

High Court backs freedom to contract in major ruling

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The High Court has reinforced businesses' ability to engage workers as independent contractors in a landmark ruling that erects major barriers for sham contract claims and lends support to Uber and Deliveroo's arguments their drivers are not employees entitled to minimum wages and conditions.

In a unanimous decision handed down Wednesday, the High Court held two truck drivers who worked full-time for a lighting company for almost 40 years but under a partnership arrangement were not employees entitled to minimum pay and conditions, including superannuation and annual leave.



The ruling indicates a potentially favourable approach to Uber's arguments its drivers are not employees. **AP**

The decision overrules a full Federal Court judgment that looked beyond the drivers' contracts to the reality of their working arrangements and held they were really employees, in line with previous authority.

A majority of the High Court instead adopted a strict approach to sham contract claims that relied almost solely on the terms of the contract itself.

“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 ... 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,” a majority of the High Court said.

“A wide-ranging review of the parties' subsequent conduct is unnecessary and inappropriate.”

However, in a similar case decided by the court at the same time, a majority held an unskilled 22-year-old British backpacker, Daniel McCourt, was an employee not a contractor because his contract gave his construction labour hire firm the right to decide who he could work for.

“That the parties chose the label ‘contractor’ to describe Mr McCourt did not change the character of that relationship,” the majority said.

Mr McCourt had been paid 25 per cent less than the award minimum under the arrangement.

The decisions are expected to have far-reaching implications for industries that engage workers as independent contractors, particularly transport, construction and the gig economy, and could encourage other sectors to engage more workers as contractors, provided they word the contracts correctly.

The rulings follow last year's High Court decision, known as WorkPac v Rossato, where the judges' signalled that the primacy of the contract was what mattered despite previous Federal Court decisions examining the substance or reality of the relationship.

In the case of the two truck drivers, Martin Jamsek and Robert Whitby, the drivers' employer gave them an ultimatum that they would be retrenched unless they signed on as contractors and buy the trucks they had previously been using from the company.

The drivers set up partnerships with their wives and invoiced the company for their services while paying for maintenance and operational costs.

However, they were expected to work five days a week and their contract required they work nine-hour days, from 6am to at least 3pm.

For almost 40 years, they didn't drive or deliver goods for any other businesses and had to carry their company's logo on their clothing and trucks.

The drivers had been seeking compensation for unpaid leave and superannuation entitlements.

But Justices Michelle Gordan and Simon Steward said while the contract requirement to work nine-hour days from 6am "may tend slightly in favour" of an employment relationship the contract also provided flexibility to undertake extra work.

Chief Justice Susan Kiefel, Justices Patrick Keane and James Edelman said the fact the drivers' entry into the contract "may have been brought about by the exercise of superior bargaining power by the company did not alter the meaning and effect of the contract".

"The task of raking over the day-to-day workings of a relationship spanning several decades is an exercise not to be undertaken without good reason having regard to the expense to the parties and drain on judicial time involved in such an exercise."

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