

[2020] FWC 3470

The attached document replaces the document previously issued with the above code on 31 August 2020 to correct a typographical error at paragraph [2]

Associate to Deputy President Mansini

1 September 2020.



DECISION

Fair Work Act 2009
s.365—General protections

George Phillips

v

State of Victoria (Department of Education and Training)
(C2019/6834)

DEPUTY PRESIDENT MANSINI

MELBOURNE, 31 AUGUST 2020

Application to deal with contraventions involving dismissal – dispute about whether a binding settlement agreement has been reached - whether Commission can be satisfied that all reasonable attempts to resolve the dispute have been, or are likely to be, unsuccessful and therefore must issue a certificate under s.368(3).

[1] This decision concerns an application for the Commission to deal with a dispute made under s.365 of the *Fair Work Act 2009* (Cth) (the Act).

[2] If the Commission is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful then the Commission must issue a certificate to that effect pursuant to s.368(3)(a). In this case there was an objection such that the question presently before the Commission is, in summary: whether it is open to the Commission to determine that a certificate not issue because a binding settlement agreement exists. For the reasons that follow, I have determined that a certificate must issue pursuant to s.368(3).

Context

[3] The relevant factual context is summarised below and is not contentious except where indicated.

[4] Mr George Phillips alleges he was dismissed from his employment with the State of Victoria (Department of Education and Training) (the Department) in contravention of various of the general protections provisions (ss. 340, 343, 344, 351 and 352) of the Act. The primary remedy sought is to continue working in the Department’s teaching service.

[5] The Department denies taking adverse action as alleged or at all. It claims Mr Phillips’ teaching role at Carwatha College (the College) was declared “excess” to the operational requirements of the teaching service due to declining enrolments at the College. Redeployment attempts were not successful hence the employment came to an end.

[6] The Commission initially dealt with the dispute by way of telephone conciliation conference, before a staff conciliator on 11 December 2019, but the matter was not resolved.

[7] At Mr Phillips' request, which was not opposed, the matter was referred to a member of the Commission who conducted a further telephone conciliation conference in private on 29 January 2020.¹ The Department contends that, during the second conference, agreement was reached to settle the matter on terms to be recorded in a deed of release.²

[8] On 30 January 2020, the Department emailed a proposed deed of release to Mr Phillips.³ An exchange of correspondence then ensued over the course of 30 and 31 January 2020, in which Mr Phillips contended that "some parts" of the proposed deed were "not reflective of the conference resolution" and required amendment, and the Department in turn proposed amendments. Mr Phillips responded that the proposed amendments did not address his concerns and stated that a further conference with the Commission was needed, which he subsequently requested of the Commission.⁴

[9] By the correspondence exchanged between the Commission member's associate and the parties on 4 February 2020, it was not clear to either the Commission member or the Department how the "in principle agreement" reached at the 29 January 2020 conference was not reflected in the Department's proposed deed, and Mr Phillips was invited to respond and provide clarification of the specific amendments sought.⁵

[10] On 4 March 2020, there was a further conference before the same Commission member. The Department agreed to attend "in order to clarify the terms of settlement".⁶

[11] On 6 March 2020, the Department formally objected to the issue of a certificate under s.368(3) of the Act because the parties had reached agreement to resolve the matter.⁷ Mr Phillips responded that the draft deed "does not reflect the proposed agreement.. therefore there was no meeting of the minds and no binding settlement" and requested that a certificate issue.⁸

[12] The matter was then referred to me. The Department pressed its objection. Mr Phillips filed submissions and supporting documents and the Department filed submissions and a witness statement of a Ms Emily Lett (an Australian legal practitioner employed by the Department, who had attended the three conferences and corresponded with Mr Phillips thereafter). The Department sought that the matter be determined on the basis of written materials ("on the papers"); the Applicant wished to be heard.⁹ Accordingly, the matter was convened before me on 27 May 2020. The Department sought permission to be represented

¹ Email from Mr Phillips to the Commission dated 17 December 2019 (Witness Statement of Ms Emily Lett dated 6 May 2020 and amended 27 May 2020 (Witness Statement of Ms Lett), Annexure EL-1); Witness Statement of Ms Lett at paragraphs 12 and 13.

² Witness Statement of Ms Lett at paragraphs 15 and 28.

³ Email from Ms Lett to Mr Phillips dated 30 January 2020 (EL-3).

⁴ Email from Mr Phillips to Ms Lett dated 31 January 2020 (EL-4); Email from Mr Phillips to Commission dated 4 February 2020 (EL-5).

⁵ Email from the Commission member's associate to Mr Phillips dated 4 February 2020 (EL-5); Email from Ms Lett to Mr Phillips dated 4 February 2020 (EL-4).

⁶ Email from Ms Lett to Mr Phillips dated 4 February 2020 (EL-4).

⁷ Email from Ms Bourke to the Commission dated 6 March 2020 (EL-7).

⁸ Email from Mr Phillips to the Commission dated 11 March 2020 (EL-8).

⁹ Email from Ms Hamilton to the Commission dated 26 May 2020; Email from Ms Bourke to the Commission dated 22 May 2020; and Email from Mr Phillips to the Commission dated 17 April 2020.

by a lawyer, which was not opposed and was granted having regard to s.596 of the Act. Further submissions were sought, and filed on 27 and 29 July 2020.

Statutory context

[13] A person who has been dismissed, and alleges their dismissal was in contravention of Part 3-1 (General Protections) of the Act may apply for the Commission to deal with their dispute pursuant to s.365. If an application is made under s.365, then the Commission must deal with the dispute (other than by arbitration) pursuant to s.368(1). Section 368 sets out the functions able to be exercised by the Commission, as follows:

“(1) If an application is made under section 365, the FWC must deal with the dispute (other than by arbitration).”

Note: The FWC may deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)). One of the recommendations the FWC might make is that an application be made under Part 3-2 (which deals with unfair dismissal) in relation to the dispute).

(2) Any conference conducted for the purposes of dealing with the dispute (other than by arbitration) must be conducted in private, despite subsection 592(3).

Note: For conferences, see section 592.”

(3) If the FWC is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful, then:

(a) the FWC must issue a certificate to that effect; and

(b) if the FWC considers, taking into account all the materials before it, that arbitration under section 369, or a general protections court application, in relation to the dispute would not have a reasonable prospect of success, the FWC must advise the parties accordingly.”

[14] Section 595 reinforces the legislative note to s.368(1), including that arbitration is only if the Commission is expressly authorised under or in accordance with a provision of the Act. Section 592 provides that a person may be directed to attend a conference.

[15] Section 587 provides examples of when the Commission may dismiss an application. In an unfair dismissal context, the Federal Court has considered that the Commission has the power to dismiss an application under s.587 where a binding settlement agreement is found to exist, because the binding settlement agreement extinguishes the pre-existing cause of action and the continued pursuit of the application based on such cause of action is considered to be frivolous or vexatious or without reasonable prospects of success.¹⁰ However an application alleging dismissal in contravention of the general protections provisions (made under s.365) must not be dismissed by the Commission on the grounds that it is frivolous or vexatious or has no reasonable prospects of success (s.587(2)).

¹⁰ *Australia Postal Corporation v Gorman* [2001] FCA 975.

[16] In *Hunter v Anthony Costello Automotive*,¹¹ a Full Bench of the Commission considered the scope of the power under s.368(3)(a). At first instance the Commissioner was satisfied that the parties, in conference before her, had reached “an accord and satisfaction” that fell within one of the categories identified in *Masters v Cameron*.¹² In that case, a financial term of settlement had been satisfied (paid) by the respondent. The Commissioner declined to issue a certificate pursuant to s.368(3)(a).¹³ On appeal, the Full Bench considered the following passage from *Delwyn Hewitt v Topero Nominees Pty Ltd*:

“[35] A third contextual consideration is also relevant. Except in relation to an extension of time application, there is nothing in the Subdivision which contemplates the receipt of evidence by the Commission or the making of a determination requiring findings of fact. The decision of the Full Bench in *Hetherington-Gregory v Harrington Village Motel (Hetherington-Gregory)*, is relevant in this regard. In that matter the Commission considered whether an order for the production of documents in connection with a conference under s.776 of the Act should be made. Section 776 is part of the legislative scheme concerning unlawful termination of employment, in Part 6-4 Division 2 of the Act. That scheme, in ss.773-778, contains a procedure for the Commission to conduct a dispute resolution process in respect of any alleged unlawful termination of employment which is in all relevant respects identical to that for general protections matters in ss. 365-370. In refusing to make an order for the production of documents the Full Bench said:

‘[8] The function of a Member of Fair Work Australia in conducting a s.776 conference is to facilitate a resolution of the claim reflected in the application through an agreement of the parties. A Fair Work Australia Member, in conducting a s.776 conference, is not empowered to determine the application or otherwise impose an outcome on the parties.

[9] The statutory requirements upon a Member in relation to a s.776 conference are:

- If satisfied that all reasonable attempts to resolve the dispute have been, or are likely to be, unsuccessful, the Fair Work Australia Member must issue a certificate to that effect (s.777); and
- If the Member considers, taking into account all the materials before it, that an unlawful termination court application in relation to the dispute would not have a reasonable prospect of success, it must advise the parties accordingly (s.778).

[10] A s.776 conference does not involve the hearing of evidence or the undertaking of a hearing involving an assessment of the full evidentiary case which would arise in a hearing in the Federal Magistrates Court or the Federal Court of Australia. It is a conciliation process based on the (often limited) factual material raised by the parties.’

[36] The above characterisation of the Commission’s functions would apply with equal force to a s.368 conference and is inconsistent with the proposition that the Act imposes jurisdictional preconditions on the making of a s.365 application of such a nature as might

¹¹ [2017] FWCFB 5839 (*Hunter*).

¹² *Masters v Cameron* [1954] HCA 72; (1954) 91 CLR 353 at [9] (*Masters v Cameron*).

¹³ Decision at first instance: *Hunter v Anthony Costello Automotive* [2017] FWC 4300.

require the Commission to engage in a process of determination involving the making of findings of fact based on the receipt of contested evidence.

[37] Given the similarity between the scheme in ss.773-778 and those in ss.365-370, the analysis in Hetherington-Gregory strongly suggests that s.365(1) is not to be interpreted as imposing jurisdictional prerequisites such that the Commission might be required to hold a separate hearing, receive contested evidence and make a determination going to the merits of the application and potentially affecting the applicant's right to have his or her rights under Part 3-1 determined by a relevant court."¹⁴

[17] The Full Bench in *Hunter* proceeded to determine that the Commissioner had erred in declining to issue a certificate under s.368 as there is no jurisdiction to make findings in relation to the substantive matter. It held that the Commissioner was not empowered to determine the application or otherwise impose an outcome on the parties.¹⁵

Consideration

[18] The dispute subject of the application in this matter was dealt with by way of three conciliation conferences, each conducted by telephone, in private (and not recorded) in accordance with s.386(2). I am satisfied that all reasonable attempts have been made to resolve the dispute and there was no suggestion to the contrary.

[19] The parties gave evidence and made submissions about the outcome of those attempts. Ms Lett, a lawyer employed by the Department, has given evidence of an agreement reached in conference on 29 January 2020, including to provide her contemporaneous notes of that conference and the third conference of 4 March 2020. The Department contends that it has agreed to the very thing the original application sought – further employment of Mr Phillips, if only on a limited guaranteed basis. In various correspondence, submissions and in evidence before the Commission, Mr Phillips has vacillated between contending that the draft deed does not reflect the agreement reached on 29 January 2020 to denying that there was any agreement reached at all on that occasion. Also before the Commission is correspondence exchanged between the parties and with the Commission, which contain statements useful to deciphering the objective intention of the parties.

[20] Were this an unfair dismissal application, it would be available to the Commission to determine whether a “binding settlement agreement” of a *Masters v Cameron* variety exists and, if so, the application may be dismissed on ground(s) it is frivolous or vexatious and/or has no reasonable prospect of success. However this application is made under s.365, for the Commission's assistance to resolve a dispute alleging dismissal in contravention of the general protections provisions of the Act.

[21] I do not identify any sound basis to distinguish this matter from *Hunter* on the facts and decline the Department's invitation to depart from the ruling of the Full Bench in *Hunter* which it argued is “plainly wrong”.¹⁶ It is acknowledged that, in the result, an applicant may unilaterally renege on an agreement reached before the Commission and continue to prosecute

¹⁴ [2013] FWCFB 6321 (*Hewitt*).

¹⁵ At [36] and [37].

¹⁶ The Department's Submissions dated 27 July 2020 at paragraph 6, citing *Cetin v Ripon Pty Ltd* (2003) 127 IR 205 at [47] – [49] (Ross VP, Duncan SDP, Roberts C); *Modern Awards Review 2012* [2012] FWAFB 5600 at [85] – [87].

an otherwise “extinguished” cause of action before a Court by simply claiming that attempts at resolution were “unsuccessful”. That outcome seems counterintuitive to the process of making all reasonable attempts to resolve in the Commission before commencing contentious litigation in a Court. It comes at some, potentially considerable, inconvenience and expense to the respondent to a matter. Be that as it may, a Full Bench of the Commission has clarified that there is no jurisdiction to effectively determine the substantive application by declining to issue a certificate in circumstances where an applicant claims all reasonable attempts before the Commission were unsuccessful.

[22] In such circumstances, it may be appropriate for the Commission to exercise the discretion afforded at s.368(3)(b) of the Act. That is, if taking into account all the materials before it the Commission considers that a general protections court application or arbitration in relation to the dispute would not have a reasonable prospect of success, to so advise the parties.

[23] For the above reasons, I must issue a certificate pursuant to s.368(3). A copy will be provided to the parties separate to this decision.



DEPUTY PRESIDENT

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Appearances:

G. Phillips on his own behalf

M. Minucci of counsel for the State of Victoria (Department of Education and Training)