WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

Matter Number:	**3190/20**
Applicant:	**Gotcha Pty Ltd**
First Respondent:	**Workers Compensation Nominal Insurer**
Second Respondent:	**Emma Powell**
Date of Determination:	**15 September 2020**
Citation:	**[2020] NSWWCC 323**

The Commission determines:

Finding

1. The second respondent's employment with the applicant was connected with the State of New South Wales pursuant to s 9AA(3) of the *Workers Compensation Act, 1987* (1987 Act).

Orders

2. The first respondent has validly made compensation payments under the 1987 Act in the sum of $22,172.79 in respect of the second respondent's injury sustained on 6 January 2020.

3. The application to set aside the notice dated 1 June 2020 issued under s 145 of the 1987 Act is dismissed.

JOHN HARRIS
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF JOHN HARRIS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Ms Emma Powell (the worker) was employed by Gotcha Pty Ltd (the employer) and sustained an injury on 6 January 2020.

2. The employer did not hold a valid policy of insurance issued pursuant to the provisions of the *Workers Compensation Act 1987* (1987 Act). The employer apparently held a policy of insurance under the relevant Queensland workers compensation legislation.

3. The claim was rejected by WorkCover Queensland on the basis that the worker's employment was connected to the State of New South Wales.

4. The present dispute arises because payments were made to the worker by the Workers Compensation Nominal Insurer (the Nominal Insurer) under the New South Wales workers compensation scheme. The Nominal Insurer issued a notice dated 1 June 2020 to the employer under s 145 of the 1987 Act seeking the recovery of payments totalling $22,172.79 (the notice).

5. The employer has filed a Miscellaneous Application (Application) seeking orders halting any demand for payment and that the Nominal Insurer "does not have jurisdiction to accept the Claim". In an amended Application the employer joined the worker to these proceedings.

6. The only issue identified by the employer at the arbitration hearing contesting the notice was whether the worker was entitled to compensation under the 1987 Act by reason of s 9AA.[1] The employer contends that the worker's employment is connected with the State of Queensland pursuant to s 9AA(3)(c) where it holds a policy of insurance.

LEGISLATION

7. Section 9AA of the 1987 Act relevantly provides:

> "(1) Compensation under this Act is only payable in respect of employment that is connected with this State.
>
> (2) The fact that a worker is outside this State when the injury happens does not prevent compensation being payable under this Act in respect of employment that is connected with this State.
>
> (3) A worker's employment is connected with—
>
> (a) the State in which the worker usually works in that employment, or
>
> (b) if no State or no one State is identified by paragraph (a), the State in which the worker is usually based for the purposes of that employment, or
>
> (c) if no State or no one State is identified by paragraph (a) or (b), the State in which the employer's principal place of business in Australia is located.
>
> ….

[1] Transcript, *Gotcha Pty Ltd v Workers Compensation Nominal Insurer*, 1 September 2020 (T), p 4.

(6) In deciding whether a worker usually works in a State, regard must be had to the worker's work history with the employer and the intention of the worker and employer. However, regard must not be had to any temporary arrangement under which the worker works in a State for a period of not longer than 6 months."

PROCEEDINGS BEFORE THE COMMISSION

8. The matter was listed for a telephone conference on 8 July 2020. The employer was then directed to join the worker as a second respondent.

9. The matter was listed for a second telephone conference on 3 August 2020 when the worker was also represented. An agreed timetable provided for the service of further evidence. The parties complied with these timetables and served the evidence in an efficient manner.

10. The matter was listed for arbitration hearing on 1 September 2020 by telephone. Mr Johnstone, the Chief Operating Officer, then appeared for the employer after a solicitor provided notice that he was no longer appearing. Mr Ainsworth appeared for the Nominal Insurer and Mr Morgan of counsel appeared for the worker. At that hearing, the parties admitted by consent the following documentation:[2]

    (a) Application;
    (b) Nominal Insurer's Reply and attachments;
    (c) Worker's Reply and attachments;
    (d) Amended Miscellaneous Application;
    (e) Employer's late application dated 22 July 2020;
    (f) Nominal Insurer's late Application dated 29 July 2020, and
    (g) Worker's late Applications dated 30 July 2020 and 5 August 2020.

11. Following the arbitration hearing the parties filed supplementary written submissions. This course was undertaken at the employer's request[3] who subsequently made submissions broader than it indicated at the hearing.

12. There was no application by any party to adduce oral evidence.

AGREEMENT

13. The parties agreed that the worker made one trip to Perth and two trips to Queensland during the period of her employment.[4] It was subsequently accepted that the worker flew to Queensland on three occasions during her employment.[5] Those trips were in addition to the pre-employment interview when the worker travelled to Queensland.

EVIDENCE

Worker's statements

14. The worker provided a statement dated 5 August 2020.[6] Relevantly the worker stated that she commenced employment on 16 September 2019.

[2] T, p 4-11.
[3] T, p 70.
[4] T, p 17, lines 20-31.
[5] T, p 22.
[6] Worker's late Application, p 1.

15. The worker described her duties in general terms stating that she managed two studios in Western Sydney and another in the Newcastle/Central Coast region. This work required her to travel to various shopping centres in those areas where she oversaw and maintained the running of the studios.

16. The worker stated that she was also responsible for the recruitment within New South Wales and any leads for persons outside New South Wales were sent to Ms Ross.[7]

17. Apart from the training undertaken in Western Australia and the three trips to Queensland, the worker undertook the duties exclusively in New South Wales.

18. The worker was allocated a studio in Western Australia in late October 2019. She stated:[8]

> "[T]he only reason that I took over this studio was because I had a professional relationship with the photographer, Jordan Smith, who requested that I act as his supervisor. Even though I managed Jordan, I did not travel to Western Australia and I remained in New South Wales."

19. The worker noted that there were other studios in Western Australia that she was not responsible for and she did not travel to Western Australia "because that particular studio was doing well".[9]

20. The worker referred to Mr Johnstone's assertion that she was supposed to progress to a National Studio Manager. She stated that this was "only mentioned in the interview stage and nothing eventuated from this discussion". It was "her belief" that it was said to "make the job sound more appealing to me". In hindsight the worker did not think that there was much truth involved in the assertion as the position was already occupied by Ms Ross.[10]

21. The worker stated that she was studying in New South Wales at the time "at SELC" and was only able to leave the State "during my study breaks". This was known to Mr Johnstone and her colleagues.[11]

22. The worker asserted that Ms Ross "was very territorial; and made it clear that she did not want to give away any of her studios".[12] She did not accept that her position was akin to that held by Ms Ross as the worker was specifically employed as "the New South Wales Coach".[13] This was the reason she did not leave New South Wales as well as her other commitments within that State.[14]

23. In a prior statement, probably in relation to proceedings in the Fair Work Commission[15], the worker stated that the employer intended to move her responsibilities from three studios to five studios and that there was "the plan to transition me into National Manager".[16]

24. The worker also stated that she was "the main source of recruitment for the company" and the sole source to the recruitment email. She was sourcing candidates for "all 10 studios" from her Facebook account.[17]

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[7] Worker's late application, p 2, par 14.
[8] Worker's late Application, p 4, par 24.
[9] Worker's late Application, p 6, par 29.
[10] Worker's late Application, p 4, par 25.
[11] Worker's late Application, p 4, par 26.
[12] Worker's late Application, p 6, par 33.
[13] Worker's late Application, p 6, par 35.
[14] Worker's late Application, p 6, par 37.
[15] I have made this assumption and refer to it throughout the Reasons as evidence provided to the Fair Work Commission.
[16] Employer's late Application, p 65.
[17] Employer's late Application, p 68.

25. The worker also stated:[18]

> "Both these offers mention National Manager with transition after 3 months. This was so I could find my feet and then transition at the start of the year (2020)."

Mr Johnstone's statement

26. Mr Brendan Johnstone provided a statement dated 22 July 2020.[19] He is the Chief Operating Officer of the employer having held that position since January 2019.

27. Mr Johnstone was involved in pre-employment discussions between the worker and the employer's Manging Director, Ms Baravykas. From these conversations Mr Johnstone understood the intention of the parties was:

    (a) for the worker to "initially be engaged as the State Coach for New South Wales and Western Australia"; and

    (b) upon successful performance, the worker "would transition to the role of National Studio Manager responsible for managing photography studios in all States and Territories of Australia for the Organisation".

28. Mr Johnstone stated:[20]

> "Due to behavioural, and to a lesser extent performance concerns, Ms Powell only reached the first of two intended stages (managing New South Wales and Western Australia), and did not transition to the role of National Studio Manager."

29. Mr Johnstone stated that it was an oversight that the employment position in the agreement, specified as "NSW State Coach", was not updated "to reflect her expanded duties".[21]

30. Mr Johnstone stated that the worker was required to attend monthly management meetings in Queensland "approximately once per month" and "was expected to perform her duties in Western Australia on a far more regular basis". He stated that the worker's "performance and difficulty in managing her studios in New South Wales largely prevented more regular travel to Western Australia, noting that such travel was typical for the position."[22]

31. Mr Johnstone asserted that it was "certainly the intention of the parties that Ms Powell would work across a number of different Australian States and Territories".[23]

Ms Ross' statement

32. Ms Joanne Ross is a State Coach of the employer and provided a statement dated 22 July 2020.[24] Ms Ross held this position since September 2016 "and oversaw all the States and Territories in Australia". She also described her position as the "Queensland, Victoria and South Australia counterpart".[25]

[18] Employer's late Application, p 68.
[19] Employer's late Application, p 1.
[20] Employer's late Application, p 1.
[21] Employer's late Application, p 1.
[22] Employer's late Application, p 1.
[23] Employer's late Application, p 2.
[24] Employer's late Application, p 70.
[25] Employer's late Application, p 70.

33. Ms Ross discussed the typical roles and duties of a State Coach based on her experience. Relevantly Ms Ross stated:[26]

> "I am aware that Ms Powell was originally hired as the State Coach for New South Wales however quickly transitioned to managing studios in New South Wales and Western Australia and can confirm that it not unusual for a State Coach to be officially nominated contractually within one State when they begin, but in practice quickly transition to managing multiple states, as was the case with Ms Powell.
>
> I confirm that:
>
> (a) It is customary for an employee holding the position of 'State Coach' to be responsible for multiple jurisdictions and to regularly cross state lines in the performance of their duties;
>
> (b) State Coaches are not specifically directed to reside in any one given State or location and are often posted to locations where there is the greatest need; and
>
> (c) Ms Powell was having considerable difficulty in performing her role in line with required expectations, and as a result did not leave New South Wales as often would be typical of her role."

Other documents

34. The employer and the worker executed an employment contract which is dated 13 September 2019[27] (the contract). The contract, which is detailed, includes the following:

- The employer is described as a professional photography business specialising in children's photography in travelling studios from different shopping centres in every State and Territory in Australia (Background A).
- The worker is required to "undertake such travel (including interstate and overseas travel) as is reasonably required for the proper discharge" of the role (clause 4.3(j)).
- The worker is based at the Location specified in Part B of Schedule 1. Part B of Schedule 1 specifies the Location as "as advised per roster".
- The worker is specified as the "NSW Coach" (clause 2.2 and Schedule B).
- The worker had a six month probationary period in which the employer could terminate at any time on one weeks' notice if it was not satisfied with the worker's "ability to perform" her duties, her conduct, her interpersonal skills or is otherwise unsuitable (clause 2.5).
- The written agreement is the entire agreement between the parties and supersedes "any prior understanding or agreement between the parties" including any "representation" (clause 31.1).
- The agreement may only be varied in writing (clause 34).

[26] Employer's late Application, p 70, par 5-6.
[27] Employer's late Application, p 87.

35. An email from Ms Lydia Baravykas to the worker dated 10 September 2019 noted that the worker was to:[28]

- "travel as required to various studios including the possibility of inter-state when required";
- there would be a reasonable degree of travel to meet objectives, and
- the only way to way to come close to matching her salary with ITP was to take additional responsibilities and broaden the scope from three studios to possibly ten, which would be "more of a National Manager role".

36. A further email from Ms Baravykas to the worker on 10 September 2019 stated:[29]

> "As you can see with the below structure the initial 3 month trial where you are working on the 3 studios is slightly less than ITP, but assuming you can prove yourself and are successful transitioning to a higher duty role (eg National Manager) there is actually potential for you to earn more than you were at ITP."

37. An email from Jean Cobine on 20 September 2019 welcomed the worker to "NSW". Relevantly it provided:[30]

> "To that end, I am pleased to introduce Emma Powell as your new NSW Coach. …. At the moment Emma is in WA learning how we do things her at Gotcha!, but soon she will be basing herself back in Sydney and responsible for managing the 3 NSW studios. As from Monday 23rd September please note Jo will no longer be your point of contact."

38. A statement from Delphine Clabau[31] indicated that she worked for the employer in Perth. During the "few months" she had "daily contact" with the worker by phone.

39. The worker's employment was terminated by letter dated 7 February 2020.[32] The notice provided that the probationary period was due to end on 3 March 2020. One week's notice was provided with the employment expiring on 14 February 2020.

SUBMISSIONS

Employer's oral submissions

40. The employer submitted that nobody was disputing the fact that the worker was initially engaged as the New South Wales coach. The issue was "the intention … to progress that relationship to expand her responsibilities, first with the addition of Western Australia, and then with the inclusion of all States and Territories".[33] The intent was to expand to Western Australia and then to a "national studio manager".

41. The worker admitted in prior proceedings that it was the employer's intention to move her from three to five studios. There was also a plan to transition the worker to the "National Manager".[34]

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[28] Employer's late Application, p 66.
[29] Employer's late Application, p 67.
[30] Worker's late Application, p 28.
[31] Employer's late Application, p 69.
[32] Worker's late Application, p 29.
[33] T, p 31.
[34] Employer's late Application, p 65.

42. That admission is consistent with the email correspondence from Ms Baravykas dated 10 September 2019. The three-stage plan was to commence in New South Wales, expand to Western Australia and "subject to being successful with the two jurisdictions, being employed in a national position."[35]

43. The employer accepted that the worker wasn't running "Western Australia" but "running a studio in Western Australia".[36] However, in addition she was given the mandate to recruit for all 10 studios crossing all States and Territories.[37]

44. The applicant accepted that the evidence showed that the worker travelled to Western Australia on occasion for five days and to Queensland on three occasions. There was no need to analyse the travel documents.[38]

45. The applicant submitted:[39]

> "So section 4 of my own statement, there I make it clear that the intention of both parties was that upon successful performance of the above, being our, being engaged as the State Coach New South Wales and subsequently Western Australia, that she would transition to the role of National Studio Manager and thus be responsible for managing photography studios in all States and Territories of the company, of the States and Territories of Australia for the company. The issue arose essentially that, and I guess this is where our argument for intent comes into play, is that Ms Powell, yes, was initially hired as the New South Wales State Coach. That role quickly progressed to one where she was responsible for Western Australia. She subsequently was also given responsibility for managing the recruitment and training of all studios across States and Territories of Australia. And, presumably, Ms Powell, had it not been for a number of behavioural issues that were raised in the performance of her duties, would have fulfilled the final stage of the intended plan between both parties, which was for her to perform a role that crossed all States and Territories in which she wouldn't, obviously, have to be based in any one given State. Now we acknowledge that that last stage didn't occur but nonetheless doesn't change the intent of the parties for that relationship to occur and tangible steps to have happened towards that cross-border arrangement."

46. It was asserted that he worker "would have worked in every State and Territory with the exception of Tasmania and the Northern Territory, because we don't have operations in either of those two States."[40] The plan and intention of the parties was to transfer the worker to the role of National Manager where she would be responsible for "maintaining operations across all our photography studios"[41] and would have been working across all States.

47. Pursuant to s 9AA(6) the question of the parties "intention" was only relevant to s 9AA(3)(a) and did not apply to s 9AA(3)(b).[42]

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[35] T, p 37.
[36] T, p 38.
[37] T, p 41.
[38] T, p 42.
[39] T, pp 42-43.
[40] T, p 44.
[41] T, p 44.
[42] T, p 47-49.

48. The issue under s 9AA(3)(b) is what is meant by "usually based". The applicant submitted:[43]

> "So, I guess, that brings us to what the definition of 'usually based' is. Now in applying it in the literal sense and according to the Oxford dictionary usually is being normal conditions or generally, and based being the area in which something or someone works, lives or does business. Now my view, sir, that by definition neither of these terms require exclusivity. One can normally or generally be based in more than one location and it's essentially a matter of what of customary or regular for the individual as to what is usual, and just because one location is more customary or regular for the employee does not mean that the other location is not normal or a general place of work. So in my view section 9AA(3)(b) of the Act would only serve a practical utility if one single State could be identified, and to the extent the multiple States were demonstrated as usual, the Commission would have to invoke the third tier of the test."

49. One could normally or generally be based in more than one location: *Avon Products Pty Ltd v Falls* (*Avon Products*).[44] It was submitted that a worker can usually be based in more than one location which does not necessarily require a quantitative analysis.

50. The worker did not fall within either (a) and/or (b) and therefore s 9AA(3)(c) applied. The employer's principal place of business was clearly in Queensland.

51. The employer did not dispute that the worker "was engaged in the first instance as the New South Wales Coach … what the matter in question is how did her role progress and, furthermore, what the intentions of the parties were in creating that initial relationship."[45]

52. The employer disputed that the worker was issued a car. The issue that the worker was still on probation was irrelevant.[46]

53. The employer disputed that the intention to promote the worker was "speculative" as it had been demonstrated, by reason of the increase in duties to Western Australia, that it was the employer's intention to "broaden the relationship".[47]

Employer's written submissions

54. The employer filed written submissions attaching documents, most of which were in evidence. Portions of the written submissions were repetitive of the oral submissions. It was submitted that the parties' intent was that:

    (a) the worker was required from the outset, to attend work in Queensland "no less than once per month for Management and planned meetings";

    (b) had her duties expanded "across state lines";

    (c) the duties were expanded to manage a studio in Western Australia and recruit for all 10 photographic studios, and

    (d) upon successful conclusion of the above "would become the 'National Manager' for ten photographic studios across all states and territories".

[43] T, p 50.
[44] [2010].
[45] T, pp 60-61.
[46] T, p 61.
[47] T, p 70.

55. The first three "are a matter of fact" and did (d) not eventuate because the employer terminated the employment relationship.

56. The worker's assignment initially spanned two States and evolved to encompass three States with recruitment functions for all states and territories. The position required regular travel and the performance of the duties "would have included more significant travel". The reason that the worker "did not travel as often as would be customary for this role is outlined in the statement of Joanne Ross."[48]

57. Where the worker "usually works" means the place where the worker habitually or customarily works in a regular manner: *Hanns v Greyhound Pioneer Australia Ltd*· (*Hanns*)[49] It does not mean the place where the worker works for a majority of the time: *Tamboritha Consultants Pty Ltd v Knight* (*Knight*).[50] It was asserted that *Avon Products* supported the proposition that it was not simply a mathematical exercise. This was also supported by the observations by Gray J in *Hanns*.

58. The employer referred to the findings in *Avon Products* where it was held that the worker in that case usually worked in both the ACT and New South Wales. It submitted that based on where the worker usually worked and the intention of the parties, there was no clear answer to where Ms Powell "usually works".

59. The employer submitted that the work performed in New South Wales was a "temporary arrangement". Whether something is a temporary arrangement will depend upon looking at the work history and the terms of the contract: *Knight*.

60. It was submitted that the worker "was not contracted to NSW indefinitely and was simply posted to NSW for a trial of approximately 3 months". This was an opportunity for the employer "to assess the employee's suitability" for the role of National Manager. It was submitted that this, in conjunction with the short tenure of five months, "may reasonably be considered a temporary arrangement under the Act."[51]

61. In respect of "usually based" under s 9AA(3)(b) it was conceded that "a simple quantitative analysis of time worked meant that New South Wales was the state of connection".[52]

62. It was submitted that the decision in *Knight* stands for the proposition that "usually based" does not require a percentage analysis. This does not require "exclusivity" and one could be based in more than one location. This view was consistent with the observations of Gray J in *Hanns* (at [22]).

63. It was submitted that one could "usually be based in NSW, but also usually and customarily required to attend other states".[53]

64. Reference was made to the decision in *Knight* and the matters then considered relevant including:

    - The work location specified in the contract;
    - The location the worker attends to receive direction;
    - The location the worker reports to in relation to the work, and
    - The location from which the work was paid.

[48] Employer's written submissions, para 6.
[49] [2006] ACTSC 5.
[50] [2008] WADC 78.
[51] Employer's written submissions, par 16.
[52] Employer's written submissions, p 3, par 2.
[53] Employer's written submissions, p 3, par 8.

65. It was submitted that the last three were the State of Queensland and the first "was not fixed in NSW".

66. The employer submitted that s 9AA(3)(b) would only have practical utility if one single state could unequivocally be identified. This did not occur in the present case.

Worker's oral submissions

67. The second respondent referred to the decision of *Workers Compensation Nominal Insurer v O'Donohue*[54] as the "leading decision in the Commission on this"[55] and that the construction of the section required "an analysis of the facts in a cascading fashion".

68. The second respondent submitted:[56]

> "The employer takes the view, Arbitrator, that when one looks at the operation of the Act as far as determining what the relevant state of connection is, that in particular with 9AA(3)(a) that the worker usually worked in the employment in which she was engaged in the State other than New South Wales. Hence, (3)(a) would not identify the worker as being a relevant worker for the purposes of the, for the legislation in New South Wales. The difficulty with that assertion, in my submission, is that the employer can't get past if it's not New South Wales because clearly it could not be said that the State in question is Queensland, in that, the factual material that has been available by the employer suggests that there were a number of, as the worker has identified in her statement, what could only be described as brief periods of attendance in Queensland over a period of employment of a number of months. And those attendances appear to be either for the purposes of interviewing for the job in question and attending meetings that were, in comparative terms, of brief duration when one looks at the overall period of employment. And then on the worker's statement evidence and, indeed, if one looks at in totality the evidence of the employer, the majority of the worker's time was spent in the state of New South Wales. Some months into her employment she was allocated territory in Western Australia which the worker identifies as being associated with a particular relationship she had with one photographer.
>
> But as (3) and there's no, in my submission, there can be no dispute on the evidence for the purposes of the Act that the applicant, the worker I should say, is anything other than when injured, was anything other than when injured usually based, for the purpose of that employment, in the State of New South Wales. Two indicia of that, Arbitrator, are the fact that (a) she lived there and had always lived in New South Wales with respect to this period of employment, that her intention had been to always remain living in New South Wales and there was no suggestion that she was to move to Queensland or some other State, and that she was engaged in study in New South Wales. So in our submission it's a very daunting prospect, if not impossible prospect for the employer to establish that the applicant, sorry, the worker was anything other than usually based, for the purpose of employment, in New South Wales, such that the employer, in seeking to cast some doubt on the application of either (a) or (b) seeks to rely on (c)."

69. The worker referred to her job title, that she was employed as the NSW Coach and this was specified in her employment contract. Her clients were in New South Wales although she eventually obtained one portfolio in Western Australia. The only reason she travelled to Queensland was for management meetings.[57]

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[54] [2014] NSWWCCPD 1 *(O'Donohue).*
[55] T, p 12.
[56] T, p 13-14.
[57] T, p 22.

70. It was submitted that there was an internal inconsistency between the evidence of Mr Johnstone and Ms Ross as the latter agreed that the worker was originally hired as the NSW coach but Mr Johnstone stated that the contract was incorrect in its identification.[58]

71. The section requires weighing the work in New South Wales with another state, not all other states combined. The applicant was only subsequently appointed to only one studio in Western Australia whereas she worked in a number in New South Wales. The only time the worker travelled to Western Australia was to undergo training and it had nothing to do with overseeing the studio in that State.

72. The email from Jena Cobine on 20 September 2019 advised the employees that the worker was commencing as the new NSW Coach and would be based in Sydney.

73. The letter of termination dated 7 February 2020 stated that the worker's probationary period had not ended. It also notes that the worker was provided with a car and is consistent with the worker's evidence that she spent most of her time travelling through New South Wales supervising studios.[59]

74. It was submitted that the suggestion of promotion was:

> "consistent with the worker's statement … that what was being dangled was a carrot more than anything else … you would not import into that an acceptance that the intention of the parties was that the worker would do anything other than usually work in New South Wales."[60]

75. There is no suggestion that the worker was ever based in Western Australia and you could readily infer, absent any other evidence, that any work would have been performed from New South Wales. The suggestion of a promotion was only a possibility and no guarantees were given. This was consistent with the email from Ms Baravykas on 10 September 2019 where it was suggested that there was "potential" to earn more. There is no evidence that the worker would be housed in another state such as Queensland.

Worker's written submissions

76. The worker submitted that there was "no evidence" to support the factual propositions contained in the employer's written submissions.[61] The worker submitted that she did not travel to Queensland once per month, at some point dealt with a studio in Western Australia which was conducted remotely and any recruiting was done online from New South Wales.

77. The worker usually worked in New South Wales and was based in New South Wales.

78. It was further submitted that there was no evidence that the worker's employment in New South Wales was a "temporary arrangement". The assertion made by the employer that the worker's tenure in New South Wales was an opportunity to assess the worker's suitability is not based on any evidence. Further, it does not follow the ascension to the role of National Manager meant that the worker would have been based anywhere other than in New South Wales.

79. Consistent with the decisions in *Hanns*, *Avon Products* and *O'Donohue*, where a worker "usually works" is not mandated by a quantitative analysis. However, this must form part of the evaluative process. There was no evidence, even if the grandiose plans came to fruition, that the worker would have been other than based or performing work in New South Wales.

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[58] T, p 22.
[59] T, p 59.
[60] T, p 62.
[61] Worker's written submissions, par 4.

80. The supporting evidence contained in the Fair Work general protection claim, contrary to the employer's submissions, supports the proposition that:

- The worker was engaged to work in and from New South Wales;
- The worker spent little time outside New South Wales, and
- The worker was managing her operation she had been assigned in Western Australia by email and telephone from New South Wales.

81. None of the other materials explain anything other than an acceptance that the worker was based in New South Wales.

First respondent's oral submissions

82. The first respondent adopted the worker's submissions.

83. The "temporary arrangement" covered by s 9AA(6) only applied where there is a move from a state where they are usually based on a temporary basis: *Martin v R J Hibbens Pty Ltd.*[62] It does not apply for the purposes of a probationary period of employment: *Klemke v Grenfell Commodities Pty Ltd*.[63]

84. In reply, the first respondent submitted that s 9AA(6) of the 1987 Act requires that in addition to intention, the work history is taken into account.

85. Examining the work history, the worker was managing her work in Western Australia from New South Wales. It could be inferred that the worker could manage work in other States from New South Wales.[64]

86. In addition, the worker had study commitments in New South Wales which meant that she was required to stay there during term time.[65]

First respondent's written submissions

87. The Nominal Insurer opposed the admission of further evidence.

88. The Nominal Insurer accepted that where a worker usually works is not a mathematical exercise. However, it could not be said that it was customary, habitual, or regular for the worker to work outside New South Wales. It was not the intention of the parties for the worker to work outside New South Wales. She performed the work managing the one studio in Western Australia from New South Wales. It is otherwise not apparent that a national role would have changed this usual practice.

89. Any intention of the employer changed because it terminated the employment relationship. The analysis must be restricted to the actual period of employment.

90. The Nominal Insurer accepted that "usually based" might not require any quantitative or mathematical exercise. It was submitted that the worker's base was her own home from where she conducted coaching remotely and from which she travelled to the various studios in New South Wales.

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[62] [2010] NSWWCCPD 83.
[63] [2011] NSWWCCPD 27 (*Klemke*).
[64] T, p 69.
[65] T, p 69.

REASONS

Factual findings

91. It is necessary to make several factual findings.

92. The worker carried out all work in New South Wales for the employer from the commencement of her employment on 16 September 2019 until when the notice of termination was given on 7 February 2020 except for the following periods:

    - Undertaking training in Western Australia from 15 to 20 September 2019;

    - On 25 October 2019, for a meeting with the managing director in Queensland returning to Sydney on the same day;

    - On 1 November 2019, with a meeting with the managing director in Queensland returning to Sydney on 2 November 2019, and

    - In December 2019, for a management meeting in Queensland returning on the day.

93. In late October 2019, the worker was allocated a further studio in Western Australia. All work undertaken by the worker associated with that studio was done remotely from New South Wales via email and by telephone.

94. I do not accept the employer's submission that the worker became the manager of Western Australia. That repeated submission overstates the evidence. In that respect I accept the worker's evidence as to the one studio she managed in Western Australia. That evidence is precise and not contradicted by any evidence from the employer.

95. I also rely on Mr Johnstone's statement in the transcript accepting my observation that the evidence was that the worker "wasn't running Western Australia, she was running a studio in Western Australia."[66] Mr Johnstone replied that this was correct but sought to describe the "extenuating circumstances".[67] It was at this point that the employer's advocate was advised that he was required to address the evidence before me and not give further evidence during his oral submissions.

96. The statement from Ms Clabau, who was based in Perth, was that she spoke daily by phone with the worker who was her manager. I accept Ms Clabau's evidence. That evidence indicates the management by the worker of the one studio in Western Australia was undertaken by phone and/or by email.

97. For these reasons, I also reject that part of Ms Ross' evidence where she stated that the worker was "managing multiple states".

98. I also reject the employer's subsequent written submissions suggesting and misrepresenting the evidence that the worker was managing multiple states.

99. The correct position is that the worker was managing all studios in New South Wales and managing, from New South Wales, one studio in Western Australia.

100. I accept the evidence of Mr Johnstone that the worker was required to attend monthly management meetings in Queensland. The evidence discloses that the worker attended meetings in October, November and December. She did not attend a meeting in January which may be explained by the holiday period although the evidence is silent on that point.

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[66] T, p 38, lines 10-15.
[67] T, p 38, line 17.

101. The worker's written submission that there was "no evidence" on this point ignores the direct evidence from Mr Johnstone and the fact that the worker attended meetings in Queensland in October, November and December.

102. It is likely that the worker did not attend the September monthly meeting because her initial training concluded around 21 September. The worker was given notice of her termination on 7 February 2020 and that would probably explain why there was no attendance for the February monthly meeting.

103. I accept the employer's submission that at some point, the worker's duties expanded when she became involved in recruitment. Those duties were undertaken remotely through email, telephone and by Facebook, whilst the worker was physically present in New South Wales.

104. The worker's evidence to the Fair Work Commission indicated a more expansive role than stated in her evidence in these proceedings. The worker previously indicated that she was "the main source of recruitment for the company" and the sole source to the recruitment email. She then stated that she was sourcing candidates for "all 10 studios" from her Facebook account.[68]

105. In these proceedings the worker phrased these duties as responsibility for the recruitment within New South Wales and any leads for persons outside New South Wales were sent to Ms Ross.[69] It is possible that the two versions can be read consistently although the worker's evidence filed in these proceedings downplays those duties.

106. It is otherwise clear that these duties were undertaken through electronic communications. There is no evidence that this part of the worker's duties required travel out of New South Wales as part of any recruitment process.

107. The other factual dispute is the employer's critical submission that it was the parties' intention that the worker would become the National Manager. The submission was repeated on several occasions and stated in its written submissions as one that "would" occur.

108. The evidence does not support this submission and it is rejected for the following reasons.

109. I accept that the concept of promotion to the National Manager role was raised at the interview stage in early September. I also agree with the employer's submissions that the worker's evidence before the Fair Work Commission was inconsistent with her evidence in these proceedings. In these circumstances I am cautious in accepting the recent worker's version on this issue.

110. The worker initially represented to the Fair Work Commission that the plan was "to transition me into National Manager".[70] The employer relied on that statement as indicating the parties' intention.

111. In the present proceedings the worker described the employer's representation in hindsight as one involving not much truth.

112. In my view the correct position as what was discussed in the pre-employment interview is identified in the email from Ms Baravykas, dated 10 September 2019, described by Mr Johnstone in submissions as the employer's Managing Director[71]. That email is fairly contemporaneous with the interview. Ms Baravykas then stated:[72]

> "[B]ut assuming you can prove yourself and are successful transitioning to a higher duty role (eg National Manager)".

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[68] Employer's late Application, p 68.
[69] Worker's late application, p 2, par 14.
[70] Employer's late Application p 65.
[71] T, p 35, line 15.
[72] Employer's late Application, p 67.

113. The representation made by the employer is clarified in this email as being based on the worker proving herself.

114. There is no written promise that the worker would become the National Manager. The Contract executed after the initial discussions provides that it overrides any previous representations and can only be varied in writing.

115. Mr Johnstone incorrectly stated that that the worker would "initially be engaged as the State Coach for New South Wales and Western Australia". The worker was not initially engaged as the State Coach for Western Australia and only commenced managing a studio in that State some six weeks after the commencement of the contract.

116. Mr Johnstone also stated that "upon successful performance of the above, Ms Powell would transition to the role of National Studio Manager."

117. Two observations are made about this evidence. First, the worker was never appointed as State Coach for Western Australia. Secondly, the transition, in Mr Johnstone's view, presupposes "successful performance".

118. The evidence from Ms Ross is that the worker was "having considerable difficulty performing her role". Mr Johnstone stated that the worker's "performance and difficulty managing the studios in New South Wales" prevented her from travelling to Western Australia.

119. The statements from both Mr Johnstone and Ms Ross indicate that the employer believed the worker was not performing. They do not state when the employer formed this view although the worker never travelled to Western Australia to manage the one studio.

120. I accept the worker's evidence as to when and why she was given the one studio in Western Australia. The employer did not contradict that evidence. In these circumstances the employer must have believed the worker's performance in managing the New South Wales studios always prevented her from travelling to Western Australia for that one studio. That view must have arisen as early as late October 2019 when the worker commenced managing the one Western Australian studio as she never travelled to Western Australia after that time.

121. This conclusion is consistent with the fact that the employer terminated the worker's contract during her probation period. The employer submitted that the fact of termination during the probationary period was irrelevant at the same time as asserting that the parties' intention was to promote the worker to National Manager. The employer's principal submission of the intention to promote is grossly inconsistent with the fact that it terminated the worker's lesser role as a State Coach dung the probationary period.

122. I conclude that the employer was dissatisfied with the worker's performance from as early as late October 2019.

123. I reject the employer's submission that the intention of the parties was that the worker would become National Manager. Any initial intention was predicated on the basis that the employer must be satisfied of the worker's performance. That conclusion is a matter of common sense as there would be every reason why the employer would need to be satisfied of the worker's abilities prior to offering a senior position.

124. Further, the intention was not confirmed in the Contract which is expressed to supersede any previous representations.

125. I observe that the worker's evidence is that the National Manger's role was already occupied by Ms Ross.[73] The employer has not explained how Ms Ross was going to be removed from this position. It is only another matter that is consistent with my conclusion that any promise of promotion was only a possibility and subject to the employer being satisfied of the worker's performance.

Authorities

126. The worker referred to the decision of *O'Donohue*. In *O'Donohue* the Acting President confirmed that the test in s 9AA(3) provided a series of "cascading test to determine the State with which the employment is connected".[74]

127. The Acting President noted that in determining "usually works" regard is had to the worker's work history and the intention of the worker and the employer. No regard is had to any temporary arrangement where a worker works in a State for less than six months.[75]

128. The Acting President repeated what he stated in *Martin v R J Hibbens*[76] with some qualifications. He stated:[77]

> 53. I considered the general operation of s 9AA in *Martin v R J Hibbens Pty Ltd* [2010] NSWWCCPD 83 (*Martin*). After reviewing the authorities, I concluded (at [60]) that the following principles are applicable in determining cases under that provision:
>
> '(a) regard should always be had to the terms of the contract of employment;
>
> (b) 'usually works' means the place where the worker habitually or customarily works, or where he or she works in a regular manner (*Hanns* at [26]) [*Hanns v Greyhound Pioneer Australia Ltd* [2006] ACTSC 5]. It does not mean the place where the worker works for the majority of time (*Knight* at [76]) and is not simply a mathematical exercise (*Falls* at [43]) [*Avon Products Pty Ltd v Falls* [2009] ACTSC 141], though the time worked in a particular location will naturally be relevant. It will also be relevant to look at where the worker is contracted to work (*Falls*). Regard must be had to the worker's work history with the employer and the parties' intentions, but "temporary arrangements" for not longer than six months within a longer or indefinite period of employment are to be ignored. Whether an arrangement is a "temporary arrangement" will depend on the parties' intentions, which will be ascertained by looking at the worker's work history and the terms of the contract. A short-term contract of less than six months that is not part of a longer or indefinite period of employment will not usually be a "temporary arrangement" (*Knight*);
>
> (c) 'usually based' can include a camp site or accommodation provided by an employer (*Knight* at [83]). Where a worker is usually based may coincide with the place where the worker usually works, but that need not necessarily be so. In considering where a worker is 'usually based', regard may be had to the

[73] Worker's late Application, p 4.
[74] *O'Donohue* at [3].
[75] *O'Donohue* at [49].
[76] [2010] NSWWCCPD 83 (*Martin*).
[77] *O'Donohue* at [53]-[56].

following factors, though no one factor will be decisive: the work location in the contract of employment, the location the worker routinely attends during the term of employment to receive directions or collect materials or equipment, the location where the worker reports in relation to the work, the location from where the worker's wages are paid, and

(d) an employer's 'principal place of business' is the most important or main place where it conducts the main part or majority of its business (*Knight* at [66]). It will not necessarily be the same as its principal place of business registered with ASIC.'

54. To the above summary must be added the following qualification. After deciding *Martin*, the Supreme Court of the ACT, Court of Appeal, overturned the decision in *Falls* (see *Avon Products Pty Ltd v Falls* [2010] ACTCA 21 (*Falls CA*). In the joint judgment in *Falls CA*, Gray P, Penfold and Marshall JJ held at [29]:

> 'There is no gloss placed on s 36B(3)(a) which compels a court only to consider where a worker is 'required' to work.'

55. The Court went on to conclude, at [30]:

> 'We have no doubt that Ms Falls was required to do the work that she happened to do in NSW, but that she was not required to do it in NSW. We also have no doubt that a requirement or the absence of a requirement as to where work is performed is not relevant; the test is where the work is done, rather than where it is required to be done or whether it is required to be done anywhere in particular.'

56. It follows, as Keating DCJ observed in *Klemke v Grenfell Commodities Pty Ltd* [2011] NSWWCCPD 27, that the extracted principle from the first instance decision in *Falls*, namely, that it would be relevant to look at where the worker is contracted to do the work, will not always be a determinative consideration. The test is where the work is done (*Falls CA*). However, care must be exercised when, because of the injury, the work under the contract has not been completed. In that situation, it may still be necessary to look at where the worker was contracted to work.

129. The employer referred to and relied on the discussion by the Full Court of the ACT Supreme Court in *Avon Products* in support of its argument. That decision is discussed and set out in *O'Donohue.*

130. I observe that the equivalent ACT legislation was recently considered by the Court of Appeal of the ACT Supreme Court in *I.C. Formwork Services Pty Ltd v Moir (No 2)*.[78]

Temporary arrangement – s 9AA(6)

131. I do not accept the employer's submission that the initial engagement for work in New South Wales was a temporary arrangement within the meaning of s 9AA(6) of less than six months.

132. The contract was for an indefinite period that could be terminated by the employer by giving one week's notice within the probationary period. The contract specified that the worker was the "NSW Coach" and that her location was as per the roster.

[78] [2020] ACTCA 44.

133. No rosters were in evidence although it is clear the worker did all her work (apart from the three day trips to Queensland) travelling to and at various shopping centres in Sydney and on the Central Coast.

134. The employer's submission is not supported by the terms of the contractual agreement.

135. The contract specified that the worker was contracted to work in NSW in accordance with her roster. There was no intention of the parties that this arrangement was temporary.

136. In *Klemke*, President Keating stated that the provision in s 9AA(6) can only apply where "any temporary arrangement contemplated by that provision must be seen as part of a longer or indefinite period of employment."[79] *Klemke* was referred to and approved by the Supreme Court of NSW in *Weir Services Australia Pty Ltd v Allianz Australia Insurance Ltd*[80] (*Weir Services*).

137. Consistent with the observations in *Klemke*, I reject the employer's submission that the work undertaken in New South Wales was a temporary arrangement within the meaning of s 9AA(6).

138. In rejecting this submission, I also rely on the factual finding that there was no guarantee or promise that the worker would become National Manager. Any such suggestion was predicated on the employer being satisfied that the worker was, in its view, of sufficient competence. The employer clearly was not satisfied that the worker did not meet its standards for becoming National Manager as it did not offer her that position and indeed terminated her employment as the NSW Coach within the probationary period.

Usually works – s 9AA(3)(a)

139. The employer stressed that the resolution of where the "worker usually works" as defined in s 9AA(a) does not mean the majority of the time or a simple mathematical exercise. Whilst that submission is undoubtedly correct, it does not mean that an analysis of how often work was undertaken in a particular State is irrelevant.

140. The facts of the case clearly show that the worker "usually works" in New South Wales.

141. The worker's employment commenced in mid-September 2019. At that time, she travelled to Western Australia for training and returned to New South Wales on 21 September 2019.

142. The worker then performed all duties in New South Wales apart from attending the three meetings in Queensland.

143. The worker did not travel to Western Australia to manage the one studio although took control of that position in late October 2019. The employer submitted that the fact that the worker was managing a studio in Western Australia meant that she would be travelling to that place. It however, somewhat inconsistently, adduced evidence from Ms Ross that the worker was not properly performing the duties in New South Wales and this meant that she could not travel to Western Australia.

144. The employer relied on the fact that the worker was given control of recruitment across all the studios. It is unclear from the evidence what this involved. However, the worker performed all these duties in New South Wales. There is no suggestion and no evidence that this would be undertaken from any other location

[79] *Klemke* at [79]-[80].
[80] [2013] NSWSC 26 at [80]. During the hearing I referred this decision to the parties.

145. The worker was required, as Mr Johnstone asserted, to travel to Queensland once per month. The three trips which occurred over the period of employment occupied a total of four days.

146. The contract specified that the worker was the NSW State Coach. Whilst travel was required, it is consistent with the worker's duties in managing the three studios in New South Wales that the travel was intra state.

147. In accordance with s 9AA(6), the intention of the parties is relevant in assessing where the worker usually works. I refer to the earlier finding that the intention of the parties does not establish that the worker would become the National Manager.

148. The facts of this case are compelling. Other cases where workers spent a degree of time in two or more separate States does not provide any guidance to the facts in this case. The State in which the worker usually works in this employment was New South Wales. Indeed the decision in *Avon Products* confirms that this clause directs attention to where the work is done and not where the worker is required to work.

149. Having rejected the employer's submission that the worker "would" become the National Manager and that was relevant in ascertaining the intention of the parties, the evidence is otherwise particularly lacking as to what that role would entail in terms of travel. Whilst Ms Ross provided some evidence on this matter based on her position, the state of the evidence is highly speculative as to what it involved.

150. Given my factual finding that the suggestion of promotion was only a possibility and otherwise based on the employer being satisfied on the worker's performance, I am not prepared to speculate on where the work would have been undertaken. However, I would observe, although I do not consider it particularly relevant, that the worker was studying in New South Wales. That is just one factor suggesting that there was no present intention on the worker's part to relocate from New South Wales.

Usually based – s 9AA(3)(b)

151. It is unnecessary to address the issue of where the worker "is usually based for the purposes of the employment" as I have concluded that the answer to "usually works" is clearly answered by reference to New South Wales. However, if I am wrong on that conclusion, as this was argued and if the matter proceeds further, then I also address this issue.

152. Whilst the authorities state the answer to the question is not a mathematical exercise, that does not mean that the presence of a worker is irrelevant.

153. The worker was the manager of the New South Wales studios whilst physically present in New South Wales. It is also the fact that she managed the one studio in Western Australia from New South Wales.

154. The statement from Jean Cobine in the email dated 20 September 2019 was that the worker was the new NSW coach, and "will be basing herself back in Sydney" after finishing the weeks training in Western Australia. The facts after that time support this statement because, apart from two single day trips and one overnight trip to Queensland, the worker spent the next four and a half months working exclusively in New South Wales.

155. The contract states that the worker was the NSW State Coach. Contrary to the employer's submission, the contract did specify a location, because it stated, "As advised per roster".[81] The rosters were not in evidence although the places where the worker undertook her duties were. It would be extremely likely that the worker was rostered at the various shopping centres in New South Wales where the photographic studios were situated.

[81] Part B of the Contract.

156. The employer relied on the discussion in *Knight* of matters relevant to "usually based". Those matters were extracted from s 53AA of the *Work Health Act (NT)* and seem to have been adopted in *O'Donohue* despite the absence of these words appearing in the 1987 Act. Noting that Commissioner Herron stated that no matter was decisive and otherwise assuming they are relevant, in my view the employer has mischaracterised and/or failed to refer to any evidence when it submitted that three of the four matters favoured a conclusion that the worker was usually based in Queensland.

157. I have previously noted that, contrary to the employer's submissions, that the contract specified the location of work as set out in the roster. That strongly indicates that, given that the worker almost exclusively worked in New South Wales, that this is what the roster specified.

158. The employer submitted that the location the worker routinely attends to receive direction or collect material was Queensland. It is unclear on what basis that submission was made.

159. The employer also submitted that the location the worker reports to in relation to the work was Queensland. That statement begs the question as to what is meant by "reports to". It is also unclear what evidence the employer relied on in making this submission.

160. Finally, the employer referred to the location in which the wages are paid as being relevant. It is probably that the wages were paid by electronic means from Queensland although there was no evidence on the point. I do not consider the way the wages were paid in this matter of any particular relevance to the resolution of the issue of where the worker was "usually based".

161. The Nominal Insurer submitted that the worker was usually based at home and that was in New South Wales. In my view the evidence does not particularly disclose where the electronic work was undertaken. I accept that it is extremely likely that the worker would probably travel from her home to the various shipping centres.

162. Given the lack of specific evidence I do not accept the Nominal Insurer's submission that the worker was usually based at home.

163. Section 9AA(3)(b) does not require a worker to be based in a particular location within a State. Rather the clause requires the identification of a State "in which the worker is usually based".

164. The facts of this matter are compelling. The worker was employed for just under five months. She received one week of training in Western Australia and attended three meetings in Queensland which lasted four days. The rest of the employment, consistent with the Contract, was undertaken In New South Wales which involved attending various locations at shopping centres in Western Sydney or on the Central Coast.

165. I am clearly satisfied that the worker was usually based in New South Wales for the purposes of the employment.

Orders and findings

166. The parties made no proper submissions on the findings and orders that should be made if either party was successful.

167. Section 145(4) of the 1987 Act that the Commission may "make such determination in relation to the application" and "make such awards or orders as to the payment of compensation under this Act".

168. Given the issue is restricted to consideration of s 9AA, it is appropriate to make a finding that the worker's employment was connected with the State of New South Wales within the meaning of s 9AA(3) of the 1987 Act.

169. I also order that the Nominal Insurer has validly made workers compensation payments under the 1987 Act in the sum of $22,172.79 in respect of the worker's injury sustained on 6 January 2020.

170. The employer is not entitled to the relief it seeks and its application is dismissed.

171. The finding and orders are set out in the Certificate of Determination.