Article Information

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Service: Employment & Labour, Employment Disputes & Litigation

Contract Rules – In two landmark decisions, the High Court has restored some confidence in contracting with individual workers

The High Court has handed down decisions in two major test cases on the determination of employment status, *Construction, Forestry, Maritime, Mining and Energy Union v. Personnel Contracting Pty Ltd* (Personnel Contracting) and *ZG Operations Australia Pty Ltd v. Jamsek* (Jamsek).

Businesses can now have more confidence in sourcing work from individuals who agree to be treated as self-employed, provided the terms of their contracts are consistent with that characterisation. There is less risk that the practical reality of a working relationship might be invoked by a court to find such workers to be employees.

Key Takeaways

As a result of the High Court's reasoning in *Jamsek* and *Personnel Contracting* the following considerations arise when determining the true nature of an arrangement to perform work:

- **Reliance on the contract's terms:** Where an arrangement is properly documented, courts are now required to have primary regard to the written terms of the contract and the rights and duties arising under those terms, with only limited exceptions.
- **'Labels' are not determinative:** Simply labelling an individual a 'contractor' will not be determinative of the relationship. The whole of the contract has to be considered.
- **Examination at the time of contracting:** Events and circumstances surrounding the contract which are known to the parties at the time of contracting may be examined in seeking to identify the purpose or object of the contract. However, subsequent conduct will not generally be relevant to the task of characterising the relationship between the parties.
- **Sub-contracting labour hire providers beware**: The *Personnel Contracting* decision demonstrates that labour hire providers can be determined to be employers, despite purporting to engage workers as independent contractors. Such providers should seek advice about their current arrangements.
- **Contracting with partnerships**: The decision in *Jamsek* may suggest an increased appetite by the courts to find that workers operating through partnerships who structure their tax arrangements consistent with their claimed status as contractors are even less likely to be considered employees.

Two cases, two decisions on the same day, different facts and outcomes, same legal reasoning

Personnel Contracting

(a) Background

Personnel Contracting (**Personnel**), which traded under the name Construct, was a labour hire agency that had engaged Daniel McCourt as a contractor, and supplied him as a labourer to work on construction sites for Hanssen Pty Ltd (**Hanssen**).

Mr McCourt had no particular specialisation or expertise, having arrived in Australia as a backpacker on a working holiday visa.

He was paid a flat hourly rate by Personnel and worked around 50 hours per week. He had no right to delegate the performance of his work.

The contract described Mr McCourt as a "self-employed contractor" but at the same time obliged him to comply with the directions of both Personnel and Hanssen.

Mr McCourt took instructions from, and was under the control of, supervisors at Hanssen in respect of basic building work, such as cleaning the site, removing rubbish and preparing the site for the work of others.

The Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) claimed that Mr McCourt was an employee of Personnel and that he had not been paid in accordance with what was then the Building and Construction General On-site Award 2010.

(b) The Full Federal Court's approach

The Full Federal Court reluctantly found that, while 'intuitively' Mr McCourt's engagement bore the markers of employment, the engagement was that of a contractor given the terms of the contractual arrangement and the 'control' over Mr McCourt, in the particular circumstances of the labour on-hire arrangement, could not be relied upon as being indicative of employment.

The Chief Justice and one of the other Justices indicated a preference to find that there was an employment relationship. However, both felt constrained by previous decisions to the contrary by State appeal courts, involving what was essentially the same contract.

(c) High Court's decision

The dispute over Mr McCourt's status was seen by the High Court as an opportunity to reconsider the principles for determining employment status, and to address what had become a conflict of opinion in the lower courts about the relevance of assessing whether a worker genuinely has a business of their own.

Some of the judges highlighted the difficulty of applying the established "multi-factor" test and the uncertainties it can create. But none sought to challenge it directly. They also accepted that it is relevant to consider whether a worker has their own business, or is working in and for the business of another. But this would not be determinative.

In its 2001 decision in *Hollis v Vabu*, the High Court had stressed that in characterising a work arrangement it was necessary to consider the "totality" of the parties relationship. In *Personnel Contracting* that proposition was reaffirmed. But there was disagreement as to how far the inquiry should be taken.

For Gageler and Gleeson JJ, an employment relationship is necessarily broader than the contract establishing it. They said it is relevant to consider the way in which a contract is being performed, not just the formally agreed terms.

But the majority of the Court disagreed, making it clear that what had been said last year in *WorkPac Pty Ltd v Rossato* about the identification of casual employment also applied in this context. According to Kiefel CJ, Keane and Edelman JJ:

> *"Where the parties have comprehensively committed the terms of their relationship to a written contract the validity of which is not in dispute, the characterisation of their relationship as one of employment or otherwise proceeds by reference to the rights and obligations of the parties under that contract."*

Gordon J (with whose approach Steward J generally agreed) took a similar approach. It may be appropriate to have regard to "events, circumstances and things external to the contract which are objective, which are known to the parties at the time of contracting and which assist in identifying the purpose or object of the contract". But what the parties have said or done after entering into the contract is not generally to be considered.

This is not to say, however, that the way in which the parties have dealt with one another in practice can never be relevant to the determination of employment status.

As Kiefel CJ, Keane and Edelman JJ noted, where the parties' relationship is not fully documented in writing the imposition of work practices may suggest a contractual right of control consistent with a relationship of employment.

It may be also argued in some cases that a written agreement is a "sham", or that the parties have implicitly agreed to vary the original terms of their arrangement.

The Court also stressed that the parties cannot simply choose to describe or "label" a worker as an independent contractor and expect to have that accepted, if the terms of the parties' contract, considered as a whole, suggest otherwise.

That indeed became the crux of the Court's approach to the case before it. It allowed the CFMMEU's appeal from the Full Federal Court's decision, determining by majority that Mr McCourt was an employee of Personnel during the relevant period.

Unlike the Federal Court, the Court was not constrained by previous decisions on the status of similar arrangements. All but Steward J considered that while Mr McCourt's contract described him as a contractor, the terms of his contract suggested that Mr McCourt's work was dependent upon, and subservient to, Personnel's business. It was properly regarded as a contract of service (employment) rather than a contract for services.

The decision will be portrayed by some as a rejection of what is sometimes called the "Odco" model of labour hire. Agencies like Personnel have typically sought to avoid not just direct employment by the "host" business to which a worker is assigned, but employment by the agency itself.

However, the judges of the Court were by no means unanimous in their treatment of prior cases in which the Odco model had been considered. And on the approach taken by the majority, it will remain necessary to consider the terms on which an agency worker is engaged. It may well be possible for agencies operating this system to amend their contracts so as to remove or downplay the features highlighted in this case as suggesting employment.

Jamsek

(a) Background

The dispute concerned whether two truck drivers, Mr Jamsek and Mr Whitby, were employees for the purposes of the *Fair Work Act 2009*, superannuation and long service leave legislation.

The drivers derived their sole income from performing delivery work for the same business (there were a series of owners of that business, which are referred to as "the Company" for convenience) for close to 40 years.

The drivers were originally employees of the Company. In 1986, they were informed that if they didn't agree to become contractors, the Company couldn't guarantee them a job going forward.

Both of the drivers entered a contracting relationship involving them buying the trucks previously owned by the Company, and they took over the risk and expense of owning and operating the delivery trucks.

The relationship between the drivers and the Company was, for the large part, subject to contracts, entered between partnerships in which the drivers were members with their spouses, and the Company. The contracts were entitled a "Contract Carriers Agreement" and the partnerships were described as "contractors".

The drivers were required to be available to work set hours. The Company's logo was displayed on the drivers' trucks for a significant portion of the relevant period, and the Company's branding was on the drivers' clothing. The drivers were entitled to unpaid annual leave for a portion of their engagement.

For a significant portion of their engagement, the drivers were required to complete run sheets which recorded the driver's arrival at the warehouse in the morning, their deliveries for the day, and the time that the driver had completed the deliveries for the day.

Although free under their contracts to serve other customers, that never happened. In practice, the drivers worked exclusively for the Company.

(b) The Full Court of the Federal Court's decision

The Full Court determined that the drivers were employees for the bulk of the time they performed work for the Company.

The Court placed significant emphasis upon the inability of the drivers to generate goodwill in their own businesses and their practical inability to work for anyone else.

The Full Court also focussed significant attention upon the post-contractual conduct of the parties, and the disparity of the bargaining power between them, in concluding that the drivers were employees.

(c) The High Court's decision:

The High Court determined to allow the Company's appeal, finding that the drivers were not employees.

Reaffirming what they had said in *Personnel Contracting*, the majority of the court emphasised the need to determine the status of the parties' relationship by reference to the contractual arrangements that established it, not the "reality" of their dealings.

The fact here that it was the partnerships that contracted with the Company, not the drivers, precluded any suggestion they were employees. Furthermore, it was clear from the events of 1986 that the parties' clear intent had been to establish a relationship that was not one of employment. Indeed similar arrangements had long been held not to have that character.

Kiefel CJ, Keane and Edelman JJ noted that the Company's superior bargaining power had no bearing on the meaning and effect of the bargain that was struck between the partnerships and the Company. The drivers had made no attempt to challenge the validity of the contracts that their partnerships had made.

Despite broadly endorsing the legal approach taken by the Full Federal Court, Gageler and Gleeson JJ agreed that it had erred in finding that the drivers were employees. The commitment here was to supply expensive equipment, to be maintained at the drivers' expense. And it was the partnerships who had contracted to provide the drivers' services, not them personally.

Conclusion

The High Court's decisions represent a significant recalibration of the approach to be taken by courts, tribunals and agencies to the determination of employment status.

What matters about them is not so much the outcomes in the two cases, which were not in themselves particularly surprising, but the reasoning adopted by the majority of the Court – in particular, the primacy accorded to contractually agreed terms.

The decisions warrant businesses which engage independent contractors taking stock of their arrangements. We recommend that businesses:

- now, more than ever, review their existing contracts
- ensure that written contracts with independent contractors are current, reflect the true nature of the intended engagement, and constitute the entire agreement with each contractor; and
- consider and address any risk of arrangements being challenged as shams.

If you would like to discuss what the decisions mean for your workplace, or if you have any other questions about changes to independent contracting arrangements, please contact a member of our employment relations team.