Case Note

Boundary Disputes: Employment v Independent Contracting in the High Court

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Introduction

Few questions in the field of labour law have engendered as much academic writing as where to draw the boundary between employment and independent contracting.[1] The High Court of Australia's decisions in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (*Personnel Contracting*)[2] and *ZG Operations Australia Pty Ltd v Jamsek* (*Jamsek*)[3] are bound to prompt voluminous additions to this literature, as commentators tease out the full implications of the decisions. This note provides a preliminary assessment of the key significance of the decisions. It also suggests a number of issues that will continue to vex those lower courts and tribunals faced with the task of distinguishing employment from other

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1 For a small and by no means exhaustive example of the literature, see K W Wedderburn and J Clark, 'Modern Labour Law: Problems, Functions and Policies' in K W Wedderburn, R Lewis and J Clark (Eds), *Labour Law and Industrial Relations*, Clarendon Press, Oxford, 1983, p 127; H Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (1986) 15 *ILJ* 1; A Brooks, 'Myth and Muddle — An Examination of Contracts for the Performance of Work' (1988) 11 *UNSWLJ* 48; H Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 *OJLS* 353; A Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 *AJLL* 235; M Freedland, *The Personal Employment Contract*, Oxford University Press, Oxford, 2003; G Davidov and B Langille, *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work*, Hart Publishing, Oxford, 2006; M Freedland, 'From the Contract of Employment to the Personal Work Nexus' (2006) 35 *ILJ* 1; O Razzolini, 'The Need to Go Beyond the Contract: "Economic" and "Bureaucratic" Dependence in Personal Work Relations' (2010) 31 *Comp LL & Policy* J 267; M Freedland and N Kountouris, *The Legal Construction of Personal Work Relations*, Oxford University Press, Oxford, 2011; J Riley, 'The Definition of the Contract of Employment and its Differentiation from Other Contracts and Other Work Relations' in M Freedland et al (Eds), *The Contract of Employment*, Oxford University Press, Oxford, 2016, p 321; A Stewart and S McCrystal, 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' (2019) 32 *AJLL* 4; P Bomball, 'Intention, Pretence and the Contract of Employment' (2019) 35 *JCL* 243; P Bomball, 'The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique' (2021) 44 *UNSWLJ* 1336; P Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (2019) 42 *MULR* 370.

2 [2022] HCA 1 (*Personnel Contracting*).

3 [2022] HCA 2 (*Jamsek*).

work relationships in matters arising under the Fair Work Act 2009 (Cth) (FW Act), and other statutes that continue to rely on the common law test for coverage.[4] First, a brief outline of the relevant facts and findings in the earlier litigation is provided, with apologies to the members of the Federal Court (especially Allsop CJ and Lee J in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*[5] (*Personnel Contracting FCA*)) whose detailed and insightful observations are glossed over, in the interests of meeting the tight word limit of a case note.

Facts and Findings

Personnel Contracting concerned a 22-year old backpacker (McCourt) engaged by a labour hire outfit (Construct) and hired to a host employer (Hanssen) to provide the most basic of builder's labouring tasks, sweeping up rubbish and shifting bricks.[6] His written contract with Construct described him as a 'contractor',[7] and on this basis, Construct paid him 'approximately 75%' of what he would have been paid under the Building and Construction General On-Site Award 2020 if he were an employee.[8] The Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) brought proceedings against both Construct and Hanssen seeking compensation and penalties for breach of the Award.

This claim failed at trial,[9] and also before the Full Court, because the bench considered itself bound by an earlier decision of the West Australian Court of Appeal[10] determining that essentially the same contract used by Construct to engage its workers, was properly characterised as an independent contract.[11] This West Australian decision followed shortly after the High Court's

4 Some statutes provide extended definitions to capture a wider range of relationships in their coverage. See, eg, the deeming provisions in State workers' compensation statutes: Workers Compensation Act 1951 (ACT) ss 8–15; Workplace Injury Management and Workers Compensation Act 1998 (NSW) s 5, Sch 1; Return to Work Act 1986 (NT) ss 3B(1)–(19); Workers Compensation and Rehabilitation Act 2003 (Qld) s 11(2), Sch 2; Return to Work Act 2014 (SA) s 4, Sch 1; Workers Rehabilitation and Compensation Act 1988 (Tas) ss 3–4E; Workers Compensation Act 1958 (Vic) s 3; Workers Compensation and Injury Management Act 1981 (WA) s 7. The Superannuation Guarantee (Administration Act) 1992 (Cth) s 12(3) also provides for an expanded definition of employee. In *Jamsek*, above n 3, at [71]–[77] (Kiefel CJ, Keane and Edelman JJ), at [91] (Gageler and Gleeson JJ), the question of the owner drivers' coverage by that legislation was remitted for consideration by the Federal Court.

5 (2020) 279 FCR 631; 381 ALR 457; [2020] FCAFC 122 (*Personnel Contracting FCA*).

6 The nature of McCourt's work is set out in colourful detail in the reasons of Lee J: ibid, at [42], [51]–[60].

7 The terms of the Administrative Services Agreement (ASA) governing McCourt's engagement are set out in full: *Personnel Contracting*, above n 2, at [14].

8 *Personnel Contracting FCA*, above n 5, at [4] (Allsop CJ).

9 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806.

10 *Personnel Contracting Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers* (2004) 141 IR 31; [2004] WASCA 312 (*Personnel Contracting No 1*). The Court was also concerned about comity with the Tasmanian Supreme Court's decision in *Young v Tasmanian Contracting Services Pty Ltd* [2012] TASFC 1.

11 *Personnel Contracting FCA*, above n 5, at [34] (Allsop CJ), at [185] (Lee J).

determination of *Hollis v Vabu Pty Ltd* (*Hollis*).[12] The Full Court, being itself an intermediate appellate court, considered itself bound to follow this decision,[13] but the observations made by both Allsop CJ and Lee J implicitly invited the CFMMEU to mount an appeal to the High Court. Both judges clearly had concerns with a result that permitted seriously under award payment for the work of an itinerant labourer who brought nothing more than a hard hat, hi-vis vest, steel capped boots and a strong back to his job.

Jamsek, on the other hand, concerned the working arrangements of two truck drivers (Jamsek and Whitby) who, after a long period as employees, were told that they must agree to resign their employment and sign up as independent contractors if they wanted to keep working as delivery drivers for the company. This occurred in 1985 or 1986, before the enactment of any provision similar to the FW Act s 358, which prohibits an employer from threatening to dismiss an employee in order to 'engage the individual as an independent contractor to perform the same, or substantially the same, work under a contract for services'. Like so many transport workers of that era, Jamsek and Whitby agreed to form partnerships with their spouses, and caused the partnership to enter into contracts with the company. The partnerships purchased the vehicles from the company with the assistance of company finance.[14] In reality, the working lives of Jamsek and Whitby changed very little. They continued to work effectively full-time hours in the exclusive service of the company, driving vehicles emblazoned with the company's trademarks, and performing whatever additional tasks the company directed them to do. From a legal perspective, however, their arrangement with the company had changed significantly. The payments they received were increased to recognise that they were providing fully maintained and insured vehicles and not only their own labour.[15] They were able to invoice the company for additional work that they undertook. Most significantly, payments were made to their partnerships, and this allowed them to enjoy the tax benefit of income splitting with their spouses.[16] This arrangement operated for many years, from 1986 until 2017 when their services were no longer required.

Jamsek and Whitby claimed a range of statutory benefits on the assertion that they were in fact employees, including payments for annual leave (4 weeks for each year of their engagement),[17] personal leave, public holidays, overtime under the relevant modern award, redundancy compensation of 12 weeks, long service leave entitlements,[18] and superannuation

12 (2001) 207 CLR 21; 181 ALR 263; [2001] HCA 44 (*Hollis*).

13 *Personnel Contracting FCA*, above n 5, at [31] (Allsop CJ), at [181] (Lee J).

14 For a critique of these arrangements as a means for thrusting business risk onto workers without surrendering control in any meaningful way, see R Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships*, Federation Press, Sydney, 2012, pp 78, 88–91.

15 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114; 297 IR 210; [2020] FCAFC 119 (*Jamsek FCA*) at [41].

16 Mr Whitby lost this benefit when he was divorced and began contracting as a sole trader, but this was not held to influence the outcome in his case: see *Jamsek*, above n 3, at [108] (Gordon and Steward JJ).

17 Under Fair Work Act 2009 (Cth) (FW Act) s 87.

18 Under Long Service Leave Act 1955 (NSW).

contributions.[19] At trial, their claims were rejected on the basis that they were not employees.[20] A full bench of the Federal Court overturned this finding, and found, after an extensive analysis of the factors in the multifactorial test, that the 'substance and reality of the relationship, rather than its mere legal form'[21] made Jamsek and Whitby employees of ZG Operations.[22] The multifactorial, or multiple indicia test has been used in Australia since the High Court's decision in *Stevens v Brodribb Sawmilling Co Pty Ltd* (*Brodribb*).[23] This so-called 'test' weighs up a range of factors, such as which of the parties provides capital equipment, whether the worker must wear the hirer's livery and display the hirer's trademarks, and whether the worker can delegate tasks to others.[24] In the course of the analysis, Anderson J also referred to the 'respective bargaining positions of each party',[25] in order to discount the weight that ought to be afforded to the contracts signed by Jamsek and Whitby when they were told their only option for keeping their jobs was to become contractors.

Appeals to the High Court

The above outline of the facts and findings in the Federal Court reveals how very different these cases were, notwithstanding that they raised essentially the same 'boundary' question. One concerned an itinerant labourer paid well below award wages who was found to be an independent contractor. The other involved owner drivers who waited for decades to contest their treatment as self-employed contractors, and were now found to be entitled to a massive compensation payment in respect of the benefits they were now found to be entitled to as employees.

The High Court allowed both appeals (Steward J alone dissenting, and only in *Personnel Contracting*). McCourt was found to be an employee of the labour hire entity (Construct), and Jamsek and Whitby were found to have contracted for the provision of transport services to ZG Operations through their own family partnerships. In *Jamsek*, the matter was sent back to the Federal Court to determine whether the drivers were nevertheless covered by the extended coverage provisions in the Superannuation Guarantee (Administration) Act 1992 (Cth) s 12(3).

Although *Jamsek* was a unanimous decision, and *Personnel Contracting* provided a clear majority (6:1) in the result, the cases are complicated by a division in the High Court on the reasoning to be applied in distinguishing employment from other work relations. In *Personnel Contracting* there were four sets of reasons:

- Kiefel CJ, Keane and Edelman JJ (which for ease of reference shall be referred to in this note without any disrespect as the 'KKE reasons');

19 See *Jamsek FCA*, above n 15, at [126] (Anderson J) for a full list of the claims.
20 See *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934.
21 *Jamsek FCA*, above n 15, at [182] (Anderson J).
22 Ibid, at [243].
23 (1986) 160 CLR 16; 63 ALR 513 (*Brodribb*).
24 For a full explanation of the multiple indicia test, see Riley, above n 1, p 321.
25 *Jamsek FCA*, above n 15, at [196].

- Gageler and Gleeson JJ ('GG reasons');
- Gordon J; and
- Steward J (dissenting).

In *Jamsek*, there were three sets of reasons, the KKE reasons, the GG reasons, and Gordon and Steward JJ writing together. At the risk of doing a grave injustice to the erudition of the members of the court, the key elements of each of the sets of reasons is summarised here. An analysis of how these reasons affect future disputes over the 'boundary' question is reserved to the section of this note headed 'Significance of the Decisions'.

Kiefel CJ, Keane and Edelman JJ reasons

The KKE reasons in both cases held that courts must assess the 'totality of the relationship between the parties', but in doing so may have regard only to the terms of the contract, and not to the reality of their relationship, when assessing whether the relationship is one of employment.[26] In a case where the contract is wholly in writing (as was held to be the case in both *Personnel Contracting* and *Jamsek*), there is no scope to consider the conduct of the parties in performing the work. The apparent absoluteness of this statement was, however, heavily qualified. Subsequent conduct of the parties may be called in evidence to support arguments that the contract was not wholly in writing, or had been varied, or discharged and replaced by a new contract, or that a party should be estopped from enforcing it.[27] The KKE reasons criticised the way that the multiple indicia test from *Brodribb*[28] has been applied as a 'mechanistic checklist'[29] in earlier decisions. They cited *Brodribb*[30] and *Hollis*[31] for the principle that the characterisation of a working relationship 'is to be determined by reference to "the totality of the relationship between the parties"' with a view to establishing whether the worker is serving the hirer in the hirer's business, or carrying on a trade or business of their own.[32]

The KKE reasons in *Personnel Contracting* affirmed the distinction between the employment relationship, and the employment contract,[33] and

26 *Personnel Contracting*, above n 2, at [32]–[60]. This analysis traversed key High Court authorities, including *Logan v Gilchrist* [1927] ALR 321; *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539; 19 ALJR 253; *Humberstone v Northern Timber Mills* (1949) 79 CLR 389; [1949] ALR 985; *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210; [1963] ALR 859 (*Marshall*); *Australian Mutual Provident Society v Chaplin* (1978) 18 ALR 385; *Brodribb*, above n 23; *Hollis*, above n 12. See also the decision of the Privy Council in *Narich Pty Ltd v Commissioner of Pay-roll Tax* [1983] 2 NSWLR 597; (1983) 50 ALR 417 (*Narich Pty Ltd)*.

27 *Personnel Contracting*, above n 2, at [43]. These qualifications are explained below.

28 *Brodribb*, above n 23, at 29.

29 See *Personnel Contracting*, above n 2, at [34], [36].

30 *Brodribb*, above n 23, at 29.

31 *Hollis*, above n 12, at [24].

32 *Personnel Contracting*, above n 2, at [36]–[39]. For the long pedigree of this approach, KKE cited: *Braxton v Mendelson* (1922) 233 NY 122, at 124 (Andrews J); *Marshall*, above n 26, at 217 (Windeyer J).

33 *Personnel Contracting*, above n 2, at [41], citing *Concut Pty Ltd v Worrell* (2000) 176 ALR 693; [2000] HCA 64 at [17].

acknowledged that '[i]t may be that aspects of the way in which a relationship plays out "on the ground" are relevant for statutory purposes'.[34] They also affirmed past case law establishing that parties cannot simply apply a false label to their contract.[35] They held that the earlier West Australian Court of Appeal decision in *Personnel Contracting Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers (Personnel Contracting No 1)*,[36] dealing with the same contract had been wrongly decided because too much weight had been given to labels.[37] The factors establishing that this contract was properly characterised as an employment contract, included that Construct could direct where McCourt must work, and McCourt himself had no discretion over what work he must do.[38] This right of control over McCourt's labour was a 'key asset' of Construct's labour hire business.[39] In making this finding the KKE reasons affirmed the orthodox Australian view that it is the labour hire entity, and not the host employer, who is the employer of labour hire workers.[40]

In *Jamsek*, the KKE reasons emphasised that the full Federal Court had erred in taking account of how 'the parties actually conducted themselves over the decades of their relationship'.[41] There had been no argument in the case that the contracts were shams, or had been varied or otherwise displaced by the conduct of the parties. Nor were there any claims that the contracts should be set aside for unconscionable conduct in equity, or under any relevant statutory provision. Most emphatically the KKE reasons asserted that any inequality of bargaining power (such as found by Anderson J) was of no relevance, unless the parties sought to have the contracts set aside in equity or varied under some statutory provision.[42] No such claim had been made in this case.[43] So there were no grounds for a court to look outside of the terms of the written contracts to characterise the relationships.[44] The terms of the contract that determined the workers were independent contractors were that they had contracted through partnerships, the partnership provided fully-maintained heavy vehicles,[45] the drivers determined their own delivery routes,[46] and payments for these transport services (involving both vehicles and labour) were made to the partnerships.[47]

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34 *Personnel Contracting*, above n 2, at [41]. They particularly noted the relevance of the conduct of the parties for s 65(2)(b)(ii) of the FW Act dealing with the rights of long-term casual employees to request flexible working arrangements if they have a 'reasonable expectation of continuing employment'.

35 *Personnel Contracting*, above n 2, at [63]–[66], [79].

36 *Personnel Contracting No 1*, above n 10.

37 *Personnel Contracting*, above n 2, at [86].

38 Ibid, at [75]–[77].

39 Ibid, at [76].

40 Ibid, at [78].

41 *Jamsek*, above n 3, at [6].

42 Ibid, at [62].

43 Ibid.

44 Ibid, at [8].

45 Ibid, at [14]–[16], [63].

46 Ibid, at [22].

47 Ibid, at [25].

Gordon J reasons

In order to find a majority view on the approach to be taken to determining employment status, we must rely also on the reasons of Gordon J in *Personnel Contracting*, and Gordon and Steward JJ in *Jamsek*, so it is worth summarising Gordon J's reasons next.

Gordon J agreed with the KKE reasons that in a case involving a wholly written contract it was necessary to confine consideration to the terms of the contract, and to ignore subsequent conduct of the parties when assessing 'the totality of the relationship'.[48] Gordon J allowed for the same qualifications to this principle: when it is necessary to call evidence to establish whether a contract has been formed; whether there are any oral terms; whether the contract has been varied or discharged; or whether the contract is affected by a vitiating factor, or an estoppel.[49] She cited key commercial contract authorities for the proper principles of contract interpretation in employment contracts.[50]

In contrast to the KKE reasons, however, Gordon J said that it was not necessary to treat the question as one 'involving a binary choice between employment and "own business"'.[51] Presumably this means that a worker need not be running their own business to fall outside of the employment category. Gordon J agreed with the KKE reasons that the parties' own labels for their contracts were not determinative, but she emphasised that they cannot be completely ignored.[52] They too were elements of the whole contract that needed to be construed in determining the nature of the relationship.[53]

The factors that Gordon J identified as relevant to McCourt's characterisation as an employee in *Personnel Contracting* were that Construct determined the duration, the place, the daily hours of work and 'other terms and conditions' of his job, and Construct was the only party obliged to pay him for his work.[54]

In *Jamsek*, the factors that Gordon and Steward JJ relied upon to find there was no employment contract were that the contract was between the hirer and partnerships, and the partnerships gave all of the undertakings under the contract, including the provision of maintained vehicles.[55] The partnership was at liberty to undertake other work, even if in practice the drivers worked exclusively in ZG Operations' business.[56]

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48 *Personnel Contracting*, above n 2, at [162].
49 Ibid, at [176]–[178], [183].
50 Notably, *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 350, 352; 41 ALR 367 at 373–5; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; 325 ALR 188; [2015] HCA 37 at [50].
51 *Personnel Contracting*, above n 2, at [162], [180].
52 Ibid, at [184].
53 Ibid.
54 Ibid, at [193], [194].
55 Ibid, at [99]–[103].
56 Ibid, at [103].

Gageler and Gleeson JJ reasons

Although the GG reasons arrived at the same outcome as the KKE reasons and Gordon J in both cases, they did so for significantly different reasons. The GG reasons disagreed that employment relationships are to be characterised only by reference to the terms of a written contract. They emphasised the important and long-established distinction between the employment contract and the employment relationship[57] and said: 'focusing exclusively on the terms of the contract loses sight of the purpose for which the characterization is undertaken'.[58]

> [T]here will be cases where, without any variation to the terms of a written contract, the true character of a relationship in fact established and maintained under the contract will be revealed through the manner of the performance of the contract. That will be so where the terms of the written contract are sufficiently opaque or obscure to admit of different manners of performance. And it will be especially so where such a contract is a standard form contract couched in language that might arguably have been chosen by the putative employer to dress up the relationship to be established and maintained as something somewhat different from what it might turn out to be.[59]

Relying on the fact that in *Hollis* the High Court *did* take work practices into account, the GG reasons concluded that a court can also consider the manner of performance of work to determine the character of the relationship, even where the contract is wholly in writing.[60] They cited *ACE Insurance Ltd v Trifunovski*[61] with approval.[62] They also disagreed with the KKE reasons on the matter of the significance of *Workpac Pty Ltd v Rossato (Rossato)*.[63] They said that the plurality in *Rossato* determined nothing more than that the distinction between casual and permanent employees could be determined by the terms of the contract of employment, and said nothing about the distinction between an employee and an independent contractor.[64]

McCourt's relationship with Construct was one of employment, because he supplied nothing but his own labour at an agreed hourly rate; he was not in business for himself; and he was subject to the direction and control of the host (Hanssen) as a consequence of the back-to-back operation of his own contract with Construct and Construct's labour supply contract with Hanssen.[65]

In *Jamsek*, the GG reasons stated that the principles applied by the Full Court of the Federal Court were correct, except for one reservation about the

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57 Ibid, at [110], [111], citing *Mynott v Barnard* (1939) 62 CLR 68 at 91; [1939] ALR 193; *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 469; [1946] ALR 390; *Byrne v Australian Airlines Ltd* (1955) 185 CLR 410 at 428; 131 ALR 422; *Visscher v Giudice* (2009) 239 CLR 361; 258 ALR 651; [2009] HCA 34 at [53]–[55].

58 *Personnel Contracting*, above n 2, at [130].

59 Ibid, at [132].

60 Ibid, at [143].

61 (2013) 209 FCR 146; 295 ALR 407; [2013] FCAFC 3 (*Trifunovski*) at [91].

62 *Personnel Contracting*, above n 2, at [139].

63 (2021) 392 ALR 39; [2021] HCA 23 (*Rossato*) at [58], [62], [65], [99].

64 *Personnel Contracting*, above n 2, at [141].

65 Ibid, at [158].

suggestion that the workers might have been both employees and contractors for different aspects of the contract.[66] Nevertheless they disagreed with the conclusions reached by the Federal Court, because two aspects of the relationship between ZG Operations and the workers pointed 'inexorably' to it being a commercial relationship, rather than a personal services contract.[67] The first was the obligation to supply and maintain expensive vehicles, so that payment made was for the provision of both capital equipment and labour.[68] The second was that the contracts were with partnerships, and all partners were jointly and severally liable for the obligations under the contract.[69]

Steward J reasons in *Personnel Contracting*

Steward J agreed with Gordon J's expression of the test to be applied in determining the character of an employment relationship,[70] but would have dismissed the CFMMEU's appeal in *Personnel Contracting* for what can only be described as policy reasons. He said that disturbing Construct's engagement practices now would create great disruption in the labour hire industry, because Construct and others like it had enjoyed many years of operation under the assumption that the contract considered in *Personnel Contracting No 1* reliably described an independent contracting relationship.[71] This begs the question of whether these earlier contracting practices were indeed legitimate in all cases, bearing in mind the 'totality of the relationship' test that the KKE and Gordon J reasons accepted as the orthodox approach, dating back to *Marshall v Whittaker's Building Supply Co*,[72] decided in 1963.[73] Steward J said that it was for the legislature, and not the courts, to address any problems arising from these practices. He referred to a government report prepared for the Howard Coalition government ahead of the enactment of the Independent Contractors Act 2006 (Cth) to assert that it was parliament's intention to encourage the use of this kind of 'entrepreneurial' work.[74] This is an aspect of *Personnel Contracting* that will no doubt attract a great deal of commentary, particularly given the extensive attention paid to the regulation of the labour hire industry in more recent times,[75] but falls outside of the scope of this preliminary assessment of the case.

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66 *Jamsek*, above n 3 at [85].
67 Ibid, at [86]–[88].
68 Ibid, at [88].
69 Ibid, at [89].
70 *Personnel Contracting*, above n 2, at [203].
71 Ibid, at [218]. Allsop CJ also alluded to this risk in *Personnel Contracting FCA*, above n 15, at [31].
72 *Marshall*, above n 26, at 217.
73 *Personnel Contracting*, above n 2, at [37].
74 Ibid, at [210], citing Standing Committee on Employment, Workplace Relations and Workforce Participation, *Making it Work: Inquiry into Independent Contracting and Labour Hire Arrangements*, Parliament of Australia, Canberra, 17 August 2005, at 34.
75 See A Forsyth, *Final Report: Victorian Inquiry into the Labour Hire Industry and Insecure Work*, Industrial Relations Victoria, Melbourne, 31 August 2016.

Key Significance of the Decisions

Australian courts and tribunals have now been warned that they cannot take account of the way a working relationship evolves in assessing employment status, at least, not when the parties have committed the terms of their agreement to a wholly written contract.[76] Both decisions affirm that it is the totality of the relationship between the parties that is assessed, and the ultimate question for determination is whether the worker is a subordinate working in the hirer's business, under the direction and control of the employer. Control may be proved by the worker's obligation to submit to the direction of a host who derives their power of control from a labour supply contract with the hirer.[77] It is, however, only the legal obligations arising from a binding contract between the parties that can be assessed to determine an answer to this question. Decisions of lower courts and tribunals that have applied the multiple indicia test from *Brodribb* to the reality of the relationship rather than to the 'rights and duties established by the parties' contract',[78] are now unreliable authorities, although few clues were provided about which particular decisions, apart from *Personnel Contracting No 1,* had strayed into error.[79] In this respect, the majority opinions in these decisions affirm the primacy of contract arguments that determined the result in *Rossato*.[80]

This most certainly does *not* mean that the labels the parties give to their relationships in contract documentation will prevail over a proper characterisation of the contract terms as a whole.[81] It is still emphatically the case that roosters masquerading as ducks will be exposed for what they truly are.[82] Nor does it invite parties to create works of fiction to disguise the true terms of their agreement. Subsequent conduct of the parties remains relevant to a range of potential arguments, including:

1. The contract is not wholly in writing but is wholly or partly oral, so that subsequent conduct of the parties may aid construction of the terms actually agreed by the parties at the time they entered the contract.[83]

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76 *Personnel Contracting*, above n 2, at [61] (KKE), at [162] (Gordon J, with whom Steward J agreed at [203]); *Jamsek*, above n 3, at [6] (KKE), at [95] (Gordon and Steward JJ). Gageler and Gleeson JJ would have permitted consideration of the 'manner of performance of the contract': *Personnel Contracting*, above n 2, at [132].

77 *Personnel Contracting*, above n 2, at [89] (KKE), at [154], [155] (GG), at [196] (Gordon J). See *Drake Personnel Ltd v Commissioner of State Revenue* (2000) 2 VR 635; 105 IR 122; [2000] VSCA 122 at [4], [55], [56], [78]; *Staff Aid Services v Bianchi* (2004) 133 IR 29. For commentary, see P Bomball, 'The Attribution of Responsibility in Trilateral Work Relationships: A Contractual Analysis' (2016) 29 *AJLL* 305.

78 *Personnel Contracting*, above n 2, at [61] (KKE).

79 Ibid, at [47] n 83, the KKE reasons suggested that *Trifunovski*, above n 61, at [107] and *Jensen v Cultural Infusion (Int) Pty Ltd* [2020] FCA 358 (19 March 2020) at [83], fell into error in the manner they applied the multifactorial test to the whole of the relationship.

80 *Rossato*, above n 63, at [58], [62], [65], [99].

81 See *Personnel Contracting*, above n 2, at [63]–[66] (KKE), at [127] (GG), at [184] (Gordon J). See also *Rossato*, above n 63, at [98].

82 *Personnel Contracting*, above n 2, at [127] (GG), at [184] fn 317 (Gordon J) reprised the submission of Michael Black QC in *Re Porter; Re Transport Workers Union of Australia* (1989) 34 IR 179 at 184: 'the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else calls it a duck'.

83 *Personnel Contracting*, above n 2, at [42] (KKE), at [187] (Gordon J).

2. The written contract has been varied, or discharged and replaced by a new oral contract.[84] Features of the parties' conduct of their relationship may be relevant to establishing the existence of a new contract.[85]
3. The written contract was a sham from the outset because it did not reflect the true agreement between the parties.[86]
4. The parties have so conducted their relationship, in a manner contrary to the terms of their relationship, that one party may be estopped from relying on the terms of the contract. This involves the somewhat arcane, but re-emerging doctrine of estoppel by convention.[87]

The court also mentioned those grounds which may justify refusal to enforce the terms of an otherwise valid written contract: equitable doctrines such as unconscionable dealing;[88] statutory remedies such as unfair contracts review;[89] and the application of some contrary statutory obligation overriding the parties' freedom to set their own terms.[90] So, far from providing a clear invitation to employers to draft up fictional contract documents to avoid protective employment regulation, these decisions have affirmed that employment status is a matter of law, not susceptible to misdescription by parties who want to avoid statutory obligations.

What remains of the multiple indicia test?

One of the more confusing aspects of these decisions is where they have left the 'multiple indicia' test established by the High Court in *Brodribb* and applied in *Hollis*. The 'mechanistic checklist' approach to applying this test has been roundly criticised in the KKE reasons in *Personnel Contracting*.[91] So does this mean that the Fair Work Commission must bin its own often-cited

84 Ibid, at [46] (KKE), citing *Narich Pty Ltd*, above n 26, at 601. See also *Personnel Contracting,* above n 2, at [177] (Gordon J).

85 See, eg, the argument that succeeded in *Quinn v Jack Chia (Australia) Ltd* [1992] 1 VR 567.

86 *Personnel Contracting,* above n 2, at [48]–[50] (KKE), at [177] (Gordon J); *Jamsek*, above n 3, at [8] (KKE), at [82] (GG).

87 *Personnel Contracting*, above n 2, at [43] (KKE), at [177] (Gordon J). See also *Thompson v Palmer* (1933) 49 CLR 507 at 547; *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641; 11 ALJR 272; *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd;* (1986) 160 CLR 226 at 244; 64 ALR 481. Denning LJ described this as estoppel by a 'course of dealing': *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1981] 3 All ER 577. For a recent application of estoppel by convention in an employment context, see *Leggett v Hawkesbury Race Club [No 3]* [2021] FCA 1658 (24 December 2021) at [158] (Rares J). For the principles of this doctrine generally, see R Durham, 'Estoppel by Convention — Parts I and II' (1997) 71 *ALJ* 860; 71 *ALJ* 976. See also MNC Harvey, 'Estoppel by Convention — An Old Doctrine with New Potential' (1995) 23 *Aust Bus Law Rev* 45; J Riley, 'Estoppel in the Employment Context: A Solution to Standard Form Unfairness?' [2007] *UNSWLRS* 49.

88 *Personnel Contracting*, above n 2, at [59] (KKE); *Jamsek*, above n 3, at [8] (KKE).

89 *Personnel Contracting*, above n 2, at [59] (KKE), citing the contracts review provisions in the Independent Contractors Act 2006 (Cth) Part 3; Contracts Review Act 1980 (NSW) Part 2; Industrial Relations Act 1996 (NSW) chap 2 Part 9; Industrial Relations Act 2016 (Qld) chap 11 Part 2 Div 4 Subdiv 7.

90 *Personnel Contracting*, above n 2, at [41] (KKE).

91 Ibid, at [34], [39].

decision, *Abdalla v Viewdaze Pty Ltd*?[92] The various factors themselves (such as control, ownership of vehicles, and rights to delegate) were applied in the analyses of the contracts in both *Personnel Contracting* and *Jamsek*. The KKE reasons (in a sentence marred by a double negative) said:

> The foregoing should not be taken to suggest that it is not appropriate, in the characterisation of a relationship as one of employment or of principal and independent contractor, to consider the 'totality of the relationship between the parties' by reference to the various indicia of employment that have been identified in the authorities.[93]

This suggests that all those 'various indicia' are relevant, but the assessment must be directed to answering the central question, of whether the worker serves in the business and under the control of the hirer. This is expressed in two bold headings in the KKE reasons in *Personnel Contracting*: 'Mr McCourt served in the business of Construct',[94] and 'Mr McCourt worked subject to the control of Construct'.[95] The checklist approach, and the balancing exercise trading one factor off against others, is to be abandoned, but the indicia remain relevant, to the extent that they assist in answering the essential question: does the putative employee serve in the business of the putative employer, under the control and direction of the employer?

Shams

Another question that will no doubt produce much academic commentary, is whether the United Kingdom Supreme Court's decision in *Autoclenz Ltd v Belcher (Autoclenz)*[96] can be relied on in Australia. *Autoclenz* concerned motor vehicle detailers who had been engaged on contracts containing clauses that were designed to make them look like independent contractors, such as an apparent entitlement to delegate work to others.[97] Despite these contractual provisions, the workers in fact enjoyed no genuine right to delegate work, and their working arrangements met all of the tests for employment, so the Supreme Court found that the written contract did not represent the true agreement between the parties, hence the workers were employees.[98] This decision is criticised in the KKE reasons for proposing a view that employment contracts are governed by different principles of interpretation than orthodox contract law principles.[99] And yet *Autoclenz* was decided on the basis that the parties' contract documentation was a sham,[100] disguising the true agreement between the parties.[101] The KKE reasons appear to accept the

92 (2003) 122 IR 215 at 229–31.
93 *Personnel Contracting*, above n 2, at [61], citing *Brodribb*, above n 23, at 29; *Hollis*, above n 12, at [24].
94 *Personnel Contracting*, above n 2, at [68].
95 Ibid, at [73].
96 [2011] UKSC 41 (*Autoclenz*).
97 Ibid, at [6].
98 Ibid, at [38], [39].
99 See *Personnel Contracting*, above n 2, at [60].
100 *Autoclenz*, above n 96, at [24]–[29], [38].
101 Ibid, at [38].

validity of early decisions of the Australian High Court that such subterfuges are shams, and do not preclude a finding of employment.[102]

The concept of a 'sham contract' in English law has been said to be confined to circumstances where both parties conspire to disguise the true nature of their dealings, perhaps for the purpose of avoidance of revenue statutes.[103] This limitation has already been ignored in the United Kingdom in *Autoclenz* itself, and should not constrain arguments based on shams in Australia, given that the FW Act chap 3 Div 6 — 'Sham Arrangements' treats a unilateral misrepresentation by an employer as such a 'sham arrangement'.[104] We can expect more arguments that written employment contracts are shams, following *Personnel Contracting*.

One wonders how an Australian court would now decide a case with facts similar to those in *Protectacoat Firthglow Ltd v Szilagyi (Protectacoat)*,[105] where an employer required workers to pair up so that they could be engaged as partnerships, instead of under individual personal service contracts. (Apparently, the employer adopted this strategy on the advice of an accountant).[106] This was clearly a stratagem to avoid employment obligations, because the employer was astute to guarantee its own customers that it 'absolutely' avoided engaging subcontractors, and only provided the services of highly skilled employees.[107] Despite the carefully crafted contract terms, the 'real' agreement between the parties was found to establish an employment relationship with each individual worker.[108] The factual scenario in *Protectacoat* was very different from the circumstances in *Jamsek*, where the partnerships between Whitby and Jamsek and their respective spouses do appear to have been genuine. One hopes, however, that the findings in *Jamsek* do not encourage 'armies of lawyers'[109] (and battalions of accountants) to promote *Protectacoat*-type stratagems for hiring unskilled labourers. The KKE reasons complained of 'obscurantism' in the approach taken by the Full Court of the Federal Court in *Jamsek,*[110] and also in *Rossato*.[111] Surely there is nothing more obfuscatory than a written contract that is nothing but a clever 'cloud of words'.[112] Courts should be astute to ignore the mist and focus on true substance. On one view, the approach taken by the United Kingdom Supreme Court in *Autoclenz* respects the spirit of contract law, by honouring the true agreement between the parties, rather than the words on some wad of paper.

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102 *Personnel Contracting,* above n 2, at [50], citing the reasons of Dixon, Fullager and Kitto JJ in *R v Foster* (1952) 85 CLR 138 at 151; [1952] ALR 182.

103 See G Anderson, D Brodie and J Riley, *The Common Law Employment Relationship: A Comparative Study,* Edward Elgar Publishing, Cheltenham, 2017, p 53, citing *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786.

104 See FW Act s 357(1).

105 [2009] IRLR 365; [2009] EWCA Civ 98.

106 Ibid, at [19].

107 Ibid.

108 Ibid, at [61].

109 *Consistent Group Ltd v Kalwak* [2007] IRLR 560 at [57] (Elias J).

110 *Jamsek*, above n 3, at [62] (KKE).

111 *Rossato*, above n 63, at [63], [99].

112 *Cam & Sons Pty Ltd v Sargent* (1940) 14 ALJ 162 at 163 (Dixon J). See also *Massey v Crown Life Insurance* [1978] 2 All ER 576.

Fate of the Odco contract

Another question raised by the *Personnel Contracting* decision concerns the fate of the standard 'Odco' contract that has been adopted in many labour hire contracts since the decision in *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (*Odco*).[113] This was the case brought by the BWIUA against a labour hire agency trading as 'Troubleshooters Available', arguing that tradespeople placed on building projects through this agency were employees and must join the union.[114] The court found that the workers were genuine independent contractors. The contract used to engage these tradies was reproduced in the case report, and subsequently became a useful precedent for many other hirers of labour who wanted to avoid employment obligations. *Odco* itself was arguably an uncontroversial decision. Many of the workers involved were running their own small plumbing, carpentry and electrical businesses, and were using the services of Troubleshooters to find subcontracting jobs. Other uses of the same contract were highly controversial. See, for example, the case of the itinerant tomato picker engaged on an Odco contract in *Country Metropolitan Agency Contracting Services Pty Ltd v Slater*,[115] who was found to be an employee in reality. Does the decision in *Personnel Contracting* mean that the Odco contract will always produce an employment relationship, regardless of the practical circumstances of the parties? The KKE reasons in *Personnel Contracting* decided that *Personnel Contracting No 1* was wrongly decided, and 'the same error infected the decision in *Odco*'.[116] If all that can be interrogated in a case where the parties have used the Odco contract are the terms of the written agreement itself, is it legitimate to consider the nature of the work in deciding whether the workers are truly employees? If the worker is a tradesperson running their own business and using the agency to find subcontracting jobs, will the fact that the High Court has now declared this contract to be an employment contract entitle them to various statutory benefits applicable to employment? Perhaps the answer to this lies in Gordon J's concession that 'recourse may be had to events, circumstances and things external to the contract which are *objective*, which are *known to the parties at the time of contracting* and which assist in identifying the purpose or object of the contract'.[117]

Contract interpretation principles for employment

Personnel Contracting and *Jamsek* settle (for the time being at least) the question of whether employment contracts form a special category that attracts different principles of construction and interpretation from

113 (1991) 29 FCR 104; 99 ALR 735.

114 The case predated the prohibition of closed shops by the Workplace Relations Act 1996 (Cth).

115 (2003) 124 IR 293. See also *Fair Work Ombudsman v Metro Northern Enterprises Pty Ltd* [2013] FCCA 216 (15 August 2013); *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346; 321 ALR 404; [2015] FCAFC 37.

116 *Personnel Contracting*, above n 2, at [86]. The other judgments did not affirm this view.

117 Ibid, at [187], citing a raft of commercial contract cases. Emphasis in original.

commercial contracts.[118] 'The proposition that a written contract of employment must be interpreted according to ordinary contract principles is not in doubt.'[119] What remains to be determined in subsequent decisions is the extent to which employment relationships test the many principles of contract construction that strain when confronted with disputes arising in long term relational contracts.[120] In *Personnel Contracting* and *Jamsek*, the court has acknowledged many qualifications to the central principle that wholly written contracts must be construed without reference to subsequent conduct of the parties: there may be proof of a variation, or discharge and replacement by a new oral contract, or the whole arrangement may be a sham. Subsequent conduct may even challenge the assertion that the contract is wholly in writing in any event.

Role of the courts and the legislature

A common refrain in recent decisions of the High Court of Australia is that any development of employment law is a matter for the legislature.[121] The problem with this view when it concerns the determination of the very existence of an employment relationship, is that the legislature itself has largely deferred to the courts the question of when a worker will benefit from the FW Act's protections by using the common law definition of employment to determine coverage of most of its provisions. Is it too speculative to suggest that Parliament's reasons for doing so might have been to enable the evolution of that concept, gradually and incrementally, as the courts adapted that definition to meet the social, economic and technological circumstances of the age? The definition of employment has evolved over time, as industrial practices and business enterprises have changed.[122] If Parliament had wanted to freeze the definition of employment, why did it not simply codify the definition prevailing at the time the Act was drafted? Lord Goff of Chieveley once described the common law as 'a living system of law, reacting to new events and new ideas, and so capable of providing ... a system of practical justice, relevant to the times in which [citizens] live'.[123] It appears that in Australia this is far too optimistic a view of the potential of the judicial branch of law-making. We must perpetually wait for a sticky-footed and distracted Parliament to act.

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118 See P Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (2015) 32 *JCL* 149; D Brodie 'The Autonomy of the Common Law of the Contract of Employment from the General Law of Contract' in M Freedland et al (Eds), *The Contract of Employment*, Oxford University Press, Oxford, 2016, p 124; Bomball, above n 1; G Golding 'The Distinctiveness of the Employment Contract' (2019) 32 *AJLL* 170.

119 *Personnel Contracting*, above n 2, at [124] (GG), at [88] (KKE).

120 See D Brodie, 'Relational Contracts' in M Freedland et al (Eds), *The Contract of Employment*, Oxford University Press, Oxford, 2016, p 145.

121 See *Commonwealth Bank of Australia Ltd v Barker* (2014) 253 CLR 169; 312 ALR 356; [2014] HCA 32 at [38]–[41]; *Rossato*, above n 63, at [62].

122 See A Merritt, 'The Historical Role of Law in the Regulation of Employment — Abstention or Interventionist?' (1982) 1 *AUJlLawSoc* 56; S Deakin and F Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution*, Oxford University Press, Oxford, 2005, pp 306–7; J Howe and R Mitchell, 'The Evolution of the Contract of Employment in Australia: A Discussion' (1999) 12 *AJLL* 113.

123 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 377.

Conclusions

In the end, the itinerant backpacker was found to be an employee entitled to award wages, and the owner-drivers were not entitled to substantial back payments after decades of operating through their own family partnerships. Few would make any serious objection to the outcomes in these cases. The reasoning in the cases is perhaps not so concerning as early media reports of the cases suggested.[124] In many respects, the majority simply reinforced established principles from earlier Australian High Court decisions, such as *Brodribb* and *Hollis*. The edict that we must not follow the approach taken by the UK Supreme Court in *Autoclenz* is disappointing, because that approach provided a short cut to taking actual work practices into account in determining employment status. Without that direct route, worker advocates will need to resort to the range of exceptions signalled in the judgments to argue that the parties' conduct was relevant to determining their mutual legal obligations. Conduct may assist in identifying the terms in an oral or partly oral contract, or in establishing that the contract has been varied or discharged. Conduct that is at odds with the written terms is useful evidence that the contract document is a complete sham, or that the parties are estopped (by convention) from relying on the contract. It is reassuring, at least, that the court has emphatically endorsed the principle that false labels can be ignored.

Labour engagement practices are evolving rapidly, as is shown by the many cases involving on demand workers in the so-called 'gig economy'.[125] The key lesson from *Personnel Contracting* and *Jamsek* is that we desperately need a legislated solution to the boundary problem.[126] A system that requires an itinerant backpacker to spend 6 years of his life pursuing litigation all the way to the High Court, just to be paid the minimum award wage for a few months work, is not serving our society or economy at all well.

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124 See, eg, 'High Court Rulings on Employment Relationships "Frightening"', *Workplace Express*, 9 February 2022.

125 See, eg, *Klooger v Foodora Australia Pty Ltd* (2018) 283 IR 168; [2018] FWC 6836 (16 November 2018); *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579 (11 May 2018); *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807 (12 July 2019); *Gupta v Portier Pacific Pty Ltd* [2020] FWCFB 1698 (21 April 2020); *Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818 (18 May 2021).

126 That solution might be to expand the definition of employment: see Stewart, above n 1; Stewart and McCrystal, above n 1. Or it might be the more radical proposal of extending certain protections to all workers regardless of employment status, suggested in M Rawling and J Munton, *Final Report: Proposal for Legal Protections of On-Demand Gig Workers in the Road Transport Industry*, University of Technology Sydney, Sydney, 2021.