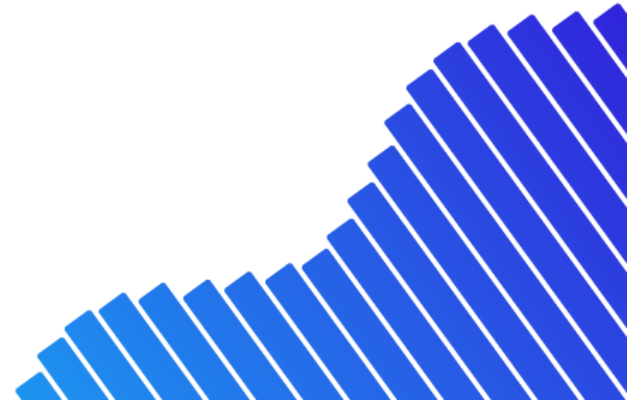


Case Summary

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Correct as of 14 July 2022



JMC Pty Ltd v Commissioner of Taxation – Employee vs contractor (higher education provider)

[*JMC Pty Ltd v Commissioner of Taxation*](#) [2022] FCA 750

Federal Court of Australia

Wigney J

Date: 23 June 2022

Decision: in favour of the Commissioner

Synopsis of decision

The Federal Court held that an individual engaged by the Applicant to lecture and mark exams was an employee under both the ordinary meaning in section 12(1) of the *Superannuation Guarantee (Administration) Act 1992 (SGAA)* and the extended definition under section 12(3) of the SGAA. Accordingly, the Court upheld the assessments of superannuation guarantee (SG) charges issued by the Commissioner, finding that the Applicant was liable and failed to pay superannuation contributions in respect of the services provided by the lecturer.

Facts

Background

JMC Pty Ltd (**JMC** or **the Applicant**) provides higher education in the creative arts sector. JMC engaged Mr Nicholas Harrison (**Mr Harrison**), a qualified sound engineer, to lecture students and mark exams from 1 April 2013 to 30 June 2016 and from 1 July 2017 to 31 March 2018 (the relevant periods).¹

Mr Harrison provided his services to JMC pursuant to a series of rolling contracts, comprising more than 20 contracts, entered into from July 2011 to August 2017.

¹ *JMC Pty Ltd v Commissioner of Taxation* [2022] FCA 750 at [1].

Mr Harrison provided his services to JMC on the following terms:²

- Mr Harrison was paid at an hourly rate for lecturing students and marking exams.
- Mr Harrison submitted invoices to JMC, detailing the particulars of his teaching services and supported by timesheets and signed lesson plans.
- JMC's managing academic officer had oversight and control over when, how, and where Mr Harrison provided his teaching services.
- Although Mr Harrison was allowed to delegate his teaching responsibilities, any subcontracting party would need to be appropriately qualified to perform the services required. JMC had an unconditional right to decline the delegate, or the decision to delegate altogether.³ Further, Mr Harrison could only sub-contract or assign the contracted services if he obtained JMC's written consent. He was unable to unilaterally decide to sub-contract or assign the services.

During the relevant periods, JMC paid Mr Harrison according to the invoices he submitted. However, JMC did not make any superannuation contributions for Mr Harrison, as they considered that he was an independent contractor, not an employee.⁴

Disputes between JMC and the Commissioner

On 25 March 2019, the Commissioner issued JMC with notices of assessment of SG charges for the relevant periods in relation to Mr Harrison's services. These assessments totalled \$17,369.63, including the nominal interest component and the administration component.

The Commissioner considered that Mr Harrison was an employee for the purposes of the SGAA because he was:⁵

- an employee under the ordinary meaning of that term in section 12(1); or
- an employee under the extended definition in section 12(3) as he worked under contracts that were 'wholly or principally for his labour'.

OBJECTION AND APPEAL

On 22 May 2019, JMC lodged objections against the Commissioner's SG charge assessments. On 17 January 2020, the Commissioner disallowed JMC's objections, upholding the assessments. JMC then appealed the Commissioner's objection decision to the Federal Court, asserting that the assessments should be set aside in full by allowing its objections.⁶

² Ibid, at [2].

³ Ibid, at [92]–[93].

⁴ Ibid, at [3].

⁵ Ibid, at [5].

⁶ Ibid, at [6].

Decision

Wigney J dismissed JMC's appeal and agreed with the Commissioner that Mr Harrison was an employee under both the ordinary and extended meanings of the term pursuant to the SGAA. Although he conceded that the application of the ordinary meaning of an employee was difficult in this case, Wigney J explained that the sum of all the legal rights and obligations in the relevant contracts pointed to the conclusion that Mr Harrison was engaged as an employee.⁷

Ordinary meaning of employee – section 12(1) of the SGAA

Wigney J began by noting that the ordinary meaning of an employee under section 12(1) is based on principles from established case law.⁸

HISTORICAL APPLICATION OF MULTIFACTORIAL TEST

His Honour observed that, initially, both JMC and the Commissioner proceeded on the basis that the determination of whether one person was employed by another at common law involved a multifactorial assessment of the 'totality of the relationship'⁹ and that the relationship was not to be found merely from the contractual terms, but also from the 'system which was operated thereunder' and the 'work practices imposed'.¹⁰

Given the state of the authorities at the time, numerous Full Federal Court decisions had applied the multifactorial test including:¹¹

- [ACT Visiting Medical Officers Association v Australian Industrial Relations Commission](#) [2006] FCAFC 109 at [19] (Wilcox, Conti and Stone JJ)
- [FCT v Jayasinghe](#) [2016] FCAFC 79 at [57] (Pagone and Davies JJ)
- [ACE Insurance Ltd v Trifunovski](#) [2013] FCAFC 3.

FUNDAMENTAL PRINCIPLES ESTABLISHED BY RECENT AUTHORITIES

However, His Honour went on to observe that two recent High Court decisions¹² have 'moved the goalposts ... or affirmed where the goalposts had always been, or should always have been seen to have been' in relation to the ordinary meaning of an employee.¹³

⁷ Ibid, at [8].

⁸ Ibid, at [13].

⁹ [Stevens v Brodribb Sawmilling Co Pty Ltd](#) [1986] HCA 1 at [29] (Mason J).

¹⁰ [Hollis v Vabu Pty Ltd](#) [2001] HCA 44 at [24] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); see also [47].

¹¹ [JMC Pty Ltd](#) at [14].

¹² See [Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd](#) [2022] HCA 1 ([Personnel Contracting](#)) and [ZG Operations Australia Pty Ltd v Jamsek](#) [2022] HCA 2 ([Jamsek](#)).

¹³ [JMC Pty Ltd](#) at [15].

His Honour summarised the key principles as follows:

Key principles from recent case law

1 If the rights and obligations of the parties have been comprehensively recorded in a written contract, the terms and conditions specified in the contract are decisive in determining whether the parties are in an employer-employee relationship provided that:

- the validity of the contract has not been challenged as a sham; or
- the terms of the contract have not been varied, waived or are subject to an estoppel.

In characterising the contract and the nature of the relationship between the parties, the focus should be on construing the contract at the time it was entered into.¹⁴

2 In determining the rights and obligations of the parties to an employment contract, the established principles of contractual interpretation should be used. The Court may consider the following in doing so:¹⁵

- the circumstances around the making of the contract
- events and circumstances external to the contract that are objective, mutually known to the parties at the time of contracting and that assist in identifying the purpose or object of the contract
- the nature of the specific job that the individual applied for
- the nature and extent of any tools or equipment they are required to supply for that job.

Evidence of anything said or done by the parties after the contract was made is generally irrelevant.

3 Circumstances, facts or occurrences that do not affect the parties' legal rights and obligations are irrelevant in determining the nature of the relationship between the parties. The focus should be on the rights and obligations of the parties as set out in the contract rather than on how an aspect of the relationship between the parties has played out that has no particular connection to the parties' contractual obligations.

Thus, it is unnecessary and inappropriate to perform an extensive review and analysis of the historical dealings between the parties.¹⁶ The actual conduct of the parties becomes relevant only where the parties' behaviour shows that the contract was a sham or the contract has been varied.¹⁷

¹⁴ Ibid, at [17].

¹⁵ Ibid, at [18].

¹⁶ Ibid, at [19].

¹⁷ Ibid, at [20].

Key principles from recent case law

- 4 The provisions in a contract that are relevant to determining the nature of the relationship between the parties include (but not limited to):¹⁸
- Remuneration
 - Provision and maintenance of equipment
 - Obligation to work
 - Hours of work
 - Provision for holidays
 - Deduction of income tax
 - Delegation of work
 - The right to exercise direction and control.

Where the contract is wholly in writing, this list of possible indicia should now be approached by focusing on the parties' contractual rights and obligations relevant to those matters, rather than on the way in which the work was actually carried out.

- 5 Although not determinative on their own, the Court should consider the extent to which:¹⁹
- the supposed employer has the right to control how, when and where the supposed employee performs the work; and
 - the supposed employee can be seen to be working in their own business rather than for the supposed employer's business.

Determining the existence of the element of control assists in assessing whether a relationship should properly be regarded as a contract *of* service rather than a contract *for* services.²⁰

- 6 Any labels or terms used by the parties to describe their relationship should be disregarded where they are inconsistent with the rights and obligations set out in the terms of the contract.²¹

Characterising the parties' relationship should not be approached on the basis that there is some checklist against which ticks and crosses may be placed so as to produce the right answer. Some degree of uncertainty is unavoidable, particularly in the case of many modern-day work or service contracts.²²

¹⁸ Ibid, at [21].

¹⁹ Ibid, at [23].

²⁰ Ibid, at [24].

²¹ Ibid, at [26].

²² Ibid, at [27].

Application of the ordinary meaning of employee to the present case

In stating that the question of Mr Harrison's relationship with JMC was 'not entirely straightforward', Wigney J noted some factors indicated that Mr Harrison may have been engaged by JMC as an independent contractor.

However, on balance, His Honour ultimately concluded that the relationship between JMC and Mr Harrison was that of employer and employee (under the ordinary meaning of that term), not principal and independent contractor, based on the following factors:

1. **Contracting parties:** JMC contracted with Mr Harrison directly as an individual, rather than as a partnership or through an association with another company; nor was he carrying on a separate business.²³
2. **Control:** JMC had significant rights under the contracts to supervise and control how Mr Harrison provided his teaching services.
 - JMC necessarily needed to have significant supervision and control over Mr Harrison to satisfy the requirements of being an accredited tertiary education provider, which included meeting teaching requirements.²⁴
 - His Honour also regarded that the requirement to provide signed lesson plans with his invoices was not merely an administrative requirement, but ensured that Mr Harrison conformed to the detailed and prescriptive lesson plans. The contracts gave JMC the right to take disciplinary action against Mr Harrison where his lectures deviated from these plans.²⁵
3. **Power of delegation:** Although JMC argued that Mr Harrison's right to delegate or subcontract his work meant that he was a contractor, His Honour rejected this claim. In practice, Mr Harrison's right to delegate or subcontract was subject to receiving written consent from JMC. As such, Mr Harrison's right to subcontract his services was extremely limited and resembled more of those rights that an employee would have.²⁶
4. **Mode of remuneration:** Mr Harrison was remunerated at an hourly rate to provide teaching services, rather than to provide or produce a result. This was because Mr Harrison was paid based on his time providing services and the terms of the contract explicitly referring to 'teaching services' rather than producing specified results or outcomes.²⁷

²³ Ibid, at [88]–[89].

²⁴ Ibid, at [95]–[97].

²⁵ Ibid, at [108]–[110].

²⁶ Ibid, at [118]–[121] and [130].

²⁷ Ibid, at [150]–[153].

5. **Provision of tools and equipment:** JMC provided and maintained the equipment that Mr Harrison would use to provide his teaching services. His Honour explained that there was substantial equipment provided and made available by JMC for Mr Harrison to provide his services, and that he was required to obtain consent from JMC to use his own equipment. Further, it was mutually known to both parties when the contract was entered into, suggesting that Mr Harrison was being engaged to provide his labour in JMC's business as an employee.²⁸
6. **Intellectual property:** Any intellectual property that was created while Mr Harrison provided his teaching services vested in JMC, revealing a subservience in the relationship between Mr Harrison and JMC. His Honour noted that, if Mr Harrison were a contractor, it would be expected that he would retain the intellectual property in any recordings made in the course of providing his services.²⁹
7. **Integration into employer's business:** The terms and conditions of the contracts between JMC and Mr Harrison suggested that Mr Harrison was engaged to work as part of JMC's business and was effectively integrated into that business. On its website, JMC held out Mr Harrison to be a lecturer in its business. Further, JMC's business model involved engaging lecturers who were integral to and integrated into its business. His Honour observed that there was little to no indication that Mr Harrison was engaged as a contractor working in his own business while providing his teaching services to JMC.³⁰

Extended meaning of employee – section 12(3) of the SGAA

Although Wigney J found that Mr Harrison was an employee of JMC within the ordinary meaning of that term, His Honour felt it necessary and desirable to also consider whether Mr Harrison fell within the extended meaning of employee in section 12(3).

His Honour began by stating that three elements must be satisfied in order for a person to be regarded as an employee under the extended definition:³¹

1. there must be a contract;
2. the contract must be wholly or principally for that person's labour; and
3. the person must work under the contract.

His Honour qualified that a contract is not wholly or principally for a person's labour if the contract is for the production of a result and the person is paid for the result.³²

²⁸ Ibid, at [155]–[157].

²⁹ Ibid, at [158] and [159].

³⁰ Ibid, at [176]–[180].

³¹ Ibid, at [29] citing [Dental Corporation Pty Ltd v Moffet](#) [2020] FCAFC 118, per Perram and Anderson JJ, Wigney J agreeing, at [82], [111] and [115].

³² Ibid, at [31].

Application of the extended definition of employee to the present case

Wigney J began by noting that the first and third elements of the extended definition were clearly satisfied, as there were a series of contracts between JMC and Mr Harrison under which Mr Harrison relevantly worked.³³

As for the second element, His Honour stated that the assessment needs to be made from the perspective of the supposed employer (i.e. JMC) and based on the terms of the contract. The key issue is whether the benefit the supposed employer receives from entering into the contract is wholly or principally the labour of the supposed employee.³⁴

His Honour ultimately concluded that the contracts were wholly or principally for Mr Harrison's labour.³⁵ Although JMC contended that the contracts were for the production of a result, His Honour noted that Mr Harrison's remuneration would have been based on the completion of units or marking of exams, rather than based on the hours he worked.³⁶

Further, although JMC argued that Mr Harrison's right to delegate meant that he was not an employee, His Honour noted that his right to delegate his work was so narrow that it was unlikely to ever be exercisable or exercised. Mr Harrison's right to sub-contract was not unilateral and could be exercised only with JMC's written consent. JMC therefore effectively had an unfettered discretion to refuse to give its consent. Practically, Mr Harrison was not free to do the work himself or to employ other persons to carry out the work. His Honour explained that at the time the contract was entered into, it was always understood that Mr Harrison would provide the teaching services personally.³⁷

Significance of the decision

Clarification of the ordinary meaning of employee

The present case is important, as it is the first case to apply the High Court's landmark decisions in *Personnel Contracting and Jamsek*. Earlier cases have suggested that the conduct and behaviour of the parties may be relevant in determining whether an individual is an employee for the purposes of the SGAA. However, the High Court's decisions and that of the Federal Court in the present case all emphasise that – in the absence of a sham, or some other variation or displacement by conduct – the terms of the contract should be accepted over the traditional multifactorial test.

³³ Ibid, at [189].

³⁴ Ibid, at [191].

³⁵ Ibid, at [199].

³⁶ Ibid, at [190].

³⁷ Ibid, at [197].

This signifies a subtle shift in characterising the relationship between the parties. Practically, and ideally, the contract should address the key factors of delegation, basis of payment, provision of equipment, liability, control and independence so that the terms of the contract can be accepted on their face.

Due to these developments in the ordinary meaning of an employee, it is crucial that employees who are relying on previously established case law review their current contracts and arrangements with their supposed contractors to ensure they are not, in fact, employees – either within the ordinary meaning of that term or the extended meaning in section 12(3) of the SGAA

This is important, as the penalties and charges for non-compliance with the SG rules are significant, even where an employer honestly believes that an individual is not an employee.

The ATO website guidance for distinguishing between an employee and a contractor can be found [here](#).

The right to delegate

The present case also demonstrates that the mere right to delegate is not decisive of whether an individual is a contractor. Although the right to delegate duties and the performance of work may be a strong indicator that an individual is a contractor, consideration must still be given to the full terms and conditions set out in the contract.

Additionally, employers should consider whether the right to delegate is a full right, or a heavily limited and fettered right as was found in the present case. As the present case illustrates, the existence (or absence) of a right to delegate may affect the application of both the ordinary and extended meanings of an employee for SG purposes.

Accordingly, employers should consider whether their arrangements and contracts with their supposed contractors should be reviewed, particularly where they heavily rely on the individuals' ability to delegate as part of their reasoning.

Further guidance and information

If you have any specific concerns that have not been outlined above, please email taxpolicy@taxinstitute.com.au.

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