

FACTS

The case of *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1* involved a complaint made against a labour hire company (**Construct**) by the CFMEU, in respect of **Mr McCourt**, who conducted work for a builder (**Hanssen**) between July 2016 and June 2017. Mr McCourt signed a contract (“the ASA”) with Construct which stated that he was an independent contractor and identified Construct as conducting introductions between contractors and clients. Under the agreement, Construct would ‘underwrite’ payment to Mr McCourt.

Although Mr McCourt was to provide a hard hat and clothing, he did not sign any contract with Hanssen. The ‘underwriting’ of payment essentially involved a transfer of pay by hour into Mr McCourt’s bank account.

The contract created a number of rights and obligations for Mr McCourt including to:

1. “Co-operate in all respects with Construct and the builder in the supply of labour to the Builder”; and,
2. “Attend at any building site as agreed with the Builder at the time required by the Builder...for the duration required by the Builder in a safe, competent and diligent manner”.

ISSUE

Whether the Mr McCourt was an employee of Construct.

FINDING

The High Court allowed the appeal, with only Steward J dissenting.

In their combined judgment, Kiefel CJ, Keane and Edelman JJ stated:

79. “The ASA described Mr McCourt as “the Contractor”. But the effect of the rights and duties created by the ASA was that Mr McCourt was engaged by Construct to serve Construct in its business...[T]hat the parties have described their relationship a certain way cannot change the character of the relationship established by their rights and obligations.”

Their honours then referred to those obligations and rights in characterising the nature of the agreement between Mr McCourt and Construct:

89. “Under the ASA, Mr McCourt promised Construct to work as directed by Construct and by Construct’s customer, Hanssen. Mr McCourt was entitled to be paid by Construct in return for the work he performed pursuant to that promise...The right to control the provision of Mr McCourt’s labour was an essential asset of that business...Mr McCourt was Construct’s employee.”

IMPACT

This decision places the focus on the character of the rights and responsibilities created under contracts, in determining the nature of a relationship whether an employee or contractor. A clear contract demonstrating classic characteristics is necessary to establish an independent contracting relationship.