

Employee or independent contractor? The High Court reiterates that it's all about the contract

FEBRUARY 2022

CFMMEU v Personnel Contracting Pty Ltd [2022] HCA 1; ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2

AT A GLANCE:

- Two landmark High Court cases¹ have decided that the terms of a written contract will determine whether a person is an employee or a contractor.
- This is a major shift away from the uncertainty of analysing multiple and often conflicting factors in an employment or contractor relationship.
- This shift is consistent with the recent High Court decision of *Workpac Pty Ltd v Rossato*², which confirmed that a written contract is the most important factor in determining whether a person is a casual or permanent employee.
- It is now even more important to make sure employment contracts and contractor agreements accurately reflect the intention and scope of the relationship.
- In short, the High Court has again explained that it's all about the contract.

BACKGROUND

The case of *ZG Operations Australia Pty Ltd v Jamsek*³ involves two truck drivers who were initially employees of a company. In the mid-1980s, the company offered to engage the two truck drivers as contractors instead of employees. Each truck driver formed a legal partnership with their wife and entered into a written agreement to carry goods for the company. The key terms of the written agreement were that the two drivers supply their own trucks, invoice the company in the name of their partnership, install tarpaulins bearing the company logo on the trucks, and carry goods as reasonably directed.

The company terminated the written agreements in 2017. The truck drivers issued proceedings in the Federal Court of Australia and claimed they were employees of the company. This would have allowed the truck drivers to claim superannuation, long service leave and annual leave from the company.

The Federal Court found that the two trucks drivers were contractors and “an example of partnerships...running businesses of their own”. However, the Federal Court relied on a multi-factor approach to determine whether the truck drivers were employees or contractors. Key factors were the drivers providing their own trucks and paying all maintenance costs, invoicing via legal partnerships, having no direction to wear a uniform, and having the flexibility to choose delivery routes.

On appeal, the Full Federal Court reversed this decision and found that the two truck drivers were employees. The Full Court focused on the “substance and reality” of the relationship. On balance, the Full Court placed more weight on the long relationship between the company and the truck drivers, rather than the written terms of the contractor agreement. The Full Court also found that the parties’ intention, when entering into the agreement in the mid-1980s, “must be characterised in light of the reality of the respective bargaining positions of each party”.

This set the stage for an appeal to the High Court.



The contract or written agreement is the dominant authority.

THE HIGH COURT'S RULING

On 9 February 2022, the High Court unanimously overturned the decision of the Full Court and found that the truck drivers were independent contractors.

The High Court focused on the key features of the written agreement between the company and the truck drivers:

- the truck drivers supplied and maintained their own vehicles
- each truck driver could work for another party if the work was not detrimental to the company's interests
- each driver could obtain consent from the company for another person to drive the truck
- the company paid for the services via invoices, instead of salary, and
- the driving work was reasonably directed by the company, but the company did not direct how the work must be done.

CFMMEU v Personnel Contracting Pty Ltd

The High Court in *ZG Operations* applied the methodology used in *CFMMEU v Personnel Contracting Pty Ltd*.⁴ In that case, a labourer worked for a labour hire company, Construct, for several months in 2016 and 2017. The labourer signed an agreement that described him as a "self-employed contractor". However, the agreement explained that he had to attend the host builder's worksite at nominated times and supply labour as directed. The labourer had a regular pattern of work and was given all the tools and equipment he needed (other than boots and clothing).

Similar to the truck drivers in *ZG Operations*, the labourer argued that he was an employee of Construct and sought to claim superannuation, long service leave and annual leave from the company.

However, a majority of the High Court found that the labourer was an employee of Construct and not an independent contractor. This was because of the key features of the written agreement, specifically:

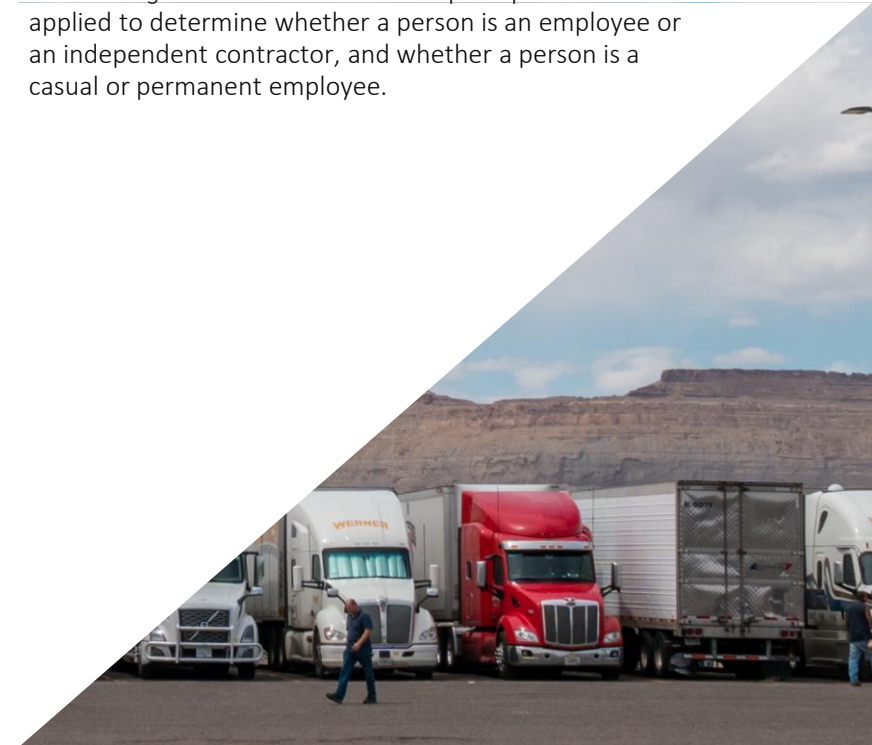
- Construct was entitled to determine who the labourer could work for. Once he was assigned to a host builder, he was required to "co-operate in all respects with Construct and the builder in the supply of labour".
- The terms of the agreement meant that the labourer had no right to exercise any control over what work he did and how it was to be carried out.

In reaching this decision, the High Court made the following statement:

"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...proceeds by reference to the rights and obligations of the parties under that contract. Where no party seeks to challenge the efficacy of the contract...on the basis that it is either a sham or otherwise ineffective...there is no occasion to seek to determine the character of the parties' relationship by a wide-ranging review of the entire history of the parties' dealings. Such a review is neither necessary nor appropriate because the task of the court is to enforce the parties' rights and obligations, not to form a view as to what a fair adjustment of the parties' rights might require".

This is a major change because the High Court has explained that a court should not be adjusting the application of a written contract or agreement without significant justification. This is because the old approach of routinely considering the practical reality of the relationship and weighing up those factors has now been cast aside.

The High Court's decision means that, in the vast majority of cases, the written agreement or contract will determine the legal nature of the relationship. When combined with the *WorkPac* case, the *ZG Operations* and *Personnel Contracting* decisions mean that this principle will be applied to determine whether a person is an employee or an independent contractor, and whether a person is a casual or permanent employee.



GUIDANCE FOR EMPLOYERS AND THEIR INSURERS

The decisions of *WorkPac, ZG Operations* and *Personnel Contracting* represent a major shift in workplace relations law across Australia.

The key implications for employers and their insurers are:

- the contract or written agreement is the dominant authority – unless it is ineffective or a sham, the terms of the written agreement or contract are very likely to determine the nature of the relationship
- contracts and written agreements must be clear and accurately reflect the intentions of all parties, and
- if the relationship changes, the contract or written agreement must also be changed.

The overall message for employers and their insurers is simple – a clearly defined employment contract or contractor agreement will provide certainty. Conversely, a wholly verbal or poorly drafted agreement will create confusion, ambiguity and litigation risk.

REFERENCES:

¹ *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1; *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

² <https://www.wottonkearney.com.au/high-court-clarifies-its-all-about-the-employment-contract/>

³ [2022] HCA 2.

⁴ [2022] HCA 1

Need to know more?

Wotton + Kearney's Workplace & EPL team can advise on all aspects of managing employees and independent contractors in your workplace. This includes preparing clear and accurate contracts and agreements, reviewing existing arrangements, and resolving disputes in this crucial area.



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