DECISION

Fair Work Act 2009
s.773—Termination of employment

Dr Daniel Krcho
v
University of New South Wales T/A UNSW Sydney
(C2020/1574)

COMMISSIONER JOHNS SYDNEY, 1 FEBRUARY 2021

Unlawful termination dispute - objection raised as to jurisdiction - operation of s. 723 - operation of s. 351 (2) extinguishing general protection.

[1] This matter involves an application made under s. 773 of the *Fair Work Act 2009* (**FW Act**) for the Fair Work Commission (**Commission**) to deal with an unlawful termination dispute (**Form F9 Application**).

[2] The Form F9 Application was made by Dr Daniel Krcho (**Applicant**) against the University of New South Wales (**UNSW/Respondent**).

[3] UNSW objected to the Commission exercising jurisdiction in relation to the matter. In its Form F9A response to the Form F9 Application, UNSW contended that “the Applicant is entitled to make a general protections court application”, with the consequence that he is statute barred from making a claim under s.773.

Interim decision

[4] On 21 August 2020 I made an interim decision[1] about a jurisdictional objection taken by UNSW. I did so in the following terms:

> “[37] In the present matter the termination of the Applicant’s employment can be characterised in a number of different ways. The Applicant has done so in his Form F9 application. He characterises the termination as being for various reasons. Some of those reasons would have entitled the Applicant to commence a general protections claim under Part 3-1. Because he could have made those claims under Part 3-1 he cannot make them under Part 6-4.
>
> ….
>
> [39] What this means is that, as it is presently drafted, the Form F9 Application is:

[1] [2020] FWC 4435.

a) incompetent in large measure; but
b) competent in so far as it seeks to prosecute a claim that "political opinion" was the basis for UNSW terminating Dr Krcho's employment.

[40] In indicating that an aspect of the unlawful termination claim made by Dr Krcho against UNSW is competent I am in no way expressing a view about the merits or strength of that cause of action. It is not my role in a jurisdictional hearing to decide that issue. I am merely dealing with whether the jurisdiction of the Commission is enlivened.

[41] In this instance the Respondent, UNSW, has made a challenge to an application for unlawful termination of employment which was taken under s. 773 of the FW Act. The challenge to the Form F9 Application made by UNSW relies upon the purported operation of s. 723 of the FW Act.

[42] I have concluded that in the particular circumstances of this case, s. 723 of the FW Act does not operate entirely as a jurisdictional bar to the Form F9 Application, as the Applicant is not a person who is entitled to make a general protections court application in relation to the conduct that he complains of, namely "political opinion". However, the present application is much wider in its intent.

[43] My decision is consistent with the observations made by the Commissioner in *mcintyre*,

> [45] My conclusions have been broadly drawn from a purposive interpretation of the Act cognisant that it is beneficial legislation. In simple terms, I believe that the Act, and s. 723 in particular, should not be interpreted in a manner which would deprive an individual of access to a fair hearing or, as may be euphemistically described, a person's "day in court". In the circumstances of this case the Applicant does not seek multiple proceedings or remedies but simply seeks to have his day in court.

[44] I am conscious that the Form F9 Application was prepared by a non-legally trained person and, it may be that, as presently drafted, the Form F9 Application might deprive the Applicant of his day in court.

[45] I further note that the Commission has the power to "allow a correction or amendment of any application, … relating to a matter before the [Commission], on any terms that it considers appropriate."

[46] The Applicant has not made an application to correct or amend the Form F9 Application. If he did so, such that the answer to section 3.2 was confined to "political opinion", it seems that no jurisdictional complaint could be made about it. Again, I am not expressing a view about the merits of the claim that the Applicant was dismissed because of his political opinion. But because all the other grounds are statute barred (because of the operation of s.723), "political opinion" is all that the Applicant is left with. He might well have been in a stronger position if he had commenced an application under s.365 of the FW Act in respect of all the other grounds except political opinion. But he made an election about which kind of application to make on

12 May 2020 and he is stuck with the decision he made. But, presently, there are difficulties with that application.

[47] It is not my job to tell the Applicant how to run his matter. It is entirely a matter for him. However, in fairness to the Applicant I think I should allow him an opportunity to seek a correction or amendment. If he does make such an application I will then hear from UNSW about the same.

[48] For these reasons the Applicant is directed to file in the Commission and serve on UNSW any application he wants to make to correct or amend the Form F9 Application made by him on 12 March 2019. Any application to correct or amend the Form F9 Application must be made on a Form F1 by 4.00 pm on Friday, 28 August 2020.

[49] That is not to say the Applicant must make an application to correct or amend the Form F9 Application. That is entirely a matter for him to decide.

[50] If:

a) such an application is made I will invite UNSW to respond to it. It may be that they form the view that there is no prejudice to them in not opposing the correction or amendment. In which case it will likely be granted and the matter can be listed for conciliation.
b) no such application is made I will issue a final decision in relation the present application made by UNSW to have the Applicant's unlawful termination dispute application dismissed."

[5] On 23 August 2020 the Applicant asked that he be granted an extension of time to the 28 August 2020 deadline. He indicated that he needed to seek legal advice about a Form F1 Application.

[6] Noting that the Applicant is not legally represented, on 24 August 2020, I provided the Applicant with an example of a Form F1 Application

[7] On 24 August 2020 the Applicant pressed his application for an extension of time. The Applicant wrote,

"Thank you for your kind response and pre-filled F1 form.

However, the Applicant – not being legally educated or represented, also now experiencing some difficulties, as well as being exhausted – feels strongly that the extra time is necessary to enable him to seek professional help and assistance with proper re-formulation (which he has rights to receive), to ensure success of his application – beyond just simple reduction of the reasons/grounds, but in order to ensure his right to be fully heard in Court, in compliance with FWA, ss.3, 557 & 578.
The Applicant intends to have his original Form F9 Application professionally amended in a correct manner so that it achieves full compliance without unduly limiting his rights.

Thank you for your consideration."

[8] Against the objection of UNSW, I granted an extension of time to 11 September 2020.

Appeal of interim decision

[9] On 10 September 2020, Dr Krcho filed a Notice of Appeal and sought a stay of the interim decision under s. 606 of the FW Act.

[10] On 14 September 2020 her Honour, Deputy President Asbury, declined to issue a stay.[2] Her Honour held that,

> "[15] In the present case the decision against which the stay is sought was that Commissioner Johns would proceed to make a final decision in relation to Dr Krcho's application, which was subsequent to Dr Krcho deciding how he wished his application to proceed.
>
> [16] I do not accept Dr Krcho's submission that a final decision has been made with an ongoing operative effect that is capable of being stayed. All that has occurred is that the Commissioner has stated that absent the filing of an amended application, the Commissioner would proceed to issue a final decision in relation to an application made by UNSW to have Dr Krcho's unlawful termination dispute application dismissed. I also do not accept Dr Krcho's submission that this statement means the Commissioner will inevitably dismiss the application.
>
> [17] There has been no final decision made in relation to Dr Krcho's application. As previously stated, if Dr Krcho is dissatisfied with the final decision once it is made, he can also seek permission to appeal and seek a stay of that decision.
>
> [18] I also do not accept Dr Krcho's submission that refusing the stay removes his right and ability to be fully heard, and to have "the question of law" properly decided by the Commission. Dr Krcho's present application seeking to appeal the interim decision will be listed for hearing before a Full Bench of the Commission.
>
> [19] A stay will not alter the status quo in any substantive manner or in a manner relevant to the appeal. Further, it cannot be said that the balance of convenience favours the grant of a stay.
>
> CONCLUSION
>
> [20] For these reasons I refuse Dr Krcho's application for a stay of the Decision in [2020] FWC 4435. Dr Krcho should note that my decision to refuse a stay of the decision is not based on any finding about the merits of his appeal against the interim decision or any subsequent appeal he may file if dissatisfied with any final decision."

[11] Following the stay decision, I wrote to the parties in the following terms,

> "…. The stay sought in that appeal has failed.

[2] [2020] FWC 4926.

The Commissioner notes that no application has been made to amend the original s.773 application.

Notwithstanding, and out of an abundance of procedural fairness to the Applicant, the Commissioner has decided to provide the Applicant with a further opportunity to file any application he wants to make amend his original s.773 application.

If he chooses to do so, he must do so by 4 pm on Friday, 18 September 2020."

[12] The Applicant did not file an application to amend his original s.773 application.

[13] Because the stay was declined, I was entitled to determine the substantive matter to finality. However, out of an abundance of regard for an applicant who is not legally trained or legally represented, I decided to await the appeal decision.

[14] On Friday, 29 January 2021 the Full Bench refused permission to appeal.[3] It held that,

"[55] As we have observed, the Commission has not dismissed the Appellant's unlawful termination application. Rather, the Commissioner has provided the Appellant with an option to overcome the jurisdictional objection raised by the Respondent by seeking to amend his application. The Appellant is free to take up the option or not. If the Appellant does not opt to amend his unlawful termination application, the Commissioner has indicated that he will proceed to determine the Respondent's jurisdictional objection. If the Appellant is aggrieved by a decision of the Commissioner determining the Respondent's jurisdictional objection, the Appellant may appeal such decision.

[56] If the Appellant does decide to amend his unlawful termination application the Commissioner has indicated that he will hear from the Respondent as to its views about such an amendment before deciding whether to allow the amendment. It may be that the Respondent objects to the amendment. If the Commissioner was to allow the amendment over an objection by the Respondent, such decision may also be subject of an appeal by the Respondent.

[57] The Appellant has not elected either option suggested by the Commissioner but has instead lodged this appeal. In our view the appeal is premature. If the Appellant wishes to maintain the position advanced in the appeal, he need only inform the Commissioner that he declines to "devalue" his unlawful termination application by removing all grounds other than political opinion. If the Commissioner then proceeds to dismiss his unlawful termination application, the Appellant may lodge an appeal against that decision.

[58] There may be cases where an interim or provisional decision does affect substantive rights in a manner which cannot be redressed in an appeal against a final decision. Such cases may warrant a departure from the well-established position that appeals from preliminary or procedural rulings are discouraged. The present case is not one of these. The Commissioner has laid out some options and if the Appellant maintains the position he has adopted in the present appeal, and declines to amend his

[3] [2021] FWCFB 350.

application, he will be entitled to appeal any final decision to dismiss his application. If such an appeal succeeds the Appellant will be permitted to advance his application in the form he seeks and will have lost no right in this regard which cannot be restored consequent on a successful appeal.

[59] Even if the decision is substantive, it forms part of a broader controversy, the totality of which may be the subject of a single appeal. Further, there is no substantive or procedural prejudice to the Appellant arising from a refusal of permission to appeal in circumstances where all his appeal grounds can be advanced in a later appeal against a final decision. In those circumstances, we do not consider that the present appeal enlivens the public interest, or that permission to appeal should otherwise be granted under s. 604(2)."

[15] Permission to appeal was refused and the appeal was dismissed.

Final determination

[16] As I stated on 21 August 2020,

"[46] It is not my job to tell the Applicant how to run his matter. It is entirely a matter for him.

….

[48] That is not to say the Applicant must make an application to correct or amend the Form F9 Application. That is entirely a matter for him to decide."

[17] Since first inviting the Applicant to do so 163 days ago, he has not made an application to amend or correct his Form F9 Application.

[18] Following the decision of the Full Bench I considered allowing the Applicant a further opportunity to lodge an application to correct or amend the Form F9 Application. However, you can only "lead a horse to water" so many times. The Full Bench noted that,

"[28] The Appellant also took issue with the email correspondence sent to him by the Commissioner after the decision was released including the email on 14 September 2020, which the Appellant referred to as an "ultimatum email". The Appellant took further issue with the provision by the Commissioner of a "draft Form F1" to amend his F9 Application which the Appellant states was "partially pre-filled" by the Commissioner.[4] The Appellant stated that such "sudden and unexpected assistance" was perceived by him as "highly unusual, unorthodox, questionable and most likely untrustworthy" in light of what he viewed as consistent and profound bias against him by the Commissioner. The Appellant contends that the Commissioner provided incorrect legal advice by partially pre-filling the form, which severely limited his right to be fully heard."

[4] Appellant's 'complaints' submissions filed 18 September 2020.

[19] Further, UNSW filed its objection to the application more than 10 months ago. In fairness to the Respondent, it is entitled to have the matter finally determined (at least at first instance).

[20] Because the Applicant has decided not to amend his Application it remains as it was when it was filed on 12 March 2020, that it to say, the Application is incompetent in large measure.

[21] Section 723 of the FW Act provides:

> "**723 Unlawful termination applications**
>
> A person must not make an unlawful termination application in relation to conduct if the person is entitled to make a general protections court application in relation to the conduct."

[22] A general protections court application is an application to a court under Division 2 of Part 4-1 for orders in relation to an alleged contravention of Part 3-1 of the FW Act.[5] Applications under Division 2 of Part 4-1 are able to be made by national system employees with respect to alleged conduct by national system employers.

[23] There is little doubt that, and I find, UNSW is a national system employer.[6] Consequently, I also find that the Applicant was a national system employee.

[24] Because the Applicant was a national system employee, I am satisfied that:

a) in respect of six out of the seven grounds he alleges in his s.773 Application, he could have made a general protections court application; and consequently,
b) he is, by virtue of s.723 statute barred from making a s.773 Application in relation to those matters.

[25] In circumstances were the Applicant has not made an application to amend or correct his s.773 Application, the substantive application has not been made in accordance with the FW Act.

[26] Section 587 of the Act provides as follows:

> "**587 Dismissing applications**
>
> (1) Without limiting when the FWC may dismiss an application, the FWC may dismiss an application if:
>
> (a) the application is not made in accordance with this Act; or
>
> (b) the application is frivolous or vexatious; or
>
> (c) the application has no reasonable prospects of success.

---

[5] *Fair Work Act 2009*, s.368(4)

[6] Ibid, s.14.

Note: For another power of the FWC to dismiss an application for a remedy for unfair dismissal made under Division 5 of Part 3 2, see section 399A.

(2) Despite paragraphs (1)(b) and (c), the FWC must not dismiss an application under section 365 or 773 on the ground that the application:

(a) is frivolous or vexatious; or

(b) has no reasonable prospects of success.

(3) The FWC may dismiss an application:

(a) on its own initiative; or

(b) on application."

[27] Based on the above, I am satisfied that the Applicant was entitled to make a general protections court application in relation to the conduct alleged in the s.773 Application. The application is thus not made in accordance with the Act.

[28] Although the power of the Commission to summarily dismiss an application should be sparingly employed and approached with caution, the numerous attempts made to assist Dr Krcho to regularise his s.773 Application have amounted to nought.

[29] The Applicant has not sought to amend the s.773 Application.

[30] In circumstances where the Applicant has:

a) through the Interim Decision, been notified of the deficiencies with the s.773 Application;
b) been invited to remedy the deficiencies, but
c) chosen not to do so

I am persuaded that I should exercise my discretion under s.587 of the FW Act and dismiss the s.773 Application.

[31] An Order to this effect [PR726560] has been issued with this decision.

COMMISSIONER

Printed by authority of the Commonwealth Government Printer

<PR726125>