

The High Court, on 9 February 2022, handed down its decision in *ZG Operations v Jamsek*. This decision should provide some welcome relief to many in the industry who had previously been uncomfortable about the possible employment status of some of their owner drivers. The good news is that the High Court unanimously found that two owner drivers (Mr Jamsek and another driver Mr Whitby) were contractors, not employees, and provided some badly needed certainty on the topic.

The drivers had been employed by Thorn EMI straight from school and continued to drive for the same business until retirement forty years later by which time the business had become known as ZG Operations. Around eight years into the job they were offered contracts involving them purchasing vehicles from their employer with the contracts stating that they were now independent contractors. The Federal Court initially confirmed that they were indeed contractors, but that decision was overturned by the Full Court of the Federal Court on appeal, ruling that they were employees. The Full Court's decision took many in the industry by surprise.

The main reason for this surprise was that both owner drivers had purchased and operated their own vehicles. Mr Jamsek had also bought a new truck in 1989 for \$70,000 and Mr Whitby in 1990 for somewhere between \$70,000 and \$80,000. In addition, both drivers had set up partnerships with their respective wives and were paid through those partnerships. Until the Full Court decision the widely held view (referred to by both the Full Court and the High Court as the 'conventional view') was that when a contract was with a company or partnership and particularly when that business had to provide equipment as substantial as a heavy vehicle, the owner driver could safely be assumed to be a contractor.

Although the High Court was not unanimous in its reasons for finding the drivers to be contractors, the majority accepted that the 'conventional view' was correct. More importantly perhaps the majority also ruled that where there is a clear, written contract, and no other legal concerns, the contract itself determines the question of whether an owner driver is an employee or a contractor.

### **What legal issues were decided?**

The central issue was whether the owner drivers were employees of the company, or contractors. The general question of how to determine this issue in future cases was also settled.

### **What reasons did the judges give?**

A majority of the Court said that the 'multi-factor test' which had been applied by earlier courts in this and other cases was not the first step in deciding whether someone was an employee or not. If the contract setting out the relationship clearly describes a contract for services, then there will be no employment relationship. If the contract is only partly in writing, if there is a claim that it is a sham or contrary to some other legal or statutory provision, or if it is claimed that the parties have changed the contract over time (whether those changes have been recorded in writing or not), then a court might need to apply the multi-factor test. However, if none of those exceptions apply, the question is answered by looking at the contract.

This alone provides a significant amount of certainty to businesses that was previously lacking.

The High Court also heard and decided another case alongside *Jamsek* where they applied the same principles. In that other case (*CFMMEU v Personnel Contracting*), the High Court found that, despite the written contract describing the worker as a 'contractor', he was actually an employee. This was because the contract itself set out terms that the Court found to be the terms of an employment contract. This shows that merely using 'labels' such as 'contractor' will not determine the outcome; the whole contract has to be considered. However, subject to the exceptions mentioned above, there will be no need to look at the actions of the parties after the contract is agreed or indeed at anything other than the contents of the contract.



The Court also revisited, and upheld, the 'conventional view'. They found that contracts with partnerships were very unlikely to be employment contracts and that, where a driver was providing a truck, the contract was almost certain to be for the service of delivering goods, with the provision of a driver as something incidental to fulfilling that contract.

Both of these findings should be welcomed by the industry. A properly drafted contract should give the parties certainty as to what has been agreed, and where the party contracting to provide the service is a partnership or a corporate entity or where they supply a vehicle, a presumption that they are not employees is a reasonable one.

### What are the key takeaways?

- A written contract is the key to being able to rely on the certainty that this decision has brought.
- The decision in *CFMMEU v Personnel Contracting* shows that the written contract must still be put together with care if it is to bring that certainty. (The contract must match the 'labels' used.)
- Written contracts should be adhered to. Don't start treating a driver like an employee if their contract says they are a contractor.
- Contracts should make clear that they are for the carriage of goods, not for the provision of drivers or for the driving of vehicles.

