HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S27/2021
File Title:	ZG Operations Australia Pty Ltd & Anor v. Jamsek & Ors
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **ZG OPERATIONS AUSTRALIA PTY LTD (ACN 060 142 501) & Anor**

Appellants

and

MARTIN JAMSEK & Ors
Respondents

RESPONDENTS' OUTLINE OF ORAL ARGUMENT

Part I:

1. This outline is in a form suitable for publication on the internet.

Part II:

2. The submissions of the amicus curiae do not arise, *inter alia*: the Full Court did not make a finding that Mr Jamsek and Mr Whitby had any entitlements including under the *Long Service Leave Act 1955* (NSW); all but one of the drivers claims were made under the relevant Federal award (CAB 9 [7]); sections 26 to 30 *Fair Work Act 2009* (Cth) (**FW Act**) operate to exclude section 313 of the *Industrial Relations Act 1996* (NSW); and, prior to the relevant Commonwealth legislation, and if not time barred, there is a factual question about section 6 of the *Long Service Leave Act 1955* (NSW).

3. The appellants' appeal raises three issues:

   (a) *first,* a question of principle as to whether there is a dichotomy between, on the one hand, being employed and, on the other, conducting one's owns business;

   (b) *secondly,* a question of fact as to whether the Full Court was correct to conclude in all the circumstances that Mr Jamsek and Mr Whitby:

      (i) were "employees" of the appellants within the meaning of section 335 and item 1 in table at section 342(1) of the FW Act and for the purposes of section 12(1) of the *Superannuation Guarantee (Administration) Act 1992* (Cth) (**SGA Act**); and

      (ii) were "workers" for the purpose of section 3 of the *Long Service Leave Act 1955* (NSW); and

   (c) *thirdly,* if those questions are answered in favour of the appellants, a further question of fact as to whether Mr Jamsek and Mr Whitby worked under contracts that were wholly or principally for their labour within the meaning of section 12(3) of the SGA Act.

4. The exchange of the parties' written submissions indicates that is no question of principle. Neither party contends that person can undertake exactly the same labour in

their own business and in an employer's business. The appellants misconstrue the Full Court's observations at [7].

- *Ace Insurance Ltd v Trifunovski* (2011) 200 FCR 532 at [95] (provided 20/8)
- Full Court judgment, CAB 76 [7]
- Reply submissions at [2] and [3].
- *Hollis v Vabu* (2001) 207 CLR 21 (JBA page 161)

5. It is well-established that partners in a partnership can undertake external roles and be required to the partnership for their income from those roles. That is what happened in this case and is consistent with the conclusion of employment.

- *Collins v Jackson* (1862) 31 Beav 645; 54 ER 1289 (JBA page 427)
- *Carlyon-Britton v Lumb* (1922) 38 TLR 298 (JBA page 409)
- Section 309(1)(b), *Industrial Relations Act 1996* (NSW)

6. This appeal in substance simply seeks that this Court again re-evaluate the facts and apply the well-established multifactorial test to determine the "totality" of the relationship. This should still result in the conclusion that Mr Jamsek and Mr Whitby were employees for the reasons given by the Full Court.

(a) "Intentions behind the 1986 Contract" (CAB 118 [192] – [201]). The appellants embrace paragraphs [188] to [190] but reject the analysis in [192] to [201] - effectively on the basis that the motives of the drivers in entering the agreements is irrelevant (AS [64]). That is not correct, the multifactorial test looks to the substance of the relationship.

(b) "Contributions of the vehicles" (CAB 122 [202] – [208]). The purchase of the trucks was a significant capital outlay by the drivers: CAB 123 [205]. The trucks were not a "substantial asset" for most of the the parties' relationship. The drivers had been compelled to arrange for the purchase the trucks as part of the employment ultimatum given in 1985 and, for most of the time, were adorned with the appellants logo (CAB page 123 at [206]). This consideration is also often seen as a composite one with the degree to which the capital equipment involves special skills and training (CAB 123 [207]). The drivers did not exercise any significant additional skills in driving the trucks (and certainly not the ute).

- *Re Porter; Re* Transport *Workers Union of Australia* (1989) 34 IR 179

(c) "Broad contractual mechanics" (CAB 124 [209] – [211]). There was a single written agreement made with all drivers and, with one exception, their spouses, in terms which made clear the men were to do the work (RBFM, part 1, page 12 – 33).

(d) "Day to day control of the drivers" (CAB 125 [212] – [225]). The appellants had effectively the same control over the drivers as prior to 1986 (RBFM, part 1, page 52 [12], 53[22], 55 [32], 66 [12]. The drivers and their trucks were dressed in the livery – or "get up" – of the appellants. This encouraged the appellants clients to

identify the drivers as part of their staff; and it would not have been misleading to describe the drivers as representatives of the company.

(e) "Exclusivity of work and the right to subcontract" (CAB 131 [226] – [233]). The contract allowed the men taking "sick" days (and therefore acknowledged their work could not be readily delegated). Only once in 30 years did someone else drive one of the trucks (RBFM, part 2, page 153 line 15).

(f) "Capacity to generate goodwill" (CAB 134 [234] – [237]). Mr Jamsek and Mr Whitby entered into only one transaction of substance being solely their work for the appellants. Clause 2(1)(k) of the contract prevented them from generating goodwill. The appellants new arguments in this Court were never put the drivers and it was for the appellants to adduce that evidence.

- *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 cited with approval in *Commissioner of State Revenue v Placer Dome Inc* (2018) 265 CLR 585 at [69].

(g) "Absence of written contracts" (CAB 135 [238] – [241]). The absence of written contracts for lengthy periods of time indicated more of an employment relationship.

7. In the alternative, Mr Jamsek and Mr Whitby were "employees" under the extended definition in section 12(3) of the SGA Act. Section 12(3) requires:

(a) there should be a 'contract';

(b) that the contract is wholly or principally 'for' the labour of a person; and

(c) that the person must 'work' under that contract.

- *Dental* Corporation *Pty Ltd v Moffet* [2020] FCAFC 118; 278 FCR 502 (JBA 431).
- *Gray v Mercantile Mutual Insurance (Australia) Limited* (1994) SASR 154 (JBA 458)

8. That question of whether the contract is "principally' for the labour of a person cannot be undertaken by a simple analysis that there are two purposes and to assume each is equal. Some analysis of the substantive facts must be undertaken to determine whether the purpose of "labour" is the main or chief purpose from the perspective of the putative employer.

9. Using the metric of money, the contracts were "principally" for the labour and Mr Jamsek and Mr Whitby and not the trucks they brought with them.

10. There are no floodgates arising from the respondents' construction: see section 12(11) of the SGA Act and the question as to whether the contract is for "labour" within the meaning of section 12(3) or for a given result.

Noel Hutley Rachel Francois Ashley Crossland

1 September 2021