# DECISION

*Fair Work Act 2009*
s.603 - Application to vary or revoke a FWC decision

**Australian Ceramics Engineering Pty Ltd**
**v**
**Ryan Archer**
(C2022/8177)

DEPUTY PRESIDENT BEAUMONT PERTH, 27 FEBRUARY 2023

*Application to revoke decision [2022] FWC 3029 of Commissioner Williams at Perth on 18 November 2022*

**[1]** On 9 December 2022, Australian Ceramics Engineering Pty Ltd (**ACE**) made an application pursuant to s 603(2)(b)(i) of the *Fair Work Act 2009* (Cth) (the **Act**) to revoke a decision of this Commission in *Archer v Australian Ceramics Engineering Pty Ltd* (the **Decision**).[1] In the Decision, Commissioner Williams concluded that Mr Archer, the respondent in this application, had been unfairly dismissed within the meaning of s 386 of the Act and consequently ordered that ACE pay compensation to Mr Archer in the amount of $34,200.00 before tax (the **Order**).[2] On 23 December 2022, I ordered a stay of the Decision and the Order, pending the outcome of this revocation application.[3]

**[2]** Section 603(1) of the Act allows the Commission to vary or revoke a decision of the Commission that is made under the Act. It is generally accepted that the power in s 603(1) should not be narrowly confined.[4] Whilst the Commission can of its own initiative revoke a decision, a person who is affected by a decision can apply for its revocation. In this case, it is uncontroversial that ACE has standing to make such application.

**[3]** Briefly stated, ACE seeks the revocation of the Decision on the basis that it was premised on incomplete evidence, ACE having not presented its case at first instance. ACE attributes this failure on having been misled by a temporary Human Resources (**HR**) contractor, a Mr Roeland Willeboordse. I am not so convinced. The evidence shows that at all material times ACE possessed knowledge that the unfair dismissal application was on foot. Not only did Mr Willeboordse have knowledge of Mr Archer's application, Mr Paul Devine, Managing Director of ACE, and Ms Desire Collier, the incumbent HR Manager, were informed of Mr Archer's application.

**[4]** Now once Mr Willeboordse departed the business, ACE might have operated on the assumption that Mr Archer's application had fallen away, the assumption arising, in part, from Mr Willeboordse purportedly having informed Ms Collier that he considered the matter was likely to fall away due to the jurisdictional objection he had raised (based on the high income

threshold).[5] However, a likelihood of 'falling away' does not constitute an outcome such as a discontinuance, dismissal, or determination.

**[5]** Mr Devine had himself authorised the filing of the Form F3 and approved its content. Further, before Mr Willeboordse departed the business, he had sent to Mr Devine a 'Notice of Listing – Cancellation' (**Notice**) which informed ACE:

> THE LISTING(S) HAS NOW BEEN CANCELLED.
> The respondent has advised that they wish for their objection to be dealt with in the first instance.
> **The matter will be listed for a conference/hearing.**
> **Parties will receive a new notice of listing in due course.**
>
> Inquiries and contact details:
> All inquiries relating to this notice are to be directed to 1800 759 566 or Email UDT@fwc.gov.au.
> 20 May 2022 4:05PM[6]

**[6]** Mr Devine did not receive a new notice of listing as he was not listed as a point of contact for the Commission. Instead of enquiring with the Commission about a conference or hearing, Mr Devine, armed with the opinion of a temporary HR contractor who had informed him 'there was no case to answer', opted to believe this, asserting he had no reason not to, given Mr Willeboordse's expertise.[7] However, ACE was clearly embroiled in litigation. In my view, ACE did not adduce persuasive evidence as to why it failed to exercise due diligence and enquire about the status of the application against it, in circumstances where it had not received a new notice of listing or for that matter any other material from the Commission or Mr Archer. It is evident that neither Mr Devine nor Ms Collier had been informed that the unfair dismissal application had been discontinued, dismissed or determined.

**[7]** However, against this backdrop is a Decision based upon the uncontested evidence of Mr Archer. At first instance, Mr Archer made much of the point that ACE had informed him if he did not receive the COVID-19 vaccination, he could be redeployed to work in the Wangara workshop. Evidently, working in his usual work location at a client's remote mine site would prove problematic. This was because the *Resources Industry Worker (Restrictions on Access) Directions* (**Resources Directions**) prohibited access to mine sites for those unvaccinated against COVID-19. Ultimately, the Commissioner found there was a valid reason for Mr Archer's dismissal (having not been vaccinated, Mr Archer was unable to meet one of the inherent requirements of his position).[8] Mr Archer was notified of the valid reason prior to his dismissal and provided with the opportunity to respond. Mr Archer had not been denied the assistance of a support person at discussions held and the procedures followed in effecting the dismissal were consistent with the size of the business and presence of a HR management specialist. However, redeployment was the sticking point, the Commissioner concluding that the evidence before him showed it had been possible to redeploy Mr Archer within ACE's workshop and that Mr Archer had been told this would occur even if not vaccinated.[9] In the Decision, it is stated:

> [119] What the evidence does demonstrate is that the applicant could have been redeployed into the workshop but was not. Instead for reasons unknown the respondent opted to dismiss him.

> [120] In all the circumstances of this matter the respondent's dismissal of the applicant was unreasonable. The applicant was unfairly dismissed.

**[8]** Unquestionably, the Decision was based on incomplete evidence, meaning that ACE, for reasons that will be further detailed, did not file any material subsequent to the Form F3. In *Grabovsky v United Protestant Association of NSW Ltd* (**Grabovsky**),[10] his Honour stated:

> [37] It is apparent from its terms and the legislative context that s.603 is intended to be broader than a statutory form of the slip rule. So much is clear from s.602, which is directed at slip rule problems. The question is how broad the power is and in what circumstances should it be exercised?
>
> [38] The power to vary or revoke a decision has generally only been exercised where there has been a change in circumstances such as to warrant the variation or revocation of the original decision[11] or, where the initial decision was based on incomplete[12] or false information, fraudulently procured or otherwise.[13]
>
> [39] As a general proposition applications to vary or revoke a decision should not be used to re-litigate the original case. After a case has been decided against a party, that party should not be permitted to raise a new argument which, deliberately or by inadvertence, it failed to put during the original hearing when it had the opportunity to do so.[14]

**[9]** In some cases, there may be a fine line or even a sfumato blurring as to whether to exercise the discretionary power in s 603(1) of the Act. This is not such a case. Whilst appreciative that the Decision at first instance may not have favoured Mr Archer had a complete profile of the evidence been provided, at the revocation hearing, I proposed to Counsel for ACE that it was not apparent that ACE had received any indication that the matter had been discontinued or otherwise brought to finality. Ms Collier had been informed of a 'likelihood' it would fall away and yet ACE took no steps to follow up as to the status of the application – and perhaps this could be framed as inadvertence. Counsel for ACE accepted that there was no evidence of any further steps, but he did not accept it was inadvertence. Clearly, I disagree and have found to the contrary. ACE faced a legal claim against it. Imbued with that knowledge, a responsibility fell upon ACE to enquire about Mr Archer's application and to respond to the same should it have wished to defend its position. By inadvertence, ACE failed to put its case at first instance and I am unable to conclude that a further opportunity is warranted.

**[10]** My detailed reasons follow. However, shortly stated, the revocation application is dismissed. In respect of the disposition of the stay, pursuant to s 589 of the Act, the stay of the Decision and Order is immediately removed.

## 1 Background to the revocation application

### 1.1 The Decision

**[11]** At first instance, the Commissioner outlined in his Decision that ACE had raised a jurisdictional objection in its Form F3 that Mr Archer earned more than the high income threshold, and a telephone conciliation conference with a staff conciliator had been cancelled at ACE's request. Having had the matter allocated to him, the Commissioner issued a Notice of Listing with directions for the filing of materials (the **Directions**).[15] The Directions were stated that they must be complied with and that:

> If the respondent does not comply the matter may be decided on the basis of the applicant's materials only.[16]

**[12]** At paragraph [10] of the Decision, the Commissioner writes that nothing had been received from ACE by the due date of 15 July 2022 and so an email was sent to ACE noting its non-compliance with the Directions and directing it to file and serve its materials urgently.

**[13]** As can be anticipated, there were no materials forthcoming from ACE and the Commissioner proceeded to hear the matter in ACE's absence, basing the Decision on the materials filed by Mr Archer.[17]

**[14]** Having determined that Mr Archer was protected from unfair dismissal (covered by a modern award), the Commissioner arrived at the following findings:

a) Mr Archer did not have the capacity to meet one of the inherent requirements of his position as the Senior Site Services Supervisor, which was to attend site in person, and therefore there was a valid reason for his dismissal;
b) Mr Archer was notified of the valid reason prior to his dismissal;
c) ACE had invited Mr Archer to respond to the reason being considered for his dismissal and he did so in writing;
d) ACE did not refuse to allow Mr Archer to have a support person present at any discussions;
e) the reason for dismissal was not performance related; and
f) the procedures followed in effecting the dismissal were consistent with the size of the business and the presence of a HR management specialist.

**[15]** However, the Commissioner still determined that Mr Archer's dismissal was unfair. In his consideration of 'other' relevant matters, the Commissioner first addressed the decision of *DA v Baptists Care SA* (**Baptist Care**).[18] In *Baptist Care*, the Full Bench explained the obligations of an employer in circumstances where the employee is unable to meet the inherent requirements of their job because their job is affected by the actions of a third party.[19] Amongst other passages extracted from *Baptist Care*, the Commissioner referred to paragraph [32]:

> Second, in a situation where an employee's capacity to perform the inherent requirements of their job is affected by the actions of a third party, the employer still has an obligation to treat the employee fairly. The principle in this respect was stated by Deputy President Asbury in *Stevens v ISS Property Services Pty Ltd*, in the context of a situation where the work capacity of an employee of a labour hire business is affected by the actions of the host employer, as follows:
>
> > "[12] A number of cases have considered the manner in which the matters in s.387 of the Act are considered in circumstances where an employer provides labour to a client and the client directs the employer to remove the employee from a site. As a Full Bench of the Commission observed … in *Donald Pettifer v MODEC Management Services Pty Ltd (Pettifer)* labour hire arrangements in which a host employer has the right to exclude a labour hire employee from its workplace, are becoming a common part of the employment landscape in Australia. The reality for companies in the business of supplying labour is that they frequently have little if any control over the workplaces at which their employees are placed and the rights of such companies in circumstances where a client seeks the removal of an employee are limited. However, this is not a basis

> upon which companies in the business of supplying labour to clients can abrogate responsibility for treating employees fairly when dismissal is the result of removal from a particular site and the fairness of the dismissal is considered with reference to the matters in s. 387 of the Act."

**[16]** The Commissioner then concluded that the evidence before him showed that it had been possible to redeploy Mr Archer within ACE's workshop and that Mr Archer had been told this would occur even if not vaccinated.[20] Prior to addressing remedy, the Decision states:

> [119] What the evidence does demonstrate is that the applicant could have been redeployed into the workshop but was not. Instead for reasons unknown the respondent opted to dismiss him.
>
> [120] In all the circumstances of this matter the respondent's dismissal of the applicant was unreasonable. The applicant was unfairly dismissed.

## 1.2 The issue of redeployment

**[17]** Chronologically, it makes sense at this point to address the factual circumstances following Mr Archer's dismissal. However, the Commissioner's findings about redeployment and his conclusion that Mr Archer's dismissal was unfair warrant attention at this juncture. In the revocation application, these issues loomed large, monopolising much of Mr Archer's cross examination.

**[18]** In its submissions, ACE summarised the Commissioner's findings as follows:

a) it was possible for ACE to redeploy Mr Archer to another position in its workshop which would have alleviated the need for Mr Archer to have been vaccinated against COVID-19;
b) ACE 'created the expectation that [Mr Archer] could choose not to be vaccinated and he would then be redeployed to the workshop in Wangara and not have to attend site in Port Hedland', however they declined to redeploy him;[21] and
c) there was no reasonable explanation as to why the promised redeployment did not occur.[22]

**[19]** ACE argued that the Commission should exercise its discretion pursuant to s 603(2) of the Act because the evidence of Mr Devine, amongst other matters, revealed:

a) a number of attempts were made by ACE to engage with Mr Archer about his vaccine hesitancy and the possibility of redeployment;
b) it was Mr Archer who failed to attend meetings or engage, despite those requests;
c) consequently, ACE was not in a position to redeploy Mr Archer to an alternative site and there was no reasonable expectation of any such redeployment in circumstances where Mr Archer failed to attend meetings or engage from 17 January 2022;
d) it was Mr Archer who requested that a decision be made in respect of the termination of his employment so that he could 'make a decision on what [he] [would] do next and move on with [his] life'; and
e) the only reason ACE did not participate in the substantive hearing at first instance was because of the misconduct of the temporary HR Practitioner – Mr Willeboordse.

**[20]** ACE submitted that the Commissioner's findings were made on a narrow and incomplete version of events, noting that Mr Devine's evidence described:

a) no commitment in relation to redeployment was ever made to Mr Archer by any person at ACE with authority to make such a commitment;[23]
b) ACE considered options for redeployment, but determined that this was not a viable alternative;[24] and
c) in any event, Mr Archer declined to attend every meeting at which redeployment was able to be discussed and refused to engage meaningfully with ACE's attempts to consult with him in relation to his ongoing employment.[25]

**[21]** At hearing and within his witness statement, Mr Archer gave evidence that he had a telephone discussion with Mr Tane Smiler, ACE's Operations Manager, in October 2021 about moving to the Wangara workshop if he did not get the COVID-19 vaccine.[26]

**[22]** Mr Archer further said that it was Mr Smiler who stated that he could be redeployed and work in the workshop if he did not want to get the COVID-19 vaccine.[27] At paragraph [10] of his witness statement, Mr Archer stated that Mr Smiler promised to redeploy him into the workshop if he was not vaccinated, and ACE refused or neglected to do that.

**[23]** When Mr Archer was asked in cross examination whether Mr Smiler had promised him the option of redeployment, Mr Archer responded to the effect that Mr Smiler had said he could come and work in the workshop and garage, if he did not go ahead with the vaccine. Mr Archer said that it was an option that was given to him.

**[24]** It is uncontroversial that Mr Archer had a period of three weeks personal leave from late November until 19 December 2021 and was asked by ACE on 6 January 2022 to provide an update on his vaccination status.

**[25]** Counsel for ACE pointed out to Mr Archer that in his response to ACE on 10 January 2022, he raised several concerns in relation to the vaccine and asked why other roles in the business had not been discussed with him. Mr Archer agreed that was the case. Mr Archer, expanding upon his answer, noted that having gone on leave, the discussion with ACE went from coming into work in the workshop to that of vaccination. Mr Archer commented that the role (presumedly the Wangara workshop role) had gone out the window.

**[26]** In cross examination, it was suggested to Mr Archer that as of 10 January 2022, he had not sent any email where he referred to his discussions with Mr Smiler about any opportunity promised for relocation to Wangara. Mr Archer, whilst responding to the question asked of him, spoke not of any email sent as of 10 January 2022, but instead referred to other emails which did not appear to be in evidence. Counsel for ACE cautioned Mr Archer that he needed to be careful to answer the questions asked of him, as they directly related to 10 January 2022. At that point, Mr Archer conceded that his correspondence to ACE had not up to that point, being 10 January 2022, referred to his discussion with Mr Smiler about redeployment.

**[27]** On 17 January 2022, Ms Sara Harris, HR Manager of ACE, responded to Mr Archer's email dated 10 January 2022. Mr Archer agreed in cross examination that the letter of 17

January 2022 included an invite for him to attend a meeting to discuss the future of his employment, including any possible redeployment.[28] Further, Ms Harris directed Mr Archer to provide evidence of his vaccination status in order to comply with the *Resources Directions*.

**[28]** In respect of the opportunity to discuss redeployment, Mr Archer noted that it was only one meeting that he was invited to, and his children's grandmother was dying of cancer in hospital. Later in his evidence, Mr Archer conceded that he had been invited to a second meeting (the first having been rescheduled) some two days later, but he considered two days was insufficient time for him to get himself into a good headspace.

**[29]** On 17 January 2022, Mr Archer responded to Ms Harris' letter setting out issues regarding the COVID-19 vaccination and others such as economic duress, consent, apprehension of assault and so on. No mention was made of redeployment.

**[30]** On 28 January 2022, Ms Harris sent further correspondence to Mr Archer informing him to the effect that due to the lack of evidence showing his vaccination against COVID-19, ACE was now considering the termination of his employment.[29] In that same letter, Ms Harris wrote:

> You are required to attend a meeting with Keith Vuleta and myself at 11:00 on Tuesday 1 February 2022 to discuss the above. This meeting will give you an opportunity to provide your reasons as to why your employment should not be terminated which we will then consider before making any final decision. We will also consider and discuss any suitable redeployment options available based on our operational requirements and business interests.[30]

**[31]** In cross examination, it was proposed to Mr Archer that as of 28 January 2022, despite his protestations, he had not raised once the alleged promise that had been made by Mr Smiler to him about redeployment at Wangara. Mr Archer agreed that was the case.

**[32]** Mr Archer was certified unfit for work between 7 February 2022 and 6 March 2022.[31]

**[33]** On 22 February 2022, Ms Harris wrote to Mr Archer noting that in light of his medical certificate and unfortunate family circumstances, ACE had let some time pass since its last correspondence.[32] Ms Harris continued, observing that Mr Archer could not meet the inherent requirements of his role, he could not comply with the *Resources Directions*, and had failed to follow a reasonable and lawful direction to provide evidence of his vaccination status by 21 January 2022.[33] With a deadline of 25 February 2022, Mr Archer was provided with an opportunity to provide a written response as to why he should not be dismissed.[34]

**[34]** A response was forthcoming from Mr Archer on 2 March 2022.[35] Amongst other matters traversed in the response, redeployment not being one of them, Mr Archer asked for a final decision on his employment status by no later than 4 March 2022.[36]

**[35]** By letter dated 16 March 2022, Mr Archer was notified of his dismissal.[37]

### 1.3 The factual circumstances after Mr Archer made his unfair dismissal application

**[36]** For the most part, the factual circumstances following Mr Archer filing his unfair dismissal application are not in dispute and are set out in the witness statement of Mr Devine.

**[37]** On 29 March 2022, Mr Archer filed his application for unfair dismissal with the Commission. That application was sent to the email address info@australce.com.[38]

**[38]** During the period 19 April 2022 to 5 June 2022, ACE engaged Mr Willeboordse as a contractor through an agency. Mr Willeboordse occupied the role of HR Manager,[39] although there was discussion of him having been a HR Consultant. At hearing, Mr Devine clarified that Mr Willeboordse had been engaged on a part-time basis.

**[39]** On 5 May 2022, Mr Willeboordse sent to Mr Archer, Mr Archer's representative, and the Commission a Form F3 – Employer Response, submitting that ACE had a jurisdictional objection based upon Mr Archer earning above the high income threshold. The Form F3 also stated:

> (a) the reason for the dismissal was that Mr Archer was unvaccinated and was therefore unable to enter a resources industry site;
> (b) ACE's postal address (67 Excellence Drive, Wangara WA 6065);
> (c) Mr Willeboordse's ACE email address (Roeland.Willeboordse@australce.com);
> (d) a mobile number (Mr Willeboordse's own personal number); and
> (e) a mistyped landline number: 08 93030 9944 (containing an extra zero).[40]

**[40]** At hearing, Mr Devine confirmed that Mr Willeboordse was authorised to complete the information in the Form F3 under his instruction.

**[41]** Mr Devine gave evidence that all correspondence sent from ACE (presumedly to the Commission and Mr Archer's representative) thereafter was from the email address Roeland.Willeboordse@australce.com.

**[42]** Mr Devine stated that within ACE, the standard procedure is that all external emails from HR are sent using the address ACE.HR@australce.com. At hearing, Mr Archer's representative directed the Commission's attention to a document that contained the signature clause of Ms Collier, who had within her signature clause a personalised email address, such that it referred to her name and thereafter '@australace.com',[41] and to another email whereby a Ms Harris similarly had a personalised email address, such that it referred to her name and thereafter '@australace.com'.[42]

**[43]** Mr Devine stated that without authority and for reasons unknown to ACE, Mr Willeboordse used his own personal ACE email address (and not the ACE.HR@australce.com email address), and this was the only email address to receive any correspondence from the Commission or Mr Archer's representative.

**[44]** A conciliation conference was listed for 23 May 2022. On 19 May 2022, Mr Willeboordse supplied the Commission two phone numbers to be used for the conciliation,

being his mobile number and a different landline (the direct contact number to the ACE boardroom conference telephone).

**[45]** On 20 May 2022, Mr Willeboordse sent an email to the Commission and Mr Archer's representative again asserting a jurisdictional objection and requesting that the conciliation be cancelled. Mr Devine acknowledges he was copied into Mr Willeboordse's email to the Commission on 20 May 2022, which read:

> G Day,
> Please note that as a result of the applicant exceeding the high income threshold of $ 158500per annum, we object against the consiliation [sic] meeting being scheduled and respectfully request you to cancell [sic] said meeting.
> Your urgent reply is appreciated[43]

**[46]** Later that day, the Commission sent the parties a notice stating that the conciliation had been cancelled.[44]

**[47]** Mr Devine said that Mr Willeboordse told him words to the effect that Mr Archer did not qualify for a claim as his income was above the high income threshold.[45] Mr Devine further added that Mr Willeboordse told him that he had indicated this to the Commission and sent him the notice of cancellation. By email dated 23 May 2022, Mr Willeboordse sent that 'Notice of Listing – Cancellation' (**Notice**) to Mr Devine, his email stating:

> Hi Paul,
> For your information, the income issue will now be dealt with to determine whether the dispute can continue…[46]

**[48]** In respect to the cancellation of the Notice of Listing for a 'Staff conciliation' before a Fair Work Commission conciliator, the Notice read, in part:

> THE LISTING(S) HAS NOW BEEN CANCELLED.
> The respondent has advised that they wish for their objection to be dealt with in the first instance.
> The matter will be listed for a conference/hearing.
> Parties will receive a new notice of listing in due course.[47]
>
> Inquiries and contact details:
> All inquiries relating to this notice are to be directed to 1800 759 566 or Email UDT@fwc.gov.au.
> 20 May 2022 4:05PM

**[49]** Whilst Mr Devine notes he was copied into the correspondence from Mr Willeboordse to the Commission dated 20 May 2022, he stated he did not receive any other email from the Commission, or Mr Archer's representative, and was not copied into any other correspondence by Mr Willeboordse.[48]

**[50]** Mr Devine said that approximately one week later, he raised the matter with Mr Willeboordse again and Mr Willeboordse said he had not heard anything further from the Commission.[49] Mr Devine explained that Mr Willeboordse said to him words to the effect that

he was of the view that there was no case to answer.[50] Mr Devine said he had no reason to disbelieve this, as he relied on Mr Willeboordse's expertise as a HR professional.[51]

**[51]** Mr Willeboordse's engagement at ACE ended on 5 June 2022.[52] Mr Willeboordse handed over the HR Manager role to his permanent replacement, Ms Collier, who commenced on 30 May 2022.[53] Mr Devine said that Ms Collier informed him, and he believed, that Mr Willeboordse did not mention that he had been using his personal ACE email address in correspondence with the Commission. Mr Devine said Ms Collier also informed him that she was told by Mr Willeboordse that he considered the matter was likely to fall away due to the jurisdictional objection he had raised.[54]

**[52]** Mr Devine said that having made relevant enquires of Ms Collier and Mr Keith Vuleta, Chief Financial Officer, he could confirm that ACE and Ms Collier were not aware that Mr Willeboordse had used the email address Roeland.Willeboordse@australce.com in any external correspondence to the Commission (other than the email he was copied into on 20 May 2022), and the account remained active but was not monitored following Mr Willeboordse's departure from ACE.[55]

**[53]** Mr Devine stated that it was now apparent to ACE that the Commission and Mr Archer's representative continued to send all correspondence to that email address (Mr Willeboordse’s email address). Mr Devine said that from on or about 6 June 2022, no correspondence was received by ACE in relation to Mr Archer's application.[56]

## 2 Consideration

**[54]** Section 603 of the Act relevantly provides:

> **603 Varying and revoking the FWC's decisions**
>
> (1) The FWC may vary or revoke a decision of the FWC that is made under this Act (other than a decision referred to in subsection (3)).
>
> Note: If the FWC makes a decision to make an instrument, the FWC may vary or revoke the instrument under this subsection (see subsection598(2)).
>
> (2) The FWC may vary or revoke a decision under this section:
>
> > (a) on its own initiative; or
> >
> > (b) on application by:
> >
> > > i. a person who is affected by the decision; or
> > >
> > > ii. if the kind of decision is prescribed by the regulations – a person prescribed by the regulations in relation to that kind of decision.

**[55]** Section 603 is applicable to the whole of the broad range of decisions which may be made by the Commission, other than those specified in s 603(3).[57] Any doubt in this respect is removed by s 598(1) of the Act which provides that a reference in Part 5-1 (which includes ss 602–4) to a ‘decision’ of the Commission includes ‘any’ decision of the Commission however

described.[58] In *Minister for Industrial Relations (Vic) v Esso Australia Pty Ltd* (**Esso**),[59] it was said that this circumstance, together with the provisions in the Act establishing the Commission and the discharge of its functions,[60] suggests that the power in s 603(1) should not be narrowly confined.[61]

**[56]** In *Esso*, the Full Court of the Federal Court of Australia had before it an application for the judicial review of a decision of the Full Bench of the Commission. The application was a continuation of substantial litigation, the impetus of which had been an initial decision handed down by Watson VP to terminate protected industrial action.

**[57]** Briefly stated, Watson VP acted on the basis that the industrial action before him was protected industrial action. Before Watson VP made the order under s 424 terminating the industrial action, there had been other litigation in the Federal Court concerning the question of whether s 413(5) of the Act had the effect that industrial action in contravention of a Commission order could be regarded as protected – a point relevant to Watson VP's decision. Ultimately, the High Court delivered a judgment on the interpretation of s 413(5) a year after Watson VP's decision, holding that the section encompassed past contraventions of orders.[62] That is, s 413(5) applies to a person who has at any time contravened an order relating to industrial action in relation to the enterprise agreement and this is so even though the order may have since ceased to operate.[63] It was the High Court's different view regarding the proper construction of s 413(5) which led Esso to apply for the revocation of the s 424 order.[64]

**[58]** Esso's revocation application was heard by the Full Bench which allowed the application.[65] The reasoning of the Full Bench was summarised by the Full Court at paragraph [27] of its judgment:

> (a) section 603 of the FW Act vests in the FWC a discretionary power to vary or revoke one of its previous decisions, including an order under s 424, at [33], [60];
>
> (b) when making the s 424 Order, Watson VP had proceeded on the basis that the AWU Notified Action which was the subject of the Minister's application was 'protected' industrial action, as defined in s 413, at [58];
>
> (c) Watson VP had been correct to proceed on that basis because of the construction of s 413(5) adopted in *AMMA v MUA (Full Court)* and in *Esso v AWU (Full Court)*, at [58];
>
> (d) the decision in *Esso v AWU (HCA)* 12 months later meant that, contrary to the basis on which Watson VP had proceeded, the AWU Notified Action was not protected action, at [59];
>
> (e) contrary to the submissions of Esso, this did not mean that the decision of Watson VP was affected by jurisdictional error, only an error within jurisdiction, at [58], [68];
>
> (f) the fact that it was now apparent that Watson VP had been wrong in concluding that the proposed action was protected action and that, in the event of a new application, no order under s 424 would be made, weighed in favour of an exercise of the s 603 discretion to revoke, at [68];
>
> (g) other aspects of the statutory scheme also pointed in favour of the exercise of the discretion. In particular, the prospect that a workplace determination may be made pursuant to s 266(1) when the statutory scheme contemplates that this should occur only on the termination of *protected* industrial action was pertinent, at [69], [73]; and

> (h) these factors outweighed matters pointing against an exercise of the discretion to revoke, namely, the fact that the s 424 Order was not affected by jurisdictional error ([68]), the prejudice resulting to the parties by reason of the wasted time and costs incurred in the Workplace Determination proceedings ([70]), and the prejudice to employees who had negotiated a new Longford and LIP Agreement at a time when they had not, by reason of the s 424 Order, been able to exert legitimate industrial pressure through a continuation of protected industrial action, at [71].

**[59]** The Full Bench concluded that it could not countenance an outcome:

> …which has the result that a workplace determination should be made on the basis of an order which, though not affected by jurisdictional error, nonetheless terminated industrial action in the AWU Notified Action, which according to the decision in *Esso HCA* was plainly not protected industrial action at the time the Order was made. Whether or not a workplace determination, made consequent on the Order, is susceptible to subsequent challenge is in our view beside the point. We are in a position to determine whether the foundation upon which a workplace determination would be built should be removed. We consider that the discretionary matters which we discuss[ed] above, which point in favour of the exercise of our discretion, outweigh those going the other way. For these reasons we therefore propose to revoke the Order pursuant to s 603(1) of the Act.[66]

**[60]** The decision of the Full Bench was appealed to the Federal Court which ultimately upheld the decision of the Full Bench, concluding at paragraph [46] of *Esso*:

> The Full Bench considered that Watson VP was wrong in his conclusion that the AWU Notified Action was protected industrial action because (at [68]), "it is now patently clear that the AWU Notified Action was not protected industrial action", and that "[f]aced with an application under s 424 now made in relation to the same action, the Commission could not properly form the requisite satisfaction so as to enliven the jurisdiction under s 424". It was correct to so hold. It was that changed circumstance, in combination with the other factors that the Full Bench identified, that informed the Full Bench's decision to exercise the discretionary power under s 603 of the FW Act to revoke the order of Watson VP. In doing so, the Full Bench was not looking to the past but to how the FWC should proceed thereafter.

**[61]** In *Snyder v Helena College Council, Inc.* (**Snyder**), the Full Bench of this Commission stated that the legal principles relevant to the interpretation of s 603 were those set out in the *Esso* judgment, summarised as follows:

> (a) Section 603 is applicable to the whole of the broad range of decisions which may be made by the Commission, other than those specified in s.603(3) of the Act;
>
> (b) This circumstance, together with provisions in the Act concerning the establishment of the Commission and the discharge of its functions, suggests that the power in s.603(1) should not be narrowly confined but should have a broad flexible operation;
>
> (c) The Act does contemplate that the Commission should have both the power to vary and revoke pursuant to s.603, and the power to determine matters on appeal pursuant to s.604;
>
> (d) There is no discernible basis upon which it could be concluded that the correction of error is solely within the preserve of s.604. On the contrary, it would be inconsistent with the relatively broad powers available under s.603 for the correction of error somehow to be carved out from its purview;

(e) The fact that there might be a degree of overlap between s.604 and s.603 so that there might be scope to deploy each to achieve the same practical result does not alter the position;

(f) The discretionary power in s.603(1) to vary or revoke a decision is not cast in terms of a power to be exercised only in particular stated events or circumstances and, apart from the decisions that are excluded by s.603(3), the power is not subject to any other express limitations;

(g) There may be circumstances in which the discretionary power under s.603 properly should not be exercised because the applicant for the order is a person who is aggrieved by the decision and should pursue an appeal under s.604; and

(h) However, the fact that one can contemplate the existence of a range of potential circumstances in which the discretionary power under s.603 might properly not be exercised does not warrant the implication of arbitrary limits on the power itself.[67]

**[62]** *Snyder* involved an appeal of a decision in which Mr Snyder, the applicant, was refused an extension of time within which to lodge an unfair dismissal application. Mr Snyder sought permission from the Full Bench of the Commission to appeal that decision (the **First Appeal Decision**), which was refused.[68]

**[63]** Mr Snyder lodged a second Notice of Appeal against the decision at first instance. This second appeal was filed outside the time period prescribed in the *Fair Work Commission Rules 2013* and the application to extend time was heard by a separately constituted Full Bench of the Commission. In its decision, that Full Bench was not persuaded that it was in the interests of justice to extend time to file the second appeal and refused Mr Snyder's application.[69]

**[64]** Mr Snyder then filed an application pursuant to s 603(2)(b)(i) for the *First Appeal Decision* to be revoked and for reconsideration of his appeal against the decision at first instance.

**[65]** In arriving at its decision, the Full Bench in *Snyder* referred to the decision of Ross J in *Grabovsky*, in which His Honour stated:

[37] It is apparent from its terms and the legislative context that s.603 is intended to be broader than a statutory form of the slip rule. So much is clear from s.602, which is directed at slip rule problems. The question is how broad the power is and in what circumstances should it be exercised?

[38] The power to vary or revoke a decision has generally only been exercised where there has been a change in circumstances such as to warrant the variation or revocation of the original decision[70] or, where the initial decision was based on incomplete[71] or false information, fraudulently procured or otherwise.[72]

[39] As a general proposition applications to vary or revoke a decision should not be used to re-litigate the original case. After a case has been decided against a party, that party should not be permitted to raise a new argument which, deliberately or by inadvertence, it failed to put during the original hearing when it had the opportunity to do so.[73]

**[66]** The Full Bench in *Snyder* observed at paragraph [56] that his Honour's statements in *Grabovsky* about the nature of the s 603 revocation power had subsequently been endorsed by the Full Bench in *Re Health Services Union (Vic No 1 Branch)* (**Re HSU**).[74]

**[67]** In *Re HSU*, a case involving an appeal of a decision to revoke an entry permit, the Full Bench referred to the Federal Court judgment in *Asmar v Fair Work Commission* (**Asmar**)[75] in which the Court said the power in s 603 was at least exercisable to revoke a decision that was 'flawed at inception',[76] 'ought never to have been made',[77] or 'based on an innocently or fraudulently procured incorrect factual foundation'.[78] The Court in *Asmar* went on to conclude that the power conferred by s 603 could be exercised where circumstances had changed since the original decision was made.[79] The Full Bench then observed that the conclusion of the Court was consistent with the way in which the revocation power in s 603 and its statutory predecessors had historically been used, as summarised by Ross J in *Grabovsky*.[80]

**[68]** ACE submitted that the power in s 603 of the Act to revoke decisions is a considerably broad one.[81] It observed that the Commission has on several occasions revoked decisions in the context of applications for relief from unfair dismissal, where parties have not responded or participated in proceedings of the Commission.

**[69]** One such occasion relied upon by ACE was in *Rainshield Roofing Pty Ltd v Paerau* (**Rainshield**).[82]

**[70]** *Rainshield* addressed circumstances where costs had been awarded against the applicant, a Mr Paerau, and his representative, Just Relations, following an earlier decision about the merits of Mr Paerau's unfair dismissal application against Rainshield. After the costs decision was issued, Mr Paerau contacted the Commission claiming that it had not taken into account submissions he had made. Having identified that the submissions had not been considered because they had not been received by Chambers having been sent to the 'UDT Rosters' email address, the Commissioner provided an opportunity for the parties to file further submissions in respect of the matter. The Commissioner considered it appropriate to vary the decision under s 603 of the Act so as to take into account the material Mr Paerau sought, but failed, to bring to the attention of the Commission – acknowledging that Mr Paerau's materials had been sent to the incorrect Commission email address.

**[71]** ACE also place reliance on *Williams v North Queensland Youth Rehab Education Equine Centre Aboriginal And Torres Strait Islander Corporation* (**Williams**),[83] where an unfair dismissal application was received, but it appeared that the applicant had not responded to the Commission's correspondence directing her to make payment of the application fee or seek a waiver of the same. The application was subsequently dismissed, with the Commission later being informed that the applicant had contacted the Commission by telephone to make payment but was advised by a client services representative to await further correspondence from the Commission. The Commission's records confirmed that the call occurred. Having found that the applicant attempted to make payment of the required fee on 2 December 2021, six days before the dismissal decision and order were issued, the decision was made to revoke the dismissal decision.

**[72]** A further decision relied upon by ACE, *Popovic v DPG Services Pty Ltd* (**Popovic**),[84] involved circumstances where the applicant, having made an unfair dismissal application, did

not comply with the directions, and subsequently the application was dismissed. However, on reviewing the directions issued, it was identified that incorrect dates had been specified, with two dates for filing materials dated after the hearing date. The dismissal decision was revoked on the grounds of procedural fairness given the potential confusion caused by the directions.

**[73]** ACE also relied upon the decision of *Willis v BE Imaging Pty Ltd* (**Willis**),[85] in which the Commission dismissed an unfair dismissal application on the grounds of non-compliance with the directions issued. However, following the dismissal of the application, the Commission's information technology team identified that several pieces of correspondence sent by the applicant had been 'blacklisted' and therefore no one at the Commission received any of the applicant's correspondence. The Deputy President revoked the dismissal decision under s 603 of the Act and the matter was reallocated.

**[74]** The circumstances before me differ to those traversed in *Willis*, *Popovic*, *Williams* and *Rainshield*. ACE was at all material times cognisant that Mr Archer had made an unfair dismissal application against it, ACE's correspondence to the Commission had not been 'blacklisted' or otherwise not received, and there had been no communication that had been unaccounted for – such as a phone call to registry.

**[75]** Fundamental to ACE's argument is its lack of knowledge about Mr Archer's unfair dismissal application proceeding through to hearing (directions having been issued for the filing of materials). It blames its inattention to, or ignorance of, this component of the legal proceedings – the filing of materials and presenting itself at hearing – on Mr Willeboordse's non-compliance with an instruction to adopt the use of a particular email address when corresponding with third parties.

**[76]** In its submissions, ACE cited the following extract drawn from the decision of *Australian Ceramics Engineering Pty Ltd v Archer*:

> …the Applicant was misled by a temporary HR contractor, who was acting without authority, in relation to the progress of the proceedings.[86]

**[77]** The abovementioned extract was not a finding made by the Commission in respect of this revocation application. It was one of several submissions made by ACE in support of its stay application. A stay of course was granted, and I had cause to state the following:

> In light of the Applicant's submissions and there having been no argument pressed to the contrary by Mr Archer, who incidentally is agreeable to the grant of a stay, I have concluded that there is a serious question to be tried in the Revocation Application.[87]

**[78]** Returning to the proposition that ACE was 'misled by a temporary HR contractor, who was acting without authority, in relation to the progress of the proceedings', ACE argues that its failure to participate can be explained by the fact that Mr Willeboordse misled it. However, the evidence supports a finding that Mr Devine authorised the filing of the Form F3 and was therefore not only aware of the jurisdictional objection raised but endorsed the making of the objection on behalf of ACE. Further, the evidence does not show that Mr Devine intervened at any point to instruct Mr Willeboordse to manage Mr Archer's unfair dismissal application differently.

**[79]** At this point, I wish to draw upon a line of authority oft cited in extension of time applications in this Commission. That is, applications where the onus is placed upon the applicant to have knowledge of the statutory timeframes concerning the making of applications such as unfair dismissal applications, general protections application or termination of employment applications under Part 6-4.

**[80]** In *Nulty v Blue Star Print Group Pty Ltd* (**Nulty**),[88] the Full Bench considered the statutory time limit in the context of the discretion to extend time for making such applications on the existence of 'exceptional circumstances'. The Full Bench observed that parliament must be presumed to have proceeded on the basis that an employee who is aggrieved at being dismissed ordinarily ought to be expected to seek out information on any remedy they may have in a timely fashion such that delay on account of ignorance of the statutory time limit is not, of itself, an exceptional circumstance.[89]

**[81]** Whilst on first blush the reasoning may not appear apposite to the current case, within it sits a principle, one that is premised on responsibility. Effectively, cases like *Nulty* convey the proposition that if you consider you have been, for example, unfairly dismissed, the onus sits upon you, the individual, to seek out information and then bring your case. That includes deciphering promptly the timeframes in which that recourse is to be pursued. Ignorance of the law will not avail an applicant in providing an excuse as to why their application was filed late in such circumstances.

**[82]** In this case, there were two persons within ACE who knew of Mr Archer's unfair dismissal application on Mr Willeboordse's departure. The first, Mr Devine, who ACE called to give evidence. His evidence was clear, with little to no obfuscation.

**[83]** First, it is observed that Mr Devine was not ignorant to the fact that Mr Archer had made an unfair dismissal application. He conceded the point, appropriately in my view, in cross examination, pointing out that Mr Willeboordse had filed the Form F3 on his authority.

**[84]** Second, Mr Devine was aware that ACE had filed a jurisdictional objection to Mr Archer's unfair dismissal application. So much is evident from Mr Devine's evidence that on 20 May 2022, Mr Willeboordse sent an email to the Commission and Mr Archer's representative, again asserting the jurisdictional objection, and requesting that the conciliation be cancelled, to which Mr Devine was copied.

**[85]** Mr Devine gave evidence that Mr Willeboordse informed him to the effect that Mr Archer did not qualify for a claim as his income was above the high income threshold,[90] and that Mr Willeboordse told him he had indicated this to the Commission. Mr Devine acknowledges he was provided with the Notice and informed that the income issue would be determined to ascertain whether the dispute could continue.[91] That same Notice read '[t]he matter will be listed for a conference/hearing. Parties will receive a new notice of listing in due course'.[92]

**[86]** Mr Devine also gave evidence that he asked Mr Willeboordse about Mr Archer's application one week later and was informed by him that he had not heard anything further from the Commission.[93] Mr Devine said Mr Willeboordse said to him words to the effect that he

was of the view that there was no case to answer,[94] and Mr Devine said he had no reason to disbelieve this.[95]

**[87]** Mr Devine explained that he did not receive any other email from the Commission or Mr Archer's representative, he was not copied into any other correspondence by Mr Willeboordse,[96] and Mr Willeboordse's engagement at ACE ended on 5 June 2022.[97]

**[88]** Having not heard anything about Mr Archer's unfair dismissal application from the Commission, the evidence shows that Mr Devine did not take steps to enquire about its status or to inform himself of the legal process on foot. This is notwithstanding that ACE faced a legal claim against it, Mr Devine had received a Notice that outlined that the matter would be listed for conference or hearing, and Mr Devine had *not* been informed by Mr Willeboordse that the application had been determined or otherwise concluded.

**[89]** The evidence then discloses that Ms Collier assumed the responsibility of HR Manager on 30 May 2022. ACE did not call Ms Collier to give evidence. Whilst asked to draw the inference that Ms Collier's evidence would not have supported ACE's case, I have found it unnecessary to do so because in my view Mr Devine's evidence of what Ms Collier informed him does not advance ACE's case in any event. Mr Devine said Ms Collier informed him that she was told by Mr Willeboordse that he considered the matter was likely to fall away due to the jurisdictional objection he had raised.[98] On the evidence presented, it is not apparent that Ms Collier took any steps to ascertain the status of the unfair dismissal application notwithstanding being a HR Manager whose department had, by all accounts, an active unfair dismissal application under its remit. Whilst purportedly informed by Mr Willeboordse he considered the matter was likely to fall away due to the jurisdictional objection, the evidence does not reveal that Ms Collier had been informed by Mr Willeboordse that the matter had been discontinued, dismissed, or determined by the Commission.

**[90]** At this juncture, one might conclude that ACE's responsibility for the legal claim it faced had faded. Two personnel of ACE had knowledge that Mr Archer had made an application for an unfair dismissal remedy. Further, the evidence does not suggest that Mr Devine or Ms Collier had been informed that the application had been discontinued, dismissed or otherwise determined. According to Mr Devine, Mr Willeboordse had expressed an opinion that ACE had no case to answer and had purportedly informed Ms Collier that the matter was likely to fall away. Such information is markedly different to having been informed that an unfair dismissal application has been dismissed, discontinued or otherwise determined. A likelihood of an outcome is not an outcome.

**[91]** The issue in respect to Mr Willeboordse utilising an unsanctioned email address warrants attention. ACE relied, in part, on it being unaware of the progress of Mr Archer's unfair dismissal application because Mr Willeboordse had provided the Commission with a 'personal' email address, such that it was not the email address mandated for use with third parties. Consequently, when Mr Willeboordse departed ACE, the email account remained unmonitored and correspondence from the Commission and Mr Archer's representative was not identified by ACE.

**[92]** Mr Archer's representative drew attention to other emails in evidence where employees of ACE had utilised their 'personal' ACE email address in correspondence. I do not consider

that drawing attention to this point impugns Mr Devine's evidence that Mr Willeboordse utilised an email address unsanctioned by ACE for use by HR when communicating with third parties.

**[93]** Critically, however, I am unconvinced that this abrogates ACE's responsibility for following up with the Commission about the status of Mr Archer's unfair dismissal application in circumstances where it effectively says it had not heard further from the Commission in respect of a hearing or conference, or for that matter an outcome.

**[94]** Counsel for ACE highlighted that it was not the case that ACE had simply ignored correspondence from the Commission. Counsel continued to the effect that on one view, particularly at the earlier stage of proceedings, there was no further outreach from the registry of the Commission. However, it remains that at all material times it was open to either Mr Devine or Ms Collier to provide to the Commission ACE's contact details on conclusion of Mr Willeboordse's engagement with its business. Whilst ACE refers to Mr Willeboordse not having advised Ms Collier that he had been using his 'personal' ACE email address in correspondence with the Commission, ACE's apparent lack of an effective handover process between its staff members regarding this litigious matter is a matter for its own internal governance and as such is not relevant to this application.

**[95]** Due diligence, if exercised by ACE in this case, teamed with the requisite level of respect for a legal process and the responsibility that follows, would have, in my view, uncovered at an earlier stage the issuance of directions and a notice of a hearing on jurisdiction and merits, hence negating any prejudice suffered by ACE's own failure to avail itself of the opportunity to present its case or response. This factor, namely ACE's own inadvertence, weighs against an exercise of the s 603 discretion to revoke.

**[96]** However, other aspects of this case merit attention. The matter is not one of changed circumstances (like *Esso*), but unquestionably, the Commissioner based his Decision on incomplete evidence – meaning that ACE, for reasons detailed, did not file any material subsequent to the Form F3. Whilst it is evident from the materials filed at first instance (that form part of the Commission's record) that Mr Archer presented relevant evidence such as the letters from ACE of 17 January 2022, 28 January 2022, 22 February 2022, ultimately and understandably, Mr Archer likely presented his case to favour his version of events. This is not however to suggest that Mr Archer provided false information or otherwise misled the Commission.

**[97]** When referring to the circumstances of 'incomplete evidence', his Honour in the decision of *Grabovksky* cited the decision in *Rainshield* (see paragraph [70] of this decision for discussion of *Rainshield*). However, the incomplete evidence in *Rainshield* arose because the party had filed material albeit to the 'UDT Rosters' email address and presumedly not the relevant Chambers. The circumstances are remarkably removed from those where ACE did not file any materials notwithstanding Mr Devine and Ms Collier having knowledge of the application and ACE having been advised that a conference or hearing would follow the cancelled conciliation.

**[98]** However, having acknowledged that the Commissioner had before him an incomplete picture of the evidence and noting, in addition, the absence of a contradictor, the Commissioner

proceeded to determine that Mr Archer had been unfairly dismissed and issued a compensatory order for a not insignificant amount. The Commissioner did so in circumstances whereby he had arrived at the findings set out at paragraph [14] of this decision. Those findings evidently supported a conclusion that Mr Archer had not been unfairly dismissed. However, the turning point of the case was ultimately the Commissioner's conclusion that Mr Archer had been unfairly dismissed because the evidence before him demonstrated that Mr Archer could have been redeployed into the workshop but was not. The Commissioner concluded that instead, for 'reasons unknown', ACE opted to dismiss Mr Archer.

**[99]** I will pause briefly on the conclusion arrived at by the Commissioner, namely that, for 'reasons unknown', ACE opted to dismiss Mr Archer. There was evidence before the Commissioner that outlined ACE's reasons for dismissal (*see* the letter of termination of 16 March 2022). Presumedly then, when the Commissioner reached his conclusion, it was made in the context where he had formed the view that ACE had created an expectation and/or provided a commitment of redeployment.[99] Hence the reference to 'reasons unknown' is open to be construed as the reasons why Mr Archer was not redeployed, rather than simply the reasons for dismissal having been unknown.

**[100]** As observed, for the purpose of the revocation application, ACE went to great pains to elicit the circumstances surrounding Mr Archer's evidence that Mr Smiler had purportedly said he could be redeployed and work in the Wangara workshop if he did not get the COVID-19 vaccination.

**[101]** In ACE's closing submissions, Counsel for ACE submitted that criticism levelled toward ACE in respect of its argument on the merits (as pressed by Mr Archer in the context of this revocation application) was misconceived. Counsel continued that this was because the merits were a relevant consideration for the exercise of the discretion. There is force in Counsel's contention that if ACE came before the Commission and said it would like the Decision revoked whilst not speaking to the merits of the case, then ACE would be rightly criticised. ACE ventured that it could not ask the Commission to exercise its discretion if there was not at least an arguable, and in its submission, a strong case (on the merits).

**[102]** In *Esso*, it was stated that s 603 is applicable to the whole of the broad range of decisions which the Commission may make, other than those in s 603(3). The Full Court continued that this circumstance together with provisions in the Act concerning the establishment of the Commission and the discharge of its functions suggest that the power in s 603(1) should not be narrowly confined. In respect of the functions, the Full Court made reference to the Commission's obligation to take into account equity, good conscience and the *merits* of the matter (s 578(b)).

**[103]** Had the evidence and submissions of ACE been before the Commissioner, a different outcome may have unfolded – particularly given the evidence in this application illuminated the circumstances surrounding the issue of redeployment. There was undoubtedly a factual contest between what Mr Archer said Mr Smiler communicated to him about redeployment, and what ACE says it conveyed to Mr Archer about working at the Wangara workshop. It is noted that ACE chose not to call Mr Smiler for the revocation application. In my view, this does not warrant an adverse inference, despite Mr Archer's submission to the contrary. The nature of this application does not necessitate a full exposition of the merits. Notwithstanding,

ACE's substantive argument with respect to the unfair dismissal application is not absent merit – noting, however, that the jurisdictional objection did not garner much attention by either party at hearing.

**[104]** ACE argued that Mr Archer's dismissal could hardly be described as harsh. It did so in the context of Mr Devine's evidence that no commitment was made to Mr Archer regarding redeployment, there were no viable redeployment options and Mr Archer declined to attend every meeting at which redeployment was to be discussed. ACE continued that it would, therefore, be contrary to the interests of justice if the Decision was allowed to stand.

**[105]** First, it should be said that at paragraph [120] of the Decision, the Commissioner did not conclude that Mr Archer's dismissal was harsh. The Commissioner determined that Mr Archer's dismissal was unreasonable. Second, with respect to the interests of justice, in *Grabovksky*, his Honour stated that as a general proposition, applications to vary or revoke a decision should not be used to re-litigate the original case. His Honour noted that after a case has been decided against a party, that party should not be permitted to raise a new argument which, deliberately or by *inadvertence*, it failed to put during the original hearing when it had the opportunity to do so.[100]

**[106]** There are factors of ACE's application for the revocation of the Decision that point in favour of the exercise of the discretion. The findings reached by the Commissioner, as detailed at paragraph [14] of this decision, are compelling. In respect to the substantive case regarding the merits of the unfair dismissal application, there is at least a plausible contention that Mr Archer's own failure to engage in discussions about potential redeployment may have contributed to his dismissal and that if a commitment was made by Mr Smiler, he may have lacked authority to do so. However, at this point, discussion regarding ostensible authority is unwarranted. Further, those factors include the salient point that the Commissioner made his decision based on incomplete evidence (no criticism is levelled at the Commissioner in this respect).

**[107]** ACE submitted in its application to revoke the Decision that there is significant prejudice (presumedly against it) in respect of the findings arrived at by the Commissioner. It continued that in order to ensure procedural fairness, it is appropriate that the Commission exercise its discretion to revoke the Decision and comprehensively re-hear and determine Mr Archer's originating unfair dismissal application with the benefit of all relevant evidence (and the testing of such evidence), and submissions before it. ACE contended that once presented with its evidence and submissions, and the cross-examination of Mr Archer, the Commission would find that the dismissal was not harsh, unjust or unreasonable.

**[108]** However, in my view, these factors are outweighed by certain countervailing factors pointing against the exercise of the discretion to revoke.

**[109]** Mr Archer's unfair dismissal application had been on foot since 29 March 2022. In that time (by 18 November 2022 to be precise), the Commission has handed down its decision that Mr Archer had been unfairly dismissed and awarded to him a compensatory amount. Through no fault of Mr Archer, the Decision is now being revisited by the making of the revocation application. The premise of the revocation application is essentially that ACE failed to put on a case in response to Mr Archer's application because it had been misled by a temporary HR

contractor, the purported rogue Mr Willeboordse, who, says ACE, was acting without authority in relation to the progress of the unfair dismissal application proceedings. However, as has been detailed, I am not similarly convinced that ACE was misled by Mr Willeboordse.

**[110]** At all material times, ACE was provided with the opportunity to present its response to the unfair dismissal application at first instance. Not only did Mr Willeboordse have knowledge of Mr Archer's unfair dismissal application, Mr Devine and Ms Collier were informed that Mr Archer's application was on foot. Mr Devine had authorised the filing of the Form F3 and hence its content. Further, Mr Devine had been provided with the Notice, which informed ACE:

> THE LISTING(S) HAS NOW BEEN CANCELLED.
> The respondent has advised that they wish for their objection to be dealt with in the first instance.
> **The matter will be listed for a conference/hearing.**
> **Parties will receive a new notice of listing in due course.**[101]
>
> Inquiries and contact details:
> All inquiries relating to this notice are to be directed to 1800 759 566 or Email UDT@fwc.gov.au.
> 20 May 2022 4:05PM

**[111]** Mr Devine did not receive a new notice of listing and he had not been informed that the unfair dismissal application had been discontinued, dismissed, or determined. Instead, Mr Devine, armed with the opinion of a temporary HR contractor that in respect of the unfair dismissal application 'there was no case to answer', opted to believe this on the basis he had no reason not to, given Mr Willeboordse's expertise.[102] However, ACE was clearly embroiled in litigation. In my view, ACE did not adduce persuasive evidence as to why it failed to exercise due diligence to enquire as to the status of the application against it, in circumstances where it had not received a new notice of listing or for that matter any other material from the Commission or Mr Archer.

**[112]** As observed, in some cases, there may be a fine line or even a sfumato blurring as to whether to exercise the discretionary power in s 603(1) of the Act. This is not such a case.

## 3 Conclusion

**[113]** I have declined to exercise the discretionary power in s 603(1) of the Act to revoke the Decision. Therefore, the revocation application is dismissed. An Order[103] issues concurrently with this decision.

DEPUTY PRESIDENT

*Appearances*:

*Mr M Minucci* of Counsel for the Applicant.
*Mr P Mullally* for the Respondent.

*Hearing details:*

2023.
Perth (by video):
14 February.

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<PR749696>

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[1] [2022] FWC 3029 (**Decision**).

[2] PR747981.

[3] *Australian Ceramics Engineering Pty Ltd v Archer* [2022] FWC 3337 (**Stay Decision**); PR749099.

[4] *Minister for Industrial Relations (Vic) v Esso Australia Pty Ltd* (2019) 268 FCR 520, 530, [34] (**Esso**).

[5] Witness Statement of Paul Devine, [47] (**Devine Statement**).

[6] Ibid annexure PD-20 (emphasis added); Digital Hearing Book, 185 (**DHB**).

[7] Devine Statement (n 5) [46].

[8] *Decision* (n 1) [108].

[9] Ibid [116].

[10] [2015] FWC 5161.

[11] See *Re Endeavour Energy* [2014] FWC 198 (**Endeavour Energy**).

[12] *Rainshield Roofing Pty Ltd v Paerau* [2014] FWC 3946 (**Rainshield**).

[13] *Re Rubber, Plastic and Cablemaking Industry Award 1972* (1975) 167 CAR 929, 931 (Gaudron J).

[14] *University of Wollongong v Metwally* (1985) 59 ALJR 481, 483 (**Metwally**).

[15] *Decision* (n 1) [8].

[16] Ibid [9].

[17] Ibid [13].

[18] (2020) 302 IR 120.

[19] *Decision* (n 1) [115].

[20] Ibid [116].
[21] Ibid [117].
[22] Ibid [118] – [119].
[23] Devine Statement (n 5) [19]
[24] Ibid [19], [23(e)], [25(e)].
[25] Ibid [24], [26(d)].
[26] Witness Statement of Ryan Archer, [15].
[27] Ibid.
[28] Devine Statement (n 5) annexure PD-9; DHB (n 6) 148.
[29] Divine Statement (n 5) annexure PD-11; DHB (n 6) 155.
[30] Divine Statement (n 5) annexure PD-11; DHB (n 6) 155.
[31] Divine Statement (n 5) annexure PD-12; DHB (n 6) 157.
[32] Divine Statement (n 5) annexure PD-13; DHB (n 6) 158.
[33] Divine Statement (n 5) annexure PD-13; DHB (n 6) 158.
[34] Divine Statement (n 5) annexure PD-13; DHB (n 6) 158.
[35] Divine Statement (n 5) annexure PD-14; DHB (n 6) 160.
[36] Divine Statement (n 5) annexure PD-14; DHB (n 6) 160.
[37] Divine Statement (n 5) annexure PD-15; DHB (n 6) 163.
[38] Devine Statement (n 5) [35].
[39] Ibid [36]; DHB (n 6) 30.
[40] Devine Statement (n 5) [36], annexure PD-17; DHB (n 6) 30.
[41] DHB (n 6) 286.
[42] Ibid 292.
[43] Devine Statement (n 5) annexure PD-19; DHB (n 6) 182.
[44] Devine Statement (n 5) [44].
[45] Ibid [45].
[46] Ibid annexure PD-20; DHB (n 6) 184.
[47] Devine Statement (n 5) annexure PD-20; DHB (n 6) 185.
[48] Devine Statement (n 5) [44].
[49] Ibid [46].
[50] Ibid.
[51] Ibid.
[52] Ibid [47].
[53] Ibid.
[54] Ibid.
[55] Ibid [48].
[56] Ibid [49].
[57] *Esso* (n 4) 530 [33].
[58] Ibid.
[59] Ibid 530 [34].
[60] *Fair Work Act 2009* (Cth) ss 576(2), 577, 578(b).
[61] *Esso* (n 4) 530 [34].
[62] Ibid 526–7 [22].
[63] Ibid 526–7 [22].

[64] Ibid 527 [23].

[65] *Esso Australia Pty Ltd v Australian Manufacturing Workers' Union* (2018) 281 IR 147.

[66] Ibid 173 [74].

[67] [2019] FWCFB 3992, [58] (citations omitted).

[68] [2018] FWCFB 4734.

[69] [2019] FWCFB 815.

[70] See *Endeavour Energy* (n 11).

[71] *Rainshield* (n 12).

[72] *Re Rubber, Plastic and Cablemaking Industry Award 1972* (n 13) 931 (Gaudron J).

[73] *Metwally* (n 14) 483.

[74] (2015) 256 IR 112 (**Re HSU**).

[75] (2015) 247 IR 31.

[76] Ibid 49 [85]

[77] Ibid 50 [88]

[78] Ibid 54 [100]

[79] Ibid 50 [87]

[80] *Re HSU* (n 74) 122–3 [24].

[81] *Esso Australia Pty Ltd v Australian Workers' Union* (2017) 263 CLR 551, 579–80 [49].

[82] *Rainshield* (n 12).

[83] [2021] FWC 6572.

[84] [2022] FWC 212.

[85] [2021] FWC 1308.

[86] *Stay Decision* (n 3) [13(b)].

[87] Ibid [16].

[88] (2010) 203 IR 1.

[89] Ibid 6 [14].

[90] Devine Statement (n 5) [45].

[91] Ibid annexure PD-20; DHB (n 6) 184.

[92] Devine Statement (n 5) annexure PD-20; DHB (n 6) 185.

[93] Devine Statement (n 5) [46].

[94] Ibid.

[95] Ibid.

[96] Ibid [44].

[97] Ibid [47].

[98] Ibid.

[99] *Decision* (n 1) [117].

[100] *Metwally* (n 14) 483.

[101] Devine Statement (n 5) annexure PD-20; DHB (n 6) 185 (emphasis added).

[102] Devine Statement (n 5) [46].

[103] PR749697.