



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Kelley Fouracre

v

BHP Coal Pty Ltd
(U2022/6596)

COMMISSIONER SPENCER

BRISBANE, 5 MAY 2023

Application for unfair dismissal – jurisdictional decision - Applicant passed away after hearing – whether the Commission has jurisdiction to issue a decision – whether application for unfair dismissal remedy made under section 394 survives death of applicant and may be continued by a person of appropriate legal standing or estate - application dismissed.

[1] Mr Kelley Fouracre (the Applicant) lodged an application to the Fair Work Commission (the Commission) for an unfair dismissal remedy pursuant to section 394 of the *Fair Work Act 2009* (the Act) alleging that the dismissal of his employment by BHP Coal Pty Ltd (the Respondent/the Employer/BHP) was harsh, unjust or unreasonable. The Applicant sought reinstatement, continuity of service, remuneration for the interim period or compensation.

[2] The application was subject to a hearing. Mr Fouracre was represented by Mr Aidan Nash of the CFMMEU (the Union), and the Respondent was represented by Mr Nicholas Le Mare of Corrs Chambers Westgarth, instructed by Ms Tahira Sabdia and Ms Emily Larsen from the Respondent. At the conclusion of the hearing, the decision was reserved. The matter involved an allegation of sexual harassment and accordingly, various redactions of names on the transcript document were also applied for by consent between the parties. Confidentiality orders were also sought and granted by consent after the hearing.

[3] Following the hearing but prior to a decision being issued, the Commission and the Respondent were informed that Mr Fouracre had passed away. The Applicant's Union Representative informed Chambers by email that:

...
"We received the sad news this morning that the Applicant, Mr Fouracre, died by suicide on the weekend.

The union will communicate with his family about their wishes in relation to these unfair dismissal proceedings. Given that this must be a difficult time for them, we anticipate that it could be a week or two before we have any instructions.

I am bringing this matter to the Commission's attention, and I request, in consideration of Mr Fouracre's family, that no decision be issued, and no decision be made about whether or not to issue a decision, until after we have been able to receive instructions.

I will revert to Chambers after seeking instructions from Mr Fouracre's family."

...

[4] After a period of time, but prior to a further response from the Union, correspondence was sent to the parties, acknowledging this email from the Union and conveying the Commission's condolences to all, related to the circumstances of Mr Fouracre's passing. Reference was also made to the Union's correspondence in which they referred to the potential of instructions being obtained from the deceased Applicant's family, in relation to them seeking the possible publication of a decision in this matter. Accordingly, it was set out in the correspondence from my Chambers that it was necessary to provisionally convey some of the relevant case authorities to be considered in relation to the current situation.

[5] It was referenced in the correspondence, on a preliminary basis, that the case authorities cited,¹ dealt with limitations on the publication of the decision in the circumstances where an Applicant is no longer able to receive the decision outcome or any potential remedy. The correspondence set out that with reference to the case authorities cited, that the right under the Act to make an unfair dismissal remedy application is personal to the dismissed employee, and that the Act does not confer a transferable right to a remedy. It was proposed that the parties should consider any case authorities with respect to this specific situation, and whether they elected to provide submissions, as to whether the decision could be provided. The Union sought to provide submissions on the matter and the Respondent therefore also sought to provide submissions in reply to the Applicant's submissions. Consent directions were issued, and the parties sought for the matter to be determined on the papers filed.

Summary of the Union's Submissions

[6] The Union submitted that the Commission has jurisdiction to release the decision, after an Applicant passes away and is required to make a decision on the matter. They stated that the statutory framework of an unfair dismissal application was complied with, and therefore a decision must be issued in accordance with section 601 of the Act.

[7] The Act provides as follows:

601 Writing and publication requirements for the FWC's decisions

(1) The following decisions of the FWC must be in writing:

- (a) a decision of the FWC made under a Part of this Act other than this Part;*
- (b) an interim decision that relates to a decision to be made under a Part of this Act other than this Part;*
- (c) a decision in relation to an appeal or review.*

Note: For appeals and reviews, see sections 604 and 605.

- (2) *The FWC may give written reasons for any decision that it makes.*
- (3) *A decision, and reasons, that are in writing must be expressed in plain English and be easy to understand in structure and content.*
- (4) *The FWC must publish the following, on its website or by any other means that the FWC considers appropriate:*
 - (a) *a decision that is required to be in writing and any written reasons that the FWC gives in relation to such a decision;*
 - (b) *an enterprise agreement that has been approved by the FWC under Part 24.*
- ...
- (6) *Subsections (1) and (4) do not limit the FWC's power to put decisions in writing or publish decisions.*

[8] The Union acknowledged that the availability of a remedy has changed with the Applicant's passing, however stated that the granting of a remedy is discretionary, and not an essential prerequisite in an unfair dismissal matter before the Commission. The Union referred to cases in support of its proposition that the Commission can issue an unfair dismissal decision without a remedy.² However, these cases all involved circumstances where the Applicant's conduct was the reason for the remedy being denied despite their being a finding of harshness or otherwise. None of the cases involved a deceased Applicant.

[9] Further, the Union argued that dismissing the application would not be an appropriate course of action. The Union submitted that the Commission's power to dismiss applications should be 'used sparingly and with caution.'³ In support of this, the Union referred to sections 399A and 587(1) of the Act and concluded that neither provision was applicable in the present circumstances.

[10] The Union also stated that the decisions referred to: *Stan v Frontline Australasia* ('Stan'),⁴ and *Rohrlach v L.M Robertson & P.F. Robertson T/A PF & LM Robertson* ('Rohrlach'),⁵ were not applicable to the facts at hand, as they argued both of those matters had no reasonable prospects of success due to the death of the Applicant occurring before giving evidence and the hearing of the matter. Further, the Union stated that these cases had significant factual disputes and jurisdictional objections that were unable to be determined due to the incomplete state of the evidence. It was submitted that this was in contrast with the current matter where all submissions and evidence were provided in accordance with the directions, and a decision was reserved after the hearing.

[11] Further, the Union submitted that as the present case had been prosecuted and the decision reserved, there was no need to identify a next of kin or executor of the Applicant's estate in seeking the decision, and there were no further steps required for the Commission to issue a decision.

[12] The Union highlighted the absence of legislation ceasing an application on the death of the Applicant. They additionally referred to section 66 of the *Succession Act 1981 (Qld)* as authority that all causes of action vested in a deceased person will survive for the benefit of the deceased's estate. This section relevantly sets out:

66 Survival of actions

(1) Subject to the provisions of this section and with the exception of causes of action for defamation or seduction, on the death of any person after the 15 October 1940 all causes of action subsisting against or vested in the person shall survive against, or, as the case may be, for the benefit of, the person's estate.

...

(5) Nothing in this section enables any proceedings to be taken which had ceased to be maintainable before the commencement of this Act.

...

[13] The Union concluded that the inability to assign a remedy to another person on behalf of the Applicant is not fatal to their case, as a remedy is not a prerequisite for an unfair dismissal application to be successful. They stated that even without a remedy, a finding that the Applicant had been unfairly dismissed would be of benefit to his legacy and reputation. It was submitted by the Union that the issuing of a decision would 'clear the name'⁶ of the deceased and provide closure for the Applicant's family.

Summary of Respondent's Submissions

[14] The Respondent's submissions conclude that the proceedings should be ceased, and the Commission's file should be closed. The Respondent stated that the nature of an unfair dismissal application and remedy is 'personal', meaning the application is unable to continue as a result of the Applicant's passing.

[15] In support of the above proposition, the Respondent referred to the absence of a provision in the *Fair Work Commission Rules 2013* ('the Rules') that considered the capacity to continue proceedings in the event of the death of an Applicant. The Respondent additionally referred to the absence of an express power or provision in the Act allowing for the substitution of a party.

[16] The Respondent referred to various case authorities⁷ to support its position that an unfair dismissal application cannot be continued by another person on behalf of the Applicant, after they are deceased. The Respondent submitted this was due to the 'personal and non-transferrable' nature of the unfair dismissal application and remedy.

[17] The Respondent referred to the case of *Stan* as authority that section 394 of the Act, grants the aggrieved employee the right to make an application for an unfair dismissal remedy, rather than the remedy itself.⁸

[18] The Respondent also referred to the Union's contention that the present circumstances can be distinguished from the case in *Stan*, as the application has been validly brought, and a decision has been reserved. The Respondent stated that this contention was misconceived as *Stan* confirmed that there is a requirement of legal authority for instructions to purport to continue an unfair dismissal application. The Respondent further distinguished the present circumstances from those in *Stan*, in that there has been no application by any person with legal standing, to maintain the application in circumstances where the Applicant has passed away.

[19] Further, the Respondent stated that the present circumstances of a hearing occurring, and a decision being reserved are not ‘material distinguishing factors.’⁹ The Respondent contended that the case authorities confirm the personal and non-transferrable nature of the application and the potential remedies, and as such, a decision cannot be issued.

Consideration

[20] In considering whether the decision in this matter can be released, a number of cases have been referred to. In *Stan*, the Applicant had passed away prior to any issues that required determination by the Commission being considered. The Applicant’s solicitors in the matter argued that a person named as the Applicant’s next of kin sought, in that capacity, to continue with the application. The decision stated that the Applicant appeared to have died intestate, and that the State Trustees were involved in obtaining a grant of probate or administration.¹⁰ No evidence was provided of the person’s status as next of kin or evidence of their capacity and legal authority to purport to continue with the application made by the Applicant. It was determined in *Stan* that the person, in those circumstances did not have any standing to seek permission to continue the application in their own name, or on behalf of the deceased Applicant’s estate.¹¹

[21] In the case of *Stan* Deputy President Gostencnik relevantly set out:

[4] The rules of the Federal Court of Australia contemplate the capacity to continue proceedings in Fair Work Act 2009 applications in the event of death if the interest in the proceedings or the liability of a party in the proceedings passes to another person during a proceeding, by assignment, transmission, devolution or by any other means. There is no similar rule to be found in the Fair Work Commission Rules 2013. Further there is no express rule or provision in the Act which would allow a substitution of a party in these circumstances¹²

...

[7] The right under the Act to make an unfair dismissal remedy application is personal to the dismissed employee. The Act does not confer a right to a remedy, but only a right to make an application and having it heard according to law. It is a right that is a bare and non-assignable right and generally is not one that is to be regarded as a proprietary right. The remedies of reinstatement, loss of pay orders or compensation that might be available do not follow simply because an applicant is successful in persuading the Commission that his or her dismissal was harsh, unjust or unreasonable. The remedies that might be granted are discretionary and the remedy of compensation is intertwined with and not severable from the discretionary considerations relating to an order for reinstatement.¹³

...

[9] In my view, the personal and discretionary nature of the remedy that might have been available to the Applicant had he succeeded in his application and the nature of the right to apply for a remedy makes it unlikely that the right to bring and maintain the application is something that may be assigned, transmitted, devolved or passed to another person even assuming there is power to make such an order. However as there is no application by any person with legal standing to assert the contrary or who seeks such an order it is unnecessary for me to finally decide that question.

[22] In the current circumstances, similarly, the Union did not refer to any person with legal authority seeking the merits decision or an order for remedy.

[23] In *Newman v Bunnings Group Limited*,¹⁴ Commissioner Bissett in dealing with a part heard matter, also relied on Deputy President Gostencnik's findings in the case of *Stan* to dismiss the application on the same basis.¹⁵

[24] In the matter of *Rohrlach v L.M Robertson & P.F. Robertson T/A PF & LM Robertson*¹⁶, ('*Rohrlach*') the decision of *Stan* was relied on (in circumstances where the Applicant had passed away prior to the determination of the jurisdictional matters and the merits) and similar conclusions were reached by way of the following paraphrased observations, which are also considered to be applicable in the circumstances of the current matter:

1. "Requirement for evidence of legal authority to purport to continue the application;
2. No rule in the Fair Work Commission Rules contemplating capacity to continue proceedings in the event of death as is the case in the Federal Court rules;
3. No express power or provision in the Fair Work Act (the Act) to allow a substitution of a party;
4. The right under the Act to make an unfair dismissal remedy application is personal to the dismissed employee and is non-assignable.
5. The remedies available do not follow simply by succeeding and are discretionary and the remedy of compensation is intertwined with and not severable from the discretionary considerations relating to an order for reinstatement;
6. The personal and discretionary nature of the remedies available make it unlikely that the right to bring and maintain the application is something that can be assigned, transmitted, devolved or passed to another person assuming such a power exists"¹⁷

[25] In the *Rohrlach* matter it was determined that in circumstances where there was no evidence of the legal standing of the next of kin, there was no power to press the application where the Applicant had passed away. Furthermore, it was confirmed that even if the legal standing of the next of kin had been established, in accordance with *Stan*, the right to a remedy for unfair dismissal is non assignable and not severable from the merits decision.¹⁸

[26] In the above cases, the applications were dismissed, pursuant to the discretion in section 587(1)(c) on the basis that the applications no longer had any reasonable prospect of success. It is recognised that such cases were part heard.

[27] The Union also referred to section 66 of the *Succession Act* in arguing a decision in this matter must be released. That Act deals with distinct proprietary rights, not personal rights such as those vested in employment, and as such that legislation is not relevant to this matter.

[28] Further, the case of *Millington v Traders International Pty Ltd*¹⁹ ('*Millington*') considered the matter of a deceased Applicant in the circumstances of bankruptcy and formed conclusions on the 'proprietary' nature of the right to make the application for unfair dismissal and for a remedy. The Full Bench in that case found that the application is not 'property' and therefore is not able to be vested in a trustee.²⁰ The Full Bench decision also made reference to *Georgiadis v Australian and Overseas Telecommunications Corporation*²¹ in support of this finding, where Dawson J stated:

“The right to maintain an action...constitutes property for the purposes of section 51(xxxi), whilst recognising that it is a personal right which is not capable of assignment at law...and would in other contexts not be regarded as property.”

(Emphasis added)

[29] In the case of *Hutchinson v Monash Health*²² (‘*Hutchinson*’), Deputy President Smith also stated the following:

In my view Mr Champion makes a persuasive case that the traditional concept of a chose in action is not relevant to a statutory remedy contained in beneficial legislation. I am drawn to agree with the Full Bench of the Industrial Relations Commission of New South Wales when it concluded: ...*Employment is not usually referred to, or known as, property. Whatever legal “interest” an employee has in his or her employment, it is not a property interest.*

(Emphasis added)

[30] In terms of the separate test of legal capacity to continue an application, the Union in their submissions have not referred to the legal authority of any person acting on behalf of the deceased Applicant’s estate or established evidence of any person purporting to have legal authority as the next of kin. Relevantly in the current matter, at the time of the events occurring that are the subject of the dismissal, the Applicant provided evidence that he was separated from his wife.²³

[31] The Union’s submissions focused on the advanced nature of the application in contrast to other cases.²⁴ The Union’s submission that the present case is distinguishable from *Stan* and *Rohrlach*, in that all of the evidence has been heard in the current matter prior to the Applicant’s death, is recognised. Notwithstanding this, even if there was capacity to continue the application, I reject the Union’s assertion that there is no need to identify a next of kin with legal capacity or an executor of the Applicant’s estate²⁵ (to continue the application in the Applicant’s absence).

[32] Even if these legal practicalities had been resolved, it is clear that as set out in *Stan*, there is no Rule or provision allowing for the substitution of a party in the circumstances of the Applicant’s passing.²⁶ The death of the Applicant, after the completion of the hearing does not alter the determination that the Commission does not have the ability to transmit or pass the right to the application to another person. I find that the circumstances of the process currently undertaken with this application do not present as a materially distinguishing factor,²⁷ with respect to the assessment of the personal and non-transferrable nature of an unfair dismissal application and remedy. As such, no such transfer of the application can be contemplated.

[33] Further, there is no evidence that the Applicant sought the decision and/or a remedy be assigned to another person in his absence. In the absence of these instructions, or a person with legal capacity, the Applicant’s primary remedy sought remains as reinstatement.²⁸ Without particular instructions from a party with legal standing as to the alternative remedy sought, caution must be exercised, particularly in circumstances of the Applicant’s death and where the subject matter of these proceedings involve allegations of some sensitivity.

[34] Though all the evidence has been heard, the capacity for the Commission to consider reinstatement as a remedy is, unfortunately in the circumstances, redundant. It is recognised that in lieu of reinstatement, compensation was sought. The consideration of reinstatement as the primary remedy and compensation in lieu thereof would require a consideration of changed facts since the hearing. However, the remedy of compensation is intertwined with, and not severable from, the discretionary considerations relating to a possible order for reinstatement,²⁹ nor from a consideration of the merits.

[35] The Full Bench in *Millington* explained that the “primary remedy” that must be considered in unfair dismissal matters is reinstatement,³⁰ prior to any consideration of compensation in lieu. The assessment must be made of the individual employee’s personal suitability to return to their former position, and as considered in the case of *Hutchinson*, Deputy President Smith found that “*the result in this case cannot be a half way house where an application may be considered valid but only insofar as particular relief is concerned*” (emphasis added). In applying *Millington*, I find that even if there was a continuing right for a decision to be issued on the merits of the case, no consideration could be given to remedy. The assessment would fail at the primary consideration of reinstatement, and only compensation could be appropriate. However, again as there is no estate or person purporting to have legal standing, there is no clarity on who or where the possible compensation might be payable. No effective Order could be made.

[36] There are no provisions in the Rules contemplating capacity to continue proceedings in the event of the death of the Applicant and no express power or provision exists in the Act to allow for a substitution of a party. The case law provides that the provision of the remedies available do not follow simply by substitution or succeeding, they are not severable.

[37] In summary, the release of a decision in the application fails on both grounds. Firstly, the right to pursue a section 394 application is not transferable, and further, there has been a failure to identify a person with legal authority to continue the application. Due to this, no decision could be released on merits or remedy, and one is not available without the other.

[38] As set out, in other like matters, the dismissal of the applications has been considered. Section 587 of the Act states:

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.*

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.

...

(3) The FWC may dismiss an application:

- (a) on its own initiative; or*
- (b) on application.*

(Emphasis added)

[39] In addition, Section 399A of the Act states:

399A Dismissing applications

(1) The FWC may, subject to subsection (2), dismiss an application for an order under Division 4 if the FWC is satisfied that the applicant has unreasonably:

- (a) failed to attend a conference conducted by the FWC, or a hearing held by the FWC, in relation to the application; or*
- (b) failed to comply with a direction or order of the FWC relating to the application; or*
- (c) failed to discontinue the application after a settlement agreement has been concluded.*

Note 1: For another power of the FWC to dismiss applications for orders under Division 4, see section 587.

Note 2: The FWC may make an order for costs if the applicant's failure causes the other party to the matter to incur costs (see section 400A).

(2) The FWC may exercise its power under subsection (1) on application by the employer.

(3) This section does not limit when the FWC may dismiss an application.

(Emphasis added)

Conclusion

[40] The Respondent's submissions made clear their view that the matter could not proceed to a decision, however, there was no distinct application from the Respondent for the matter to be dismissed pursuant to section 399A. They set out:

"...the proceedings should therefore cease and the Commission's file should be closed."³¹

However, given the limitations on issuing the decision arising from the case law, as there is no delegable right to pursue it or the remedy, there are no reasonable prospects of success.

[41] Therefore, pursuant to the discretion in section 587(1)(c), the decision cannot be provided, and the section 394 application is dismissed.

[42] I order accordingly.



COMMISSIONER

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¹ *Stan, v Frontline Australasia* [2014] FWC 5457 and *Rohrlach v L.M. Robertson & P.F. Robertson T/A PF & LM Robertson* [2018] FWC 2798.

² In support of its submissions the Applicant provided the following: *Cini v Plenty Valley Services Association Inc* [2012] FWA 6918; *Bevege v Javelin Transport - Kevin Lambert & Paul Scott T/A Resource Management Group* [2015] FWC 1929; *Folwell v Primeline Contracting Pty Ltd T/A Hi-Trans Express* (2020) FWC 1257.

³ *Resta v Myer Pty Ltd* [2013] FWC 7080 at [32].

⁴ [2014] FWC 5457.

⁵ [2018] FWC 2798.

⁶ Applicant's Submissions on Issuing a Decision at [34].

⁷ The Respondent referred to *Newman v Bunnings Group Limited* [2020] FWC 1776; *Subhas Chandra v Thiess Services Pty Ltd* [2014] FWC 984; *Stewart Robinson v Automotive Holdings Group Pty Ltd* [2014] FWC 1988; *Walter Wojcik v Region Peak Transport T/A Rocbrix Pty Ltd* [2016] FWC 2794; *Stan v Frontline Australasia* [2014] FWC 5457 and *Rohrlach v L.M. Robertson & P.F. Robertson T/A PF & LM Robertson* [2018] FWC 2798.

⁸ Respondent's Outline of Submissions in Relation to Jurisdictional Issue of Delegation at [7].

⁹ *Ibid* at [15].

¹⁰ *Stan v Frontline Australasia* [2014] FWC 5457 at [2].

¹¹ *Ibid* at [9].

¹² See rule 9.10 of the Federal Court Rules 2011.

¹³ *Millington v Traders International Pty Ltd* [2014] FWC 888 at [71].

¹⁴ [2020] FWC 1776.

¹⁵ *Ibid* at [8].

¹⁶ [2018] FWC 2798.

¹⁷ *Rohrlach v L.M. Robertson & P.F. Robertson T/A PF & LM Robertson* [2018] FWC 2798 at [4] considering *Stan v Frontline Australasia* [2014] FWC 5457.

¹⁸ *Rohrlach v L.M. Robertson & P.F. Robertson T/A PF & LM Robertson* [2018] FWC 2798 at [12].

¹⁹ [2014] FWC 888.

²⁰ *Ibid* at [69] referring to a consideration of *Hutchinson v Monash Health* [2013] FWC 8173 at [31].

²¹ (1994) 119 ALR 629 at 641.

²² *Hutchinson v Monash Health* [2013] FWC 8173 at [31].

²³ Witness Statement of Kelley Fouracre at [17]; Applicant Outline of Submissions at [85](d).

²⁴ Applicant's Submissions on Issuing a Decision at [8](c), [27] and [30].

²⁵ Applicant's Submissions on Issuing a Decision at [30].

²⁶ *Stan v Frontline Australasia* [2014] FWC 5457 at [4] and [9].

²⁷ Respondent's Outline of Submissions in Relation to Jurisdictional Issue of Delegation at [15].

²⁸ Applicant's Outline of Submissions at [3](a) and [86](a).

²⁹ *Millington v Traders International Pty Ltd* [2014] FWC 888 at [73].

³⁰ [2014] FWC 888 at [72] with reference to *Fair Work Act* section 390(3). See also *Holcim (Australia) Pty Ltd v Serafini* (2011) 216 IR 1 at [24].

³¹ Respondent's Outline of Submissions in Relation to Jurisdictional Issue of Delegation at [17].