

HIGH COURT RULING

Written contract key to determining if a worker is an employee or a contractor

In *ZG Operations v Jamsek* [2022] HCA 2 (**Jamsek**), the High Court held that where parties have comprehensively committed the terms of their relationship to a valid written contract (ie. the contract is not a sham or is otherwise ineffective under general law or legislation), the characterisation of that relationship as one of employment or otherwise must proceed by reference to the rights and obligations of the parties under that contract.

In other words, the terms of the contract will be considered to determine if there is an employer and employee relationship or if the person providing services is a contractor.

This was consistent with the approach in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 (**Personnel Contracting**).

These decisions are significant as they uphold the terms of the written contract as the key to determining the legal relationship.

In addition, in *Personnel Contracting*, the High Court held that where the terms of the contract are not in dispute, a wide-ranging review of the parties' subsequent conduct is not necessary or appropriate.

This is a shift away from the traditional (and often complex) multifactor test which considers all relevant factors on a case-by-case basis to determine whether a person is an employee or an independent contractor.

Jamsek Case

The High Court appeal concerned whether two truck drivers were engaged by a company as employees or independent contractors.

Between 1977 and 2017, Mr Jamsek and Mr Whitby (**Respondents**) were engaged as employees of the second appellant (**Company**) and drove the company's trucks.

However, the company subsequently offered the respondents the opportunity to "become contractors" and purchase their own trucks.

The respondents agreed and set up partnerships with their respective wives.

Each partnership executed written contracts with the Company for the provision of delivery services, purchased trucks from the company, paid the maintenance and operational costs of those trucks, invoiced the Company for its delivery services, and was paid by the Company for those services.

Income from the work performed for the Company was declared as partnership income for the



purposes of income tax and split between each Respondent and his wife.

The Respondents claimed to be owed entitlements pursuant to the *Fair Work Act 2009* (Cth), the *Superannuation Guarantee (Administration) Act 1992* (Cth) and the *Long Service Leave Act 1955* (NSW) on the basis that they were employees of the Company.

The primary judge concluded that the respondents were not employees, and instead were independent contractors.

The Full Court overturned that decision and held that, having regard to the "substance and reality" of the relationship, the Respondents were employees.

The High Court held that the Respondents were not employees of the Company.

The contracting parties were the partnerships and the Company. The contracts involved the provision by the partnerships of both the use of the trucks owned by the partnerships and the services of a driver to drive those trucks.

Personnel Contracting Case

A different outcome resulted in the *Personnel Contracting* case on considering the terms of the contract.

This High Court appeal concerned a worker who was hired by a labour-hire company (**Business**) and worked on a construction site operated by another company (**Builder**). There was a contract between the worker and the Business but no contract between the worker and the Builder.

Under the contract with the Business the worker was described as a "self-employed contractor". However, under the contract:

- the Business had the right to determine who the worker worked for;

- the worker was obligated to co-operate in all respects with the Business and the Builder in the supply of labour to the Builder; and
- the Business was obligated to pay the worker for the work performed.

The High Court found that these rights and obligations indicated an employer and employee relationship between the Business and the worker.

Key Takeaways:

- The terms of a contract are key to determining if an employee and employer relationship exists or if the person providing services is a contractor;
- Defining the engagement status of a person as a contractor in a contract is not sufficient to prevent the terms of the contract indicating an employee and employer relationship, unless the rights and obligations under the contract reflect such an engagement status;
- If the terms of the contract reflect the desired relationship or engagement status, follow the terms of the contract to assist with preventing a successful challenge on the contract; and
- Contact us if you would like assistance with preparing a contract.

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