DECISION

Fair Work Act 2009
s.365—General protections

Kiril Simonovski

v

Fonterra Brands (Australia) Pty Ltd
(C2022/6242)

DEPUTY PRESIDENT BELL MELBOURNE, 5 APRIL 2023

Application to deal with contraventions involving dismissal – jurisdiction objection – whether applicant dismissed – jurisdictional objection dismissed.

[1] Mr Simonovski was a senior executive with the respondent Fonterra Brands (Australia) Pty Ltd (**Fonterra**). In around June 2022, Fonterra announced a business restructure to create a "Global Markets" structure. Disagreements ensued as to how that restructure would apply to Mr Simonovski and those disagreements led to the end of his employment.

[2] Mr Simonovski seeks to make a general protections application under s.365 of the *Fair Work Act 2009* (**Act**). There are other aspects in dispute between the parties, such as whether Mr Simonovski was made redundant. Fonterra denies the claims.

[3] The issue I am required to consider is whether or not Mr Simonovski was "dismissed" on 19 August 2022. As Mr Simonovski is making an application under s.365 of the Act, a jurisdictional condition of that application is that he was "dismissed".[1] The term "dismissed" has a meaning defined by s.386 of the Act. Fonterra contends Mr Simonovski was not dismissed.

[4] By way of a simplified overview, Fonterra contends that Mr Simonovski was given a lawful and reasonable direction to perform certain duties and that Mr Simonovski evinced an intention not to perform them. On Fonterra's case, this resulted in Mr Simonovski repudiating his contract of employment by renunciation, which repudiation was accepted by Fonterra. The acceptance of this repudiation is not, on Fonterra's case, a "dismissal" for the purposes of the Act.

[5] For the reasons that follow, I have concluded that even on Fonterra's preferred analysis – namely it issued a lawful and reasonable direction that Mr Simonovski indicated that he would not comply with – the termination of the contract in the circumstances nonetheless constitutes a "dismissal" for the purpose of the statute and the jurisdictional objection is dismissed.

Factual background and findings

[6] Fonterra is a global dairy company, operating under a cooperative structure owned by around 9000 farming families in New Zealand. It has significant operations in Australia.

[7] Mr Simonovski was employed by Fonterra from 2013 to 2022. At the time of the termination of his employment, his role was Director, Sales and Marketing Services. Without disclosing the exact figure, Mr Simonovski was highly remunerated, with the total salary above $600,000 per annum, which is a matter of some significance as to the scope of his duties.

[8] The most recent contract of employment was dated 15 October 2019 (**Contract**). Among other matters, there were terms in the Contract as follows:

> "**Duties and Expectations**
>
> You are required to perform the duties of your position and such other duties and responsibilities as may be specified by the Company from time to time, including for any other company in the Fonterra group. You may also be required to work in a position, other than that to which you have been appointed, that is commensurate with your skills and/or experience and you may from time to time have different reporting responsibilities. Irrespective of any changes to your duties, position or reporting responsibilities, the terms and conditions set out in this document and your letter of offer will continue to apply unless otherwise amended in writing.
>
> You must perform your duties to the best of your abilities and knowledge, serve the Company faithfully and diligently and act in the best interests of the Company and the Fonterra group. If applicable your duties and responsibilities may also be set out in a position description. ·
>
> As a Fonterra employee, you agree to:
> - Comply with the lawful directions of the Company including, without limitation, those set out in Fonterra's policies and procedures;
> - Act in ways that are consistent with Fonterra's values and principles;
> - Work safely and look out for the safety of others;
> - Follow the operating policies and quality control guidelines set from time to time by the Company or, more generally, Fonterra; and
> - Work in ways that build on the good reputation and interests of the Company and other companies in the Fonterra group and their staff and customers.
>
> …
>
> **Termination**
>
> You or the Company may terminate your employment at any time by giving the other the period of notice specified in your letter of offer.
>
> The Company may pay you an amount equal to your remuneration in lieu of the notice period specified in the letter of offer. The Company may also direct that you not attend for work during the notice period.

> The Company may terminate your employment at any time without notice (or payment in lieu of notice) if you disobey a lawful instruction of the Company or engage in other conduct which warrants summary dismissal."

[9] Under the Contract, Mr Simonovski reported to the Asia Pacific CEO, Ms Judith Swales (whose title at the time of the hearing was CEO, Asia Pacific & Global Markets).

[10] In June 2022, Fonterra announced the creation of a "Global Markets" division of its business, which represented a business restructure that would bring together its 'Asia Pacific' (**APAC**) region and 'Asia, Middle East and North America' (**AMENA**) region under a single leadership team. At this point in time, Mr Simonovski worked within the APAC region.

[11] The creation of Global Markets would consolidate the sales and marketing 'director' roles for the APAC and AMENA regions into a single role, being 'Director Sales & Marketing – Global Markets'. The degree of change in Mr Simonovski's APAC role when compared to the duties and functions in the proposed new Global Markets role was an issue in dispute.

[12] While at least by June 2022, it was clear that a decision to adopt a new Global Markets structure had been made, there remained a number of details yet to be determined. One of those details would be the sales and marketing function across the global structure.

[13] From around late June 2022 to mid-July 2022, Mr Simonovski was involved in the design of the sales and marketing function for Global Markets. In doing so, Mr Simonovski was involved with the Director, Sales and Marketing, for the AMENA region.

[14] On 19 July 2022, Mr Simonovski spoke briefly with Ms Swales and Ms Tracey Wood (the latter who is now the People & Culture Director, Global Markets, Fonterra). During that conversation, Ms Swales foreshadowed that the proposed restructure would have a single director for the sales and marketing function, which was proposed to be selected from a "closed" process between the APAC region (i.e. Mr Simonovski) and the director of the AMENA region. Ms Swales foreshadowed that a confidential information pack would be sent shortly.

[15] Mr Simonovski alleges that, during this conversation, Ms Swales "stated that I would be entitled to a retrenchment payment in the event that I chose not to accept the new role". No details were provided as to what the payment would entail or how it would be assessed. Ms Swales and Ms Wood deny the claim. I note that the 'particulars of complaint' attached to Mr Simonovski's 'Form F8' filed 9 September 2022 refer to a conversation in June 2022, in which (according to the particulars):

> "Ms Swales stated words to the effect, *'if you were ever thinking about leaving the company, now would be a good time'*, representing that a redundancy would be available, and that I would receive a considerable redundancy package".

[16] Those statements in the Form F3 (which were not included in Mr Simonovski's actual witness statement), even if accepted, do not rise to being told he would be entitled to a retrenchment payment. I prefer Ms Swales' and Ms Wood's account for the conversation on 19 July 2022, although I find that Mr Simonovski was nonetheless acting under a belief that a redundancy package would be (or should be) offered to him, which I find partly informs his

responses in the events that follow. I would also record that a definite finding on this issue is largely unnecessary and I consider that the parties' did not conduct the hearing before me on a different basis.

[17] On the same day, Mr Simonovski (and others in similar leadership positions) was sent a consultation pack that set out the proposed Global Markets leadership team structure. The presentation document indicated that a purpose of it was to give members of the current leadership team(s) time to consider, discuss and seek clarity about the proposed new team without unnecessarily drawing out the process. Any feedback was requested to be provided to Ms Swales by 27 July 2022. The document described a "merger" of APAC and AMENA, coming into effect by 1 October 2022.

[18] Further to Mr Simonovski's then-role in assisting with the detail of the proposed new structure, on 28 July 2022, he provided feedback by email to Ms Wood on the consultation pack. In relation to the "S&MS Director Role", he indicated he was "keen" to have some visibility on how the "role will be banded and remunerated given the scope change".

[19] On 3 August 2022, Ms Swales called Mr Simonovski. She informed him that he had "got the role", being a reference to the role of sales and marketing services position for Global Markets. She also stated there would be a 5% salary increase and indicated some further long-term incentives were being looked at. Mr Simonovski said the pay increase should have been bigger as the new role was a much bigger role. Ms Swales did not accept that. Mr Simonovski also said it would be too much travel and he would like to "take the package". Ms Swales said there "is no package" and said her expectation was that travel should be unchanged and they would continue working with him to ensure he worked the appropriate hours.

[20] On 4 August 2022, Mr Simonovski received a letter by email from Ms Wood (**4 August letter**).[2] The letter informed Mr Simonovski that as a "result of the creation of Global Markets", his "new title will be Director Sales & Marketing – Global Markets effective 01 September 2022." The letter also set out a new "Total Remuneration Cost" that would be associated with the role and stated that "All other terms and conditions of your employment remain unchanged". The letter asked Mr Simonovski to "signify your acceptance of the Company's offer by signing this letter and signing the attached Deed Poll" and returning them. The value of the remuneration increase was (together with a year-end remuneration increase) approximately a 5% increase to Mr Simonovski's then level of remuneration.

[21] There was some controversy between the parties as to the effect of this letter, which I will return to. One aspect of the controversy was whether (as was Ms Wood's view), the letter constituted a *direction* to perform the responsibilities of the new role. Suffice to say for the time being, Mr Simonovski did not sign and return the letter, nor the Deed Poll.

[22] On the same day, Ms Wood spoke to Mr Simonovski. The discussion was primarily about money. Mr Simonovski stated that there should be more pay than the 5% increase as the role was bigger. Ms Wood said the role had been "benchmarked well in the market and you're very well paid." Mr Simonovski replied that he was "sick of being told I am well paid" and said "This is a substantially bigger job." There were other aspects discussed but, on salary, Ms Wood asked if he would accept the role if the remuneration was higher and Mr Simonovski said "I would, yes". To this, Ms Wood said that given the benchmarking, no further salary would be

offered. She said that as the company was "announcing the confirmed structure" and some appointments to the Global Market team, they would need to consider what was said about the sales and marketing structure.

[23] The following day, on 5 August 2022, the company did not make announcements about the sales and marketing function for the Global Markets restructure, beyond stating that it was still working through the process.

[24] Also on 5 August 2022, Mr Simonovski met with Ms Swales and Ms Wood. It is not necessary to recount the full detail of that discussion but, in it, Ms Swales repeated earlier statements to the effect that, while they acknowledged that Mr Simonovski felt that more remuneration or a redundancy was deserved, neither would be offered. Ms Swales described the current differences as "unworkable" but said they appreciated Mr Simonovski had a different perspective as to remuneration. Ms Swales said that "As senior leaders, the relationship we have is paramount". She described the situation as an "impasse" and stated that Mr Simonovski would be placed on "gardening leave effective today" until they could resolve the situation. Ms Swales foreshadowed setting up a time for them to meet in the week of 15 August 2022.

[25] For the same meeting, Ms Wood's evidence about the end of that meeting included Mr Simonovski stating that he needed to consider his options and that he hoped he could "come back on Monday week and accept this role if that's where I land". Ms Wood said to that it was a "closed pool" process and they were waiting to hear from him so they could announce the appointment.

[26] That day, Mr Simonovski collected various personal items and left to commence gardening leave. For avoidance of doubt, and no one suggested to the contrary, I understood the reference to "gardening leave" as to a period of paid leave.

[27] I accept Ms Swales' and Ms Wood's accounts of the meetings and conversations I have described above. Some further brief exchanges occurred between Ms Wood and Mr Simonovski in the days that followed, although I do not consider they impact on anything already described or that follows.

[28] By 12 August 2022, Mr Simonovski had sought legal advice. On 12 August 2022, his solicitors sent Ms Swales a letter on his behalf (**12 August letter**). The 12 August letter was 26 pages in length. I will not attempt to fully summarise it. However, among other matters, the letter stated that the Global Market position planned for Mr Simonovski was a "material change" to his then APAC role and was "not a suitable alternative position". That proposition was addressed at length, leading to statements that Mr Simonovski "is" entitled to a redundancy and that his APAC position "has been" made redundant. The letter referred to a 'Redundancy Directive', which appears to be a policy (I infer) of Fonterra. The Redundancy Directive was not in evidence, a matter I note without criticism, as that reflects the fact that neither party required me to form a view on whether or not any redundancy had occurred.

[29] Towards the conclusionary parts of the 12 August letter, the letter states:

> "Accordingly, it is clear that our client's position with Fonterra has been made genuinely redundant, as he has been offered no suitable redeployment to other positions, in light of being told by you on 4 August 2022 that redundancy was '*off the table*' and that he must '*take the role or resign…. those were [his] only options*'. While our client's position, the Current Position, has been disestablished, Fonterra has breached clause 3.11 of its Redundancy Directive, given that Fonterra has not '*discuss[ed] directly with [our client] to outline the reasons for [his] role being disestablished and the alternatives which have been considered*'. Fonterra has also breached clause 3.13 of its Redundancy Directive by refusing to provide out client with a redundancy payment in accordance with its schedule."

[30] On 15 August 2022, Fonterra (now communicating through its solicitors) responded to the 12 August letter. By its letter (**15 August letter**), Fonterra briefly recounted its attempts in the previous weeks "to reconfirm Mr Simonovski's ongoing commitment to its business by offering him an increased remuneration package and a new position title with some broader responsibilities."

[31] Critical to the current dispute, the 15 August letter then set out extracts from the Contract (which are set out more fully above) and stated:

> "As set out above, the Contract provides for sufficient flexibility to enable Fonterra, in this instance, to direct Mr Simonovski to perform duties and responsibilities that are aligned with its proposed strategic direction in relation to Global Markets.
>
> Regrettably, Mr Simonovski has so far refused to comply with our client's lawful and reasonable directions in relation to these matters."

[32] In relation to redundancy, the 15 August letter rejected Mr Simonovski's claim and stated it had secured an alternative acceptable role for him.

[33] Under the heading "Next steps", the 15 August letter then stated:

> "Fonterra requires Mr Simonovski to confirm by no later than midday on Wednesday 17 August 2022 that he will perform the amended duties as have been communicated to him. This confirmation should be emailed directly by Mr Simonovski to Ms Swales and Ms Wood.
>
> Should Mr Simonovski refuse to provide such confirmation, or more explicitly decline to do so, Fonterra will consider that Mr Simonovski no longer considers himself bound by the terms of the Contract and is bringing his employment to an end. Fonterra will write to Mr Simonovski at that time if it is required to do so."

[34] There was no further communication between the parties (directly or through solicitors) over the next few days. With no further communication occurring, Fonterra issued a letter on 19 August 2022 (**19 August letter**) titled "Cessation of Employment". That letter briefly recounted the more recent events and then stated:

> "In those circumstances, we consider that you have repudiated your contract of employment with Fonterra and accept that repudiation, therefore bringing your employment with Fonterra to an end. In the circumstances, there is no issue of notice being provided or payable to you. For the avoidance of doubt, your cessation of employment date will be today, Friday 19 August 2022."

[35] There appears to be no dispute between the parties that the employment relationship ended on 19 August 2022, upon the issuance of the 19 August letter.

Submissions

[36] The parties filed detailed written submissions and made further oral submissions before me at the hearing. I will not set them out here, although I have had regard to them.

[37] Broadly, the issues raised were as follows:

- Was Fonterra's contention correct that Mr Simonovski was given a *direction* to perform the new Global Markets role or, as Mr Simonovski contends, was he simply made an *offer*?
- If Mr Simonovski was given a direction, when was it given and was it in accordance with the Contract?
- If Mr Simonovski was given a direction, did he refuse or fail to comply with it such that it constituted repudiation of the Contract?
- Did the acceptance by Fonterra of any repudiation by Mr Simonovski have the effect that there was no "dismissal" within the meaning of s.386 of the Act?

[38] I have not included in the list above whether or not Mr Simonovski was made redundant. Putting aside any argument about the National Employment Standards, I understood that argument primarily rested upon the application of a Fonterra policy (which, I have noted, was not before me and not argued). There is potentially a slight tension arising from this issue, because the 12 August letter stated that Mr Simonovski "has been made" (present tense) genuinely redundant, which was suggestive of a termination of employment having already occurred. But, as I noted above, both parties proceeded (correctly, in my view), that the operative date of the termination of employment was 19 August 2022. I have also proceeded on that basis.

[39] As is commonly the case, some issues attracted greater prominence than others and some can be dealt with more succinctly.

Consideration

[40] As to whether there was a direction or (merely) an offer, the evidence of Fonterra was that it considered there was direction given as early as 4 August 2022 through its correspondence of that date. I am doubtful that correspondence was sufficient to constitute a direction (noting, as Mr Simonovski's counsel drew attention to, the language of "*offer*" in the final sentence). That said, I consider that the commercial realities at that point were tolerably clear, which was that Fonterra *would* be undertaking a restructure and a Global Marketing director for sales and marketing *would* be required, effective 1 September 2022. Mr Simonovski's employment was going to be directly affected, one way or another.

[41] Notwithstanding how the effect of the letter of 4 August 2022 was perceived by each party, I am satisfied that the 15 August letter did contain a direction in clear terms. Mr Simonovski submits that letter contain no direction at all. He said that, at most, that letter sought *clarification* on whether Mr Simonovski *will* perform the amended duties but it was not actually a direction to perform those duties. I do not accept that submission.

[42] The 15 August letter was clear that Mr Simonovski had (in Fonterra's view) "so far refused to comply with our client's lawful and reasonable directions in relation to these matters". I am prepared to accept Mr Simonovski's submission that this statement necessarily referred to an earlier direction (which I am not satisfied was given), such that the premise that Mr Simonovski had *so far* failed to comply with a direction was incorrect. But I consider that the balance of the letter makes clear that, regardless of past events, Mr Simonovski was being given a fresh direction for future compliance with the Global Markets duties and he was being specifically asked to confirm that he "*will*" perform the amended duties as had been communicated to him. The direction was also expressed to be made in reliance upon express terms in the Contract, which the letter also set out. Mr Simonovski was given two days to provide that confirmation.

[43] That in turn raises the issue of whether or not the scope of the Contract was sufficiently broad to accommodate such a direction.

[44] The potential scope of duties under the Contract that Mr Simonovski would be required to perform was a widely cast net. The key clause stated (with my emphasis):

> "You are required to perform the duties of your position and such other duties and responsibilities as may be specified by the Company from time to time, including for any other company in the Fonterra group. You may also be required to work in a position, other than that to which you have been appointed, that is commensurate with your skills and/or experience and you may from time to time have different reporting responsibilities. Irrespective of any changes to your duties, position or reporting responsibilities, the terms and conditions set out in this document and your letter of offer will continue to apply unless otherwise amended in writing."

[45] The requirement that Mr Simonovski be required to work in a position "commensurate with" his skills or experience is, in my view, particularly salient in the present matter. Mr Simonovski was a highly paid executive in a leadership role. While the duties clause in the Contract is not without limit, I consider that on the material before me, it was sufficiently broad

to accommodate the changes proposed by Fonterra to Mr Simonovski's duties. While I acknowledge there were disputes between the parties as to the changes contemplated in the duties, I do not consider that (at least on the material put before me) that the changes proposed were beyond the boundaries of the Contract.

[46] On this basis, I accept Fonterra's submission that it gave Mr Simonovski a contractual direction (whose effect was expressed in clear terms to shortly commence). Fonterra also sought clarification, in clear terms, as to whether Mr Simonovski intended to perform the modified duties. Not having received that assurance, Fonterra considered that the conduct constituted repudiation and "accepted" that repudiation to end the contract.

[47] Putting aside the contractual analysis, the issue I must decide is whether there was a "dismissal" for the purpose of s.386 of the Act.[3] Section 386 relevantly directs attention to a dismissal "*on the employer's initiative*".

[48] At this point in the analysis, I will refer to a key foundation of Fonterra's case, which made the following two propositions:

- First, where the conduct of an employee amounts to a renunciation of the contract of employment, it is the conduct of the employee that terminates the employment relationship.
- Second, included in the categories of conduct "renunciation" are (on Fonterra's case) repudiation or renunciation where an employee was given a lawful and reasonable direction and the employee refused to follow it.

[49] While I consider that in the case before me, Fonterra's arguments fail at the first of the propositions above, it is convenient to first set out my findings as to whether there was a "renunciation" of the kind relied upon.

[50] In the present case, Fonterra relies on there being "renunciation" as a species of "repudiation" described in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 (***Koompahtoo***). In *Koompahtoo,* the renunciation there was described as:

> "conduct which evinces an unwillingness or an inability to render substantial performance of the contract. This is sometimes described as conduct of a party which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations."

[51] Renunciation of the kind just described can (but not necessarily will) be evinced where there are *existing* breaches of contract (whether or not those breaches are themselves sufficiently serious to independently justify termination for breach). As stated in *Koompahtoo*, "unwillingness or inability to perform a contract often is manifested most clearly by the conduct of a party when the time for performance arrives. In contractual renunciation, actions may speak louder than words."

[52] Where the impugned conduct that is said to evince an unwillingness or inability to perform falls *before* the time for performance, renunciation by conduct of that kind is

commonly described as 'anticipatory breach'.[4] At the point one party has communicated, by conduct or words, a refusal to carry out the contract, the innocent party is put to an election.[5]

[53] Prior to the 15 August letter, I consider it was clear that Mr Simonovski had evinced an intention not to perform the new Global Markets role. A critical issue was remuneration, and it was clear that neither party was moving from their position. Mr Simonovski had made it clear that the proposed increase was insufficient; Fonterra had made it clear that no further salary increase was forthcoming.

[54] In circumstances where Mr Simonovski had been placed on gardening leave to consider the very issue of whether he would be undertaking the Global Markets role, together with the detailed position he advanced by the 12 August letter, I consider that the 15 August letter was clear in terms as to what was expected and gave a reasonable time to comply or respond. Having not responded where the circumstances called for an answer, I am satisfied that Mr Simonovski had evinced an intention to not perform the Global Markets role at the time performance would be required (which, I consider, was 1 September 2022 at the latest), as he had been directed to do. That constituted renunciation of the kind described in *Koompahtoo* and it was open for Fonterra to accept that form of repudiation and elect to terminate the Contract. By Fonterra's letter dated 19 August 2022, it did so.

[55] Notwithstanding, I do not accept Fonterra's contention that the termination of the Contract in these circumstances is taken outside the scope of s.386 of the Act as being a termination at the initiative of the employee as contended by the 'first proposition' described above.

[56] As to the first proposition, the authorities cited by Fonterra in support were *Visscher v The Honourable President Justice Giudice* (2009) 239 CLR 361 (***Visscher***) at [53]-[55]; *NSW Trains v James* [2022] FWCFB 55 (***NSW Trains***) at [62]; and the Full Bench decision *Abandonment of Employment* [2018] FWCFB 139 (***Abandonment of Employment***) at [21].

[57] Starting with *Visscher*, the paragraphs cited do not address the present circumstances. In paragraphs [53] – [55], the High Court was, firstly, addressing the circumstances of a "wrongful dismissal" (which is not being put by Fonterra) and, secondly, was explaining the consequences of a wrongful dismissal on the contract of employment vis-a-vis the relationship of employment. I consider that the decision in *NSW Trains* was similarly focussed on the distinction (in the case of a demotion) between the termination of the employment relationship and the termination of an employment contract.

[58] In the *Abandonment of Employment* decision, the Full Bench stated at [21] – [22] (citations omitted, underlining added):

> "**[21]** "Abandonment of employment" is an expression sometimes used to describe a situation where an employee ceases to attend his or her place of employment without proper excuse or explanation and thereby evinces an unwillingness or inability to substantially perform his or her obligations under the employment contract. This may be termed a renunciation of the employment contract. The test is whether the employee's conduct is such as to convey to a reasonable person in the situation of the employer a renunciation of the employment contract as a whole or the employee's fundamental

> obligations under it. Renunciation is a species of repudiation which entitles the employer to terminate the employment contract. Although it is the action of the employer in that situation which terminates the employment *contract*, the employment *relationship* is ended by the employee's renunciation of the employment obligations.
>
> **[22]** Where this occurs, it may have various consequences in terms of the application of provisions of the FW Act. To give three examples, first, because the employer has not terminated the employee's employment, the NES requirement in s 117 for the provision of notice by the employer, or payment in lieu of notice, will not be applicable. Second, if a modern award or enterprise agreement provision made pursuant to s 118 requiring an employee to give notice of the termination of his or her employment applies, a question may arise about compliance with such a provision. Third, if the employee lodges an unfair dismissal application, then the application is liable to be struck out on the ground that there was no termination of the employment relationship at the initiative of the employer and thus no dismissal within the meaning of s 386(1)(a) (unless there is some distinguishing factual circumstance in the matter or the employee can argue that there was a forced resignation under s 386(1)(b)).”

[59] In the penultimate sentence of paragraph [21] of *Abandonment of Employment*, the Full Bench cited (uncontroversially, I would add) the High Court in *Koompahtoo* at [44]-[47].

[60] In the final sentence of paragraph [21] of *Abandonment of Employment*, the Full Bench cited (again uncontroversially, I would add) *Visscher* at [53].

[61] However, it is the combination of those statements that I consider Fonterra has misconstrued. I do not consider that any fair reading of those two sentences, or paragraphs [21] – [22] in *Abandonment of Employment*, supports the wide proposition that appears to be advanced by Fonterra that where conduct of an employee constitutes renunciation, that conduct will necessarily result in a termination at the initiative of the employee. The Full Bench was dealing with a factual scenario of ‘abandonment’. Necessarily, that is conduct that will be at the initiative of an employee.

[62] Fonterra submitted that a ‘refusal to perform work’ or to ‘comply with a reasonable and lawful direction’ have been found to constitute a repudiatory breach of the employment contract, justifying summary dismissal. So much might be accepted. Such circumstances of dismissal might provide a very sound reason to underpin a ‘valid reason’ for a dismissal (where this is an unfair dismissal case) but the cases I was referred to undermine Fonterra’s antecedent proposition that there is no statutory “dismissal” at all.

[63] As to a refusal to ‘comply with a reasonable and lawful direction’, Fonterra referred me to *Borg v NSW Greyhound Breeders, Owners & Trainers' Association* (2012) 227 IR 398 [2012] FWA 10013 (***Borg***) and *Avenia v Railway & Transport Health Fund* (2017) 272 IR 151 [2017] FCA 859 (***Avenia***). On the question of jurisdiction, neither of those cases assist Fonterra and, respectfully, both point to the opposite direction on the question of jurisdiction.

[64] In *Borg*, the applicant was given directions to perform certain duties that he did not wish to perform. Deputy President Sams found that the directions were reasonable and that the failure to comply with them founded a valid reason for dismissal: see [83]. There was no question,

however, that the applicant was prohibited from pursuing his unfair dismissal claim because the acceptance by the employer of Mr Borg's repudiation was not a statutory "dismissal". Indeed, the Deputy President found, overall, the dismissal was unfair and an order for compensation was made.

[65] Similarly for *Avenia*, Justice Lee accepted that the applicant's failure to comply with directions to attend an investigation meeting was (along with other similar conduct) a proper basis for the applicant's dismissal. However, while the statutory cause of action in that matter was a general protections claim, there was again no question that there was a statutory "dismissal" and jurisdiction to hear the claim (although, unlike *Borg*, the claim was unsuccessful).

[66] In summary, I am satisfied that, even with a finding that Mr Simonovski's conduct constituted renunciation that, at common law, entitled Fonterra to elect to terminate the Contract, the circumstances in this case are a "dismissal" for the purpose of s.386 of the Act.

[67] Suffice to say, if I was wrong about my conclusions regarding Fonterra's entitlement to terminate the Contract due to renunciation, then the position regarding whether there was a dismissal or not is even more clear (as that dismissal may well have been a wrongful dismissal). However, on any permutation regarding the termination of employment, I am satisfied that there was a "dismissal" for the purpose of s.365 of the Act (as defined by s.386).

Disposition

[68] For the reasons stated above, the jurisdictional objection is dismissed. As a result of my determination, this matter will now be referred for conciliation before a staff member of the Commission to deal with the dispute: s.368. An Order[6] to this effect will be issued in conjunction with this decision.

DEPUTY PRESIDENT

Appearances:

R Millar of Counsel for the Applicant
J Hor of People & Culture Strategies for the Respondent

Hearing details:

2023.
Melbourne:
February 13.

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[1] *Coles Supply Chain Pty Ltd v Milford and Another* (2020) 279 FCR 591.

[2] The letter itself was dated 1 August 2022 but there was no dispute it was sent and received on 4 August 2022.

[3] While the application was made under s.365, s.12 defines "dismissal" by reference to s.386, which in turn then applies to applications under s.365: cf, *Coles Supply Chain Pty Ltd v Milford and Another* (2020) 279 FCR 591 at [15].

[4] *Foran v Wight* (1989) 168 CLR 385 at 406, 423 and 441.

[5] E.g., *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235 at 250 (Kitto J).

[6] PR748462