



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Giang Son Tra

v

Prodigy Holding Pty Ltd

(U2022/11032)

DEPUTY PRESIDENT GOSTENCNIK

MELBOURNE, 6 MARCH 2024

[1] The applicant, Giang Son Tra, was summarily dismissed from his employment by the respondent, Prodigy Holding Pty Ltd, on 30 October 2022. In a decision published on 15 August 2023,¹ I determined that the applicant's dismissal was unfair, and I directed, *inter alia*, the parties attend a member assisted conciliation conference facilitated by Commissioner Lee in the following week to attempt to resolve the question of remedy by agreement.

[2] The respondent now says the parties have entered into a binding settlement agreement with the effect of resolving the proceedings with finality and applies for dismissal of the applicant's unfair dismissal remedy application under ss 399A(1)(c) and/or 587 of the *Fair Work Act 2009* (Act). Section 399A(1)(c) permits the Commission, on application by an employer the subject of an unfair dismissal remedy application, to dismiss the application if satisfied that the applicant failed to discontinue the application after a settlement agreement has been concluded. Section 587 permits the Commission to dismiss an application if, *inter alia*, the application is frivolous or vexatious or has no reasonable prospects of success.

[3] On 23 August 2023, the parties participated in a conciliation conference facilitated by Commissioner Lee using Microsoft Teams. The applicant says that at the conference, the parties engaged in discussions and reached consensus on some of the key terms of a settlement agreement and agreed to enter into a formal deed of release incorporating those terms. It says, in other words, there was not a concluded agreement. The respondent says that at the conference the parties reached an agreement in principle to resolve the proceedings, the terms of which were to be reduced to writing in the form of a settlement deed. It says there was then a concluded and binding settlement agreement. Alternatively, the respondent maintains that on 30 August 2023, it unequivocally accepted the terms set out in a settlement deed proposed by the applicant the day before, for execution, and it executed and returned the deed to the applicant. The applicant contends that the threshold in ss 399A(1)(c) and 587 of the Act are not satisfied, and therefore, the Commission cannot exercise its discretion to dismiss. This, in short compass, is because there was no binding settlement on either occasion on which the respondent relies, or alternatively, the settlement agreement is no longer binding as a result of the applicant's acceptance of the respondent's repudiation.

[4] Most of the relevant background facts are not in dispute, but not all.

[5] It is not in dispute that at the conciliation conference the parties agreed to terms. This the respondent describes as the parties reaching an agreement in principle to resolve the proceedings. The applicant describes this as the parties having reached a consensus on some of the key terms of a settlement agreement and agreeing to enter into a formal deed of release incorporating those terms.² Most of the terms said to have been agreed at the conference are not in dispute. Without recounting the particulars, the undisputed terms were that the respondent would pay the applicant a sum of money, there would be a mutual release and that settlement agreement was conditional on a separate agreement for the sale of the applicant's shares in the respondent.

[6] That which is in dispute is whether the agreed terms included:

- mutual releases extending to the Respondent's shareholders;
- provision that the applicant would not be restricted from defending the ongoing Supreme Court of Western Australia Proceeding CIV 2204 of 2022 (WA Proceeding); and
- provision for non-disparagement and confidentiality.³

[7] Also in dispute is whether the settlement was subject to the execution of a formal and fully executed deed of release.⁴

[8] Both parties were legally represented at the conference. Neither party produced any notes taken during the conference. The only witness statement filed was that of the applicant. The parties were content to have the matter determined on the papers and so the applicant was not cross-examined on his evidence, which was that at the conference the parties:

“reached consensus regarding some of the terms of a settlement agreement. One of those terms was that the parties entering into a fully executed agreement for the sale of the Shares was a condition precedent of any settlement agreement between the parties” and that “between August 2023 and September 2023, [he] engaged in negotiation discussions with [the respondent], through [his] solicitors Holding Redlich, about the terms of a formal deed of release to settle the FWC Proceeding.”⁵

[9] Shortly after the conclusion of the conference, at 1:12 pm Commissioner Lee sent a note to me using the chat function on Microsoft Teams as follows:

“settled your mac. subject to finalisation of deed. A doing first draft. bit complicated but it should be OK.”

[10] The Commissioner's note is wholly consistent with the applicant's evidence. At 2:41 pm that day, the applicant's solicitors sent an email to the respondent's solicitors attaching a draft settlement deed for the respondent's consideration.⁶ Relevantly, the draft deed included the following terms (redacted so as not to disclose the settlement sum and banking details):

“1.1 Condition precedent

The operative provisions of this deed shall not be binding upon the Employer and the Employee or otherwise be of any effect unless and until the Employee has entered into a fully executed agreement for the sale of the Shareholding.

1.2 Payment

- (a) The Employer will pay to the Employee an amount of [Redacted] as reimbursement for legal fees incurred by the Employee for the Application (Settlement Sum).
- (b) The Settlement Sum will be paid into the Holding Redlich Trust Account [Redacted] in two instalments, namely:
 - (i) [Redacted] to be paid within 14 days of execution of this deed; and
 - (ii) [Redacted] to be paid within 28 days of execution of this deed.

...

2. Releases

2.1 Release by the Employee

The Employee unconditionally and irrevocably releases and discharges the Employer and the Released Persons from all Claims (with the exception of workers' compensation or superannuation claims) that the Employee has or, but for this deed, may have had against the Employer or any Released Person, arising out of, in relation to or in connection with the Resolved Matters and/or the matters set out in the Introduction to this deed.

2.2 Release by the Employer

The Employer releases and discharges the Employee and Tra Brothers Pty Ltd (and its related entity) from all Claims the Employer has or, but for this deed, may have had against the Employee and Tra Brothers Pty Ltd (and its related entity) arising out of, in relation to or in connection with the Resolved Matters and/or the matters set out in the Introduction to this deed.”

[11] The draft deed contained a confidentiality term at clause 3 and mutual non-disparagement obligations at clause 4. Clause 5.3 of the draft deed provided:

“5.3 Status of deed

Although this deed is marked “WITHOUT PREJUDICE AND SUBJECT TO EXECUTION”, it constitutes an open and binding deed once executed by the parties.”

[12] Clause 5.9 of the draft deed is titled “Counterparts and operation” and provides:

“This deed may be executed in any number of counterparts. All counterparts taken together constitute one instrument. The electronic exchange of an executed counterpart of this deed, is sufficient to bind the parties to this deed. This deed becomes effective on the later date of execution by either party.”

[13] Clause 6 of the draft deed contained two defined terms:

“(a) **Claims** includes any claims, complaints, demands, suits, litigation, actions, notices, investigations, damages, debts, costs (including legal costs and expenses), verdicts, and judgments whatsoever (whether at law or in equity or, to the extent permitted, under any statute), however it arises, present or future, fixed or unascertained, actual or contingent; and

(b) **Released Person** means each person who served as a director of the Employer during the period of the Employment.”

[14] On 25 August 2023, the respondent’s solicitors sent an email to the applicant’s solicitors attaching a clean and tracked changes copy of the amended draft deed for the applicant’s consideration.⁷ Amendments were proposed to clauses 2 and 6 of the draft deed as follows:

2.1 Release by the Employee

The Employee unconditionally and irrevocably releases and discharges the Employer and the Released Persons from all Claims ~~(with the exception of workers’ compensation or superannuation claims)~~ that the Employee has or, but for this deed, may have had against the Employer or any Released Persons, arising out of, in relation to or in connection with the Resolved Matters and/or the matters set out in the Introduction to this deed.

2.2 Release by the Employer

The Employer releases and discharges the Employee and Tra Brothers Pty Ltd ~~(and its related entity)~~ from all Claims the Employer has or, but for this deed, may have had against the Employee and Tra Brothers Pty Ltd ~~(and its related entity)~~ arising out of, in relation to or in connection with the Resolved Matters and/or the matters set out in the Introduction to this deed.

...

6.1 Definitions

...

(b) **Released Persons** means ~~each person who served as a director of the Trieu Thai, Bao Nguyen Thi Thu Thuy Nguyen and the late Duc Long Hoang Employer during the period of the Employment.~~”

[15] Email correspondence from the applicant’s solicitors to the respondent’s solicitors sent on 29 August 2023 attached a further draft deed⁸ and advised that the changes made by the respondent’s solicitors (as noted above) were accepted, except for those in the release provisions relating to workers compensation and superannuation. The email requested the respondent’s solicitors to return to the applicant’s solicitors a signed copy of the deed if the deed was acceptable to the respondent.

[16] The following day, solicitors for the respondent sent an email to the applicant’s solicitors attaching a signed copy of the deed, which had been attached to the email noted in the previous paragraph, and requesting a copy of a fully executed deed once signed by the applicant.⁹ The deed signed for the respondent and returned to the applicant’s solicitors contained clause 5.3 and 5.9 in the form earlier set out.

[17] In an email sent on 31 August 2023 attaching an amended deed,¹⁰ the applicant's solicitors proposed an amendment to clause 2.1 of the deed as follows:

“2.1 Release by the Employee

The Employee unconditionally and irrevocably releases and discharges the Employer and the Released Persons from all Claims (with the exception of workers' compensation or superannuation claims) that the Employee has or, but for this deed, may have had against the Employer or any Released Person, arising out of, in relation to or in connection with the Resolved Matters and/or the matters set out in the Introduction to this deed, provided that nothing in this deed will prevent the Employee from making any Claim against the Employer and any of the Released Persons in Supreme Court of Western Australia Proceeding CIV 2204 of 2022 or any other proceeding brought by a party who is not a party to this Deed against the Employee”

[18] The applicant's evidence about the circumstances in which the amendment was sought is as follows:

- Walter Grant Legal are the solicitors representing him in the WA Proceeding;¹¹
- on 25 August 2023, Forbes Kirby Lawyers, solicitors representing Trend Holding Pty Ltd, the plaintiff in the WA Proceeding, sent an email to Walter Grant Legal indicating a possibility of amending its pleadings in the WA Proceeding;¹²
- in the evening of 25 August 2023, he received an email from his solicitors in this proceeding, enclosing a copy of the proposed deed, including the amendments sought by the respondent;¹³
- on 29 August 2023, he asked Walter Grant Legal to review the deed and on the same day, Walter Grant Legal advised him of the possibility of the plaintiff changing its pleadings in the WA Proceeding;¹⁴
- on 31 August 2023, he formed the view that he should seek amendments to clause 2.1 of the deed to further give clarity on his ability to defend the WA Proceeding and to ensure that the deed was consistent with the terms agreed at the conciliation conference;¹⁵
- he immediately let his solicitors in this proceeding know about this position and instructed them to write to the respondent's solicitors requesting an amendment to clause 2.1 of the deed.¹⁶

[19] I am troubled by this evidence. I do not accept that the amendment was sought for reasons that included a desire to ensure that the deed was consistent with the terms agreed at the conciliation conference for several reasons.

[20] *First*, the first draft of the deed prepared by his solicitors and sent to the respondent's solicitors on 23 August 2023, presumably on his instructions and reviewed by him, did not contain the text of the amendment sought on 31 August 2023. It did not contain any reference to the WA Proceeding.

[21] *Second*, on 29 August 2023, the deed proposed by his solicitors to the respondent's solicitors for signing, presumably also on his instructions, did not contain the WA Proceeding

text or any reference to those proceedings. It was sent to the respondent with a suggestion that if it was acceptable, the respondent should sign and return the deed, which is at odds and sits uncomfortably with the applicant's evidence that on that day he asked Walter Grant Legal to review the deed. The email from the applicant's solicitors was sent at 11:23 am AEST¹⁷ and received by the respondent's solicitors who are Perth based, at 9:23 am WAST.¹⁸ Walter Grant Legal is also Perth-based. When were the instructions to review the deed given to Walter Grant Legal – before or after that time? If instructions were given before, then why did he also instruct his solicitors in this proceeding to send its email inviting the respondent to sign the deed attached? If the instructions were given afterwards, then why not instruct his solicitors in this proceeding to immediately send a note to the respondent's solicitors withdrawing the deed attached to the earlier email?

[22] *Third*, the proposed amendment was motivated by a new development – the suggestion by the plaintiff in the WA Proceeding that it might amend its pleading. This suggests that it is unlikely, given the history of the deed and its progeny, that but for the new development the applicant held any concern that the release provisions of the deed did not reflect or was not consistent with the terms agreed at the conciliation conference.

[23] I consider the applicant held a concern that the release provision proposed by him through his solicitors did not or might not protect his interest in responding to any amended pleading in the WA Proceeding. These concerns emerged or were communicated to his solicitors after the respondent had signed the deed. But ultimately, I do not consider this to be material to the issue I need to determine.

[24] Discretionary considerations to one side, the success of the respondent's dismissal application under ss 399A(1)(c) and 587 of the Act turns on whether there was a binding settlement agreement reached either at the conciliation conference or later, on 30 August 2023 when solicitors for the respondent sent an email to the applicant's solicitors attaching a signed copy of the deed, such that the applicant's cause of action - his unfair dismissal remedy claim before the Commission has been extinguished and resolved with finality. In short, the question is whether, on either occasion, the parties agreed to be immediately bound by an agreement.

[25] The applicable legal principles to determine whether the parties have agreed to be immediately bound by an agreement they have reached are not seriously in dispute. The issue whether an agreement is reached which is intended to be immediately binding is determined objectively, having regard to the presumed or inferred intention of the parties. The objective intention of the parties is a factual inquiry determined having regard to all the surrounding circumstances, including by drawing inferences from the words and conduct of the parties,¹⁹ and from the terms of the parties' correspondence, which is to be read in the light of the surrounding circumstances having regard to the commercial context in which the correspondence was exchanged.²⁰ Simply put, the ultimate question is whether each party, by their words or conduct, led a reasonable person in the position of the other party to believe there was an immediately binding agreement at the time the alleged agreement was made.²¹

[26] In cases such as this, where the parties agreed that a written document setting out terms of agreement would be prepared, the agreement falls in one of the three categories of contract described in *Masters v Cameron*,²² which are as follows:

- the parties have reached finality on all the terms of their agreement and intend to be bound immediately, but also want to draw up their agreement in a more precise and formal document at a later stage which is not different in effect;
- the parties have completely agreed on all terms, intend to be bound immediately, intend no departure from or addition to that which are their agreed terms but wish the operation of a particular clause or term to be delayed or conditional on the execution of a formal document; or
- the parties do not intend to make a concluded agreement unless and until a formal document is executed.

[27] A later emerging fourth category is that described in *Baulkham Hills Private Hospital Pty Ltd v G R Securities Pty Ltd*,²³ where the parties intended to be bound immediately and exclusively by agreed terms while expecting to make a further contract in substitution containing, by consent, additional terms.²⁴

[28] In each of the first two categories identified in *Masters v Cameron* and in the fourth in *Baulkham Hills* there will be a binding agreement. In the first and fourth categories, the agreement binds the parties at once to perform the agreed terms whether the contemplated formal or additional document comes into existence or not. In the second category, there will be an agreement binding the parties to join in bringing the formal contract into existence and then to carry it into operation. That agreement is binding immediately but the performance of a particular term or terms will not be required until a formal document is executed by the parties. This is so even though there may be later disagreement about the terms that are to be included in the formal document to be executed.

[29] As earlier noted, the respondent contends that a binding agreement was reached at the conclusion of the conciliation conference before Commissioner Lee on 23 August 2023 or alternatively, when it executed and returned the settlement deed to the applicant's solicitors on 30 August 2023. I do not accept on either occasion that a binding settlement agreement was reached. My reasons may be briefly stated.

[30] The result at the conclusion of the conciliation conference was at best an agreement in principle whereby the parties agreed on some key terms. They did not agree that the terms would be binding immediately as a settlement agreement and instead agreed they would prepare and execute a deed which would be the concluded agreement. I accept that at the conciliation conference the settlement agreement discussed was subject to the parties agreeing on the sale of the applicant's shares. The respondent's submissions also assert that, as part of the agreement in-principle reached on 23 August 2023 "the settlement agreement is to be conditional upon a separate agreement for the sale of the applicant's shares in the respondent".²⁵

[31] That the settlement agreement was conditional on an agreement for the sale of shares, as opposed to the operation of, or compliance with a particular clause or term of the settlement agreement being conditional on that event, suggests strongly that the parties did not intend to be immediately bound by the terms that were agreed at the conclusion of the conciliation conference. A sale of shares agreement was not then and has not since been made. It was a condition to settlement stipulated by the applicant, who gave evidence, and was not challenged through cross-examination that the sale of the shares was a condition precedent of any

settlement agreement.²⁶ And as the respondent acknowledges, the condition was proposed by the applicant.²⁷

[32] Furthermore, the Commissioner’s note after the conference that settlement was subject to the finalisation of a deed, is consistent with there being no binding agreement concluded on 23 August 2023. The respondent’s contention to the contrary is rejected. The Commissioner’s note is also consistent with a requirement that settlement is conditional on execution of a deed. To finalise a deed, surely means to complete or finish a definitive deed, which includes its execution. The WA Proceeding, which was on foot as at 23 August 2023, brought by the respondent’s related entity against the applicant added another layer of complexity to settlement negotiations. It would be surprising if, given the various moving parts, that the parties, represented by lawyers, would be content to make a binding settlement on oral terms discussed at a conciliation conference. That the settlement was subject to the execution of a settlement deed, reflects the complexity of the transaction and is inconsistent with a binding settlement being reached on 23 August 2023. In the circumstances I do not accept that by reason of the applicant’s conduct a reasonable person in the position of the respondent would have been led to believe there was an immediately binding agreement on 23 August 2023. To the contrary, the applicant’s conduct gave a clear message – the settlement agreement was conditional on other matters happening. No reasonable person could have understood this as anything other than indicating there is no agreement yet, but there will be if the conditions are met.

[33] There was also no concluded agreement made when the respondent executed and returned the deed on 30 August 2023. It is accepted that the presence or absence of a signature is a relevant circumstance to consider when determining whether there is an objective or manifest intention to be legally bound, but it is only one consideration, and the absence of a signature does not prevent a conclusion that the content of an unsigned agreement binds the parties²⁸ where otherwise there appears manifest an intention to create legal relations.²⁹

[34] But here, the deed was not signed by the applicant when it was sent to the respondent’s solicitors by email on 29 August 2023. The absence of the applicant’s signature from the deed attached to the email from his solicitors, and taking into account the content of the email suggests that he was not proposing to be bound but merely that, in the course of the negotiations, the changes proposed by the respondent’s solicitors to the deed were acceptable. The final sentence in the email that if “the deed [is] acceptable to your client, can you please return to us a signed copy of the deed” is in the circumstances of the negotiations, ambiguous. It does not contain the language of an offer, although it is capable of that reading. Another reading is that it is seeking to procure an offer from the Respondent, by having the respondent sign and return the deed. That the applicant did not sign the deed before it was sent is consistent with the latter construction.

[35] Moreover, the deed as executed by the respondent contained two provisions which tell against a contention that execution by the respondent in the circumstances constituted a binding settlement. Clause 5.3 provided that “[a]lthough this deed is marked “WITHOUT PREJUDICE AND SUBJECT TO EXECUTION”, it constitutes an open and binding deed once executed by the parties”. This suggests that there is no intention that a settlement agreement binding on the parties is made until the deed is signed by both parties. To similar effect, clause 5.9 provided, *inter alia*, that the “deed becomes effective on the later date of execution by either party”.

[36] Consequently, when regard is had to the circumstances of the negotiations for the deed, the content of the deed and the absence of the applicant's signature from the deed attached to the email of 29 August 2023, it seems clear that the email was no more than part of the negotiations between the parties. I agree with the applicant that the deed executed only by the respondent did not constitute an unequivocal or complete agreement.³⁰ Nor was the draft deed sent to the respondent's solicitors by email on 29 August 2023 an indication that the applicant intended to be bound by the deed if the respondent signed it. Having regard to the text of the draft deed sent, I do not consider that a reasonable person in the position of the respondent would consider an intention to the contrary. I therefore reject the respondent's submission that the deed constituted an "accurate and reliable record of the binding and enforceable agreement".³¹

[37] But even if the 29 August 2023 email from the applicant's solicitors attaching the deed was an offer, when it is read with the provisions of the deed, the offer was conditional - the settlement proposed would not have legal effect and would not bind the parties until the deed was signed by both parties.

[38] For these reasons, I conclude there was no concluded and binding settlement agreement made.

[39] As there are no other bases advanced in support of the respondent's application for dismissal of the applicant's unfair dismissal remedy application under ss 399A(1)(c) and/or 587 of the Act, the respondent's application fails and must be dismissed.

Order

[40] The respondent's application under ss 399A(1)(c) and 587 of the Act for dismissal of the applicant's application for an unfair dismissal remedy is dismissed.

Directions

[41] I direct:

1. The parties confer on any further directions necessary to determine the remedy (if any) that should be ordered consequent on the decision in *Giang Son Tra v Prodigy Holding Pty Ltd* [\[2023\] FWC 1514](#);
2. The parties file consent draft directions by 5.00pm AEDT on Wednesday, 13 March 2024;
3. If the parties cannot agree on consent draft directions, each party is to file and exchange their proposed directions by 5.00pm AEDT on Wednesday, 13 March 2024;
4. The parties are at liberty to apply to vary these directions.



DEPUTY PRESIDENT

Appearances:

Matter determined on the papers.

Final written submissions:

Applicant, 4 December 2023 and 8 February 2024

Respondent, 11 November 2023, 12 December 2023 and 9 February 2024

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¹ *Giang Son Tra v Prodigy Holding Pty Ltd* [2023] FWC 1514

² Applicant's Submissions – Dismissal Application submitted on 4 December 2023 at [8]

³ Compare Respondent's Submissions in Support of an Application to Dismiss the Proceeding submitted on 11 November 2023 at [21] with the Applicant's Submissions – Dismissal Application submitted on 4 December 2023 at [12]

⁴ Applicant's Submissions – Dismissal Application submitted on 4 December 2023 at [13], Respondent's Submissions in Support of an Application to Dismiss the Proceeding submitted on 11 November 2023 at [23]-[23]

⁵ Witness Statement of Giang Son Tra filed on 4 December 2023 at [6]-[7]

⁶ Attached as attachment "A" to both parties' submissions

⁷ Attached as attachment "B" to both parties' submissions

⁸ Attached as attachment "C" to both parties' submissions

⁹ Attached as attachment "D" to both parties' submissions

¹⁰ Attached as attachment "E" to both parties' submissions

¹¹ Witness Statement of Giang Son Tra filed on 4 December 2023 at [2]

¹² *Ibid* at [8]

¹³ *Ibid* at [9]

¹⁴ *Ibid* at [10]

¹⁵ *Ibid* at [13]

¹⁶ Ibid

¹⁷ Applicant's Submissions – Dismissal Application submitted on 4 December 2023, attachment "C"

¹⁸ Respondent's Submissions in Support of an Application to Dismiss the Proceeding submitted on 11 November 2023, attachment "C"

¹⁹ *Sagacious Procurement Pty Ltd v Symbion Health Ltd (Formerly Mayne Group Ltd)* [2008] NSWCA 149 at [99] ('Sagacious') citing *Allen v Carbone* [1975] HCA 14; (1975) 132 CLR 528 at 532 (Stephen, Mason and Murphy JJ); *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 at 548 (Gleeson CJ, with whom Hope and Mahoney JJA agreed) ('Commonwealth Games')

²⁰ *Queensland Phosphate Pty Ltd v Korda (as joint and several liquidators of Legend International Holdings Inc (in liq))* [2017] VSCA 269 at [37]

²¹ *Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309 at 331

²² [1954] HCA 72; (1954) 91 CLR 353, 360.

²³ (1986) 40 NSWLR 622

²⁴ See also *Graham Evans Pty Ltd v Stencraft Pty Ltd* [1999] FCA 1670

²⁵ Respondent's Submissions in Support of an Application to Dismiss the Proceeding submitted on 11 November 2023 at [21.4]

²⁶ Witness Statement of Giang Son Tra filed on 4 December 2023 at [6]

²⁷ Respondent's Submissions in Support of an Application to Dismiss the Proceeding submitted on 11 November 2023 at [22]

²⁸ *Alonso v SRS Investments (WA) Pty Ltd* [2012] WASC 168 at [49]-[50]

²⁹ Ibid at [50]

³⁰ Applicant's Submissions – Dismissal Application submitted on 8 February 2024 at [33]

³¹ Respondent's Supplementary Outline of Written Submissions dated 9 February 2024 at [18]