CFMMEU v Personnel Contracting: Contracts are Trumps

Thomas Dixon*

Abstract

In *CFMMEU v Personnel Contracting*, the High Court held that workers designated as contractors under tri-partite labour hire arrangements were properly characterised as employees. In so deciding, the Court brought to an end its doctrinal approach to characterisation based on an empirical exercise focussed on the "true nature" of the relationship. A majority of the Court reduced adjudication to an interpretive exercise fixed solely on the formal contract, and eschewed inquiries into the practical reality of the parties' relationship. This new jurisprudential approach, which gives primacy to *laissez-faire* notions of 'freedom of contract', is necessarily premised on the theoretical assumption of formal equality between workers and employers. It is to be contrasted with the focus on legal and economic realism that underpins the treatment of the relationship-contract dichotomy in the USA and the UK, and the objectives of modern Australian industrial legislation which establishes safeguards against exploitation and places collective bargaining at the heart of the workplace relations system. The following is taken from a presentation delivered at State Chambers, Sydney shortly after the decision was delivered.

Background

The case involved the engagement of one Daniel McCourt, a 22-year-old backpacker from Liverpool, England in Australia on a working holiday visa, via a tripartite labour hire arrangement.

Labour hire arrangements involve a trilateral relationship in which the labour hire business supplies a worker to a host employer for an agreed fee. This model dates back to at least the *Odco* decision in the 1980s in which the Federal Court found that employees engaged under a tripartite model were not employed by either the labour hire company or the host company that directed the workers in their day-to-day duties.[1]

Such arrangements have since been used to avoid otherwise non-delegable duties under occupational health and safety legislation, payroll tax, vicarious liability at common law, and the requirement to provide minimum conditions of employment to workers under awards and protective industrial legislation.[2]

In this case, McCourt was paid 25% below the minimum rate in the applicable industrial award.[3] He was not paid any amounts in respect of annual leave, sick leave, long service leave or other statutory entitlements required to be paid in an employer-employee relationship.[4]

---

* BSc (Hons), LLB, BEcons, LLM (Columbia). The views expressed are solely those of the author.

[1] *Odco Pty Ltd v Building Workers' Industrial Union of Australia* [1989] FCA 336 (Woodward J); *BWIU v ODCO Pty Ltd* [1991] FCA 87; 29 FCR 104 (Wilcox, Burchett & Ryan JJ) (***Odco***).

[2] (eg) In *Fair Work Ombudsman v Contracting Solutions Australia Pty Ltd* [2013] FCA 7, the tripartite Odco model was used to engage school-aged children in food retail outlets. The children performed in their capacity as putative "independent contractors" according to the terms of the contracts they were required to execute.

[3] *Building and Construction General On-Site Award 2010* (**Award**); *CFMMEU v Personnel Contracting Pty Ltd* [2020] FCAFC 122; (2020) 279 FCR 631 at [4] (Allsop CJ).

[4] The Australian Building and Construction Commission found that 79% of labour hire companies were non-compliant with Australian workplace laws: Australian Building and Construction Commission "Labour Hire Campaign Report" (2020).

Facts

McCourt sought work through the respondent labour hire company, Personnel Contracting (trading as Construct). Construct supplied labour to a major construction company, Hanssen Pty Ltd. The tripartite arrangement had the following features:

(a) The relations between McCourt and Construct were governed by an Administrative Services Agreement (**ASA**). The ASA described workers such as McCourt as "*self-employed contractors*", and required the workers "*to co-operate in all respects with…the builder in the supply of labour*"[5];

(b) The relations between Construct and its client, Hanssen, were governed by a Labour Hire Agreement (**LHA**). The LHA provided that workers were to be "*under the client's direction and supervision from the time they report to the client and for the duration of each day on the assignment*"; and

(c) There was no written agreement between McCourt and Hanssen.

McCourt commenced at a Hanssen construction site as a general labourer the day after his first interview with Construct. He supplied his own hard hat, boots and hi-vis vest. He worked around 50 hours per 6-day week in two long stints between July 2016 and June 2017.

The Appellants alleged that Construct contravened the National Employment Standards and the Award.[6] The National Employment Standards and Award only applied if Mr McCourt was an 'employee' as defined in s.15 of the FW Act, namely, according to its "ordinary meaning".

Decision at first instance

The Court at first instance made an important finding that McCourt "*did not operate a business on his own account*".[7] Despite the apparent antinomy of this finding and the contractual designation of McCourt as a "self-employed contractor", O'Callaghan J found the relationship between McCourt and Construct to be one of principal and contractor.[8]

O'Callaghan J undertook (what was at that stage) an orthodox, multifactorial approach to the issue of characterisation by setting out the various indicia that courts had typically considered in order to inform the ultimate question. Under that approach, the terms of the written contract were not of themselves determinative as the process of characterisation required an holistic analysis of the totality of the relationship.

As is often the case, the indicia pointed in each direction and were "reasonably evenly balanced" in the calculus.[9] The language of the ASA, and in particular the label of "contractor", proved to be the tie-breaker and determinative of the ultimate outcome.

---

[5] The ASA is set out in full in *CFMMEU v Personnel Contracting Pty Ltd* [2020] FCAFC 122; (2020) 279 FCR 631 at [49] (Lee J). Under the ASA, McCourt had no right of delegation (cl.4(c)), and had to give four hours' notice to terminate the engagement (cl.5(c)).
[6] Section 45 of the *Fair Work Act 2009* (Cth) (**FW Act**).
[7] *CFMMEU v Personnel Contracting Pty Ltd* [2019] FCA 1806 at [156] (O'Callaghan J).
[8] At [178].
[9] At [176].

The Decision of the Full Court of the Federal Court

The members of the Full Court (Allsop CJ, Jagot and Lee JJ) also approached the question by way of the (then) orthodox multifactorial analysis. Allsop CJ, in particular, identified a difference in approach between the early "contract-centred or dominated approach" and the more modern recognition of the need for a "totality" approach based on an analysis of the entire relationship between the parties which was not merely to be found in the contractual terms.[10]

In taking this totality approach, the Court was alive to the obvious tensions attendant in the application of the multifactorial test to multilateral work arrangements. For example, the fact that the labour hire company typically exerts no day-to-day control over the worker on site has served to confound questions of where the locus of legal control properly resides.[11] Accordingly, control sometimes came to be identified in these scenarios as a neutral or even countervailing factor militating against the characterisation of employment with the labour hire company.[12]

Preference was expressed in the judgments for the purposive approach of the UK Supreme Court in *Autoclenz Limited v Belcher*[13] wherein the Court stated that "*the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part*".[14]

Unconstrained by authority, both Allsop CJ and Lee J (Jagot J agreeing) would have found that McCourt was an employee of Construct.[15] Lee J, for example, was of the view that the notion of Mr McCourt being an independent contractor was "*somewhat less than intuitively sound*".[16]

However, for reasons of comity, their Honours felt bound to apply a (2:1) decision of the Western Australian Industrial Appeal Court which gave primacy to the contractual language in situations where other indicia were evenly balanced.[17]

The lead-up to the High Court

Special leave to appeal was granted on 12 February 2021.[18]

In the time between the grant of special leave and the hearing, the High Court handed down its decision in *WorkPac Pty Ltd v Rossato*.[19] *Rossato* concerned the question of whether a worker was a casual or permanent employee. The worker, Rossato, relied on non-contractual aspects

---

[10] *CFFMEU v Personnel Contracting Pty Ltd* [2020] FCAFC 122; 279 FCR 631 at [35]. Allsop CJ refered to *Hollis v Vabu Pty Ltd* [2001] HCA 44; 207 CLR 21 as an example of the application of the modern approach to relationship characterisation: at [13].
[11] At [80]-[88] (Lee J).
[12] (eg) *CFFMEU v Personnel Contracting Pty Ltd* [2019] FCA 1806 (6 November 2019) at [138] (O'Callaghan J); *Young v Tasmanian Contracting Service Pty Ltd* [2012] TASFC 1 at [4] (Blow J), [18], [21] (Tennent J).
[13] [2011] UKSC 41; 4 All ER 745.
[14] At [35] (Clarke LJ); see also *NLRB v. Hearst Publications, Inc*., 322 U.S. 111 (1944) at pp.127-128; *USA v. Silk*, 331 U.S. 704 (1947).
[15] At [31] (Allsop CJ); [41] (Jagot J); [125]-[132], [185], [189] (Lee J).
[16] At [185].
[17] *Personnel Contracting Pty Ltd t/as Tricord Personnel v CFMEUW* [2004] WASCA 312; 141 IR 31 (***Tricord***).
[18] On the same day as ZG Operations Australia Pty Ltd v Jamsek, No.S139 of 2020.
[19] [2021] HCA 23; 392 ALR 39 (***Rossato***).

of his employment relationship to argue the existence of a firm advance commitment as to the duration of his employment.[20]

The Court took a strict, black letter approach to the issue. In doing so, it rejected all appeals to indicia that might be sourced in the employment relationship and dehors the contract. Thus, it objurgated any approach based on the "*practical reality and true nature*" of the relationship on the basis that "*nothing less than binding contractual terms are apt to characterise the legal relationship between employer and employee*".[21]

It was held that any result where the parties could not know what their respective obligations were at the outset of their relationship would be contrary to "*elementary notions of freedom of contract*", and involve an obscurantism that was "*alien to the judicial function*".[22]

The Court's approach in *Rossato* was a grim augury for the fate of the arguments that had been advanced in McCourt's case to date, not least because any approach based on "totality of the relationship" or inequality of bargaining power (as the US Supreme Court[23], and the United Kingdom Supreme Court, have been prepared to countenance[24]) was now considered to be judicial anathema.[25]

Against this background, McCourt's case was principally argued on the basis that it was beyond the capacity of the parties to attach a label to their relationship in order to deem its legal character.[26] Shorn of the characterisation term, it was submitted that the determinative indicia were the fact that McCourt was not conducting his own independent business, and that the ultimate right of control attached to Construct under the terms of the ASA.

Reasons

The High Court, by majority (6:1; Steward J dissenting), held that McCourt was Construct's employee.

The approaches in the various sets of reasons are radically different to the point where identifying a common ratio or test may prove elusive.

---

[20] Principally, Rossato relied upon the operation of the roster system.
[21] *Rossato* at [63] (Kiefel CJ, Keane, Gordon, Edelman, Steward & Gleeson JJ)
[22] *Rossato* at [99] (Kiefel CJ, Keane, Gordon, Edelman, Steward & Gleeson JJ).
[23] *NLRB v. Hearst Publications*, 322 U.S. 111 (1944); see also *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018) for a discussion of the "ABC-test" utilised in some U.S. jurisdictions, wherein a worker is properly considered to be an employee if he or she is performing a job that is part of the "usual course" of the company's business, unless the hiring entity establishes (A) that the worker is free from the control and direction of the hirer, both under the contract and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently-established trade or business of the same nature as the work performed for the hiring entity.
[24] *Autoclenz Limited v Belcher* [2011] UKSC 41; 4 All ER 745 at [34]-[35] (Clarke LJ); *Uber BV v Aslam* [2021] UKSC 5; [2021] ICR 657 at [95] (Leggatt LJ).
[25] *Rossato* at [99]; *cf* s.241(a) of the FW Act (objects include assist and encourage low-paid employees "*who have not historically had the benefits of collective bargaining*" to make enterprise agreements).
[26] The question whether a person is an employee or an independent contractor is said to be a question of mixed fact and law (being the determination of the legal nature of the relationship): *Marshall v Whittaker's Building Supply Company* [1963] HCA 26; 109 CLR 210 at p.216 (Windeyer J); *ACT Visiting Medical Officers Association v AIRC* [2006] FCAFC 109, 153 IR 228 at [17] (Wilcox, Conti & Stone JJ).

The one approach which did command a majority is that, consistent with *Rossato*, the hermeneutic limits of the judicial function start and end with the written agreement. Thus, where the parties have reduced their agreement to written terms, the characterisation of the relationship is to be determined solely by those terms, not praxis.[27]

It was, however, accepted by a plurality (and arguably a majority) that attempts by parties to use labels to designate the legal characterisation can be wholly discounted.[28] This was an important inroad into the efficacy of the very contractual provision that proved determinative at first instance and on appeal to the Full Court.

What vestiges remain of the "multi-factorial" approach is unclear given that the common indicia were developed in a case that did not feature a formal contract.[29] The focus in future cases will principally involve divining indicia from the terms of the contract.

Control is plainly able to be informed by contractual terms.[30] However, evidence of actual control can no longer form part of the inquiry under the majority approach.[31] Actual conduct will remain relevant to questions of (eg) contractual formation, variation, estoppel, waiver, rectification, post-termination arrangements, novation, to show that the contract was a "sham", and where contract is not so comprehensive as to exclude the existence of oral terms.[32]

The "integration test", to the extent it involves considerations of whether the worker was treated as part of the employer's business in practice, is no longer applicable under the plurality approach.[33] The integration test often militated against the finding of employment for workers engaged within a group of companies or following takeovers[34], and for labour hire employees not seen as being 'part of' the labour hire company.

Other common indicia such as the mode of remuneration, the provision of equipment, the hours of work and rostering, and the deduction of income tax no longer form part of the calculus if they are not reduced into contractual terms.[35] The mode of remuneration was often turned into a factor to weigh against identifying the existence of employment by the simple expedient of creating a separate payroll entity, or requiring the worker to render invoices.[36] Indicia such as

---

[27] At [59] ("*there is no occasion to seek to determine the character of the parties' relationship by a wide-ranging review of the entire history of the parties' dealings. Such a review is neither necessary nor appropriate*.."), [61] (Kiefel CJ, Keane & Edelman JJ); [162], [187] (Gordon J), *cf* [132] (Gageler & Gleeson JJ).
[28] At [2022] HCA 1 at [58], [63]-[67], [79] ("*There was no occasion to have recourse to the label chosen by the parties, whether as a "tie-breaker" or otherwise*") (Kiefel CJ, Keane & Edelman JJ); *cf* at [189] ("*labels are not determinative*") (Gordon J).
[29] *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1; 160 CLR 16 at p.24 (Mason J); *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 at [39], [61] (Kiefel CJ, Keane & Edelman JJ); *cf* at [189] (Gordon J).
[30] At [76] (Kiefel CJ, Keane & Edelman JJ); *cf ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 at [69] (Kiefel CJ, Keane & Edelman JJ).
[31] At [59] (Kiefel CJ, Keane & Edelman JJ); at [188] but *cf* at [175] (Gordon J).
[32] At [42] (Kiefel CJ, Keane & Edelman JJ); at [177]-[178] (Gordon J); *cf* [143] (Gageler & Gleeson JJ)
[33] At [80]-[81] (Kiefel CJ, Keane & Edelman JJ).
[34] (eg) *Hyro Ltd v Eland & Ors* [2007] NSWSC 1111 at [7].
[35] At [174] (Gordon J).
[36] *Odco Pty Ltd v Building Workers' Industrial Union of Australia* [1989] FCA 336 at [109], [112].

the provision of equipment[37], and the deduction of income tax were similarly counted as countervailing factors, including in this case. [38]

Against this formalistic approach to characterisation, it was accepted by the three-member plurality that the "own-business test" could be a strong indicator of the nature of the relationship as it is a "*more cogent and coherent*" prism through which to focus attention upon "*those aspects of the relationship generally defined by the contract which bear more directly upon whether the putative employee's work was so subordinate to the employer's business that it can be seen to have been performed as an employee of that business rather than as part of an independent enterprise*".[39]

Gageler and Gleeson JJ recognised the own-business criteria as only relevant to a degree, and as "*really posing the ultimate question in a different way*".[40] Gordon J (whose approach Steward J agreed with) rejected the utility of the own-business test.[41] Her Honour would have posited the more appropriate test as "whether, by construction of the terms of the contract, the person is *contracted to work in the business or enterprise of* the purported employer".[42]

Thus, by radically different pathways, six members of the Court in three very distinct sets of reasons arrived at the same conclusion – that McCourt was Construct's employee.

Discussion

Any abiding academic interest in this case may well lie in the approach taken to precedent.

In the area of employment law and industrial relations, the Court has for many decades recognised the dichotomy between contract and relationship.[43] Legislation in Australia continues to recognise the existence of the employment relationship as the touchstone upon which rights inhere.[44]

The wholesale rejection of relationship evidence in favour of contractual analysis in matters of characterisation has not been a feature of the High Court's approach prior to this decision.

In *Stevens v Brodribb*[45], the Court found that sniggers[46] and carters of logs were contractors. The multifactorial approach was applied in the various judgments to determine whether the relationship was properly characterised as employment or not.

---

[37] *Odco Pty Ltd v Building Workers' Industrial Union of Australia* [1989] FCA 336 at [205]-[207].
[38] *Odco Pty Ltd v Building Workers' Industrial Union of Australia* [1989] FCA 336 at [247]; *CFMMEU v Personnel Contracting Pty Ltd* [2019] FCA 1806 at [168].
[39] At [39] (Kiefel CJ, Keane & Edelman JJ).
[40] At [2022] HCA 1 at [114] (Gageler & Gleeson JJ)).
[41] At [2022] HCA 1 at [180]-[182] (Gordon J); at [203] (Steward J).
[42] At [2022] HCA 1 at [183] (Gordon J; original emphasis).
[43] *Automatic Fire Sprinklers Pty Ltd v Watson* [1946] HCA 25; (1946) 72 CLR 435 at p.454 (Dixon J); *Byrne v Australian Airlines Ltd* [1995] HCA 24; 185 CLR 410 at p.427 (Brennan CJ, Dawson & Toohey JJ) ("*It does not appear to have been doubted in this country that a wrongful dismissal terminates the employment relationship notwithstanding that the contract of employment may continue until the employee accepts the repudiation*").
[44] (Eg) s.172 of the FW Act.
[45] *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1; 160 CLR 16.
[46] Workers who chain logs for transport.

Kiefel CJ, Keane and Edelman JJ, and Gordon J, sought to distinguish *Stevens v Brodribb* on the basis that there were no written contracts involved. However, there is almost no mention in the judgments of this fact (although it can be accepted as a given). Wilson and Dawson JJ in their joint judgment mention in passing that "*the contractual arrangements do not appear to have been formalised*" in respect of the carters (but not the sniggers).[47] Mason J (with whom Brennan J and Deane J agreed on this point) as well as Wilson and Dawson JJ took an holistic approach to the matter and weighed up a number of criteria by reference to the nature of the work performed. Nowhere was it suggested that the reasoning was confined to oral or implied contracts.

In *Hollis v Vabu*[48], a vicarious liability case, the members of the Court found that an unidentified bicycle courier was an employee. There were three pages of written terms in the standard engagement with the courier company. Five members of the Court (with whom McHugh J was in general agreement on this point), after identifying the various written contracts, stated that:

> *It should be added that the relationship between the parties, for the purposes of this litigation, is to be found not merely from these contractual terms. The system which was operated thereunder and the work practices imposed by Vabu go to establishing "the totality of the relationship" between the parties; it is this which is to be considered.*[49]

The authority cited in support of this proposition was the judgment of Mason J in *Stevens v Brodribb.* That is, there was no suggestion by the Court in *Hollis v Vabu* that *Stevens v Brodribb* was confined to its facts. The Court identified that the system of work and the work practices were relevant without qualification, thus reifying "the totality of the relationship" approach based on post-contractual evidence.[50]

Kiefel CJ, Keane and Edelman JJ, and Gordon J, sought to distinguish *Hollis v Vabu* on the basis that the contract was partly oral and partly written.[51] The three-member plurality also placed preferential reliance on the contract-based approach of the Privy Council in *Australian Mutual Provident Society v Chaplin*[52] and *Narich v Commissioner of Pay-roll Tax.*[53]

However, as Gageler and Gleeson JJ point out, the overarching purpose of the factual inquiry in which their Honours undertook in *Hollis* contradicts any notion that the inquiry was confined to the identification and interpretation of contractual terms alone.[54] Indeed the interpretation of any commercial contract, even one which features comprehensive written terms, is amenable to supplementation by extrinsic evidence to determine its commercial purpose including a "*consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding 'of the genesis of the*

---

[47] At p.39.
[48] *Hollis v Vabu Pty Ltd* [2001] HCA 44; 207 CLR 21
[49] *Hollis v Vabu Pty Ltd* [2001] HCA 44; 207 CLR 21 at [24] (Gleeson CJ, Gaudron, Gummow, Kirby & Hayne JJ).
[50] *cf* [2022] HCA 1 at [61] (Kiefel CJ, Keane & Edelman JJ); at [162], 172] (Gordon J).
[51] At [57] (Kiefel CJ, Keane & Edelman JJ); at [190] (Gordon J)
[52] [1978] UKPC 7; 18 ALR 385.
[53] [1983] 2 NSWLR 597 at pp.600-601 ("*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*..").
[54] At [137].

transaction, the background, the context [and] the market in which the parties are operating"".[55]

The approach of the Court has signalled a shift to a rejection of the use of indicia beyond the strict terms of the contract to characterise the relationship between parties. Indeed, the approach in *Rossato* suggests that it is no part of the judicial function to engage in an exercise that involves an inquiry into the "practical reality and true nature" of the relationship.

Why this is the case is not readily apparent given that the Court has, for decades, undertaken such an analysis in manifold situations where a contract did not condition the outcome. For example, a fiduciary relationship is one which gives the fiduciary a special opportunity to exercise a power or discretion to the detriment of another who is vulnerable to abuse by the fiduciary.[56] That typically requires a finding as to the relative positions of strength and vulnerability between the parties to a relationship. In *United Dominions Corporation Ltd v Brian Pty Ltd*[57], the High Court found that a fiduciary relationship came into existence before the execution of formal joint venture agreements for the development of land. The relationship between the parties was found to be based upon the existence of "a mutual confidence", rather than the rights and obligations that had been expressly defined in the formal agreement.[58]

Inquiries into the "true nature" of a relationship have never previously been treated as wholly antithetical to the judicial function in modern Australian jurisprudence. Indeed, such an inquiry remains central to characterisation questions where contracts are not reduced to comprehensive written terms. To suggest otherwise invites the obvious criticism that the inquiry may become concerned with something other than arriving at a point which permits the just determination of the controversy. As was demonstrated in this case, the true nature of the relationship as found by the Court was not reflected in the written terms of the contract which sought to impose a formal label on a state of affairs that bore no relation to reality.

Conclusion

Sounding the death knell of the Odco model may yet prove premature. However, the use of the labels-as-'tie-breakers' that saw the model survive significant challenges over the years has been dealt a mortal blow. The destruction of that keystone will need to be overcome if the tripartite system is to survive in anything resembling its former iteration.

The Odco model served not only to permit employing parties to circumvent regulated minimum conditions of employment, but also facilitated stratagems designed to defeat the organisation of the workforce. Any worker who took steps to seek better terms and conditions, including through union participation, was susceptible to being removed from the worksite with impunity.[59]

This reality underscores the apodictic truth that pathologies in workforce control that contribute to the deterioration in workers' bargaining power frequently manifest in broader economic

---

[55] *Woodside Energy Ltd v Electricity Generation Corporation* [2014] HCA 7; 251 CLR 640 at [35] (French CJ, Hayne, Crennan & Kiefel JJ; references omitted).
[56] *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; 156 CLR 41 at p.96 (Mason J).
[57] [1985] HCA 49; 157 CLR 1.
[58] [1985] HCA 49; 157 CLR 1 at p.11 (Mason, Brennan & Deane JJ).
[59] Unfair dismissal laws did not apply because the characterisation term in the Odco model had the intended effect of taking workers outside of the ordinary meaning of 'employee' in the FW Act.

inequalities.[60] The Odco model survived nearly four decades of scrutiny. The number of workers, like McCourt, who were paid substantially under minimum award rates will never be known, and their loss never quantified. Yet each of these workers signed onto an arrangement which often saw them deprived of the most fundamental entitlements that an employee would reasonably expect from a system whose objects include the protection of the individual against power asymmetries.

The assumption of downward rigidity in nominal wages was the lynchpin of Keynes' analysis of the labour market across the business cycle.[61] However, real-world data on nominal wages demonstrate that they are not particularly resilient to downward pressures.[62] That result is hardly surprising when the effect of taking vulnerable workers out of the protections of workplace relations system is to leave them exposed to the depredations that can attend arrangements based on 'freedom of contract'.

The classical formalism movement in the common law defeated neoclassical notions of reasonable commercial expectations and egalitarian ethos. However, the flaws associated with the development of contract theory based on the *laissez faire* economics led to the decline of the principle of freedom of contract and the ascendency of legal realism.[63]

The veneration of the principle of freedom of contract once defined the jurisprudence of the United States Supreme Court. In *Lochner v. New York*[64], the Court held that State legislation directed at preventing the exploitation of vulnerable workers was unconstitutional as it was an "*unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract*".[65]

The 'Lochner Era" saw courts invalidating federal and state statutes that sought to regulate working conditions, including into the Great Depression. The case was finally overturned in 1937.[66] Lochner, however, continues to hold a unique place within the anticanon of American jurisprudence.[67]

If there is to be some acknowledgement in the approach of the High Court of need to maintain sight of the practical realities, it is that, even on the most conservative view, Gordon J ultimately concluded that "*the context of an individual on a working holiday visa being contracted to perform labouring work as directed by Construct and required to provide nothing but basic personal protective equipment reinforces that characterisation*" that McCourt was an employee.[68]

---

[60] Paul C. Weiler "A Principled Reshaping of Labor Law for the Twenty-First Century" *3 U. Pa. J. Lab. & Emp. L. 177* (2001) at p.185.
[61] John Maynard Keynes "The General Theory of Employment, Interest, and Money" (1936), Chapter 2.
[62] Michael W. Elsby and Gary Solon "How Prevalent Is Downward Rigidity in Nominal Wages? International Evidence from Payroll Records and Pay Slips" *NBER Working Paper* No. 25393, December 2018 at p.3.
[63] P. S. Atiyah "The Rise and Fall of Freedom of Contract" (Oxford: Clarendon Press, 2003), Chapter 21. p.681ff; *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37, 256 CLR 104 at [49] (French CJ, Nettle and Gordon JJ).
[64] 198 U.S. 45 (1905); *cf Adair v. United States*, 208 U.S. 161 (1908) at p.191 (Holmes J, dissenting).
[65] 198 U.S. 45 (1905) at p.56 (Peckham J).
[66] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
[67] Jamal Greene "The Anticanon" *Harvard Law Review* Vol.125, No.2 (2011).
[68] At [201] (Gordon J, emphasis added); and, similarly, three-member plurality's approach to viewing the contract through the 'own-business' prism: at [39] (Kiefel CJ, Keane & Edelman JJ).

It remains to be seen just how the Court's formalistic approach will translate as a precedent into the jurisdiction where these questions will most often play out – a forum that is required to exercise its powers in a manner that is "fair and just" taking account of "equity, good conscience and the merits of the matter", and that avoids "unnecessary technicalities" including the rules of evidence.[69]

T.J. Dixon
State Chambers
18 February 2022

[69] Namely, the Fair Work Commission: sections 577, 578 and 591 of the FW Act.