Jamsek v ZG Operations Australia Pty Ltd (No 3) -

Decision impact statement

Jamsek v ZG Operations Australia Pty Ltd (No 3)

Court citation/s:	[2023] FCAFC 48 (Full Federal Court) [2022] HCA 2 (High Court) [2020] FCAFC 119 (Full Federal Court) [2018] FCA 1934 (Federal Court)
Venue:	Full Federal Court of Australia High Court of Australia Full Federal Court of Australia Federal Court of Australia
Venue reference no:	NSD 332 of 2022 (Full Federal Court) S27/2021 (High Court) NSD 495 of 2019 (Full Federal Court) NSD 2023 of 2017 (Federal Court)
Judge name/s:	Perram, Wigney and Anderson JJ (Full Federal Court) Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward, and Gleeson JJ (High Court) Perram, Wigney and Anderson JJ (Full Federal Court) Thawley J (Federal Court)
Judgment date:	24 March 2023 (Full Federal Court) 9 February 2022 (High Court) 16 July 2020 (Full Federal Court) 30 November 2018 (Federal Court)
Appeals on foot:	No
Decision outcome:	Favourable to the Commissioner

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*
- ATO Interpretative Decision ATO ID 2014/28 *Superannuation Guarantee Status of the Worker: Pizza delivery drivers as employees*

Summary

This Decision impact statement outlines the ATO's response to this case, which concerns whether the appellants, Mr Jamsek and Mr Whitby (collectively the Drivers), were employees of the first and second respondents, ZG Operations Australia Pty Ltd and its predecessors (collectively, ZG), pursuant to subsection 12(3) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA). Under subsection 12(3) of the SGAA an individual will be an employee of an engaging entity where they work under a contract that is wholly or principally for their labour.

This proceeding was remitted to the Full Federal Court by the High Court in *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2. The Commissioner was joined as the third respondent to the remitted Full Federal Court proceedings.

All legislative references in this Decision impact statement are to the SGAA, unless otherwise indicated.

Brief summary of facts

From 1977 until late 1985 or early 1986, the Drivers were employed by ZG to drive its trucks. Subsequently, ZG insisted it would no longer employ the Drivers and would continue to use their services only if they became contractors and provided their own trucks. The Drivers agreed to this new arrangement and set up partnerships with their respective wives. The partnerships then entered into written contracts with ZG for the provision of delivery services.

The partnerships invoiced ZG for the delivery services provided and were paid by ZG for those services. Part of the revenue earned was used to meet the partnerships' costs of maintaining and operating the trucks.

In 2012, Mr Whitby's partnership was dissolved but he continued to supply his services to ZG as a sole trader.

In 2017, the Drivers commenced proceedings in the Federal Court seeking declarations in respect of statutory entitlements alleged to be owed to them as employees of ZG, including under the *Fair Work Act 2009* and the SGAA.

At first instance, Thawley J held that the Drivers were not employees of ZG, either according to the common law meaning of the term under subsection 12(1) or pursuant to the extended meaning of the word under subsection 12(3). Specifically in respect of subsection 12(3)[1], His Honour concluded in summary that:

- the relevant contracts were with the Drivers' partnerships (although in the case of Mr Whitby, only until 2012) and the individual Drivers were not parties to the contracts[2], and
- the contracts were not wholly or principally for the labour of the person and instead were for equipment (delivery vehicles) and labour.[3]

The Drivers appealed the decision of Thawley J to the Full Federal Court.

The Full Federal Court set aside the orders of Thawley J and held that the Drivers were employees within the common law meaning of that term, having regard to the substance and reality of the relationship.[4] Having come to this conclusion, the Full

[1] *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934 (*Jamsek – first instance*) at [218].
[2] *Jamsek – first instance* at [219].
[3] *Jamsek – first instance* at [220].
[4] *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119 (*Jamsek – FFC*) at [12], [14] and [253].

Federal Court considered it unnecessary to deal with the Drivers' argument in respect of subsection 12(3) in order to dispose of the appeal.[5]

ZG sought special leave to appeal the decision of the Full Federal Court to the High Court. The Drivers also sought special leave to cross-appeal, contending that they fell within the extended definition of employee under subsection 12(3).[6] The High Court agreed to hear the appeal and cross-appeal.

Having regard to the contracting relationship between the Drivers' partnerships and ZG, the High Court unanimously held that the relationship was not one of employment within the ordinary meaning of that term.[7] The High Court came to this conclusion applying its findings with respect to the operation of the common law test of employment outlined and discussed in its decision in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 (*Personnel Contracting*).[8] With respect to the cross-appeal, the High Court remitted this issue back to the Full Federal Court for determination.[9]

Issues decided by the Full Federal Court on remittal

The issue before the Full Federal Court on remittal was whether the primary judge was correct to find that the Drivers did not fall within the extended definition of employee under subsection 12(3). The Court unanimously held that they did not.[10]

In summary, the Full Federal Court concluded that:

- The Drivers were not parties to the contracts, rather the partnerships were the relevant parties. Section 12(3) only applies where the party providing the services is a natural person who was a party to the contract in his or her individual capacity and not in any other capacity such as a trustee of a personal services trust, or as in this case, a partner in a partnership.[11]
- The Drivers did not discharge their onus of proving that the contracts were wholly or principally for the labour of the Drivers.[12]

ATO view of the decision

The Full Federal Court's conclusion on remittal that the Drivers were not employees under subsection 12(3) was consistent with the Commissioner's submissions in the proceedings.

The Full Federal Court affirmed the test set out in *Dental Corporation Pty Ltd v Moffet* [2020] FCAFC 118 in administering subsection 12(3).[13]

The Full Federal Court's decision has clarified aspects concerning the application of subsection 12(3), particularly with respect to the following propositions:

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[5] *Jamsek – FFC* at [255], Perram and Wigney JJ do not specifically address subsection 12(3).
[6] *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 (*Jamsek – High Court*) at [71].
[7] *Jamsek – High Court* at [60–70], [87–91] and [107–111].
[8] *Jamsek – High Court* at [8] and [95].
[9] *Jamsek – High Court* at [76–77], [91] and [111].
[10] *Jamsek v ZG Operations Australia Pty Ltd (No 3)* [2023] FCAFC 48 (*Jamsek – FFC remittal*) at [65] and [78].
[11] *Jamsek – FFC remittal* at [42].
[12] *Jamsek – FFC remittal* at [49–63].
[13] *Jamsek – FFC remittal* at [29] and [70].

- Applying subsection 12(3) requires analysing the content of a bilateral exchange of promises (regardless of the number of parties on each side of the contract).[14]
- The superannuation regime cannot be circumvented by the simple device of forming a contract which names more than 2 parties.[15]
- Only a natural person who enters into a contract in that capacity can be deemed to be an employee for the purposes of subsection 12(3).[16] Subsection 72(1) does not operate to deem a partnership or other entity to be a natural person for the purposes of being treated as an employee under subsection 12(3).[17]
- Assessing whether a contract is *for* labour involves an evaluation of the terms of the relevant contract or contracts.[18] Consistent with previous authority, it is assessed by reference to the benefit that the engaging entity receives out of the bargain.[19] With respect to such a process the following considerations apply.
  - A contract for the provision of a result (per *Neale v Atlas Products (Vic) Pty Ltd* [1955] HCA 18) is not one which is for labour.[20]
  - Remuneration calculated on a per hour basis points against a contract being characterised as stipulating a given result. Further, remuneration calculated by reference to a set number of hours being worked per day, even though it is possible that less work will be required in that day, is inconsistent with a contract being for a result.[21]
  - Where a provision of the contracted service requires the use of a substantial capital asset, this is a factor supporting the characterisation of the contract as not being wholly or principally for labour.[22]
  - If a contract contains a right which permits the individual engaged to provide the services to delegate the performance of those services to another, regardless of whether the consent of the engaging entity is required to exercise the right, its existence means that the performance of the contract is not personal to the individual engaged to provide the services.[23]
  - Where a contract is properly characterised as being for a single integrated benefit (for example, a delivery service), it may not be appropriate to divide the contract into separate components (for example, between labour and equipment) in determining whether the character of the contract is or is not wholly or

[14] *Jamsek – FFC remittal* at [32] and [71].
[15] *Jamsek – FFC remittal* at [32].
[16] *Jamsek – FFC remittal* at [33–43] and [71].
[17] *Jamsek – FFC remittal* at [44–48] and [73–74].
[18] *Jamsek – FFC remittal* at [50].
[19] *Jamsek – FFC remittal* at [49].
[20] *Jamsek – FFC remittal* at [52].
[21] *Jamsek – FFC remittal* at [56].
[22] *Jamsek – FFC remittal* at [75], per Perram and Anderson JJ (see also [75], per Wigney J in applying the 'principally' test).
[23] *Jamsek – FFC remittal* at [58], per Perram and Anderson JJ.

principally *for* labour.[24]

Quantitative v qualitative analysis of the contract

The Commissioner observes that Perram and Anderson JJ on remittal found that the Drivers failed to adduce evidence, at trial, of the market value of the various components of the delivery service. Such a quantitative valuation was regarded by the Full Federal Court as required if the Drivers were to establish that they fell within the scope of subsection 12(3), on the basis that the contracts were at least principally for their labour. Perram and Anderson JJ further commented on the type of evidence that would be relevant to such an analysis which included the market value of hiring similar trucks on similarly favourable terms and the market cost of the labour involved in providing the delivery services during the relevant period.[25]

While noting the conclusion reached by their Honours in this regard, the Commissioner considers that there may be some scenarios where a qualitative analysis of the components of a supply of services may also be relevant in determining whether a contract is principally for labour under subsection 12(3).

The Commissioner accepts Perram and Anderson JJ's conclusion that a quantitative analysis of the components of delivery services would have been the most appropriate valuation methodology in the circumstances of this case. However, in the Commissioner's view, it remains open to apply a qualitative analysis for the purpose of testing whether a contract is principally for labour under subsection 12(3) where the factual circumstances of a case warrant that approach.

Implications for impacted advice or guidance

The Commissioner is considering whether any changes are required to SGR 2005/1, SGR 2005/2, SGR 2009/1, ATO ID 2014/28 and other relevant guidance products. These will be reviewed and updated as necessary.

Comments

We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

Date issued:	15 May 2024
Due date:	14 June 2024
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[24] *Jamsek – FFC remittal* at [59], per Perram and Anderson JJ.
[25] *Jamsek – FFC remittal* at [62].

Legislative references

SGAA 12(1)
SGAA 12(3)
SGAA 72(1)
Fair Work Act 2009

Case references

Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1; 275 CLR 165; 398 ALR 404; 96 ALJR 89; (2022) 312 IR 1

Dental Corporation Pty Ltd v Moffet [2020] FCAFC 118; 278 FCR 502; 297 IR 183

Jamsek v ZG Operations Australia Pty Ltd [2020] FCAFC 119; 279 FCR 114; 297 IR 210

JMC Pty Limited v Commissioner of Taxation [2023] FCAFC 76; 2023 ATC 20-861; 116 ATR 309; 297 FCR 600

Neale v Atlas Products (Vic) Pty Ltd [1955] HCA 18; 94 CLR 419; 10 ATD 460

Whitby v ZG Operations Australia Pty Ltd [2018] FCA 1934

ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2; 275 CLR 254; 96 ALJR 144; 312 IR 74

Relevant rulings

SGR 2005/1; SGR 2005/2; SGR 2009/1

Other references

ATO ID 2014/28

ATO references
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