



Employee or Independent Contractor? High Court says the contract is key Authors: Jimmy Gill & Ekaterina Oglos

The High Court recently handed down two decisions that mark a significant shift in how employment and independent contractor relationships are determined.

Essentially, the High Court has held that the terms of the written contract will determine whether a person is an employee or an independent contractor, and not conduct that occurs after the contract was formed. The reasons for the decisions are complex, so we expect subsequent cases to provide further clarity in this area. In the meantime, businesses can be more confident that their written agreements will be essential when determining whether a person is classified as an employee or a contractor.

Key takeaways

- You should review your written contracts with your employees and independent contractors to ensure the terms of engagement are comprehensively set out in the contracts and accurately record the nature of the relationship between the parties.
- You should enter into written contracts with your independent contractors to minimise the prospect of such a relationship being held to be one of employment instead.
- These decisions do not affect the laws relating to, for example, superannuation, payroll tax and workers compensation, which impose obligations on principals when dealing with certain independent contractors.

The multifactorial approach

For over 20 years, the courts have used the multifactorial test to determine whether a relationship is one of employment or independent contractor. The test involved considering a range of indicia in the worker/business relationship, including:

- mode of remuneration;
- degree of control exercised over the worker;
- hours of work and who dictates the hours; and
- provision of equipment, tools or vehicle.

Importantly, the test encompassed a consideration of how the parties to the written contract acted in practice, with proper analysis not restricted to the terms of the contract. It has posed tremendous difficulty for employers and workers alike, particularly those who have worked together over several decades and in circumstances where the relationship has continually evolved.

The *Personnel* case

The High Court has now held that this approach is no longer warranted. In *Construction, Forestry, Maritime, Mining and Energy Union & Anor v. Personnel Contracting Pty Ltd* [2022] HCA 1 (**Personnel**), the High Court held that it is solely the terms of the written agreement that determine whether a person is an employee or independent contractor, and not also how the parties acted in practice. The factors of the old test are still relevant, but are to be applied first and foremost to the contract between the parties, rather than to the whole of their relationship and to the conduct of the parties.

In *Personnel*, the High Court looked to the contract only, and considered that the following terms of the engagement contract between Construct and their worker, Mr McCourt, meant that the relationship was one of employment:

- The labour hire company Construct retained a high degree of control over Mr McCourt;
- Construct had the capacity to terminate the engagement if Mr McCourt failed to follow the direction of Hanssen (host employer); and
- Mr McCourt was not carrying on a business on his own account.

The *Jamsek* case

The High Court handed down the decision of *ZG Operations Australia Pty Ltd & Anor v. Jamsek & Ors* [2022] HCA 2 at the same time as the *Personnel* case. In that case, the Court was persuaded by the following factors in deciding that Mr Jamsek and Mr Whitby (the respondents and the workers in question) were independent contractors:

- The trucks were owned and operated by the partnerships, and the respondents conducted a business of their own as partners;
- The origin of the arrangement between the parties acted as acceptance from the respondents that they would transition from employees to independent contractors; and
- The trucks were maintained and paid for by the respondents, and ZG Operations were invoiced for the services provided.

Whilst it will bring comfort to businesses that the terms of their written contracts will be the key focus on a question of whether a worker is an employee or a contractor, there are scenarios where a court will apply the multifactorial test to the parties' conduct and broader relationship, including, for example:

- where there is no written agreement between the parties (or if that written agreement does not reflect the whole of the agreement), their conduct will dictate the nature of the relationship;
- where a party alleges that their engagement contract is a sham contracting arrangement (where a person ought be classified as an employee but is instead treated as a contractor); or
- where the agreement is otherwise void,

then the courts will look to the parties' conduct and relationship rather than the contract alone.