New guidance on the question of 'employees' vs 'independent contractors'

By Justin Pen

The High Court of Australia has allowed two appeals from the Full Court of the Federal Court of Australia, finding that a construction labourer engaged by a labour-hire firm was an 'employee' (*Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1) (*Personnel*) and that two truck drivers engaged by an electrical lighting business were 'independent contractors' (*ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2) (*Jamsek*).

The approach of the High Court in *Personnel* and *Jamsek* provides guidance to lower courts and workplace tribunals tasked with determining whether a worker has been engaged as an employee or independent contractor.

In so doing, the High Court – Kiefel CJ, Keane and Edelman JJ (KKE Plurality) and the Gordon and Steward JJ (GS Plurality) –

have re-centred the parties' contractual rights and obligations and made them the focus of this inquiry, rejecting an audit approach directed towards the parties' performance of such rights and obligations.

But if, as some commentators have put it, 'contract is king', a proper reading of the *Personnel* and *Jamsek* reveals a Magna Carta that serves to provide checks and balances against this so-called monarch.

Personnel

In *Personnel*, the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) alleged that Mr Daniel McCourt, an English backpacker and construction labourer, had not been an independent contractor, as he had been treated, but an 'employee' of Personnel Contracting Pty Ltd (trading as Construct) (Construct), a labour-hire company, for which he performed work in 2016 and 2017.

The CFMMEU argued that, if Construct engaged Mr McCourt as an employee, Mr McCourt should have been paid in accordance with the Construction General

On-site Award 2010. In failing to do so, the CFMMEU alleged that Construct breached the *Fair Work Act 2009* (Cth) (FW Act) and Hanssen Pty Ltd (Hanssen), a host business to whom Mr McCourt was assigned, was accessorily liable for Construct's breaches of the FW Act.

The KKE Plurality and the GS Plurality[1] both favoured an exclusive focus on the contractual rights and obligations of the parties to the exclusion of the subsequent conduct of the parties, the latter being described as the 'substance' or 'reality' of Mr McCourt's relationship with Construct: *Personnel* at [43] (KKE Plurality), [173] (GS Plurality).

In determining whether a worker had been engaged as an 'employee' or an 'independent contractor', courts and tribunals must still conduct a multifactorial analysis – briefly, an evaluation of the various 'indicia' of the contractual relationship as identified in the case authorities – to determine whether the 'totality of the relationship' is that of an employee/employer or an independent contractor/principal. Following *Personnel*, if the parties' contract is wholly in writing, such analysis is to be confined to the contractual rights and obligations of the parties: *Personnel* at [48], [61] (KKE Plurality), [162] (GS Plurality).

As such, if a contract is wholly written (that is, it is not partly written and partly oral, or wholly oral), absent an allegation of sham or contractual variation, evidence of how the parties performed the contract is deemed to be irrelevant to determining the contractual rights and obligations against which the multifactorial analysis is to be applied: *Personnel* at [46], [54], [59] (KKE Plurality).

Conventional principles of contract law have not been abrogated. In addition to cases involving sham or contractual variation, extrinsic evidence remains admissible to assist in the identification of the purpose or object of the contract so long as the strictures of the parol evidence rule are satisfied: *Personnel* at [175] (GS Plurality). Evidence of subsequent conduct, too, may still be relevant to determining issues such as formation, discharge, rectification, estoppel, and any other legal, equitable, or statutory rights and remedies: *Personnel* at [177] (GS Plurality).

In its close reading of past decisions of the High Court, the KKE Plurality considered that the cases that considered the parties' subsequent and actual performance of the contract all came within such exceptions to the general rule: so it was that *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurance Ltd* (1952) 85 CLR 138 involved an allegation of a sham (or, in the alternative, should be read as contemplating contractual variation) (at [49]–[51] (KKE Plurality)); *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 was not a case 'where the parties had committed the terms of their relationship to a written contract' (*Personnel* at [56] (KKE Plurality)); and *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 was a case in which the parties' contract of employment was partly written and partly oral (*Personnel* at [57] (KKE Plurality)).

If, as some commentators have put it, 'contract is king', a proper reading of the* Personnel *and* Jamsek *reveals a Magna Carta that serves to provide checks and balances against this so-called monarch.

In the course of conducting a multifactorial analysis of the parties' contractual rights and obligations, the KKE Plurality endorsed the organising principle of the 'own business/employer's business' dichotomy, relevantly observing that (at [39]):

> … [T]he dichotomy usefully focusses attention upon those aspects of the relationship generally defined by the contract which bear more directly upon whether the putative employee's work was so subordinate to the employer's business that it can be seen to have been performed as an employee of that business rather than as part of an independent enterprise. In this way, one may discern a more cogent and coherent basis for the time-honoured distinction between a contract of service and a contract for services than merely forming an impressionistic and subjective judgment or engaging in the mechanistic counting of ticks on a multifactorial checklist.

The GS Plurality, for its own part, eschewed the utility of this dichotomy; it preferred the asking and answering of the following question (at [183]) (original emphasis):

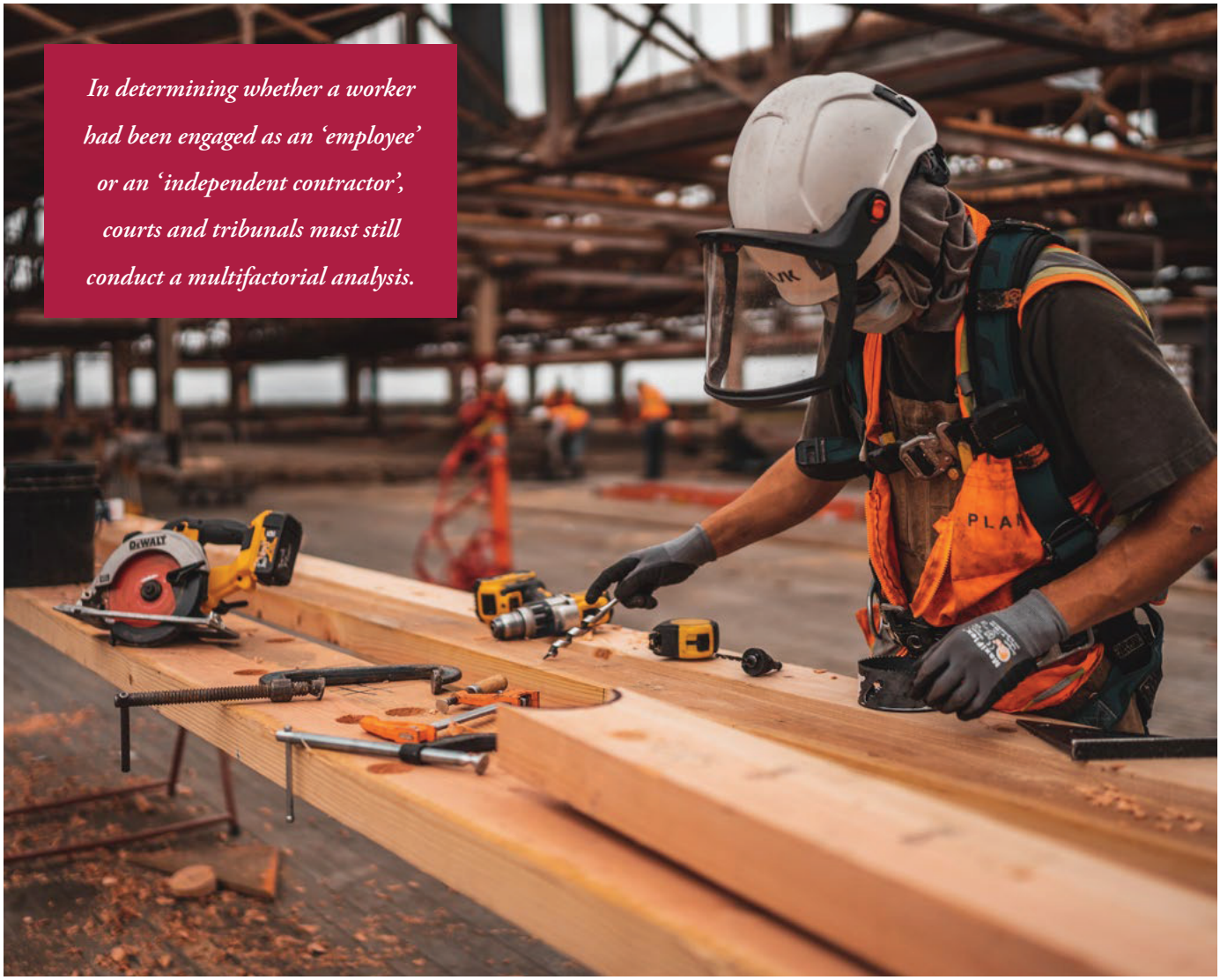
> [W]hether, by construction of the terms of the contract, the person is *contracted to work in the business or enterprise of the purported employer*. That question is focussed on the contract, the nature of the relationship disclosed by the contract and, in this context, whether the contract discloses that the person is working in the business of the purported employer'.

On the application of these principles, all of Kiefel CJ, Keane and Edelman JJ and Gordon J (Steward J dissenting) found that the written document that bound Mr McCourt and Construct, which the latter called an 'Administrative Services Agreement' (ASA), was a contract of employment.

In so doing, their Honours emphasised Mr McCourt and Construct's obligations to each other with respect to pay, dismissal, and authority to control – all of which were construed from the express terms of the ASA: *Personnel* at [71] (KKE Plurality), [194]–[197] (GS Plurality). At the same time, it was observed that Mr McCourt's freedom to work for others was as consistent with the status of casual employment as it was with that of a contractor relationship: *Personnel* at [84] (KKE Plurality), [196] (GS Plurality). Finally, it warrants mention that the consideration granted to the parties' designation of Mr McCourt as a contractor received criticism both in the conduct of the decision under appeal ('There was no occasion to have recourse to the label chosen by the parties, whether as a 'tie-breaker' or otherwise') (*Personnel* at [79] (KKE Plurality) and as a matter of broad legal principle ('Generally speaking, the opinion of the parties on a matter of law is irrelevant') (*Personnel* at [66] (KKE Plurality)).

Steward J, while agreeing with the approach of Gordon J, dissented with the conclusion, finding that it was, respectively, 'unfair' and 'undesirable' to find against Construct as to do so would 'expose the respondent to significant penalties on a retrospective basis' and 'greatly damage the respondent's business and the businesses of many others' (*Personnel* at [222]).

The plurality judgment of Gageler and Gleeson JJ (GG Plurality) rejected the centrality of the parties' contractual rights and obligations that dominated both the approach taken in the KKE Plurality and the GS Plurality. The point of principle on which the GG Plurality diverged from the KKE Plurality was its disinclination to follow the decision of the Privy Council in *Narich Pty Ltd v Commissioner of Pay-roll Tax* [1983] 2 NSWLR 597, a decision made 'just three years before the ultimate abolition of appeals to it' [126], which was said to be and remains the leading authority for the proposition that a court is not entitled to consider 'the manner in



In determining whether a worker had been engaged as an 'employee' or an 'independent contractor', courts and tribunals must still conduct a multifactorial analysis.

which the parties subsequently acted in pursuance of [a wholly written] contract', something the GG Plurality considered 'wrong as a matter of common law principle and contrary to the authority of this Court in two earlier decisions': see, *Personnel* at [45] and [47] (KKE Plurality) and [129] and [142] (GG Plurality).

Favouring a distinction between the legal concepts of an 'contract of employment' and a 'relationship of employment' (*Personnel* at [110] (GG Plurality)), the GG Plurality demurred that '[f]ocusing exclusively on the terms of the contract loses sight of the purpose for which the characterisation is undertaken. That purpose is to characterise the relationship' (*Personnel* at [130]).

Jamsek

Each of the KKE Plurality, GG Plurality, and GS Plurality re-appeared as firm coalitions in *Jamsek* and, unsurprisingly, propounded the same legal principles each had set down in *Personnel*: *Jamsek* at [8] (KKE Plurality), [85]–[86] (GG Plurality), [95] (GS Plurality).

Applied to the facts of the *Jamsek*, the court unanimously found that truck drivers, Mr Martin Jamsek and Mr Robert Whitby had been independent contractors of ZG Lighting Australia Pty Limited (and its related predecessors) (ZG Lighting) for just over 30 years of the 40 years the pair had been working with ZG Lighting.

The key distinctions that cleaved *Jamsek* from *Personnel* were the fact that the truck drivers were engaged pursuant to partnership agreements with ZG Lighting (*Jamsek* at [63] (KKE Plurality), [89] (GG Plurality), [99] GS Plurality) and the fact that Mr Jamsek and Mr Whitby owned the trucks themselves (at [88] (GG Plurality)).

Of some note, the KKE Plurality denounced, again, in strong language, the consideration given to the real or perceived superior bargaining party of a putative employer against a putative employee (*Jamsek* at [62]), as well regard had to the 'expectations' of the parties (*Jamsek* at [51]-[56]), in the decisions under appeal.

Conclusion

Though it is now the usual course to reduce judgments to 'key takeaways', in the circumstances of these cases it is perhaps most appropriate to adopt that which was said by Gageler and Gleeson JJ in *Personnel* at [119] and apply it to the task that falls to courts, tribunals, and lawyers in determining whether a worker is an 'employee' or an 'independent contractor':

> The overall experience of the multifactorial analysis of the totality of parties' contractual rights and obligations has taught 'respect for the humble particular against the pretentious rational formula'.[2] BN

ENDNOTES

1 While Gordon J and Steward J published separate reasons for their decisions, Steward J relevantly adopted and agreed with 'Gordon J's expression of the test to determine whether a person is an employee': *Personnel* at [203].

2 With apologies to Cass Sunstein and John Dewey – see, *Personnel* at [119] (GG Plurality): "The overall experience of the common law has taught 'respect for the humble particular against the pretentious rational formula".