DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Shazlia Saleh, Mohamed Namaoui, Hamoda Dayein, Salwa Elshikh, Elhadi Almahadi, Abdelrahman Wedissa, Muhammad Ahmed, Qusai Mubaidin, Elsyaed Ali Eltaher Bashir, Suzanne Maksoud, Mohammed Obaidi, Mohammad Abdul-Hwas, Yassine Belkamel, Zach Kalany, Mu'ammar Ibrahim Najjar, Abdalaal Nassir, Mohamed Ben Mansour, Abdulrazig Osman

v

Saudi Arabian Cultural Mission/Saudi Embassy & Embassy of the Kingdom of Saudi Arabia, Cultural Mission

(U2022/4348; U2022/4550; U2022/4553; U2022/4557; U2022/4565; U2022/4568; U2022/4575; U2022/4579; U2022/4695; U2022/5015; U2022/6848; U2022/6904; U2022/7868; U2022/8775; U2022/8853; U2022/8885; U2022/9536; U2022/9642)

DEPUTY PRESIDENT EASTON SYDNEY, 2 MAY 2024

Applications for unfair dismissal remedy – jurisdictional objections – immunity from Commission jurisdiction – sovereign foreign state – Foreign States Immunities Act 1985 (Cth) – employee v independent contractor – inconsistent contractual terms – permanent resident of Australia – applications said to have been made prematurely prior to any termination taking effect – jurisdictional objections dismissed – applications to proceed.

[1] Eighteen applicants each claim to have been unfairly dismissed by Saudi Arabian Cultural Mission/Saudi Embassy & Embassy of the Kingdom of Saudi Arabia, Cultural Mission. The Respondent has raised two jurisdictional objections. Firstly, the Respondent argued that it has immunity from the jurisdiction of the Commission because it is a sovereign foreign state, and it is immune from jurisdiction by virtue of the provisions of the *Foreign States Immunities Act 1985* (Cth) and other statutes and conventions. Secondly, the Respondent argued that the Fair Work Commission does not have jurisdiction to deal with any of the applications because each application was lodged during the notice period and prior to any of the alleged dismissals taking effect.

[2] Every communication to the Commission so far from the Respondent has contained the following qualification, or a similarly worded qualification:

> "As per paragraph 10(7)(b) of the *Foreign States Immunities Act 1985* (FSI Act), nothing in this document should be taken to indicate that the Respondent has submitted to the jurisdiction of the Fair Work Commission and/or waived, intentionally or otherwise, the immunity and privileges provided in the FSI Act generally, and specifically by s 9, s 6,

> s 24, s 25 and s 39 of the FSI Act or any other Act, common law, or under international law and international treaties or conventions or customary international law. All the interventions and steps taken in the proceedings are for the purpose of, or in the course of. asserting immunity only."

[3] The applicants each worked for the Respondent for between 9 and 15 years. The engagement of each applicant ended in 2022. 10 of the 18 applicants finished in late March 2022 and the last applicant finished in September 2022. For most of the proceedings the applicants had legal representation however by the time the Respondent's jurisdictional objections were heard in the Commission, the applicants had run out of money and appeared for themselves.

[4] The Respondent has advanced two jurisdictional objections. The Respondent's first jurisdictional objection is that the Respondent has immunity from the jurisdiction of the Commission because it is a sovereign foreign state, and it is immune from jurisdiction by virtue of the provisions of the *Foreign States Immunities Act 1985* (Cth). This objection as several limbs based on the terms of the FSI Act. The respondent argues that:

(a) the Respondent has not waived its foreign State immunity;
(b) none of the exceptions to immunity in the FSI Act apply to the present applications;
(c) the relevant exceptions to immunity only apply to proceedings in a "court" and the Commission is not a court; and
(d) in any event the exceptions to immunity referred to in s.12 of the FSI Act do not apply.

[5] The final limb raises further matters to be determined. The Respondent argued that:

(a) all of the Applicants were independent contractors and therefore were not dismissed from employment; and/or
(b) the written contracts contain provisions said to be inconsistent with the employment exclusion (see s.12(4) of the FSI Act); and/or
(c) some of the Applicants were not permanent residents at the time they were engaged (see s.12.6); and/or
(d) the six applicants who are permanent residents will be barred from the exception under s.12 by operation of the savings provision in s.6 of the FSI Act.

[6] The respondent's second jurisdictional objection is that every application was made prematurely and therefore not properly made at all. Each application is said to have been lodged during the notice period and prior to any termination of contract taking effect.

[7] Except for two particular applicants, and for the reasons that follow, I do not accept any of the Respondent's substantive arguments and have dismissed its jurisdictional objections.

The Evidence: general observations

[8] The matters to be determined at this stage our are predominantly legal matters rather than factual matters. As such, the evidence from the parties was not extensive.

[9] The Respondent did not lead any evidence from a person with direct knowledge of any of the events between 2007 and 2022. In fact, the Respondent did not lead any evidence from any person with direct knowledge at all. Instead, the Respondent relied upon two statements by

Mr Jason Noakes, who has been the Respondent's solicitor in these proceedings for the last four months.

[10] Mr Noakes' statements indicate that his client gave him various documents. Mr Noakes attached more than 50 documents to his statements - all of which he said were provided to him by his client.

[11] Mr Noakes' statements also provided some commentary on the documents and other information that he said he was told by his client. Mr Noakes did not disclose in his statement who told him any of this information. I accepted the whole of Mr Noakes' statements into evidence but have placed no weight at all on Mr Noakes' bald statements that unnamed people from the Respondent told him certain things about events or documents.

[12] Four lawyers appeared for the Respondent at the hearing of the Respondent's jurisdictional objections. No one from the Respondent itself was present at the hearing.

The Evidence: The standard contract

[13] Mr Noakes said that each of the applicants were engaged under a standard contract written in the Arabic language. The contacts signed by each of the applicants were in identical terms save for the date and personal details of each applicant such as their nationality, role/capacity and pay.

[14] The terms of the written contracts have been translated into English by at least two separate interpreters. The Respondent relied upon a translated copy, and at least one applicant relied upon a different translation.

[15] Except for the title of the document there are no material differences between the two translations received into evidence.

[16] The key parts of the contract, extracted from the Respondent's translation, are:

"**Work Contract**

For contractors at the Representatives and Attaches offices abroad

It is on the [date] this contract was concluded between each of:

[details of the parties]

Article 1:

The (Second Party) shall work for the (First Party) at the Cultural Office in the capacity of secretary.

The duties of the post shall include the following:

(a) …
(b) …

(c) Obey supervisors and perform work duties accurately, honestly and in the best possible way. Preserve the time, documents, papers, tools, machines, equipments, and properties of the Mission.
(d) Refrain from all that may affect the continuity and execution of this contract, observe fine etiquette when dealing with others, protect the confidentiality of the job. and not use its authority and power for personal gain.
(e) Any other duties assigned to him/her.

Article 2: The two parties agreed that the duration of this Contract shall be for (one year) and will be renewed automatically unless either party notifies the other, in writing, of his wish to terminate it at least two months prior to its expiration.

Article 3: The (Second Party) appointed shall be under probation for three months during or at the end of which the (First Party) may terminate the contract in accordance with Article (16) Paragraph (K), without the (Second Party) having any claims or compensations except for the salary of the period of work.

…

Article 7: The (First Party) shall pay the (Second Party) a lump sum monthly salary of [$$] Australian Dollar, to be paid at the end of every Gregorian month, and this salary shall include social insurances, health and other (1).

Article 9: The (Second Party) shall be entitled to an ordinary paid leave of (thirty days) per year at full salary.

Article 10: The (First Party) has the right to defer the (Second Party)'s ordinary leave, provided that the postponement period does not exceed five months from the date of the leave entitlement. He also has the right to divide the leave to two parts if so required in the interest of work. A financial compensation for the leave is not permitted.

Article 11: The (First Party) may, in emergency situations accepted at his discretion, grant the (Second Party) an emergency leave to a maximum of five days per year.

Article 12: The (Second Party) "Contractor lady" is entitled to a full paid maternity leave of forty days, including public holidays.

Article 13:
(a) The (Second Party) in case of illness or injury that prevents him from performing his work temporarily entitled to a sick leave to a maximum of one month, paid in full per year. A sick leave is not allowed if the injury or illness from which the (Second Party) suffers occurred during his leave. Evidence to that shall be in the form of an approved medical report from the entity designated by the (First Party). The (Second Party) shall also lose his right to the said sick leave with the end of the year in which it was allowed.
(b) If the illness or injury was the result of work or while performing it, without any error or failure on his part, the (Second Party) shall be entitled to a fully paid sick

leave of no more than three months per year, in accordance with an approved medical report from the entity designated by the (First Party).

(c) If the (Second Party) used all the sick leave he is entitled to as mentioned in Paragraphs (a) or (b) of this Article and did not resume his post, or has become unfit medically, suffering from some infectious or chronic diseases or a permanent impairment. the (First Party) may treat him in accordance with Article (16) Paragraph (d), ending his contract for his inability to work.

Article 14: If the (Second Party) has become sick or injured because of work and while performing it, without error or failure on his part, the (First Party) is obliged to cover the costs of his treatment for a maximum of three months, after which he shall be treated in accordance with Article (13) Paragraph (c), in the absence of any health insurance for the (Second-Party).

…

Article 16: The contract shall be terminated before the expiry of its term in the following cases:

(a) Ending the work of the (Second Party) for public interest.
(b) Cancellation of the contracted post.
(c) Death.
(d) Health impairments preventing the performance of the work duties or the consummation of the sick leave periods.
(e) Acceptance of resignation.
(f) Absence from work without a legitimate excuse accepted by the (First Party) for more than fifteen consecutive days or thirty non-consecutive days 1 within the contract year.
(g) Failure to perform work or inability to perform the job duties.
(h) Misconduct.
(i) If it was proven that the (Second Party) is medically unfit or suffering from infectious or chronic diseases or permanent impairments prior to contracting him.
(j) If the (Second Party) is convicted in,or imprisoned for, a crime related to breaching honour or honesty.
(k) Ineligible to undertake work during or by the end of the probation period.
(l) The (Second Party) does not begin work within three days from the date of signing the contract and the contract is considered null and void.

…

Article 21: The Arabic copy shall be considered the original copy, and any dispute arising between the parties of the contract regarding any of its Articles shall be presented to the Ministry of Civil Service in the Kingdom of Saudi Arabia, and its decision on the matter shall be considered final."

[17] The translation provided by Mr Mubaidin, contained a different heading: "Employment Contract for Contractors at representations and missions abroad".

The Evidence: The work performed by the applicants

[18] It seems uncontroversial that the applicants performed administrative or technical work associated with the Respondent carrying out its functions. From the Form F2s filed it seems that the work performed by the applicants, or the positions held by the applicants, included Academic Supervisor, Academic Advisor, Academic Student Advisor for University Affairs, "HR Office", Liaison Officer and Group Coordinator, Accountant, Medical Reimbursement Officer at Financial Affairs, and IT support. None of the applicants were said to be diplomatic staff of the mission or consular officers.

The Evidence: The applicants' evidence

[19] Each of the applicants filed a statement/submission based on a common template. These statements were filed at a time when none of the applicants had legal representation. The text of the statements includes material that is properly understood to be submissions and/or legal conclusions. I have significant reservations about receiving evidence in identical or near identical form from the applicants.

[20] The evidence of most of the applicants included the following:

> "I was employed by the Respondent for work at SACM pursuant to a contract of employment made in Australia (Employment Contract).
>
> Whether I was employed as a contractor, or an employee is very crucial as it will affect:
> (a) Whether I fall under the foreign state immunity exception under section 12 of the FSI Act; and
> (b) What sort of entitlements I may claim from my employer under legislation such as the Fair Work Act 2009 (Cth) and any Fair Work instruments your employment may fall under (such as a Modern Award).
>
> There are two distinct requirements that must be met to satisfy the definition of an employee, being:
> 1) The person must be engaged to work under a valid and enforceable contract; and
> 2) The contract must be characterised as one of employment.
>
> There are a number of factors to consider in regard to such a question. The matter of *Abdalla, Abraham v Viewdaze Pty Ltd t/as Malta Travel* (2003) 122 IR 215 (Abdalla v Viewdaze) at [34] provided the following helpful list that a court may consider in deciding whether, ultimately, a person was the worker for someone else's business (that is, an employee) or was carrying on a trade or business on their own behalf (that is, an independent contractor) (c.f. *Hollis v Vabu* (2001) 207 CLR 21 at 41-42, citing Justice Windeyer in *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 2010 at 217), including:
>
> …
>
> I'm an employee of the SACM. This is because:
> - SACM have the right to extensively control my work and how it was performed. As per my contract, my duties include:
>
> …

(c) Obeying superiors and carrying out duties accurately and diligently at their best possible [SIC] in a timely manner and take care of documents and equipment owned by the mission"

…

(e) Any other duties as directed.

- I did not have a separate place of work and did not advertise your own services to the "world at large" but rather performed work directly on-site of the Cultural Mission and as part of the Cultural Mission's own operations.
- As per Article 7 of the contract, I was paid a fixed monthly wage, rather than being paid for performing specific tasks;
- As per Article 9 (concerning annual leave) and Article 13 ('fully paid medical leave'), I received annual and personal leave;

Therefore, during the period I worked at SACM:

- I was directed and supervised in my work by the Respondent
- I did not run my own enterprise or business in respect of the services I performed at SACM;
- I did not have independence in the conduct of my operations as I would if I was independent contractors.
- I was paid a fixed wage on a monthly basis set by the Respondent.
- I was not permitted to negotiate or set my own pricing or fees for services performed.
- I worked in the roles and completed the tasks set or directed by the Respondent.
- I worked the number of hours and frequency imposed by the Respondent.
- I was provided with some leave and was required to seek the Respondent's permission to be absent from work within my ordinary hours, such as for leave or doctor's appointments and the like.
- I was required to use the Respondent's systems, procedures, and protocols in order to perform my role.
- I was required to work substantially at the Respondent's Premises.
- I was provided all tools necessary to do my work including but not limited to: furniture, computers, phones, and stationery.
- I was not able to, and did not, delegate my work.
- I did not pay any rent or fees for services including but not limited to telecommunications.
- I was not required to and did not provide the Respondent with an ABN and was not required to and did not issue invoices to the Respondent in respect of my work.
- I worked pursuant to the Employment Contract made in Australia, as pleaded above, which contained, among other things, a right of the Respondent to dismiss me as well as annual leave, sick leave, and other entitlements on my part.

I was an employee of the Respondent and not an independent contractor."

The Evidence: The 2014 "Contractor Declaration Form"

[21] In 2014 each applicant provided a signed "Contractor Declaration Form" to the Respondent, stating:

> "I declare that since the commencement of my providing professional services to the Saudi Arabia Cultural Mission in Australia (SACM), I have worked as an independent contractor. I wish to receive all the future dues of the contract as a lump sum progressive payment as per the option that I have selected above.
>
> I hereby consciously undertake full responsibility to deal with any federal, state/territory, or any other, legal requirements, including the payment of any taxation liabilities and superannuation, and SACM shall hold no responsibility for any legal or financial requirement resulting from the disbursement of the contract value to me directly in full by the payment method selected above."

[22] The "Declaration" above was on the lower half of a single page document on what appears to be the letterhead of "Royal Embassy of Saudi Arabia, Cultural Attache Office, Canberra". The top half of the document is headed "Contractor – Method of Payment Form" and in this part of the form each applicant could make an election between receiving payment by cheque or by electronic funds transfer, and could also elect to receive payment monthly, quarterly, biannually, or annually.

[23] Mr Noakes included an explanation for how these documents came into existence, essentially suggesting that the document followed several submissions and requests by the applicants who "considered themselves to be independent contractors and wished to have superannuation (and all other monies due to them) paid to them directly." For the reasons referred to above I have placed no weight at all on Mr Noakes' explanation.

[24] Some applicants gave direct evidence about how this "declaration" was made. The evidence of each applicant is very similar and, like much of the evidence relied upon by the applicants, appears to have been prepared using a common template. Most applicants said:

> "In 2014, the Respondent presented me and many of the Applicants with a "Contractor's Declaration Form" (**Sham Declaration**) which provided that the Relevant Applicant:
> (a) declared retrospectively that they had worked as an independent contractor since the commencement of providing professional services to the Respondent;
> (b) wished to receive all the future dues of the contract as a lump sum progressive payment monthly, quarterly, biannually or annually as selected by the Applicant or Group Member; and
> (c) undertook full responsibility to deal with any federal, state/territory or other legal requirements including the payment of taxation liabilities and superannuation.
>
> The Respondent:
> (a) did not provide any consideration for the Sham Declaration;
> (b) did not provide the Applicants and Group Members with advance notice of the Sham Declaration;
> (c) did not explain the nature and consequences of the Sham Declaration to the Applicants and Group Members;
> (d) did not provide the Applicants and Group Members with adequate time to read and consider the Sham Declaration;
> (e) did not provide the Applicants and Group Members with an opportunity to obtain legal or other advice in relation to the Sham Declaration;

(f) directed and/or required the Applicants and relevant Group Members that they were required to sign the Sham Declaration;
(g) told the Applicants and some Group Members that they were required to sign the Sham Declaration as a condition of continuing their employment with the Respondent;
(h) did not provide the Applicants and Group Members with a choice other than to sign the Sham Declaration, including because it treated employees who did not sign the Sham Declaration as having done so.

I did sign the Sham Declaration because:
(a) the arrangement was represented as lawful; and/or
(b) I understood I would lose my employment if I did not sign the Sham Declaration.

After the Sham Declaration, the Respondent ceased paying superannuation to the superannuation funds."

[25] Noting the reservations described earlier, I am satisfied that the "declaration" was procured by the Respondent rather than sought by any of the applicants. As will become apparent, the case does not turn on the force or credibility of this "declaration."

The legislative provisions

[26] The Respondent's first jurisdictional objection relies heavily on the claim that it is a foreign state and has immunity from claims in accordance with the FSI Act.

[27] It is necessary to refer to the key provisions of the FSI Act.

[28] The Respondent is a foreign state as defined in the FSI Act. Section 9 affords immunity to foreign states "except as provided by or under this Act":

"General immunity from jurisdiction

Except as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding."

[29] The immunity in s.9 applies to the exercise of judicial power or function or a power or function that is of a like kind by a court. Section 8 of the FSI is in the following terms:

"Application to courts

In the application of this Act to a court, this Act has effect only in relation to the exercise or performance by the court of a judicial power or function or a power or function that is of a like kind."

[30] "Court" is a defined term and includes some tribunals. The definition of court in s.3 of the FSI Act is as follows:

> “"court" includes a tribunal or other body (by whatever name called) that has functions, or exercises powers, that are judicial functions or powers or are of a kind similar to judicial functions or powers.”

[31] Section 12 of the FSI contains exceptions to the general immunity:

"Contracts of employment

(1) A foreign State, as employer, is not immune in a proceeding in so far as the proceeding concerns the employment of a person under a contract of employment that was made in Australia or was to be performed wholly or partly in Australia.

(2) A reference in subsection (1) to a proceeding includes a reference to a proceeding concerning:

(a) a right or obligation conferred or imposed by a law of Australia on a person as employer or employee; or

(b) a payment the entitlement to which arises under a contract of employment.

(3) Where, at the time when the contract of employment was made, the person employed was:

(a) a national of the foreign State but not a permanent resident of Australia; or

(b) an habitual resident of the foreign State;

subsection (1) does not apply.

(4) Subsection (1) does not apply where:

(a) an inconsistent provision is included in the contract of employment; and

(b) a law of Australia does not avoid the operation of, or prohibit or render unlawful the inclusion of, the provision.

(5) Subsection (1) does not apply in relation to the employment of:

(a) a member of the diplomatic staff of a mission as defined by the Vienna Convention on Diplomatic Relations, being the Convention the English text of which is set out in the Schedule to the Diplomatic Privileges and Immunities Act 1967; or

(b) a consular officer as defined by the Vienna Convention on Consular Relations, being the Convention the English text of which is set out in the Schedule to the Consular Privileges and Immunities Act 1972.

(6) Subsection (1) does not apply in relation to the employment of:

(a) a member of the administrative and technical staff of a mission as defined by the Convention referred to in paragraph (5)(a); or

(b) a consular employee as defined by the Convention referred to in paragraph (5)(b);

unless the member or employee was, at the time when the contract of employment was made, a permanent resident of Australia.

(7) In this section, permanent resident of Australia means:

(a) an Australian citizen; or

(b) a person resident in Australia whose continued presence in Australia is not subject to a limitation as to time imposed by or under a law of Australia."

[32] As noted by Nettle and Gordon JJ in *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43 at [198], (2015) 258 CLR 31 at [88]-[89], s.12 reflects a legislative expectation that when a foreign State enters into an employment contract in Australia or which is to be performed in Australia, the interest of Australia in providing a local forum for the resolution of disputes arising from it outweighs the interest of the foreign State in having exclusive jurisdiction (see also *Republic of Italy (Minister of Foreign Affairs and International Cooperation – Adelaide Consulate) v Benvenuto* [2018] FCAFC 64 at [8] (**Benevenuto**)).

[33] It can be difficult to follow provisions that contain double negatives and even triple negatives. Within s.12 of the FSI Act there are exceptions to the exceptions to the immunity.

[34] For present purposes the above provisions of the FSI Act mean that some or all of the Applicants cannot continue their unfair dismissal claim if any one of the following conditions apply:

(a) the Fair Work Commission is not a "court" as defined in the FSI Act; or
(b) an applicant was engaged as an independent contractor; or
(c) the standard contract contained a term that is consistent with the Respondent maintaining its immunity; or
(d) an applicant was not a permanent resident of Australia at the time their contract of employment was made.

[35] The Respondent submits that none of the applicants can continue their claims because the Commission is not a 'court', each applicant was engaged as an independent contractor, the terms of the standard contract contain a term that is consistent with the Respondent maintaining its immunity, and that some of the applicants were not permanent residents at the time their written contracts were made.

Jurisdictional objection: Is the Fair Work Commission a 'court'?

[36] It is well established that the Commission is not a judicial body and not a court for the purposes of the FW Act (see s.546 of the FW Act).

[37] The Respondent argued that the Commission is not a court as defined under the FSI Act. The Respondent relies on a decision by Commissioner Simmonds in *Christodulakis v French Consulate* [1999] AIRC 460, (1999) 91 IR 362 ("**Christodulakis**"). The Commissioner found that the Commission was not a court because it did not undertake any judicial functions. Part of the Commissioner's reasoning included a reference to the fact that the Commission has a wide discretion when determining matters generally, and specifically refers to the Commission determining unfair dismissal claims by ensuring that a "fair go all round" is accorded.

[38] Other decisions of the Commission have come to the opposite conclusion about whether the Commission is a court for the purposes of the FSI Act. Most notably, Vice President Lawler said the following in *Hussein v The People's Bureau of the Great Socialist People's Libyan Arab Jamahiriya* [PR973596], [2006] AIRC 486 ("**Hussein**") at [10]-[11]:

> "[10] In *Adam v High Commission of Malaysia* [PR963745] Deegan C held that the Commission is a tribunal that has functions or exercises powers which are of a kind similar to judicial functions or powers and was therefore a "court" as defined in s.3 of the FIS Act [at 36]. Deegan C did not refer to the earlier decision in *Christodulakis*.
>
> [11] In my view, the conclusion reached by Deegan C was correct. It is not to the point that the Commission does not exercise the judicial power of the Commonwealth. That is a given. If the definition in s.3 was intended to be confined to tribunals that exercise judicial power then there would be no point in the definition of "court" in s.3 referring to functions or powers "*of a kind similar to judicial functions or powers*". Those words indicate that the definition extends beyond courts exercising judicial power to "*tribunals or other bodies*" exercising functions and powers that, although not judicial functions and powers, are similar to judicial functions and powers. On any view, the Commission exercises functions and powers that are "*similar*" to judicial functions or powers in its termination of employment jurisdiction. It is unnecessary to set out a full list of the provisions of the WR Act that confer relevant functions and powers on the Commission. It is sufficient to note that the Commission conducts arbitration hearings where parties may be represented. It adjudicates upon applications for relief made pursuant to provision in the WR Act that requires the Commission to apply a broad discretionary standard in determining [whether] a termination of employment was harsh, unjust or unreasonable. The Commission can administer an oath and receive evidence (although it is not bound by the rules of evidence). It can issue summonses for the attendance of witnesses and the production of documents by witnesses and can exercise the other powers specified in s.111(1). It makes decisions that are amenable to appeal to a Full Bench of the Commission. It can make orders requiring the payment of compensation in relation to a termination of employment that is found to be harsh, unjust or unreasonable. It can make orders as to costs in certain circumstances. It must act judicially. With respect to Simmonds C, the obligation to ensure a "fair go all round" in relation to termination of employment matters is not something that is antithetical to the similarity between the Commission's functions and powers and judicial functions and powers."

[39] The Respondent submitted that Commissioner Simmonds' approach in *Christodulakis* is the "preferred" approach. Obviously this approach is preferred by the Respondent because it delivers it a better outcome. However there is a gaping hole in the reasoning in *Christodulakis*.

[40] The FSI Act is a federal statute. The definition of 'court' in the FSI Act incorporates tribunals, albeit only certain kinds of tribunals. Under the FSI Act the term 'court' incorporates tribunals that have functions that are of a kind similar to judicial functions. The decision in *Christodulakis* does not consider whether the functions of the Commission are of a similar kind to judicial functions.

[41] In *Hussein* Vice President Lawler squarely found that the functions of the Commission are of a similar kind to judicial functions. In its written submissions the Respondent did not engage at all with Vice President Lawler's reasoning in *Hussein*. At the hearing Counsel for the Respondent conceded that the definition of a court was broad enough to encompass a tribunal that has functions similar to judicial functions. The Respondent did not cavil at all with the Vice President's analysis of the functions of the Commission and his reasoning that "on any view, the Commission exercises functions and powers that are "*similar*" to judicial functions or powers in its termination of employment jurisdiction."

[42] The only part of the Vice President's reasoning that the Respondent disagreed with was the last sentence of paragraph 11 and the reference to the fair go all round test, which is only passingly relevant to the Vice President's analysis of the functions of the Commission.

[43] Eventually the Respondent conceded that the Vice President's substantive reasoning was correct, but nonetheless maintained its submission without any proper basis that Commissioner Simmonds' approach was preferred.

[44] I reject the Respondent's submission. I am satisfied that the Commission is a court as defined in s.3 of the FSI Act for all the same reasons given by Vice President Lawler, and that proceedings in the Commission are proceedings for the purposes of the FSI Act.

Jurisdictional objection: Were the applicants independent contractors?

[45] The Respondent submitted that all of the exceptions to immunity under s.12 of the FSI Act depend upon there being an employment relationship. The Respondent argued that every applicant was engaged as an independent contractor and therefore none of the applicants can rely on the exception to the immunity.

[46] There are two bases upon which the Respondent submitted that all of the applicants were independent contractors: (1) the terms of the standard contract signed by each applicant and (2) the "Contractor Declaration Forms" signed by each applicant in 2014. Neither argument has any substance at all.

[47] No direct evidence was provided about the formation of any contract made with the applicants. There is no suggestion or submission that the Standard Contract was a sham or that it did not reflect the contractual terms between the parties.

[48] The terms of the standard contract cover matters commonly found in employment contracts. Workers are required to "obey supervisors and perform work duties accurately, honestly and in the best possible way" (Article 1), a probation period applied (Article 3), workers were paid a monthly salary that was not conditional upon the amount of work performed (Article 7), workers were entitled to paid leave including sick leave (Articles 9, 11

and 13), female workers were entitled to 40 days paid maternity leave (Article 12) and workers were eligible for leave similar to workers compensation weekly benefits if they "become sick or injured because of work" (Article 14).

[49] None of the rights or obligations under the contract are consistent with any of the applicants having been engaged as independent contractors.

[50] The only arguable reference to independent contractors is the title. The translation commissioned by the Respondent translates the title to be "Work Contract, For contractors at the Representatives and Attaches offices abroad". In the translation relied upon by the applicants the title is: "Employment Contract for Contractors at representations and missions abroad."

[51] At the hearing of its jurisdictional objections, the only term of the contract the Respondent cited or relied upon as the basis for their objection was the title.

[52] Obviously both translations use the word "contractors." Mr Osman, who worked for the Respondent as a translator, submitted that in Arabic the word "contractors" refers to two people who make a contract. He said that if one person purchased a car from another, for example, then in Arabic both of them would be referred to as contractors (who entered into a contract for the sale of a car).

[53] In any event the title of the document is not determinative. In considering the terms of the contract entered into by the Respondent with each of the applicants, I am readily satisfied that each applicant was engaged by the Respondent under a contract of employment.

[54] Although each application was filed prior to the High Court decisions in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 312 IR 1, [2022] HCA 1 (**Personnel Contracting**) and *ZG Operations Australia Pty Ltd v Jamsek* (2022) 312 IR 74, [2022] HCA 2 (**Jamsek**) the Respondent's argument that all of the applicants were independent contractors is baseless and should never have been put.

[55] Secondly the Respondent relies upon the "Contractor Declaration Form" document signed by each applicant in 2014. The evidence about this signed "Contractor Declaration Form" is summarised at paragraphs [21]-[25][25] above.

[56] The Respondent did not submit that the "declaration" varied any contract between the Respondent and any applicant. Taken at its highest the "declarations" are obviously either conduct under the contract or a label applied by the parties.

[57] The applicants all indicated that they were given a copy of the 2014 "declaration" by the Respondent and, in essence, were coerced into signing the document in order to keep working for the Respondent.

[58] The Respondent relied on *Jamsek* at [9] where the plurality recognised that in some circumstances there might be "good reason" for examining conduct under the contract:

> "[9] In addition, as a practical matter of the due administration of justice, 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. The claims made by the respondents in this case did not give rise to an occasion for such an exercise, those claims involving no suggestion that any aspect of the day-to-day performance of the contract superseded the rights and duties established by the contract. That having been said, however, in order to aid an understanding of the reasons of the courts below and of the arguments in this Court, it is desirable to summarise the salient aspects of the history of the dealings between the parties."

[59] The Respondent submitted that this was one such occasion where there was a "good reason" to examine conduct under the contract. The "good reason" relied upon by the Respondent was that the original standard contract was in Arabic and there was some uncertainty about competing translations of the contract. The Respondent then argued that the "declaration" by workers, reproduced above, was relevant to understanding the nature of the contractual relationship between the Respondent and each applicant.

[60] I reject this submission. I have assumed that each of the parties that executed a written contract could read Arabic. The Respondent made no submission to the contrary. Whilst there are some differences between the two translations provided by the parties, the Respondent was unable to identify why the fact that the contracts were in Arabic was a "good reason" to look beyond the terms of the written contract.

[61] The fact that after the "declarations" were signed the payment arrangements for the applicants changed is problematic for the Respondent's argument. On its face the declaration purports to "declare" something that has always been so. However the "declarations" brought about a change to the payment arrangements for the applicants – most noticeably that taxation and superannuation were no longer deducted or paid by the Respondent. If the contracts were not varied then there is no obvious need to change the payment and taxation arrangements.

Jurisdictional objection: Were the terms of the standard contract relevant inconsistent?

[62] The next limb of the Respondent's jurisdictional objection is no stronger than the previous objections.

[63] Section 12(4) of the FSI Act is to the effect that the employment exclusion in s.12 does not apply if "an inconsistent provision is included in the contract of employment and a law of Australia does not avoid the operation … of the provision."

[64] The Respondent's submitted that Article 21 in the standard contract is inconsistent with the loss of immunity. Article 21 is reproduced in paragraph [16] above and allows disputes about the contracts to be referred to the Ministry of Civil Service in the Kingdom of Saudi Arabia whose decision on the matter shall be considered final.

[65] The Respondent's submissions included the following:

> "The Respondent says that Article 21 of the Contract that was signed by all of the Applicants represents a mandatory agreement in writing between it and each of the Applicants that the jurisdiction of relevant authorities of Saudi Arabia, rather than the courts of Australia, is to apply to the relationship between the parties and the locus fori of any disputes that may arise."

[66] I do not accept this submission. The Respondent's and the applicants' translations of Article 21 use the word 'shall' rather than 'must'. The Respondent's translation says "any dispute ... regarding the any of [the contract's] articles shall be presented to the Ministry of Civil Service ...". The applicants' translation says "any dispute ... shall be referred to the Ministry of Civil Service". In context this does not require the parties to refer any and all disputes to the Ministry or prevent a party from pursing a dispute in a different forum. Article 21 does not amount to an agreement to confer exclusive jurisdiction upon the Ministry to deal with any and every dispute about a term of the contract.

[67] The Full Court in *Benevenuto* said of s.12(4)(a):

> "[47] Accordingly, I consider it appropriate to proceed on the basis that s 12(4)(a) requires an enquiry as to whether there is a provision in the contract of employment which is inconsistent with the local court having jurisdiction over disputes arising from, or in relation to, the contract. An actual inconsistency with the Australian courts having jurisdiction is required. It is not sufficient that courts of the foreign State could hear and determine the dispute. Nor is it sufficient that matters exist which may attract the doctrine of forum non conveniens. If an inconsistent provision of the requisite kind is included in the contract of employment, the enquiry under subs (4)(b) is whether there is a law of Australia which negates in one or other of the specified ways the effect of that provision."

[68] The Ministry of Civil Service in the Kingdom of Saudi Arabia is not a court. If the Respondent's submission is correct, then no dispute about a term of the Standard Contract could ever be raised in a court.

[69] There is no inconsistency with Australian courts having jurisdiction to enforce these contracts, particularly when many of the contracting employees are Australian citizens or residents only ever employed to work in Australia.

[70] Perhaps more fundamentally, the translated versions of Article 21 refer only to disputes about the Articles of the contract. An unfair dismissal claim is not a dispute about an Article of the contract, it is a proceeding relating to the termination of the employment. In other words, no applicant can or is seeking to enforce a term of their contract in these unfair dismissal proceedings.

[71] Even if s.12(4)(a) was engaged, s.12(4)(b) would undoubtedly apply to the inconsistent term. By analogy, such a term in an employment contract between a National System Employer and a National System Employee could not affect the operation of the unfair dismissal jurisdiction. Quite obviously Article 21 would be subject to Australian law, including the FW Act. Parties are not able to contract out of the statutory provisions of the FW Act (see *Benevenuto* at [68] and the cases cited therein including *Josephson v Walker* [1914] HCA 68; (1914) 18 CLR 691).

[72] This aspect of the Respondent's objection is rejected.

Permanent residents

[73] The final limb of the Respondent's jurisdictional objection in reliance on the FSI Act is that some of the applicants were not permanent residents (see FSI Act, ss.12(3) and 12(7)).

[74] The Respondent accepted that some applicants were permanent residents of Australia at the relevant time: Mr Bashir, Mr Dayein, Ms Elshikh, Mr Darwish, Mr Ahmed and Ms Saleh.

[75] None of the other applicants, whom I will refer to collectively in this part of the decision as the 'contested applicants', were Australian citizens or Saudi nationals at the time they signed written contracts. The contested applicants were third state nationals (see below), being Algerian, Sudanese, Jordanian, Lebanese, Iraqi or New Zealanders at the relevant times.

[76] It is necessary to make some observations about the FSI Act generally and s.12(3) and 12(7) specifically:

(a) the purpose of the FSI Act is to reflect the more restrictive view of the common law immunity which had been taken in other countries and adopted in legislation;
(b) the FSI Act was introduced after the publication of the Australian Law Reform Commission Report Foreign State Immunity (Report No 24, 10 October 1984);
(c) the recommendations of the ALRC Report were wholly accepted and the report's draft legislation formed the basis for the FSI Act;
(d) the ALRC Report provides an important context by reference to which the terms of the FSI Act are to be interpreted (per *Greylag Goose Leasing 1410 Designated Activity Company v P.T. Garuda Indonesia Ltd* [2023] NSWCA 134 at [18]-[22], [51]-[52] and [79], (2023) 111 NSWLR 550);
(e) the ALRC Report cannot displace the clear meaning of the FSI Act (see *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43 at [173], (2015) 258 CLR 31 at [81];
(f) the scheme of s.12(1) is to provide first that a foreign State, as employer, is not immune from the jurisdiction of Australian courts in respect of proceedings concerning the employment of a person whose contract of employment has a defined nexus with Australia (Republic of Italy (*Minister of Foreign Affairs and International Cooperation - Adelaide Consulate) v Benvenuto* [2018] FCAFC 64 at [8]);
(g) the summary section of the ALRC Report (page xiii) includes the following:

> "19. Contracts of Employment. A special provision is needed to take into account both the sensitivity of the employment relationship between a foreign state and its employees, and the interest of Australia in asserting jurisdiction over local employment. A foreign state should not be immune with respect to a contract of employment made in Australia

or to be wholly or partly performed in Australia, unless made with a person who, when the contract was entered into, was a national of that state and not a national or permanent resident of Australia, or who was habitually resident in that state."

(h) the body of the report includes the following (at [94]-[97]):

"94 … It can be assumed that the Australian government would not wish to be able to be sued in a foreign court by its employee where the employee was an Australian citizen recruited in Australia and perhaps only present in the foreign state for the briefest of periods. Yet were an alleged breach of the employment contract to occur in the foreign state it would be open, if the ordinary rules of jurisdiction are applied, to the employee to sue in this way. On the other hand where a foreign state hires an Australian national in Australia to work in Australia and the breach occurs here it seems clear that the interest of Australia in providing a local forum for the employee outweighs the foreign state's interest in exclusive jurisdiction.

…

96. Avoiding Unnecessary Distinctions. Two distinctions appearing both in the European Convention and in the United Kingdom Act, and which add significantly to their complexity in this respect, can be dispensed with in an Australian provision. The first involves a distinction, in applying the connecting factors of nationality or permanent residence, between the time when the contract is entered into and the time when the proceedings are brought. Both times are relevant under the United Kingdom provisions. On balance it is sufficient to refer only to the time when the contract is made, both because it is simpler and because that is the time when the intention of the parties is formed. The employee may change status without reference to his employer and, to take the worst case, might even do so simply in order to take advantage of a greater opportunity to sue his employer… In the *Annotated Draft Legislation* circulated by the Commission, the distinction between 'commercial office' and other employment was adopted in slightly simpler form. The effect was to exclude jurisdiction over third state nationals not permanent residents of Australia and not employed in relation to a commercial office. But the employment of third state nationals may have no nexus at all (other than nationality) with the third state, and it does not seem desirable to assert (or encourage the assertion of) jurisdiction over transactions based solely on the plaintiffs nationality. There is no reason to treat employment by a state of a national of another state (not a habitual resident of the employing state) as necessarily or exclusively a matter for the employing state. For these reasons, it is better to assert jurisdiction over local contracts of employment based on justifiable jurisdictional links independently of the distinctions between 'commercial office' and other employment.

97 *Connecting Links with State Employment Contracts.* In designing an Australian provision for employment contracts it is necessary to consider first what links should exist between the employment contract and Australia, such that it is reasonable that Australian courts have jurisdiction over the contract. A second issue is whether any further links between the employee and Australia should be required, or alternatively which links between the employee and the foreign state should be sufficient to attract immunity…

> *Status of employee*: A state has a special relationship with persons who are its own nationals, and with persons who (whatever their nationality) are closely linked to the state by virtue of long term residence there. For these reasons, and consistently with the overseas provisions a foreign state should be immune from local jurisdiction in respect of a contract of employment with a person who, when the contract was entered into, was a national of that state and not a national or permanent resident of Australia, or who was habitually resident in that state at that time. For the reasons already given, no general distinction should be drawn between Australian and third state nationals with respect to local employment. The foreign state's interests are sufficiently protected by excluding employment with its own nationals or habitual resident, and by the provisions for agreements to the contrary, and for employees of diplomatic and consular missions…"

(i) as can be seen from this excerpt, the focus of the exclusion for permanent residents in s.12(3) and s.12(7) is to preserve immunity for foreign states in relation to the employment of nationals of their own state. The report found that it is better to assert local jurisdiction over local contracts of employment based on justifiable jurisdictional links and that there was sufficient reason/justifiable links to treat the employment of nationals of a third state as local employment/local contracts because the other protections and immunities are sufficient to protect the foreign state's interests; and

(j) it is in this context that one should consider whether the contested applicants were permanent residents of Australia at the relevant time.

[77] The Respondent submitted that the definition in s.12(7) of permanent resident includes any limitation as to time imposed by or under a law of Australia. The Respondent said:

> "… Such a limitation could be that a visa expires on a specified date or that a visa expires on the occurrence of a specified event that will necessarily occur. A visa may also expire by reason of some other factor which may occur, such as, in the case of a Special Category Visa (SCV) subclass 444, travelling, changing New Zealand nationality or cancelling the visa for any reason."

[78] Section 12(7) does not appear to have been specifically considered by any court or tribunal.

[79] In my view the Respondent's submission states the test too highly. In essence the Respondent submitted that any limitation on a person's continued presence in Australia activates the immunity. At its crudest, the Respondent's argument seems to be that any contested applicant whose presence in Australia at the relevant time was subject to a visa, is not able to pursue their claim because their visa might expire or be cancelled at a time in the future.

[80] Applying the text of the Act, a person who is not an Australian citizen can only be a permanent resident of Australia (as defined) if the following circumstances apply:

(a) the person is a resident in Australia; and

(b) the person's continued presence in Australia is not subject to a limitation as to time (imposed by or under a law of Australia).

[81] As outlined above, the terms "permanent resident of Australia" and "limitation as to time" are to be understood in the context of legislation that seeks to ensure that a foreign State employer is not immune from the jurisdiction of Australian courts in respect of proceedings concerning the employment of a person whose contract of employment has a defined nexus with Australia. The requirement that the person be a permanent resident of Australia at the time the contract was made is one such nexus. Treating the employment of nationals of a third state as local employment/local contracts is appropriate when setting the boundaries of the immunity from local employment laws afforded to foreign states.

[82] In this context, the "limitation as to time" must relate directly to the time that the person is entitled to be present in Australia, be identifiable and specific as to the limitation imposed on the person's time.

[83] The Respondent submitted that each applicant bore an onus to establish that they were permanent residents. There was a suggestion at the hearing that the Respondent had required each applicant to provide passport and visa information periodically so that the Respondent could meet requirements imposed on it by the Australian Department of Foreign Affairs, and that therefore the Respondent was in possession of relevant documentation to prove or disprove the status of each applicant at the relevant time. At the conclusion of the hearing I gave the contested applicants leave to file additional evidence.

[84] It is necessary to consider the circumstances of each of the contested applicants.

Mr Abdelrahman Wedissa and Mr Qusai Mubaidin (no documentation)

[85] Mr Wedissa signed a contract on 22 February 2008. In 2008 Mr Wedissa was a Sudanese national. Mr Wedissa provided a photograph of a sub-class 866 visa that appears to have been issued in 2009. No evidence was provided about any visa issued to him before 2009.

[86] I gave Mr Wedissa a fair opportunity to provide evidence to establish that he was a permanent resident (as defined) in 2008 but he did not do so.

[87] Mr Wedissa became an Australian citizen on 8 December 2011, which means he had been an Australian citizen for more than 10 years when he was dismissed in April 2022. However s.12(6) of the FSI Act is very clear in its reference to "at the time when the contract of employment was made."

[88] Similarly Mr Mubaidin signed a contract on 25 February 2013 but provided no evidence that established that he was a permanent resident at the time that his contract of employment was made.

[89] On the state of the evidence I cannot be satisfied that Mr Wedissa or Mr Mubaidin were permanent residents at the time they made their employment contracts with the Respondent. Mr Wedissa's and Mr Mubaidin's unfair dismissal claims cannot continue and must be dismissed because the Respondent is immune from the jurisdiction of the Commission in relation to their claims.

Ms Suzanne Maksoud (sub-class 309 visa)

[90] Ms Maksoud signed a contract on 26 April 2009 and was a Lebanese national at the time. Ms Maksoud filed a copy of a subclass 309 visa granted to her on 30 October 2008 that said:

> "Class UF Provisional Resident P620
>
> Sub class 309
>
> Conditions Mig.Regs.Sched.8
>
> Initial Entry by 07JUN09.
>
> Granted 30OCT08. Holder(s) permitted to travel to and remain in Australia until notified that the permanent visa application has been decided or until the permanent visa application is withdrawn. Multiple travel."

[91] The Respondent submitted that a sub-class 309 visa is a temporary visa can be issued to spouses or defacto partners of Australian or New Zealand citizens while a permanent visa (subclass 100) is finalised or withdrawn. The Respondent argued that "at the time when a person is holding a subclass 309 visa itself, they have only been given permission to be present in Australia for a finite period" and therefore Ms Maksoud's presence in Australia was subject to a limitation as to time within the meaning of s.12(7) of the FSI Act.

[92] For the reasons explained above, the limitations on Ms Maksoud's ongoing entitlement to be present in Australia were not directly limitations as to time. The limitations could have, but did not, indirectly affect the length of time that Ms Maksoud was entitled to be present in Australia, but this potential impact or limitation is not relevantly a "limitation as to time" for the purposes of s.12(7).

[93] On the evidence available, Ms Maksoud was a permanent resident of Australia as defined in s.12(7) at the time her contract of employment was made.

Mr Mohamed Ben Mansour (subclass 820 visa)

[94] Mr Mansour was a Tunisian national on 11 November 2007 when he signed a contract in the standard terms. Mr Mansour held a subclass 820 visa at the time, which allowed him to remain in Australia until either (1) his spouse's application for a subclass 801 visa has been decided or (2) his spouse's application is withdrawn. Mr Mansour was told by the Department of Immigration and Multicultural Affairs that "the grant of the temporary spouse visa does not necessarily mean that you will be granted permanent residence".

[95] The Respondent submitted that Mr Mansour's visa limited Mr Mansour's right to be present in Australia to "a finite period."

[96] For the reasons explained above, the limitations on Mr Mansour's ongoing entitlement to be present in Australia were not directly limitations as to time. On the evidence available, Mr Mansour was a permanent resident of Australia as defined in s.12(7) at the time his contract of employment was made.

Mr Mohammed Namaoui (New Zealand citizen with subclass 444 visa)

[97] In the contract signed by Mr Namaoui on 5 January 2011 his is described as an Algerian national. Mr Namaoui provided a New Zealand Certificate of citizenship dated 5 September 2005, says he is a New Zealand citizen who has been residing permanently in Australia and working under a Special Category Visa (**SCV**) Subclass 444 since 2009.

[98] It seems to be accepted that a subclass 444 visa is a "temporary visa [that] allows you to visit, study, stay, and work in Australia if you are a New Zealand citizen and meet the eligibility criteria". It allows the holder to stay "from the time you are granted the visa until you leave Australia, unless it ceases because of other reasons. These may include if we grant you a permanent visa, you become an Australian citizen, or we cancel the visa. When you leave Australia your visa will cease. You must apply for a new SCV if you want to enter Australia again."

[99] Once again the Respondent submitted that this class of visa has several restrictions as to time. In the same way that some of the circumstances or conditions of this subclass of visa might affect the time that Mr Namaoui might be permitted to be present in Australia, these limitations are not "limitations as to time" for the purposes of s.12(7) of the FSI Act.

[100] For the reasons explained above, the limitations on Mr Namaoui's ongoing entitlement to be present in Australia were not directly limitations as to time. On the evidence available, Mr Namaoui was a permanent resident of Australia as defined in s.12(7) at the time his contract of employment was made.

Mr Yassine Belkamel (New Zealand citizen with subclass 444 visa)

[101] Mr Belkamel was a New Zealand citizen on 11 October 2011 when he signed a written contract. Mr Belkamel's circumstances are relevantly identical to Mr Namaoui's circumstances insofar as he was resident in Australia at the relevant time under a subclass 444 visa.

[102] The same arguments were put against Mr Belkamel and for the same reasons applied to Mr Namaoui, I find that Mr Belkamel was a permanent resident of Australia as defined in s.12(7) at the time his contract of employment was made.

Mr Mohammad Abdul-Hwas,

[103] Mr Mohammad Abdul-Hwas was also a New Zealand citizen holding a SCV subclass 444 visa when he signed a contract of employment in Australia in 2011. Mr Abdul-Hwas relies on the "Trans-Tasman Travel Arrangement" which is a bilateral agreement between Australia and New Zealand that permits citizens of both countries to reside, work, and travel freely between them.

[104] The legal effect of the "Trans-Tasman Travel Arrangement" is not clear but Mr Abdul-Hwas' circumstances are indistinguishable from the circumstances of Mr Namaoui and Mr Belkamel. I find that Mr Abdul-Hwas was a permanent resident of Australia as defined in s.12(7) at the time his contract of employment was made.

Mr Zach Kalany, Mr Muaammar Ibrahim Najjar, Mr Abdalaal Nassir, Mr Abdulrag Osman, and Mr Mohammad Obaidi (permitted to remain indefinitely)

[105] Mr Kalany, Mr Najjar, Mr Nassir, Mr Osman, and Mr Obaidi all provided evidence of valid and operative visas applying to them on the day they each signed a written agreement.

[106] The visas for each of these applicants all say that the "Holder(s) permitted to remain in Australia indefinitely."

[107] Each visa also said that the holder must not arrive after a specified date.

[108] Despite the obvious fact that each applicant had arrived in Australia prior to signing their contracts, the Respondent relied upon the condition in the respective visas that specified a "must not arrive after" date to submit that each visa imposed a limitation as to time on the applicants. The Respondent's submission is nonsense.

[109] I find that Mr Kalany, Mr Najjar, Mr Nassir, Mr Osman, and Mr Obaidi were permanent residents of Australia as defined in s.12(7) at the time their contracts of employment were made.

Jurisdictional Objection: Premature Applications

[110] Lastly the Respondent argued that each of the applications was made prematurely because each applicant commenced their proceeding prior to their dismissal taking effect.

[111] The Full Bench decision in *Mihajlovic v Lifeline Macarthur* [2014] FWCFB 1070 at [42] makes it plain that the Commission has power to waive such irregularities (per s.586(b) FW Act).

[112] The Respondent argued it the Commission should not waive this irregularity because it would be inappropriate for the Respondent as a foreign state to have to defend applications that are deficient. The Respondent did not explain, or could not explain, why it was inappropriate for the Respondent to have to defend these claims.

[113] To the extent that the Respondent raised this matter as a jurisdictional objection, that objection must fail.

Conclusion

[114] In light of my findings at [87] I will separately make orders dismissing the applications made by Mr Wedissa and Mr Mubaidin.

[115] The Respondent's jurisdictional objections are otherwise dismissed and the remaining applications will progress to a determination on merits.

Costs

[116] It is premature to consider any orders for costs (see s.402 of the FW Act) but it is nonetheless timely to make some brief observations about costs before the matters progress to the next stage.

[117] As is clear from the above, almost all the Respondent's objections failed.

[118] Although several arguments were raised by the Respondent as to why the Commission does not have jurisdiction to hear any of the claims, almost every argument fails under closer scrutiny. Many aspects of the Respondent's arguments failed on grounds that should have been obvious to the Respondent's representatives. Except for matters relating to s.12(7) of the FSI Act, each argument advanced by the Respondent failed in its own case.

[119] As mentioned in paragraph [3] above, the applicants all engaged legal representation but ran out of funds to continue that representation. There is a prima facie argument available that the provisions of s.400A, s.401 and s.611 are enlivened by the Respondent's decision to press its jurisdictional objections.

[120] The Respondent's pursuit of these matters may or may not have caused the applicants to incur costs. These are matters for determination on another day.

DEPUTY PRESIDENT

Appearances:

Shazlia Saleh, Mohamed Namaoui, Hamoda Dayein, Salwa Elshikh, Elhadi Almahadi, Abdelrahman Wedissa, Muhammad Ahmed, Qusai Mubaidin, Elsyaed Ali Eltaher Bashir, Suzanne Maksoud, Mohammed Obaidi, Mohammad Abdul-Hwas, Yassine Belkamel, Zach Kalany, Mu'ammar Ibrahim Najjar, Abdalaal Nassir, Mohamed Ben Mansour, Abdulrazig Osman, Applicants
C Harris, T Mills, J Noakes and H Wilson of Norton Rose Fulbright for the Respondent

Hearing details:

2024.
Sydney (By Video using Microsoft Teams)
March 14.

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