FEDERAL CIRCUIT COURT OF AUSTRALIA

ZINTCHENKO v [redacted] *& ORS (No.2)* *[2019] FCCA 3651*

Catchwords:
INDUSTRIAL LAW – Default judgments – declarations not made – findings of the Fair Work Commission not binding on the Court – accessorial liability – knowing contravention not established against the First Respondent.

Legislation:
Fair Work Act 2009 (Cth), ss.550 and 570

Cases cited:
Construction, Forestry, Mining and Energy Union v Bhp Coal Pty Ltd [2017] FCAFC 50
Fair Work Ombudsman v Lohr [2018] FCA 5
Miller v University of New South Wales [2003] FCAFC 180
Port Kembla Coal Terminal Ltd v Construction, Forestry, Mining and Energy Union [2016] FCAFC 99
Quinlivan v Australian Competition and Consumer Commission [2004] FCAFC 175
Zintchenko v [redacted] *& Ors* [2019] FCCA 1724

Applicant:	MAXIM ZINTCHENKO
First Respondent:	[redacted]
Second Respondent:	AUDI ENTERPRISES PTY LTD (A.C.N 604 532 416)
Third Respondent:	ACN 094 365 901 PTY LTD
File Number:	MLG 370 of 2019
Judgment of:	Judge McNab
Hearing date:	5 September 2019
Date of Last Submission:	5 September 2019
Delivered at:	Dandenong

Delivered on: 13 December 2019

REPRESENTATION

Counsel for the Applicant:	Mr Ting
Solicitors for the Applicant:	Berrigan Doube Lawyers
Counsel for the First, Second and Third Respondents:	Mr Cooper
Solicitors for the First, Second and Third Respondents:	Peter Cooper Lawyers

ORDERS

(1) The application filed 12 February 2019 be dismissed.

THE COURT NOTES THAT:

(2) The orders of 5 June 2019 remain extant.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE

MLG 370 of 2019

MAXIM ZINTCHENKO
Applicant

And

[redacted]
First Respondent

AUDI ENTERPRISES PTY LTD (A.C.N 604 532 416)
Second Respondent

ACN 094 365 901 PTY LTD
Third Respondent

REASONS FOR JUDGMENT

Introduction

1. This matter arose by application filed 12 February 2019 and follows findings made by the Fair Work Commission ('FWC') on 28 February 2018.

2. By this application and the Statement of Claim (filed 12 February 2019), the Applicant sought an order that the Respondents pay to the Applicant $30,810.70.

Background

3. This matter has a difficult history and procedurally, has not been without complication.

4. The Applicant asserts that he was employed by the Second and Third Respondents (collectively referred to as 'the companies') from July 2011 until terminated on 24 May 2017.

5. The termination of the Applicant's employment was the subject of an unfair dismissal application made to the Fair Work Commission ('FWC') on 28 May 2017.

6. The Applicant worked for the Second Respondent ('Audi Enterprises') as a courier driver. Audi Enterprises was a franchisee of a courier company ('Couriers Please'). In about May 2017, Couriers Please made a decision to prohibit the Applicant from attending the workplace and performing work as it had accused the Applicant of serious misconduct. Couriers Please was the only client of Audi Enterprises, and in circumstances where Couriers Please refused to accept the Applicant as a driver, Audi Enterprises terminated the Applicant's employment.

7. On 28 March 2018, Commissioner Cirkovic in the FWC handed down a decision in which she found that the termination of the Applicant's employment was harsh, unjust or unreasonable. Audi Enterprises had contested the application on the basis that the Applicant was not an employee but was a subcontractor. Audi Enterprises argued that, in the alternative if he was an employee, the termination was not unfair as they had effectively been forced to terminate his employment by reason of a decision taken by Couriers Please.

8. Commissioner Cirkovic found that the Applicant was an employee and that the termination of employment was harsh, unjust or unreasonable, although Commissioner Cirkovic did find that there was a valid reason for the termination. By her decision of 13 July 2018, Commissioner Cirkovic ordered that Audi Enterprises pay the Applicant the sum of $3,990 which she found was the equivalent of three weeks' pay.

9. Despite demands, the companies did not pay the sum ordered by the FWO.

10. On 12 February 2019, the Applicant filed an application in this Court naming [redacted] as the First Respondent, Audi Enterprise as the

Second Respondent and ACN 094 365 901 PTY LTD as the Third Respondent.

The Statement of Claim

11. The statement of claim alleged that the Applicant commenced employment with the Third Respondent as a courier driver in July 2011 and was employed until about 3 March 2015. The Statement of Claim then alleges that from 3 March 2015, the Applicant's employment transferred to the Second Respondent until his employment was terminated on 24 May 2017.

12. The claim alleged, amongst other things that:

a) the Applicant was not paid annual leave;

b) the *Road Transport and Distribution Award 2010* (Cth) ('the Award') was contravened in relation to:

i) superannuation entitlements;

ii) payments for ordinary hours worked;

iii) failure to pay overtime rates;

c) the Second and Third Respondents had failed to comply with a FWC Order;

d) the Second and Third Respondents had not complied with the National Employment Standards ('NES') in relation to annual leave and personal leave;

e) the Second and Third Respondents failed to keep employee records; and

f) the Applicant did not receive pay slips.

Procedural history

13. An affidavit of service filed 22 February 2019 by the Applicant establishes that the Respondents were served with the application and statement of claim on 17 February 2019.

14. On 30 April 2019 the matter was listed for directions. The Respondents failed to appear on this date.

15. Orders were made on 30 April 2019 fixing compensation to be paid by the Respondents to the Applicant. The matter was listed for hearing.

16. In the absence of the Respondents, default judgment was entered against the Respondents in the sum of $30,810.70 with interest in the sum of $5,417.67.

17. The judgments entered against the First Respondent represented the sum ordered by the FWC plus interest. As the First Respondent was the director of Audi Enterprises, the Court proceeded on the basis that the Applicant would have been aware of the requirement to pay the sum ordered and it was his decision that the company not pay that sum. Therefore, it was taken that he was knowingly involved in that contravention. The Court did not make orders against the First Respondent in respect of the other claims for underpayment or breaches of the NES because the question of his knowing involvement in those matters was a matter that required evidence.

18. On 31 May 2019 the Respondents made an Application in a Case seeking to set aside the 30 April 2019 order. That Application in a Case was dismissed on 5 June 2019 with reasons being given on that day: see *Zintchenko v* [redacted] *& Ors* [2019] FCCA 1724.

19. Whilst the Application in a Case was dismissed, orders were then made setting aside the 30 April 2019 orders. In their place, the Court ordered that:

> *1. The Orders of 30 April 2019 be set aside and in their place the Court Orders that:*
>
> *(a) the First Respondent pay the Applicant the sum of $4,369.05 (less deduction for taxation);*
>
> *(b) the Second Respondent pay the applicant the sum of $30,810.70 (less deduction for taxation); and*
>
> *(c) the Third Respondent pay the Applicant the sum of $26,441.65 (less deduction for taxation).*

20. The Court also ordered that:

2. By 5 July 2019 the Respondents file a response and supporting affidavit(s).

3. By 5 August 2019, the Applicants file affidavit evidence going to the liability of the First Respondent and any application for penalties and/or general damages against all the Respondents.

4. By 15 August 2019 the Respondents file any affidavit(s) in reply and/or submissions.

5. By 26 August 2019 the Applicant file submissions.

Orders were also made for the Respondents to file affidavits in reply.

21. The Applicant filed an affidavit in support of his claims dated 20 May 2019. That affidavit deposed to making demands that the Respondents pay the Applicant in accordance with the FWC order. The Applicant further deposed that the FWC order remained unpaid.

22. The Applicant then deposes to lodging a dispute with the Fair Work Ombudsman ('FWO') against the First and Second Respondent due to the First and Second Respondent's failure to pay the FWC order and other unpaid entitlements.

23. The affidavit referred to a letter from the FWO to the First and Second Respondents. That letter stated that the FWO had made findings that the Second Respondent had contravened workplace laws in relation to the Applicant and had contravened the FWC order.

24. On 30 November 2018, the FWO threatened enforcement action by letter.

25. The affidavit also referred to the Applicant's stress and anxiety caused by the termination of his employment and the failure of the Respondents to pay the sum ordered by the FWC or to pay his entitlements.

26. The Applicant claimed relief against the First Respondent as being knowingly involved in the contravention and sought penalties against each of the Respondents.

The hearing

27. The matter came on for hearing on 5 September 2019 with the parties represented by solicitors. The Respondents' solicitor advised the Court that the sum relating to the FWC order had been paid to the Applicant.

28. The Respondent did not file any evidence in response to the claims made. The submissions made by the Respondents' solicitor were to the effect that the claims were denied and that the sum ordered by the FWC had been paid prior to the hearing on 5 September 2019.

29. The Applicant gave evidence at trial. The only evidence raised in relation to the First Respondent in the affidavit were the statements:

> *5. The first Respondent was my boss and the Director controlling the second and third Respondents during my employment.*
>
> *6. At the time of my termination I was being paid by the second Respondent. However, I really considered my employer to be the first Respondent as he was the sole person in charge and used the second and third Respondents only to pay me.*

30. The Applicant was also cross examined by the solicitor for the Respondents. It was put to him in cross examination that he had in fact been guilty of serious misconduct whilst employed or engaged by Audi Enterprises. The Applicant denied this and pointed to the fact that the police had not proceeded to charge him with any offences arising from the alleged misconduct and that he had received notification from the police that no investigation would proceed.

Consideration

The First Respondent

31. Whilst no submissions were made on the point, the Court notes that the judgements as against the Second and Third Respondents were undisturbed at the time of hearing. The decision of Justice Bromwich in *Fair Work Ombudsman v Lohr* [2018] FCA 5 is authority for the proposition that the Court can rely on declarations made against a company as proof that a contravention has occurred.

32. In the present proceeding, as no declaration has been made against the Second Third and Third Respondents, it then becomes a question as to

what extent the Applicant can rely upon the default judgements against Second and Third Respondents as against the First Respondent. There has been no adjudication on the merits of the claims against the Second and Third Respondents and there has been no declaration that the Second and Third Respondents have contravened the *Fair Work Act 2009* (Cth) ('the FW Act'). Even if the Court was to find that the default judgements stand as proof that the contravention had occurred, the Applicant must still prove that the First Respondent had knowledge of the essential matters going to the contraventions and that the First Respondent was an intentional participant in those contraventions.

33. There are a number of points that are relevant to the application.

34. *First*, the findings of the FWC in relation to the employment status of the Applicant are not binding on the Court; similarly the findings of contravention made by the FWO are not binding on the Court as against any of the Respondents: see *Miller v University of New South Wales* [2003] FCAFC 180 at [17]. The Applicant was required to prove that the Applicant was entitled to the entitlements claimed. These matters were not proven.

35. *Second*, the material presented to the Court by the Applicant, particularly in relation to the findings of the FWC, were to the effect that the First Respondent had always regarded the Applicant as an independent contractor rather than an employee.

36. *Third*, there was no evidence before the Court that the First Respondent was aware of the matters going to the contraventions of the Award and the NES. Put another way, there is no evidence that the First Respondent had actual knowledge of the essential elements of the contravention: see *Quinlivan v Australian Competition and Consumer Commission* [2004] FCAFC 175, *Construction, Forestry, Mining and Energy Union v Bhp Coal Pty Ltd* [2017] FCAFC 50 at [59] (Greenwood, Flick and Rangiah JJ) and *Port Kembla Coal Terminal Ltd v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 99 at [448] (Rangiah J).

37. *Fourth*, there is no evidence before the Court that the Applicant was aware of the entitlements he now claims or that he made any claim on the companies for these entitlements prior to 24 May 2017. Whilst that

lack of awareness does not preclude the Applicant from making a claim for entitlements, because the Applicant failed to raise these claims, he is not in position to give evidence that he put the Respondents on notice of entitlements and thereby creating a basis for asserting that the Respondents (and in particular the First Respondent) were aware of those entitlements.

38. The evidence before the Court is that the Applicant and Respondents conducted themselves on the basis that the Applicant was an independent contractor. There is no claim that the Second or Third Respondents engaged in sham contracting whereby the parties acted in the knowledge that the Applicant was, in reality, an employee of those companies.

39. For these reasons, the Applicant's claim against the First Respondent pursuant to section 550 of the FW Act must fail on the grounds that it has not been established that he had actual knowledge of the essential elements of the contravention. That is, it is not established that the First Respondent knew that an award applied, that the NES applied, that the First Respondent had directed the companies not to comply or knew that the companies had not complied.

40. The Court will make orders dismissing the application against the First Respondent.

The Second and Third Respondents

41. In relation to the Second and Third Respondents the evidence does not support the claim made by the Applicant at [20] of his affidavit of 5 August 2019. By that paragraph, the Applicant sought repayment of sums of $44,810 for van hire, insurance costs of $5,921 and GST in the sum of $33,898. This sum was not claimed in the statement of claim, there is insufficient evidence to support the claim, and therefore the Court will not make orders in relation to that sum claimed.

42. The Applicant has made a claim for general damages in an amount to be assessed. The Applicant relies on, in part, medical reports that the Applicant suffers from hypertension and high blood pressure. This evidence is not sufficient proof that the health issues are related to any conduct by the Second and Third Respondents. Similarly, claims for

loss of income are effectively claims arising from the alleged unfair dismissal which has already been the subject of a claim and orders in the FWC.

Penalties

43. This is not an appropriate case for the imposition of penalties on the Second and Third Respondents given the state evidence before the Court. In my view, the Applicant has the benefit of the orders of the Court against the companies and may move to enforce those judgments. No submissions were put before the Court in relation to penalties.

44. Otherwise the Court is not minded to impose a penalty on the First Respondent in relation to his involvement in the failure of the companies to pay the FWC order. The First Respondent has been put to the costs of these proceedings in circumstances where the Applicant has been largely unsuccessful. The Applicant has been paid the sum ordered by the FWC. The imposition of penalties is not mandatory.

Costs

45. The Court will make no order as to costs by reason of the provisions of section 570 of the FW Act.

I certify that the preceding forty-five (45) paragraphs are a true copy of the reasons for judgment of Judge McNab

Associate:

Date: 13 December 2019