

AUSTRALIAN PRINCIPLES OF TORT LAW 5th EDITION

ADDENDUM TO CHAPTER 20

Since Chapter 20 was written, two 2022 Australian High Court decisions have made a significant change to the law affecting the way in which an employment relationship is identified at common law where there is a written agreement between the parties. These decisions have a direct effect on the discussion at 20.2.1.1. The law as stated in the cases discussed there, has been revised by the 2022 decisions.

The new cases are:

Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 (9 February 2022) (the *CFMMEU case*)

and

ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2 (9 February 2022) (the *ZG case*)

The *CFMMEU case* sets out the High Court's reasoning and a revised approach to the determination of whether or not an employment relationship exists where there is a contract between parties that sets out the terms and conditions of a work relationship. That decision was followed and applied in the *ZG case*.

The High Court has moved away from the approach taken in *Stevens v Brodribb* (1986) 160 CLR 16 and *Hollis v Vabu* (2001) 207 CLR 21 discussed at 20.2.1.1 which utilised a 'various indicia' or 'multi-factorial' approach considering the totality of the relationship between parties. The majority justices (Kiefel CJ, Keane and Edelman JJ, with whom Gordon and Steward JJ agreed) in each of the new decisions, favoured primary reference to the contract between the parties and in the absence of any dispute as to its validity, reliance on its terms rather than a review of the parties' 'dealings', to determine whether an employment relationship exists.

The following paragraph from the majority judgment in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 is instructive:

Where the parties have comprehensively committed the terms of their relationship to a written contract the validity of which is not in dispute, the characterisation of their relationship as one of employment or otherwise proceeds by reference to the rights and obligations of the parties under that contract. Where no party seeks to challenge the efficacy of the contract as

the charter of the parties' rights and duties, on the basis that it is either a sham or otherwise ineffective under the general law or statute, there is no occasion to seek to determine the character of the parties' relationship by a wide-ranging review of the entire history of the parties' dealings. Such a review is neither necessary nor appropriate because the task of the court is to enforce the parties' rights and obligations, not to form a view as to what a fair adjustment of the parties' rights might require. (Kiefel CJ, Keane and Edelman JJ [59])

The Court did not overrule the earlier authorities or the multi-factorial approach but stressed the primacy of the contract between the parties:

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. What must be appreciated, however, is that in a case such as the present, for a matter to bear upon the ultimate characterisation of a relationship, it must be concerned with the rights and duties established by the parties' contract, and not simply an aspect of how the parties' relationship has come to play out in practice but bearing no necessary connection to the contractual obligations of the parties. (Kiefel CJ, Keane and Edelman JJ [61])

The Court nevertheless made it clear that a 'label' attached to a relationship by the parties need not always be accepted, where it is "inconsistent with the rights and duties otherwise set forth" (Kiefel CJ, Keane and Edelman JJ [58]).

These 2022 decisions of the High Court certainly represent an important shift in approach to the way in which a work relationship should be analysed in order to determine its nature, either as one of employment or of contractor/principal. A written contract between the parties will be the primary focus.

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