DECISION

Fair Work Act 2009
s.365 - Application to deal with contraventions involving dismissal

Mrs Sonia Argentier

v

City Perfume Retail Pty Ltd
(C2023/2593)

DEPUTY PRESIDENT ROBERTS SYDNEY, 24 JULY 2023

Application to deal with contraventions involving dismissal – Whether employ dismissed within the meaning of s.365(a) – Whether application filed out of time

[1] Ms. Sonia Argentier (the Applicant) has applied under s.365 of the Fair Work Act 2099 (Cth) (the FW Act) for the Fair Work Commission (the Commission) to deal with a dispute relating to her alleged dismissal by City Perfume Retail Pty Ltd (the Respondent). The Applicant claims that the alleged dismissal was in contravention of Part 3-1 General Protections, of the FW Act. The Respondent has submitted that the Applicant was not dismissed, or that she terminated her own employment and, in the alternative, that the application was not made within the 21-day time period provided for by the FW Act.[1]

[2] 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.*

[3] In order for the Commission to be able to deal with the dispute under s.368 of the FW Act it must determine that the Applicant has been dismissed within the meaning of s.365.[2] The Commission must conclude that the relevant dismissal has actually occurred as a matter of jurisdictional fact. It is not sufficient that the applicant merely alleges that they were dismissed. If there is a contest as to whether the alleged dismissal, the subject of the application has occurred, this is an antecedent question which has to be determined before the powers to deal with the dispute conferred by s.368 can be exercised.[3]

[4] An application under s.365 must also be made within 21 days of the date of an applicant's dismissal or within such further period as the Commission allows under s.366(2).

[5] For the reasons which follow I have concluded that the Applicant was dismissed within the meaning of s.365. I have also concluded that the application was made within 21 days after the dismissal took effect in accordance with s.366(1)(a).

Background and Evidence

[6] Most of the evidentiary material in this matter came from the Applicant. That evidence was not seriously contested. The Applicant gave evidence that on or about 4 April 2023, the Applicant applied for a position with the Respondent as a Fragrance Brand Ambassador.[4] The evidence was that shortly after the application for the position was made, she attended an online interview with a representative from the Respondent on 6 April 2023. Documents submitted by the Applicant show that at 9.56am on 6 April the Applicant was sent a written communication from Mr. Gergi, Senior Financial Accountant and HR Manager for the Respondent, which is reproduced, as it appears, below:

> ***Onboarding documents and interview information***
>
> *Hi Sonia*
>
> *Well done in todays interview and being successful*
> *I have sent through your onboarding information via email you will receive 2 links from the deputy one is for the documents and forms that are required to be completed and the other is for your deputy app download and invitation. if you can kindly complete the documents by 12 of april that would be greatly appreciated. For a start date of 18th April 2023.*
>
> *Kind regards*
> *Jack*[5]

[7] The Applicant's documentary evidence showed that on the same day she received an invitation from Mr. Gergi to join the Respondent on an app called 'Deputy'. The messages from Mr. Gergi, through the app, included the following:

> *Jack from City Perfume Retail has invited you to receive your shifts using Deputy*[6]

And

> *Hi Sonia Argentier,*
>
> *Welcome to City Perfume Retail. We're happy to have you! To get you started your manager has sent you onboarding forms to fill out including bank details, tax information, superannuation*[7]

[8] The documentation also shows that on the same day the Applicant accepted the invitation via the app and 'activated' her Deputy account.[8]

[9] Further documentation filed by the Applicant shows that a copy of an employment contract was sent to her through the Deputy app on 6 April 2023.[9]

[10] The Applicant's evidence was that a week or so later she attended a second meeting. The meeting was brief – in the order of 10 minutes – and was conducted in-person. The Applicant spoke with a Ms. Moreno at the meeting. Ms. Moreno was from a business called Agence de Parfum.[10] This business was described in written communications from Mr Gergi to the Applicant as the Respondent's 'brand partner.'[11]

[11] The Applicant provided evidence that on 11 April 2023, the Respondent sent a message through Deputy to the Applicant. It provided in part:

> *Notification from City Perfume Retail*
>
> *Just another reminder to all staff including all new starters that there is a training session on 19 April at 7pm at agence de parfum head office in roseberry for niche.*[12]

[12] The Applicant's documentation also showed that on 12 April 2023, Mr. Gergi sent the Applicant a message, reproduced as it appears, below:

> *Onboarding*
>
> *hi sonia*
> *i have only one more document left for you to sign for the onboarding to be completed and that is the employment contract.*[13]

[13] The message further indicates that by that time, the Applicant had signed or acknowledged the Respondent's mobile phone policy, uniform policy, new employee form, TFN declaration and super choice form.

[14] The Applicant's employment contract was also put in evidence by the Applicant.[14] The employment contract shows that it was signed by her on 12 April 2023.[15] It was returned to the Respondent on the same day.[16] The Applicant provided a copy of a message from Mr. Gergi to the Applicant dated 12 April 2023 that provided as follows:

> *perfect all received*
>
> *your onboarding has now completed and you will be rostered on next week please check your deputy app for your rostering shortly*[17]

[15] It appears that having provided the Respondent with a copy of the contract signed by herself, the Applicant requested the Respondent to provide a copy of the contract executed by both parties. Mr. Gergi obliged that request in a message of the same date. The Applicant's employment contract was signed by Mr Naboulsi, a director of the Respondent, on 13 April 2023. Mr. Gergi's message also included the words 'nothing further to complete at this present moment.'[18]

[16] The Applicant's employment contract provides in part as follows:

> *THIS AGREEMENT is made on 06/04/2023 between City Perfume Retail Pty Ltd ABN 69 652 130 633 hereafter known as the employer and Sonia Argentier (Hereafter known as the employee)*
>
> *THE PARTIES agree as follows:*
>
> *THE AGREEMENT*
>
> *…1.2 It records the conditions in relation to the employment relationship established by this agreement, except those created or implied by law.*
>
> *APPOINTMENT*
>
> *2.1 The employer offers to employ the Employee and the Employee accepts employment with the Employer subject to the terms and conditions herein and implied by law….*
>
> *2.2 Date new contract commenced: 18/04/2023*
>
> *2.3 Basis of employment is Casual.*
>
> *2.4 Date employment originally started 18/04/2023.*

[17] According to the Applicant's oral evidence, she had indicated to the Respondent that she was available to start work from 18 April 2023. She said the Respondent had made several changes to her proposed shifts but had ultimately rostered her to work on Thursday, 20 April. Mr. Gergi gave evidence for the Respondent and said that the Applicant's 'technical start date' was 20 April. However, he accepted that the Applicant could have been rostered on to work on any day on and from 18 April. He said that the first available shift that the Applicant was rostered to work on was on 20 April.

[18] As events transpired, the Applicant did not commence her first shift. The Applicant's documentary evidence was that on 17 April 2023, she sent a message to Mr. Gergi asking whether the training session on 19 April was to be a paid session.[19] Mr Gergi replied on the same day that the session was 'professional development' and would be unpaid.

[19] On 18 April, the Applicant sent a further message to the Respondent indicating that because the session was to be unpaid, she would not be attending.[20] The Respondent, through Mr. Gergi, replied at 11.14am on 18 April. Mr Gergi said the masterclass session was an opportunity that arises once a year, that a gift would be provided to the Applicant for attendance and that the session would be 'truly beneficial for (the Applicant's) own knowledge'. He asked that the Applicant confirm her attendance at the session.[21] By return message at 12.07pm the Applicant advised again that she would not be attending the unpaid training session.[22]

[20] At 12.52pm on 18 April, Mr. Gergi sent the following message to the Applicant:

> *Hi Sonia*

With much regret I wish to inform you that our business and brand partners have decided to withdraw the brand ambassador role at this stage from the market.

With that being said the brand ambassador role is no longer available. Unfortunately they have also cancelled our masterclass last minute apologies for the inconvenience caused.

However should the role come back up I will keep you in mind if that is okay with you.

Wishing you all the very best success in your future endeavours, thank you kindly for applying with us and many apologies for the outcome.[23]

[21] The Applicant's reply to Mr. Gergi's message at 3pm later that day is reproduced as follows:

Dear Jack,

Many thanks for your email and letting me know.

The way you have fired me, I think that it is not correct.

I didn't ask much, I just wanted things done correctly and by the law, a Mandatory Training or Masterclass should have been paid.

Wishing you all the best as well.[24]

[22] Later that day, the Applicant was notified through the Deputy app that her rostered shifts for Thursday 20, Friday 21 and Saturday 22 April 2023 had been 'removed'.

[23] The Applicant made an application under s.365 of the FW Act by telephone on 9 May 2023. She later lodged further supporting documentation in support of her application on 22 May. The Respondent accepts that the application was submitted on 9 May 2023.

[24] The Applicant contended that she was dismissed by the Applicant by the message she received at 12.52pm. As I apprehend the Respondent's submissions, they say that the Applicant's employment had not started because:

(i) her onboarding, including relevant documentation, was not completed and she had received no confirmation to the contrary,
(ii) she had not 'officially' started on the job,
(iii) she had not reported to a manager or undertaken any duties instructed by the Respondent,
(iv) she did not successfully complete an induction and
(v) she did not receive any company accesses.[25]

[25] Consequently, the Respondent says that as the Applicant's employment had not commenced, she could not have been dismissed by the Respondent. The Respondent contended

that there was no written evidence that the Applicant had been dismissed by them.[26] Alternatively, the Respondent suggested that the Applicant, through her 3pm message of 18 April, had terminated her own employment.[27]

Consideration

[26] Section 386 of the FW Act sets out the circumstances in which an employee can be said to have been 'dismissed' for the purposes of s 365. That section 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.

[27] In order to be dismissed under s. 386(1)(a), a person's 'employment' with his or her employer has to be terminated and terminated on the employer's initiative. For employment to be terminated it has to have commenced in the first place.[28]

[28] In *Khayam v. Navitas English Pty Ltd* [2017] FWCFB 5162 a Full Bench of the Commission concluded that the analysis of whether there has been a termination of employment at the initiative of the employer for the purpose of s 386(1)(a) is to be conducted by reference to termination of the employment *relationship*, not by reference to the termination of the contract of employment operative immediately before the cessation of the employment.[29] The question of whether the Applicant was dismissed for the purposes of s.386(1) therefore depends on the status of any employment relationship between the Applicant and the Respondent as opposed to the status of any contract of employment. This is not to say that the existence and effect of a contract of employment has no bearing on the question of whether an employment relationship exists or when that relationship comes into existence. The employment relationship is "inherently" a contractual one[30] and there can be no employment relationship without a contract of employment.[31] The High Court has recently noted the employment relationship is 'principally based in contract'[32] although earlier decisions have also observed that it would be rare to find an employment relationship defined purely by contract.[33]

[29] The employment relationship is the relationship between an employer and an employee in those respective capacities. An employment contract and an employment relationship can come into existence at different times. Often, but not always, the contract precedes the employment relationship or the commencement of work.

[30] In this matter the circumstances surrounding the negotiation and conclusion of an employment contract were not in issue. A written contract was executed by both parties by 13 April 2023. The terms of the contract provide that the agreement was 'made' on 6 April and that the contract 'commenced' on 18 April. The contract also includes the following terms:

1.2 It records the conditions in relation to the ***employment relationship established by this agreement****, except those created or implied by law.*

3.8 From the date of commencement of this agreement, the Employee shall not undertake any work (apart from that of his/her Employer) for remuneration except with the express permission of the Employer.

9.4 The ***commencement date of employment*** *for calculating long service leave and other entitlements will be the commencement date noted at 2.2.*

RELATIONSHIP OF PARTIES

33.1 ***The parties hereby specifically agree that it is intended that this agreement will create the relationship of employer and employee between them*** *and they hereby state that it is not their intention to create any other relationship and, in particular, the relationship of principal and contractor or the relationship of partners.* (emphasis added)

[31] In *Kelly v Melba Support Services Australia Ltd T/A Melba Support Services* (2021) FWCFB 4845 a Full Bench of the Commission pointed out that the question of whether an employment relationship exists at any point in time is a question of fact.[34] The determination of that question may be made more difficult in the case of casual employment. Irving has observed in relation to casual employees:

> *Ascertaining when the employment relationship of a casual worker commences can be perplexing. In some senses both a zero hours casual and those engaged under an umbrella contract are in employment relationships. But does the employment commence once placed on the books, or only when an employee accepts an offer to work a particular shift, or only when work is performed? There is no single correct answer in all contexts.*[35]

[32] In this matter, it was not in dispute that the Applicant had not commenced her first shift with the Respondent and consequently had not received any wages. The performance of work and payment of wages would generally be relevant considerations in any determination as to the existence of an employment relationship. The absence of either could suggest that there was no such relationship. However, these are not the only factors that need to be considered. All of the surrounding circumstances should be taken into account. In this case there are other factors that point to the existence of an employment relationship.

[33] The terms of the contract of employment are significant in this respect. It is the contract of employment which creates the basis of and underpins the employment relationship.[36] In this case those terms do not just set out conditions of employment but also make express reference to an 'employment relationship' being established by the contract itself. The agreement was made on 6 April. On any view, by 18 April those terms, including this term that established an employment relationship, had come into effect. Unlike the situation in *Kelly*, the contract of employment had been finalised and there were no contractual pre-conditions or unresolved issues between the parties that prevented an employment relationship from coming into

existence. The express terms of the agreement itself had brought an employment relationship into existence.

[34] Secondly, the evidence shows that the Applicant had completed the application process and 'onboarding', and had been added to the Respondent's 'Deputy' app. Through this app, a number of employment-related communications had passed to her from the Respondent prior to the events of 18 April. This included information and instructions about dealing with customers and the advice about the 'mandatory' training session that was to take place on 19 April. It was also through this app that employees, including the Applicant, were advised of shift arrangements. In other words, the Applicant was by this stage part of the Respondent's workforce. Any service-based payments that she might have been entitled to had begun to accrue by 18 April. She was being given directions about attendance at mandatory training and was, in accordance with her contract, available from 18 April to receive shift allocations on the same basis as employees who had worked for the Respondent for some time.

[35] Thirdly, the contract terms included a term that restricts the employee's capacity to work for another without the employer's consent. That restriction came into existence at the time when the contract was first entered into. The Applicant was from that point onwards restricted to working for the Respondent unless the Respondent agreed otherwise. Although this restriction was created by the contractual term, it also reflects an employee's common law duty of fidelity under which an employee would generally not be permitted to work for another employer whilst employed by the first employer. This restriction arose independently of the Applicant actually commencing work for the Respondent. It is consonant with the notion that an employment relationship existed between the Applicant and the Respondent.

[36] Fourthly, the exchange between the Applicant and the Respondent about attendance at the training session on 19 April, before the Applicant had commenced her first shift, supports the view that there was an employment relationship in existence. The session was described to the Applicant by the Respondent as a 'mandatory' training session. The Respondent asked the Applicant to confirm her attendance twice and clearly had an expectation that the Applicant, like other staff members, would attend even though the session was not an ordinary allocated shift and was unpaid.

[37] Finally, Mr. Gergi for the Respondent acknowledged that the Respondent could have been allocated shifts on and from 18 April. The Applicant had in fact been allocated her first shifts and was set to work between 20 to 22 April 2023. Had the events of the 18 April not intervened, it is likely she would have worked on those days.

[38] These matters lead me to conclude that even though the Applicant had not yet commenced her first shift with the Respondent, an employment relationship, albeit one of relatively short duration, existed between them. That relationship existed on 18 April 2023. Given the Applicant had not commenced any shifts, the issue of the potential impact on any employment relationship of her status as a casual employee with separate contracts of employment for each period of engagement and gaps between different engagements,[37] does not disturb that overall conclusion.

Termination on the employer's initiative

[39] Having concluded that there was an employment relationship, I must next consider whether that relationship was terminated at the initiative of the employer. In my view there is no doubt that the Respondent terminated the employment of the Applicant by the message that was sent at 12.52pm on 18 April. The message is in unequivocal terms. It says that the role the Applicant had successfully applied for had been withdrawn and was no longer available. That constituted a written notice of termination. It was clearly intended to have immediate effect. Removal of the Applicant's shifts from the app followed. The submission by the Respondent that there was no written evidence that the Applicant had been terminated by them is wrong as is the suggestion that the Applicant's message in reply at 3pm on the same day constituted a resignation by the Applicant.

Was the Application made Within Time?

[40] Section 366 provides that an application under s.365 must be made within 21 days after the dismissal took effect or within such further period as the Commission allows. The dismissal took effect on 18 April 2023 when the Respondent sent the message to the Applicant at 12.52pm. It was not in issue that the Applicant filed the originating application on 9 May 2023. The 21-day period does not include the day on which the dismissal took effect.[38] Accordingly, the application was made on the last day of the 21-day period.

Conclusion

[41] For the foregoing reasons, the Respondent's objections are dismissed. The matter will be relisted for a conference pursuant to s.368 of the FW Act on a date to be fixed.

DEPUTY PRESIDENT

Appearances:

Ms Argentier for the Applicant
Mr Gergi for the Respondent

Hearing details:

In-Person in Sydney on Thursday, 13 July 2023

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[1] s 366.

[2] *Coles Supply Chain Pty Ltd v. Milford* (2020) 279 FCR 591 and see *Lipa Pharmaceuticals v Jarouche* [2023] FWCFB 101.

[3] *Lipa* op cit at paragraph [4].

[4] Applicant Submissions and Documentation Exhibit A5 Court Book page 84. Referred to as a Retail Make Up Artist (Level 1) in the employment contract referred to hereunder, Court Book page 41.

[5] Exhibit A4, Court Book page 63.

[6] Ibid page 64.

[7] Ibid page 65.

[8] Ibid page 66.

[9] Exhibit A2 Annexures to Application Court Book page 44.

[10] Applicant Submission and Documentation Exhibit A5 Court Book page 97.

[11] Ibid page 82.

[12] Exhibit A4 Court Book page 68.

[13] Exhibit A4 Court Book page 70.

[14] Exhibit A2 page 32.

[15] Exhibit A2 Court Book page 40 and 44.

[16] Ibid page 71.

[17] Ibid.

[18] Exhibit A4 page 72.

[19] Exhibit A2 Court Book page 24.

[20] Exhibit A2 Court Book page 25.

[21] Exhibit A5 Court Book page 80.

[22] Ibid page 81.

[23] Ibid page 82.

[24] Exhibit A2 Court Book page 29. See also Exhibit R1 Court Book page 120.

[25] Exhibit R1 Court Book page 122.

[26] Ibid page 110.

[27] Ibid.

[28] *Kelly v Melba Support Services Australia Ltd T/A Melba Support Services* (2021) FWCFB 4845 at paragraph [20].

[29] At paragraph [75].

[30] *R v Bowen; Ex parte Amalgamated Metal Workers and Shipwrights' Union* [1980] HCA 42; (1980) 144 CLR 462 at 475.

[31] *Broadlex Services Pty Ltd v United Workers' Union* [2020] FCA 867 per Katzmann J at [61].

[32] *Construction Forestry Maritime Mining and Energy Union v. Personnel Contracting Pty Ltd* [2022] HCA 1 per Kiefel CJ, Keane and Edelman JJ at [41].

[33] *Commonwealth Bank of Australia v Barker* [2014] HCA 32 at per French CJ, Bell and Keane JJ at [16].

[34] At paragraph [20].

[35] Irving, M. *The Contract of Employment* 2nd Edition 2020 at 4.2.

[36] *Alouani-Roby v National Rugby League Ltd, Sutton and Annesley* [2022] FWCFB 171 at [125].

[37] *Melrose Farm Pty Ltd t/as Milesaway Tours v. Milward* (2008) 175 IR 455 at [106].

[38] *Singh v Trimatic Management Services Pty Ltd* [2020] FWCFB 553, [10]. See also Acts Interpretation Act 1901 (Cth) s 36(1) as in force on 25 June 2009; Fair Work Act 2009 (Cth) s 40A.