[2023] FWCFB 101

The attached document replaces the document previously issued with the above code on 31 May 2023.

It corrects a section reference in [13] to refer to s 386(1)(a) instead of s 389(1)(a).

Associate to Justice Hatcher, President

Dated 24 August 2023

DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Lipa Pharmaceuticals Ltd
v
Mariam Jarouche
(C2023/1492)

JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT BINET

SYDNEY, 31 MAY 2023

Appeal against decision [2023] FWC 493 of Deputy President Anderson at Adelaide on 28 February 2023 in matter number C2022/7079

Introduction

[1] Lipa Pharmaceuticals Ltd (Lipa) has lodged an appeal, for which permission is required, against a decision of Deputy President Anderson issued on 28 February 2023.[1] The decision concerned a jurisdictional objection made by Lipa in respect of an application made by Dr Mariam Jarouche pursuant to s 365 of the *Fair Work Act 2009* (Cth) (FW Act) in which she alleged that she was dismissed from employment with Lipa in contravention of ss 340, 351 and 352 of the FW Act. Lipa contended that Dr Jarouche's application was not validly made because she had not been dismissed but rather resigned from her employment. In his decision, the Deputy President rejected this contention and, in conjunction with his decision, made an order[2] by which he determined to issue a certificate in accordance with s 368(3)(a) of the FW Act.

[2] Section 365 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 respect of an application made under s 365, s 368(1) of the FW Act requires that the Commission 'deal' with dispute other than by arbitration. The statutory note to s 368(1) states, by reference to s 595(2), that the Commission may 'deal' with such a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion. Section 368(3)(a) provides that if the FWC is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful, then the FWC must issue a certificate to that effect. Once such a certificate has been issued, the applicant is entitled to make a general protections court application subject to the time limitation in s 370(a)(ii), unless the parties have agreed to the Commission arbitrating the dispute pursuant to s 369.

[4] As the Deputy President correctly stated in paragraph [72] of his decision, a valid application under s 365 requires that the relevant dismissal has actually occurred as a matter of jurisdictional fact. It is not sufficient that the applicant has merely alleged 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, according to the Federal Court Full Court decision in *Coles Supply Chain Pty Ltd v Milford*[3] (*Milford*) 'must be resolved before the powers conferred by s 368 can be exercised at all'.[4]

[5] The term 'dismissed' in s 365(a) is defined in s 386(1) of the FW Act as follows:

> **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.

Background facts

[6] In the appeal, there was no challenge to the findings of fact made by the Deputy President. The facts of the matter can therefore be summarised largely by reference to those findings.

[7] Dr Jarouche commenced employment with Lipa as its Chief of Quality on around 24 May 2021. During 2022, Lipa's Chief Executive Officer, Rob Tanna, developed concerns about parts of Dr Jarouche's performance which he discussed with her in June and July. In September 2022 Dr Jarouche confirmed to Mr Tanna that she would require a period of six weeks' leave for planned surgery. On 16 September 2022 Mr Tanna emailed Dr Jarouche concerning a backlog in product codes and sought that this be addressed urgently.

[8] On Thursday 29 September 2022, Mr Tanna called Dr Jarouche to a meeting. The Deputy President found that a conversation occurred to the following effect:[5]

> MR TANNA: I appreciate that the timing of this discussion given your personal circumstances is difficult, but the role that you perform is critical to the business. It's just not working for the business. I feel that we are at a stage where the right decision must be made for the business due to my ongoing performance concerns. This discussion has absolutely nothing to do with your

upcoming surgery. [Name redacted] (Technical Services Manager) could step up for the 3-6 week period [of leave] which he has previously done. At the end of the day we could have managed for 3-6 weeks but it would not change the outcome.

DR JAROUCHE: But we have improved the stability and the raw material testing. The workload is high.

MR TANNA: We never seem to be in control. We address one area and another area would fall behind. This is consuming a lot of my personal time to constantly check and make sure that we were on top of things. I believe you would have been better suited to a QC Lab Manager role. The Chief of Quality role was too big a step I feel. I have avoided making this decision for some months hoping there would be a change. We have both invested a lot of time trying to improve the situation and I'm very sorry that it's come to this. I have a long list of concerns in front of me which I can go through in detail if you wish. Much of this we have been discussing and have been trying to rectify. I would rather we focus on looking forward and reaching an agreed communication and settlement.

DR JAROUCHE: I'm sorry that I have disappointed you. I thought I was doing better.

MR TANNA: Let's work together on how we best position you leaving the business. One option is to say that due to your upcoming surgery you have decided to resign and you wish to focus on your health. This however would be your decision and I will respect whichever way you wish to do this. I can draft an announcement about your resignation for you to consider if you wish.

DR JAROUCHE: OK – let me have a look at it.

MR TANNA: If you wish to resign, we won't need you to work out your 3 month notice period which we will pay together with your accrued leave. I realise that this is a lot to take in right now. We can work through the detail of your resignation over coming days. I'm OK if you wish to take some time to collect your things and say goodbye to your team.

DR JAROUCHE: Here's my laptop. I need to go downstairs to the lab and get my bag and the laptop bag. They are beautiful people in the Quality team. Please make sure you look after them.

MR TANNA: That's fine – take your time. Are you OK to drive home? Do you need us to organise a ride?"

DR JAROUCHE: No – I will be OK.

[9] The Deputy President found that Dr Jarouche was 'in shock' at what occurred. Dr Jarouche collected her belongings and left the workplace about 20 minutes later. Later the same day, Dr Jarouche telephoned Mr Tanna and advised that she was 'okay with the resignation', that she did not 'want to go legal' but wanted more money from Lipa as well as a reference. Mr Tanna said in reply: 'I will do everything I can to help you but let me get back to you on your request for more money'.

[10] Dr Jarouche did not come into work the following day (Friday 30 September 2022), and Mr Tanna agreed in his evidence that he had told her not to.[6] That day, Mr Tanna sent Dr Jarouche an email which included a financial payout offer of four months' pay in return for her executing a deed of release, and a draft announcement to the effect that Dr Jarouche was leaving the business to deal with her surgery and recovery. Dr Jarouche did not respond. She eventually responded on Tuesday 4 October 2022 (the preceding Monday was a public holiday) indicating

that she would sign the release and agree to the announcement once she had received a letter of reference. By subsequent emails that day, Mr Tanna sent Dr Jarouche a draft reference, the deed of release and a payment calculation. The recitals in the draft deed noted that the employment had ended on 30 September 2022 by way of resignation. Dr Jarouche did not respond that day. On 5 October 2022, Dr Jarouche sent Mr Tanna an email which relevantly stated: 'The reference letter is fine, thank you. Will wait on the next steps from your end.' Mr Tanna then arranged for the announcement to staff, in the terms of the 4 October 2022 draft, to be made, and sent Dr Jarouche a signed copy of the reference letter.

[11] Dr Jarouche did not sign the deed of release. On 7 October 2022, she sent Mr Tanna an email stating that she did not want to sign the deed of release and requesting that the payment of her 3 months' notice and her annual leave proceed. On 10 October 2022, Mr Tanna indicated by email that the payments would be made on the basis that Lipa regarded Dr Jarouche as having resigned effective 5 October 2022.

[12] The payments were subsequently made. On 21 October 2022, Dr Jarouche filed her s 365 application. It appears that, notwithstanding its jurisdictional objection (articulated in its Form F8A response to the application filed on 18 November 2022), Lipa agreed to participate in a conciliation conference to be conducted by the Commission. This conference occurred on 13 December 2022 and was conducted by a staff member of the Commission acting under delegated authority. The conference did not result in a settlement of the matter. Lipa then pressed for its jurisdictional objection to be determined prior to the issue of any certificate pursuant to s 368(3)(a).

Decision under appeal

[13] In his decision, the Deputy President first rejected Dr Jarouche's contention that she was dismissed within the first limb of the definition of 'dismissal' in s 386(1)(a). The Deputy President found that Mr Tanna's conduct on 29 September 2022 did not terminate the employment contract or constitute the giving of notice that the employment would end on unilaterally determined terms, but rather involved a proposal for the 'parting of the ways by a managed resignation'.[7] As to the second limb of the definition, the Deputy President first found that Dr Jarouche resigned on 5 October 2022 when she agreed to Lipa announcing her resignation and asked that she be sent the reference letter in previously-agreed terms and that, in doing so, Dr Jarouche had not acted in the heat of the moment.[8]

[14] The Deputy President then considered whether Dr Jarouche's resignation was 'forced' within the meaning of s 386(1)(b) of the FW Act. The Deputy President found that Lipa's conduct between 29 September and 5 October 2022 had the intention of bringing the employment to an end. Mr Tanna's initial discussion with Dr Jarouche on 29 September proposed no other outcome than her exit from Lipa, and this remained the stated intention and the objective over the following six days until the resignation.[9] The Deputy President characterised the choice presented to Dr Jarouche by Lipa as a choice of whether or not to agree to its resignation announcement and reference letter – it did not constitute an expression of choice on her part to bring her employment to an end.[10] The Deputy President said: 'The choice she exercised involved no realistic counterfactual whereby, absent exercising that choice, she could reasonably expect to have continued to be lawfully employed as Lipa's Chief of Quality.'[11]

Appeal grounds and submissions

[15] Lipa's four appeal grounds all involve the contention, formulated in varying ways, that the Deputy President erred in finding that Dr Jarouche was dismissed within the meaning of the s 386(1)(b) of the FW Act. Lipa's submissions proceed on the premise that Dr Jarouche resigned from her employment on 5 October 2022, as found by the Deputy President, and Lipa does not dispute that its conduct between 29 September and 5 October 2022 was conduct with the intention of bringing the employment to an end. However, it submits that it does not follow that Dr Jarouche had no effective or real choice but to resign, and that Dr Jarouche did not demonstrate that she was 'forced' to resign and the evidence does not support that finding. Lipa characterises the discussion on 29 September 2022 as involving a proposal that Dr Jarouche leave the business because of Mr Tanna's concerns about her performance, that Lipa suggested the option of resignation, and that after consideration Dr Jarouche indicated her intention to resign, subject to negotiations as to the terms. Thus, it submits, '[r]esignation was a possible, not probable, result.' The Deputy President erred by substituting Dr Jarouche's onus to prove that she was forced to resign because of Lipa's conduct with the assumption that she did so because of Lipa's intention that she resign, and by not properly accounting for and evaluating all of the circumstances operating at the time of the resignation.

[16] In its notice of appeal, Lipa contends that permission to appeal should be granted because decision raises for consideration the relationship of s 386(1)(b) of the FW Act to s 365, the decision operates as a jurisdictional gateway for Dr Jarouche to claim relief under Pt 3-1 of the FW Act such that it is in the public interest for the Commission to determine the appeal prior to any further action being taken to claim relief, and the decision raises questions regarding the effect and application of the Full Bench decision in *Bupa Aged Care Australia Pty Ltd v Tavassoli*[12] (*Bupa*) whether it is sufficient for an employee to be dismissed for the purposes of s 365 that the employer have an intention to bring their employment to an end.

[17] Dr Jarouche submits that the Deputy President's decision was correct for the reasons given by him.

Consideration

[18] On the premise, not contested in the appeal, that Dr Jarouche resigned from her employment on 5 October 2022, we consider that it is beyond doubt that her resignation was 'forced' within the meaning of s 386(1)(b) of the FW Act and that Lipa's contention to the contrary is not reasonably arguable. There was no disagreement between the parties that s 386(1)(b) was to be applied to the facts of the matter in accordance with the following statement of principle in the Full Bench decision in *Bupa*:[13]

> A resignation that is "forced" by conduct or a course of conduct on the part of the employer will be a dismissal within the second limb of the definition in s.386(1)(b). The test to be applied here is whether the employer engaged in the conduct with the intention of bringing the employment to an end or whether termination of the employment was the probabl[e] result of the employer's conduct such that the employee had no effective or real choice but to resign. Unlike the situation in [s 389(1)(a)], the requisite employer conduct is the essential element.

[19] As earlier stated, Lipa accepts that the conduct of Mr Tanna on 29 September 2022 and the days following was intended to bring Dr Jarouche's employment to end but contends that this conduct did not result in Dr Jarouche having no effective or real choice other than to resign. We disagree. Having regard to the events of 29 September 2022 in particular, it is not possible to identify any choice which Dr Jarouche might have exercised in response to Lipa's conduct other than resignation. Lipa's submissions do not identify any alternative choice. Although Mr Tanna expressed himself in somewhat euphemistic terms, what he said at the meeting on 29 September 2022, assessed objectively, can only be understood as conveying that he had made a final decision that Dr Jarouche's employment was to come to an end. His statement 'I have avoided making this decision for some months hoping there would be a change' (underlining added) makes explicit that a decision had been made. Further, Mr Tanna made it clear, albeit again euphemistically, that Dr Jarouche was to cease work and leave the workplace forthwith when he said 'I'm OK if you wish to take some time to collect your things and say goodbye to your team' and 'Are you OK to drive home? Do you need us to organise a ride?' Consistent with this, Dr Jarouche had returned her laptop, collected her belongings, said goodbye to staff, and left the workplace, never to return, within about 20 minutes of the end of the discussion with Mr Tanna on 29 September 2022.

[20] The only matters remaining for consideration after Dr Jarouche left the workplace on 29 September 2022 were the basis and the monetary terms of Dr Jarouche's departure. For all intents and purposes, her employment had already come to an end. Dr Jarouche's subsequent accession to Mr Tanna's proposal for a 'managed resignation' must be understood in that context. It was the only response available to the reality which Mr Tanna had already imposed upon her.

[21] The only doubt we have about the decision under appeal is whether the better view is that Dr Jarouche's dismissal arose because she was terminated on the initiative of the employer, within the meaning of s 386(1)(a), on 29 September 2022, rather than having been forced to resign on 5 October 2022. A termination on the initiative of the employer for the purpose of s 386(1)(a) is to be conducted by reference to the termination of the *employment relationship*, not by reference to the termination of the contract of employment operative immediately before the cessation of the employment.[14] The alternative view would be that Dr Jarouche's employment relationship came to an end on Lipa's initiative on 29 September 2022 because of Dr Tanna's announcement of the decision he had made to that effect and Dr Jarouche's removal from the workplace the same day, and that what followed until 5 October 2022 was negotiation and jockeying as to the terms upon which the *contract of employment* would terminate. However, we do not need to pursue this because, on any view, the Deputy President was correct in concluding that Dr Jarouche had been dismissed, within the meaning of s 386(1), as a matter of jurisdictional fact.

[22] Because Lipa's appeal is not reasonably arguable, we decline to grant permission to appeal.

Further observation

[23] As earlier stated, the Commission conducted a conciliation conference in respect of Dr Jarouche's application prior to the determination of Lipa's jurisdictional objection, with Lipa's consent. This involved the exercise of the Commission's functions and powers under s 368(1).

This should not have occurred since it was inconsistent with the Full Court's command in *Milford* as set out in paragraph [4] above. Where the respondent to a s 365 application contends, in its response to the application or otherwise, that the application was not validly made because the applicant was not dismissed, this must be determined prior to the Commission 'dealing' with the dispute under s 368 including by conducting a conciliation conference.

Conclusion

[24] Permission to appeal is refused.

PRESIDENT

Appearances:

A Fernon SC, for the appellant.
A Britt, of counsel, for the respondent.

Hearing details:

2023.

Sydney:
11 May.

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[1] [2023] FWC 493.

[2] PR751253.

[3] [2020] FCAFC 152, 279 FCR 591.

[4] Ibid at [67].

[5] [2023] FWC 493 at [31].

[6] Transcript, 16 February 2023, PN 490.

[7] [2023] FWC 493 at [79].

[8] Ibid at [93], [101]-[102].

[9] Ibid at [108].

[10] Ibid at [114].

[11] Ibid at [115].

[12] [2017] FWCFB 3941, 271 IR 245.

[13] Ibid at [47].

[14] *Khayam v Navitas English Pty Ltd* [2017] FWCFB 5162, 273 IR 44 at [75(1)], [124]-[126].