



DECISION

Fair Work Act 2009
s.365—General protections

Lili Sinden

v

HDR Inc. T/A HDR
(C2018/1915)

DEPUTY PRESIDENT KOVACIC

CANBERRA, 7 SEPTEMBER 2018

Application to deal with contraventions involving dismissal – application to amend application to correct an error made with respect to the legal name of the Respondent – application rejected.

[1] This decision concerns an application made on 23 April 2018 by Ms Lili Sinden (the Applicant) for the Fair Work Commission (the Commission) to amend her general protections application to correct an error made with respect to the legal name of the respondent.

[2] For the reasons set out below, I am not prepared to exercise my discretion to amend Ms Sinden’s general protections application to name HDR Pty Limited as the respondent.

Background

[3] On 11 April 2018 Ms Sinden made an application under s.365 of the *Fair Work Act 2009* (the Act) alleging that her dismissal on 26 March 2018 by HDR Inc. T/A HDR (the Respondent) was in contravention of the general protections provisions of the Act.

[4] In its Form F8A – Employer response to a general protections application the Respondent stated that it had a jurisdictional objection to Ms Sinden’s application. Specifically, the Respondent stated as follows:

“The entity named in the purported application as the “Respondent” is a corporation registered in the United States of America. HDR Inc does not have any presence in Australia and it does not submit to the jurisdiction of the Fair Work Commission (FWC). HDR Inc enters a conditional appearance in response for the limited purpose of informing the FWC that it did not ever employ the Applicant as alleged (or at all) either in the United States of America (or in Australia) and that HDR Inc is not subject to the jurisdiction of the FWC.”¹ (Emphasis as per original)

[5] As previously noted, on 23 April 2018 Ms Sinden made an application to amend her general protections application in accordance with s.586 of the Act so that HDR Pty Limited was cited as the respondent. In her application to amend Ms Sinden stated that the documentation surrounding her employment and termination of employment repeatedly

referred to the Respondent as “HDR” and that as a result she made an error when detailing the full legal name of the Respondent. Ms Sinden also stated that there was sufficient information provided in her general protections application to allow the respondent to be identified and that as the Respondent’s legal representative also acted for HDR Pty Limited that the latter had suffered no hardship or prejudice by having its legal name incorrectly referred to in her general protections application.

[6] Ms Sinden’s general protections application was the subject of a conference convened by one of the Commission’s conciliators on 30 May 2018. That conference failed to resolve the dispute, with the Applicant requesting that her application to amend the name of the respondent cited in her general protections application be referred to a member of the Commission to determine. The Respondent conversely requested that the matter be referred to a member of the Commission to issue a certificate in accordance with s.368 of the Act.

[7] The matter was listed for mention and directions on 13 June 2018 with Directions subsequently issued. Ms Sinden’s application to amend was also listed for hearing on 20 August 2018. However, prior to the hearing both parties advised the Commission that they were content for the matter to be determined on the papers.

The Statutory framework

[8] Section 586 of the Act provides the Commission with the power to correct or amend applications. Specifically, s.586 provides that:

“586 Correcting and amending applications and documents etc.

The FWC may:

- (a) allow a correction or amendment of any application, or other document relating to a matter before the FWC, on any terms that it considers appropriate; or
- (b) waive an irregularity in the form or manner in which an application is made to the FWC.”

The Applicant’s case

[9] Ms Sinden submitted that based on her evidence the Commission should be satisfied that she:

- was seeking to make an application against her employer;
- her application correctly identified the trading name of her employer, the Australian Business Number (ABN) of her employer and the address of her employer;
- she made an error in identifying the legal name of her employer, adding that the error was genuinely made; and
- the application was not misleading in that the employer was otherwise correctly identified, HDR was alerted to the potential for the claim before it was made and both HDR Inc. and HDR Pty Limited were aware of the correct identity of the employer.

[10] Ms Sinden further submitted that she acted promptly following the filing by the Respondent of its Form F8A by making an application to amend her general protections application and that there was no dispute that her employer was HDR Pty Limited. In support of her application to amend Ms Sinden relied on several decisions including *Mr David Djula v Centurion Transport Company Pty Ltd*² (*Djula*), *Yasin Oznek v Oxford Cold Storage*³ (*Oznek*) and *Tobiahs Pty Ltd v Jessica Vidacic*⁴. Ms Sinden also referred to the decision in *Knight v Visionstream Australia Pty Ltd*⁵ (*Knight*), a decision brought to the parties' attention by the Commission.

[11] Ms Sinden provided a witness statement which was not formally received into evidence as the matter was dealt with on the papers. Among other things, Ms Sinden deposed in her witness statement that:

- the documentation surrounding her employment and the termination of employment referred repeatedly to her employer as "HDR";
- as a result, she made an error when detailing the full legal name of HDR in her general protections application;
- she understood that HDR Pty Limited is a related body corporate that is part of the HDR Inc. group of companies;
- she was originally employed by Rice Daubney Group (NSW) Pty Ltd (Rice Daubney) in September 2017 and recalled that in December 2017 she signed a letter that related to the transfer of her employment to another entity with effect from January 2018, adding that she did not retain a copy of that letter;
- she did not have the benefit of a copy of that letter at the time she instructed her legal representative to lodge her general protections application;
- whilst she was an employee of HDR her email signature was as follows:

Lili Sinden
National Head Human Resources
HDR

...
lili.sinden@hdrinc.com
hdrinc.com/follow-us;

- her employment was terminated on 26 March 2018, adding that on or about 27 March 2018 she spoke with Mr Manhar the Respondent's contact person cited by Ms Sinden in her general protections application and the Respondent's Chief Human Resources Officer, about her dismissal and that she subsequently sent him a follow up email⁶; and
- the termination letter of 29 March 2018 is printed on HDR letterhead and includes the details "hdrinc.com" under the writer's signature block.

The Respondent's case

[12] The Respondent accepted in its submissions that in some circumstances an applicant may erroneously name the wrong entity as respondent and that in those circumstances it may be appropriate for the Commission to exercise the power under s.586 of the Act to grant leave to allow the applicant to amend and correct the respondent's name. However, the Respondent submitted that this was not such a case.

[13] The Respondent further submitted that the facts and circumstances in this case demonstrated that, at the time of preparing her general protections application, Ms Sinden was aware of the legal identity of her employer but consciously elected to commence proceedings against another entity that was not within jurisdiction. The Respondent contended that Ms Sinden did so deliberately to elevate the matter to the parent company in the United States and to Mr Manhart with the belief that doing so would be of some strategic benefit to her in the proceedings. Beyond that, the Respondent submitted that if Ms Sinden's application were amended as sought that the proposed respondent, HDR Pty Limited, would suffer prejudice as it would be subjected to having proceedings commenced against it more than four months after legally terminating Ms Sinden's employment.

[14] For all these reasons, the Respondent submitted that Ms Sinden's application to amend her general protections application should be dismissed.

[15] The Respondent referred to several authorities in its submissions including the decisions in *Djula, Oznek, Ms Kataryzna Wybranski v Telstra (Contracted by Regent Recruitment* ⁷ (*Wybranski*) and *T De Silva-McKay v EQ Life Pty Ltd*⁸ (*EQ Life*). The Respondent also submitted that the facts in *Knight* could be distinguished from those in this case in a number of respects including that it cannot be said that Ms Sinden genuinely believed that she was induced by the letter of termination to believe that HDR Inc. was her employer.

[16] The Respondent provided witness statements from Mr Manhart and Mr Stephen Auld, the Managing Director of HDR Pty Limited, neither of which were received into evidence due to the matter being dealt with on the papers.

[17] In his witness statement Mr Manhart deposed *inter alia* that it would be inappropriate for him to remain as the named contact person for the Respondent should Ms Sinden's application to amend be granted as he lived in the United States. Mr Manhart also deposed that Ms Sinden in her role as Senior Human Resources Manager of HDR Pty Ltd was required to share any human resources initiatives she developed in Australia with him so as to ensure that such initiatives were aligned globally, adding that his involvement was therefore to have input on human resources issues from a global perspective. While Mr Manhart confirmed in his witness statement that he spoke with Ms Sinden on the evening of 26 March 2018 (US time), he disputed aspects of Ms Sinden's version of their conversation. Mr Manhart also deposed that Ms Sinden said to him during their conversation that she had a lawyer, that she thought she had a good claim and that it was her view that she had been unfairly dismissed but that her salary limited her legal rights in that regard.

[18] Mr Auld in his witness statement deposed among other things that he found it difficult to comprehend that Ms Sinden had made an error in citing HDR Inc. as the Respondent for several reasons including that:

- Ms Sinden has extensive human resources experience over 17 years and was employed as HDR Pty Limited's most senior Human Resources Manager;
- her work involved drafting and distributing documents that specified the name of the employer as HDR Pty Limited on a regular basis; and
- even if it was accepted that Ms Sinden did not have a copy of the letter relating to the transfer of her employment to HDR Pty Limited, he found it alarming that given her position she did not appreciate that she and others worked for an Australian company rather than an entity incorporated in the United States.

Consideration of the issues

[19] As can be seen from above, s.586(a) of the Act provides the Commission with a broad discretion to correct or amend an application "*on any terms that it considers appropriate*". The issue to be determined in this case is whether as a matter of discretion the power to amend Ms Sinden's general protections application should be exercised in the particular circumstances of this matter.

[20] However, before considering that issue I briefly refer to the authorities relied upon by the parties. In particular I note that the authorities generally involved circumstances where there was confusion as to who the actual employer was as a result of:

- inconsistent or incorrect references in the relevant documentation (*Djula* and *Knight*);
- a contractual relationship between a labour hire firm (the employer) and the host employer (*Oznek* and *Wybranski*); or
- a transfer of business (*EQ Life*).

[21] Further I note that the Full Bench in *Djula* stated as follows:

"[34] Finally, we emphasise that it was the peculiar facts in this case which, in our opinion, justified the grant of the application to amend the name of the respondent. The facts in other matters may not be comparable. In such a case the correct ruling may be to refuse an amendment to the name of a respondent. In the event that was to occur, the applicant would then need to consider whether another s.394 application should be made and to seek an extension of time for the filing of that application, should it be made out of time."⁹ (Underlining added)

[22] In short, the decision in *Djula* is authority for the principle that each application to amend the name of a respondent needs to be determined having regard to the particular facts of the matter. Consistent with that approach I set out below several key aspects of the material before the Commission.

[23] First, I note that the transfer of employment letter dated 7 December 2017 which was signed by Ms Sinden includes the following:

“Re: alternative Employment with HDR Pty Limited

Dear Lili Sinden,

As you are aware, as part of a staged restructure, the business of Rice Daubney has undergone a recent rebranding exercise with the launch of the new HDR website. The next phase of that restructure involved the transfer of the business of Rice Daubney to the HDR trading arm in Australia. In connection with an restructure, the Rice Daubney proposes to transfer the employment of its employees to HDR.

We are pleased to advise HDR Pty Limited ACN 158 075 220 (**HDR**) is offering you employment on the same terms and conditions as those currently governing your employment with The Rice Daubney Group (NSW) Pty. Limited ...

If you wish to accept the offer of employment from HDR, please confirm your acceptance by signing and returning the enclosed copy of this letter to Lili Sinden before 5.00 pm on 21st December 2017.

Please do not hesitate to contact Lili if you have any questions.”¹⁰ (Underlining added)

[24] Second, in her witness statement Ms Sinden described a number of features of the termination letter, including the letterhead on which the letter was printed and the internet address featured at the bottom of the page. However Ms Sinden omitted to mention the contact details which appeared immediately below the “hdrinc.com” internet address. Those contact details read as follows:

“Level 1, 110 Walker Street, North Sydney NSW 2060
T +61 ... W hdrinc.com.au
HDR Pty. Limited ABN 76 158 075 220 trading as HDR
...”¹¹ (Underlining added)

[25] Attached to Mr Auld’s witness statement was a copy of Ms Sinden’s LinkedIn profile. The profile included the following under the heading “Experience”:

“National Director of People and Culture at HDR
November 2017 – Present”

[26] In her submissions Ms Sinden highlighted that she correctly identified HDR Pty Limited’s ABN and business address in her general protections application. However, she did not indicate where those details were drawn from. An examination of the documents attached to Ms Sinden’s witness statement indicates that there are only two documents which included those details. They are the termination letter of 29 March 2018¹² and a copy of the transfer of employment letter referred to above which was attached to a letter sent by the Respondent’s representative to the Commission on 27 April 2018¹³ (i.e. after Ms Sinden had lodged her general protections application and her application to amend).

[27] Drawing on the material referred to above, in circumstances where:

- Ms Sinden was, as HDR Pty Limited's Human Resources Manager, the contact person for employees at the time of their employment transfer from Rice Daubney to HDR Pty Limited;
- the footer at the bottom of the termination letter refers to HDR Pty Limited, its ABN and its trading name;
- Ms Sinden was legally represented from at least 27 March 2018¹⁴; and
- Ms Sinden contacted Mr Manhart to discuss her dismissal on or about 27 March 2018

[28] I consider it implausible that she made an error in identifying HDR Inc. as the Respondent. Beyond referring to the letterhead used for the termination letter, Ms Sinden produced no material which pointed to any confusion as to the identity of her employer. Having regard to contact details set out in the footer on the letterhead used for the termination letter (see paragraph [24] above) I am not satisfied that the letterhead was the cause of Ms Sinden's error. Against that background, I am not prepared to exercise my discretion to amend Ms Sinden's general protections application to name HDR Pty Ltd as the respondent.

[29] As previously noted, Ms Sinden's general protections application has previously been the subject of conciliation which failed to resolve the dispute. In those circumstances I am satisfied that all reasonable attempts to resolve the dispute have been or are likely to be unsuccessful and will therefore issue a certificate in accordance with s.368 of the Act.

Conclusion

[30] For the reasons outlined above, I am not prepared to exercise my discretion to amend Ms Sinden's general protections application to name HDR Pty Limited as the respondent. A certificate under s.368 of the Act will be issued in conjunction with this decision.

[31] Finally, I note that it is open to Ms Sinden to lodge a general protections application in respect of the termination of her employment by HDR Pty Limited, though any such application would clearly fall outside the 21 day statutory timeframe for lodging such an application. As a result, Ms Sinden would need to satisfy the Commission that there were exceptional circumstances warranting the Commission to allow her a further period to make such an application.



¹ Form F8A - Employer Response to general protections application at Question 6.1

² [2015] FWCFB 2371

³ [2015] FWC 189

⁴ [2011] FWA FB 1679

⁵ [2017] FCA 1513

⁶ Annexure LS2 to Ms Sinden's witness statement

⁷ [2012] FWA 2566

⁸ [2013] FWC 9203

⁹ [2015] FWCFB 2371 at [34]

¹⁰ Annexure LS14 to Ms Sinden's witness statement

¹¹ Ibid at Annexure LS7

¹² Ibid

¹³ Ibid at Annexure LS12

¹⁴ Ibid at Annexure LS2