



# DECISION

*Fair Work Act 2009*  
s.365—General protections

**Rohit Baweja**

**v**

**Capital Insurance Group Limited**

(C2023/967)

COMMISSIONER HUNT

BRISBANE, 21 SEPTEMBER 2023

*Application to deal with contraventions involving dismissal – jurisdictional objection – not national system employer – employer incorporated in Papua New Guinea – question as to whether there is sufficient connection to Australia.*

[1] On 22 February 2023, Mr Rohit Baweja made an application to the Fair Work Commission (the Commission) under s.365 of the *Fair Work Act 2009* (the Act) to deal with a general protections dispute involving dismissal. Mr Baweja claimed that he was dismissed by Capital Insurance Group Limited (the Respondent) in contravention of the general protection provisions of the Act.

[2] The Respondent is an incorporated entity in Papua New Guinea.

[3] Mr Baweja nominated 13 February 2023 as the date of his dismissal. Accordingly, the application has been made within the 21-day time limit prescribed by the Act.

[4] On 7 March 2023, O’Briens Lawyers, a law firm in Papua New Guinea, wrote to the Commission stating *inter alia*:

- The Commission had contacted the Respondent, seeking to know if its email system was secure to receive email communication;
- O’Briens Lawyers communicated that the firm would, on behalf of the Respondent, receive email communication from the Commission;
- The Commission subsequently sent to O’Briens Lawyers the Form F8, a Form F8A, a Notice of Listing and a Form F53;
- O’Briens Lawyers is not able to complete the Form F53 as it is not an Australian firm;
- The Respondent is not able to respond to the Form F8 and the Notice of Listing;

- The Respondent submitted that the Commission does not have jurisdiction on account of the Respondent not being an Australian Employer;
- The workplace and employment described in the employment agreement between Mr Baweja and the Respondent is not in Australia;
- The employment agreement provides for the exclusive jurisdiction of Papua New Guinea;
- Nothing about the employment relationship is within the territorial jurisdiction of Australia; and
- The Commission’s efforts in purporting to serve the Respondent in a foreign country is without legal effect.

[5] O’Briens Lawyers advised that the Respondent had requested through it that the Commission inform itself of the matters raised and determine on its own motion that it does not have jurisdiction. The Respondent requested the Commission determine that there is insufficient connection to Australia as the Respondent cannot be a “national system employer” for the purposes of s.14 of the Act. Attention was made to the Federal Court decision in *Fair Work Ombudsman v Valuair Limited (No 2) (Valueair)* [2014] FCA 759 at [66] – [90].

[6] The application was allocated to me on 23 March 2023. Upon allocation, I issued directions for the filing of material for hearing to determine whether the Respondent is a national system employer.

[7] The Respondent did not file any material to my chambers, as directed. Communication was sent to O’Briens Lawyers, and then directly to the Respondent. I decided to proceed with determining the application without any material from the Respondent.

[8] A hearing by Microsoft Teams was convened on 25 May 2023. Mr Zyngier and Ms Connell of Gilchrist Connell were granted leave to appear for Mr Baweja. Mr Baweja appeared and gave evidence. The Respondent did not attend the hearing.

### **Relevant Legislation**

[9] The question before the Commission is whether the Respondent is a national system employer, and therefore, whether Mr Baweja is protected by the general protections provisions in the Act.

[10] Section 14 of the Act defines national system employer as follows:

**“14 Meaning of *national system employer***

(1) A *national system employer* is:

(a) a constitutional corporation, so far as it employs, or usually employs, an individual; or

- (b) the Commonwealth, so far as it employs, or usually employs, an individual; or
- (c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or
- (d) a person so far as the person, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:
  - (i) a flight crew officer; or
  - (ii) a maritime employee; or
  - (iii) a waterside worker; or
- (e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or
- (f) a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.

Note 1: In this context, **Australia** includes Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands (see the definition of **Australia** in section 12).

Note 2: Sections 30D and 30N extend the meaning of **national system employer** in relation to a referring State.

*Particular employers declared not to be national system employers*

- (2) Despite subsection (1) and sections 30D and 30N, a particular employer is not a national system employer if:
  - (a) that employer:
    - (i) is a body established for a public purpose by or under a law of a State or Territory, by the Governor of a State, by the Administrator of a Territory or by a Minister of a State or Territory; or
    - (ii) is a body established for a local government purpose by or under a law of a State or Territory; or
    - (iii) is a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of, or is wholly controlled by, an employer to which subparagraph (ii) applies; and

(b) that employer is specifically declared, by or under a law of the State or Territory, not to be a national system employer for the purposes of this Act; and

(c) an endorsement by the Minister under paragraph (4)(a) is in force in relation to the employer.

(3) Paragraph (2)(b) does not apply to an employer that is covered by a declaration by or under such a law only because it is included in a specified class or kind of employer.

*Endorsement of declarations*

(4) The Minister may, in writing:

(a) endorse, in relation to an employer, a declaration referred to in paragraph (2)(b); or

(b) revoke or amend such an endorsement.

(5) An endorsement, revocation or amendment under subsection (4) is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the endorsement, revocation or amendment.

Note: Part 4 of Chapter 3 (sunsetting) of the *Legislation Act 2003* does not apply to the endorsement, revocation or amendment (see regulations made for the purposes of paragraph 54(2)(b) of that Act).

*Employers that cannot be declared*

(6) Subsection (2) does not apply to an employer that:

(a) generates, supplies or distributes electricity; or

(b) supplies or distributes gas; or

(c) provides services for the supply, distribution or release of water; or

(d) operates a rail service or a port;

unless the employer is a body established for a local government purpose by or under a law of a State or Territory or is a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of, or is wholly controlled by, such a body.

(7) Subsection (2) does not apply to an employer if the employer is an Australian university (within the meaning of the *Higher Education Support Act 2003*) that is established by or under a law of a State or Territory.”

[11] Sections 30D and 30N extends the meaning of *national system employer*, as provided below:

**“30D Extended meaning of national system employer**

- (1) A *national system employer* includes:
- (a) any person in a State that is a referring State because of this Division so far as the person employs, or usually employs, an individual; and
  - (b) a holder of an office to whom subsection 30E(2) applies.
- (2) This section does not limit the operation of section 14 (which defines a national system employer).

Note: Section 30H may limit the extent to which this section extends the meaning of national system employer.”

**“30N Extended meaning of national system employer**

- (1) A *national system employer* includes:
- (a) any person in a State that is a referring State because of this Division so far as the person employs, or usually employs, an individual; and
  - (b) a holder of an office to whom subsection 30P(2) applies.
- (2) This section does not limit the operation of section 14 (which defines a national system employer).

Note: Section 30S may limit the extent to which this section extends the meaning of national system employer.”

[12] Section 12 of the Act defines a constitutional corporation as “a corporation to which paragraph 51(xx) of the Constitution applies.”

[13] Paragraph 51(xx) of the *Australian Constitution* applies to “foreign companies, and trading or financial corporations formed within the limits of the Commonwealth.”

**Submissions and evidence of Mr Baweja**

[14] Mr Baweja maintained he was dismissed by the Respondent in contravention of Part 3-1 of the Act.

[15] Mr Baweja submitted that the Commission should determine it has jurisdiction to deal with the application because, in summary:

- Mr Baweja lived and worked in Australia for the predominant part of his employment with the Respondent;
- Mr Baweja did business and networking for the Respondent in Australia and represented it at conferences in Australia;

- the employment relationship was substantially “*in and of Australia*” and there was an “*appropriate connection linking the employment relationship sufficient with Australia*”; and
- in the circumstances, Mr Baweja was a national system employee of the Respondent and it was a national system employer of Mr Baweja for the purposes of Part 3-1 of the Act.

[16] Mr Baweja submitted that his employment with the Respondent was subject to the Act, and he is capable of making an application under Part 3-1 of the Act. He submitted that the Commission should proceed to deal with the application pursuant to Part 3-1 of the Act.

### **Chronology of Events**

[17] Mr Baweja explained that the Respondent is in the business of providing insurance products to small, medium and large businesses across five pacific markets. The Respondent is based in Papua New Guinea (PNG).

[18] Mr Jeremy Norton is the Chief Executive Officer. He is an Australian citizen, based in PNG.

[19] The following board members of the Respondent reside in Australia:

- Mr Michael Koisen, Board Chairman, an Australian Permanent Resident based in Cairns and PNG;
- Mr Mark Vele, Board Member and Chair of the Reinsurance Committee, an Australian citizen based in Brisbane; and
- Mr Sundar Ramamurthy, Board Committee and Chair for Capital Life Insurance Group, based in Brisbane.

[20] Mr Baweja is an Australian citizen and lives in Queensland.

[21] Mr Baweja held discussions with a recruiter, People Connexion, in or around November 2020 for a position of Chief Operating Officer (COO). People Connexion operates in Australia and PNG. Two interviews were held, however the Respondent informed him that it was looking locally for the COO role, and Mr Baweja informed the Respondent that he did not wish to relocate to PNG.

[22] In or about August 2021, the recruiter contacted Mr Baweja stating the COO role was being recruited, and the Respondent had appointed Mr Norton as the new CEO. Between August 2021 and December 2021, Mr Baweja held direct discussions with Mr Norton to negotiate the terms of his employment contract. All discussions between Mr Baweja and Mr Norton occurred while Mr Baweja was in Brisbane.

[23] Mr Baweja made it clear to Mr Norton he would not be moving to PNG and his acceptance of the employment with the Respondent was contingent on him being able to work in Brisbane most of the time, with travel to PNG, as required.

[24] Mr Baweja and Mr Norton agreed that he would initially spend 50% of the time in PNG and 50% of the time in Brisbane. The arrangement would then be that Mr Baweja would slowly move to work 70% of his time in PNG and 30% of his time in Brisbane. Ultimately, this arrangement did not eventuate, and Mr Baweja spent considerably more of his working time in Brisbane.

*The terms of Mr Baweja's employment with the Respondent*

[25] On 22 December 2021, while located in Brisbane, Mr Baweja signed an employment agreement which permitted him to make an application for a work visa. The agreement provided for three flights between PNG and Brisbane at the Respondent's cost. Mr Baweja did not immediately commence employment with the Respondent; he did not do so until 16 May 2022.

[26] On 9 March 2022, Mr Baweja met with Mr Norton in Brisbane for the Respondent's Management conference.

*Payment into PNG bank account*

[27] On 6 May 2022, Mr Baweja was requested to open a PNG bank account so that his future earnings could be deposited into that account. Mr Baweja made inquiries and learned that if an Australian bank account is opened, significant delays in receiving payments can occur. Mr Baweja agreed to open a PNG bank account and be paid in kina.

[28] Pursuant to a tax treaty between PNG and Australia, Mr Baweja was not taxed in PNG. At the time of the hearing he had not completed an Australian taxation return, however he will, and he will declare his earnings to the ATO.

[29] On 16 May 2022, Mr Baweja commenced employment as the COO for the Respondent. Mr Norton sent the following email to employees:

“Good morning all

I am delighted to let you know that Roger Baweja is joining us from today as Chief Operations Officer. He will initially be working from Brisbane and will join is here in PNG in early June. We are in the process of updating the org structure and will circulate to everyone in due course.

.....  
.....

Roger will be setting up meetings this week to get to know everyone before he arrives in country – please give him all the assistance he needs and make him welcome.

Great to have you onboard Roger.”

[30] The terms and conditions of his employment were contained in an amended written employment agreement executed by Mr Baweja and the Respondent on 6 June 2022 (the Employment Contract).

[31] The terms of the Employment Contract included the following updated terms:

- Clause 6, Housing:

“The Group Chief Operating Officer shall be entitled to furnished housing to a maximum rental cost of ~~PGK 3,000 plus GST per week~~ or as sufficient to secure accommodation. Such housing is to be free of rent or outgoings/utilities.”

- Clause 8, Joining and Repatriation:

“(a) Four economy class air travel shall be provided by the Company upon commencement and completion of employment to the point of engagement for the Group Chief Operating Officer. The company shall at the completion of the term of employment, ship and repatriate the Group Chief Operating Officer’s personal and household effect up to a maximum capacity of a 20ft container from Port Moresby to the point of engagement.

(b) For this Contract, the point of engagement shall be Brisbane, Australia.”

[32] Mr Baweja noted alongside clause 8 the following: “Per annum total six flights year”.

[33] Mr Baweja explained that the purpose of the amendment to clause 6 was to make it more flexible for Mr Baweja to secure proper accommodation. In practice, Mr Baweja only stayed at the Hilton Hotel whilst in PNG.

[34] As to clause 8, in practice, Mr Baweja used his allocated flights as return flights from Brisbane to PNG.

[35] Mr Baweja stated that he enjoyed all of the relevant public holidays in both PNG and Brisbane.

[36] At the time of the commencement of employment, Mr Baweja received from the Respondent:

- a credit card that was issued to him by the Respondent, which he used for transactions in Brisbane and in PNG; and
- a mobile telephone sim with intentional roaming, which he only used for international calls.

[37] Mr Baweja used his personal laptop and Australian mobile phone account for work purposes.

*Approval to spend more time in Australia*



[38] Mr Baweja stated that in or around July or August 2022, he had a verbal discussion with Mr Norton, Mr Ramamurthy and Mr Koisen about his performance. He requested a pay rise to 750,000 kina and further flexibility to work from Brisbane. He wanted to spend less time working from PNG as he was concerned with the escalating violence. His salary was increased from 600,000 kina to 650,000 kina with approval to work more from Brisbane that had previously been agreed.

*Mr Baweja's work in Brisbane*

[39] Mr Baweja worked at his home in Oxenford, Queensland while in Australia. Mr Baweja performed the majority of his duties for the Respondent while working from Oxenford, however he would also work from Brisbane.

[40] He stated that in addition to his day-to-day activities, he:

- Met with board members of the Respondent who were located in Brisbane;
- Met with Mr Norton when he was in Brisbane;
- Met with various external consultants of and suppliers to the Respondent;
- Met with clients who were located in Brisbane in order to gain more business referrals for the Respondent - Mr Baweja said he met with these clients for coffees, lunches and dinners, which Mr Baweja charged to his credit card issued by the Respondent;
- Attended educational forums for the PNG market on behalf of the Respondent that were held in Brisbane;
- Attended a medical specialist convention in Cairns in July 2022 on behalf of the Respondent, at which amongst other things he held discussions with (Ramsey Group) Cairns Private Hospital for a specialist cardiac treatment scheme for PNG-based clients, including clients based in Australia or travelling overseas; and
- while attending the educational forums, met potential clients, local key insurance brokers (Marsh and Aon insurance brokers) in order to drum up the business as well as increase brand presence for the Respondent.

*Mr Baweja's work in PNG*

[41] During the course of Mr Baweja's employment with the Respondent of approximately nine months, he worked in PNG for a total of 89 days, which included the following dates:

- 5 June 2022 to 10 June 2022;
- 19 June 2022 to 28 June 2022;
- 17 July 2022 to 4 August 2022;
- 8 August 2022 to 12 August 2022;

- 29 August 2022 to 14 September 2022;
- 2 November 2022 to 8 November 2022;
- 27 November 2022 to 9 December 2022;
- 8 January 2023 to 13 January 2023; and
- 22 January 2023 to 26 January 2023.

[42] In addition, Mr Baweja travelled to Fiji from 2 November 2022 to 8 November 2022; and Vanuatu from 16 December 2022 to 21 December 2022.

[43] Mr Baweja calculates the time spent in various locations as:

- PNG - approximately 33% of his time;
- Brisbane – approximately 54% of his time; and
- Other countries – approximately 11% of his time.

#### *The termination of Mr Baweja's employment*

[44] It is not appropriate to traverse in this decision the circumstances relating to Mr Baweja's dismissal.

[45] It is necessary to note, however, that Mr Baweja engaged a PNG law firm in February 2023, who acted on his behalf in corresponding with the Respondent. In correspondence from the PNG law firm, references were made to PNG courts and cases, together with allegations that the Respondent had, in respect of Mr Baweja, contravened the *Whistleblowers Act 2020*, a statute of PNG. A 'demand for payment' was made to the Respondent in respect of certain contraventions Mr Baweja claimed, including for an alleged contravention of the *Whistleblowers Act 2020*. The claim was for approximately 1,800,000 kina.

[46] During the hearing on 25 May 2023, Mr Baweja confirmed he gave instructions to his PNG law firm to make such an allegation to the Respondent.

#### *Evidence given during the hearing*

[47] Without the Respondent's appearance, I considered it necessary to ask questions of Mr Baweja.

[48] In respect of superannuation, Mr Baweja understood and agreed that he would not be paid superannuation in Australia. He stated that in PNG, the company pays local employees superannuation. The Respondent did offer arrangements for superannuation to be paid to him in PNG.

[49] I questioned Mr Baweja in respect of flights made by him to PNG and whether the flights were at his cost or that of the Respondent. Following the hearing, Mr Baweja supplied documentation demonstrating the following, noting that he could not find all of the documentation to support who exactly paid for each and every flight:

<b>Date</b>	<b>Purpose</b>	<b>At whose cost?</b>
5 June 2022 – 10 June 2022	Meet and greet (local team)	Respondent
19 June 2022 – 28 June 2022	Staff meeting and process improvement interviews	Respondent
17 July 2022 – 4 August 2022	Client meetings and staff catch up (face to face)	Respondent
8 August 2022 – 12 August 2022	Board preparation and Brisbane Marketing Agent meet	Respondent
29 August 2022 – 14 September 2022	Unknown	Respondent
2 November 2022 – 9 November 2022	Staff training and Underwriting auditing with ANSIC	Respondent
27 November 2022 – 9 December 2022	Vanuatu business trip debrief and staff meetings	Respondent and Mr Baweja
8 January 2023 – 13 January 2023	Staff function and training	Respondent and Mr Baweja
22 January 2023 – 26 January 2023	Re-insurance audit and Singapore trip debrief	Respondent

**[50]** On 12 January 2023, Mr Baweja emailed Mr Norton as follows:

“Hi Jeremy

I have reviewed all records and can confirm that I used 3 out of my 4 allocated flights and that I wanted to use the final one, for the contracted year, i.e. until May 16 2023.

Can you please confirm approval for Air Niugini flight on 26 Jan to and return to Pom on 5 Feb i.e. work from home on week of 30 Jan – 3 Feb.

I await your approval to book the flights before they become too expensive – price check today was CIRCA 1400 Kina return.”

**[51]** Mr Norton replied:

“Great – thanks and approved to book. Can we please make sure Renagi/Talita etc are updated so we can track.”

**[52]** Mr Baweja soon thereafter emailed a PNG-based administrator of the Respondent:

“...speak soon and I know Tich is doing up a policy for travel booking but until that time, let’s keep a register transparent and log approvals from JN.”

#### *Submissions*

**[53]** Mr Baweja submitted that the application is within jurisdiction because:

- (a) the Respondent is a constitutionally-covered entity, in that it is a foreign corporation within the meaning of paragraph 51(xx) of the Australian Constitution and consequently a constitutional corporation; and
- (b) in respect of Mr Baweja's employment, the Respondent was a national system employer within the meaning of s.14 of the Act and Mr Baweja was a national system employee of the Respondent within the meaning of s.13 of the Act.

[54] In determining whether the Respondent is a 'foreign company', reference was made by Mr Baweja to the decision in *Jones v QinetiQ Pty Ltd T/A QinetiQ Australia*,<sup>1</sup> where the Commission considered the application of *New South Wales v the Commonwealth*<sup>2</sup> as to whether a foreign company within the meaning of paragraph 51(xx) of the Australian Constitution is a national system employer for the purposes of the Act as follows:

"[9] In *New South Wales v the Commonwealth* (the Incorporations Case) the majority of the High Court held 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." Justice Deane agreed that the word "foreign" and the phrase "formed within the limits of the Commonwealth" should be construed as alternatives, so that a foreign corporation is one that is formed outside Australia.

Commonwealth, for the purposes of the Constitution is defined in s.6:

*"The Commonwealth"* shall mean the Commonwealth of Australia as established under this Act.

Therefore, the parliament subject to the Constitution has power to make laws for the peace, order and good government of Australia with respect to foreign corporations."

[55] Mr Baweja submitted that the Respondent is a 'constitutional corporation' under paragraph 51(xx) of the Constitution as the Respondent is a 'foreign corporation'.

[56] The test for when a foreign corporation is a national system employer was set out by the Federal Court of Australia in *Valuair*, which held:

"[67] A constitutional corporation (as referred to in s 14(1)(a) of the FW Act) is a corporation to which paragraph 51(xx) of the *Constitution* applies, including "foreign corporations". I accept that each of *Valuair* and TET is a constitutional corporation.

[68] However, it is clear that s 14(1)(a) cannot be construed to have an operation or effect which would render every foreign corporation throughout the world a national system employer, regardless of any connection at all with Australia (see e.g. *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397 at [43]). Some sufficient connection must therefore be made with Australia, either so far as the constitutional corporation is concerned, or so far as its employees are concerned.

.....

.....

[74] The respondents argued that in order for the FW Act to apply the applicant must show that the employment relationship itself, between TET and Valuair and their cabin crew employees supplied to Jetstar, may be said to be “in and of Australia”.

[75] I accept the respondents’ contention that the FW Act and the Award apply to employment relationships rather than simply to particular work, so that it is necessary first to identify an appropriate connection linking the employment relationship sufficiently with Australia.”

**[57]** It was submitted that the test in *Valuair* was applied by Driver J in *Holmes v Balance Water Inc & Ors* (No.2):<sup>3</sup>

“[124] In *Valuair* Buchanan J found that the Fair Work Act applies to employment relationships rather than simply to particular work, so that it is necessary first to identify an appropriate connection linking the employment relationship sufficiently with Australia.

[125] There are therefore requirements to be met before the Fair Work Act will apply to the employment contract under which Ms Holmes worked for Balance Water LLC:

that there is an “appropriate connection” aligning that employment relationship with Australia; and that the employment relationship is “sufficiently” linked with Australia.’

.....  
.....

[130] I disagree with the summary of the legal position set out at [72] of Ms Holmes’ submissions which states that the relevant connection with Australia must be either in relation to the constitutional corporation or in relation to its employees. That analysis misstates the law as found by Buchanan J in *Valuair*. His Honour observed that:

“It is therefore important, at the outset, to establish the existence of a contract of employment. It is upon that legal circumstance, not just the performance of work, that awards operate.”

[131] The proper test, as set out by Buchanan J, is to link “the employment relationship sufficiently with Australia” not just the employee or the employer.”

**[58]** In *Gardner, Glenn v Milka-Ware International Ltd* [\[2010\] FWA 1589](#),<sup>4</sup> the Commission considered whether a foreign corporation incorporated in New Zealand was a national system employer under the Act. Commissioner Gooley (as she then was) held:

“[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.

.....

[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.’

.....

[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, 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.”

[59] Mr Baweja submitted that having regard to the above authorities, there is a sufficient connection between him and the Respondent’s employment relationship and Australia, considering:

- He was recruited in Australia by Australian recruiters;
- The employment relationship was negotiated while he lived in Australia, was ‘formed’ in Australia and was terminated while he was in Australia;
- His primary place of work was at his home office in Australia;
- He spent only 89 days working at the Respondent’s PNG office and 149 days working in Brisbane;
- The Respondent employed, paid and authorised him to conduct business and represent its interests in Australia, in addition to PNG and other Pacific markets, in that:
  - (a) a substantial part of his role was to meet with and deal with clients and insurance brokers who were located in Queensland, which included having business meetings with them over coffees, lunches and dinners at various locations in Brisbane, for which he paid using his Respondent-issued corporate credit card;
  - (b) a substantial part of his role was to confer with external contractors and consultants who were located in Australia and who also operated in Australia; and

(c) he attended conferences in Australia on behalf of the Respondent and at the Respondent's cost, in the course of his employment;

- He remuneration was only paid to a PNG bank account due to the difficulties with the exchange rate if he was to be paid in his Australian bank account, this would result in significant delays of payment of his remuneration;
- The Chairman and two Directors of the Respondent are based in Queensland; and
- He was granted Queensland public holidays.

[60] Mr Baweja submitted that there are numerous authorities which establish that working from home is considered no different than working in an office. It was submitted that Mr Baweja's home office should be considered an extension of the Respondent's workplace, in that when he was working from his home office, he was at work in the Respondent's workplace, and it was his primary place of work.

[61] Mr Baweja acknowledged that having regard to the decision in *Valuair*, the Act applies to employment relationships rather than simply to particular work and that in *Valuair*, the Court held that the employees were not national system employees. He seeks to distinguish his matter from the circumstances in *Valuair* given the relevant employees were air crew flying through and spending short periods of time in Australia. Further, they were not Australian citizens or permanently residing in Australia.

[62] Mr Baweja submitted that in his case, the employment relationship was substantially (or at least, sufficiently) '*in and of Australia*', and there was an '*appropriate connection linking the employment relationship sufficiently with Australia*'.

[63] Mr Baweja submitted that the Respondent should not have the benefit of Mr Baweja doing business and working for it in Australia without also being bound by the Act in respect of its employment of him.

### **Consideration**

[64] There are limited authorities of the Commission dealing with the issue as to whether an applicant can demonstrate an appropriate connection linking the employment relationship sufficiently with Australia. Of course, the decision in *Valuair* is of great assistance in the matter before me.

[65] I have had regard to the two decisions of the High Court of Australia in *CFMMEU & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1 (Personnel Contracting) and *Operations Australia Pty Ltd & Anor v Martin Jamsek & Ors* [2022] HCA 2 (Jamsek). The High Court confirmed that the legal relationship between the parties will be determined by reference to the rights and obligations created by any contract that they have made, and not by reference to their subsequent conduct.

[66] The decisions emphasised that where the legal rights and obligations are comprehensively committed to a written contract, the validity of which is not challenged as a

sham nor the terms of which otherwise varied, waived or the subject of an estoppel, should not be decisive of the character of the relationship and that the only kinds of rights with which a court is concerned are legal rights.

[67] The employment contract entered into between Mr Baweja and the Respondent expressly declared that Mr Baweja would be an employee of a PNG company and perform his services in “any and all such places in Papua New Guinea as the Company shall require from time to time”. That Mr Baweja gives evidence that the oral arrangement with Mr Norton was for an initial period, 50% of the work to be performed in PNG, regrettably cannot be tested on account of the failure of the Respondent to participate in the proceedings. In any event, the written agreement does not reflect what Mr Baweja asserts is an oral arrangement. The oral arrangement, also, it is noted, was for Mr Baweja to then work 70% of his time from PNG.

[68] There must have been some contemplation for some flights to return to Brisbane, as evidenced by clause 8 within the employment contract. The number of flights expressed to be paid for by the Respondent is very limiting, and not reflective of an arrangement where Mr Baweja would regularly fly to and from PNG, as it somewhat eventuated.

[69] At the time the employment commenced, the contractual terms governing the employment relationship stated that Mr Baweja would be entitled to furnished housing to a maximum rental cost of PGK 3,000 plus GST per week. The parties had contractually agreed that Mr Baweja would primarily perform work from PNG save for a settling in period.

[70] The motor vehicle declared to be provided to Mr Baweja was in PNG, not in Brisbane. Mr Baweja confirmed during the hearing that the vehicle was a pool vehicle, and he understood that he would not be provided with a vehicle in Brisbane.

[71] The repatriation clause within the contract expressly provides for the repatriation of Mr Baweja’s personal and household effects at the conclusion of the employment, evidencing an arrangement where Mr Baweja would primarily live and work in PNG.

[72] The employment contract provides that Mr Baweja will not become involved in or speak out against local PNG politics.

[73] The employment contract provides that Mr Baweja would be entitled to statutory holidays celebrated in PNG. That he took additional holidays in Queensland is not, in my view, a determinative issue.

[74] The parties to the employment contract agreed to submit to the exclusive jurisdiction of PNG.

[75] The annual salary was stated to rise annually in accordance with the PNG consumer price index.

[76] I further note Mr Baweja’s answer during the hearing that at no time did he contemplate that he would become entitled to superannuation pursuant to Australia’s Super Guarantee legislation. He always understood and agreed that superannuation would not be applicable in Australia, and superannuation would be paid into a PNG account.



[77] While it ultimately eventuated that Mr Baweja spent more time in Australia than he did in PNG, this was largely due to personal circumstances that need not be discussed in this decision. It was not reflective of the contractual arrangement entered into at the commencement of the employment.

[78] It is noted that to the best of Mr Baweja's records, the Respondent paid for more than the contractually agreed return trips to PNG. Yet in January 2023, there was permission sought from Mr Baweja to have the last company-paid flight for the first year of the employment relationship. The parties noted that it would be appropriate to put in place more transparent record keeping of the company-paid flights.

[79] Further, it is noted that Mr Baweja submitted that he was recruited by an Australian recruiter. This is not supported in evidence as it clearly demonstrates that a PNG based recruiter, Mr Stephen Mead, had contact and interviews with him. Simply because the recruiting firm had operations in Australia does not equate to him having been recruited by an Australian agency.

[80] I am satisfied that the parties sought to, and did enter into, a contractual relationship to have Mr Baweja work substantially from PNG and not Australia. It was not a sham of any sort; it was the arrangement freely entered into by the parties and solidly reflected in the written terms agreed by them.

[81] Mr Baweja's subsequent arrangement to perform less work in PNG and more work in Australia does not, in my view, alter the rights and obligations created by the contract that they made together. In my view, any work Mr Baweja performed in Australia relating to Australian contacts and arrangements was incidental to the work he was performing from Australia with respect to PNG contacts, staff and arrangements.

[82] For the above reasons, I am not satisfied that Mr Baweja can demonstrate an appropriate connection linking the employment relationship with Australia. I am not satisfied that the employment relationship was "in and of Australia".

[83] If I am wrong about the reliance on the decisions in *Personnel Contracting* and *Jamsek*, I confirm that I would not find that there is an appropriate connection linking the employment relationship with Australia on the following grounds:

- On Mr Baweja's evidence, he agreed to perform 50% of the work from PNG, later increasing to 70%;
- He was not paid in Australian currency;
- He agreed that he would not be entitled to superannuation in Australia;
- He understood that a workers' compensation policy in Queensland would not be taken out by the Respondent and that any workplace health and safety matter would be covered by an international policy taken out by the Respondent;

- He never pressed for the provision of a motor vehicle in accordance with clause 7 of the employment agreement because he knew that one was not provided by the Respondent in Australia; it was only provided in PNG;
- The work performed by him in Australia relating to Australian contacts and insurance opportunities was incidental to the work he performed in Australia and PNG in respect of PNG contacts and insurance opportunities. That is the principal purpose of his employment was the generation of PNG opportunities; and
- His communication (via PNG lawyers) to the Respondent prior to his dismissal threatened actions in a PNG court, citing reliance on particular PNG statute – an avenue not available to employees performing work in Australia unless they consider they have a right to protection from relevant PNG courts.

## **Conclusion**

[84] I am satisfied that the Respondent is a constitutional corporation having regard to paragraph 51(xx) of the Constitution as the Respondent is a foreign company.

[85] In respect of Mr Baweja’s employment with the Respondent, I am not satisfied that there is sufficient connection with Australia and therefore I am not satisfied that the Respondent is a national system employer within the meaning of s.14(1)(a) of the Act.

[86] Accordingly, the jurisdictional objection is upheld, and the application is dismissed. An order to this effect will be published [[PR766474](#)].

## **Order of the National Court of Justice at Waigani Papua New Guinea**

[87] Following my decision being reserved, the Commission received by mail on 22 June 2023, the following letter from O’Briens Lawyers:

“Dear Commissioner,

Attached is a copy of an Order of the National Court of Papua New Guinea restraining Baweja from continuing or maintaining Case Number C2023/967 in the Fair Work Commission.

Neither this letter nor the ordered service constitutes recognition of the Commission’s jurisdiction or a submission to the claimed jurisdiction.”

[88] The Order attached to the correspondence is as follows, where the Respondent in the proceedings before the Commission is the Plaintiff in the PNG proceedings, and Mr Baweja is the Defendant:

- “1. The requirements for service of this Notice of Motion are dispensed with pursuant to Order 1 Rule 15 and or Order 12 Rule 1 and/or Order 4 Rule 49 (20) of the *National Court Rules* and all other powers enabling.

2. The Plaintiff is granted Leave to serve the Defendant with a Notice of the Writ and sealed copies of the Orders made herein, by post and email to the last known addresses of the Defendant in Australia.
3. Until further Order of this Court the Defendant is restrained from continuing or maintaining the claim or action styled *C2023/967 Mr Roger (Rohit) Baweja v Capital Insurance Group Ltd.* in the Australian Fair Work Commission in Brisbane, Australia.
4. The matter is returned to the Court at 1.30 pm on Thursday the 10th August 2023.
5. Insofar as it is necessary, the Plaintiff have Leave to forthwith serve the *Fair Work Commission* in Brisbane with sealed copies of the documents and Orders filed or made herein, by post and email to the Commission in Brisbane, Australia.
6. That the defendant will file his Notice of Intention to Defend in this Court within 45 days of service of the Notice of the Writ.
7. The Plaintiff will make and file affidavits of the service ordered herein.
8. Liberty is granted to each Party to apply on 24 hours notice to the other.
9. Costs are in the cause.
10. Time for entry of these Orders is abridged to the time of settlement by the Register which shall take place forthwith.”

[89] On 27 June 2023, I caused my chambers to seek advice of the Commission’s legal team, noting that my decision was reserved.

[90] On 29 June 2023, advice was communicated to my chambers from the Commission’s Senior Legal Counsel that the Australian Government Solicitor considered the Commission was free to issue its decision despite the orders of the PNG court. The orders do not purport to restrain the Commission.

[91] My decision remained reserved until the issuing of this decision.



COMMISSIONER

*Appearances:*

*J Zyngier and L Connell* of Gilchrist Connell, with permission, with *R Baweja* for the Applicant.

*Hearing details:*

2023

Brisbane

By Video

25 May

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<PR766335>

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<sup>1</sup> [\[2013\] FWC 3302](#).

<sup>2</sup> *The State of New South Wales Plaintiff; and The Commonwealth of Australia Defendant. The State of South Australia Plaintiff; and The Commonwealth of Australia Defendant. The State of Western Australia Plaintiff; and The Commonwealth of Australia Defendant* (1989 - 1990) 169 CLR at 482.

<sup>3</sup> [2015] FCCA 1093.

<sup>4</sup> [\[2010\] FWA 1589](#).