Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd -

Decision impact statement

Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd

Court citation(s):	[2022] HCA 1 [2020] FCAFC 122 [2019] FCA 1806
Venue:	High Court Full Federal Court Federal Court
Venue reference no:	P5/2021 WAD 584 of 2019 VID 1191 of 2018
Judge:	Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ Allsop CJ, Jagot and Lee JJ O'Callaghan J
Judgment date:	9 February 2022 17 July 2020 9 November 2019
Appeals on foot:	No
Decision outcome:	High Court – favourable to the applicant Full Federal Court – favourable to the respondent Federal Court – favourable to the respondent

Impacted advice

The ATO is reviewing the impact of this decision on related advice and guidance products.

- Superannuation Guarantee Ruling SGR 2005/1 *Superannuation guarantee: who is an employee?*
- Superannuation Guarantee Ruling SGR 2005/2 *Superannuation guarantee: work arranged by intermediaries*
- Superannuation Guarantee Ruling SGR 2009/1 *Superannuation guarantee: payments made to sportspersons*
- Taxation Ruling TR 2005/16 *Income tax: Pay As You Go – withholding from payments to employees*

- Taxation Ruling TR 2013/1 *Income tax: the identification of 'employer' for the purposes of the short-term visit exception under the Income from Employment Article, or its equivalent, of Australia's tax treaties*
- ATO Interpretive Decision ATO ID 2014/28 *Superannuation Guarantee Status of the Worker: Pizza delivery drivers as employees*

Précis

This Decision impact statement outlines the ATO's response to this case which concerns whether the applicant Mr McCourt was an employee of Personnel Contracting Pty Ltd (Personnel Contracting) for the purposes of the *Fair Work Act 2009* (FWA).

While not a party to the litigation, the decision of the High Court is relevant to legislation administered by the Commissioner involving the ordinary meaning of the term 'employee'.

Brief summary of facts

Personnel Contracting is a labour hire company which engages workers to supply labour to building clients. In 2016, Personnel Contracting engaged the services of Mr McCourt and entered into a written agreement with him, titled 'Administrative Services Agreement' (ASA). After an interview and execution of the ASA, Personnel Contracting contacted Mr McCourt and offered him work at a building site of Hanssen Pty Ltd (Hanssen), one of their major clients.

Mr McCourt commenced basic labouring work on site with Hanssen, under Hanssen's direct supervision. Mr McCourt did not sign a contract with Hanssen. Mr McCourt ceased working with Personnel Contracting and Hanssen on 30 June 2017.

Mr McCourt and the Construction, Forestry, Maritime, Mining and Energy Union commenced proceedings against Personnel Contracting for compensation and penalties under sections 545, 546 and 547 of the FWA. Mr McCourt claimed that he was a 'common law employee' of Personnel Contracting, who had not paid him according to his entitlement pursuant to the Building and Construction General On-site Award 2010.

The Federal Court[1] and Full Federal Court considered these claims by Mr McCourt and concluded that he was not an employee of Personnel Contracting[2], applying the authority in *Personnel Contracting Pty Ltd T/as Tricord Personnel v The Construction Forestry Mining and Energy Union of Workers* [2004] WASCA 312, which involved an almost identical dispute between the Construction, Forestry, Mining and Energy Union (as it was then known) and Personnel Contracting, heard in the Western Australian Industrial Appeal Court. Mr McCourt appealed to the High Court.

Issues decided by the Court

The judgment of the Federal Court at first instance

At first instance in the Federal Court, O'Callaghan J applied a multifactorial approach to the characterisation of the relationship between Mr McCourt and Personnel

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[1] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806.

[2] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2020] FCAFC 122 at [121], per Lee J.

Contracting and concluded that he was not an employee. His Honour concluded that, while the circumstances were evenly balanced, the references in the agreement to Mr McCourt as a 'contractor' was decisive in this instance (at [177–178]).

The judgment of the Full Federal Court on appeal

The Full Federal Court upheld the conclusion of O'Callaghan J on appeal. The Full Federal Court also applied the multifactorial analysis but concluded that, because they were bound by the decision of the Western Australian Industrial Appeal Court in *Personnel Contracting Pty Ltd T/as Tricord Personnel v The Construction Forestry Mining and Energy Union of Workers* [2004] WASCA 312, Mr McCourt was not an employee of Personnel Contracting. The Full Federal Court indicated that, were it not for that authority, they would have concluded that Mr McCourt was an employee.[3]

The judgment of the High Court

The High Court concluded that Mr McCourt was an employee of Personnel Contracting.

The High Court stated the Court's role is to characterise the relationship by examining the totality of the relationship having regard to the parties' rights and obligations contained in the written contract.[4] The High Court stated that where the parties have comprehensively committed the terms of the relationship to a written contract, and no party is disputing the validity of that contract, the characterisation must proceed on the basis of the legal rights and responsibilities established in that written contract.[5]

The High Court concluded that a multifactorial approach that examined all of the relations between the parties over the entire history of their dealings was unnecessary and inappropriate.[6]

However, the High Court did note that examination of post-contractual conduct is permissible in certain circumstances. This might be where the contract is not in writing, partly written and partly oral, or where the terms of the written contract are being challenged as invalid (such as sham) or varied.[7] In addition, conduct may be examined in circumstances where a party to the contract may be asserting rectification, estoppel or any other legal, equitable or statutory rights or remedies.[8]

In contrast, Gageler and Gleeson JJ considered that the multifactorial test was a well-established principle for characterising the totality of the legal relationship and that they were permitted to look at the whole employment relationship, including how it was formed and how it was performed, and were not restricted to the written contract.[9]

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[3] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2020] HCA 1 (*Personnel*) at [31], per Allsop CJ, with whom Jagot J agreed, and at [185], per Lee J, with whom Jagot J agreed.

[4] *Personnel* at [61], per Kiefel CJ, Keane and Edelman JJ. See also [162] and [173], per Gordon J, with whom Steward J relevantly agreed at [203].

[5] *Personnel* at [59], per Kiefel CJ, Keane and Edelman JJ. See also [173], per Gordon J, with whom Steward J relevantly agreed at [203].

[6] *Personnel* at [18], [55] and [59], per Kiefel CJ, Keane and Edelman JJ, and [185–189], per Gordon J, with whom Steward J relevantly agreed at [203].

[7] *Personnel* at [43] and [59], per Kiefel CJ, Keane and Edelman JJ.

[8] *Personnel* at [43] and [59], per Kiefel CJ, Keane and Edelman JJ, and [177], per Gordon J, with whom Steward J relevantly agreed at [203).

[9] *Personne*l at [136–143].

The High Court considered that labels used in a contract by the parties to describe the relationship are not determinative.[10]

Notwithstanding the different approaches taken in the judgment, the High Court agreed the critical grounding question was whether the putative employee performed the work while working *in* the business of the engaging entity.

Kiefel CJ, Keane, Edelman JJ (at [39]) and Gageler and Gleeson JJ (at [113]) considered that it would be useful to consider whether the worker performed their work in the engaging entity's business *or* in an enterprise of their own. Gordon J (with whom Steward J agreed as to reasoning (at [203])) considered that it is more appropriate to consider whether, by construction of the terms of the contract, the person is contracted to work in the business or enterprise of the purported employer rather than considering whether the individual is working in their own business (at [180–183]).

The High Court concluded that a significant aspect of the contractual relationship that indicated employment was the extent and degree to which the putative employer could control the work being done by the person, which indicates that they are working in the putative employer's business.[11]

When considering both the degree and nature of control and whether the worker was performing work in the business of the putative employer (or, in some circumstances, in a business of their own), various contractual aspects are to be considered. This includes well-known indicia from established authorities, such as the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work, the provision for holidays, the deduction of income tax and the delegation of work by the putative employee.[12]

In determining whether the worker works in the business or enterprise of the purported employer, the High Court considered that understanding and characterising the core nature of the putative employer's business was relevant in interpreting the terms of the written contract.[13]

The majority of the High Court concluded that Mr McCourt had contracted to provide labour to Personnel Contracting. That labour was subordinate or subservient to the core business being carried on by Personnel Contracting. Mr McCourt was not, in any meaningful sense, in business for himself. In supplying his labour, Mr McCourt was subject to the control of Personnel Contracting. Accordingly, Mr McCourt was an employee of Personnel Contracting.[14]

ATO view of decision

The Commissioner was not party to this matter which concerned entitlements under the FWA. In relation to the common law test of employment, the decision of the High Court has provided clarity in the approach to be taken when characterising the legal relationship of the parties.

The Commissioner observes that the High Court has not disturbed the well-established practice of examining the *totality of the relationship*. The most significant clarification arises in primarily examining the terms of the written contract

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[10] *Personnel* at [64] and [66], per Kiefel CJ, Keane and Edelman JJ, at [127], per Gageler and Gleeson JJ, and at [184] per Gordon J with whom Steward J relevantly agreed at [203].
[11] *Personnel* at [73–74], [77] and [88], per Kiefel CK, Keane and Edelman JJ, at [174], per Gordon J, with whom Steward J relevantly agreed, and at [113], per Gageler and Gleeson JJ.
[12] *Personnel* at [61] and [177].
[13] *Personnel* at [70–72] and [76], per Kiefel CJ, Keane and Edelman JJ.
[14] *Personnel* at [90], per Kiefel CK, Keane and Edelman JJ, at [159], per Gageler and Gleeson JJ, and at [200], per Gordon J.

between the parties to establish the character of the relationship, where that contract is an accurate and accepted record of the agreement struck between the parties.

The multifactorial test, that requires considering all aspects of the contractual arrangement over an extended period of time, was rejected by the High Court. However, the Commissioner notes that Kiefel CJ, Keane, Edelman, Gordon and Steward JJ considered that a Court may look beyond a written contract and consider the conduct of the parties in circumstances where:

- the contract is an oral contract, or is partly written and partly oral to determine when the contract was formed and the contractual terms that were agreed
- the terms of the written contract have been varied
- the terms of the written contract are being challenged as invalid (for example, being a sham)
- a party to the contract asserts rectification, estoppel or any other legal, equitable or statutory rights or remedies.[15]

The long-established employment indicia are still relevant when characterising the contractual relationship between the parties. However, they are to be considered through the focusing question or prism of whether the putative employee is working in the business of the employer. This reflects the Commissioner's understanding and application of the business integration test. The High Court has elevated that test as one of the primary and focusing aspects of the examination of the contractual terms. In addition, the High Court has continued the emphasis on the examination of control as a complementary focus to the business integration test.

The High Court's commentary that the use of labels in a contract should not be determinative of the nature of a relationship is consistent with existing views articulated by the Commissioner in several public advice and guidance products.

Implications for impacted advice or guidance

The Commissioner will review relevant products, including the following:

- Superannuation Guarantee Ruling SGR 2005/2 *Superannuation guarantee: work arranged by intermediaries*
- Superannuation Guarantee Ruling SGR 2005/1 *Superannuation guarantee: who is an employee?*
- Taxation Ruling TR 2005/16 *Income tax: Pay As You Go – withholding from payments to employees*
- Taxation Ruling TR 2013/1 *Income tax: the identification of 'employer' for the purposes of the short-term visit exception under the Income from Employment Article, or its equivalent, of Australia's tax treaties*
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[15] In *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2, Kiefel CJ, Keane and Edelman JJ (at [8–9]), in applying this principle from *Personnel*, explained it in terms that day-to-day performance may be looked at where the conduct of the parties results in the written terms and conditions being superseded.

The Advice under development program will be updated to indicate progress on this work.

Comments

Date issued	31 March 2022
Contact officer:	Contact officer details have been removed as the comments period has expired.

Related Rulings

SGR 2005/1
SGR 2005/2
SGR 2009/1
TR 2005/16
TR 2013/1

Other references

ATO ID 2014/28

Legislative references

Fair Work Act 2009

Case references

Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2020] FCAFC 122; 279 FCR 631; 381 ALR 457; 297 IR 269

Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2019] FCA 1806

Personnel Contracting Pty Ltd T/as Tricord Personnel v The Construction Forestry Mining and Energy Union of Workers [2004] WASCA 312; (2004) 141 IR 31

ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2; 96 ALJR 144