FAIR WORK AUSTRALIA

DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Glenn Gardner

v

Milka-Ware International Ltd
(U2009/13800)

COMMISSIONER GOOLEY MELBOURNE, 25 FEBRUARY 2010

Termination of employment – jurisdiction – national system employer.

[1] This decision relates to an application by Mr Glenn Gardner under s.394 of the *Fair Work Act 2009* (the FW Act) alleging that the termination of his employment by Milka-Ware International Ltd (MW International) was harsh, unjust or unreasonable. The application was made on 16 November 2009.

[2] MW International filed a Form F3 – Employer's Response to Application for Unfair Dismissal Remedy – in which it advised that there was a jurisdictional objection to the application. It stated that because MW International was a New Zealand Registered, Directed and Owned Company; traded in New Zealand only; employed Mr Gardner in New Zealand and paid Mr Gardner in New Zealand dollars into Mr Gardner's New Zealand bank account, Fair Work Australia did not have the jurisdiction to hear the application and it should be dismissed.

[3] The matter was initially set down for conciliation on 3 December 2009 but this was cancelled in light of the advice of MW International that it would not attend such conciliation due to its jurisdictional objection. Directions for the filing of material were issued on 10 December 2009.

[4] MW International was directed to file with Fair Work Australia and serve on the applicant an outline of submissions and any witness statements and documentary material it intended relying on by 21 December 2009. No material was filed by MW International.

[5] On 13 January 2010, in compliance with the directions, Mr Gardner filed and served an outline of submissions and a statement of Mr Gardner.

[6] During the proceedings Mr Ludbrook, of counsel, represented Mr Gardner and Mr Doak, the Chief Executive Officer of MW International, represented MW International. The matter was heard on 12 February 2010. Mr Doak did not call any witnesses in the proceeding. Documentary evidence was tendered by Mr Doak without objection.

[7] Mr Gardner gave evidence and was not cross examined by Mr Doak. Mr Doak objected to parts of Mr Gardner's evidence on the basis of relevance. The evidence was admitted subject to his objection which I propose to deal with in this decision.

[8] Some correspondence had been forwarded to Fair Work Australia by Mr Gardner's legal representative prior to the hearing which had raised the question of who was Mr Gardner's employer and in his submissions and statements Mr Gardner made reference to Milka-Ware (Australia) Pty Ltd as Mr Gardner's employer. No application was made to amend the name of the employer and it was accepted by all parties that Mr Gardner was employed by MW International who was named in the original application.

Background

[9] Mr Gardner was initially employed by Milka-Ware (Australia) Pty Ltd in November 2004 as the Product Manager: Electronics/Herd Management[1]. At some time before Mr Gardner commenced employment with MW International, Milka-Ware (Australia) Pty Ltd was taken over by CCH Pty Ltd[2].

[10] In May 2008 Mr Gardner was approached by Mr Doak to perform work in New Zealand[3]. No written contract was signed, however Mr Gardner attached to his statement a copy of emails between Mr Doak and himself in which the terms of his engagement were discussed[4]. There is no reference to MW International in the email forwarded by Mr Doak to Mr Gardner on 22 May 2008. When discussing the terms of Mr Gardner's return to Australia at the end of the contract Mr Doak stated that "Australia is a totally separate situation. Different company, different environment and customers that are insecure … NZ is different because any employee moving out of Australia to NZ without needing to be replaced, effectively alleviates payroll tax pressures on Australia and gets funded by a new company, with very few costs, assisting the entire situation. On return, the reverse occurs. This goes for me as well."[5] While the email makes it clear that the terms of the new engagement were not finalised at that time, it is clear from an email sent by Mr Gardner on 10 November 2008 that he was aware that he was "not actually employed officially by CCH anymore and rather by Milka-Ware International".[6] Mr Doak relied upon both these documents to support his contention that Mr Gardner knew he was employed by a new employer, namely MW International.

[11] Mr Gardner's sworn evidence is that there was no discussion about working for a new company[7]. Mr Doak, from the bar table, stated that the change of company was verbally discussed[8]. No objection was taken to Mr Doak's statement at the time. In any event while Mr Gardner's written submissions sought to suggest that he was employed Milka-Ware (Australia) Pty Ltd this submission was not pressed at the hearing where it was accepted that MW International was Mr Gardner's employer at the time of his dismissal.

[12] Mr Gardner commenced work for MW International and he originally performed work in both New Zealand and Australia on the basis that he work three weeks in New Zealand and one week in Australia[9]. At the commencement of 2009 this arrangement was changed and Mr Gardner worked two weeks in New Zealand and two weeks in Australia[10]. Mr Gardner's evidence was that in May 2009 he worked one day in New Zealand and the rest of the time in Australia[11]. While Mr Doak indicated that he agreed that this was correct, he submitted that it was not because there was no work for Mr Gardner to do in New Zealand[12]. In June Mr Gardner worked one week in New Zealand and three weeks in Australia and in July he

worked for four weeks in Australia. In August and September 2009 he worked two weeks in New Zealand and two weeks in Australia in each month and he did not return to New Zealand after September 2009[13]. Mr Gardner, at the time of his dismissal on 12 November 2009, was performing work for MW International in Australia[14]. Mr Doak submitted that whilst working in Australia Mr Gardner performed work for CCH Pty Ltd for which MW International invoiced CCH Pty Ltd[15]. However there is no evidence that Mr Gardner performed this work, other than at the direction of MW International, and whilst Mr Doak gave unsworn evidence that Mr Gardner did very little chargeable work for CCH Pty Ltd during his time in Australia, Mr Doak's own evidence showed that in October 2009 MW International charged CCH Pty Ltd $12,320 for 22 hours work performed by Mr Gardner for CCH Pty Ltd[16].

Submissions

[13] MW International's principal submission was that Fair Work Australia does not have the jurisdiction to hear the application because MW International is not a national system employer as it is not a constitutional corporation. MW International, it was submitted, is incorporated in New Zealand[17] and its employment of Mr Gardner was not subject to the FW Act.

[14] In his submissions Mr Doak referred to section 51(xx) of the Australian Constitution which relevantly says:

> "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-
>
> …
>
> (xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;"

[15] Mr Doak's primary submission was that for a foreign corporation to be within the scope of s.51(xx) it must be "formed within the limits of the Commonwealth"[18] and the Commonwealth in this context is the Commonwealth of Australia. Mr Doak submitted that because MW International was formed and incorporated in New Zealand it is not within the ambit of s.51(xx).

[16] Mr Doak accepted that if it were found that MW International was a foreign corporation that it was not necessary to determine the alternative submissions that Mr Gardner was an "Australian based employee" within the meaning of s.35(2) of the FW Act.

[17] Mr Ludbrook's submission was that for the whole of 2009 Mr Gardner spent most of his time working in Australia and that Mr Gardner was "principally employed in Australia during 2009."[19] In response to Mr Doak's submissions that the Constitution requires foreign corporations to be formed within the limits of the Commonwealth, Mr Ludbrook made no submissions only stating that he "wouldn't have thought that was the case"[20].

Findings

[18] Section 380 of the FW Act provides that:

> "In this Part, **employee** means a national system employee, and **employer** means a national system employer."

[19] Section 13 of the FW Act defines a national system employee as follows:

> "A **national system employee** is an individual so far as he or she is employed, or usually employed, as described in the definition of **national system employer** in section 14, by a national system employer, except on a vocational placement."

[20] Relevantly s.14 of the FW Act defines a national system employer as follows:

> "(1) A **national system employer** is:
>
> (a) a constitutional corporation, so far as it employs, or usually employs, an individual; or …"

[21] The submissions of Mr Doak that MW International is not a national system employer must be rejected.

[22] Mr Doak and Mr Ludbrook's attention was drawn to *New South Wales v The Commonwealth*[21] (the Incorporation Case) and both parties were invited to put further submissions on whether to be a foreign corporation, the corporation must be formed within the Commonwealth of Australia. Neither party put forward any further submissions.

[23] The joint judgement in the Incorporation Case held, in discussing the scope of s.51(xx), that "to fall within one limb of the power, a corporation must satisfy two conditions: it must be formed within the limits of the Commonwealth and it must be a trading or financial corporation. To fall within the other limb, a corporation must be a foreign corporation, that is, a corporation formed outside the limits of the Commonwealth."[22] Justice Deane, whilst in dissent in the substantive matter, also agreed that "In the context of s.51(xx), the word "foreign" and the phrase "formed within the limits of the Commonwealth" should, in my view, be construed as comprehensive alternatives. So construed, a "foreign" corporation is, for the purposes of the paragraph, one that is "formed" outside the limits of the Commonwealth."[23]

[24] The fact that MW International was incorporated in New Zealand means that it is a foreign corporation within the meaning of s.51(xx) and therefore, to the extent that it employs employees to perform work in Australia, it is a national system employer as defined in s.14 of the FW Act.

[25] It is not clear from the evidence in the proceeding where the contract of employment between Mr Gardner and MW International was formed. Discussions of the terms of the contract were contained in emails. Mr Doak gave unsworn evidence that some of the discussions were verbal.[24]

[26] It is not necessary, for this decision, to decide if the place of the formation of the contract was Australia or New Zealand. Even assuming that the contract of employment was made in New Zealand this does not prevent Fair Work Australia from having jurisdiction to deal with the dismissal by a foreign corporation of an employee in Australia.

[27] It was uncontested that, throughout his employment with MW International, Mr Gardner performed work in Australia at MW International's direction. It is also uncontested that in 2009 the majority of Mr Gardner's work was performed in Australia and for the last two months of his employment, and at the date of his termination, all of his work was performed in Australia. Whether Mr Gardner's alleged conduct in 2009 in not performing work in New Zealand during this time warranted his termination is not a matter to be determined in this jurisdictional hearing.

[28] The final issue to be determined is whether the termination of employment of an employee of a foreign corporation whilst in Australia is within the jurisdiction of Fair Work Australia. Mr Ludbrook submitted that as Mr Gardner's principal employment was in Australia in 2009 his termination is within the jurisdiction of Fair Work Australia. Mr Doak's submission was that MW International wanted Mr Gardner to return to New Zealand and he refused and that the work performed in Australia was not by the company's choice[25]. Unfortunately this was not put to Mr Gardner in cross examination and no sworn evidence was put before the Tribunal that contradicted Mr Gardner's evidence about where he performed work. Further this is not consistent with MW International invoicing CCH Pty Ltd for work performed by Mr Gardner in Australia.

[29] I find that it is sufficient for Fair Work Australia to have jurisdiction in this matter that Mr Gardner worked in Australia throughout his contract with MW International and his employment was terminated in Australia. Alternatively if it is necessary, for Fair Work Australia to have jurisdiction to hear the application, to determine that Mr Gardner's primary place of work was in Australia[26], I find that in 2009 Mr Gardner's primary place of work was Australia. Alternatively I find that at the time of his termination, and for the period two months prior to his termination, his primary place of work was Australia and therefore Fair Work Australia has the jurisdiction to deal with Mr Gardner's application.

[30] In relation to Mr Doak's objection to Mr Gardner's evidence which dealt with his employment with other companies, I have had regard to that only as background material and have not relied upon that evidence in reaching my conclusions about Mr Gardner's primary place of work.

Conclusion

[31] The jurisdictional objection is dismissed and Mr Gardner's s.394 application will be further dealt with by Fair Work Australia.

COMMISSIONER

Appearances:

G. Ludbrook for the applicant.

B. Doak for the respondent.

Hearing details:

2010.
Melbourne:
February 12.

Decision Summary

TERMINATION OF EMPLOYMENT – national system employer – foreign corporation – s51(xx) Commonwealth of Australia Constitution Act– ss13 14 380 394 Fair Work Act – jurisdictional hearing following a s394 application for unfair dismissal remedy – applicant was employed by New Zealand company in a role requiring some work in Australia – respondent submitted that FWA has no jurisdiction to hear the matter under s51(xx) as company was not formed within the Commonwealth – held that a foreign corporation under the constitution is one formed outside the Commonwealth – therefore it is sufficient for FWA to have jurisdiction that the applicant worked in Australia throughout the contract and that the employment was terminated in Australia – jurisdictional objection dismissed – application will be further dealt with by FWA.

Glenn Gardner v Milka-Ware International Ltd

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Gooley C Melbourne 25 February 2010
Citation: *Glenn Gardner v Milka-Ware International Ltd* [2010] FWA 1589 (25 February 2010)

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[1] Exhibit GG1.
[2] Transcript PN 170.
[3] Exhibit GG1 at [13].
[4] Ibid at [16].
[5] Exhibit GG1.
[6] Exhibit MW2.
[7] Exhibit GG1 at [17]
[8] Transcript PN 174
[9] Exhibit GG1 at [15].
[10] Ibid at [20].
[11] Ibid at [21].
[12] Transcript PN 176.
[13] Exhibit GG1 at [21].
[14] Ibid at [24] and Transcript PN 215.
[15] Exhibit MW4.
[16] Ibid.
[17] Exhibit MW3.
[18] Transcript PN 158.
[19] Ibid at PN 263.
[20] Ibid at PN 265.
[21] (1990) 169 CLR 482.
[22] Ibid at 497-498.
[23] Ibid at 504.
[24] Transcript PN 174.
[25] Ibid at PN 290
[26] *Noble v Barrick (Ngiugini) Limited* [2007] AIRC 195 at [24].