

The High Court of Australia last week handed down two long anticipated decisions tackling the question of whether certain workers were employees or independent contractors, and in doing so, affirmed the primacy of contractual terms in determining the legal character of the relationship. In this update, we outline each of the decisions and how these decisions could impact businesses.

CFMMEU v Personnel Contracting

In the case of *Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) v Personnel Contracting Pty Ltd* [2022] HCA 1 (**Personnel Case**), the CFMMEU argued on behalf of a worker that the worker, Mr McCourt, had been misclassified by Personnel Contracting (trading as Construct) (a labour hire company) as an independent contractor and was in fact, an employee. As a result of this misclassification, the CFMMEU asserted that the worker had not been paid in accordance with the relevant award. In accepting a role with Construct, the worker had signed an "Administrative Services Agreement" (**ASA**), which described the worker as a "self-employed contractor". The worker proceeded to provide labouring services on two sites run by Construct's client.

The Federal Court initially dismissed the claim. The CFMMEU appealed to the Full Court of the Federal Court, which dismissed the appeal. Both the Federal Court and the Full Court applied a multi-factorial test in determining that the worker was an independent contractor.

On appeal to the High Court, the majority of the High Court concluded that the worker was an employee. The High Court noted that under the ASA, Construct had a right to determine who the worker would work for, and the worker had agreed to cooperate in all respects in his supply of labour. The judges said the "core" of the labourer's contractual obligation to Construct was his promise to work as directed by it or by its customer. Further, under the ASA, Construct retained the right to fix the worker's reward for his work, act as the worker's paymaster and terminate the worker's engagement, should he fail to comply with directions from Construct or its client. This right of control, similar to that found in an employment contract, was considered determinative in the finding that the worker was, in fact, an employee.

The majority indicated that, in cases where the terms of the parties' relationship are comprehensively set out in a written contract, and where the validity of the contract is not in question, there is no reason why "the legal rights and obligations so established should not be decisive of the character of the relationship." It was found that there was nothing in the tripartite nature of a labour hire arrangement that prevents recognition of Construct's contractual right to control the provision of the worker's labour to its customers.

Notably, the High Court stated that in circumstances where there was no suggestion that the contract had been varied, nor any suggestion that it was invalid due to sham or illegality, a wide ranging review of the parties' conduct was unnecessary and inappropriate. The fact the ASA described the worker as a contractor "cannot change the character of the relationship established by their rights and obligations", concluding it was "impossible" to find the worker was anything other than Construct's employee.

ZG Operations Australia Pty Ltd v Jamsek

The case of *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 (**Jamsek**) centred on two truck drivers, who had performed services for ZG Operations for over 40 years. Although initially commencing with ZG Operations as employees and driving ZG Operations' trucks, the drivers subsequently established and contracted through partnerships, purchasing and maintaining their own trucks in order to provide delivery services to ZG Operations from 1986 to 2017.

The drivers commenced proceedings in the Federal Court seeking entitlements allegedly owed to them as employees of ZG Operations. At first instance, the Federal Court found that the drivers were not employees. The drivers appealed, with the Full Court of the Federal Court overturning the first instance decision, applying a multi-factorial assessment and focusing on the "substance and reality" of the relationship to ultimately find that the drivers were, in fact, "employees" under the Fair Work Act 2009 (Cth) and "workers" under the Long Service Leave Act 1955 (NSW).

On appeal to the High Court, the High Court examined the written agreement between the partnerships and ZG Operations for the provision of services. After considering the terms of the written agreement, the High Court formed the view that the relationship was one of independent contractor, overturning the decision of the Full Court.

In its decision, the High Court noted that the obligation under the agreement was for each partnership to provide, operate and maintain a truck to carry out delivery services for ZG Operations, with each partnership entitled to invoice ZG Operations for carrying the goods. The Court also noted the substantial nature of the equipment purchased by the partnerships, which supported the view that the partnerships were, in fact, independent contractors.

Notably, the majority of the High Court found that where parties have comprehensively committed the terms of their relationship to written contract and where such written contract is not challenged as a sham contract or otherwise ineffective, the characterisation of the relationship must proceed by reference to the rights and obligations of the parties under that contract.

Key Takeaways

These decisions are significant for any business engaging, or looking to engage, an independent contractor.

The High Court has placed a strong emphasis on the primacy of the written agreement governing an independent contracting relationship. Going forward, it appears that there now needs to be a move away from the typical multifactorial test in determining if an independent contractor is in fact an employee (provided a written agreement governs the relationship). Where the terms of the written agreement are not in dispute, focus must be placed on the legal rights and duties of the contracting parties, with reference to the terms of that written agreement.

Some experts have expressed concerns that the decisions widen a "loophole" and provide an opportunity for parties to "escape" the Fair Work Act 2009 (Cth) simply by getting a worker to agree that they are an independent contractor and sign up to an agreement with terms consistent with this characterisation, with little regard to the practical reality of the relationship. There has also been criticism that the decisions gave no regard to the power imbalance between organisations and workers.

Following the decisions, it is expected that Deliveroo's appeal against a decision confirming that one of its drivers was in fact an employee will be revived (currently on hold while awaiting these decisions). We also anticipate companies such as Deliveroo, Menulog and Uber will be emboldened by the decisions, with experts lauding the decisions as a "big win" for such companies.

Practical Tips

In light of the decisions, businesses are strongly encouraged to:

- Review any existing independent contracting arrangements, including the underlying contract or agreement that sets out the terms and conditions of the engagement, to ensure that the agreement is reflective of an independent contracting relationship (including, particularly, with reference to who has control over how, when and where the services are provided – noting that where the control is held by the principal, this will be a strong indication of an employment relationship).
- Undertake a review of any template independent contractor agreements to ensure that they adequately capture key terms and conditions that are reflective of a true contracting relationship, including:
 - Ensuring the contractor has significant control over how, when and where the services are performed
 - Including a right for the contractor to delegate work to key persons or subcontractors (subject to the business' approval)
 - Requiring the contractor to provide their own tools and equipment
- Going forward, contract with corporate entities wherever possible (as opposed to directly with individuals).
- Ensure that your actions (and the actions of any independent contractors) are consistent with the terms of the underlying contractor agreement so as to avoid any later argument that the underlying contract has been varied or waived.

Should you require any further advice regarding independent contracting arrangements or need assistance with a review of your arrangements including your agreements, please get in touch with our Labour and Employment team.

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