



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Mitchell King

v

NHN Group Pty Ltd
(U2023/5065)

DEPUTY PRESIDENT SAUNDERS

NEWCASTLE, 19 SEPTEMBER 2023

Unfair dismissal application – jurisdictional objection – multiple actions – application dismissed.

Introduction

[1] Mr King has made an application for an unfair dismissal remedy against his former employer, NHN Group Pty Ltd (*NHN*), pursuant to s 394 of the *Fair Work Act (Cth) 2009 (FW Act)*. He has also completed and submitted an on-line complaint form with the Australian Human Rights Commission (*AHRC*) in connection with his dismissal by NHN. It is contended by NHN that Mr King’s unfair dismissal application in the Fair Work Commission (*Commission*) is jurisdictionally barred by reason of the multiple actions he has pursued against NHN in relation to his dismissal. Mr King denies those contentions and submits that the Commission should proceed to consider the merits of his unfair dismissal application.

[2] On 11 September 2023, I conducted a hearing in relation NHN’s jurisdictional argument concerning multiple actions by Mr King in relation to his dismissal. NHN adduced evidence from its solicitor, Ms Michelle Christmas, and its Chief Operations Officer, Mr Charles Hall. Mr King gave evidence in support of his opposition to NHN’s jurisdictional objection.

Relevant facts

[3] Mr King was employed by NHN as a Responsible Service of Alcohol Marshall.

[4] On 23 May 2023, NHN received a criminal history report pertaining to Mr King.

[5] On 23 May 2023, Mr King says that he was told by a manager employed by NHN that his employment was to be terminated.

[6] At 9pm on 23 May 2023, Mr King sent an email to NHN in the following terms:

“Hello Alex

Can you please provide me the following.

1. Name of your insurance company that has decided I don't meet the criteria for employment
2. Any of the relevant emails in relation to my ineligibility for coverage as an employee.
3. Relevant insurance policy items.

Regards

Mitchell king”

[7] On 24 May 2023, Mr King completed an on-line complaint form on the website of the AHRC. At 2:11 am on 24 May 2023, the AHRC emailed Mr King a copy of his complaint form. It states:

“Your Details (Your complaint)

Name: **Mitchell King**

Address:

[Address of Mr Mitchell King]

Email: [Email address of Mr Mitchell King]

Phone (After hours): [Mobile telephone number of Mr Mitchell King]

Phone (Business hours):

Mobile:

Fax:

TTY:

Would you like a copy of your complaint emailed to you: **Yes** (A copy of the complaint form will be sent to [Email address of Mr Mitchell King])

Do you require assistance to participate in the complaint process?: **No**

Do you require assistance to participate in the complaint process?: **No**

Do you have a legal representative or advocate? **No**

Who is the complaint about

Organisation Details

Organisation name: **Nhn group**

ABN:

Address: 29 smith street Charlestown NSW 2290

Email: hr@nhngroup.com.au

Phone (Business hours):

Mobile:

Fax:

What is their relationship to you or the aggrieved person?: **Employer**

Do you want to add another respondent? **Yes**

2nd Respondent's Details

Organisation name: The insurance company

ABN of organisation:

Address:

Email:

Phone (Business hours):

Mobile:

Fax:

What is their relationship to you or the aggrieved person?: **Insurer**

What are you complaining about

I have been discriminated against because of my:

age: **No**

disability: **No**

association to a person with a disability: **No**

use of an assistance animal or disability aid or because I have a carer: **No**

sex: **No**

pregnancy: **No**

marital or relationship status: **No**

family responsibilities: **No**

sexual orientation: **No**

gender identity: **No**

intersex status: **No**

race (including colour, national origin, descent, ethnicity and immigrant status): **No**

trade union activity (employment only): **No**

criminal record (employment only): **Yes**

What is your criminal record? **Multiple offences**

political opinion (employment only): **No**

religion (employment only): **No**

social origin (employment only) : **No**

Please state the other reason(s): **Roughly 12 months after my employment. The insurance company received my criminal history and refused to cover me, terminating my employment by de facto**

When did the alleged event(s) happen?
23/05/2023

Reason(s) for delay

What happened?

I have been employed by NHN for roughly 12 months on a casual basis. I was only asked for a criminal history after I had been working in the job for a few weeks, I thought I had completed the criminal history check however, unbeknownst to me I didn't complete it properly. Nine months later, I was asked to submit it which I did. Upon receipt, the insurance company refused to cover me and my employer had to fire me.

Do you intend to email the Commission supporting information?
No

Upload Document File ID:

Other Information

How do you think the complaint could be resolved?
The decision to refuse to ensure me should be satisfied, and I should be able to continue my employment.

Have you complained about this to another organisation?
No

Have you complained about this to another organisation?
No

[8] At 11:26am on 25 May 2023, Mr King received an email from a Complaint Information Officer of the AHRC. The email states:

“Dear Mitchell

I refer to your recent contact.

This Commission can look into complaints of criminal record discrimination in the area of employment/occupation. Criminal record discrimination is defined as being any distinction, exclusion or preference made on the basis of a person's criminal record that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. It is not considered criminal record discrimination however, if a decision was based on the inherent requirements of the job.

For further information on criminal record discrimination please refer to our website at http://www.humanrights.gov.au/human_rights/criminalrecord/index.html.

Your concerns

I note you have raised concerns about the insurance company, however as noted above, this Commission can only consider concerns about criminal record discrimination in the context of an employment relationship. Therefore, while this Commission may be able to consider your concerns in the context of your relationship with your former employer, it is unclear we would be able to assist in this respect with your insurer.

If you feel that you have been treated unfairly in your employment because of your criminal record, and you believe that you are able to perform the inherent requirements of the job regardless of your criminal record, it is open for you to make a complaint to the Commission.

Please provide a copy of your police record if possible, and any other relevant document such as a refusal decision.

Australian Financial Complaints Authority (AFCA)

You may wish to raise your concerns with AFCA, which can consider complaints about insurance companies. Its website is <https://www.afca.org.au/>.

If you have not done so, you can seek free legal advice. You can contact:

- Law Access (www.lawaccess.nsw.gov.au)
- Legal Aid of NSW (www.legalaid.nsw.gov.au)
- Community legal centre (<http://www.clcnsw.org.au>)
- South West Sydney Legal Centre (Greater Western Sydney area only) (www.swslc.org.au)

Should you have any further queries or wish to provide clarification, please advise by return email or call our National Information Service on 1300 656 419.

Kind regards,

Tom (he/him)

Complaint Information Officer

National Information Service

Australian Human Rights Commission”

[9] At 1:29pm on 30 May 2023, Mr King responded by email to the AHRC in the following terms:

“I’ve since been contacted by my ex employer. They are now giving me a differing reasons for terminating my employment.

I am now of the understanding that wasn’t the insurance company, but rather NHN that in fact terminated my employment on the basis of my criminal history.

Due to a Facebook post where I stated that I was making a complaint to the AHRC, the company have now given me differing reasons these include

A complaint made by an employee William Martin. That has no basis in truth

They are also indicating that my Facebook post goes against their policy, despite my understanding is that my employment with them had ceased

I wish for the commission to deal with this matter as it is now clear NHN have terminated my employment on the basis of my criminal history.”

[10] At 12:27pm on 31 May 2023, the Complaint Information Officer responded by email to Mr King in the following terms:

“Dear Mitchell

Thank you for your email.

Please clarify:

1. The name of your former employer, and when your employment was terminated.
2. Please provide a copy of any correspondence outlining the reasoning given for the termination of your employment, and how you feel this relates to alleged irrelevant criminal record discrimination.
3. Please provide information about the inherent requirements of the role you were performing, and why you feel that your criminal record would not affect your ability to perform the inherent requirements of the role.

Please provide a copy of your police record if possible, and any other relevant documents such as a termination letter.

Should you have any further queries or wish to provide clarification, please advise by return email.

Kind regards,

Tom (he/him)

Complaint Information Officer

National Information Service

Australian Human Rights Commission”

[11] Mr King did not provide any of the information or documents requested by the Complaint Information Officer in his email of 31 May 2023.

[12] On 1 June 2023, Mr King received a letter of termination from NHN. It states:

“Dear Mitchell,

Re: Termination of Employment

I am writing to you about the termination of your employment with the NHN Group.

You were notified over the Phone by the Head of Security, Kris Hanna on Tuesday the 30th of May 2023, that your employment with NHN Group was to be terminated effective immediately. We consider that your performance and behaviour is unsatisfactory and does not align with NHN Group Team Rules.

You were previously issued a first and final warning relating to your unacceptable behaviour towards a fellow NHN employee. Unfortunately, we have received reports of further reoccurrence of unacceptable behaviour. As outlined in your previous warning, this is a clear violation of the NHN Group Team Rules.

If you have any queries or would like to discuss the matter further, we welcome you to contact the office as soon as possible on 02 4960 9922.

Yours faithfully,

Human Resources
NHN Group”

[13] On 8 June 2023, Mr King lodged his unfair dismissal application against NHN in the Commission. Mr King took this step following legal advice he received in relation to his dismissal and the options for remedy that were available to him.

[14] On 4 September 2023, Mr King received an email from a Complaint Information Officer of the AHRC in the following terms:

“Dear Mitchell,

I refer to your phone conversation with the National Information Service earlier today.

I note you submitted a complaint form regarding NHN Group to the Commission on 24 May 2023 and with the information provided this has not yet been accepted as a complaint.

I note in an email to you dated 31 May 2023, you were asked to clarify some details of the alleged criminal record discrimination for the purposes of assessing your correspondence, however you have not replied to this email.

Should you have any further queries or wish to provide clarification, please advise by return email or call our National Information Service on 1300 656 419.

Kind regards,

Gemma

Complaint Information Officer

National Information Service

Australian Human Rights Commission”

[15] Mr King also gave evidence, which I accept, that he was told by a representative of the AHRC that they would not consider that they had received his complaint until he had provided the additional information and documentation sought from Mr King. This message was consistent with the email Mr King received from a Complaint Information Officer of the AHRC on 4 September 2023.

[16] On 5 September 2023, Mr King sent an email to Ms Christmas with the subject “Re: U2023/5065” in which he, *inter alia*, stated, “Following this case, I intend on pursuing [sic] the discrimination element in a different court.”¹ Mr King gave oral evidence that he would prefer to settle his case with NHN than to pursue litigation to its finality, but he wants to achieve ‘justice’.

[17] NHN has not received any communication from the AHRC in relation to Mr King, nor has it been provided with a copy of Mr King’s complaint form by the AHRC.

Multiple actions – legislative framework

[18] NHN contends that Mr King’s unfair dismissal application should be dismissed on the basis that it is barred by s 725 of the FW Act. Section 725 forms part of a scheme of provisions set out in Part 6-1 of the FW Act which establish rules with respect to multiple actions about various matters. Subdivision B of Division 3 of Part 6-1 is concerned with “Applications and complaints relating to dismissals”. Sections 725, 729 and 732 of the FW Act are relevant to the present case. They state:

“725 General rule

A person who has been dismissed must not make an application or complaint of a kind referred to in any one of sections 726 to 732 in relation to the dismissal if any other of those sections applies.”

“729 Unfair dismissal applications

- (1) This section applies if:
 - (a) an unfair dismissal application has been made by the person in relation to the dismissal; and
 - (b) the application has not:
 - (i) been withdrawn by the person who made the application; or
 - (ii) failed for want of jurisdiction; or
 - (iii) failed because the FWC was satisfied that the dismissal was a case of genuine redundancy.
- (2) An *unfair dismissal application* is an application under subsection 394(1) for a remedy for unfair dismissal.”

“732 Applications and complaints under other laws

- (1) This section applies if:
 - (a) an application or complaint under another law has been made by, or on behalf of, the person in relation to the dismissal; and
 - (b) the application or complaint has not:
 - (i) been withdrawn by the person who made the application; or
 - (ii) failed for want of jurisdiction.
- (2) An *application or complaint under another law* is an application or complaint made under:
 - (a) a law of the Commonwealth (other than this Act); or
 - (b) a law of a State or Territory.
- (3) For the purposes of this Subdivision, if a complaint under the *Australian Human Rights Commission Act 1986* relates to a dismissal only as a result of an amendment of the complaint, the complaint is taken to be made when the complaint is amended.”

[19] There is no doubt that the *Australian Human Rights Commission Act 1986* (Cth) (*AHRC Act*) is a law of the Commonwealth within the meaning of s 732(2) of the FW Act.

[20] Section 3 of the AHRC Act defines a “complaint” to mean “except in Part IIC, ... a complaint lodged under Division 1 of Part IIB”.

[21] Part IIB of the AHRC is entitled “Redress for unlawful discrimination”. It relevantly provides:

“46P Lodging a complaint

- (1) A written complaint may be lodged with the Commission:
 - (a) alleging:
 - (i) that one or more acts have been done; or
 - (ii) that one or more omissions or practices have occurred; and
 - (b) alleging that those acts, omissions or practices are unlawful discrimination.

Note 1: *Unlawful discrimination* is defined in subsection 3(1).

Note 2: Under section 46PZ, a complaint may be taken to be lodged with the Commission if all or part of a complaint is transferred from the Inspector-General of Intelligence and Security under section 32AD of the *Inspector-General of Intelligence and Security Act 1986*.

- (1A) It must be reasonably arguable that the alleged acts, omissions or practices are unlawful discrimination.
- (1B) The complaint must set out, as fully as practicable, the details of the alleged acts, omissions or practices.
- (2) The complaint may be lodged:
- (a) by a person aggrieved by the alleged acts, omissions or practices:
 - (i) on that person's own behalf; or
 - (ii) on behalf of that person and one or more other persons who are also aggrieved by the alleged acts, omissions or practices; or
 - (b) by 2 or more persons aggrieved by the alleged acts, omissions or practices:
 - (i) on their own behalf; or
 - (ii) on behalf of themselves and one or more other persons who are also aggrieved by the alleged acts, omissions or practices; or
 - (c) by a person or trade union on behalf of one or more other persons aggrieved by the alleged acts, omissions or practices.
- (3) A person who is a class member for a representative complaint is not entitled to lodge a separate complaint in respect of the same subject matter.
- (4) If it appears to the Commission that:
- (a) a person wishes to make a complaint under subsection (1); and
 - (b) the person requires assistance to formulate the complaint or to reduce it to writing;
- the Commission must take reasonable steps to provide appropriate assistance to the person.

46PA Amendment of complaint

- (1) Any complainant may at any time amend the complaint, with the leave of the President.
- (2) Subsection (1) does not, by implication, limit any other power to amend the complaint.

...

46PD Referral of complaint to President

If a complaint is made to the Commission under section 46P, the Commission must refer the complaint to the President.

46PF Inquiry by President

- (1) Subject to subsections (1A) and (5), if a complaint is referred to the President under section 46PD, the President must:
 - (a) consider whether to inquire into the complaint, having regard to the matters referred to in section 46PH; and
 - (b) if the President is of the opinion that the complaint should be terminated—terminate the complaint without inquiry; and
 - (c) unless the President terminates the complaint under paragraph (b) or section 46PH—inquire into the complaint and attempt to conciliate the complaint.
- (1A) For the purposes of paragraph (1)(a), the President may inform himself or herself of such facts and circumstances as are necessary to form the opinion referred to in paragraph (1)(b).
- (1B) If the President terminates the complaint under paragraph (1)(b), the President must comply with the notification requirements of subsections 46PH(2), (2A) and (3).
 - (2) If the President thinks that 2 or more complaints arise out of the same or substantially the same circumstances or subject, the President may hold a single inquiry, or conduct a single conciliation, in relation to those complaints.
 - (3) With the leave of the President, any complainant or respondent may amend the complaint to add, as a respondent, a person who is alleged to have done the alleged acts, omissions or practices.

Note: In some cases, a person is regarded as having done acts or omissions by being treated as responsible for the acts and omissions of another person. See sections 56 and 57 of the *Age Discrimination Act 2004*, sections 122 and 123 of the *Disability Discrimination Act 1992*, sections 18A and 18E of the *Racial Discrimination Act 1975* and sections 105, 106 and 107 of the *Sex Discrimination Act 1984*.
- (4) A complaint cannot be amended after it is terminated by the President under paragraph (1)(b) or section 46PH.
- (5) The President may decide not to inquire into the complaint, or, if the President has started inquiring into the complaint, may decide not to continue to inquire into the complaint, if:
 - (a) the President is satisfied that the person aggrieved by the alleged acts, omissions or practices does not want the President to inquire, or to continue to inquire, into the complaint; or
 - (b) the President is satisfied that the complaint has been settled or resolved.
- (6) The President must act fairly to:
 - (a) the complainant or complainants; and
 - (b) the respondent;
 in dealing with the complaint in accordance with this section.
- (7) If the President has decided to inquire into a complaint, the President:

- (a) must notify the complaint to the respondent, unless the President is satisfied that notification would be likely to prejudice the safety of a person; and
 - (b) if the complaint is amended under subsection (3) by adding a respondent—must notify the complaint to that respondent, unless the President is satisfied that notification would be likely to prejudice the safety of a person; and
 - (c) if any person (other than the respondent) is the subject of an adverse allegation arising from the complaint—must notify the person of the adverse allegation, unless the President is satisfied:
 - (i) that notification would be likely to prejudice the safety of a person; or
 - (ii) that it is not practicable to do so; and
 - (d) may notify the complaint to any person who, in the opinion of the President, is likely to be able to provide information relevant to the complaint.
- (8) For the purposes of paragraphs (7)(a), (b) and (c), the President must notify the respondent or the other person, as the case may be:
- (a) under paragraph (7)(a)—as soon as the President has decided to inquire into the complaint; or
 - (b) under paragraph (7)(b)—as soon as the complaint has been amended; or
 - (c) under paragraph (7)(c)—as soon as the President forms the opinion that the person is the subject of an adverse allegation arising from the complaint.
- (9) For the purposes of subsections (7) and (8), *adverse allegation* means an allegation:
- (a) that:
 - (i) one or more acts have been done; or
 - (ii) one or more omissions or practices have occurred; and
 - (b) that those acts, omissions or practices are unlawful discrimination.

Note: *Unlawful discrimination* is defined in subsection 3(1).

- (10) The President:
- (a) must, having regard to:
 - (i) the nature of the complaint; and
 - (ii) the needs of the complainant or complainants; and
 - (iii) the needs of the respondent;act expeditiously in dealing with the complaint in accordance with this section; and
 - (b) must use the President's best endeavours to finish dealing with the complaint within 12 months after the complaint was referred to the President under section 46PD.
- (11) Subsections (6) and (10) do not impose a duty on the President that is enforceable in court.
- (12) Subsection (11) does not affect a legally enforceable obligation to observe the rules of natural justice.

46PG Withdrawal of complaint

- (1) Any complainant to a complaint may withdraw the complaint, with the leave of the President.
- (2) The President must grant leave if the President is satisfied that all the affected persons agree to withdrawal of the complaint. The President cannot grant leave unless the President is satisfied that they all agree.

46PH Termination of complaint

Discretionary termination of complaint

- (1) The President may terminate a complaint on any of the following grounds:
 - (a) the President is satisfied that the alleged acts, omissions or practices are not unlawful discrimination;
 - (b) the complaint was lodged more than 24 months after the alleged acts, omissions or practices took place;
 - (c) the President is satisfied, having regard to all the circumstances, that an inquiry, or the continuation of an inquiry, into the complaint is not warranted;
 - (d) in a case where some other remedy has been sought in relation to the subject matter of the complaint—the President is satisfied that the subject matter of the complaint has been adequately dealt with;
 - (e) the President is satisfied that some other more appropriate remedy in relation to the subject matter of the complaint is reasonably available to each affected person;
 - (f) in a case where the subject matter of the complaint has already been dealt with by the Commission or by another statutory authority—the President is satisfied that the subject matter of the complaint has been adequately dealt with;
 - (g) the President is satisfied that the subject matter of the complaint could be more effectively or conveniently dealt with by another statutory authority;
 - (h) the President is satisfied that the subject matter of the complaint involves an issue of public importance that should be considered by the Federal Court or the Federal Circuit and Family Court of Australia (Division 2).

Note: An act, omission or practice may not be unlawful discrimination because an exemption applies (for example, section 18D of the *Racial Discrimination Act 1975*). Accordingly, consideration by the President of the question of whether an act, omission or practice is not unlawful discrimination will involve consideration of whether an exemption applies.

- (1A) A complaint may be terminated under subsection (1) at any time, even if an inquiry into the complaint has begun.

Mandatory termination of complaint

- (1B) The President must terminate a complaint if the President is satisfied that:
 - (a) the complaint is trivial, vexatious, misconceived or lacking in substance; or

- (b) there is no reasonable prospect of the matter being settled by conciliation.
- (1C) The President must terminate a complaint if the President is satisfied that there would be no reasonable prospect that the Federal Court or the Federal Circuit and Family Court of Australia (Division 2) would be satisfied that the alleged acts, omissions or practices are unlawful discrimination.
- (1D) A complaint may be terminated under subsection (1B) or (1C) at any time, even if an inquiry into the complaint has begun.

Notification

- (2) If the President terminates a complaint, the President must notify the complainants in writing of the termination and of the reasons for the termination.
- (2A) A notice under subsection (2) must include a statement explaining that the Federal Court and the Federal Circuit and Family Court of Australia (Division 2) can award costs in proceedings under section 46PO.
- (3) On request by an affected person who is not a complainant, the President must give the affected person a copy of the notice that was given to the complainants under subsection (2).

Revocation

- (4) The President may revoke the termination of a complaint, but not after an application is made to the Federal Court or the Federal Circuit and Family Court of Australia (Division 2) under section 46PO in relation to the complaint.

46PI President's power to obtain information

- (1) This section applies if the President has reason to believe that a person is capable of providing information (*relevant information*) or producing documents (*relevant documents*) relevant to an inquiry under this Division.
- (2) The President may serve a written notice on the person, requiring the person to do either or both of the following within a reasonable period specified in the notice, or on a reasonable date and at a reasonable time specified in the notice:
 - (a) give the President a signed document containing relevant information required by the notice;
 - (b) produce to the President such relevant documents as are specified in the notice.
- (3) If the notice is served on a body corporate, the document referred to in paragraph (2)(a) must be signed by an officer of the body corporate.
- (4) If a document is produced to the President in accordance with a requirement under this section, the President:
 - (a) may take possession of the document; and
 - (b) may make copies of the document or take extracts from the document; and

- (c) may retain possession of the document for as long as is necessary for the purposes of the inquiry to which the document relates.
- (5) While the President retains any document under this section, the President must allow the document to be inspected, at all reasonable times, by any person who would be entitled to inspect the document if it were not in the possession of the President.

46PJ President may hold conferences

President may decide to hold a conference

- (1) For the purpose of attempting to conciliate a complaint in accordance with section 46PF, the President may decide to hold a conference, to be presided over by:
 - (a) the President; or
 - (b) a suitable person (other than a Commission member) determined by the President.

President may invite people to attend

- (2) The President may:
 - (a) invite any or all of the complainants or respondents to attend the conference; and
 - (b) invite any other person to attend the conference, if:
 - (i) the President reasonably believes that the person is capable of giving information that is relevant to the conciliation of the complaint; or
 - (ii) the President considers that the person's presence at the conference is likely to be conducive to the conciliation of the complaint.

President may require people to attend

- (3) The President may, by written notice given to a person referred to in subsection (2), require the person to attend the conference (whether or not the person has already been invited to attend the conference).

Note: Failure to comply with a notice is an offence—see subsection (5).

- (4) A notice under subsection (3):
 - (a) must specify the place and time of the conference, not being a time that is less than 14 days after the notice is given; and
 - (b) must set out the effect of subsection (5).
- (5) A person commits an offence if:
 - (a) the person has been given a notice under subsection (3) requiring the person to attend a conference; and
 - (b) the person refuses or fails to comply with the requirement.

Penalty: 10 penalty units.

- (6) Subsection (5) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

Expenses for attendance

- (7) A person who is required to attend the conference is entitled to be paid, by the Commonwealth, a reasonable sum for the person's expenses of attendance."

[22] The functions of the AHRC relating to equal opportunity in employment are governed by Division 4 of Part II of the AHRC Act. Sections 31 and 32 relevantly provide:

"31 Functions of Commission relating to equal opportunity

The following functions are hereby conferred on the Commission:

- (a) to examine enactments, and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments, as the case may be, have, or would have, the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation, and to report to the Minister the results of any such examination;
- (b) to:
 - (i) inquire into any act or practice (including any systemic practice) that may constitute discrimination; and
 - (ii) if the Commission considers it appropriate to do so—endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry;
- (c) to promote an understanding and acceptance, and the public discussion, of equality of opportunity and treatment in employment and occupation in Australia;
- (d) to undertake research and educational programs and other programs, on behalf of the Commonwealth, for the purpose of promoting equality of opportunity and treatment in employment and occupation, and to co-ordinate any such programs undertaken by any other persons or authorities on behalf of the Commonwealth;
- (e) on its own initiative or when requested by the Minister, to report to the Minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to equality of opportunity and treatment in employment and occupation;
- (f) when requested by the Minister, to report to the Minister as to the action (if any) that, in the opinion of the Commission, needs to be taken by Australia in order to comply with the provisions of the Convention;
- (g) on its own initiative or when requested by the Minister, to examine any relevant international instrument for the purpose of ascertaining whether there are any inconsistencies between that instrument and the Convention, and to report to the Minister the results of any such examination;
- (h) to prepare, and to publish in such manner as the Commission considers appropriate, guidelines for the avoidance of acts or practices of a kind in respect of which the Commission has a function under paragraph (b);

- (j) where the Commission considers it appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court, to intervene in proceedings that involve discrimination issues;
- (k) to do anything incidental or conducive to the performance of any of the preceding functions.

32 Performance of functions relating to equal opportunity

- (1) Subject to subsections (2) and (3), the Commission shall perform the functions referred to in paragraph 31(b) when:
 - (a) the Commission is requested to do so by the Minister; or
 - (b) a complaint is made in writing to the Commission, by or on behalf of one or more persons aggrieved by an act or practice, alleging that the act or practice constitutes discrimination; or
 - (c) it appears to the Commission to be desirable to do so.
- (2) The Commission shall not inquire into an act or practice, or, if the Commission has commenced to inquire into an act or practice, shall not continue to inquire into the act or practice, if the Commission is satisfied that the subject matter of the complaint is dealt with under a prescribed enactment or a prescribed State enactment.
- (3) The Commission may decide not to inquire into an act or practice, or, if the Commission has commenced to inquire into an act or practice, may decide not to continue to inquire into the act or practice, if:
 - (a) the Commission is satisfied that the act or practice does not constitute discrimination; or
 - (b) the Commission is satisfied that the person aggrieved by the act or practice does not want the Commission to inquire, or to continue to inquire, into the act or practice; or
 - (ba) the Commission is satisfied, having regard to all the circumstances, that an inquiry, or the continuation of an inquiry, into the act or practice is not warranted; or
 - (c) in a case where a complaint has been made to the Commission in relation to the act or practice:
 - (i) the complaint was made more than 12 months after the act was done or after the last occasion when an act was done pursuant to the practice; or
 - (ii) the Commission is of the opinion that the complaint is frivolous, vexatious, misconceived or lacking in substance; or
 - (iib) the Commission is satisfied that there is no reasonable prospect of the matter being settled by conciliation; or
 - (iii) where some other remedy has been sought in relation to the subject matter of the complaint—the Commission is of the opinion that the subject matter of the complaint has been adequately dealt with; or
 - (iv) the Commission is of the opinion that some other more appropriate remedy in relation to the subject matter of the complaint is reasonably available to the complainant; or

- (v) where the subject matter of the complaint has already been dealt with by the Commission or by another statutory authority—the Commission is of the opinion that the subject matter of the complaint has been adequately dealt with; or
 - (vi) the Commission is of the opinion that the subject matter of the complaint could be more effectively or conveniently dealt with by another statutory authority; or
 - (vii) the Commission is satisfied that the complaint has been settled or resolved.
- (4) The Commission must act fairly in the performance of the functions referred to in paragraph 31(b).
- (5) If a complaint is made under paragraph (1)(b), the Commission:
- (a) must act expeditiously in dealing with the complaint; and
 - (b) must use the Commission’s best endeavours to finish dealing with the complaint within 12 months after the complaint was made.
- (6) Subsections (4) and (5) do not impose a duty on the Commission that is enforceable in court.
- (7) Subsection (6) does not affect a legally enforceable obligation to observe the rules of natural justice.”

Consideration

[23] Mr King contends that the online complaint form he completed and submitted through the AHRC website does not meet the description of a “complaint under another law ... made by [him] in relation to the dismissal” within the meaning of s 732 of the FW Act. Mr King argues that his complaint to the AHRC is not an active complaint, and has not been accepted as a complaint by the AHRC, because he has not provided the information and documents sought by the AHRC. Mr King accepts that he has not withdrawn his complaint to the AHRC and it has not failed for want of jurisdiction, but says that is because one cannot withdraw, or have dismissed for want of jurisdiction, something which does not yet exist, i.e. an inactive or incomplete complaint.

[24] I am satisfied that the online complaint form Mr King submitted through the AHRC website, on 24 May 2023, is a complaint in relation to his dismissal by NHN. So much is clear from the fact that the complaint form states that it is made about “Nhn group”,² as well as an unnamed “insurance company”,³ and describes the conduct relevant to Mr King’s allegation of discrimination in employment on the grounds of his criminal record as follows:

“Roughly 12 months after my employment. The insurance company received my criminal history and refused to cover me, terminating my employment by de facto...

I have been employed by NHN for roughly 12 months on a casual basis. I was only asked for a criminal history after I had been working in the job for a few weeks, I thought I had completed the criminal history check however, unbeknownst to me I didn’t

complete it properly. Nine months later, I was asked to submit it which I did. Upon receipt, the insurance company refused to cover me and my employer had to fire me...

The decision to refuse to ensure [sic] me should be satisfied, and I should be able to continue my employment.”

[25] I am also satisfied that the online written complaint form Mr King submitted through the AHRC website is a complaint he made under s 46P of the AHRC Act. The complaint form alleges that “one or more acts have been done” and that “those acts ... are unlawful discrimination”.⁴ Further, the on-line complaint form completed by Mr King “sets out, as fully as practicable, the details of the alleged acts”.⁵ It is also “reasonably arguable”, in my view, that the acts alleged by Mr King in his online complaint form constitute “unlawful discrimination”.⁶

[26] I do not accept Mr King’s contention that his complaint to the AHRC was against NHN’s insurance company, not NHN. The complaint form nominates NHN as the first respondent to the complaint complains about NHN’s conduct in terminating his employment.

[27] There is no evidence before the Commission as to whether Mr King’s complaint to the AHRC has been referred to the President of the AHRC in accordance with s 46PD of the AHRC Act. But that does not impact on the question of whether a “complaint under another law has been made by ... the person in relation to the dismissal” within the meaning of s 732(1) of the FW Act.

[28] It is apparent that a Complaint Information Officer of the AHRC has sought clarification and documentation in relation to Mr King’s complaint,⁷ which he has not yet provided. I consider the request by the AHRC for information and documents from Mr King to be part of the AHRC’s inquiry into “any act ... that may constitute discrimination” in accordance with its function under s 31(b) of the AHRC Act. Such inquiries may be made by the AHRC when “a complaint is made in writing to the Commission, by or on behalf of one or more persons aggrieved by an act or practice, alleging that the act or practice constitutes discrimination”.⁸

[29] Further, the fact that the AHRC may inquire into a discrimination complaint, obtain information and documents relevant to the inquiry,⁹ and permit a complainant to amend their complaint,¹⁰ does not disclose an intention to treat a complaint, which may be lacking in detail, as entirely invalid and of no effect.¹¹

[30] By email sent on 4 September 2023, a Complaint Information Officer of the AHRC informed Mr King that his complaint form “with the information provided ... has not yet been accepted as a complaint”.¹² Whether or not the author of that email, or any other person within the AHRC, has decided, or formed an opinion, that Mr King’s complaint form has not yet been accepted or received as a complaint is not determinative of the question of whether or not Mr King has made a “complaint under another law ... in relation to the dismissal” within the meaning of s 732 of the FW Act.

Conclusion

[31] For the reasons stated above, I am satisfied that, on 24 May 2023, Mr King made a complaint under a law of the Commonwealth in relation to his dismissal when he submitted his

on-line complaint form to the AHRC. Mr King's complaint to the AHRC has not been withdrawn or failed for want of jurisdiction. It follows that s 732 of the FW Act applies. Section 729 of the FW Act also applies, given that Mr King made an unfair dismissal application, on 8 June 2023, in relation to his dismissal, which application has not been withdrawn, failed for want of jurisdiction, or failed because the Commission is satisfied that the dismissal was a case of genuine redundancy. Because ss 729 and 732 apply, Mr King is barred from pursuing his unfair dismissal application by the "general rule" against multiple actions in s 725 of the FW Act.

[32] Mr King's unfair dismissal application is dismissed for want of jurisdiction.

[33] It is open to Mr King to pursue his discrimination complaint against NHN in the AHRC.



DEPUTY PRESIDENT

Appearances:

Mr M. King, on behalf of himself

Ms M. Christmas, solicitor, for NHN Group Pty Ltd

Hearing details:

2023.

Newcastle:

September 11.

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¹ Ex R3

² Court Book at p 291

³ Ibid

⁴ Section 46P(1) of the AHRC Act

⁵ Section 46P(1B) of the AHRC Act and paragraph [24] above

⁶ Section 46(1A) of the AHRC Act

⁷ Ex A3

⁸ Section 32(1)(b) of the AHRC Act

⁹ Section 46PI of the AHRC Act

¹⁰ Section 46PA of the AHRC Act

¹¹ *Arch v Insurance Australia Group Services Pty Limited* [2020] FWC 601 at [35]

¹² Court Book at p 303