



# DECISION

*Fair Work Act 2009*  
s.394—Unfair dismissal

**Amit Singhal**

v

**National Australia Bank Limited**

(U2024/3994)

COMMISSIONER FOX

MELBOURNE, 8 OCTOBER 2024

*Application for an unfair dismissal remedy – jurisdictional objections raised by the respondent – objection that applicant is not employed by the respondent and not an Australian-based employee – exception found under s.35(3) – application dismissed.*

[1] On 7 April 2024, Mr Amit Singhal (**the Applicant**) filed a remedy for unfair dismissal application under s.394 of the *Fair Work Act 2009* (**the Act**). In his application, the Applicant named the Respondent as National Australia Bank Limited (**the Respondent**).

[2] The Respondent filed a Form F3 in which it raised three jurisdictional objections to the application. The objections are as follows:<sup>1</sup>

1. The Respondent is not the employer of the Applicant;
2. The Applicant is not an Australian-based employee; and
3. The Applicant resigned from his employment.

[3] This Decision deals with the first two jurisdictional objections.

[4] I conducted a Hearing of the matter on 3 September 2024. The parties filed material in accordance with Directions, which was then compiled into a Digital Hearing Book. The Digital Hearing Book was accepted into evidence at the Hearing without objection from either party.

[5] In considering the evidence of the parties, I uphold the two jurisdictional objections of the Respondent. The reasons for my decision follow.

## Background and Submissions

[6] The Applicant, in his unfair dismissal application, names National Australia Bank Limited (**NAB**) as his employer.

[7] The Respondent submits that the Applicant is employed by NAB Global Innovation Centre India Private Limited (**NICI**). NICI is a wholly owned subsidiary of NAB.<sup>2</sup> Both parties made submissions about the nature and structure of NICI and its relationship to NAB.

[8] The Respondent submits that the Applicant cannot seek a remedy for unfair dismissal as he was not employed by the Respondent, and therefore not employed by a national system employer within the meaning of s.14 of the Act.<sup>3</sup>

[9] The Respondent further submits that the Applicant was not an *Australian-based employee* under s.35 of the Act.

[10] The Applicant submits that NICI is a foreign corporation and submits that ‘any corporation which is formed outside of Australia is termed as a foreign corporation to the parent. Such [sic] foreign corporation when employs an employee to work in its Australian business is likely to be a national system employer and therefore fall within the jurisdiction of the Fair Work Commission.’<sup>4</sup> He cites ss.13 and 14 of the Act and refers to *Glenn Gardner v Milka-Ware International Ltd*<sup>5</sup> (*‘Gardner’*).

[11] The Applicant’s reliance on ss.13 and 14 of the Act and *Gardner* is misconceived. NICI is not a national system employer under s.14 of the Act. *Gardner* determined that a foreign corporation may be covered by s.14 to the extent that it employs employees to work in Australia.<sup>6</sup> There is no evidence that NICI employs employees to work in Australia.

[12] The Applicant’s reliance on *Gardner* is also misconceived as that case is not akin to the Applicant’s situation. In *Gardner*, the employee worked for a foreign corporation in Australia at various times and particularly in the two months leading up to his dismissal. In this matter, on his own evidence, the Applicant has never worked in Australia, nor has he undertaken any work for NICI in Australia. The Applicant was employed by NICI to work in India and his primary place of work was in India. At no time has the Applicant set foot in Australia to perform work for NICI.

[13] It is uncontested between the parties that the Applicant had a contract of employment which:<sup>7</sup>

- identifies the parties to the contract as being Mr Amit Singhal and NICI;
- identifies the place of work being the Company’s office in Gurugram, Haryana (India);<sup>8</sup>
- prescribes that for the purposes of the contract, the governing law is that of India;<sup>9</sup>
- prescribes that dispute resolution will be in accordance with the *Arbitration and Conciliation Act 1996* (which is a statute of India); and
- was signed and executed in India by the Applicant and Mr Inderpreet Kaur (on behalf of NAB Global Innovation Centre India Private Limited) on 26 June 2023.

### **Objection 1: The Respondent is not the employer**

[14] The Respondent submits that Mr Singhal was employed by NICI and not by the Respondent.

[15] It is my view, having regard to the evidence before me, that the Applicant was employed by NICI and not by the Respondent. I consider the contract of employment to be clear and unambiguous in identifying the parties to the contract, that being NICI and not NAB. I also regard it as telling that the Applicant filed a claim in India in relation to his employment in which he identifies his employer as NICI and not the Respondent. Further, the Respondent submits that Mr Singhal ‘resigned from his employment subject to the terms of a confidential agreement between Mr Singhal and NICI.’<sup>10</sup> While the Applicant contests the way NAB characterises these other proceedings, he does not dispute the fact that he identified NICI, and not NAB, as being his employer for the purposes of those proceedings.

[16] I now move to consider whether Mr Singhal is an Australian-based employee.

### **Objection 2: Not an Australian-based employee**

[17] The Applicant contends that he is protected from unfair dismissal by way of s.34(3) of the Act. For the Act to apply to the Applicant’s employment, s.35 of the Act must be satisfied. Section 35 defines an *Australian employer* and ss. 35(2) and (3) define who is an Australian-based employee.

[18] Section 35(2)(a) of the Act defines an *Australian-based employee* as:

- (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.

[19] However, s.35(3) states that ‘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.’ The Respondent seeks to rely on the exemption in s.35(3) of the Act.

[20] Section 35(2)(a) and (c) are not relevant here. It is uncontested by the parties that Mr Singhal’s primary place of work was not in Australia nor is Mr Singhal an Australian-based employee as prescribed by the Regulations. If the Respondent is found to be an Australian employer for the purposes s.35(2)(b), the Respondent relies on the exemption in s.35(3).

[21] Determining the application of s.35(3) requires consideration of a two-limb test. In *Winter v GHD Services Pty Ltd*,<sup>11</sup> Heffernan J summarised that “[t]he decision in Cohen<sup>12</sup> 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.”

[22] The first limb relates to the words ‘engaged outside Australia’. This requires identification of the location or formation of the contract. The Respondent submits that the Applicant was recruited by NICI and that all interviews and correspondence were held between the Applicant and representatives of NICI in India and that no negotiations or correspondence occurred between the Applicant and the Respondent in Australia directly.

[23] Further, the Respondent submits that the Applicant's employment contract, executed on 26 June 2023, contains express terms that the location of the Applicant's employment was the NICI office in Hayana, India and that the agreement was governed by the jurisdiction of India. The Respondent submits that this distinguishes *Gautam Parimoo v Lake Resources N.L.*,<sup>13</sup> in which the contract was formed and accepted in Australia.

[24] From the submissions and evidence provided, the contract of employment was formed and executed by both parties in India. There is no evidence that the contract was formed and executed outside of India. I therefore find in relation to the first limb that the Applicant was *engaged* outside Australia.

[25] The second limb under s.35(3) considers where the duties were performed.

[26] The Applicant contends that the work he performed was for the benefit of NAB in Australia. However, that is not the relevant test here. The test is about *where* the work was performed.

[27] It is the Applicant's own evidence that the performance of his duties occurred *exclusively* in India. The Applicant gave evidence that he had not performed any of his duties in Australia, nor had he ever visited Australia in the performance of his duties with NICI. It is clear from the materials and evidence that he performed his duties exclusively in India and not in Australia.

[28] I therefore find in relation to the second limb that the Applicant *performed* his duties outside of Australia.

[29] The Applicant falls within the exemption in s.35(3) and is therefore not an Australian-based employee under s.35(2) of the Act.

[30] In conclusion, I find that the Applicant was not an employee of the Respondent, and that he was not an Australian-based employee and as such, the Commission does not have jurisdiction to determine his unfair dismissal application.

[31] I uphold the jurisdictional objections of the Respondent and dismiss the Applicant's remedy for unfair dismissal application. An Order to this effect will be issued with this Decision.<sup>14</sup>



COMMISSIONER

*Appearances:*

*A Singhal* on his own behalf.  
*S Aloï* for the Respondent.

*Hearing details:*

2024.  
Melbourne (By Video using Teams):  
3 September.

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<sup>1</sup> Page 49 of the Digital Hearing Book (**DHB**).

<sup>2</sup> *Ibid* 102.

<sup>3</sup> *Ibid*.

<sup>4</sup> *Ibid* 18.

<sup>5</sup> [\[2010\] FWA 1589](#).

<sup>6</sup> *Ibid* [24].

<sup>7</sup> DHB 54.

<sup>8</sup> *Ibid*.

<sup>9</sup> *Ibid* 67.

<sup>10</sup> *Ibid* 50.

<sup>11</sup> [2019] FCCA 775 [15].

<sup>12</sup> *Cohen v iSOFT Group Pty Ltd* (2013) 298 ALR 516.

<sup>13</sup> [\[2023\] FWC 2543](#).

<sup>14</sup> [PR780051](#).