

*Note: An appeal pursuant to s.120 (C2007/3774) was lodged against this decision - refer to Full Bench decision dated 31 January 2008 [[\[2008\] AIRCFB 26](#)] for result of appeal.*

[2007] AIRC 814

[PR978595](#)

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AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

*Workplace Relations Act 1996*

s.643 application for relief in respect of termination of employment

**Eva**

and

**Victorian Radio Network Pty Ltd**  
(U2007/5413)

COMMISSIONER EAMES

MELBOURNE, 25 SEPTEMBER 2007

*Termination of employment - jurisdictional grounds - Section 643(10).*

**DECISION**

[1] This matter arises following an application made pursuant to s.643 of the *Workplace Relations Act 1996* (the Act) by Mr Eva (the Applicant), who sought a remedy following his termination of employment by Victorian Radio Network Pty Ltd (the Respondent) on 1 August 2007.

[2] The matter was first listed for a conciliation conference in conformity with the Act on 12 September 2007, before the Commission, as constituted in this matter, however the matter was not resolved.

[3] The Applicant was represented in this matter by Mr M Rinaldi of counsel, and the Respondent by Mr S Gibson, solicitor. Leave was granted in both cases for the appearances.

[4] As the matter had not resolved at the conciliation conference, it was confirmed by Mr Gibson, that the Respondent wished to argue that the application was beyond jurisdiction, in that the Respondent, and its related bodies corporate, employed fewer than 100 employees as defined by s.643(10) of the Act.

[5] The jurisdictional hearing was set down for 20 September 2007, and submissions were taken from both parties, on that date.

### **Respondent's case**

[6] Mr Gibson tendered three exhibits at the proceedings namely:

- Exhibit G1 Statutory Declaration of Mr A Failla, Group Accountant of the Respondent
- Exhibit G2 Statutory Declaration of Mr B Quick, Chief Executive Officer of the Respondent
- Exhibit G3 Statutory Declaration of Mr S Gibson, Principal Solicitor acting for the Respondent

[7] The three statutory declarations contained statements and attachments related to the number of employees, employed by the Respondent, at the time of the termination of the Applicant.

[8] These statements and attachments were the evidence relied upon by the Respondent, in the proceedings. No witness evidence was taken in court.

[9] It was argued by Mr Gibson that when one examines the lists prepared in support of the Respondent's case, including the WorkSafe Declarations of Rateable Remuneration, attached to Exhibit G3, one arrives at a figure of 52 employees in total, within the meaning of s.643(10) of the Act, at the time of the Applicant's termination.

[10] This figure is well below the "less than 101" figure which is the cut off referred to in the Act, where jurisdiction is enlivened.

### **Applicant's case**

[11] Mr Rinaldi indicated in his initial submissions that the persons set out in the attachment to Mr Failla's declaration, Exhibit G1, numbered 52, and that the Applicant accepted that number, as being part of the calculations to be taken into account in this matter.

[12] Mr Rinaldi tendered three exhibits which in his submission demonstrated his clients belief that the Respondent employed a total of 114 employees. Those exhibits were:

- Exhibit R1 The Applicant's statutory declaration related to persons known to him as employees of the Respondent

- Exhibit R2The Applicant’s statutory declaration related to persons known as “contractors” who are employees.
- Exhibit R3The Respondent’s Telephone Directory.

[13] It was agreed by the parties, and determined by the Commission that the Exhibits of the Applicant, would be placed in a sealed envelope, and attached to the Commission’s file, for security purposes, as the various lists contained personal phone numbers of those mentioned in the proceedings.

[14] Mr Rinaldi indicated the names, phone numbers and email addresses contained in the various lists were not obtained illegally but were provided to the Applicant by another employee.

[15] The telephone listing is at 2 August 2007, the day after the Applicant was dismissed. His name does not appear on the list.

[16] It was put that there are 12 persons who are on the telephone list, who do not appear in Exhibit G1.

[17] In addition, Mr Rinaldi submitted, that if one adds the persons in the second group, on the first page of the attachment to Exhibit G1, in addition to the Company Secretary, and the four directors to which reference is made in the lists, one comes to a total of 114 employees.

[18] It was put, that if the objection is to succeed, then 14 of the 114 persons referred to above have to be eliminated, and as there is no material put before the Commission beyond Mr Failla’s declaration the 52 claimed by the Respondent are only an assertion made by them, with no contracts indicating the terms upon which the alleged contractors are employed.

[19] On the question of persons identified by Mr Failla as contractors who provided tax invoices, it was put by Mr Rinaldi that such invoices do not prove they are employees and the fact that they have an ABN does not prove they are not employees.

[20] There is no evidence about whether GST is charged; the ability to delegate tasks or any of the classic *indicia* of a contractor.

[21] With regard to the WorkSafe certificates tendered by the Respondent, it was put that they are produced regarding workers compensation insurance; there are no names attached and no way of determining employees from contractors; long term from short term casuals.

[22] Mr Rinaldi also submitted that the directors to whom reference is made in the exhibits can be employees as a matter of law, but there is no evidence, one way or the other, to establish they are definitely not employees.

[23] Mr Rinaldi sought the dismissal of the objection.

## Conclusion

[24] s.643(10) of the Act provides as follows:

*“(10) An application under subsection (1) must not be made on the ground referred to in paragraph (1)(a), or on grounds that include that ground, if, at the relevant time, the employer employed 100 employees or fewer, including:*

*(a) the employee whose employment was terminated; and*

*(b) any casual employee who had been engaged by the employer on a regular and systematic basis for at least 12 months;*

*but not including any other casual employee.”*

[25] s.643(11) of the Act provides as follows:

*“(11) For the purposes of calculating the number of employees employed by an employer as mentioned in subsection (10), related bodies corporate (within the meaning of section 50 of the Corporations Act 2001) are taken to be one entity.”*

[26] With regard to s.643(11) it is agreed between the parties, that the related bodies corporate number 2 and together with the named respondent are the one entity to be taken into account in this matter.

[27] The corporate relationship involves:

- Victorian Radio Network Pty Ltd
- Malbend Pty Limited
- Pacific Star Network Ltd

[28] In matters such as this, the onus is on the Respondent to establish to the satisfaction of the Commission, that on the balance of probabilities, they employed 100 or fewer employees at the time of the Applicant’s termination.

[29] It was put by Mr Rinaldi that mere assertion of employment numbers is not enough, and that sufficient evidence must be led, to convince the Commission that the jurisdictional objection is made

out.

[30] I agree with that submission.

[31] Mr Rinaldi drew the Commission's attention to three previous decisions of the Commission, which I agree, are helpful in determining this matter.

[32] While the decision of Deputy President Hamilton in *Kieselbach v Amity Group P/L*, 9 October 2006 [[PR973864](#)] ("*Kieselbach*") dealt with a termination for alleged operational reasons, paragraph 41 of His Honours decision is relevant in this matter, in my view.

[33] His Honour stated:

*"[41] If it is in fact the case that a simple statement is sufficient, then as a matter of practicality the ability of an employee to challenge that statement may in many cases be extremely limited. The effective onus would be on the employee, once the statement was made, to disprove the assertion by producing evidence that this explanation was not genuine. An employee may not know what those reasons are beyond what he or she was told, there may be financial and time limits on the employee's ability to conduct investigation and searches of records, and so on. The employer, however, has ready access to that evidence, if it exists, and has nevertheless chosen not to produce it. Nor does the language of the subsection lend support to an interpretation that the onus of proof shifts to the employee in this manner simply because an assertion is made by the employer, nor can it readily be argued that an evidentiary onus shifts simply because an assertion is made."*

[34] In this case the Respondent has all the information related to the number they employ, and has to demonstrate beyond the balance of probabilities, that Mr Rinaldi's assertion, that they employ in the order of 114 employees is incorrect. The onus is on the Respondent to prove its case.

[35] In the decision of Commissioner Smith's, *Baldacchino & ors v Triangle Cables (Aust) P/L*, 23 May 2006 [[PR972581](#)], in his findings and conclusions, the following statement was made:

*"[21] ... it was appropriate for the employer to bring material to the attention of the Commission which would demonstrate the factual basis upon which the notice of motion was made."*

[36] On the question of the description or definition of contractors the Full Bench in *Abdalla v Viewdaze P/L trading as Malta Travel*, Lawler VP, Hamilton DP, Bacon C, 14 May 2003 [[PR927971](#)] ("*Abdalla*"), collected a list of "*indicia*", taken from all the earlier cases, including High Court judgements to assist in defining contractors.

[37] In this case, other than the WorkSafe Declarations, which in my view are not conclusive of which of the Respondents employees may or may not be contractors, I have no other documents or evidence to support the Respondents assertions that they only employ 52, and not 114 as claimed by the Applicant.

[38] Mr Gibson expressed concern about the phone and email records that were accessed by the Applicant.

[39] Having looked through those records, which appear to me to be authentic, and contain references, among others, to accountants, managers, announcers, producers, panel operators, reporters, receptionist, journalist and several other names without description, I cannot be certain, on a balance of probabilities as to who are or may be employees, and who may or may not be contractors.

[40] Many of these persons do appear on the Respondents various radio programs for I have listened to many of them myself, but as to their employment status, I am most uncertain.

[41] Mr Failla could have appeared to give evidence in this matter, as could Mr Quick, and they more than likely could have brought with them sufficient documentation, to establish their claim that they employ less than 101 persons and subjected themselves to cross examination. They did not do so, and accordingly I am satisfied that the Respondent has not made out its jurisdictional objection when one applies the criteria contained in the case law references cited in this decision.

[42] Accordingly, the jurisdictional objection is dismissed, an order [[PR978682](#)] giving effect to this decision is attached, a Certificate will also be issued in accordance with s.650(2) of the *Workplace Relations Act 1996*.

BY THE COMMISSION:

COMMISSIONER

*Appearances:*

*M. Rinaldi* of counsel for *B. Eva*, the Applicant.

*S. Gibson* solicitor for Victorian Radio Network Pty Ltd, the Respondent.

*Hearing details:*

2007.

Melbourne:

September 20.

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