



Legal Update

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On 9 February 2022, the High Court of Australia delivered two judgments dealing with the question of whether a person is properly considered an employee or an independent contractor. Whilst the cases were decided in the context of whether persons were employees for the purposes of the *Fair Work Act 2009* (Cth), the Court's observations about the manner in which the characterisation is to be made are likely to apply with equal force to the meaning of employment in the general law. In the insurance context, the decisions are likely to be of particular significance to workers compensation and third-party liability insurers.

In *CFMEU v Personnel Contracting Pty Ltd* [2022] HCA 1, a majority of the Court held that a labourer engaged by a labour-hire company was, for the purposes of the *Fair Work Act*, an employee of the labour-hire company. Despite the parties using the label of "self-employed contractor" to describe the relationship, the labourer was not an independent contractor. The majority held that, in the case of a wholly written employment contract, or where the parties have comprehensively committed the terms of their relationship to a written contract, the characterisation of that relationship as one of employment or otherwise must proceed by reference to the rights and obligations of the parties under that contract, construed according to established principles.

In *ZG Operations & Anor v Jamsek & Ors* [2022] HCA 2, two truck drivers ceased their employment with a trucking company and established partnerships with their respective wives.

The partnerships then contracted with the trucking company to provide delivery services. The truck drivers later claimed entitlements from the company said to be owed on the basis that the drivers were employees of the trucking company. The Court unanimously held that the truck drivers were not employees of the trucking company for the purposes of the *Fair Work Act*.

The decisions confirm the well-established principle that a consideration of the "totality of the relationship between the parties" is necessary in the characterisation of a relationship as one of employment or principal and independent contractor. However, the analysis does not, in every case, require consideration of the conduct of the parties over the course of the relationship. Rather, the Court emphasised that where there is a written contract, the analysis must start, and in some cases end, with the rights and obligations expressed therein.

The decision reinforces the importance for workers compensation insurers of carefully assessing the terms of employment contracts lest insureds unwittingly extend the scope of insurance cover to persons who are not employees and not otherwise caught by the deeming provisions of the legislation.

The decision may be of interest to third-party liability insurers. If the employer/employee relationship can be established despite attempts to label particular relationships otherwise, insurers may explore contribution from employers in breach of a non-delegable duty.