



DECISION

Fair Work Act 2009
s.365—General protections

Samuel Howell

v

Elite Elevators Corporation Pty Ltd
(C2023/5486)

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT WRIGHT
COMMISSIONER CRAWFORD

SYDNEY, 22 DECEMBER 2023

Application to deal with general protections contraventions involving dismissal – conciliation conference conducted – settlement reached – notice of discontinuance filed by applicant’s representative – dispute regarding whether applicant instructed or authorised filing of notice of discontinuance – discontinuance held to be invalid – further conference to be conducted.

Introduction and background

[1] This decision concerns the validity of a purported notice of discontinuance that was filed in this matter on 17 November 2023. Because this issue was considered to be of legal importance and general application, it was referred by the President of the Commission to this Full Bench for determination on 20 December 2023. The issue has arisen from the following factual circumstances.

[2] On 7 September 2023, Mr Samuel Howell made an application under s 365 of the *Fair Work Act 2009* (Cth) (FW Act) for the Commission to deal with his dispute with Elite Elevators Corporation Pty Ltd (respondent) concerning Mr Howell’s dismissal on 31 August 2023. Mr Howell alleges that his dismissal by the respondent contravened the general protections provisions in Part 3-1 of the FW Act. The application was filed by ‘Employee Dismissals’, which identified itself in its covering email as Mr Howell’s paid agent, and the application was signed by Ms Belinda Solomon as ‘Paid Agent for and on behalf of Employee Dismissals’.¹

[3] On 17 September 2023, the Commission served Mr Howell’s application on the respondent and, on 3 October 2023, the respondent filed its response (Form F8A) to Mr Howell’s application.

[4] On 5 October 2023, Mr Howell’s application was listed for conference by video link using Microsoft Teams before Commissioner Allison, to take place on 19 October 2023. At the conference on that date, Ms Paresni Pillay of Employee Dismissals appeared for Mr Howell. Mr Howell was also present. The respondent was legally represented. During the conference, Mr Howell and the respondent reached a settlement. Whilst the conference itself was not

recorded, the Commissioner went 'on record' at the conclusion of the conference and read out the agreed terms of settlement. The Commissioner's chambers emailed the parties the agreed terms of settlement in writing (as a PDF attachment) for signature shortly thereafter.

[5] On 20 October 2023, Mr Howell sent an email to the Commissioner's chambers inquiring how he was to sign the document. The email attached a copy of the terms of settlement which had in fact already been signed by Mr Howell, but the signature was not witnessed nor had Mr Howell filled in his name as the document required. On 23 October 2023, the Commissioner's chambers sent a reply email to Mr Howell noting that he had already signed the document but that his signature had not been witnessed nor his name filled in.

[6] On 13 November 2023, Mr Howell sent an email to the Commissioner's chambers which stated: 'After contact with Elite elevators and getting no response from them, I am writing to inform you that I have not received a letter of resignation or the promise[d] damages'. He also left a voicemail message with the Commissioner's chambers the same day in which he said:

I still haven't received the damages or a reference on a resignation on company letterhead. I haven't heard from anyone. I can't contact my own legal people, they don't seem to answer the phone and I'm just wondering if there's anything you guys can do to resolve this. Thank you. My number is [redacted].

[7] On 14 November 2023, the Commissioner's chambers emailed the respondent's legal representative and the respondent itself, forwarding Mr Howell's 13 November 2023 email, to enquire about compliance with the terms of settlement. The email stated:

I refer to the above matter. Chambers confirmed that the parties reached an agreement to resolve this application in conference before Commissioner Allison on 19 October 2023. Terms of settlement were then sent to the parties for signature. I have **attached** the email confirming the above by way of reference.

Chambers did not receive signed terms of settlement from either party. Mr Howell has sent the **below** email to Chambers noting that he has not received anything in accordance with the settlement.

Please advise whether, in the Respondent's view the settlement has been executed, including:

- Whether signed terms of settlement have been exchanged – if yes, please attach copies of the signed terms by return email;
- Whether the settlement has been complied with; and
- If not yet complied with, when the Respondent will be able to comply with the terms of settlement.

[8] The above email was sent at 10:37 am AEDT. At 10:49 am the same day, Mr Howell sent the following email to the Commissioner's chambers:

Turns out I have received a account yesterday for \$4490.00, I am in shock.

The damages payment was sent to unfair dismissal Pty Ltd [sic], I had no idea of what the service was going to cost.

My representation was poor as you can remember and I had no communication [from] unfair dismissals Pty Ltd since the conciliation.

I don't believe I have been treated fairly in this matter as it cost me money to apply to the commission.

I was encouraged to settle and I thought it [meant] I would see some of the damages agreed.

I am not sure what to do next I am currently not working and [] visiting a counsellor.

I really feel like a stupid idiot and I have been scammed, how can [a] document I signed on the 10th enable a company to take all the money and not even provide a receipt of payment.

[9] At 11:06 am AEDT, the respondent sent the following email to the Commissioner's chambers:

Dear Associate

Thank you for your email below.

I note that you did not copy in the Applicant's representative (copied into this email).

In relation to your specific questions:

Q1. Whether signed terms of settlement have been exchanged – if yes, please attach copies of the signed terms by return email;

A1. Yes, copies attached.

Q2. [] Whether the settlement has been complied with.

A2. Yes, please see correspondence from the Applicant we have received direct[.] As advised, payment of the settlement sum occurred on 20 October 2023 into the Applicant's representative's nominated bank account. The email trail also confirms provision of the signed Statement of Service direct to the Applicant.

Q3. If not yet complied with, when the Respondent will be able to comply with the terms of settlement.

A3. As noted above – we suggest the Applicant approach his representative to finalise this matter.

[10] This email attached a copy of the terms of settlement which had been signed by Mr Howell and witnessed. It also attached a copy of a lengthy email exchange between Mr Howell and the respondent's legal representative which had occurred on 13 and 14 November 2023, and had been initiated by Mr Howell requesting that the settlement of the matter be finalised. In one of its responses to Mr Howell as part of this exchange, the legal representative forwarded an email received from Employee Dismissals on 1 November 2023 which stated:

Dear Colleague

Previous correspondence refers.

Please find attached:

1. Signed Terms of Settlement; and
2. Irrevocable authority to receive and direction to pay.

We once again confirm that payment is to be into our nominated Trust Account which details are:

[redacted]

Please kindly provide us with confirmation of the payment. We otherwise look forward to receipt of the Statement of Service.

[11] It may be noted that the payment of the settlement sum, on 20 October 2023, significantly predated the above email.

[12] In a subsequent email sent to Mr Howell on 14 November 2023 at 10:37 am AEDT which formed part of this email exchange, the respondent's legal representative stated:

Dear Mr Howell

Thank you for your time on the phone earlier.

I have confirmed that the settlement sum was paid into your representative's account on **20 October 2023** in line with the details provided in the **attached** authority signed by yourself on **10 October 2023**.

For the avoidance of doubt, the bank details listed in the transfer summary in my previous email aligns with the account details listed in the authority.

If you have any further queries in respect of payment, we recommend the same be addressed with your representatives, whom we have copied into this correspondence.

We will send through a statement of service on company letterhead shortly.

[13] On 14 November 2023 at 12:08 pm AEDT, Mr Howell sent an email to the Commissioner's chambers which stated:

This is [] the first and only contact I had with my legal representation since our consolation.

When I call this company I go straight to voice mail and I have left multiple messages.

This is the most stressful situation I had to deal with. Seems the only winning from this process is my uncontactable legal firm.

Is there a process to make a complaint about this?

Jonas has been the most helpful instructing me to contact [name redacted] the lawyer for Elite elevators. They were rude and unhelpful but at least [name redacted] investigated and eventually

sent me a letter of resignation (poorly written and not on letterhead) and informed me I had been scammed on the 20th oct 2023. It was only then I realised the nature of my legal firm.

Am I this stupid, I can't believe a document I signed on 10th sept [sic] could have such an effect on my me[n]tal health.

See below ;(

[14] Set out below that email is the text of an email Employee Dismissals had sent to Mr Howell on 13 November 2023 at 2:08 pm AEDT, which relevantly stated:

We refer to the above matter.

Please note, we have received payment of the net settlement sum of \$2,692 from your former employer.

Your professional fee is in the sum of \$4,490 plus gst.

The proceeds of settlement have been applied to our fees and you are unfortunately not entitled to any disbursement. In fact, you are indebted to us for the balance of our fees, which we reserve the right to render an invoice for.

...

A Notice of discontinuance (Form F50) will be filed shortly and our involvement in the matter shall cease thereafter.

Trusting you find this in order.

[15] In response to Mr Howell's email above, the Commissioner's chambers sent him an email on 15 November 2023 informing him how to make a complaint about a lawyer or paid agent.

[16] On 17 November 2023, Employee Dismissals filed by email the Form F50 notice of discontinuance which is the subject of this decision. The notice indicated that Mr Howell, as the applicant, wholly discontinued matter C2023/5486 as part of a settlement agreement. The notice was signed by Pareshni Pillay, described as 'Advocacy Team Leader, Employee Dismissals' and dated 17 November 2023. The email attaching the notice was copied to Mr Howell and the respondent's legal representative. After having received the notice of discontinuance, Mr Howell sent the following email to the Commissioner's chambers at 5:55 pm AEDT:

I am horrified by this outcome and am far from satisfied with the outcome.

I will be submitting [a] formal complaint against employee dismissal[s] as I have not heard back from them since oct 14.

[17] He sent a further email at 6:00 pm AEDT:

I hate to bother you again but I again feel I am being bamboozeked [sic] into signing forms I don't understand.

I wish I had never filled out the online form to seek justovr. [sic]

Can someone please explain the attached form for me please?

[18] On 20 November 2023, following telephone contact with the Commissioner's chambers, Mr Howell sent the following email to the Commissioner's chambers:

I write to request a second reconciliation meeting to resolve the issues, During the meeting I indicated that my paid agent had not been in contact with me or forwarded the response from Elite Elevators.

I did mention that I was not happy with my representation at the start of the meeting. I was under the impression they were lawyers and they had my best interest in mind.

I felt that between the commissioner and my representation I was railroaded into this settlement. After the meeting I was not happy with the outcome and was not ready to sign the document, turns out that while I am deciding what to do my former employe[r] has indeed paid in good faith to employee dismissals on the 20th Oct 2023.

The commissioner offered to make the payment damages so the amount would not be taxed as income. I was influenced by the thought of getting some money and a resignation status.

I personally had to contact your chambers on multiple occasions to find out the status of the claim. Horrified to find out that my former employee had already paid the damages directly to Unfair dismissal on the 20th of Oct. (before I actually signed the docs.) I only received the resignation letter on the 14th Nov and it was not on the company letterhead.

My new conciliation meeting would give me a proper opportunity to get the justice that I had originally sought.

I have made attempts to contact employee dismissals everyday (left messages and sent emails). They have a phone system that recognizes my phone and sends me straight to the message bank. I have sent emails requesting a review of the charges but I have had no response to any method of contact.

I don't normally feel stupid but this experience has my head spinning, I would have never settled the matter if I knew ... the entire payment would go to employee dismissals, ... I did not understand the form I signed on the 10th of sept [sic], I was told it was required to lodge the application with Fair Work.

I was never told about fees or charges prior to the conciliation. I still have no account or invoice or anything outlining the service they have performed to date.

[19] There were subsequently various communications between Mr Howell and the Commission, in which Mr Howell continued to make complaints about the outcome of his matter and the conduct of Employee Dismissals. Mr Howell's complaint, and his request for a second conciliation conference, were eventually escalated to the President of the Commission. On 6 December 2023, the President's chambers sent an email to Mr Howell requesting him to advise whether he had instructed or authorised Employee Dismissals to file the notice of discontinuance of 17 November 2023. On 7 December 2023, Mr Howell replied by email and stated:

I did not instruct my paid agent to complete the said form on my behalf, as discussed after conciliation I have had no contact with employee dismissals.

[20] On 14 December 2023, the President conducted a hearing (by video link using Microsoft Teams) in respect of the question of whether the matter had validly been discontinued. Employee Dismissals was directed to attend. At the hearing, Mr Howell confirmed (via his pro bono legal representative) that he did not at any point instruct or authorise Employee Dismissals to discontinue his application. He also submitted that:

- he did not properly understand the terms of settlement he had signed, and they were not explained to him;
- he did not recall seeing that Employee Dismissals' initial email to him included a 'quoted figure' representing its fees to act on his behalf;
- during the conference before Commissioner Allison, he had thought the parties had discussed payment of the settlement sum being made into his own bank account, the details of which the respondent already had; and
- Employee Dismissals never advised him at the conference that the settlement sum would be paid elsewhere.

[21] Employee Dismissals submitted at the hearing that it had authority to discontinue the application on Mr Howell's behalf once both parties had complied with their respective obligations under the terms of settlement. In support of this submission, it relied on the clause 9 of those terms, which provides:

[9] By signing these terms, the Applicant acknowledges and is taken to have advised the Commission, that the matter is settled and that the matter can be closed by the Commission.

[22] At the hearing, Employee Dismissals also submitted that Mr Howell had signed an 'irrevocable authority' on 10 October 2023 for payment of the settlement sum to be made into its nominated bank account instead of his own. It further submitted that Mr Howell ought to have understood from the contract ('terms of engagement') he signed engaging it as his representative that:

- the settlement sum would be applied towards its fees for acting on his behalf;
- any excess available after its fees were paid would be disbursed to him; and
- if there was no excess or indeed the settlement sum was insufficient to cover its fees (the latter being what transpired), it would forward him an account for the balance.

[23] The respondent made no submission concerning the validity of the notice of discontinuance.

[24] Following the hearing, the President issued an order requiring Employee Dismissals to produce '[a]ll documents concerning Employee Dismissals' representation of Mr Samuel Howell in matter number C2023/5486'. On 19 December 2023, Employee Dismissals produced a number of documents to the President's chambers, including the 'terms of engagement' and 'irrevocable authority' referred to in Employee Dismissals' submissions.

[25] On 20 December 2023, the President referred this matter to a Full Bench for determination as earlier stated.

Consideration

[26] In respect of the discontinuance of proceedings before the Commission, s 588 of the FW Act provides:

588 Discontinuing applications

A person who has applied to the FWC may discontinue the application:

- (a) in accordance with the procedural rules (if any); and
- (b) whether or not the matter has been settled.

[27] Rule 10 of the *Fair Work Commission Rules 2013* provides:

10 Discontinuance

- (1) An applicant in an application before the Commission may discontinue the application at any time.
- (2) To discontinue the application, the applicant must notify the Commission by:
 - (a) lodging a notice of discontinuance; or
 - (b) advising the Commission, or a member of the staff of the Commission, by letter, email, fax or telephone, or orally in person, that the applicant:
 - (i) wishes to discontinue the application; or
 - (ii) has settled the application; or
 - (iii) wishes to withdraw the application; or
 - (iv) no longer needs the Commission to deal with the application; or
 - (c) advising the Commission of the discontinuance during the course of a conference or hearing.

Note 1: For paragraph (a), the notice of discontinuance must be in the approved form—see subrule 8(2).

Note 2: The Commission prefers applicants to advise it of the discontinuance of a matter by lodging a notice of discontinuance in the approved form.

Note 3: See subregulations 3.02(8), 3.03(8), 3.07(8) and 6.07A(8) of the Regulations in relation to the refund of an application fee when an application is discontinued.

- (3) To remove any doubt, this rule does not prevent the Commission from dismissing an application on its own initiative.

[28] It is trite, but necessary to state in this case, that only an applicant can discontinue a proceeding pursuant to s 588 and r 10. Where an applicant is represented by a lawyer in a proceeding, the lawyer can of course discontinue the proceeding on the basis of instructions or authorisation from the applicant as client. The conduct of lawyers in this respect is regulated by

the statutory requirements and professional rules applying to the legal profession throughout Australia. For example, the *Australian Solicitors' Conduct Rules* require that a solicitor must:

- ‘act in the best interests of a client in any matter in which the solicitor represents the client’ (rule 4.1.1);
- ‘provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement’ (rule 7.1); and
- ‘follow a client’s lawful, proper and competent instructions’ (rule 8.1).

[29] Solicitors who breach these rules may face disciplinary action from the relevant authorities that regulate the legal profession in each State and Territory.

[30] The FW Act contemplates that parties to proceedings before the Commission may be represented in certain circumstances by ‘paid agents’. Section 12 of the FW Act defines the term ‘paid agent’ in the following way:

“paid agent”, in relation to a matter before the FWC, means an agent (other than a bargaining representative) who charges or receives a fee to represent a person in the matter.

[31] Section 596(1) of the FW Act relevantly provides that a person may be represented in a matter before the FWC (including by making an application or submission to the FWC on behalf of the person) by a paid agent with the permission of the FWC.

[32] There is no regulatory scheme governing the qualifications, conduct, ethics or financial dealings of such paid agents. However, the Commission has an overriding obligation to perform its functions and exercise its powers in a manner which is fair, just, open and transparent (s 577(a) and (c)). The proper discharge of this obligation would not, in our view, permit the Commission to allow paid agents who have been granted permission pursuant to s 596 to conduct themselves in proceedings before the Commission in a manner which is significantly inconsistent with the applicable professional obligations of lawyers in equivalent circumstances.

[33] Having regard to the above matters, we will proceed on the basis that a paid agent may only file a notice of discontinuance on behalf of an applicant they have permission to represent if they have been expressly instructed or authorised by the applicant to do so, and such instruction or authorisation has been given after the provision of appropriate advice by the paid agent to the applicant. A purported notice of discontinuance filed by a paid agent other than in these circumstances is not a discontinuance by the applicant under s 588 and r 10 and is invalid and a nullity.

[34] In this matter, Mr Howell denies ever instructing or authorising Employee Dismissals to file a notice of discontinuance on his behalf. There is no evidence of any such instruction or authorisation having been given by him. The documents produced by Employee Dismissals do not include any communication between Mr Howell and Employee Dismissals which concerns or makes any reference to instructions for the filing of a notice of discontinuance at any time.

There is no evidence of any communication at all between Mr Howell and Employee Dismissals between the conference before the Commission on 19 October 2023 and Employee Dismissals' email to Mr Howell of 13 November 2023 which peremptorily informed him that it would be filing a notice of discontinuance 'shortly'. There is no evidence that Employee Dismissals ever provided advice to Mr Howell about the nature and effect of a notice of discontinuance, and Mr Howell's emails to the Commission of 17 November 2023 make it painfully obvious that he did not understand what a notice of discontinuance was.

[35] Employee Dismissals' position at the hearing before the President on 14 December 2023 was that authorisation to file the notice of discontinuance arose from the terms of settlement to which Mr Howell had agreed at the conference on 19 October 2023 and subsequently executed. Even leaving aside Mr Howell's contention at the hearing that he did not understand the terms of settlement, that contention cannot be sustained. The terms of settlement make no reference to the filing of a notice of discontinuance.

[36] As earlier stated, Employee Dismissals relies on clause 9 of the terms of settlement as constituting authorisation to file the notice of discontinuance. Clause 9 is a term which appears in standard terms of settlement used by the Commission in conciliation conferences for s 365 and unfair dismissal matters. The reference to the matter being 'closed by the Commission' in clause 9 is to an administrative step taken by the Commission to deal with inactive files. The closure of a file by the Commission does not have the legal effect of extinguishing the matter, and the file may be re-opened where further activity in the matter is required. By contrast, a notice of discontinuance is self-executing and brings an application to an end.² Clause 9 of the terms of settlement cannot be read as authorising, or even contemplating, the discontinuance of Mr Howell's application.

[37] For the above reasons, we find that the purported notice of discontinuance filed by Employee Dismissals on 17 November 2023 is invalid and a nullity. Matter C2023/5486 has not been discontinued by Mr Howell.

A further conference?

[38] As earlier stated, Mr Howell has requested that a further conciliation conference be conducted by the Commission. We accede to this request. In our view, there is an arguable basis to consider that the dispute between Mr Howell and the respondent remains extant because of two matters:

- (1) Mr Howell contends that he did not understand the terms of settlement, and it is apparent to us that there was a lack of appropriate advice provided by Employee Dismissals to Mr Howell in relation to his matter, including in the period from the completion of the conference before the Commissioner to the date of the filing of the invalid notice of discontinuance.
- (2) Clause 3(a) of the terms of settlement required the respondent to pay the settlement sum 'into the Applicant's nominated bank account within 7 days of execution of this Agreement by both parties'. It is apparent that the respondent in fact paid the settlement sum into Employee Dismissals' bank account on 20 October 2023, before Mr Howell executed the terms of settlement and without Mr

Howell (or, as far as we can tell, Employee Dismissals on his behalf) ever having nominated a bank account for receipt of the settlement sum beforehand. The respondent's position is that, by virtue of this payment, it has no further obligation to comply with clause 3(a) of the terms of settlement. It may be arguable as a result that the respondent has contravened, or alternatively repudiated, the terms of settlement.

[39] A further conference may assist in resolving these matters. The conference will be conducted by the President. Employee Dismissals will be required to attend the conference. The parties will be notified of the time, date and place of the conference in the new year.

[40] We note that the respondent's attendance at the hearing before the President on 14 December 2023 is likely to have caused it to incur legal costs. That hearing was necessitated by Employee Dismissals' conduct in filing an unauthorised and invalid notice of discontinuance. Section 376(2)(b) of the FW Act authorises the Commission to make an order for costs against (relevantly) a paid agent acting as representative for a party in a s 365 matter where the agent caused the costs to be incurred because of 'an unreasonable act or omission of the representative in connection with the conduct or continuation of the dispute'. We draw attention to the fact that s 377 requires any such costs application to be filed within 14 days after the Commission finishes dealing with the dispute.



PRESIDENT

Appearances:

S Thirukumar, solicitor, for Samuel Howell.

A Dehaloo for Employee Claims Pty Ltd t/a Employee Dismissals.

R Hassall, solicitor, for Elite Elevators Corporation Pty Ltd.

Hearing details:

2023.

Sydney with video link using Microsoft Teams:

14 December.

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¹ 'Employee Dismissals' is a trading name of Employee Claims Pty Ltd, ACN 638 548 115.

² *Narayan v MW Engineers Pty Ltd* [2013] FWCFB 2530 at [6].