



DECISION

Workplace Relations Act 1996

s.643 - Application for relief re (Unlawful and Harsh, Unjust or Unreasonable) termination of employment

Mr Raihan Islam

v

Digeni Investments Pty Limited t/as Waterfront Restaurant

(U2008/7365)

COMMISSIONER CARGILL

SYDNEY, 18 DECEMBER 2008

Termination of employment - Jurisdiction.

[1] On 14 November 2008 Mr R Islam (the applicant) lodged an application under section 643 of the *Workplace Relations Act 1996* (the *Act*). The applicant sought relief in respect of the termination of his employment by Digeni Investments Pty Limited t/as Waterfront Restaurant (the respondent). The application is made on three grounds: that the termination was harsh, unjust or unreasonable; that there has been a contravention of section 659; and, that there has been a contravention of section 661.

[2] The matter was listed for conciliation on 2 December 2008. On 28 November 2008 the respondent filed a motion to dismiss the application. The motion is put on basis that the respondent employs 100 or fewer employees. The respondent indicated that it objected to conciliation occurring before the motion was dealt with. Accordingly, the conciliation conference was cancelled.

[3] The motion to dismiss was accompanied by a statement by Mr T Drivas, the Managing Director of the respondent. Payroll records were also attached. At my request, an affidavit sworn by Mr Drivas was provided. It is in the same substantive terms as his statement. Clearer payroll records were also provided.

[4] On 28 November 2008 I wrote to the parties inviting them pursuant to section 648(2) of the *Act* to provide further information as to whether an order under section 645 should be

made. A timetable was set for the filing and exchange of that material. Both parties provided written information in response to the invitation.

[5] I have taken into account all of the information provided by the parties. I have also considered, as I am required to do section 648(1) of the *Act*, the cost that would be caused to the business of the employer by requiring the employer to attend a hearing. I note that neither party has requested a hearing. In all of the circumstances I have decided not to hold a hearing.

[6] It should be noted that the respondent has also filed a notice of motion to dismiss the application on the basis that it is frivolous, vexatious and without substance.

MATERIAL PROVIDED ON BEHALF OF THE RESPONDENT

[7] As indicated earlier the respondent provided an affidavit from its Managing Director, Mr Drivas. In that affidavit Mr Drivas deposes that, as at the date of the applicant's dismissal, the respondent employed 71 employees including the applicant. A copy of the payroll records was provided. This shows 71 names including that of the applicant.

[8] Mr Drivas also deposes that the respondent has no related bodies corporate which are employers of any persons.

MATERIAL PROVIDED ON BEHALF OF THE APPLICANT

[9] In his response the applicant states that Mr Drivas has two other restaurants in the same location as the Waterfront Restaurant where he was employed. The applicant states that he was directed to work at one of these other restaurants on several occasions. He questions how this could occur if there is separate ownership.

[10] The applicant says that his employment was terminated by Mr C Drivas, the elder brother of Mr T Drivas. The applicant also says that the website of "Dockside Group" shows eight restaurants and function centres. He submits that the respondent has more than 100 employees.

[11] The applicant also makes submissions in relation to the other notice of motion raised by the respondent as well as his difficult personal circumstances.

MATERIAL PROVIDED ON BEHALF OF THE RESPONDENT IN REPLY

[12] In the submissions in reply the respondent refers to the affidavit of Mr Drivas and notes his deposition that there are no related bodies corporate. Copies of company searches of the Australian Securities and Investment Commission (ASIC) records are provided for each of the restaurants and websites mentioned by the applicant in his submissions.

[13] It is submitted that these documents confirm the evidence of Mr Drivas that there are no other related bodies corporate. The documents confirm that the other restaurants mentioned by the applicant are owned and operated by separate legal entities. Further, Mr Drivas is neither a director nor a shareholder in any of these bodies.

[14] It is also submitted that Mr C Drivas at times assists Mr T Drivas in his restaurant. This does not mean that there is a corporate relationship between the respondent and the company run by his brother.

CONCLUSIONS

[15] Section 643(10), (11) and (12) of the *Act* provide 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.

(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.

(12) *For the purposes of subsection (10):*

(a) *the **relevant time** is the time when the employer gave the employee the notice of termination, or the time when the employer terminated the employee's employment, whichever happened first; and*

(b) *for the purposes of calculating the number of employees employed by the employer, **employee** has the same meaning as in paragraph (b) of the definition of that term in section 636."*

[16] Section 50 of the *Corporations Act 2001* (the *Corporation Act*) provides:

"Related bodies corporate

Where a body corporate is:

(a) *a holding company of another body corporate; or*

(b) *a subsidiary of another body corporate; or*

(c) *a subsidiary of a holding company of another body corporate;*

The first-mentioned body and the other body are related to each other."

[17] There is sworn evidence before me to the effect that, at the relevant time, the respondent employed 71 employees including the applicant. There is also sworn evidence supported by searches of ASIC records that there are no other related bodies corporate.

[18] The issues raised by the applicant have been addressed and explained by the respondent.

[19] I am satisfied that the respondent's notice of motion should be granted. An order to this effect pursuant to section 645(5), PR985047, is issued at the same time as this decision.

[20] As a result of the granting of this notice of motion, the applicant's claim insofar as it alleges that the termination was harsh, unjust or unreasonable, is dismissed. Consequently there is no need to consider the respondent's other notice of motion as it can only relate to a claim under section 643(1)(a).

[21] The remaining parts of the applicant's claim, the alleged contraventions of section 659 and 661, will be listed for conciliation.

BY THE COMMISSION:



Written Submissions

R. Islam, the applicant.

Y. Hazan, solicitor for the respondent



ORDER

Workplace Relations Act 1996

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SYDNEY, 18 DECEMBER 2008

Termination of Employment - Jurisdiction

A. Further to my decision in PR985046 and the provisions of section 646(5) of the *Workplace Relations Act* the respondent's motion to dismiss the application insofar as it is made pursuant to section 643(1)(a) is granted.

B. The substantive application in respect to the alleged contraventions of section 659 and 661 will now be listed for conciliation.

BY THE COMMISSIONER:



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