3,* [50].

[10] *Jamsek No 3,* [56].

[11] *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2; 96 ALJR 144, [108].

[12] *Jamsek No 3,* [63].

[13] [2001] HCA 44.

[14] *Jamsek No 3*, [76].

[15] [2022] FCA 750.

[16] *JMC*, [132] – [139].

[17] *JMC*, [197].