DECISION

Fair Work Act 2009
s.365—General protections

Applicant
v
Respondent
(C2022/5303)

COMMISSIONER SCHNEIDER PERTH, 4 DECEMBER 2023

Application to deal with contraventions involving dismissal

[1] The Applicant has made an application to the Fair Work Commission (the Commission) under section 365 of the *Fair Work Act 2009* (Cth) (the Act) for the Commission to deal with a dismissal dispute. The dispute arises out of the Applicant's allegations that they were dismissed from their employment with the Respondent in contravention of Part 3-1 of the Act.

[2] The Respondent previously objected to the application on the grounds that the application had been lodged outside of the relevant 21-day time period, as required under section 366(1) of the Act. A decision was issued,[1] granting an extension for the application to be filed, confirming the Commission was satisfied that there were exceptional circumstances giving rise to an extension of time.

[3] The Respondent has raised a jurisdictional objection in relation to the application under section 725 of the Act, noting that the Applicant previously applied for an unfair dismissal remedy. The matter is subject to a confidentiality order.[2] Accordingly, any information that could potentially disclose the identity of the parties has been anonymized in this decision.

Relevant Legislation

[4] Chapter 6, Part 6-1 Division 3 of the Act contains provisions aimed at preventing multiple actions in relation to dismissal. Relevantly, the provisions preventing double dipping are as follows:

> "**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 the 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(i) been withdrawn by the person who made the application; or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."

[5] These provisions provide that where a person is aggrieved by a dismissal, they must not make an application for a remedy under one of these provisions under this Part of the Act if another application or complaint is made under another law within one of the other sections in this Part. The purpose of these provisions is to avoid double-dipping, and this was explained in the Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) in the following terms:

"**Clause 732 - Applications and complaints under other laws**

2707. This Subdivision is intended to prevent a person 'double-dipping' when they have multiple potential remedies relating to a dismissal from employment by seeking to limit a person to a single remedy.

2708. Clauses 726 to 732 set out all of the potential remedies that may apply. Clause 725 is the key operative provision. It provides that if a person has made an application that falls within any of clauses 726 to 732 then they may not bring an application that falls within any of the other clauses.

2709. Each of clauses 726 to 732 deals with different potential remedies. They each set out particular circumstances in which a person may not be prevented from making an application under one of the clauses even where they have initiated an application under another clause.

2710. In all cases the anti-double dipping provisions will not apply where the initial application has:

- been withdrawn; or
- failed for want of jurisdiction.

2711. This is intended to ensure that a person does not miss out on a remedy because they were unable to make a competent application for another remedy or where they have realised another remedy may be more appropriate than the remedy they initially sought."

[6] As is referenced later in this decision, I also note section 578 of the Act:

"**578 Matters the FWC must take into account in performing functions etc.**

> In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this Part), the FWC must take into account:
>
> (a) the objects of this Act, and any objects of the part of this Act; and
>
> (b) equity, good conscience and the merits of the matter; and
>
> (c) the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities pregnancy, religion, political opinion, national extraction or social origin."

Background

[7] The Applicant had previously made an application for Unfair Dismissal, the Respondent submits that the Applicant frustrated that process by:

- Failing to attend conciliation as directed.
- Failed to comply with the directions to file material as directed.
- Failed to participate in a Hearing, this resulted in the Member dismissing the matter.

[8] The Applicant subsequently filed an appeal, it is the position of the Respondent that the Applicant again frustrated the process by:

- Failing to provide submissions in line with the directions.
- Failed to attend the appeal Hearing.
- Failed to provide medical evidence as to why they did not attend the appeal Hearing.

[9] The Full Bench dismissed the Applicant's appeal. The Applicant then lodged this application with the Commission.

Submissions

[10] The Respondent was provided the opportunity to file additional submissions in relation to this jurisdictional objection. The Respondent confirmed that the original material provided in relation to this jurisdictional objection would be relied upon.

[11] The Respondent objects to the application filed on the basis that the application is inconsistent with section 725.

[12] The Respondent submits that this application is of a type referred to in section 727 of the Act.

[13] The Respondent submits that section 725 of the Act prohibits the Applicant bringing this application because the Applicant has already brought an unfair dismissal application, which is covered by section 729 of the Act, and which was dismissed for want of prosecution.

Consideration

[14] The issues considered in *Cugura v Frankston City Council & Melissa King and others* bear some similarities to the present matter. That matter concerned an application under section 365 of the Act where the respondent had objected, in reference to section 725 of the Act, due to an application of the type considered in section 732 previously made by the applicant.

[15] Commissioner Roe's decision, in the aforementioned matter, contains several comments that are potently relevant to the consideration of the issues in the matter currently under consideration.

[16] In relation to the purpose of the relevant provisions, the Commissioner noted:

> "It has been accepted that the purpose of these provisions and similar but by no means identical provisions in earlier legislation is to prevent an employer from being "twice vexed". However, it should not be used to enable an employer to avoid being vexed entirely." [3]

[17] In consideration of the circumstances of that matter, noting that the applicant had seemingly abandoned their other application, the Commissioner stated:

> "There is no evidence that the Applicant did anything after 15 October 2010 to further his VEOHRC complaint. There is no evidence that the Respondent was required to do anything further in respect to the VEOHRC complaint after 15 October 2010. The Applicant never had "his day in court" in respect to the matters associated with his dismissal through the VEOHRC action. The Respondent was never required to expend any great resources in defending itself against the VEOHRC action. A preliminary response was required and provided in respect to the VEOHRC complaint but this was only at the initial conciliation stage. The failure to actively pursue the VEOHRC application is consistent with the Applicant realising that "another remedy may be more appropriate than the remedy they initially sought".
>
> After 14 January 2011 there was no possibility of the Applicant doing anything further in respect to the VEOHRC complaint as the VEOHRC had advised that the complaint was dismissed. The complaint was not dismissed due to anything other than a lack of any action or intention on the part of the Applicant to pursue it. It was not dismissed following any process or hearing..." [4]

[18] Finally, in regard to the other application having been dismissed for want of prosecution, the Commissioner concluded:

> "… It is clearly not possible for the Applicant to withdraw his complaint after it has been dismissed for want of prosecution. To require the Applicant to withdraw his complaint after it has been dismissed would be to require the Applicant to take "further action" in respect to the complaint.
>
> It would be contrary to the clear purpose of the legislation and the obiter comment of Federal Magistrate O'Sullivan in this closely related matter to bar the new application on the grounds of Section 725. I am satisfied that at the time of the making of this new application the Respondent is only vexed by one application…" [5]

[19] In the matter of *Qantas Airways Limited v David Lawless*, a Full Bench of the Commission agreed with the decision under appeal, which concluded that the other application did not enliven any jurisdictional issues under section 725 of the Act. In doing so, having regard to the statutory purpose of avoiding access to multiple remedies in relation to dismissals, the Full Bench noted the following:

> "To find to the contrary, in circumstances where Mr Lawless's notice of dispute has been heard and determined in his favour but has not resulted in an outcome which in any identifiable way remedies his dismissal, would not achieve the statutory purpose of Subdivision B. Indeed, such an outcome would negative the statutory purpose, since it would deny Mr Lawless access to the only available dismissal remedy he has applied for." [6]

[20] I note, however, that the Full Bench did distinguish the other application in that matter as different from an application which would give rise to a remedy. Notwithstanding, the quote above aptly describes the statutory purpose in such matters.

[21] The central issue in this matter is whether the Applicant's previous application to the Commission jurisdictionally bars the ability for the current matter to be pursued.

[22] As noted in my previous decision, the Applicant has substantiated that they were afflicted with a significant mental health condition during the time of their previous applications.

[23] To portray the severity of the Applicant's illness, I believe it is helpful to note the following excerpts from the previous decision:

> "The Applicant submits that the period of delay coincides with them experiencing significant mental health issues.
>
> The severity of the Applicant's mental health issues resulted in government services intervening and involuntary hospitalisation for an extended period of time.
>
> The Applicant provided a timeline of the impact their mental health battle had on their employment and filing this application.
>
> - September 2021 – The Applicant ceased taking their prescription psychiatric medication. The Applicant informed their employer of this around the same time.

- October 2021 – The Applicant began experiencing the onset of symptoms. Both the Applicant and Respondent were not aware of this onset. The Applicant's lack of awareness around their symptoms can be attributed to the nature of the condition itself.

- November 2021 and December 2021 – Fellow employees of the Applicant noticed behaviors reflective of declining mental health. The Applicant's coworkers raise concerns over the Applicant's fitness for work. The Respondent instructed the Applicant to attend a medical assessment. The Applicant, unaware of their mental health condition, refused to engage with Respondent in completing a medical assessment.

- January 2022 – The Applicant's mental health condition and associated symptoms worsen.

- 18 January 2022 – The Applicant is dismissed from employment with the Respondent.

- March 2022 – The Applicant's family grow increasingly concerned over the Applicant's mental health, physical health, safety, and welfare. The Applicant's family attempt to prompt treatment. The Applicant refuses treatment.

- May 2022 – The Applicant's family again contact local mental health services. The Applicant continues to refuse treatment.

- June 2022 – The Applicant's mental health condition continues to worsen. The police attend the Applicant's residence several times. Following further intervention from the police, an ambulance is called, and the Applicant is confined for psychiatric treatment.

- 17 June 2022 – The Applicant is formally diagnosed. Medical professionals, during the involuntary hospitalisation, confirm that the Applicant has Schizophrenia.

- July 2022 – The Applicant is discharged from the psychiatric treatment facility. The Applicant has a family member living with them and is subject to an involuntary community treatment order.

- 26 July 2022 – The Applicant submits this application to the Commission.

…

The Applicant provided copies of three medical documents which confirmed that they were diagnosed with Schizophrenia on 17 June 2022 and were receiving treatment for their condition until 18 July 2022. The documents confirmed the Applicant would require on-going monitoring until November 2022 to ensure compliance with the Mental Health Orders:

- The Applicant provided a copy of a Centrelink medical certificate dated 13 July 2022.

- The Applicant provided a copy of their discharge summary, dated 18 July 2022, which confirmed they were admitted on 17 June 2022.

- The Applicant provided a copy of a Mental Health Tribunal treatment order, dated 21 July 2022.

…

I am also satisfied that, due to the nature of the condition, the Applicant experienced significant difficulties recognizing their own worsening condition.

It is reasonable to conclude that the Applicant was having significant issues maintaining their grip on reality and, accordingly, was not in a mental state to adequately address their termination.

I do not accept the Respondent's submission that, because the Applicant lodged two other matters before this current application, the Applicant's attempts to remedy the termination lead to a finding that they were capable of lodging within time or that they only lodged this application due to the failure of the previous applications.

It is understandable that the lodging of the previous applications may, in many cases, make it appear as though an applicant was capable of lodging a subsequent application within time. However, that is clearly not the circumstances of this matter. It is abundantly clear that the Applicant was unable to function, in even the most minimally satisfactory way, to support their vital life needs let alone initiate legal proceedings.

Rather, it is reasonable to conclude that the Applicant was aggrieved by their termination and attempted to address the termination but was so far from any ability to do that in the ways required by the Commission due to the fact that they were experiencing severe Schizophrenic symptoms.

I am satisfied that, for almost all of the delay, the Applicant was not even remotely close to being in a mental state where they could have satisfactorily complied with the lodgment requirements.

…

The Applicant suffered from a significant mental health condition which was not treated until approximately 5 months after the termination had taken place.

From the evidence and the timeline provided of the Applicant's circumstances, it is reasonable to conclude that the Applicant was suffering from the mental health condition for approximately 7 weeks prior to their employment being terminated with the Respondent.

It is therefore a reasonable conclusion that the Applicant was not able to provide any explanation for their behavior during the show cause process and, in the period

> immediately following the termination, when they could have filed an application in time.
>
> I therefore find that the Applicant did not have the benefit of being medically fit for the entire of the period from the termination until completing treatment in a mental health facility.
>
> I find that it is reasonable, and entirely defensible, that the Applicant was unable to file their application until such time as their mental health condition was stabilized."

[24] The submissions provided by the Respondent in relation to this jurisdictional objection were limited. Having considered the submissions regarding the relevant provisions of the Act, I do not accept that the position of the Respondent is consistent with the intention of the Act.

[25] As I have previously found, the Applicant was suffering from a serious and significant mental health condition during the period in which they attempted to make the previous application.

[26] Clearly, the Applicant was utterly lacking in the ability to pursue any remedy concerning the dismissal during the period in question. I am satisfied that the Applicant was unable to competently make and pursue any application due to the severity of their condition.

[27] The Applicant's unfair dismissal application was never *heard* by the Commission and the Commission was notably unable to make any findings regarding the merits of the matter due to the inability of the Applicant to prosecute such matter.

[28] The Applicant's Unfair Dismissal application was dismissed subsequent to their apparent defiance in attending a listing of the Commission not in the manner requested, alongside the history of non-compliance. I note that the existence and severity of the Applicant's condition was not clearly articulated to those who dealt with the previous applications, and the related behaviour caused by such condition, in the absence of such information, gave rise to the dismissal of the matter.

[29] The Unfair Dismissal application was extinguished well before the lodging of the current application. This is not the circumstance where the Respondent must defend itself against multiple applications concurrently. Further, this is not the circumstance where the Applicant has failed at a previous attempt to secure a remedy and is merely attempting to try their luck at another.

[30] Accordingly, I am not persuaded that Subdivision B of Division 3 of Part 6-1 of the Act applies in respect of the previous application.

[31] In making this conclusion, I highlight the severity and nature of the Applicant's condition at the time of the previous application was such that they were wholly unable to competently address many of the basic requirements for the regular maintenance of everyday life, let alone pursue any application for remedy.

[32] A finding to the contrary would be inconsistent with the medical evidence submitted by the Applicant. Further, I strongly believe that a contrary finding would be inconsistent with the statutory intention and purpose of the relevant provisions of the Act, the objects of the Acts, and the Matters the Commission must take into account in performing functions.

[33] At no point in time has the Respondent, to any notable degree, been required to defend itself against the merit of any application nor has the Applicant been afforded the opportunity to competently put forward the merits of any application.

Conclusion

[34] Above all, I note that the circumstances in the present matter are extraordinary and rare, owing largely to the severity, duration, nature, treatment, and evidence concerning the Applicant's prior mental health deterioration.

[35] I have considered that circumstances surrounding this application filed by the Applicant, and I have formed the view that this does not fall within the confines of the intention of section 725 of the Act.

[36] Therefore, I am dismissing the jurisdictional objection of the Respondent, the matter has been programmed accordingly.

COMMISSIONER

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[1] [PR761296].

[2] [PR745687].

[3] [2011] FWA 2292, [11].

[4] [2011] FWA 2292, [13]-[14].

[5] [2011] FWA 2292, [15]-[16].

[6] [2014] FWCFB 3582, [43].