

[2023] FWC 1780

The attached document replaces the document previously issued with the above code on 20 July 2023.

A typographical error in paragraph [36] has been corrected to refer to the correct section of the FW Act.

Charlotte Smee
Associate to Deputy President Wright

Dated 1 August 2023.



DECISION

Fair Work Act 2009

s.365 - Application to deal with contraventions involving dismissal

Rory Maloney

v

Knowmore Legal Service Limited

(C2023/2436)

DEPUTY PRESIDENT WRIGHT

SYDNEY, 20 JULY 2023

General protections dismissal dispute – jurisdictional objection – whether applicant dismissed – demotion – demotion constitutes dismissal – jurisdictional objection dismissed

Introduction and outcome

[1] Ms Rory Maloney made an application to the Fair Work Commission (**Commission**) under s.365 of the *Fair Work Act 2009* (Cth) (**FW Act**) for the Commission to deal with a dispute arising out of allegations that she had been dismissed from her employment with knowmore Legal Service Limited (**knowmore**) in contravention of Part 3-1 of the FW Act.

[2] knowmore has objected to the application on the ground that Ms Maloney was not dismissed from her employment.

[3] Before dealing with the dispute under s.368, I must be satisfied that Ms Maloney was dismissed.

[4] In summary, I have found that knowmore demoted Ms Maloney from the position of Support and Trauma Informed Practice Manager to the position of Social Worker/Counsellor on 12 April 2023, that Ms Maloney did not consent to the demotion and that the demotion is not authorised by Ms Maloney’s employment contract or an instrument governing it. In doing so, knowmore repudiated the contract of employment. Ms Maloney accepted the repudiation and was therefore dismissed by knowmore within the meaning of s.365 of the FW Act.

[5] The application was filed on 1 May 2023 and as such is within the timeframe required by s.366(1)(a) of the FW Act.

Legislation

[6] Section 365 of the FW Act provides:

365 Application for the FWC to deal with a dismissal dispute

If:

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

[7] The dictionary at clause 12 of the FW Act refers to section 386 for the definition of “dismissed”.

[8] Section 386 of the FW Act provides:

386 Meaning of *dismissed*

- (1) A person has been *dismissed* if:
 - (a) the person’s employment with his or her employer has been terminated on the employer’s initiative; or
 - (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.
- (2) However, a person has not been *dismissed* if:
 - (a) the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or
 - (b) the person was an employee:
 - (i) to whom a training arrangement applied; and
 - (ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement; and the employment has terminated at the end of the training arrangement; or
 - (c) the person was demoted in employment but:
 - (i) the demotion does not involve a significant reduction in his or her remuneration or duties; and
 - (ii) he or she remains employed with the employer that effected the demotion.
- (3) Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person’s employment, to avoid the employer’s obligations under this Part.

Directions and submissions

[9] The matter was listed for directions on 19 June 2023. The parties agreed that the issue of whether Ms Maloney was dismissed could be determined on the papers.

[10] On 26 June 2023, knowmore filed submissions and evidence.

[11] On 4 July 2023, Ms Maloney filed submissions and evidence.

Factual background

[12] The facts which led to the alleged dismissal are not in dispute.

[13] Ms Maloney commenced working for knowmore on 9 October 2014 as a Counsellor. In 2019, Ms Maloney was promoted to the position of Regional Client Service Manager. From March 2021 until 12 April 2023, Ms Maloney was employed as Support and Trauma Informed Practice Manager, a role that was offered to Ms Maloney on a permanent basis from 1 July 2021. According to knowmore, Ms Maloney's annual salary was \$112,571.04, however Ms Maloney says it was \$112,573.50.

[14] Ms Maloney's employment arrangements were determined by an employment contract governed by the *National Association of Community Legal Centres Enterprise Agreement 2016-2020 (NACLCEA)*.

[15] On 20 March 2023, Ms Maloney received a letter from Amanda Whelan, knowmore's Director of Client Services, setting out allegations of misconduct and advising that knowmore had reached a preliminary view that there were sufficient grounds to demote Ms Maloney to the role of Social Worker/Counsellor. It is not necessary to provide details of these allegations for the purpose of determining whether Ms Maloney was dismissed.

[16] Ms Maloney provided a verbal response to the allegations on 28 March 2023 and a written response on 29 March 2023.

[17] On 5 April 2023, Ms Maloney received a Final Outcome Decision letter from Ms Whelan advising that she would be demoted to Social Worker/Counsellor from 12 April 2023 for a period of six months, with the potential to progress to a senior practitioner role in the team at the conclusion of the six-month period. The salary for Social Worker/Counsellor is \$96,131.58. The parties agree that the reduction in Ms Maloney's salary is substantial.¹

[18] Ms Maloney has not attended work since 5 April 2023.

[19] On 1 May 2023, Ms Maloney filed a Form F8 – General Protections application involving dismissal (the **application**) alleging that the demotion was a dismissal and in contravention of Part 3-1 of the FW Act.

[20] On 16 May 2023, knowmore filed a Form F8A – Response to general protections application denying that Ms Maloney was dismissed and that knowmore has contravened section 340 or any other provision of the FW Act.

Submissions

[21] knowmore relied upon Ms Maloney's written response to the allegations dated 29 March 2023 to submit that Ms Maloney implicitly acknowledged knowmore's right to demote her.

knowmore acted in good faith, in reliance on the oral and written submissions of Ms Maloney that, while she would have preferred to not be demoted, she wished to continue her employment in whatever role knowmore saw fit to provide her.

[22] At no stage did Ms Maloney or her representative object to the proposed disciplinary action of demotion on the basis that it would constitute a dismissal or that it was otherwise unlawful. In recognition of Ms Maloney's contrition and acceptance of responsibility, knowmore determined the demotion to Social Worker/Counsellor would be temporary, for a period of six months.

[23] Accordingly, on 5 April 2023, knowmore confirmed in writing to Ms Maloney that her demotion would take effect on 12 April 2023. At this point, Ms Maloney's employment contract had been varied.

[24] The first time Ms Maloney contested the legal basis of the demotion was by way of a letter from her solicitor to knowmore dated 7 April 2023. By then it was too late.

[25] Ms Maloney continues to be employed and is currently absent on leave without pay. All of knowmore's actions since 5 April 2023 have been consistent with the premise that Ms Maloney remains employed by it.

[26] In the alternative, if Ms Maloney's contract of employment was not varied with effect from 5 April 2023, knowmore relies upon the term in Ms Maloney's contract that she may be directed to perform other duties from time to time "to suit organisational requirements and which are broadly consistent with her role".

[27] Further, or in the alternative, knowmore relies upon the NACLCLC Managing Misconduct Policy (**MM Policy**) referenced in the NACLCLC EA which provides:

Where the investigator finds that there was misconduct by a staff member, the relevant decision maker (which may, or may not be the investigator) in consultation with any other appropriate person/people will determine the appropriate penalty and/or any other action that the person should be required to undertake. These will be appropriate to the type of misconduct and must be in accordance with NACLCLC's legal obligations. Possible penalties and actions include but are not limited to:

- requirement to provide an apology in writing
- informal warning
- requirement to attend specified training or counseling [sic]
- amendment of duties
- restriction on manner or place where duties may be carried out
- formal warning
- dismissal or termination of contract

[28] knowmore claims that the demotion was an "amendment of duties" authorised by the NACLCLC EA and relies upon the reasoning of the Full Bench in *NSW Trains v James*² as authority for the proposition that, if an express term of an enterprise agreement authorises a demotion, any such change cannot be termination of employment.

[29] knowmore concludes by submitting that cases which deal with s. 386 are of limited relevance. To the extent that s.386 applies to this matter, it is not helpful where:

- Ms Maloney agreed to the demotion and/or
- knowmore had the lawful right to demote her.

[30] Ms Maloney submitted that there is no express or implied capacity in the NACLCLC EA or the associated MM Policy for knowmore to demote her. The demotion was significant in terms of role and financial reduction, and it was potentially permanent. These three factors separately and collectively strongly point to a demotion amounting to a repudiation, and therefore a dismissal. Therefore, knowmore has terminated Ms Maloney's employment by way of repudiation of the contract of employment.

[31] Ms Maloney has not agreed to the demotion. knowmore's letter to Ms Maloney dated 5 April 2023 indicates that she had not agreed to being demoted in the following sentence:

knowmore understands and appreciates that this is a big change and *in recognition of your comments about needing to consider your options* (emphasis added), we have agreed that you do not need to attend work, today 5 April 2023.

[32] The relevant payslips show knowmore has reduced Ms Maloney's hourly pay from \$57.73 to \$49.30 without further discussion.

[33] The Commission must also be satisfied that the employer has acted in accordance with the terms of the instrument authorising the employee's demotion when effecting a demotion. knowmore did not act in accordance with the NACLCLC EA in this regard.

Consideration

[34] Both parties relied on the decision of the Full Bench in *NSW Trains v Mr Todd James*³ which involved the demotion of Mr James by NSW Trains following a disciplinary procedure.

[35] Mr James made an application for an unfair dismissal remedy under s.394 of the FW Act alleging the demotion constituted a dismissal. At first instance, Deputy President Saunders determined that the demotion involved a significant reduction in Mr James' remuneration, and therefore, Mr James had been dismissed within the meaning of s.386 of the FW Act.⁴ On appeal, the Full Bench found that Mr James was not dismissed and dismissed his application.

[36] Although knowmore relied on *NSW Trains v Mr Todd James*, it submitted that cases which deal with section 386 are of limited relevance in considering Ms Maloney's application. As noted above, the meaning of "dismissed" in section s.365(a) is interpreted with reference to s.386. I do not accept this submission.

[37] In considering the matter, the Full Bench in *NSW Trains v Mr Todd James* made a number of observations concerning demotions and the proper construction and correct application of s.386 of the FW Act which are relevant to the matter before me including:

- i. There is no general right at common law to demote an employee in the absence of an express or implied contractual right to do so or other governing instrument authorising this.⁵
- ii. Where a demotion is authorised by the employment contract or an instrument governing it, and pursuant to the contract or governing instrument the demotion does not constitute termination of employment, then the demotion will not constitute termination of employment for the purposes of s.386⁶
- iii. The existence of a power to demote in contract or other governing instrument is not necessarily determinative in all cases.⁷ A critical question in each case will be whether properly construed, the relevant instrument(s) provide that a demotion authorised by the instrument does not constitute termination of employment.⁸
- iv. The Commission must also be satisfied that the employer has acted in accordance with the terms of the instrument authorising the employee's demotion, in effecting a demotion.⁹
- v. Parties cannot simply 'contract out' of the Commission's unfair dismissal jurisdiction. An industrial instrument containing detailed provisions regarding the investigation and disciplining of employees and permitting a penalty decision to be subject to merits review may not be regarded as means to avoid the Commission's unfair dismissals jurisdiction. In contrast, a standard form contract containing a bare statement that the employee may be demoted, and that does not include any procedural protections such as merits review, might be regarded by the Commission as a mere device that impermissibly seeks to oust its unfair dismissals jurisdiction.¹⁰
- vi. The Commission may need to consider in a particular case whether the terms of the written contract of employment permitting demotion reflect the actual agreement between the parties at the time of the employee's demotion.¹¹
- vii. Where an employee voluntarily consents to a demotion and the employer acts on that consent, there will be a mutually agreed outcome that does not amount to a dismissal. Such consent can be express or implied or inferred from the circumstances of the case.¹²
- viii. The expression 'employment ... has been terminated' in s.386(1)(a) means termination of the employment relationship and/or termination of the contract of employment. On this construction, unless the circumstances in s.386(2)(c) apply, an employee may be dismissed within the terms of s.386(1)(a) if the employer has repudiated the employee's contract of employment by demoting the employee and the employee has accepted that repudiation but has continued to be employed by the employer under a new employment contract.¹³
- ix. The employee could elect to accept the repudiation by lodging an application under Part 3-2 of the FW Act and leaving the employment or (reluctantly) continuing in employment with the employer in the demoted position under a new contract of employment, while pursuing the unfair dismissal application.¹⁴
- x. As a general proposition, provided the employee makes clear their objection to the demotion, they should not be taken to have affirmed their original contract of employment merely by continuing to work in the demoted position and being paid for that work whilst challenging the alleged dismissal before the Commission. It will be a question of fact in each case as to whether the conduct of an employee constitutes an affirmation of their contract.¹⁵

[38] Based upon these observations, I propose to consider the following issues in determining the matter before me:

- Did Ms Maloney voluntarily consent to the demotion?
- Is the demotion authorised by the employment contract or an instrument governing it?
- Did knowmore repudiate the contract of employment by demoting Ms Maloney?
- If knowmore repudiated the contract, did Ms Maloney accept the repudiation?

Did Ms Maloney voluntarily consent to the demotion?

[39] knowmore claimed that Ms Maloney agreed to the demotion. Ms Maloney disputes this.

[40] Both parties relied upon the terms of Ms Maloney's written employment contract (the contract) with knowmore. The contract comprises an Offer of Employment from knowmore to Ms Maloney dated 11 June 2021 which was signed by Ms Maloney on 15 June 2021. Clauses 2.5, 4 and 17 of the contract are relevant to the proceedings.

[41] Clause 2.5 provides,

The duties of this position are set out in the attached position description. You will be required to perform these duties, and you may be directed to perform other duties from time to time to suit organisational requirements and which are broadly consistent with your role.

[42] Clause 4 provides,

4. Remuneration

Your salary is **\$105,000.00** full time equivalent, per annum, which will be paid into your nominated bank account fortnightly ('Remuneration').

4.1. Your role is classified as **level 6, grade 3**. We have agreed that you will be paid above this pay point, based on the above Remuneration.

4.2. knowmore will make superannuation payments on your behalf in accordance with the *Superannuation Guarantee (Administration) Act 1992 (Cth)*, as amended from time to time, and the NACLIC Enterprise Agreement (or any subsequent applicable industrial instrument), at whichever is the higher rate.

4.3. Your Remuneration will be reviewed annually.

[43] Clause 17 provides,

Except as provided in this Contract of Employment, this Contract of Employment may only be varied by agreement in writing.

[44] The combined effect of these clauses is that knowmore could direct Ms Maloney to perform other duties broadly consistent with her role from time to time but could not vary Ms Maloney's pay without her written consent.

[45] knowmore relied upon Ms Maloney's written response to the proposed demotion dated 29 March 2023 to assert that it showed that Ms Maloney consented to the demotion as while she would have preferred to not be demoted, she wished to continue her employment in whatever role knowmore saw fit to provide her. knowmore also pointed to the fact that Ms Maloney or her representative did not object to the proposed disciplinary action of demotion on the basis that it would constitute a dismissal or was otherwise a breach of her contract of employment or unlawful.

[46] The only aspect of Ms Maloney's six-page letter which indicated that Ms Maloney was open to working in an alternative role was the following:

Moving forward, *regardless of my role going forward*, I welcome suggestions for training and/or professional development that you believe would be beneficial given my actions. I wish to take every step possible to show that I am very remorseful, regret my actions and importantly provide you with an assurance that that this will not occur again. (emphasis added).

[47] This statement by Ms Maloney does no more than confirm the provisions of clause 2.5 of the contract. In addition, as noted above, knowmore's letter to Ms Mahoney dated 5 April 2023 appears to acknowledge Ms Maloney's reluctance to accept the outcome of the disciplinary process.

[48] The evidence filed by the parties establishes that Ms Maloney did not explicitly or implicitly consent to knowmore reducing her pay. In any event, even if Ms Maloney provided such consent, clause 17 of the contract requires the consent to be confirmed in writing which did not occur. There has been no variation to the contract which permits the demotion.

[49] In making this finding, I reject knowmore's submission that the legal position was that as from 5 April 2023 the contract had been varied.¹⁶ This is not possible given the provisions of clause 17 of the contract.

[50] I therefore find that Ms Maloney did not voluntarily consent to the demotion.

Is the demotion authorised by the employment contract or an instrument governing it?

[51] The demotion of Mr James in *NSW Trains v Mr Todd James* was authorised by both legislation and an industrial instrument. In this regard, cl.32.14 of the *NSW Trains Enterprise Agreement 2018* and reg.20(1)(c) of the *Transport Administration (Staff) Regulation 2012* (NSW) both provide that a reduction in position, rank or grade and pay can be imposed following a finding of fault in disciplinary proceedings.¹⁷

[52] If Ms Maloney's contract was not varied with effect from 5 April 2023 by agreement, knowmore relies upon clause 2.5 of the contract which permits knowmore to direct her to perform other duties from time to time "to suit organisational requirements and which are broadly consistent with [her] role".

[53] The demotion of Ms Maloney involves both a transfer to a lower graded position *and* a significant reduction in pay.¹⁸ Ms Maloney’s role of Support and Trauma Informed Practice Manager is classified at Level 6, pay point 3 of the NACLCL EA and the demoted position of Social Worker/Counsellor is classified at Level 5, pay point 3 of the NACLCL EA.

[54] Given the different classifications of these roles, I have significant doubts about whether the new position of Social Worker/Counsellor would be regarded as “broadly consistent with [Ms Maloney’s] role”. In any event, there is no reference in the contract to knowmore being able to significantly reduce Ms Maloney’s pay. In the absence of the contract providing knowmore with the authority to vary Ms Maloney’s pay, I find that the employment contract does not permit the demotion.

[55] In the alternative, knowmore submits that the demotion is permitted by the relevant industrial instrument as it amounts to “amendment of duties” which is a “possible penal[t]y or action” provided in the MM Policy as referenced in the NACLCL EA. Possible penalties and actions are required to be in accordance with the knowmore’s legal obligations. In my view, such legal obligations include the employment contract between Ms Maloney and knowmore.

[56] “Amendment” means a change so made, either by way of correction or addition.¹⁹ “Duties” in the context of work means an action required by one’s position or occupation; office; function²⁰.

[57] The MM Policy permits knowmore to change or add to the actions of an employee’s position or occupation following a disciplinary procedure provided that this is in accordance with knowmore’s legal obligations.

[58] In Ms Maloney’s case, knowmore sought to both amend the duties *and* reduce the pay of Ms Maloney. There is no reference to reduction of pay in either the NACLCL EA or the MM Policy. If the NACLCL EA or the MM Policy authorised the reduction of pay as a disciplinary outcome, I would expect this to be explicitly stated as it is in the *NSW Trains Enterprise Agreement 2018* referred to above, given the potentially harsh consequences to an employee of such action.

[59] Furthermore, as noted above, the contract does not permit reduction of pay except where the parties agree to vary the contract in writing. I therefore find that Ms Maloney’s demotion is not authorised by the relevant industrial instrument. Given this finding, it is not necessary for me to determine whether knowmore has acted in accordance with the terms of an instrument authorising the demotion, in effecting the demotion.

Did knowmore repudiate the contract of employment by demoting Ms Maloney?

[60] As stated in *NSW Trains v Mr Todd James*²¹ and other authorities, there is no general right at common law to demote an employee in the absence of an express or implied contractual right to do so or other governing instrument authorising this.

[61] Given my findings that Ms Maloney did not voluntarily consent to the demotion and that the demotion is not authorised by the employment contract and/or an instrument governing it, I find that knowmore repudiated the contract of employment by demoting Ms Maloney from

the position of Support and Trauma Informed Practice Manager to the position of Social Worker/Counsellor.

If knowmore repudiated the contract, did Ms Maloney accept the repudiation?

[62] knowmore submits that at no stage prior to 7 April 2023 did Ms Maloney or her representative object to the proposed disciplinary action of demotion on the basis that it would constitute a dismissal or was otherwise a breach of her contract of employment or unlawful.

[63] However, on 7 April 2023, Ms Maloney's lawyer wrote to knowmore alleging that the demotion was a dismissal. On 26 April 2023 Ms Maloney's lawyer wrote a further letter to knowmore alleging that Ms Maloney's employment was terminated on 12 April 2023 and demanding payment of unused annual and long service leave and provision of employment records.

[64] Ms Maloney has not attended work since 5 April 2023 or applied for leave. On 1 May 2023, Ms Maloney filed the application.

[65] Based upon these actions undertaken by or on behalf Ms Maloney, I am satisfied that Ms Maloney made it clear to knowmore that she objected to the demotion and did not affirm her employment contract. Ms Maloney has therefore accepted the repudiation.

[66] The Respondent submits that Ms Maloney continues to be employed and is currently absent on leave without pay. It is not necessary for me to make findings about Ms Maloney's current employment status to conclude that Ms Maloney has accepted the repudiation.

[67] There is no evidence that establishes, and the parties have not submitted, that the exemptions in s.386(2)(a) and (b) apply. As the parties agree that the demotion involves a significant reduction in Ms Maloney's remuneration, the exemption in clause 386(c) does not apply and accordingly I find that Ms Maloney has been dismissed within the meaning of s.365 of the FW Act.

[68] The jurisdictional objection raised by knowmore is dismissed and I order accordingly. The matter will shortly be listed for Conference so that the Fair Work Commission can deal with the matter as required by s.368 of the FW Act.



DEPUTY PRESIDENT

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¹ Respondent's Outline of Submissions, [13]; Applicant's Submissions, [18]

² [2022] FWCFB 55

³ Ibid

⁴ [\[2021\] FWC 4733](#)

⁵ [2022] FWCFB 55, [113] citing *Brackenridge v Toyota Motor Corporation Australia Ltd* (1996) 142 ALR 99, 105

⁶ Ibid, [116]

⁷ Ibid, [130]

⁸ Ibid, [131]

⁹ Ibid, [135] citing *Elizabeth Gorczyca v RMIT University* [2002] AIRC 1115, [PR922414](#), [14] and *Lollback v University of Southern Queensland* [\[2014\] FWC 2011](#), [58].

¹⁰ Ibid, [137]-[140]

¹¹ Ibid, [143] citing *Quinn v Jack Chia (Australia) Ltd* (1992) 1 VR 567, 576.

¹² Ibid, [171] citing *Robinson v Commissioner of Police* [2014] NSWIRComm 35, [81]

¹³ Ibid, [45]

¹⁴ Ibid, [70]

¹⁵ Ibid at [76] citing *Crowe Horwath (Aust) Pty Ltd v Loone* [2017] VSC 163, [72].

¹⁶ Respondent's submissions, [11]

¹⁷ Ibid, [98]

¹⁸ Respondent's Outline of Submissions, [13]; Applicant's Submissions, [18]

¹⁹ Macquarie Dictionary

²⁰ Macquarie Dictionary

²¹ [2022] FWCFB 55