DECISION

Fair Work Act 2009
s.365—General protections

Jayde Paranihi
v
Roy Hill Holdings Pty Ltd
(C2020/1669)

COMMISSIONER WILLIAMS PERTH, 30 MARCH 2021

Application to deal with contraventions involving dismissal.

[1] This decision concerns an application made by Mr Jayde Paranihi (the Applicant or Mr Paranihi) pursuant to section 365 of the *Fair Work Act* 2009 (Cth) (the Act) to deal with contraventions involving dismissal. The application was lodged on 18 March 2020. The respondent is Roy Hill Holdings Pty Ltd (the Respondent).

Background

[2] This application was filed on 18 March 2020 and the Respondent filed its response on 31 March 2020.

[3] The Respondent's reply to the application included objections that the application was filed out of time and that the Applicant's resignation did not constitute a dismissal under section 386(1)(b) of the Act.

[4] A conciliation conference was held on 28 May 2020 however, the matter was not resolved.

[5] Deputy President Young then held a hearing to determine the out of time objection. On 25 August 2020, the Deputy President issued her decision[1] determining that the application had been made within time and no extension of time was required.

[6] On 10 September 2020, Deputy President Millhouse's associate contacted the parties confirming that the issuance of a section 368(3) Certificate was before the Deputy President. The associate sought the parties' views as to whether a further conference was sought given the outcome of Deputy President Young's decision.

[7] The next day, 11 September 2020, the Respondent advised that they were happy to participate in a further conference but did not seek one.

[8] That same day, the Full Federal Court issued a decision in the matter of *Coles Supply Chain Pty Ltd v Milford*[2] (the Coles Decision).

[9] This decision held that a person must have been dismissed to be entitled to make a general protections dismissal dispute application under section 365 of the Act. If an employer argues that an applicant resigned, the Fair Work Commission (the Commission) must determine whether that applicant was dismissed before it can exercise powers under section 368 of the Act to deal with a dispute about whether the applicant was dismissed in contravention of the general protections.

[10] Accordingly, on 25 September 2020, Deputy President Millhouse's associate emailed both parties and advised that the Deputy President had noted that in the Respondent's Form F8A- Employer Response it was contended that the Applicant was not dismissed, and in light of the Coles Decision, the parties were invited to advise whether there was any objection to the issuance of a Certificate.

[11] On 29 September 2020, the Respondent replied by email that, in light of the Coles Decision, the Respondent objected to the issuance of a Certificate as there was an antecedent dispute over whether the Applicant was dismissed.

[12] The application was then allocated to me on 1 October 2020, to determine the Respondent's objection that the Applicant was not dismissed.

[13] If the Applicant was not dismissed, this application should not have been made, as it is not within jurisdiction and so will be dismissed by the Commission.

[14] This decision concerns only whether the Applicant was dismissed.

[15] At the hearing, Mr Paranihi gave evidence on his own behalf and called Ms Liza (Ms Wilkins) to give evidence. Ms Emma Johanna Maddocks (Ms Maddocks) and Mr Elwin Nepgen (Mr Nepgen) gave evidence for the Respondent.

Factual findings

[16] The Respondent did not cross-examine the Applicant or Ms Wilkins.

[17] Relevantly, the Applicant's evidence was that he commenced employment as a supply chain operator at the Respondent's Perth warehouse at Perth Airport in August 2018 on a fixed term contract. On 1 July 2019, he signed a further contract of employment for ongoing full-time employment.

[18] He says in August 2019 there was a discussion about management concerns. During this discussion, he admitted he had been using his mobile phone a fair bit on 9 August 2019 and that he also used the work computer for personal use.

[19] He told them he was having some personal issues that were impacting him at work.

[20] The next day, he was stood down for further investigation. A show-cause meeting was held on 4 September 2019 regarding these issues.

[21] On 13 September 2019, during a meeting, the Applicant was provided with a first and final warning letter for breaches of the Respondent's code of conduct, safety requirements, and company values.

[22] After being provided with the warning letter, he was offered an employee settlement agreement wherein if he resigned he would be paid an additional eight weeks' wages when he left.

[23] He was informed at the same meeting that if he did not accept the employee settlement agreement, he would be placed on a performance improvement plan (PIP) on his return to work.

[24] He was provided with a copy of the proposed PIP.

[25] Four days later, he advised the Respondent that he would not resign. On 20 September 2019, the PIP commenced.

[26] The Applicant had several concerns which he expressed about the PIP. In particular that the line count which would be a KPI for him was set at 150. He felt this target was unrealistic and was setting him up to fail.

[27] He was told it could be reached and the Respondent believed he could achieve that.

[28] The first PIP review took place on 18 October 2019 and the Applicant was shocked to receive negative feedback. He was presented with a spreadsheet of line counts for himself and other team members for the period. The Applicant stated it showed the 150-line count was only achieved five times amongst all staff for the period.

[29] The Applicant asked if the line count could be changed in his PIP. He was advised that he had agreed to it and signed off on it at the 20 September 2019 meeting, even though he says he expressed a concern at that meeting.

[30] The Applicant felt that what the Respondent was expecting of him was impossible. The Applicant took personal leave for two days due to stress related medical reasons he says were caused by the conduct of the Respondent.

[31] At this point, he decided to seek support from an independent human resources specialist, Ms Wilkins, whom he engaged.

[32] The second PIP review was delayed and not held until 8 November 2019. The Applicant attended this meeting with Ms Wilkins. The Respondent advised that Ms Wilkins could attend as a support person but could not represent him at the meeting.

[33] After this PIP review, he was marked as '*partially meets expectations*' due to not achieving the 150-line count every day. Everything else was marked as '*meeting expectations*'.

[34] The third PIP review was on 25 November 2019, at which he was marked as having met expectations in every aspect of the PIP. He was advised that the PIP would be extended for another three months to 20 March 2020.

[35] From 29 November 2019 to 15 December 2019, the Applicant was on annual leave. He then took personal leave on Monday 16 December 2019, due to stress related medical reasons and the pressure at work arising from the situation.

[36] He took further personal leave on 18 and 19 December 2019.

[37] The fourth PIP review was scheduled for 10 January 2020 but was delayed because of the absence of his supervisor. On 20 January 2020, the Applicant was finally booked in for review on 31 January 2020.

[38] He took further personal leave on 22 January 2020 through to 24 January 2020, due to stress.

[39] At the fourth PIP meeting on 31 January 2020, he was marked as '*not meeting expectations*' because there were three days where his daily record sheets were not filed away. He believed this was a changing of the goalposts and it was all designed to force him to resign. He was told at the meeting that this was a simple task.

[40] He declined to sign the PIP notes for the fourth review. He felt the Respondent was pressuring and bullying him into signing something that he was not happy with.

[41] The fifth PIP review was scheduled for 14 February 2020. On 13 February 2020 he enquired by email to confirm the time and was originally advised it would be 10:00am but later was asked to contact his support person to see if she was available at 3:30pm.

[42] He contacted Ms Wilkins and then advised the Respondent 10:00am was more suitable.

[43] On the morning of 14 February 2020, he was told to contact Ms Wilkins regarding the 10:00am meeting as this now needed to be changed.

[44] The Respondent later claimed he was on personal leave on 14 February 2020 when he was not.

[45] The changing of times and dates for the meeting caused him more stress affecting his health and mental state and continued to place pressure on him to quit he says. He says it was obvious to him that it was all part of a tactic to force him to resign.

[46] He then took personal leave on 19 February 2020, again due to stress related medical reasons and pressure from work.

[47] His evidence was that by the end of that day he had had enough of the constant pressure and unfair and intimidating bullying tactics from the Respondent's management. He said it was clear to him that no matter how hard he tried, no matter what he did to satisfy the PIP criteria, they were just going to keep going at him until it forced him to resign.

[48] His evidence was that he was totally broken by them by the end of the day on 19 February 2020 and felt he had no option but to resign.

[49] On 20 February 2020, he handed in his resignation.

[50] The Applicant says the unrealistic and impossible PIP expectations that were set and the lack of support in the process he was going through, where his job was constantly threatened, had caused too much pressure and stress to his life. He states it was affecting his mental and physical health as well as his family due to him bringing his work home.

[51] The Applicant's evidence was that the situation left him no choice but to resign for the sake of his physical and mental health as well as his family. He did not want to leave the Respondent but was forced to resign due to all this pressure.

[52] After the Applicant tendered his resignation, he was told to go home and not come in the next day and that someone would contact him on Monday, 24 February 2020 once they had completed their processes.

[53] On 24 and 25 February 2020, he contacted the Respondent regarding the next steps and on 26 February 2020 received confirmation his resignation letter had been accepted.

[54] Relevantly, the letter of resignation sent by the Applicant to his leader, Mr Nepgen, reads:

> "Please accept this letter as formal notice of my resignation from my position as Operator Supply Chain at Roy Hill Holdings Pty Ltd. As per my Contract of Employment, I am giving the required four weeks' notice with my last day of employment being Thursday 19th March 2020.
>
> Thank you for giving me the opportunity to work in this position, I did thoroughly enjoy my role and working here until the day I received a written warning on 13 September 2019 for a safety related incident.
>
> Since that day, after declining the subsequent Deed of Release offer, I was placed on a Performance Improvement Plan which has continued now for over five months. I have done my utmost to meet the expectations of my managers and peers but feel the ongoing pressure and stress associated with the PIP's requirement to achieve 100% on a daily basis, along with the repeated threat that my employment will be terminated, are all impacting on my health and wellbeing, most recently resulting in my admission to hospital.
>
> Consequently, as I feel the management of Roy Hill are not supportive of my successful completion of the PIP along with the impact the working environment of the last five months has had on me personally, I tender this resignation."

[55] The evidence of Ms Wilkins, relevantly, is that she is a human resources consultant and was engaged by the Applicant on 24 October 2019. The Applicant told her his belief that the Respondent intended to terminate his employment by way of performance management and that he was committed to remaining employed.

[56] During the period October 2019 to March 2020, she attended three PIP meetings as the Applicant's support person.

[57] Ms Wilkins says the Applicant told her that the requirement to pick 150-line items of stock per day set for him was unreasonable and unattainable. She says investigation into this KPI found that during the period 14 October 2019 to 15 November 2019 the average line count per employee was only 106.3.

[58] On 8 November 2019, she attended the Applicant's second PIP review meeting wherein she was told that she was not permitted to speak at all.

[59] On 25 November 2019, she attended the third PIP review meeting, and amongst other things the Respondent advised that it was a requirement of the PIP process for the Applicant to achieve two PIP reviews in a row of '*meets expectations*' to prevent the termination of his position. This had not been discussed or agreed to previously.

[60] On 31 January 2020, during the fourth PIP meeting, the Applicant was asked questions regarding his personal health issues. The superintendent suggested that he was not managing his health and that was directly impacting his performance at work. The superintendent and human resources advisor then proceeded to instruct the Applicant on diet and rest.

[61] Ms Wilkins says the conduct towards the Applicant during the review meetings was threatening and dismissive.

[62] The fourth PIP review meeting was scheduled for 14 February 2020. Ms Wilkins says the Applicant and herself both anticipated that the Respondent would terminate his employment based on the conduct and threats of termination made at previous meetings.

[63] When Ms Wilkins was on her way to the meeting, the Applicant rang her and told her the meeting time had been changed to 3:00pm that day and the meeting was then cancelled.

[64] Ms Wilkins says it is her belief that the Respondent intended to terminate the Applicant at that meeting but they were unprepared that day due to an absent manager. She also says that the Applicant and herself believe the Respondent constructed the above scenario with the intention of either terminating or forcing the Applicant to resign.

[65] Ms Maddocks gave evidence that she is an Advisor Employee Experience at the Respondent.

[66] Ms Maddocks was directly involved in the management of the Applicant's disciplinary investigation in 2019 and the consequent PIP. Ms Maddocks attended most of the Applicant's PIP review meetings.

[67] Around the time of the investigation into the Applicant's misconduct, the Respondent conducted a business wide audit of daily working hours. This audit showed that the Applicant, between March 2019 and July 2019, attended work late for 50 of his 75 shifts. This issue was incorporated into the disciplinary investigation.

[68] Ms Maddocks' evidence was that the purpose of the PIP is to provide employees and leaders with a framework to discuss and resolve unsatisfactory performance, conduct, or behaviour. Her evidence was that Respondent's Disciplinary Action and Investigation Procedure[3] provides that under a PIP, should the requisite improvement occur, it will be acknowledged by the leader and no further action will be taken. However, if no satisfactory

improvement by the employee occurs the matter proceeds to the disciplinary action part of the procedure.

[69] Within this procedure is a table which prescribes the approval process for different potential disciplinary outcomes, including dismissal.

[70] For any dismissal, including the Applicant's, the procedure requires that dismissal would need to be recommended by Ms Maddocks and by the Applicant's leader. The recommendation would then need endorsement from the General Manager of the Applicant's team, the Chief Operating Officer, and the General Manager of People System, Health and Safety. Finally, this endorsement would need to be approved by the Chief Executive Officer.

[71] Ms Maddocks' evidence was that none of those steps had occurred nor were these steps planned, with respect to the Applicant, because the PIP was still ongoing.

[72] She did not intend to make any recommendation regarding the Applicant's ongoing employment until they knew whether the PIP had been successful.

[73] The Respondent has a workforce of approximately 2500 people.

[74] To the best of her knowledge the other relevant endorsers and approvers, listed above, who are required to authorise any dismissal, were not even aware of how the Applicant's PIP was progressing at the time of his resignation.

[75] Ms Maddocks states that PIP's are a common way for leaders to manage performance issues within their teams. She estimates that she's been directly involved in over 15 PIP's.

[76] In Ms Maddocks' experience, most PIPs usually last between 3 to 6 months. It is not uncommon for them to be extended if the desired improvement has not been achieved.

[77] Ms Maddocks' evidence was that the Applicant's PIP was a legitimate attempt to measure his performance and help him improve.

[78] The Respondent measures employee's performance on a scale of 1 to 5, with 5 being the most positive score.

[79] The Applicant's final performance rating for the 2018/2019 financial year was '*3 - meets expectations*'. This entitled him to receive incentive bonuses and a nominal pay increase.

[80] In August 2019 of the next financial year, Ms Maddocks was notified of concerns about the Applicant's conduct and that he appeared to have been repeatedly using his mobile phone in a restricted area and attempting to conceal this misuse from his leaders. Further, the Applicant was using his work computer on the Respondent's network to watch sporting videos for over one hour during his shift.

[81] The Respondent prohibits mobile phone use in restricted areas. This is because the employees are working near moving heavy stock machinery and equipment. Distraction caused by mobile phone use creates a significant risk of harm.

[82] During the investigation of these concerns, CCTV footage showed the Applicant inserting his mobile into his beanie hat against his ear so that he could conduct telephone conversations without his phone being visible when walking around the restricted area. The footage also showed him watching a live sporting event for over an hour during a shift.

[83] During the investigation, the Applicant admitted to all of the allegations against him including that he had deliberately attempted to deceive his leaders by hiding his misconduct.

[84] A series of meetings were held including a show cause meeting. Ultimately, it was decided to give the Applicant a second chance rather than dismiss him.

[85] Ms Maddocks' evidence was that she and his leader met with the Applicant to offer him a choice between a PIP or an agreed settlement involving his resignation. During this, his leader did advise him that it was possible he would not successfully complete the PIP and this could result in his termination. He was told this so that he was making a fully informed choice.[4]

[86] Her evidence was that the PIP was amended to reduce the range of tasks the Applicant was required to do so that he almost exclusively only had to focus on receipting and processing freight. The Applicant agreed to this at the time.

[87] He was required to complete a line count of 150 items of freight each day or provide a valid explanation for why he could not on a particular day.

[88] Her evidence was that other people on the team were not required to complete as many line counts as this because, unlike the Applicant, they were not exclusively receipting and processing freight. Even so, her evidence was that the Applicant's line count achieved was typically fewer than the line count achieved by these other team members.

[89] On some days, the Applicant had achieved his 150-line count and so was marked as meeting expectations, on other days he provided a valid explanation for why he did not complete his 150-line count and so was also marked as meeting expectations.

[90] It was only when he did not achieve his 150-line count and did not provide a valid explanation that he was marked as not meeting expectations.

[91] The line count he achieved each day was made available to him.[5]

[92] Ms Maddocks agrees that the Applicant created a daily record log himself to keep a record of his line items each day. Her evidence was that the Applicant asked at the second review meeting, when Ms Wilkins was present, that his leaders sign off on his daily record log and for that arrangement to be incorporated into his PIP, which the Respondent agreed to.[6]

[93] The daily record log allowed him to record any reasons explaining why he had not achieved the 150-line count and have his leader sign off on this each day.[7]

[94] The Respondent did not object to the request for Ms Wilkins to attend the review meetings. At the beginning of the second review meeting, with Ms Wilkins in attendance, the Applicant's leader read out the role of the support person and Ms Wilkins immediately

interrupted him to say she was not there as a support person but as the Applicant's advocate and intended to speak on his behalf.

[95] The meeting was adjourned to take advice on this issue. When the meeting reconvened, the Respondent advised that Ms Wilkins could only attend as a support person and could not advocate on the Applicant's behalf during the meeting. Both the Applicant and Ms Wilkins indicated they were willing to proceed on that basis.

[96] Ms Maddocks does not recall the Applicant expressing any concerns about changes to the PIP. Her evidence was that the PIP KPIs were achievable. Any amendments to the PIP were to assist him in meeting expectations and were made in his favour. Amendments were agreed to by both parties and, in some places, suggested by the Applicant.[8]

[97] Her evidence was that the 150-line count was the result of a review conducted by the leaders to determine a fair and reasonable line count for the PIP. If the Applicant did not meet the 150-line count target on a particular day but could demonstrate a reason why it was not achieved by documenting it in his daily record, he would be marked as '*meets expectations*'.[9]

[98] Ms Maddocks' evidence was that the standard wording said at the end of all PIP review meetings was a statement reminding the employee that if they are unable to meet expectations this may result in disciplinary action up to and including termination of employment. This reminder was said at all his PIP meetings and, for example, was said at the third PIP review when he was advised that he was meeting expectations in all of the assessment categories.

[99] The Applicant signed the records of his first three PIP review meetings, confirming he read and understood the feedback. If he requested amendments before he signed, they considered them. For example, at the end of his third PIP review meeting the Applicant asked for a statement made by the leader that the PIP could potentially be closed early if he kept up the same high standard of performance to be included in the meeting review record before he signed it. This was agreed to and included by the Respondent.

[100] Ms Maddocks submitted that it was difficult to schedule the review meetings because the Applicant and herself are on a different roster from the Applicant's leader. They also had to accommodate Ms Wilkins' availability. In addition, the Applicant's leaders are required to regularly travel to site in the Pilbara.

[101] Her evidence was that the scheduling of the PIP review meetings was done in consultation with the Applicant and he did not raise any concerns regarding the scheduling, frequency, or regularity of the review meetings. He also never raised any concerns regarding the purpose of the PIP.

[102] Ms Maddocks was advised on 20 February 2020, that the Applicant had submitted his letter of resignation and she was surprised to learn of this.[10] His leader had been in the process of organising the next PIP review meeting.

[103] The Respondent did not formally accept the Applicant's resignation immediately because the superintendent wanted to be sure the Applicant's resignation was genuine and not made in the heat of the moment.

[104] Mr Nepgen is a Specialist in Supply Systems for the Respondent. Alongside others, he is responsible for managing the supply warehouse in Perth.

[105] He was the Applicant's manager-once-removed.

[106] He gave evidence regarding the Applicant's employment contract which the Applicant signed on 1 July 2019.[11]

[107] That contract includes clause 22-Dispute Resolution Procedure which states:

> "Where possible it is expected that you will attempt to resolve any grievance that may arise with the other party involved.
>
> If this is unsuccessful, or is not possible, the following process must be followed:
>
> a) you should attempt to resolve the matter with your leader;
>
> b) if not resolved, the grievance or dispute should be referred to the manager once removed (MOR);
>
> c) if the grievance or dispute remains unresolved the matter should be referred in writing to the relevant Leadership Team member;
>
> d) If the matter remains unresolved, the parties may agree to refer the matter to an agreed mediator to assist in resolving the grievance or dispute;"

[108] Mr Nepgen gave evidence consistent with Ms Maddocks regarding the conduct and performance concerns which resulted in the investigation of the Applicant in August 2019.

[109] The criticisms of his performance involved him watching videos instead of working, regularly being at work late, and spending long periods of time away from his workstation during the workday.[12]

[110] His evidence was that ultimately, the Respondent issued a first and final written warning to the Applicant in relation to the misconduct issues. The Applicant was also placed on a PIP in relation to the performance issues.

[111] His evidence was that, after the investigation, they considered what disciplinary action was appropriate. His preference was, because of the seriousness and the nature of the misconduct, that the Applicant be dismissed. However, managers above him wanted to give the Applicant a second chance to see if he could learn from the experience and improve his conduct and performance.[13]

[112] Notwithstanding this, there was a concern that the Applicant seemed generally disinterested in his role and had not shown any remorse for his misconduct or performance issues.[14]

[113] His evidence was that they did not want to commit the significant resources required for a PIP if the Applicant did not wish to work at the Respondent, so they obtained authorisation to offer to pay the Applicant additional notice if he would prefer to resign rather

than receive a first and final warning and be placed on a PIP. They considered that this offer would clarify whether he wished to remain in his role and was committed to improving.

[114] Mr Nepgen's evidence was that if the Respondent had wanted the Applicant to leave the business at that time, due to his misconduct and performance, it would have dismissed him at that point in time rather than commit the resources to a PIP.

[115] Ultimately, he was issued with a first and final warning in relation to the misconduct issues and, separately, placed on a PIP in relation to his performance issues.

[116] Mr Nepgen's evidence was that they tried to make the PIP as simple as possible for the Applicant. Rather than changing tasks or doing various activities, as they would where they usually rotate people every day, they tried to make it simple for the Applicant and put him on one task so that he can hit the goals.[15]

[117] Included within the PIP review on 16 October 2019 is an item headed '*Performance – Time and Attendance*' which concerned the Applicant's history of starting shifts late and not entering personal leave properly into the Respondent's systems.

[118] Another item was headed '*Performance – Productivity/Adherence to Policies and Procedures*' which concerned the Applicant not meeting performance expectations. These expectation concerns included not processing purchase orders in a timely manner, delays in getting started or returning from breaks, and regularly spending unexplained time away from his workstation. Relevantly, the '*Performance/Expectations Measures*' specified in the PIP for this item were detailed in eight separate dot points the last one of which mentioned processing 150 lines per day of materials.[16]

[119] Mr Nepgen's evidence was that the general KPI for people in the area, in terms of daily line count, is 166 rather than the 150 that was in the Applicant's PIP. His evidence was that the Applicant should have achieved the 150 lines with no problem, and they felt it was fair to give him that to achieve. He was given a lower line count KPI than that of the KPI for the team.[17]

[120] 166 was the KPI line count for everyone including the Applicant before his PIP.[18]

[121] I note that the PIP documents provided in the Applicant's evidence include comments in the feedback section, stating that the Respondent had peers in the Applicant's team that had not been in the business for as long, doing the same duties, who were averaging more lines a day. The Applicant was also told that "*[s]omeone who has been here two days is averaging more than you. He is averaging 90% and you are averaging 85*."[19]

[122] Mr Nepgen did not believe that the Applicant, throughout the course of the PIP, was under pressure or that it was obviously stressful for him. He was aware that the Applicant had taken some days of personal leave with medical certificates. He was not aware that this was, as the Applicant says, caused by the stress associated with the PIP. His evidence was that the Applicant said he was off due to gout and an injury to his wrist.[20]

[123] His evidence was that the PIP was originally due to finish after three months, on 20 December 20. However, the Applicant had failed to satisfy some of the PIP criteria and was due to be on annual leave from 29 November to 12 December 2019. Consequently, at the

third review meeting on 25 November 2019, they notified the Applicant that they were extending his PIP to 20 March 2020 to give him an opportunity to satisfy all the PIP criteria. The Applicant signed that PIP review meeting sheet acknowledging this.

[124] Mr Nepgen's evidence was that, because the Applicant had not met the PIP's requirements, if it had ended at that point in time, he would not have achieved the requirements of the PIP, so the alternative was to extend the PIP.[21]

[125] His evidence was that the Applicant's performance during the PIP was hit and miss. It would pick up and then slump again.[22]

[126] Mr Nepgen agrees that the Applicant was told he had not met all requirements because he had not submitted his daily record sheets on three occasions. However, it was also because he had not been performing to expectations regarding his attendance and target line count.[23]

[127] Mr Nepgen's evidence was that he had no predetermined opinion on what the final outcome of the PIP would be and remained hopeful the Applicant might still successfully complete it.

[128] Mr Nepgen's evidence was that no decision was to be made regarding the Applicant's employment until after the PIP process had finished because they would not know until then if the PIP had been successful.

[129] Mr Nepgen's evidence was that he has had other employees on PIPs that are some of their best employees, and that it is better to see people succeed than not have a job. People do fail to meet PIP if they are not committed but that does not routinely occur. People are generally successful with PIP plans.[24]

[130] Mr Nepgen's evidence was that he was surprised to learn of the Applicant's resignation on 20 February 2020. He neither expected nor sought the Applicant's resignation.[25]

The legislation

[131] This application was made under s. 365 of the Act, which is set out below.

> "**365 Application for the FWC to deal with a dismissal dispute**
>
> If:
>
> (a) a person has been dismissed; and
>
> (b) the person, or an industrial association that is entitled to represent the industrial interests of the person, alleges that the person was dismissed in contravention of this Part;
>
> the person, or the industrial association, may apply to the FWC for the FWC to deal with the dispute."

[132] Section 368 of the Act prescribes how the Commission is to deal with application purportedly lodged under section 365 of the Act.

"**368 Dealing with a dismissal dispute (other than by arbitration)**

(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 that 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.

(4) A general protections court application is an application to a court under Division 2 of Part 4-1 for orders in relation to a contravention of this Part."

[133] The Full Federal Court in the Coles Decision, held that a person must have been dismissed to be entitled to make a general protections dismissal dispute application under section 365 of the Act.[26]

[134] The Full Court went on to explain:

"To summarise, when an application is purportedly lodged under s 365 it is open to a respondent to assert that there has been no dismissal, so giving rise to a dispute on that question. Such a dispute falls to be determined not under s 368 but under s 365 itself. It is an antecedent dispute going to the entitlement of the applicant to apply. It is also open to a respondent to admit that a dismissal has occurred but dispute that the dismissal took effect within 21 days of the date that the application was filed. Such a dispute may give rise to an issue under s 366(1), involving as it does a question as to whether it is necessary for the FWC to determine whether more time should be "allowed" for the application to be made under s 365. That too is an antecedent dispute, going to the question of whether an application has been made. It is a dispute that must be resolved before the powers conferred by s 368 can be exercised at all.

Contrary to Mr Milford's submissions, it is not correct to say that the FW Act contains no express powers for the resolution of antecedent issues of the kind mentioned above, nor is it correct to search for an express conferral of power of that kind in any event.

> Part 6-1 of the FW Act (which concerns multiplicity of actions) contains numerous references to applications before the FWC (including an application under s 365) failing for "want of jurisdiction", so recognising that an administrative tribunal such as the FWC may determine the limits of its powers (albeit not finally). No express power is necessary. As to procedure, s 590 expressly empowers the FWC to inform itself in relation to "any matter before it in such manner as it considers appropriate". In the present case the "matter" before the Deputy President was whether she had authority to deal with the dispute under s 368. To the extent that practices and procedures have not developed in the FWC to deal with challenges to its own jurisdiction, there is a power under s 609 to make procedural rules by legislative instrument to address the deficiency."

[135] The Commission is bound to follow the Full Federal Court's decision.

[136] Where an employer argues that an Applicant was not dismissed, as is the case here, the Commission must determine whether the person was dismissed before it can exercise powers under section 368 of the Act and is empowered to do so.

Consideration

[137] The Respondent's reply to the application argues at length under the heading '*Alleged Dismissal*' that the application cannot succeed because the Applicant resigned and was not forced to resign because of the Respondent's conduct.[27]

[138] The Applicant objects to the Commission determining the antecedent issue of jurisdiction on a number of grounds. The Applicant submits that the Commission should now issue a Certificate under section 368(3) of the Act.

[139] In my view, it is not 'too late' for the Commission to consider the question of jurisdiction and indeed it is obliged to do so and cannot simply ignore it.

[140] The fact that shortly before the Full Federal Court decision was handed down the Commission had purported to exercise powers under section 368 of the Act by conducting a conference and then was considering whether to issue a certificate or hold another conference doesn't create jurisdiction where it never existed.

[141] Section 386 of the Act prescribes that a person has been dismissed if the person has resigned, "*but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.*"

[142] A forced resignation is when an employee has no real choice but to resign.

[143] The employer must act with the intent to bring the employment relationship to an end or act in a way that has that probable result.

[144] I will now consider whether the Applicant, who resigned in writing on 20 February 2020, was, within the meaning of section 386 of the Act, dismissed by the Respondent.

[145] The evidence is clear that PIPs were a normal process commonly used by the Respondent.

[146] In this instance, the evidence is that there were sound reasons for the Respondent to require the Applicant to undergo the PIP related to his prior performance.

[147] Considered objectively, the evidence does not support a conclusion that the Applicant's PIP was contrived or otherwise deliberately designed to make him resign from his employment.

[148] Whilst the Applicant focused heavily on the line count in his evidence and submissions, there were multiple other measures of his performance included in the PIP.

[149] The evidence regarding the line count KPI is that the 150-line count was, in the context of the PIP, which allowed the Applicant to focus on the task of receipting and processing freight, reasonable and achievable. In fact, the Applicant did achieve this line count on some days. Further on those days when there were valid reasons that explained why he had not achieved the line count this was taken into account and he was then deemed to have met expectations for those days.

[150] Considered objectively, the PIP was not unreasonable.

[151] There is no evidence that the Respondent took action intending to bring the relationship to an end. Whilst this is asserted by the Applicant, there is no evidence of such intent.

[152] The evidence does not support a conclusion that the Respondent's actions would have the probable result of bringing this relationship to an end. PIPs are commonly used to assist employees to improve their performance and there was no reason to assume that this was not possible in the Applicant's case. The evidence is that throughout the process he did meet expectations on a number of occasions.

[153] It was not the case that the Applicant had no real choice other than to resign. The Applicant had several options open to him other than to resign as he did.

[154] The Applicant had the option of remaining at work and seeing the PIP through to finality. If he succeeded, he would have remained in employment. If he had not succeeded in completing the PIP, the Respondent would have to decide whether it wished to dismiss him or not.

[155] Remaining at work clearly was an option, given that in his letter of resignation he gave notice that he would continue to work for a further four weeks, the notice period he was contractually required to work out.

[156] Separately, to the extent that he was aggrieved about the PIP process or any other issue, he had the option of pursuing this under the Dispute Settlement Procedure prescribed in his contract of employment. This procedure entitled him to escalate any grievance which could ultimately be reviewed by persons more senior than those involved in the PIP process. Nothing prevented him from doing this at any point prior to his resignation.

[157] Whilst from the Applicant's subjective perspective the PIP may have been challenging and upsetting, objectively, the Respondent's conduct did not force the Applicant to resign at all. The Applicant had other alternatives but instead chose to voluntarily resign.

[158] The Applicant was not dismissed.

[159] Consequently, the Applicant was not entitled to make this application under section 365 of the Act and therefore the Commission has no jurisdiction to exercise the powers under section 368 of the Act

[160] Accordingly, this application will be dismissed for want of jurisdiction. An order [PR728194] to that effect will now be issued.

Appearances:

M Lourey of Chapmans Barristers and Solicitors for the Applicant.
D Garner for the Respondent.

Hearing details:

2021.
Perth:
January 18.

Final written submissions:

Applicant, 12 February 2021
Respondent, 2 February 2021

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[1] [2020] FWC 4485.

[2] [2020] FCAFC 152.

[3] Exhibit R1, at attachment EN 1.

[4] Transcript at PN 227.

[5] Ibid., at PN 152.

[6] Ibid., at PN 149, 154, 156, and 157.

[7] Ibid., at PN 152, 185-188.

[8] Ibid., at PN 174-178.

[9] Ibid., at PN 190-193.

[10] Ibid., PN 225.

[11] Exhibit R3, at attachment EN 5.

[12] Exhibit R3, at paragraph 9.

[13] Transcript at PN 371-383.

[14] Ibid., at PN 409-412.

[15] Ibid., at PN 430.

[16] Exhibit A3 at Pages 56-57.

[17] Transcript at PN 433-446.

[18] Ibid., at PN 464-465.

[19] Exhibit A3 at paged 58 and 60.

[20] Transcript at PN 447-458.

[21] Ibid., at PN 502.

[22] Ibid., at PN 413.

[23] Ibid., at PN 497-499.

[24] Ibid., at PN 508-512.

[25] Ibid., at PN 530.

[26] *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152 at [54].