



HIGH COURT OF AUSTRALIA

9 February 2022

ZG OPERATIONS & ANOR v JAMSEK & ORS
[2022] HCA 2

Today, the High Court allowed an appeal from a judgment of the Full Court of the Federal Court of Australia. The appeal concerned whether two truck drivers were engaged by a company as employees or independent contractors.

Between 1977 and 2017, Mr Jamsek and Mr Whitby ("the respondents") were engaged as truck drivers by a business run by the second appellant ("the company"). The respondents were initially engaged as employees of the company and drove the company's trucks. However, in 1985 or 1986, the company offered the respondents the opportunity to "become contractors" and purchase their own trucks. The respondents agreed to the new arrangement and set up partnerships with their respective wives. Each partnership executed written contracts with the company for the provision of delivery services, purchased trucks from the company, paid the maintenance and operational costs of those trucks, invoiced the company for its delivery services, and was paid by the company for those services. Income from the work performed for the company was declared as partnership income for the purposes of income tax and split between each respondent and his wife.

The respondents commenced proceedings in the Federal Court of Australia seeking declarations in respect of certain entitlements alleged to be owed to them pursuant to the *Fair Work Act 2009* (Cth), the *Superannuation Guarantee (Administration) Act 1992* (Cth) and the *Long Service Leave Act 1955* (NSW). The respondents claimed to be owed those entitlements on the basis that they were employees of the company. The primary judge concluded that the respondents were not employees, and instead were independent contractors. The Full Court overturned that decision and held that, having regard to the "substance and reality" of the relationship, the respondents were employees.

The High Court unanimously held that the respondents were not employees of the company. A majority of the Court held that, consistently with the approach adopted in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1, where parties have comprehensively committed the terms of their relationship to a written contract, the efficacy of which is not challenged on the basis that it is a sham or is otherwise ineffective under general law or statute, 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. After 1985 or 1986, the contracting parties were the partnerships and the company. The contracts between the partnerships and the company involved the provision by the partnerships of both the use of the trucks owned by the partnerships and the services of a driver to drive those trucks. The context in which the first contract was entered into involved the company's refusal to continue to employ the drivers and the company's insistence that the only relationship between the drivers and the company be a contract for the carriage of goods. This relationship was not a relationship of employment.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*