DECISION

Fair Work Act 2009
s.365 - Application to deal with contraventions involving dismissal

Marc Casis
v
JD.COM AUSTRALIA Pty Ltd
(C2023/5690)

COMMISSIONER THORNTON ADELAIDE, 28 MARCH 2024

Application to deal with contraventions of the General Protections provisions involving a dismissal - whether application prohibited by section 725 - whether applicant employed by respondent and capable of being dismissed.

[1] Mr Marc Casis (**Applicant**) has applied pursuant to s.365 of the *Fair Work Act 2009* (Cth) (Act), alleging that JD.COM AUSTRALIA Pty Ltd, trading in Australia as JD.com, (**JD.com** or the **Respondent)** contravened Part 3-1 of the Act by dismissing him from his employment.

[2] The Respondent has objected to the application on the grounds that they were not the employer of the Applicant, but rather a host employer pursuant to a labour hire agreement and as such, they could not have dismissed the Applicant. In essence, the Respondent's jurisdictional objection is that Mr Casis was not dismissed within the meaning of s.386 of the Act, because he was not an employee of JD.com. He was instead an employee of EPG Payroll & HR Pty Ltd (EPG) and was supplied via a labour hire arrangement to perform work for JD.com.

[3] In the Applicant's opening submissions, he advised the Commission that he had filed an unfair dismissal claim against EPG. The Commission's case management system showed that the matter was given action number U2023/8396 and was filed on 4 September 2023. This general protections involving dismissal application was filed on 18 September 2023. The unfair dismissal application was resolved by a confidential settlement and was later discontinued.

[4] The matter proceeded to hearing to address the jurisdictional issue as to whether the Respondent could have dismissed the Applicant. It is uncontroversial that for the matter to be within jurisdiction, Mr Casis needs to have been dismissed. In *Coles Supply Chain Pty Ltd v Milford*[1] (Coles v Milford), the Full Court of the Federal Court held that where a Respondent submits that the Applicant in a s.365 application was not dismissed, as is the case here, the FWC must determine that issue before it can exercise its powers under s.368 of the Act.

[5] However, given that it is clear that the Applicant filed two applications seeking remedies arising from the same dismissal, it is necessary that I address the effect of the existence of multiple claims arising from the same dismissal.

[6] For the reasons set out below, I have determined to dismiss the application because the Act prevents the lodgement of multiple claims arising from the same dismissal. Further, I find that if I am wrong to dismiss the matter on that basis, the Applicant was not an employee of the Respondent and as such was not dismissed.

Background

[7] Mr Casis gave evidence as the Applicant. Ms Jingting Wang gave evidence for the Respondent. Ms Wang works in Human Resource Operations for JD.com.

[8] Much of the evidence given in the matter was focussed on the origins of the relationship between the Applicant and the Respondent.

[9] Mr Casis gave evidence that he first engaged with the Respondent when he responded to an advertisement on the website LinkedIn, regarding a role in their business. The advertisement was provided to the Commission by Mr Casis. The advertisement appears to have been published by the Respondent, JD.com, and purports to be recruiting a Business Development Manager – Logistics Department.

[10] Mr Casis confirmed that he applied for the role and on 11 February 2022, he was offered an interview by Ms Yixuan Wang, from the Human Resource Department, International Business of JD.com.

[11] After a first interview on 23 February 2022, Mr Casis was offered a second interview with Mr Zhang, the country manager for JD.com and the person to whom Mr Casis would report if he was successful in being appointed to the role. Again, this communication was directly with Ms Wang of JD.com.

[12] Presumably, the second interview took place and on 2 March 2022, Mr Casis was sent an email from Ms Wang at JD.com confirming "*you are to be hired*".

[13] On 23 March 2022, Mr Casis was sent an "Offer Letter of Employment" (employment offer) that contained the following: "*We are pleased to confirm this Offer Letter of employment by **Easy Payroll Global Pty Ltd** (the "Company") to you for the position of **Business Development Manager** ... based at t**he Company's offices in Australia** with a start date of **18th – April – 2022**'.*" The letter was signed 'Easy Payroll Global Pty Ltd'.

[14] The employment offer was sent attached to a covering email from Jingting Wang of Global Employee Services which said:

> "*I am Jingting, the contact person of the 3rd party employment agency designated by JD Company, with whom I work closely to facilitate your on-boarding process. On behalf of JD, I would like to first extend you my warmest welcome to join the Company as Business Development Manager in Australia.*
> ...
> *Your employment contract will be issued once upon we receive your signed offer. CDP and its Operation arm in Australia will be fully responsible for calculating*

> *and collecting all relevant employment cost and guarantees your monthly payroll and statutory benefits contribution on time in the country*."

[15] By 6 April 2022, Mr Casis was receiving all communication with respect to the commencement of his employment from Jingting Wang of 'Global Employee Services'. Correspondence from Global Employee Services discussed collecting *'on-boarding'* information *'on behalf of JD.com'*.[2]

[16] On 15 April 2022, Mr Casis received an email from the Human Resources Department at JD.com asking for verification of documents.

[17] When Mr Casis raised concerns about some matters contained in the employment offer of 23 March 2022, he was referred from Global Employee Services to 'the recruiter'. On 24 March 2022, Mr Casis received a response to his queries from "Alice of JD Worldwide".[3]

[18] By this point, Mr Casis has received communication with respect to his future employment from JD.com, Global Employee Services, CDP and JD Worldwide.

[19] After some correspondence with JD Worldwide, Mr Casis ultimately signed the employment offer and returned it to Ms Jingting Wang of CDP on 25 March 2022.

[20] Mr Casis was later provided with a more detailed contract of employment. On 21 April 2022, Mr Casis signed the contract that importantly refers to EPG Payroll & HR Pty Ltd on the title page as the employer and contains a schedule that again confirms the employer as "EPG Payroll & HR Pty Ltd" and "The Client will initially be JD Logistics".

[21] Of note, the contract specifies that "*The Employer may change the Client by advising you in writing, and if it does so, any reference to Client in this Contract shall mean the relevant client to whom you are providing services at the time*."

[22] On 25 April 2022, Mr Casis received an email welcoming him to JD.com, noting: "*We are excited that you have accepted our position and agreed upon your start date*" and "*Once again, welcome to JD.com We anticipate a rewarding future with you*."

[23] Once Mr Casis started work, he was provided a business card including the logo of JD.com.

[24] A payslip provided by Mr Casis confirms his salary was paid to him by EPG Payroll and HR Pty Ltd.

[25] Mr Casis contended in his evidence that JD.com directed his work on a day to day basis. He worked at their facility and was under their direction and control each day. Mr Casis gave evidence that he understood he was employed by JD.com as he was "*deeply entrenched in their operations*."

[26] Mr Casis accepted that EPG played a role in his employment which he describes as "*strictly confined to administrative capacities, handling payroll and human resources-related*

formalities."

[27] Mr Casis also gave evidence that he raised multiple complaints during his employment about safety issues at JD.com and that after making these complaints he was removed from communication channels necessary to perform his role and his personal items were cleared from his office.

[28] On 1 September 2023, Mr Casis was informed that his role was to be made redundant. He received a letter from EPG confirming the redundancy and he was paid the relevant redundancy entitlements.

[29] Mr Casis contends that his selection for redundancy was motivated by his complaints about safety and forms the basis of his claim against the Respondent for a breach of section 340 of the Act.

[30] The Respondent set out in evidence and submissions that it was part of an e-commerce business known as the JD.com Group, with the parent company based in Beijing, China. The Respondent confirmed that it commenced trading in Australia approximately eight years ago and entered into an agreement with a company called CDP to provide labour hire services for the Respondent in Australia.

[31] As CDP did not have an appropriate Australian entity to provide labour to the Respondent, CDP entered into a contract with EPG for EPG to "*act as the employer of record and employ the respondent's Australian workforce*."[4]

[32] Ms Wang gave evidence that she is responsible for global employee human resource services within JD.com. Prior to commencing with JD.com in September 2023, Ms Wang was employed by CDP Group as an account manager, working with clients including JD.com.

[33] Ms Wang gave evidence that "*we use a local labour hire or employer of record company to employ employees while the local business is getting established. Once a local business is established and running smoothly, we generally set up the necessary legal frameworks to employ workers directly through a JD operated entity*."[5]

[34] Ms Wang confirmed that when the Respondent began trading in Australia they entered into a service agreement with CDP to provide those "*employer of record*" services to JD.com. I understand employer of record services to be labour hire arrangements. Ms Wang confirmed that CDP did not have an entity or a licence to employ workers in Australia so it entered into an agreement with an Australian partner, being EPG. EPG then provided labour hire services pursuant to a contract with CDP and employed employees to work in the operations of JD.com in Australia.

[35] Ms Wang confirmed that between September 2020 and September 2023, EPG employed approximately 11 employees to provide labour to JD.com in its Australian operations.

[36] When Ms Wang was working for CDP, she assisted with the Applicant's employment with EPG by providing basic personal information about the position that he was applying for to EPG in order for EPG to progress his employment and onboarding.

[37] Once the Applicant was employed, EPG provided a copy of the employment contract between EPG and the Applicant to Ms Wang at CDP. She then provided a copy to JD.com.

[38] Ms Wang gave evidence that EPG was the employer of Mr Casis and as such was responsible for issuing his employment contract, managing payroll and income taxation in relation to Mr Casis, paying superannuation contributions, managing leave arrangements through the EPG leave portal and ultimately effecting the termination of the Applicant's employment.

Preventing multiple actions

[39] Division 3 of the Act, 'Preventing Multiple Actions' says at s. 725: '*A person who has been dismissed must not make an application or complaint of a kind referred to in any one of sections 726 to 732 in relation to the dismissal if any other of those sections applies*.'

[40] Section 726 has no application to this matter. Section 727 refers to general protections applications and section 729 to unfair dismissal applications.

"**727 General protections FWC applications**

(1) This section applies if:

(a) a general protections FWC application has been made by, or on behalf of, the person in relation to the dismissal; and

(b) the application has not:
(i) been withdrawn by the person who made the application; or
(ii) failed for want of jurisdiction; or
(iii) resulted in the issue of a certificate under paragraph 368(3)(a) (which provides for the FWC to issue a certificate if the FWC is satisfied that all reasonable attempts to resolve a dispute (other than by arbitration) have been, or are likely to be, unsuccessful).

(1A) This section also applies if:

(a) a general protections FWC application has been made by, or on behalf of, the person in relation to the dismissal; and

(b) the application has not:
(i) been withdrawn by the person who made the application; or
(ii) failed for want of jurisdiction; and

(c) a certificate in relation to the dispute has been issued by the FWC under paragraph 368(3)(a) (which provides for the FWC to issue a certificate if the FWC is satisfied that all reasonable attempts to resolve a dispute (other than by arbitration) have been, or are likely to be, unsuccessful); and

(d) a notification of the parties' agreement to the FWC arbitrating the dispute has been made as referred to in paragraphs 369(1)(b) and (c).

(2) A general protections FWC application is an application under section 365 for the FWC to deal with a dispute that relates to dismissal."

…

"**729 Unfair dismissal applications**

(1) This section applies if:

(a) an unfair dismissal application has been made by the person in relation to the dismissal; and

(b) the application has not:

(i) been withdrawn by the person who made the application; or

(ii) failed for want of jurisdiction; or

(iii) failed because the FWC was satisfied that the dismissal was a case of genuine redundancy.

(2) An unfair dismissal application is an application under subsection 394(1) for a remedy for unfair dismissal."

[41] In the matter of *Alex v Costco Wholesale Australia*[6] (*Alex*), the Applicant had made an application to the Australian Human Rights Commission before filing an unfair dismissal claim, Deputy President Gostencnik considered the same provisions of the Act and observed:

> "*These provisions recognise that persons aggrieved by a decision to dismiss may have multiple avenues of redress and in so doing, they operate to prevent multiple actions being maintained in relation to the same dismissal. Put simply, a person aggrieved by a dismissal may choose to seek a remedy in relation to his or her dismissal by following one of a number of avenues. Having made a choice, that person is prevented from making a second application or complaint for redress before the application or complaint first made has not been withdrawn or failed for want of jurisdiction*."[7]

[42] The Commission's case management system shows that the unfair dismissal application against EPG was filed by the Applicant 14 days before this claim was filed. The unfair dismissal claim resolved, at least in principle, on or about 18 October 2023 and Mr Casis filed a Notice of Discontinuance on 23 October 2023.

[43] It is clear that Mr Casis made an application for the Commission to deal with a dismissal dispute under section 365 of the Act, at a time when he had made an application pursuant to

section 394 of the Act for an unfair dismissal remedy. At the time of making the general protections complaint, the Applicant's unfair dismissal claim had been made and had not been withdrawn or otherwise failed for want of jurisdiction.

[44] As the Full Bench noted in *Corrie v Loddon Mallee Housing Services Ltd*, [8] when concurring with views expressed by the Commission in the first instance decision: "*a general protections dismissal dispute application cannot be made if another application or complaint dealing with the dismissal (such as an unfair dismissal application) has also been made*".

[45] Again, in the matter of *Alex*, the Deputy President observed that when the Applicant made a second application, relying on the same dismissal, in "*purporting to make that second application, s.725 was invoked. That section prevents the Applicant from making the application under s.365*."[9] Ultimately, the Deputy President held that "*the prohibition on making this application operated at the time that the application was made to the Commission*."[10] The Deputy President found that s. 725 prohibited the application being made and in fact "*operated as a bar to this application being made*".[11]

[46] Section 725 is focussed on the person who has been dismissed being prevented from making an application or complaint in relation to the dismissal if they have already made a complaint about the same dismissal in an alternative cause of action referenced in ss 726 to 732 of the Act.

[47] It follows that the Applicant in this matter is prevented by the operation of s.725 from bringing two different claims relating to the one dismissal. As the Applicant's unfair dismissal claim was made first and was not withdrawn or dismissed as being outside jurisdiction on the date this general protections claim was made, the Applicant is in fact prevented from making the application.

[48] The Applicant asserts he was engaged in joint employment, whereby he was employed by two employers (a matter I address further below) and appears to be arguing that he can raise a cause of action, including a different cause of action, against each of them on account of the role he asserts they played in the termination of his employment. Aside from the fact that I find the Applicant was not engaged in joint employment, section 725 prevents the dismissed person bringing more than one application referenced in sections 726 to 732. The fact that this Applicant considers he has two employers has no bearing on the operation of section 725 in this case: Mr Casis is the dismissed person and he has made an application of a kind referred to in section 727 in relation to his dismissal when an application referred to in section 729 had already been made seeking a remedy for the same dismissal and had not been withdrawn or otherwise dismissed.

[49] Following the authorities referred to above, I find that the application ought to be dismissed because it is prohibited by section 725 of the Act.

Whether the Respondent is the Applicant's employer

[50] If I am wrong that the application is barred by the operation of section 725, I would otherwise find that the Respondent was not the employer of the Applicant and therefore could not have dismissed him in contravention of the general protections provisions of the Act.

[51] Section 365 of the Act outlines when the Commission can deal with a general protections application involving dismissal:

> "**365 Application for the FWC to deal with a dismissal dispute**
>
> If:
>
> (a) a person has been dismissed; and
>
> (b) the person, or an industrial association that is entitled to represent the industrial interests of the person, alleges that the person was dismissed in contravention of this Part;
>
> the person, or the industrial association, may apply to the FWC for the FWC to deal with the dispute."

[52] Section 365 requires a dismissal to have occurred as a jurisdictional fact. 'Dismissal' for these purposes (and other purposes of the Act)[12] is defined in s.386(1), which provides:

> "**386 Meaning of dismissed**
>
> (1) A person has been dismissed if:
>
> (a) the person's employment with his or her employer has been terminated on the employer's initiative; or
>
> (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer."

[53] Dismissal of a person at the initiative of their employer requires that person to have first been employed by that employer.

[54] Mr Casis asserts that this claim is within jurisdiction because he was employed in a "*trilateral agreement*" involving EPG and JD.com. Mr Casis gave evidence that JD.com exercised control over his employment on a daily basis, he was embedded in their business, and that as the Respondent ultimately determined they no longer required his services, that they were in fact his employer, *as well as* EPG. As previously referenced, Mr Casis accepted that EPG managed his payroll and human resource management and in doing so were discharging obligations as his employer. Mr Casis identifies both EPG and JD.com as being his employers as each managed different aspects of his employment relationship.

[55] I am sympathetic to the confusion created for the Applicant by the Respondent's recruitment processes. Mr Casis himself described the recruitment process as a "*bait and switch*". I think this description is apt. JD.com represented throughout much of the recruitment process that they were going to be the Applicant's employer, including sending him an email stating that he was "*to be hired*".

[56] However, when an offer of employment was made, it was expressly made by EPG in writing. Mr Casis accepted the offer. Unfortunately, there were ongoing representations from the third parties involved in this matter that they were acting on behalf of JD.com in offering employment to the Applicant. This would have likely led Mr Casis to believe that he was being offered employment by JD.com.

[57] Ultimately, in addition to the contract of employment being offered by EPG and accepted by the Applicant, it was EPG who managed key aspects of Mr Casis' employment including the withholding and remittance of income taxation, making superannuation contributions and paying workers compensation levies on his behalf. However, the Applicant's submissions placed emphasis on, in particular, the control exercised over his day to day work by the Respondent as indicative of an employment relationship between himself and JD.com.

[58] The Respondent referred to the matter of *FP Group v Tooheys Pty Ltd*[13] (*Tooheys*) as authority for the principle that "*the mere existence of an arrangement under which a first company provides labour to a second company does not point to the second company being the employer of labour so provided*."

[59] A similar conclusion was reached in the matter of *Damevski v Guidice*,[14] where the Court noted: "*In general, the courts have held that the interposition of a labour hiring agency between its clients and the workers it hires out to them does not result in an employee-employer relationship between the client and the worker*."

[60] In determining the identity of the employer in *Tooheys*, the Full Bench considered that formal labels used in the arrangements "*will not be determinative*" but remain a relevant consideration unless "*other factual matters demonstrate that those arrangements and labels do not conform to the reality of the working relationships*". They cite as a "*critical consideration*" the "*commercial authenticity of the arrangements*", including whether "*the supplier of labour is truly conducting a business of its own*."[15]

[61] In this matter, the Respondent set out evidence regarding the commercial arrangements it has for managing labour across its business internationally and in Australia. JD.com has previously contracted with CDP to provide labour to its businesses internationally, but CDP was unable to provide labour to JD.com in Australia. Consequently, it was CDP that entered into a contract with EPG to provide labour in Australia to its client, JD.com. The Respondent submits that EPG is an established business in its own right that entered into a written contract with the Applicant and assumed obligations for insurance, employee relations, taxation and superannuation in respect of the Applicant's employment.

[62] In this case, the contractual relationships exist between the Applicant and EPG, EPG and CDP, and CDP and JD.com. The Applicant was only placed at JD.com. From a contractual point of view, there are two entities interposed between the Applicant and JD.com in this matter, both EPG and CDP.

[63] With respect to the issue of day-to-day control over the work of the Applicant by JD.com, I accept that it was the reality of this situation that JD.com exercised significant control over the Applicant in the performance of his work. In considering the impact of the control of the host employer in a labour hire arrangement, the Full Bench in *Tooheys*, said:

> "*In the context of a genuine labour hire arrangement – that is, one involving a labour hire company genuinely in the business on its own account – the fact that a worker supplied by the labour hire company works under the direction of the hirer is not necessarily inconsistent with the proposition that the worker's contract is with the labour hire company and not the hirer*."[16]

[64] The Bench then offers an analogy referred to by the High Court in *Accident Compensation Commission v Odco*[17] where the employer of tradespersons "*contacts an appropriate tradesman and advises the tradesman of the builder's requirements. If the proposal is acceptable to the tradesman, he attends at the building site and performs the necessary work at the direction of the builder*." In that scenario, the employer "*does not exercise and is not able to exercise any control whatsoever over what the tradesman does at the site or how he does it*."

[65] In the matter of *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd*[18], Buchanan J noted:

> *"[T]he common law has long recognised the possibility that an employee of one business entity might be hired, loaned or seconded to another person or business, without any change in employment relationship occurring. That is so even if a good measure of practical control is exercised over the work of the employee by the person to whom the employee's services are supplied*".

[66] The Applicant raised a number of factual matters that he argued were indicative of an employment relationship, in addition or adjacent to his assertion regarding the control of his day to day work by JD.com, including that he wore a uniform that identified the letters JDL, (which I take to refer to JD Logistics), had a business card and email signature referring to JD.com and the integrated nature of his role in the core operations of JD.com.

[67] I am not persuaded that these matters are relevant to the determination of an employment relationship in a circumstance where there is a clear contract between EPG and CDP and, in turn, CDP and JD.com for the provision of labour and a contract of employment between the Applicant and EPG.

[68] The High Court in the matters of *CFMEU v Personnel Contracting Pty Ltd*[19] and *ZG Operations Australia Pty Ltd v Jamsek & Ors*[20] confirmed that in determining the nature of a relationship as one of employment or otherwise, where a written contract exists to make clear the terms of the relationship, the rights and duties established by the contract must be given primacy.

[69] A written contract of employment exists between the Applicant and EPG that was submitted into evidence. The contract includes the following matters:

- (a) an express reference to an agreement to enter into the contract recording the terms on which the Applicant agrees to be employed;
- (b) EPG is clearly identified as the employer;
- (c) the client is identified as JD Logistics (notably not JD.com);
- (d) EPG held a discretion to pay a quarterly and annual bonus to the Applicant;

(e) the terms and conditions of the employment was to be governed by the contract;
(f) EPG was liable to pay wages to the Applicant;
(g) EPG managed the leave accruals and taking of the Applicant's leave;
(h) EPG retained a right to terminate the Applicant's employment and an obligation to pay any resulting entitlements;
(i) The contract contained the entire agreement between the parties; and
(j) Entitled EPG to change the placement of Mr Casis with a different client with written notice.

[70] Of particular note is clause 29.2 of the contract, which says: "*You acknowledge and agree this Contract gives rise to a relationship of employer and employee between you and the Employer, and that there will be no legal relationship between you and the client, or any of the employer's other clients*."

[71] I find that there is no contract of employment between the Applicant and the Respondent, express or implied. There is however, a contract between the Applicant and EPG which expressly sets out the terms of an employment relationship. The employer of the Applicant was EPG, and Mr Casis was engaged in a labour hire arrangement, placed at JD.com.

[72] This is consistent with the authorities that control may be exercised by a host or client, but that the nature of the relationship is not necessarily one of employment.

[73] JD.com may have exercised control over Mr Casis' employment on a day to day basis but Mr Casis has an express contractual relationship of employment with EPG. EPG discharged a number of obligations pertaining to an employer in an employment relationship in respect of the Applicant. CDP was the client of EPG and Mr Casis was placed with JD.com pursuant to a contractual agreement between JD.com and CDP, and subsequently, EPG.

[74] For completeness, I address the Applicant's argument that JD.com is not his sole employer but that he had, in fact, two employers, each with obligations to him as their employee. An extension of that proposition impliedly advanced by Mr Casis is that he can seek a remedy against each of his employers arising from his dismissal. The fact he has this view is confirmed by his filing of two applications relating to the same dismissal against each of the parties he says are his employers.

[75] What it appears Mr Casis is asserting is that he was employed in joint employment. Irving in 'The Contract of Employment'[21] describes joint employment as: "*The idea that courts should impose joint liability on two employers under the common law, or for the purpose of some statutes, even in the absence of an express tripartite contract between employee and the two employers*."[22] Irving further elaborates:

> "*As a matter of contract, the difficulty in practice is that in a labour hire arrangement there are usually two express contracts: one between the agency and the worker and the other between the agency and the client. The question is then whether the agency, the client and the worker all jointly intended to enter into a tripartite contract. In the face of two express contracts, as a matter of fact it will be unlikely that such intention will exist*."[23]

[76] In the matter of *Tooheys,* the Full Bench gives notable consideration to an express submission by the Respondent that the employees in question were employed in a relationship of joint employment where they were employed by the respondent but worked at Tooheys in a labour hire arrangement. At first instance, the Commissioner noted:

> "*There are no authoritative decisions or judgements of the superior courts in Australia on the subject those few decisions and academic dissertations which are dealt with the matter, identified a number of problems with applying the concept of joint employment within the current legislative framework of industrial, corporations and contract law. As I understand, there are no decisions at all in Australia, which are found in favour of joint employment*."[24]

[77] The Commissioner went on to say:

> *"I do not see the facts and circumstances of this case as fitting within a prima facie case of joint employment. This is so, because I consider in balancing the facts and circumstances of this case, a firm positive conclusion can be made, in the conventional way, as to which one of the two respondents was the true employer of the applicants."*[25]

[78] The Full Bench confirmed the decision of the Commissioner and noted:

> *"[T]he application of concepts of joint employment to labour hire arrangements would involve a very considerable development of the common law. The cases in which Australian courts have analysed labour hire arrangements have invariably involved the identification of which one of two putative employers is in fact the employer. In no case has an Australian court approached the analysis on the basis that the exercise of control over the worker by the hirer of labour in a labour hire arrangement may render the hirer, together with the labour hire company, a joint employer of the worker."*[26]

[79] The Full Bench said further:

> *"[W]e do not consider that the Commission's role as a statutory tribunal extends to engagements in the development of the common law. That is a matter for the courts."*

[80] The Full Bench ultimately held that *"[I]t must be the case … That for Tooheys to have been a joint employer of the applicant, there must still have been express or implied contracts of employment between Tooheys and the applicants*." They found no such contracts existed.

[81] The facts and circumstances of this matter do not establish a case for joint employment. Considering the evidence before the Commission, an employer can be identified from the terms of the contract entered into between the Applicant and his employer, EPG. I have made this finding also considering the authorities discussed that make clear that a host employer can exercise control over the work performed by a labour hire employee on a day to day basis without an employment relationship being formed. In any event, the current law in Australia

does not recognise the concept of joint employment and any development in the law in that regard is for the consideration of the Courts and not this Commission.

[82] It is also the case that the Applicant made an unfair dismissal application against EPG and thereby expressly accepted that EPG was his employer.

Dismissal

[83] For the reasons set out above, the application is dismissed.

COMMISSIONER

Appearances:

M Casis, Applicant on his own behalf.

G Williams and *J Lennon* of MinterEllison with permission, with *Y Qiong*, *J Shao-Jun* and *J Wang* on behalf of the Respondent.

Hearing details:

Adelaide (Video via MS Teams)
2023
20 November.

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[1] [2020] FCAFC 152.

[2] See email from Ms Zhang of Global Employee Services dated 6 April 2022.

[3] See email from Alice Liu of JD Worldwide dated 24 March 2022.

[4] See submissions of Respondent dated 3 November 2023 at paragraph 9.

[5] Witness Statement of Jingting Wang dated 3 November 2023 at paragraph 7.

[6] [2014] FWC 1904.

[7] [2014] FWC 1904 at [7].

[8] [2023] FWCFB 84 at [29].

[9] [2014] FWC 1904 at [8].

[10] Ibid, at [12].

[11] Ibid, at [16].

[12] See *Varichak v COG Regional Team Pty Ltd* [2022] FWCFB 37 at [30] where it is noted 'the provisions of s.386 have been applied by the Courts to s.365 General Protections matters' (reference to footnote omitted).

[13] [2013] FWCFB 9605.

[14] (2003) 133 FCR 438 at [173].

[15] [2013] FWCFB 9605 at [22].

[16] Ibid, at [25].

[17] (1990) 34 IR 297 referenced in Tooheys at [26].

[18] (2011) 198 FCR 174 at [47].

[19] [2022] HCA 1.

[20] [2022] HCA 2.

[21] Irving, 'The Contract of Employment' 2nd edition, 2019 at 130.

[22] Ibid.

[23] Ibid, at 131.

[24] [2013] FWC 2813 at [777].

[25] Irving, 'The Contract of Employment' 2nd edition, 2019 at 781.

[26] [2013] FWCFB 9605 at [45].