Independent Contractors

Key High Court Decisions

Today the High Court handed down two long-awaited decisions regarding the engagement of independent contractors as compared to employees, an issue that has long been filled with complexity and fraught with risk.

These decisions have provided some welcome clarity, particularly confirming the focus is to be on the terms of the contractual documents. However, significant complexity remains and the decision also unsettles previously settled practices.

CFMMEU v Personnel Contracting [2022] HCA 1

This case involved an unskilled labourer, on a working visa, being engaged by a business that held itself out as an 'intermediary' placing workers with builders. The worker signed an agreement in which he was described as a "self-employed contractor", under an arrangement that is commonly referred to as an "Odco-style arrangement.

Across four separate judgments, the seven-member High Court found by 6:1 majority that the worker was in fact an employee. Because of the number of judgments, the principles cannot necessarily be readily distilled and no doubt further litigation will be required to clarify the operation of decision. However, there are some key issues that emerge.

Primacy of the terms of a written contract

Five of the seven judges determined that the test for whether someone is an employee (where a contract is wholly in writing) is applied at the time the contract is formed and is based solely on the terms of the contract. As three of the five judges held:

> *Where the terms of the parties' relationship are comprehensively committed to a written contract, the validity of which is not challenged as a sham nor the terms of which otherwise varied, waived or the subject of an estoppel, there is no reason why the legal rights and obligations so established should not be decisive of the character of the relationship.*

Historically, the Court would look at how the arrangement works in practice. Shifting the focus to the contract document provides a level of certainty to contracting parties, where a Court no longer needs to "*perform a multifactorial balancing exercise whereby the history of all of the dealings between the parties is to be extensively reviewed*". In finding this, the High Court has removed a significant amount of the complexity and uncertainty of litigation in this area.

However, this should not be taken to mean that any arrangement can be labelled as a contractor arrangement and that is decisive. All seven judges confirmed that the label placed in a contract is largely meaningless. Indeed, in this case the contract that was found to be an employment contract specifically stated the worker was a "self-employed contractor".

What terms are meaningful?

While consideration of the terms of a written contract is now clearly the applicable test, what factors are relevant is less clear, and how that might apply in any particular case less so again. It appears the existing law regarding a review of the "totality of the relationship" remains, albeit

that this is based on the terms of the contract and not the subsequent conduct of the parties (and even this is subject to some exceptions). Thus there remains an exercise in any particular case to look at the 'indicia' in the particular relationship but there is at least some certainty as to the source of this review, being the terms of the contract itself.

In this case, the worker was an unskilled labourer, being paid by the hour, and subject to a form of control (albeit complicated by the indirect nature of the Odco-style arrangement), and this was in circumstances where the business was a labour hire business where that right of control was a key asset of the business that was marketed to its clients (the hosts).

This should be contrasted with the second decision (see below) where applying the same test the High Court unanimously found those arrangements were independent contractor arrangements.

What about unwritten contracts?

The situation is less clear as to how unwritten contract will be treated. It appears that where a contract is not reduced to writing, or only partly in writing then the subsequent conduct of the parties (that is, how the relationship operated in practice) appears likely to be determinative. In this sense, where a contract is unwritten or only partly written, the scope for a wide-ranging review of the parties' conduct (and the expense and uncertainty that flows from it) remains.

Are Odco arrangements still permitted?

The previously settled law surrounding Odco arrangements has been unsettled. A majority of the judges did not expressly deal with Odco arrangements but by implication challenge the legitimacy of these arrangements. The one dissenting judge's dissent centred around supporting the legitimacy of Odco arrangements. Two other judges found that an Odco arrangement would be legitimate where it involved skill (as compared to unskilled labour), related to particular tasks as compared to working at another direction and control, and there was a guarantee against faulty workmanship.

It appears that it will be a question of fact and degree as to whether these arrangements are in fact legitimate, but the premise that these arrangements are indefensibly legitimate is plainly no longer the case.

ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2

This case involved two truck drivers who provided delivery services for a company for around 40 years, having been, in effect forced to become contractors during a restructure in the mid-1980's (something that would likely be prohibited under current laws). The workers established partnerships, purchased trucks and carried on providing services.

Despite working solely for the same client for over 30 years, with largely consistent working patterns and not working for others, the High Court held that the workers, through their partnerships, were independent contractors. Again, this was determined primarily on the basis of the written contracts.

Key Takeaways

A carefully drafted and well thought out contract is the cornerstone of maintaining the distinction between independent contractors and employees. The rights and obligations under the contract must demonstrate an absence of control between the parties to the contract.

That is not to say that the other practical steps that were previously recommended to be able to demonstrate the distinction between contractor and employee are irrelevant, but the importance of this being part of the initial contracting process has been elevated significantly. Matters such as the provision of skill, supply of equipment, insurances, delegation, freedom to work for others, provisions around leave and other entitlements and general business outlays remain important.

There will no doubt be significant litigation on this issue as this new law is applied, and businesses engaging contractors should pay careful attention to any developments. However, it is clear that a well-constructed contract and objective evidence supporting the nature of the relationship will assist in any challenge to the nature of a contracting relationship.

Need more information

The above matters are necessarily general in nature and specific advice must be sought for specific circumstances. The effect of this decision is that all businesses engaging independent contractors should consider their specific arrangements. This is particularly so in the case of "Odco" style arrangements.

If you would like further information in relation to these matters, please contact the team at Fair Work Lawyers and confirm you are a CCF member.

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