Personnel Australian High Court
The Written Contract
Some key comments/discussion from judges
August 2022

Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd
[2022] HCA 1
Date of Judgment: 9 February 2022
P5/2021

Overview of the case
CFMEU v Personnel Contracting (99 pages)
This case involved a dispute between a Perth labour hire company (Personnel Contracting) and the construction union the CFMEU. The CFMEU claimed that Personnel Contracting was paying labourers 25 percent below the required award rate. Personnel Contracting said that it was operating under a particular form of independent contractor labour hire. As such the workers were independent contractors, not employees and therefore the award rates did/do not apply.

The task of the High Court was to decide if the workers were employees or independent contractors.

The Court ruled (6 of the 7 judges) that the *workers were employees of Personnel Contracting.*

On our lay person's assessment the High Court (7 of the 7 judges) ruled that

> ***If a written contract is clear and comprehensive a court must primarily rely on the written contract in coming to a decision.**

Contents
What follows are some extracts from the High Court ruling.

The quotes in yellow highlight are the more significant statements made regarding the primacy of the written contract.

1. Justices KIEFEL CJ, KEANE AND EDELMAN JJ. (to 92)

12. It is unnecessary, and indeed inappropriate, to refer to the terms of the LHA (Labour Hire Agreement) in any greater detail because Mr McCourt was not a party to the LHA. His contract with Construct [the trading name of Personnel Contracting] was not affected by the terms of the LHA.

13. …under the ASA Construct had the right to subject Mr McCourt to the direction of Hanssen in respect of what work he was to do and how he was to do it.

14. [ASA is set out in full in this paragraph]

> 4. The Contractor's Obligations
> The Contractor shall:
> (a) Co-operate in all respects with Construct and the builder in the supply of labour to the Builder;
> (b) Ensure accurate records are maintained as to the amount of labour supplied to the builder by the Contractor;
> (c) Attend at any building site as agreed with the Builder at the time required by the Builder, and shall supply labour to the Builder (subject to notification under clause 5(c)) for the duration required by the Builder in a safe, competent and diligent manner;
> (d) Indemnify Construct against any breach by the Contractor of sub-paragraph 4(c) hereof;
> (e) Supply such tools of trade and equipment, for safety or other reasons, as may be required by the builder, in respect of which the Contractor is solely responsible;
> (f) Possess all statutory certification relevant to the supply of labour, and shall ensure that these certificates be both current and valid in Western Australia;
> (g) In the event that the Contractor reasonably considers that his safety is endangered by conditions on the building site, promptly report the unsafe conditions to Worksafe if unable to have the unsafe conditions rectified by the builder promptly;
> (h) Not represent himself as being an employee of Construct at any time or otherwise represent himself as authorised to act on behalf of Construct other than strictly under the terms of this Agreement.

16. Once Mr McCourt accepted an offer of work, his core obligation pursuant to cl 4(a) was to "[c]o-operate in all respects with Construct and [Hanssen] in the supply of labour to [Hanssen]". This included, pursuant to cl 4(c), the obligations to attend Hanssen's worksite at the nominated time, and to supply labour to Hanssen "for the duration required by [Hanssen] in a safe, competent and diligent manner".

19. The primary judge applied a "multifactorial approach"…

25. In the Full Court, Lee J applied a multifactorial approach …

32. Both the primary judge and the Full Court applied a "multifactorial test" to the determination of whether Mr McCourt was an employee of Construct.

33…Such a test (multifactorial) is apt to generate considerable uncertainty, both for parties and for the courts.

34 … It has never been suggested that the factors identified to be relevant are of equal weight in the characterisation of the relationship… avoid the injustice of a mechanistic checklist approach…

35. In this Court, the appellants submitted that the question whether a labourer is conducting his or her own independent business, as distinct from serving in the business of the employer, provides a more meaningful framework to guide the characterisation of the parties' relationship. There is force in that submission.

39. In this way, one may discern a more cogent and coherent basis for the time-honoured distinction between a contract of service and a contract for services **than merely forming an impressionistic and subjective judgment or engaging in the mechanistic counting of ticks on a multifactorial checklist.**

44. While there may be cases where the rights and duties of the parties are not found exclusively within a written contract, this was not such a case. **In cases such as the present, where the terms of the parties' relationship are comprehensively committed to a written contract, … there is no reason why the legal rights and obligations so established should not be decisive of the character of the relationship.**

45. In *Narich Pty Ltd v Commissioner of Pay-roll Tax*, (1983) ….Privy Council…said that

> "where there is a written contract between the parties whose relationship is in issue, a court is confined, in determining the nature of that relationship, to a consideration of the terms, express or implied, of that contract in the light of the circumstances surrounding the making of it; and it is not entitled to consider also the manner in which the parties subsequently acted in pursuance of such contract."

47. …courts have proceeded on an understanding that the approach stated in *Chaplin and Narich* has been superseded by the adoption of a multifactorial test ….But **no decision of this Court has ever adopted or endorsed such a departure from *Chaplin* and *Narich*.**

52. Prior to *Chaplin* and *Narich*, examples abound of this Court focussing only upon the terms of the contract, with any consideration of subsequent conduct of the parties …. In case after case after case, this Court can be seen to be applying basic, established principles of contract law rather than effecting a silent revolution.

58 … **It is the task of the courts to promote certainty with respect to a relationship** of such fundamental importance. Especially is this so where the parties have taken legitimate steps

to avoid uncertainty in their relationship. The parties' legitimate freedom to agree upon the rights and duties which constitute their relationship should not be misunderstood.

59. **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.

71. Construct retained a right of control over Mr McCourt that was fundamental to its business as a labour-hire agency.

75. Under the ASA, Construct was entitled to determine for whom Mr McCourt would work. Once assigned to a client, **Mr McCourt was obliged** by cl 4(a) to co-operate in all respects with Contruct and the builder… .

77. Mr McCourt had **no right to exercise any control** over what work he was to do and how that work was to be carried out. That state of affairs was attributable to the ASA, by which Mr McCourt's work was subordinated to Construct's right of control.

84. For the sake of completeness, it should also be said that the primary judge erred in concluding that the circumstances that Mr McCourt was free to accept or reject any offer of work**136**,…His right to reject an offer of work was exercisable at the level of an overall engagement with Hanssen, rather than on the basis of a new engagement each day.

86. In this regard, *Personnel (No 1)* was wrongly decided, the critical error of the reasoning of the majority being the attribution of decisive significance to the parties' description of their relationship in a manner so as to "remove [the] ambiguity" generated by other factors in the analysis pointing in opposite directions. ...

2. GAGELER AND GLEESON JJ. (to 162)

93. ‘ordinary’ meanings is ‘common law’.

94. approaches from vicarious liability perspective.

102. Our conclusion on the ultimate issue is that, whilst Mr McCourt was not employed by Construct merely by reason of having entered into the ASA, **Mr McCourt was employed by Construct during each of those periods by reason of what then occurred in the performance of the ASA.**

112 Here, again for reasons that will eventually be explained, Mr McCourt and Construct in fact established and maintained continual relationships for the doing of work….

113. Where a continual relationship under which work is done by an individual in exchange for remuneration in fact exists, …..The **first is the extent of the control** that the putative

employer can be seen to have over how, where and when the putative employee does the work. The **second is the extent** to which the putative employee can be seen to work in **his or her own business** as distinct from the business of the putative employer. …A **third consideration** … is the extent to which the work done by the putative employee can be seen to be **integrated** into the business of the putative employer

114 Each consideration is a matter of degree. None is complete in itself.

119. The overall experience of the common law has taught "respect for the humble particular against the pretentious rational formula". … "there is no shorthand formula or magic phrase that can be applied …all of the incidents of the relationship must be assessed and weighed with no one factor being decisive"

120 Through that case-by-case – "multi-factor", "**multi-factorial"** or multiple "indicia" – approach, the common law has shown itself to be "sufficiently flexible to adapt to changing social conditions"

121. The reality is that, for so long as employment at common law is to be understood as a category of relationship that exists in fact, "it is the **totality of the relationship** between the parties which must be considered".

122. Here, and again for reasons that will eventually be explained, the most significant indication that the relationships between Mr McCourt and Construct during the two relevant periods were relationships of employment was the **degree of control that Construct ultimately had** over how Mr McCourt physically performed his labour. Construct had that **control through the combined operation of Mr McCourt's contractual obligations to it under the ASA** and its relationship with Hanssen under the LHA.

124. The proposition that a written contract of employment must be interpreted according to ordinary contractual principles is not in doubt.

125 The uncertainty that has arisen is rather as to whether the inquiry into the nature of a relationship that has been established and maintained under a written contract is limited to consideration of the terms of the contract to the exclusion of consideration of the manner of performance of the contract.

126 The source of the uncertainty can be traced to the decision of the Privy Council in *Narich Pty Ltd v Commissioner of Pay-roll Tax* [1983] There, just three years before the ultimate abolition of appeals to it, the Privy Council stated three “governing principles”:

> "The first principle is that, subject to one exception, where there is a written contract between the parties whose relationship is in issue, a court is *confined*, in determining the nature of that relationship, to a consideration of the terms, express or implied, of that contract in the light of the circumstances surrounding the making of it; *and it is not entitled to consider also the manner in which the parties subsequently acted in pursuance of such contract*. The one exception to that rule is that, where the subsequent conduct of the parties can be shown to have amounted

to an agreed addition to, or modification of, the original written contract, such conduct may be considered and taken into account by the court.

The second principle is that,…. the most important … criterion … is the extent to which the person … is under the direction and control of the other party to the contract…

The third principle… the parties cannot alter the truth of that relationship by putting a different label upon it … On the other hand, if their relationship is ambiguous ..., then the parties can remove that ambiguity by the very agreement itself ….

130 ….Focusing exclusively on the terms of the contract loses sight of the purpose for which the characterisation is undertaken. That purpose is to characterise the relationship.

136 Since *Narich*, the existence of a relationship of employment at common law has been squarely considered by this Court only in *Stevens v Brodribb Sawmilling Co Pty Ltd* and *Hollis v Vabu Pty Ltd*. It may be conceded that neither of those cases concerned a relationship formed under a contract wholly in writing. …

139 Mostly, however, trial and intermediate appellate courts have taken their cue from *Stevens* and *Hollis* in assuming that, despite what was said in *Narich*, "the nature of the relationship may be legitimately examined by reference to the actual way in which work was carried out". ….

143 The true principle, in accordance with what we understand to have been the consistent doctrine of this Court until now, is that a court is not limited to considering the terms of a contract and any subsequent variation in determining whether a relationship established and maintained under that contract is a relationship of employment. The court can also consider the manner of performance of the contract. **That has been and should remain true for a relationship established and maintained under a contract that is wholly in writing,** just as it has been and should remain true for a **relationship established and maintained under a contract expressed or implied in some other form or in multiple forms**.

148 During each of those two periods in which a continual relationship under which Mr McCourt was to perform work existed**, Mr McCourt was obliged under the ASA** to attend Hanssen's building site and there to supply his labour to Hanssen in a "safe, competent and diligent manner". He was **obliged to ensure** that accurate records were maintained of his hours of labour**.**

…

3. GORDON J from 161

162. The resolution of the central question requires consideration of the totality of the relationship between Construct and Mr McCourt, which must be determined by reference to the legal rights and obligations that constitute that relationship**. Where the parties have entered a wholly written employment contract, as in this case, the totality of the relationship which must be considered is the totality of the legal rights and obligations**

provided for in the contract, construed according to the established principles of contractual interpretation. In such a case, the central question neither permits nor requires consideration of subsequent conduct and is not assisted by seeing the question as involving a binary choice between employment and own business. The totality of the relationship between Construct and Mr McCourt was that of employer and employee.

165. The **terms of the contract were set out in the ASA, supplemented by the Contractor Safety Induction Manual, which** was found by the Full Court of the Federal Court of Australia to be "contractual in nature". Mr

170. They (CFMEU) alleged that Mr McCourt was not paid or treated according to the Building and Construction General On-Site Award 2010 ("the Award").

173 It follows that, in the case of **a wholly written employment contract, the "totality of the relationship" which must be considered is the totality of the legal rights and obligations provided for in the contract.**

180 In construction of an employment contract it is not necessary to ask whether the purported ***employee*** **conducts their own business.** That is, the inquiry is not to be reduced to a binary choice between employment or own business. The question must always focus on the nature of the relationship created by the contract between the parties.

181 **Asking whether a person is working in their own business may not always be a suitable inquiry for modern working relationships. It may not take very much for a person, be they low-skilled or otherwise, to be carrying on their own business**. The reality of modern working arrangements, the gig economy, and the possibility that workers might work in their own business as well as one or more other businesses in the same week, suggest that focusing the analysis on "own business" considerations distracts attention from the relevant analysis – whether the totality of the relationship created by contract between the person and a purported employer is one of employee and employer. The

182 Another reason for not asking whether a person is carrying on a business of their own is that that inquiry will ordinarily direct attention to matters which are not recorded in the contract, ... But, unless those matters are provided for in the contract, they are not relevant and should be put to one side.

183 **The better question to ask is whether, by construction of the terms of the contract, the person is *contracted to work in the business or enterprise of* the purported employer**.

187 … **relatedly, that it is not legitimate to have regard to subsequent conduct to construe a contract.** There are good reasons for adhering to those principles. Otherwise, contrary to those principles, consideration of subsequent conduct might in some cases result in the nature of an employment relationship changing over time – on the day after a contract is formed, …The potential for the legal character of a relationship between two parties to be

affected by "unilateral" conduct of one party that may be unknown to the other party (for example, how one party administers their tax affairs; …

189 Following *WorkPac*, **the multifactorial approach applied in previous authorities must be put to one side** when characterising a relationship as one of employment under a contract. …

193 The contract between **Construct and Mr McCourt was wholly in writing** …This clause is significant. It **gave Construct the central role in relation to, and control over**, key aspects of the work to be …

200 The totality of the relationship between Construct and Mr McCourt provided for by the ASA was that of employer and employee….