[2023] FWC 2543

DECISION

Fair Work Act 2009
s.365 – General protections

Gautam Parimoo
v
Lake Resources N.L.
(C2023/479)

DEPUTY PRESIDENT BOYCE SYDNEY, 4 OCTOBER 2023

Application to deal with contraventions involving dismissal – jurisdictional objection raised by respondent as to whether or not the applicant is an "Australian-based employee" entitled to protection under Part 3-1 of the Fair Work Act 2009 – applicant contends that decision in Coles Supply Chain v Milford [2020] FCAFC 152 (Milford) is limited to objections as to 'dismissal' but not other jurisdictional objections – applicants' contentions as to the effect of Milford rejected – two limbs to exclusion under s.35(3) of the Fair Work Act 2009 – applicant a citizen of the United States of America employed by the Respondent to work at a lithium mine in Argentina – respondent's registered business address Sydney, Australia – acceptance of employment contract via email from overseas – whether the term 'engaged' includes entering into an employment contract – 'place' of acceptance of employment contract – effect of the Electronic Transactions Act 2000 (NSW) – whether applicant engaged 'outside Australia' – jurisdictional objection dismissed.

Introduction

[1] Mr Gautam Parimoo (**Applicant**) has filed a Form F8 with the Fair Work Commission (**Commission**), being a general protections involving dismissal application (**Application**). By way of that Application, the Applicant asserts that his dismissal by Lake Resources N.L. (**Respondent**) occurred in contravention of Part 3-1 of the *Fair Work Act 2009* (**Act**).

[2] The Respondent raises a jurisdictional objection to the Application, and otherwise denies the Applicant's allegations as to contravention. In relation to the jurisdictional objection, the Respondent says that "the Applicant was engaged outside Australia, to perform duties outside Australia, and was therefore not an Australian-based employee entitled to protection under Part 3-1 of the Act".

[3] Following the receipt of submissions and evidence in accordance with directions made, the parties agreed for this matter to be resolved by me on the papers in Chambers.

[4] The Applicant is represented by Mr *Paul Lorraine*, Executive Counsel, Harmers Workplace Lawyers. The Respondent is represented by Mr *Jamie Wells*, Partner, Mills Oakley lawyers.

Preliminary issue raised by Applicant – effect of *Coles Supply Chain v Milford*

[5] The Applicant appears to submit that the Commission is not empowered or otherwise entitled to determine its own jurisdiction in respect of a s.365 general protections not involving dismissal application, beyond the question of whether or not a person has been "dismissed". In other words, an allegation that a dismissal has occurred in contravention of Part 3-1 of the Act need not be considered in respect of any jurisdictional prerequisites (or "jurisdictional sub-elements"). Rather, the making of an 'allegation' that a respondent has contravened Part 3-1 of the Act is enough to enliven the Commission's jurisdiction to, for example, exercise its power to conciliate a s.365 application and issue a certificate under s.368 of the Act.

[6] Many applicants have contended arguments along similar lines before me in the past. The short point from these Applicants (or more relevantly, their representatives on their behalf) appears to be that the decision of the Full Federal Court in *Coles Supply Chain v Milford*[1] (**Milford**) ought be applied narrowly such that questions of jurisdiction, beyond whether a person has been "dismissed" within the meaning of s.386 of the Act, are not for the Commission to determine. In other words, if a s.365 application is subject to an attack as to competency based upon a jurisdictional prerequisite other than "dismissal", the Commission does not have the power to resolve the issue. I consider the contention nonsense. It is contrary to the decision in *Milford*.[2] The Commission is not "bound to deal with an application that [an] applicant [has] no entitlement to make [or otherwise proceed with in the first place]".[3]

[7] Whilst the making of an 'allegation' that a respondent has contravened Part 3-1 of the Act is enough to enliven the Commission's jurisdiction, if there is a valid jurisdictional objection made by a respondent (as to dismissal or otherwise), that jurisdictional objection must be dealt with in the ordinary manner by the Commission via programming and hearing (and prior to any conciliation before the Commission taking place). It cannot simply be ignored, or waived through, or left for a court, because an applicant is keen for access to a quick, unobstructed, no cost Commission conciliation process – in circumstances where a Respondent ought not be involved in such a conciliation process in the first place (because the s.365 application has been made erroneously).

[8] If an applicant files a s.365 application, they need to be prepared to defend any jurisdictional objection that is made by a respondent against such an application. If they are not so prepared, they ought not make the application in the first place. Novel arguments about the application of *Milford* to jurisdictional objections are a waste of everyone's time. Issues that go to jurisdiction in respect of a s.365 application extend to, for example, whether:

a) an applicant was an "employee" or an independent contractor;

b) an applicant was an "Australian-based employee" (to whom Part 3-1 of the Act applies);

c) a respondent was an "employer" (i.e. including of the relevant employee who has filed the s.365 application);

d) a respondent was an "Australian employer"; and

e) a person has been "dismissed" within the meaning of ss.12 and 386 of the Act (of course, a person who is not an employee, or who has no employment relationship with a relevant employer, cannot be "dismissed" in the first place under s.386 of the Act).

[9] In summary, I reject the Applicant's contention that the Commission is not empowered, or is not otherwise entitled, to determine the question in these proceedings as to whether or not the Applicant is an Australian-based employee entitled to protection under Part 3-1 of the Act.

Factual findings and conclusions

[10] I make the following findings of fact based upon the evidence filed:

a) The Applicant was born in Jammu, India, and is a citizen of the United States of America.

b) The Respondent is a registered Australian public company, listed on the Australian Securities Exchange, with a principal registered office in Sydney, New South Wales, Australia. It manages several international lithium mines, primarily based in Argentina.

c) The Applicant was originally approached for employment by a recruiter from Santiago, Chile, on behalf of the Respondent. Three interviews were conducted between the Applicant (who attended upon each of these interviews from overseas via an online video conferencing platform) and employees of the Respondent (who attended via video platform from Sydney and/or Perth).

d) By way of Executive Services Agreement dated 22 October 2021 (**Employment Contract**), the Applicant was employed by the Respondent as Chief Operating Officer (**COO Role**). The Applicant commenced working in the COO role on 25 October 2021. The COO Role encompassed the Applicant being Project Director in the development, construction and commissioning of the Kachi Lithium Brine Project in the province of Catamarca, Argentina.[4]

e) The Employment Contract contains an express term (or choice of law term) that it shall be governed and construed in accordance with the laws of New South Wales, Australia.

f) On 9 January 2023, the Applicant was dismissed, effective that day (upon payment in lieu of notice).

[11] Based upon the foregoing findings, I make the following conclusions:

a) the Respondent is an "Australian employer" within the meaning of s.35(1)(a) of the Act;

b) the Applicant was recruited by the Respondent overseas (i.e. outside Australia) to perform work in Argentina;

c) the Applicant was employed by the Respondent from 25 October 2021 to 9 January 2023;

d) putting aside the Respondent's jurisdictional objection, the Applicant was "dismissed" (within the meaning of ss.12 and 386 of the Act) by the Respondent by way of letter dated 9 January 2023; and

e) the Applicant has never relevantly attended Australia in person, for recruitment or work purposes.

Relevant law

[12] By reference to s.34(3) of the Act, and Regulation 1.15F(4) of the *Fair Work Regulations 2009*, Part 3-1 of the Act has extended application to Australian employer and an "Australian based-employee".

[13] Section 35(2) of the Act defines an "Australian-based employee", it reads:

"(2) An ***Australian-based employee*** is an employee:

(a) whose primary place of work is in Australia; or

(b) who is employed by an Australian employer (whether the employee is located in Australia or elsewhere); or

(c) who is prescribed by the regulations."

[14] However, s.35(2)(b) of the Act, is to be applied subject to the exception in s.35(3), which reads:

> "(3) However, paragraph (2)(b) does not apply to an employee who is engaged outside Australia and the external Territories to perform duties outside Australia and the external Territories."

[15] It is not in dispute that the Applicant at all times performed his duties outside Australia and its external Territories. It follows that the issue to be resolved in these proceedings is whether the Applicant was "engaged outside Australia" by the Respondent.

Case law

[16] In *Munjoma v Salvation Army (NSW) Property Trust as Trustee for the Social Work*[5], Vice President Hatcher (as he then was) made the following observations in relation to s.35(3) of the Act:

> "[38] The exclusion in s.35(3) has two limbs, both of which must be satisfied in order for the exclusion to operate. The first is that the employee is "engaged outside Australia and the external Territories". The second is that the engagement is to "perform duties outside Australia and the external Territories". It is clear that the second limb applies, since Dr Munjoma's duties under her contract of employment were to be performed primarily if not wholly in Nauru. The question therefore is whether it is manifest that the first limb also applies - that is, was Dr Munjoma "engaged" outside of Australia?"
>
> …
>
> "[45] I do not find the respondent's argument that the expression "engaged outside Australia and the external territories" refers to the performance rather than the formation of the employment persuasive. As earlier stated, the exclusion has two limbs. The second limb clearly refers to the purpose or function of the engagement of the employee as being to perform duties overseas. That is, it refers to the location where the employee's obligations under the contract of employment are to be performed. That being the case, the first limb of the exclusion - "engaged outside Australia and the external Territories" - must have some separate and different work to do. The respondent's approach does not give it any separate work to do; it takes the first limb as also referring to the location of the performance of duties under the employment contract also. On that approach, the second limb becomes unnecessary verbiage.
>
> [46] An approach which has the first limb of the exclusion referring to the location of the formation of the employment contract gives it separate and distinct work to do. It conforms to the ordinary meaning of the word "engaged". And because an employment relationship formed in Australia between an Australian employer and a person located in Australia at that time can be characterised as having a "substantial connection to Australia", it conforms to the intention of the legislature as stated in paragraph of the explanatory memorandum."

[17] In *Winter v GHD Services Pty Ltd*[6] (**Winter**), Heffernan J concluded:

> "The decision in *Cohen's* case [*Cohen v iSOFT Group Pty Ltd* (2013) 298 ALR 516] has been held to establish that there are two limbs to be considered. Firstly, the 'engagement outside' limb which requires identification of the location of formation of the contract and, secondly, 'the performance' limb dealing with the issue of whether the duties were to be performed outside Australia."[7]

…

> "I accept the submission of the applicant that *Cohen* does not stand for the proposition that a party who is outside Australia when they append their signature to a contract is a person 'engaged outside Australia'. In that matter, as I have said, the contract was formed in Singapore. As a result, Dr Cohen was 'engaged outside Australia'. In this matter, the contract was formed in Australia."[8]

[18] Consistent with the foregoing case law, I equally interpret and apply s.35(3) of the Act on the basis that is has two limbs, being an 'engagement outside' limb, and a 'performance' limb. The resolution of these proceedings concerns only the 'engagement outside' limb.

Respondent's position as to the 'engagement outside' limb, and What does the term 'engaged' mean, and was the Applicant engaged by the Respondent?

[19] The Respondent submits that the words "engaged outside Australia" in s.35(3) of the Act should be read as "engaged [while] outside Australia". It goes on to submit that s.35(3) of the Act does not adopt the language of contract, such that issues of where a contract was 'accepted' or 'made' are insignificant in construing the term "engaged" for the purposes of s.35(3) of the Act.

[20] I am unable to accept that the addition of the word "while" to the words "engaged outside Australia" ought be implied. As Lord Mersey said in *Thompson v Gold & Co*[9]:

> "It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is the wrong thing to do."[10]

[21] The ordinary meaning of the term "engage" includes or extends to the making or entering into of a contract or arrangement (including an employment contract or relationship).[11]

[22] In my view, contrary to the Respondent's submissions, the plain meaning of the word "engaged" refers to or includes the entering into of a contract of employment. For the purposes of the first limb of the exclusion under s.35(3) of the Act, it then becomes a question of fact as to whether such engagement occurred 'outside Australia'.

[23] It is not in dispute that the parties entered into the Employment Contract. I therefore find that the Applicant was relevantly "engaged" by the Respondent.

Was the Applicant engaged by the Respondent 'outside Australia'?

[24] I consider, and it does not appear to be in dispute between the parties, that the *Electronic Transactions Act 2000 (NSW)* (**ET Act NSW**) applies to the Employment Contract. Relevantly, in this regard:

a) the email dated 23 October 2023, from the Applicant to Mr Lindsay of the Respondent, falls within the definition of "electronic communication" under s.5 of the ET Act NSW; and

b) a plain reading of sections 14A and 14E of the ET Act NSW identifies that Part 2A of the ET Act NSW applies to the Employment Contract.

[25] The Applicant helpfully made the following submissions as to contract formation and the Electronic Transactions legislation:

> "1 Introduction

1.1 On 31 July 2023, Deputy President Boyce made directions requiring the Applicant to file in the Commission and serve on the Respondent an outline of submissions, witness statements, and any documents in respect of his position regarding the question of the place that the Executive Service Agreement between the Applicant and the Respondent was made.

1.2 The Deputy President specifically:

(a) requested that the parties make submissions as to the application of the *Electronic Transactions Act 1999* (Cth) ("Commonwealth Act") and/or the *Electronic Transactions Act 2000* (NSW) ("NSW Act") to the question of the place that the Executive Service Agreement between the Applicant and the Respondent was made;

(b) suggested Part 2 of the NSW Act applies by virtue of section 15A(2)(b) of the Commonwealth Act; and

(c) referred the parties to a link to an academic paper on the topic by Ms Simone Hill:
http://classic.austlii.edu.au/au/journals/JlLawInfoSci/2001/4.html>

1.3 This outline of submissions is filed in compliance with those directions, and is to be read in conjunction with the Applicant's previous Outline of Argument on Jurisdiction and lay evidence filed on 22 June 2023, and his Outline of Argument in Reply on Jurisdiction filed on 13 July 2023.

2 Legal Position

2.1 The question is whether the Executive Service Agreement ("Contract") between the Applicant and the Respondent was made at the place of *dispatch*, or the place where acceptance of the offer was *received*.

General law

2.2 As explained in Ms Hill's article (at "2. The Law and Contractual Acceptance"):

> The crucial moment in formation of contract is the acceptance: it is that moment a contract is said to be formed;
>
> and
>
> The ordinary rule is that a contract is not made, that an offer is not accepted, until the acceptance of the offer has been communicated.

(Referring to *Latec Finance Pty Ltd v Knight* [1969] 2 NSWR 79 at 81; *Carlill v Carbolic Smokeball Co* [1893] 1 QB 256 at 269; *Felthouse v Bindley* [1862] EngR 931; (1862) 11 CBNS 869; 142 ER 1037; *Re National Savings Banks Assn (Hebb's Case*) [1880] UKLawRpKQB 51; (1867) LR 4 Eq 9; *Tallerman and Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd* [1957] HCA 10; (1957) 98 CLR 93; *Bressan v Squires* [1974] 2 NSWLR 460; *Tenas Steamship Co Ltd v Owners of the Motor Vessel 'Brimnes' (The Brimnes)* [1974] EWCA Civ 15; [1974] 3 All ER 88 at 115).

2.3 Ms Hill refers to the postal acceptance rule (at "Abstract" and "4. The Postal Acceptance Rule"), saying it is a "true exception" to normal contract

principles, it is a "legal lie", and "There are no good reasons for applying the postal rule to email".

2.4 However, she suggests it is not clear when email contracts are formed (at "7. What is the outcome for Australia?"): "In terms of the common law and email this means where and when the acceptance arrives either in the mail-box of the offeror OR when the offeror actually reads the email".

The Electronic Transactions Acts

2.5 Part 2A of the *Electronic Transactions Act 1999* (Cth) ("Commonwealth Act") and Part 2A the *Electronic Transactions Act 2000* (NSW) ("NSW Act") both concern contracts involving electronic communications, such as contracts entered into by email.

2.6 Section 15A of the Commonwealth Act provides that Part 2A of that Act applies to or in relation to a contract only if at the time the contract was formed, there was no law of that State or Territory in terms substantially the same as that Part. By virtue of that section, noting that the Contract was formed in 2021, it appears that Part 2A of the NSW Act applies.

2.7 Under Part 2A of the NSW Act, section 14E provides that section 13B, which outlines the relevant place of dispatch and receipt, applies to an electronic communication relating to the formation of a contract in the same way as it applies an electronic communication referred to in that section.

2.8 Section 13B of the NSW Act relevantly states that:

> 13B Place of dispatch and place of receipt
>
> (1) For the purposes of a law of this jurisdiction, unless otherwise agreed between the originator and the addressee of an electronic communication—

(a) the electronic communication is taken to have been dispatched at the place where the originator has its place of business, and

(b) the electronic communication is taken to have been received at the place where the addressee has its place of business.

(2) For the purposes of the application of subsection (1) to an electronic communication—

(a) a party's place of business is assumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location, and

(b) if a party has not indicated a place of business and has only one place of business, it is to be assumed that that place is the party's place of business, and

(c) if a party has not indicated a place of business and has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the transaction, and

(d) if a party has not indicated a place of business and has more than one place of business, but paragraph (c) does not apply—it is to be assumed that the party's principal place of business is the party's only place of business, and

(e) if a party is a natural person and does not have a place of business—it is to be assumed that the party's place of business is the place of the party's habitual residence.

(3) A location is not a place of business merely because that is—

> (a) where equipment and technology supporting an information system used by a party are located, or
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> (b) where the information system may be accessed by other parties.
>
> (4) The sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in that country.

2.9 Although section 13B(1) identifies where an electronic communication is taken to have been dispatched and received, it does not expressly identify the place of formation of a contract entered into by email.

2.10 However, there is judicial support for the proposition that the place of formation of contracts entered into by email is where the offeror receives acceptance. That is, the place of receipt of acceptance, not the place of dispatch.

2.11 In *Australian Competition and Consumer Commission (ACCC) v Valve Corp (No 3)* (2016) 337 ALR 647, Justice Edelman found that, although it was of "very little weight" to the ultimate conclusion as to the proper law of the contract, at common law, the place of formation of a contract accepted by email is the place where the offeror receives the email (at 664-5 [78]-[82]). His Honour considered that an important factor in favour of this conclusion was coherence with the provisions in Australian legislation concerning electronic communications, citing section 13B of the NSW Act, and section 14B of the Commonwealth Act, which is set out in substantially the same terms. In particular, his Honour opined at 664 [79]:

> [79] The conclusion that the contract was formed where electronic communication is received is consistent with, and (importantly for the principle of coherence) provides coherence with, the provisions in Australian legislation concerning electronic transactions, based upon the United Nations Commission on International Trade Law, UNCITRAL Model Law on Electronic Commerce 1996 with additional article 5 bis as adopted in 1998 (adopted 12 June 1996, United Nations), which provides for the place of receipt of electronic communications which is generally where the addressee has its place of business: *Electronic Transactions Act 1999* (Cth) section 14B; *Electronic Transactions Act 2000* (NSW) section 13B; *Electronic Transactions* (Victoria) Act 2000 (Vic) section 13B; *Electronic Transactions Act 2000* (SA) section 13B; *Electronic Transactions Act 2000* (Tas) section 11B;

> *Electronic Transactions Act (Queensland) 2001* (Qld) section 25(1)(b); *Electronic Transactions Act 2001* (ACT) section 13B; *Electronic Transactions Act 2001* (NT) section 13B; *Electronic Transactions Act 2011* (WA) section 15.

2.12 Similarly, in *Olivaylle Pty Ltd v Flottweg GMBH & Co KGAA (No 4)* (2009) 255 ALR 632, Justice Logan found that a contract accepted by email was formed at the place of receipt, stating at 642 [25]:

> [25] Flottweg's acceptance was communicated by email to Olivaylle at its olive grove in Victoria. Experience suggests that email is often, but not invariably, a form of near instantaneous communication. The parties seemed content to assume that the place of contract was either Victoria or New South Wales, content because the common law of Australia was the same in either place and so, too, was the only statute law considered material. There was no suggestion in submissions that the place of contract was, for example, Germany. As a result, the ramifications of the adoption by the parties of email for their written pre-contractual communications, particularly the acceptance, were not explored. As it happens, the subject of formation of contracts by email has been explored in depth in an article by a local academic, Christensen S, "Formation of Contracts by Email Is it Just the Same as the Post?" (2001) 1(1) QUTLJJ 22. Ms Christensen details there arguments for and against the assimilation of email communications with "the postal rule" or with what one might term "the instantaneous communication rule" and also the local adoption of international convention which touches on the subject. Having regard to the position taken by the parties in this case, it is not necessary to give detailed consideration to the point. It is enough to observe that I consider that there are analogies to be drawn with the way the law developed in relation to telex communications in an earlier era where what I have termed "the instantaneous communication rule" came to be adopted, perhaps at the expense of scientific precision but not so in relation to common commercial understanding. Thus, by analogy with cases concerning the position with what were, or were treated as, other forms of instantaneous communication, I consider that the contract was made where the acceptance was received, that is in Victoria: *Entores Ltd v Miles Far East Corp* [1955] 2 QB 327; [1955] 2 All ER 493; *WA Dewhurst & Co Pty Ltd v Cawrse* [1960] VR 278; *Express Airways v Port Augusta Air Services* [1980] Qd R 543; *Reese Bros Plastics Ltd v Hamon-Sobelco Australia Pty Ltd* (1988) 5 BPR 11,106.

3 Submissions

3.1 In her article, Ms Hill finds there are no good reasons for applying the postal rule to email, but the Commonwealth Act does not settle the matter.

3.2 Further, she considers the concept of positioning risk, suggesting there is no reason why the established principles would not apply (at "5.3 Deemed receipt").

3.3 At "7. What is the outcome for Australia?", Ms Hill states:

> If we apply the general rule that communication of acceptance must be actually received for contract formation, the question of when and where must be answered with: at the time and place the acceptance is received by the offeror.

3.4 However, in 2001 she concluded it was still a moot point.

3.5 The Applicant submits that consistent with more recent judicial commentary on the operation of section 13B of the NSW Act, the overall structure of the section supports the place of receipt of an email as the place of formation of the contract: see *Valve Corp* at 664 [79].

3.6 In the alternative, the Applicant submits that even if section 13B of the NSW Act is entirely neutral as to the place of formation of the contract, the common law tends in favour of the place of receipt where email is concerned: see *Olivaylle* at 642 [25].

3.7 For the above reasons, consideration of the Electronic Transactions Acts supports the proposition that the Respondent's jurisdictional objection should be dismissed."[12]

[26] The Respondent's submissions in reply (to the foregoing submissions of the Applicant) essentially seek to assert that despite the Applicant returning a signed copy of the Employment Contract to the Respondent, because the contract was not unconditional (in the formal sense) until the Applicant had received a signed copy of the Employment Contract from the Respondent, the 'place' where the Employment Contract was made was not where the Respondent received a signed copy of the Employment Contract from the Applicant, but the place that the Applicant received a copy of the unconditional (signed) Employment Contract from the Respondent (i.e. overseas). Further or in the alternative, the Respondent submits that the 'place' where the Applicant was engaged is the place that the Applicant was located when he was engaged, and/or that the Applicant has not demonstrated (on the evidence) that the place he was engaged was within Australia.[13]

[27] In rejecting the Respondent's submissions and contentions, I see no reason as to why the conclusions in the case law referred to in the Applicant's submissions ought not be followed or adopted by me for the purposes of this decision (even if *obiter*).[14]

[28] The findings made in the case of *Winter* are also directly on point. In *Winter*, the Applicant (employee) signed his employment contract in the United States of America, and returned the signed copy of the contract to the Respondent (employer) by way of email. The Respondent's registered business address was in Canberra, Australian Capital Territory.[15] Heffernan J held that 'acceptance' did not occur at the time of signing, but at the time and the place that such acceptance was communicated (electronically) to the employer (offeror):[16]

> "… I accept the submission of Ms Walker that the formation of the contract occurred once communication was effected. Communication was effected by email. There is support in academic commentary for the proposition that the time for acceptance by email should be when the email is received by the offeror and that an email acceptance should be treated as received by the offeror when it arrives on their server."[17]
>
> "Further to the above, I accept the applicant's submission that the *Electronic Transactions Act* (1999) (Cth) ('the ET Act') applies to the facts of this matter and that irrespective of the principles I have discussed above, when a contract is concluded by an electronic communication, such as an email, it is finalised at the place of business of the recipient of the email. By virtue of s.5 of the ET Act an electronic communication is, *inter alia*:
>
> > *"'electronic communication' means:*
> >
> > *(a) a communication of information in the form of data, text or images by means of guided and/or unguided electromagnetic energy."*
>
> An email, sending an attachment containing an image of the contract, falls within that definition."[18]

[29] In these proceedings, relevantly, Mr Nick Lindsay, the Respondent's (then) Technical Director, sent the Applicant a copy of a revised and final Employment Contract via email on 22 October 2021. The Applicant returned a signed unamended copy of this Employment Contract the next day (23 October 2021) via email. Mr Lindsay duly signed the Employment Contract (as already executed by Applicant) and returned a copy of same to the Applicant via email for "your [the Applicant's] files" on 24 October 2021.[19] In view of this evidence, I make the following findings:

a) the Respondent's registered place of business is Sydney, New South Wales, Australia. To the extent that the Respondent (or persons on its behalf) sent or received emails, the location or 'place' that such emails were relevantly sent or received was Sydney, New South Wales, Australia;[20]

b) the Applicant was located overseas at the time he received, signed and returned the Employment Contract to the Respondent;

c) the Employment Contract sent to the Applicant via email on 22 October 2021 by Mr Lindsay was a contractual offer from the Respondent to the Applicant. This is plain from the words

of Mr Lindsay's email where he relayed the offer of employment to the Applicant (i.e. Mr Lindsay's email of 22 October 2021 was not a 'offer to treat', or the continuance of a negotiation);

d) the Employment Contract was accepted by the Applicant at the time he returned a signed copy of same to Mr Lindsay via email on 23 October 2021 (i.e. the Applicant unequivocally accepted the terms of the exact offer that was put to him by Mr Lindsay absent further inquiry or counter-offer);

e) the execution and return of the Employment Contract by Mr Lindsay to the Applicant via email on 24 October 2021 was a formality, in that the Employment Contract had already been made (agreed to by both parties) at the time that the Applicant communicated his acceptance of same via email the day before (on 23 October 2021). This finding is consistent with basic common law principles as to offer and acceptance,[21] and the second limb of *Masters v Cameron*[22].

[30] By way of summary, I find that:

a) the ET Act NSW applied to the formation, and the making (including acceptance) of the Employment Contract;

b) the Employment Contract was made (or agreed to between the parties) at the time that the Applicant communicated his acceptance of the Employment Contract to the Respondent (by returning a signed copy to Mr Lindsay by way of email);

c) the Applicant was 'engaged' by the Respondent at the time when the Employment Contract was made (see also paragraph [23] of this decision);

d) by virtue of s.13B of the ET Act NSW, the 'place' where the Employment Contract was made, and the Applicant was thus engaged, was at the Respondent's registered place of business in Sydney, Australia;

e) in view of (a) to (d) above:

i. the Applicant is an "Australian-based employee" employed by an "Australian employer" (the Respondent) for the purposes of s.35(2)(b) of the Act; and

ii. the Applicant was not engaged by the Respondent "outside Australia" and is therefore not subject to the exception contained in s.35(3) of the Act.

Disposition

[31] In view of my findings and conclusions as set out in this decision, the Respondent's jurisdictional objection is dismissed. An order to that effect will be published contemporaneously with this decision.

DEPUTY PRESIDENT

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[1] [2020] FCAFC 152.
[2] Ibid, at [74]-[75].
[3] Ibid, at [74].
[4] The Executive Services Agreement dated 22 October 2021 (Contract) contemplates that the Applicant, whilst employed by the Respondent, was to be seconded for a period of time to its subsidiary Morena del Valle Minerals SA. However, this secondment never occurred.
[5] [2013] FWC 3337.
[6] [2019] FCCA 775.
[7] Ibid, at [15].
[8] Ibid, at [24].
[9] [1910] AC 409.
[10] Ibid, at 420. See also *Bermingham v Corrective Services Commission of New South Wales* (1988) 15 NSWLR 292, at 302; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, at 113-116; *R v Young* [1999] 46 NSWLR 681, at [11]-[16].
[11] Cambridge and Oxford Dictionaries. See also *SNG v Canvas Australia Solutions* [2019] FCCA 1155, at [42], citing the Macquarie Dictionary definition of the word "engaged".
[12] Applicant's Outline of Submissions on the Electronic Transactions Acts, 7 August 2023, at [1.1] to [3.7].
[13] Respondent's Supplementary Submissions, 14 August 2023.
[14] *Australian Competition and Consumer Commission (ACCC) v Vale Corp (No 3)* (2016) 336 ALR 647, at 664, [79] (by reference to the effect of the *Electronic Transactions Act 2000 (NSW)* as to the 'place' of contract formation based upon the place of 'acceptance'); and *Olivaylle Pty Ltd v Flottweg GMBH & Co KGAA (No 4)* (2009) 255 ALR 632, at 642, [25] , including the authorities cited therein (as to the 'place' of contract formation based upon the common law principles of 'acceptance' in respect of instantaneous (i.e. not postal) communications).
[15] *Winter v GHD Services Pty Ltd* [2019] FCCA 775, at [5] and [10]. The Respondent's recipient of the email was based in New South Wales. The employee had an address in Queensland, but was based overseas at the time he signed and returned the employment contract. The employee was to be mobilized and demobilized from his address in the United States of America to perform work for the Respondent in Papua New Guinea.
[16] *Winter v GHD Services Pty Ltd* [2019] FCCA 775, at [16]-[26].
[17] Ibid, at [19].
[18] Ibid, at [25]-[26].
[19] Annexure "MA-1", Statement of Mark Anning (14 August 2023).
[20] The Respondent's witness evidence does not assert or suggest otherwise.
[21] See case law referred to at paragraph [2.2] of the Applicant's Outline of Submissions on the Electronic Transactions Acts, 7 August 2023.
[22] (1954) 91 CLR 353, at 360.