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TIME TO REVIEW YOUR CONTRACTUAL ARRANGEMENTS WITH INDEPENDENT CONTRACTORS

Last week, the High Court of Australia handed down two important decisions regarding the distinction between employees and independent contractors. Those decisions were:

1. ***Construction, Forestry, Maritime and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1*** ("**CFMEU v Personnel Contracting**"); and;

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

The decisions affirm the primacy of contractual terms in determining employment and contractor relationships, consistent with the HC's approach in ***WorkPac Pty Ltd v Rossato*** **[2021] HCA 23**.

CFMEU V PERSONNEL CONTRACTING

Personnel Contracting (trading as "**Construct**") is a labour-hire company based in Perth, which engages workers to supply their labour to building clients. Construct's major client was Hanssen Pty Ltd ("**Hanssen**"), a builder of high-rise residential apartments and offices.

Mr McCourt was a 22-year-old British backpacker who had travelled to Australia on a working holiday visa. On 25 July 2016, Mr McCourt attended an interview with Construct and indicated that he was prepared to do any construction work, and was available to start work immediately. He confirmed that he owned a hard hat, steel-capped boots and hi-vis clothing, having purchased them for less than $100.00. Mr McCourt was subsequently offered a role and signed an Administrative Services Agreement ("**ASA**") with Construct in which he was described as a "*self-employed contractor*".

On 27 July 2016, Mr McCourt commenced work at Hanssen's Concerto project site. Mr McCourt did not sign a contract with Hanssen. While on site, Mr McCourt performed basic labouring tasks under the supervision and direction of Hanssen supervisors.

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Mr McCourt performed work on Hanssen's Concerto and Aire projects between 27 July 2016 and 6 November 2016 and 14 March 2017 and 30 June 2017 respectively. On 30 June 2017, Mr McCourt was told that he was not to continue working on the Aire project. Thereafter, he did not receive any further work from Construct.

Mr McCourt and the CFMEU commenced proceedings against Construct seeking orders for compensation and penalties pursuant to ss 545, 546 and 547 of the *Fair Work Act 2009* (Cth) ("**FW Act**"). The claims were made on the basis that Mr McCourt was an employee (not an independent contractor) and had not been paid in accordance with the *Building and Construction General On-Site Award 2010* (Cth).

The Primary Judge

At first instance, Justice O'Callaghan applied a "*multifactorial approach*" to the question of whether Mr McCourt was an employee or an independent contractor. This involved an assessment of the totality of the relationship between the parties.

Justice O'Callaghan concluded that because relevant factors pointed "*in opposite directions*" and were "*reasonably evenly balanced*", it was "*important to pay close regard to the way in which the parties characterised their relationship*". His Honour considered the terms of the ASA wherein Mr McCourt warranted that he was a "*self-employed contractor*" and that he would not represent himself as being an employee of Construct, were clear statements of intent that the relationship was not to be one of employment, but one of principal and independent contractor.

Accordingly, His Honour concluded that Mr McCourt was an independent contractor and not an employee of Construct for the purposes of the FW Act.

Full Court of the Federal Court of Australia

The CFMEU appealed the decision to the Full Court of the Federal Court of Australia ("**Full Court**"). The Full Court upheld the Federal Court's decision and accepted Mr McCourt was an independent contractor.

The members of the Full Court (Allsop CJ, Jagot and Lee JJ) also approached the question by a multifactorial analysis, but made it clear that had it not been for the decision of the WA Industrial Appeal Court in ***Personnel Contracting Pty Ltd v CFMEU [2004] WASCA 312***, which involved essentially the same dispute between the parties, and which their Honours were not able to conclude was plainly wrong, they would have held that Mr McCourt was an employee of Construct.

High Court of Australia

The CFMEU appealed the Full Court's decision to the High Court of Australia ("**HC**"). The majority of the HC overturned the decision of the Full Court (Steward J dissenting) and found that Mr McCourt was an employee of Construct.

The HC affirmed the primacy of the employment contract in assessing the nature of the relationship, consistent with the HC's approach in *WorkPac Pty Ltd v Rossato* [2021] HCA 23.

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The HC held that 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. A wide-ranging review of the entire history of the parties' dealings is not warranted, 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.

The factors and indicia that have traditionally been applied by courts in the multifactorial approach are still a key ingredient in the determination. However, such indicia are to be considered by reference to the contract terms and not by reference to the parties' conduct over the whole course of their dealings with each other.

The HC found that Mr McCourt could not sensibly be said to have been carrying on business on his own account, notwithstanding the language used in the ASA to describe his occupation which suggested otherwise.

Under the ASA, Construct had the right to subject Mr McCourt to the direction of Hanssen in respect of what work he was to do and how he was to do it. The marketability of Construct's service as a labour-hire agency turned on its ability to supply compliant labour, and without that subservience, that labour would be no use to Construct's clients. That right of control was therefore the key asset of Construct's business.

The HC found that it was impossible to conclude other than that Mr McCourt's work was dependent upon, and subservient to, Construct's business. That being so, it held Mr McCourt's relationship with Construct was rightly characterised as a contract of service (employee) rather than a contract for services (independent contractor).

ZG OPERATIONS AUSTRALIA PTY LTD V JAMSEK

In Jamsek, Mr Jamsek and Mr Whitby ("**the respondents**") were engaged as truck drivers for ZG Operations Australia Pty Ltd ("**the Company**") for a period of 40 years. The respondents were initially engaged as employees of the Company and drove trucks provided by the Company. However, in 1986, the Company insisted it would only continue the respondents' services if they purchased their own trucks and entered into contracts to carry goods for the Company. The respondents agreed to the new arrangement and each set up a partnership with his wife. Those partnerships purchased trucks from the Company and executed a written agreement with the Company for the provision of delivery services. Thereafter, the respondents made deliveries as requested by the Company and invoiced the Company once the delivery was completed.

After the agreement was terminated in 2017, the respondents commenced proceedings in the Federal Court of Australia seeking declarations in respect of statutory entitlements alleged to be owed to them as employees of the Company pursuant to the FW Act, the *Superannuation Guarantee (Administration) Act 1992* (Cth) and the *Long Service Leave Act 1955* (NSW).

The Primary Judge

The primary judge (Thawley J) concluded that having regard to the totality of the parties' relationship, the respondents were not employees of the Company and instead were independent contractors.

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The primary judge considered that the events of 1986, including the formation of the partnerships, the payment of Mr Whitby's accrued annual leave, and the purchase by the respondents of trucks, demonstrated a mutual intention that significant aspects of the existing relationship would change from the employment relationship subsisting to that time. The primary judge found that the mutual intention to alter the structure of the relationship was reflected in the written contract.

Full Court of the Federal Court of Australia

The Full Court (Perram, Wigney and Anderson JJ) allowed the respondents' appeal, holding that the respondents were employees of the Company.

The Full Court found that because "*the reality*" was that there was little or no room for negotiation and the respondents were faced with "*an effective ultimatum*" of either redundancy or the restructured arrangement, the significance of entry into the 1986 contract was diminished.

The High Court of Australia

The HC allowed the appeal and found that the respondents were not employees, but rather independent contractors.

The HC found that the Full Court erred in two respects:

1. By devoting significant attention to the manner in which the parties actually conducted themselves over the decades of their relationship; and

2. By finding that the disparity in bargaining power between the parties affected the contract pursuant to which the partnerships were engaged, so that the "reality" of the relationship between the Company and each respondent was one of employment.

As in *CFMEU v Personnel Contracting*, the HC held that the character of the relationship between the parties was to be determined by reference to the rights and duties created by the written agreement which comprehensively regulated that relationship. The circumstance that entry into the contract between the Company and the partnerships may have been brought about by the exercise of superior bargaining power by the Company did not alter the meaning and effect of the contract. The HC found that given that the genesis of the contract was the Company's refusal to continue to employ the respondents as drivers, and the respondents' evident acceptance of that refusal, it was difficult to see how there could be any doubt that the respondents were thereafter no longer employees of the company.

The HC did not address the meaning of the extended definition of "employee" under the *Superannuation Guarantee (Administration) Act 1992* (Cth) which provides that a person is an employee for superannuation purposes if the person "*works under a contract that is wholly or principally for the labour of the person*". The HC noted any decision would have substantial consequences for revenue and it would be inappropriate for the HC to deal with the issue in circumstances where the Commission of Taxation was not a party to the proceedings. The HC remitted the issue to the Full Court so that the Commissioner could be joined to that proceeding.

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CONCLUSION

The HC decisions highlight the importance for businesses to draft clear and comprehensive independent contractor agreements to ensure they accurately reflect the rights and obligations of the parties. The terms of the written agreement will be key to determining the nature of the relationship.

However, it is necessary to note the HC decisions were reached in circumstances where there were comprehensive written contracts, with no suggestion that the contracts were not observed or that the terms of the parties' agreements had changed. There will still be circumstances in which post-contractual conduct (the manner in which the parties actually conducted themselves over the course of their relationship) becomes relevant. It is expected that in the future, claims will be brought on the basis that the written contracts are a sham, are incomplete, or that the terms of the contract have been varied or otherwise displaced by conduct. To avoid such arguments, businesses should ensure that the terms of the contact are actually followed in practice and that any change in working arrangements or practices is documented in a new contract or written variation.

For further information or assistance contact Murfett Legal on +61 8 9388 3100.

Note: The above is a summary for general information purposes only. It is not intended to be comprehensive or constitute legal advice. You should seek formal legal or other professional advice in relation to your particular circumstances before relying on the content of this article.

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