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Contract Truck Drivers using own trucks deemed to be employees Jamsek v ZG Operations Australia Pty

This case has broad reaching implications for tax, employment law and other areas in business.

This is an Appeal decision of the Full Federal Court.

The Applicants were:

1. Two truck drivers;
2. Who had worked for the same business for almost 40 years - **using their own trucks**;
3. When the working relationship was terminated with respondent, they claimed that they had been employees and were entitled to superannuation payments and other entitlements including long service leave.

The initial application in the single judge Federal Court decision characterised the working relationship as one of independent contract rather than employment.

The Applicants sought leave to appeal to the Full Federal Court, and the Court in overturning the decision of the single Judge, held

1. Application for leave to appeal granted;
2. Appeal allowed;
3. Indicia of working relationship established that they had been employees rather than independent contractors;
4. Applicants were entitled to superannuation payments and employment entitlements that they claimed.

The Full Court of the Federal Court has ordered an the deemed employer to pay significant employee entitlements to the two truck drivers who were engaged as independent contractors for nearly 40 years.

Facts

1. The applicants, Mr Martin Jamsek and Mr Robert Whitby, worked as delivery truck drivers for the respondent, ZG Operations Australia (ZG). Prior to the formation of ZG, they had worked for the companies that conducted the business that was ultimately transmitted to ZG (the business).

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2. After leaving high school at an early age, the applicants commenced working for the company that owned the business in 1977 and, from 1980 until 2017, working full-time as truck drivers.
3. That work was their sole source of income during the nearly 40-year period. They did not drive, or deliver goods, for any other business or entity.
4. From 1986, however, neither Mr Jamsek nor Mr Whitby was formally considered employees of the respective companies that owned the business from time to time.
5. The relationship between the applicants and the relevant company was, for the large part, subject to contracts.
6. Those contracts were entered into at various intervals, between, on one hand, the partnerships in which the applicants were members with their spouses and, on the other hand, the company. These contracts were each entitled a "Contract Carriers Arrangement". The partnerships were described therein as "Contractors".

After termination of their working relationship with the business in 2017, the applicants commenced proceedings seeking declarations and orders in respect of certain statutory entitlements. The central issue in those proceedings concerned the nature of the relationship between the applicants and the companies that conducted the business. More particularly, the key question was whether the applicants were, at the relevant times, "employees" within the meaning of the Fair Work Act 2009 (Cth) (FW Act) or the Superannuation Guarantee (Administration) Act 1992 (Cth) (SGA Act), or "workers" within the meaning of the Long Service Leave Act 1955 (NSW) (LSL Act).

The primary judge held that the applicants had not been "employees" or "workers" for the purposes of those statutes. Five reasons were given for that conclusion:

1. Iin 1986 the parties had deliberately decided to end the employment relationships in favour of independent contracts;
2. The applicants had created partnerships to enter into those contracts;
3. The applicants had to provide their own trucks;
4. The contracts were to be construed as contracts between the relevant company and the partnerships; and
5. The working hours, length of service and level of control, all pointed towards independent contracts.

The applicants then sought leave to appeal.

Held: application for leave to appeal allowed and appeal allowed.

Reasons for decision

- Question which was to be asked and answered was whether the person was an employee and not whether the person was conducting their own business.
- **The absence of goodwill in an employee's business was a potential indicator that the goodwill was possessed by the employer** and hence that the business being conducted was the employer's business.
- **There was no real scope for the applicants to work for other companies given that they were required to be at the disposal of the business for nine hours a day, five days a week, and their trucks were, for the most part, adorned with the business's livery**.
- Insufficient weight was given to the reality and totality of the working relationship between the parties, as demonstrated by the way they **actually conducted themselves over many years as opposed to agreements**.

- The **utilisation of the partnerships as contracting vehicles**, and the manner in which the taxation and compliance affairs of the partnerships had been undertaken, indicated that the applicants had been operating their own business. However, that **did not determine the question of whether or not they had been employees**.
- The **provision of vehicles by the applicants for the purposes of the business was a relevant**, and important, consideration supporting the conclusion that they were operating independent businesses. **But further analysis of the evidence demonstrated that they had little freedom to decide how those vehicles were to be used**.
- There was very **little opportunity for the applicants to work for other companies**. They were **expected to work nine hours a day from 6 am from Monday to Friday**. Although there was some flexibility once all deliveries were completed, there was minimal time for them to serve others in alternative hours.
- The absence of a written contract during specified periods also weighed in favour of an employment relationship.
- The manner in which the working relationship operated in practice, a **striking feature of the present case was undoubtedly the long and uninterrupted period during which the applicants conducted work for the company**.
- In circumstances where the applicants did not conduct work for any other business during this period, the facts of the present case paint a picture of two truck drivers who were an integral part of the company's business.

As such, the applicants were employees or workers for the purposes of the FW Act, the SGA Act and the LSL Act.

From a business perspective, careful review and consideration needs to be given to:

1. the engagement of services of any form;
2. what potential exposure a business may have at present and ongoing as a potential accruing liability;
3. the issues associated with taking over shares in a company or a business and employee entitlements as well as any deemed employee entitlements;
4. what measures can be taken to reduce or limit the exposure of a business.

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