[2023] FWC 1005

The attached document replaces the document previously issued with the above code on 28 April 2023.

Section 370 has been reproduced and replaced at [47].

Associate to Deputy President Easton.

Dated 1 May 2023

[2023] FWC 1005 [Note: An appeal pursuant to s.604 (C2023/2746) was lodged against this decision - refer to Full Bench decision dated 10 July 2023 [[2023] FWCFB 115] for result of appeal.]

FairWork Commission

DECISION

Fair Work Act 2009
s.365—General protections

Zhenxin Yang
v
Dijones Property Services Pty Ltd
(C2022/8543)

Zhenxin Yang
v
Mukhi Real Estate Pty Ltd
(C2022/8656)

DEPUTY PRESIDENT EASTON SYDNEY, 28 APRIL 2023

General protections application filed out of time – applicant dismissed by an employer operating a real estate business – applicant obtained employment with a second real estate business shortly after dismissal – applicant decided to delay his application to the Commission because it would have placed his new employment at risk – no "unique" relationship between the two real estate businesses – no exceptional circumstances – no capacity for the Commission to grant an extension of time.

Application to join an alleged accessory to general protections claim involving dismissal – Commission's power to deal with disputes regarding general protection claims – s.370 does not prevent a general protections court application against an alleged accessory who was not a party to the dispute before the Commission or who was not named in a certificate issued under s.368.

The Commission's powers to direct persons to attend a conference – not necessary to amend an application to join an alleged accessory – the Commission's role in general protections matters – appropriate to recognise the alleged accessory is a party to the dispute regarding the applicant's dismissal.

[1] Mr Yang started and finished his career in real estate in 2022. In August Mr Yang commenced employment with Mukhi Real Estate Pty Ltd (**Mukhi RE**), working in Neutral Bay under the DiJones Real Estate banner. In early October Mr Yang was dismissed. In late October Mr Yang commenced new employment with DiJones Property Services Pty Ltd (**DiJones PS**), working in Beecroft also under the DiJones Real Estate banner. On 5 December 2022 Mr Yang was dismissed from that employment.

[2] On 22 December 2022 Mr Yang made a single application to the Fair Work Commission alleging that both Mukhi RE and DiJones PS dismissed him in contravention of the general protection provisions of the *Fair Work Act 2009* (Cth) (**the Act**)

[3] Mr Yang's single application has been bifurcated administratively because different issues arise in relation to each employer.

[4] Mr Yang's claim against Mukhi RE was made outside of the time limit in s.366 of the Act. After making his application Mr Yang sought to add Mr Mukhi as a party to the dispute in relation to his dismissal by DiJones PS. Mr Yang alleges that Mr Mukhi was an accessory to DiJones PS' contraventions of the general protection provisions.

[5] Mr Yang seeks an extension of time under s.366(2) to file his application against Mukhi RE, and an order that his application against DiJones RE be amended to include Mr Mukhi as an alleged accessory.

[6] This decision deals with both preliminary matters.

Background

[7] The two matters were listed consecutively for hearing on 24 March 2023. Mr Yang appeared for himself and Ms Egri of the Real Estate Employers Federation appeared for each respondent.

[8] The matters have been dealt with as preliminary matters and the evidence before the Commission was not comprehensive. Unlike matters in a Court, there are no pleadings filed by the parties.

[9] Mr Yang's evidence was not clear. His evidence included the following:

> "1. Nigel Mukhi is the director of Mukhi Real Estate Pty Ltd.
>
> 2. Nigel Mukhi is also the partner of Dijones property services pty ltd, as it shows on his profile and also all the Emails signatures…
>
> 3. Nigel Mukhi is one the Captain of Dijones Brand (He is a big man in the office), he is also one of the Captain of Whole Australian Real Estate Industry.
>
> …
>
> 7. The applicant got terminated by Mukhi's Real Estate Pty Ltd then starting a new contract with Dijones is more like a redeployment within the same enterprise. (As HR called me after the termination and address it as CHANGE TEAM).
>
> 8. The main reason for termination from Mukhi Real Estate Pty Ltd is because the applicant raised a few complaints (then got terminated) about he was asked to do 876 program (Without any overtime pay) when he was employed by Mr Nigel Mukhi.
>
> …

16. At the termination meeting [on 6 October 2022 at which he was dismissed from his employment with Mukhi RE], Mr Mukhi promised he will calculated all the "money owed" and pay the applicant generously as final pay in lieu.

17. On the next day, the applicant only received one week's notice pay as final payment, the applicant then sent an email to Mr Mukhi asking for owed payment…

18. After the termination from Mr Mukhi, the applicant was offered to work within the same enterprise, In the applicant's view, Mr Mukhi sits on one of the top hierarchical of the Dijones Property, it will causing extremely high risk of losing applicant's job if the applicant submit either general protection claim or tried to pursuing any wage theft from Mr Mukhi by that time.

19. As the applicant has explained, Mr Mukhi (The partner of Dijones) and his company are in deep connection to both of the termination."

[10] In his second statement/submission Mr Yang said:

"Despite the applicant's termination by Mr. Mukhi, he still had to see him during weekly training sessions or any company event/party.

The applicant believes that submitting either a general protection claim or pursuing wage theft from Mr. Mukhi would have resulted in an extremely high risk of losing their job since Mr. Mukhi was on the top hierarchical level of the Dijones Property.

…

During the employment period, Mr. Mukhi only came to the office once or twice a week and was on holiday most of the time. The applicant received direct instructions from Ms. Dimi Kambanis and Mr. Hayden (Mukhi's team of four).

…

[On 6 October 2022] Mr. Mukhi arrived at the office around 4:00 pm. He told the applicant that he had called HR and Regional Manager Victor Gennusa before Mr. Mukhi also promised to calculate all the "money owed" and pay the applicant generously as final pay in lieu.

It makes no sense that Dijones would offer the applicant an alternative job without Mr. Mukhi's permission. It is a fact that Mr. Mukhi sits on top of the hierarchy of Dijones Property.

The applicant accepted the redeployment and commenced in a new team on 20/10/22.

…

> It is the applicant's view that anyone in a similar position would keep quiet after being terminated by Mr. Mukhi, as HR told the applicant it had happened many times before."

[11] Mr Mukhi gave evidence for the preliminary hearing. His statement included the following:

> "As a result of the concerns I had about Mr Yang's performance and conduct, I invited Mr Yang to a meeting at about 4 pm on 6 October 2022 at 15 Grosvenor Street, Neutral Bay NSW 2089. During this meeting, I terminated Mr Yang's employment with Mukhi RE with immediate effect and handed him the letter of termination.
>
> At 8.14 pm on 7 October 2022, I emailed Mr Yang and attached to that email his final pay slip. Mr Yang's final pay was paid in accordance with his employment agreement and Real Estate Industry Award 2020, which included wages up to and including his final day of work, payment in lieu of notice and accrued unused annual leave…
>
> Mr Yang accepted his termination for the reasons outlined paragraph 5 above. I did not have any further interactions or correspondence with Mr Yang about his employment from 7 October 2022.
>
> …
>
> Mukhi RE is an independent contractor to DiJones and conjuncts with DiJones on certain property sales.
>
> Mukhi RE is a separate legal and employing entity to DiJones and is not a related entity to DiJones in accordance with section 50AAA of the *Corporations Act 2001*.
>
> Mukhi RE has no financial interest or shareholding in DiJones."

[12] The key background matters that I have taken into account for the purposes of determining the two preliminary issues can be summarised as follows:

(a) Mr Yang was employed by Mukhi RE from 29 August 2022 until 6 October 2022;
(b) Mr Yang was required under s.366 to make his general protections claim against Mukhi RE by no later than 27 October 2022;
(c) On 20 October 2022 Mr Yang commenced employment with DiJones RE;
(d) Mr Yang queried his termination payment from Mukhi RE but otherwise not challenge the dismissal by Mukhi RE before accepting employment with DiJones PS;
(e) Mr Yang was employed by DiJones PS from 20 October 2022 to 5 December 2022;
(f) during his employment with DiJones PS, Mr Yang attended meetings and training sessions and saw Mr Mukhi at some, or at least one, of these meetings;
(g) Mr Yang did not talk to Mr Mukhi regarding his employment after 7 October 2022; and
(h) Mr Yang alleges that Mr Mukhi has a "deep connection" to DiJones PS, but has not identified any conduct by Mr Mukhi after 7 October 2022 that has any connection to DiJones PS' decision to dismiss Mr Yang on 5 December 2022.

Extension of Time - Consideration

[13] The first matter to be dealt with is the application for an extension of time for Mr Yang to commence an application against Mukhi RE.

[14] An application to the Commission to deal with a dismissal dispute involving an alleged contravention of the general protection provisions must be made within 21 days after the dismissal took effect or within such further period as the Commission allows (per s.366(1)). The Commission may only allow a further period if it is satisfied that there are exceptional circumstances. Section 366(2) is in the following terms:

> **"366 Time for application**
>
> …
>
> (2) The FWC may allow a further period if the FWC is satisfied that there are exceptional circumstances, taking into account:
>
> (a) the reason for the delay; and
>
> (b) any action taken by the person to dispute the dismissal; and
>
> (c) prejudice to the employer (including prejudice caused by the delay); and
>
> (d) the merits of the application; and
>
> (e) fairness as between the person and other persons in a like position."

[15] Section 394 imposes the same time limit on making an application for an unfair dismissal remedy. Section 394(3) and 366(2) are in almost identical terms. Section 394(3)(b) is one additional factor that is not included in s.366(2): "whether the person first became aware of the dismissal after it had taken effect". The Commission's approach to s.366(2) and s.394(3) are substantially the same.

[16] The exceptional circumstances requirement establishes a 'high hurdle' for applicants to overcome. The Full Bench in *Nulty v Blue Star Group Pty Ltd* (2011) 203 IR 1, [2011] FWAFB 975 described exceptional circumstances as follows:

> "[13] In summary, the expression "exceptional circumstances" has its ordinary meaning and requires consideration of all the circumstances. To be exceptional, circumstances must be out of the ordinary course, or unusual, or special, or uncommon but need not be unique, or unprecedented, or very rare. Circumstances will not be exceptional if they are regularly, or routinely, or normally encountered. Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional. It is not correct to construe "exceptional circumstances" as being only some unexpected occurrence, although frequently it will be. Nor is it correct to construe the plural "circumstances" as if it were only a singular occurrence, even though it can be a one-off situation. The ordinary and natural meaning of

> "exceptional circumstances" includes a combination of factors which, when viewed together, may reasonably be seen as producing a situation which is out of the ordinary course, unusual, special or uncommon.
>
> …
>
> [15] A finding that there are "exceptional circumstances", taking into account the matters specified in paragraphs 366(2)(a) to (e), is necessary before the discretion to extend time is enlivened. That is, even when "exceptional circumstances" are established, there remains a discretion to grant or refuse an extension of time. That discretion should be exercised having regard to all the circumstances including, in particular, the matters specified in paragraphs 366(2)(a) to (e) and will come down to a consideration of whether, given the exceptional circumstances found, it is fair and equitable that time should be extended."

[17] The factors listed in s.366(2) and s.394(3), considered separately or in combination, might constitute exceptional circumstances, even if no single factor is exceptional (per *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd t/as Richmond Oysters* (2018) 273 IR 156, [2018] FWCFB 901 ("***Stogiannidis***")).

Extension of Time - reason for the delay

[18] I am required to take into account "the reason for the delay" (per s.366(2)(a)). The test invariably applied is whether an applicant has a 'credible or reasonable' explanation for the delay. The reasonableness of an explanation is not measured in a vacuum: firstly it must be assessed as part of an inquiry into whether exceptional circumstances exist, and then secondly in deciding whether the Commission should exercise its discretion to grant the extension.

[19] Recognising that the reason for delay is only one of several factors to be considered, it is not *essential* that an applicant provide a credible or reasonable explanation for the delay (per *Stogiannidis* at [30]-[40] and *Keith Long v Keolis Downer t/as Yarra Trams* (2018) 279 IR 361, [2018] FWCFB 4109 at [36] ("***Yarra Trams***")). That said, if an applicant does not have a credible explanation the Commission is generally less likely to find that exceptional circumstances exist (at least exceptional circumstances that support an extension of time).

[20] A good, credible or even reasonable explanation for delay might ultimately count for nought if the Commission is not satisfied that exceptional circumstances exist. Indeed, many applicants with good, credible explanations for delay do not receive an extension of time because they cannot firstly establish that exceptional circumstances exist.

[21] Mr Yang said that after he secured employment with DiJones PS he did not make an application against Mukhi RE because he thought it would jeopardise his new employment.

[22] In this regard Mr Yang relied on the "unique structure" between DiJones' enterprise and its independent contractors and the "deep connection" between the two employers. The possibility of two connected businesses colluding in a single course of conduct (albeit involving two dismissals) arises at least for consideration. The fact that both employers operate similar businesses, in different areas of Sydney but under the same brand, might appear at first blush to be unusual, and perhaps even exceptional.

[23] However Mr Yang could not identify any aspect of what he called the "DiJones' enterprise structure" that was "unique". On the material before me it seems that the two employers operate separate businesses, sharing business systems, marketing resources and staff training. Mr Yang was dismissed from one employer operating a real estate business under the DiJones banner and two weeks later Mr Yang accepted an offer of employment with another employer operating a real estate business under the DiJones banner. This circumstance is indistinguishable from a worker being dismissed by one franchisee and obtaining employment with another franchisee and is not "unique".

[24] Mr Yang relied on the ongoing presence of Mr Mukhi within the "DiJones enterprise" to suggest that a general protections application made within the time limit in s.366 "would have resulted in an extremely high risk of losing [his] job."

[25] Without forming a view about the precise risk of losing his job was, I accept that Mr Yang's decision to delay making his claim was logical and sensible. Mr Yang would probably not have made any claim against Mukhi RE if his employment with DiJones PS had not ended so quickly.

[26] Mr Yang's reason for the delay does not support a finding that there were exceptional circumstances.

[27] The fact that Mr Yang obtained other employment soon after the dismissal and decided that it was in his best interests not to file an application is not an exceptional circumstance. It is not "out of the ordinary course, or unusual, or special, or uncommon" (per *Nulty* at [13]).

[28] The fact that the new employment only lasted a few weeks does not mean that I should consider Mr Yang's decision not to make an application within 21 days of the first dismissal in a different light. The later event does not reveal any circumstance, for example, that was hidden from Mr Yang in the earlier period.

[29] Nor does the fact that Mr Yang was dismissed by DiJones PS in December provide a credible explanation for the delay in the period between October and December, or cause me to consider the delay in this period in a different light.

[30] In taking into account all of the above, Mr Yang's explanation for the delay does not point towards the existence of exceptional circumstances. More so, even if I were to find that there were exceptional circumstances, Mr Yang's explanation for the delay does not support the granting of an extension of time.

Extension of Time - the merits of the application

[31] Section 366(2)(d) requires that I take into account "the merits of the application" when considering whether there are exceptional circumstances and the extension of time more generally.

[32] Little evidence was led by the parties and it is not possible or appropriate to make any firm or detailed assessment of the merits that at this juncture. There are sound reasons why the Commission should not receive evidence and make factual findings on contested issues at this

stage of the proceedings: most notably because parties should not have to present their evidentiary case twice (see *Yarra Trams* at [72]).

[33] In this context it is sufficient that an applicant establish that his claim is not without merit (per *Thomas Cosgrove v Clarity Interiors* [2020] FWCFB 5464 at [33]). The weight to be given to this consideration is dependent on the extent to which there is merit in the substantive application.

[34] Mr Yang does have at least an arguable case under the general protections regime. However I do not consider the merits in this case point towards a finding that there are exceptional circumstances. I consider the merits of the application to be a neutral consideration.

Other factors

[35] In my view the other factors listed in s.366(2) are neutral considerations. Firstly, Mr Yang took no steps to dispute the dismissal (s.366(2)(b)). Secondly, there is no evidence of prejudice to Mukhi RE (s.366(2)(c)). Thirdly, I am not aware of any persons or cases that are relevant to the question of fairness as between Mr Yang and other persons (s.366(2)(e)).

Extension of Time - Finding

[36] As referred to above, the Full Bench in *Stogiannidis* reasoned that no one factor needs to be exceptional in order to enliven the jurisdiction to extend time and individual factors might not be particularly significant when viewed in isolation, but that I must also consider the matters collectively and ask whether they disclose exceptional circumstances.

[37] In this case none of the above matters considered individually point toward there being any exceptional circumstances. Nor do these matters collectively establish there are exceptional circumstances.

[38] Because I am not satisfied that there are exceptional circumstances, there is no basis for me to allow an extension of time. I decline to grant an extension of time under s.366(2) for Mr Yang to make an application under s.365 against Mukhi RE. Accordingly, the application against Mukhi RE must be dismissed.

The claim to name Mr Mukhi as a respondent

[39] Mr Yang's original application named Mukhi RE and DiJones PS as the two respondents. After the application was filed, and presumably after Mr Yang became aware that his claim against Mukhi RE might not proceed, Mr Yang raised an allegation that Mr Mukhi was an accessory to DiJones PS' contravention of the general protection provisions.

[40] The second matter to be resolved is whether Mr Mukhi should be regarded as a party to Mr Yang's claim against DiJones PS and whether Mr Mukhi's name should appear on the certificate issued by the Commission under s.368 if conciliation is not successful.

[41] It is necessary to firstly make some observations about the Commission's role in general protection claims involving a dismissal.

[42] Sections 365 and 368 authorise the Commission to "deal with" certain disputes, being disputes that arise if a person has been dismissed and the person or their industrial organisation alleges that the person was dismissed in contravention of the general protection provisions in the Act (Part 3.1 of the Act). Sections 365 and 368 of the Act are in the following terms:

> **"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.
>
> **"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."

[43] These provisions authorise the Commission to deal with such disputes using the powers available under sections 592 and 595, viz:

> **"592 Conferences**
>
> (1) For the purpose of performing a function or exercising a power of the FWC (other than a function or power under Part 2-6), the FWC may direct a person to attend a conference at a specified time and place.
>
> Note: Part 2-6 deals with minimum wages. For the conduct of annual wage reviews, see Subdivision B of Division 3 of Part 2-6.
>
> (2) An FWC Member (other than an Expert Panel Member), or a delegate of the FWC, is responsible for conducting the conference.
>
> (3) The conference must be conducted in private, unless the person responsible for conducting the conference directs that it be conducted in public.
>
> Note: This subsection does not apply in relation to conferences conducted in relation to unfair dismissal, general protection or sexual harassment matters (see sections 368, 374, 398, 527R and 776).
>
> (4) At a conference, the FWC may:
>
> (a) mediate or conciliate; or
>
> (b) make a recommendation or express an opinion.
>
> (5) Subsection (4) does not limit what the FWC may do at a conference.
>
> **595 FWC's power to deal with disputes**
>
> (1) The FWC may deal with a dispute only if the FWC is expressly authorised to do so under or in accordance with another provision of this Act.
>
> (2) The FWC may deal with a dispute (other than by arbitration) as it considers appropriate, including in the following ways:
>
> (a) by mediation or conciliation;
>
> (b) by making a recommendation or expressing an opinion.
>
> (3) The FWC may deal with a dispute by arbitration (including by making any orders it considers appropriate) only if the FWC is expressly authorised to do so under or in accordance with another provision of this Act.
>
> Example: Parties may consent to the FWC arbitrating a bargaining dispute (see subsection 240(4)).

(4) In dealing with a dispute, the FWC may exercise any powers it has under this Subdivision.

Example: The FWC could direct a person to attend a conference under section 592.

(5) To avoid doubt, the FWC must not exercise the power referred to in subsection (3) in relation to a matter before the FWC except as authorised by this section."

[44] For present purposes it is important to note that in s.595(1) the Commission is able to direct "a person" to attend a conference. This power is not limited to directing a named party to attend a conference.

[45] If the Commission is satisfied that all reasonable attempts to resolve the dispute have been or are likely to be unsuccessful, it must issue a certificate "to that effect" (per s.368(3)).

[46] The requirement to issue a certificate is not so specific as to require the Commission to name every party to the dispute on the certificate. The Commission must issue a certificate if it is satisfied of the matters stated in s.368 – there is no option for the Commission to refuse to issue a certificate if those conditions are met. Section 368 merely requires that the certificate is "to that effect" – meaning that the Commission is satisfied that all reasonable attempts to resolve the dispute have been or are likely to be unsuccessful.

[47] Section 370 is in the following terms:

"370 Taking a dismissal dispute to court

A person who is entitled to apply under section 365 for the FWC to deal with a dispute must not make a general protections court application in relation to the dispute unless:

(a) both of the following apply:

(i) the FWC has issued a certificate under paragraph 368(3)(a) in relation to the dispute;

(ii) the general protections court application is made within 14 days after the day the certificate is issued, or within such period as the court allows on an application made during or after those 14 days; or

(b) the general protections court application includes an application for an interim injunction."

[48] The "person who is entitled to apply under section 365" referred to in s.370 is a person who has been dismissed and who alleges that they were dismissed in contravention of the general protection provisions on the Act. The term "general protections court application" is defined in s.368(4) to mean "an application to a court under Division 2 of Part 4-1 for orders in relation to a contravention of this Part."

[49] An applicant cannot make a general protections court application unless the Commission has issued a certificate under paragraph 368(3)(a) "in relation to the dispute."

Section 370 imposes a "substantial restriction upon a person making a general protections court application [to a court] in relation to a dismissal dispute" (see *Ward v St Catherine's School* [2016] FCA 790 at [3]).

[50] In this case Mr Yang will not be able to make a general protections court application against DiJones PS unless the Commission issues a certificate under s.368.

[51] If a certificate under s.368 is issued and a general protections court application is made against DiJones PS, Mr Yang is not precluded from making a claim against Mr Mukhi as an alleged accessory.

[52] In the case of *Bognar v Skilled Offshore Pty Ltd and Another* (2016) 315 FLR 364, [2016] FCCA 2962 Mr Bognar made an application to the Fair Work Commission against his former employer, Skilled Offshore. Conciliation was not successful and a certificate under s.368 was issued. Mr Bognar then made an application to the Federal Circuit Court in relation to his dismissal against Skilled Offshore and also against another company, Sapiem. Mr Bognar alleged that Sapiem was an accessory (see s.550) to Skilled Offshore's contravention of the general protection provisions.

[53] Sapiem made an application to the Court asking that the case against it be dismissed, arguing that the Court did not have jurisdiction to hear the claim because Sapiem was not named in the certificate issued by the Commission under s.368. The Court rejected Sapiem's argument, finding that Mr Bognar could make a claim in the Court against Sapiem even if the original application to the Commission and the certificate issued did not name Sapiem (at [65]):

> "For the above reasons, Saipem's argument that this Court has no jurisdiction to deal with the claim under s.550 of the *FW Act* that Saipem is accessorially liable in relation to the alleged contravention cannot succeed. Provided that a Section 368 Certificate has issued from the FWC, and provided that the general protections court application is in relation to the same dismissal (in the broad sense: see *Shea (No. 1)*), accessorial liability is limited only by the terms of s.550 of the *FW Act*, and the capacity to bring a party alleged to be accessorially liable within the relevant acts or omissions set out in s.550(2) of the *FW Act*."

[54] It is not therefore essential to Mr Yang's claim against Mr Mukhi that Mr Mukhi be named on any certificate issued by the Commission. If conciliation fails and Mr Yang commences proceedings in a court against DiJones PS then Mr Yang can also make an application against Mr Mukhi at that time (or at least he is not precluded by s.370 from doing so).

[55] Many applications to the Commission under s.365 are made against employers and additional persons named as alleged accessories. There are good reasons why an applicant might choose to include alleged accessories in their application to the Commission – the most obvious being that the conciliation or mediation process undertaken by the Commission would then be available to resolve claims against accessories.

[56] It is also not essential that Mr Mukhi is named in Mr Yang's application as a party to the 'dispute' about his dismissal. The Commission is seized with power under s.368 and s.592

to deal with the dispute by way of a conference, and to direct Mr Mukhi to attend a conference under s.592 even if he is not a named party.

[57] In the same way that it is not essential to the Commission's powers that Mr Mukhi be named as a party to the dispute or be cited on a certificate that is issued, there is no prohibition in the Act that would prevent these things occurring.

[58] Understood this way, it is a matter of discretion for the Commission to recognise Mr Mukhi as a named respondent and/or to refer to Mr Mukhi in any certificate that is issued.

[59] In deciding whether to exercise my discretion to grant Mr Yang's procedural application, the first matter to recognise is the very limited role the Commission plays in general protection matters involving dismissal. The Commission must resolve any disputes about whether an application has been properly made and, for example, determine the limits of its authority to deal with a dispute under s.368 (see *Coles Supply Chain v Milford* (2020) 300 IR 146, [2020] FCAFC 152 at [43]).

[60] Once satisfied that an application has been properly made, it is not the role of the Commission to determine whether an application has merit. For example, the Commission has a general discretion under s.587 to dismiss applications that are frivolous or vexatious or have no reasonable prospect of success, but not so in relation to general protection applications involving a dismissal (see s.587(2)).

[61] Mr Yang's claim that Mr Mukhi is an accessory to the alleged contraventions by DiJones PS appears to be very weak.

[62] The claim against DiJones PS is that it dismissed Mr Yang for reasons that include his alleged exercising of workplace rights during his employment with DiJones PS. Mr Yang does not allege that Mr Mukhi knew that Mr Yang had exercised workplace rights during his employment with DiJones PS, nor does he even allege that Mr Mukhi engaged in any conduct at all in December 2022 in relation to DiJones PS' decision to dismiss Mr Yang.

[63] Mr Yang says he "genuinely believes" that Mr Mukhi was involved in the dismissal by DiJones PS. At the hearing he accepted that all this means in substance is that he *suspects* that Mr Mukhi was involved in his dismissal by DiJones PS.

[64] If the matter proceeds to a court these are matters that, in the ordinary course, will be properly pleaded in a Statement of Claim. If the case against Mr Mukhi, once it is properly pleaded, has no reasonable prospects of success, Mr Mukhi can pursue avenues available to him to have the claim struck out, including potentially an application for costs.

[65] For present purposes there is a dispute before the Commission in relation to Mr Yang's dismissal by DiJones PS. The dispute also involves an allegation that Mr Mukhi was knowingly involved in DiJones PS' contravention of the general protection provisions as an accessory. In the context of the Commission's role merely to conciliate general protection matters, the proper course is to recognise that Mr Mukhi is a party to the dispute about Mr Yang's dismissal and, so far as possible, deal with that dispute by conciliation or mediation.

[66] A conference will shortly be convened to deal with Mr Yang's claim against DiJones PS, and Mr Mukhi will be invited to attend.

[67] I will issue a separate order dismissing Mr Yang's claim against Mukhi RE (PR761475).

DEPUTY PRESIDENT

Appearances:

Mr Z Yang, Applicant
Ms A Egri, for the Respondents

Hearing details:

2023.
Sydney (By Video using Microsoft Teams)
March 24.

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