



DECISION

Fair Work Act 2009

s.365 - Application to deal with contraventions involving dismissal

Ms Zvetanka Raskov

v

Adecco Australia Pty Ltd

(C2023/5620)

DEPUTY PRESIDENT WRIGHT

SYDNEY, 4 MARCH 2024

Application to deal with contraventions involving dismissal – whether applicant dismissed – applicant dismissed

[1] Ms Zvetanka Raskov has made an application to the Fair Work Commission (**Commission**) under s.365 of the *Fair Work Act 2009* (Cth) (**FW Act**) for the Commission to deal with a dispute arising out of allegations that she has been dismissed from her employment with Adecco Australia Pty Ltd (**Adecco**) in contravention of Part 3-1 of the FW Act.

[2] Ms Raskov claimed in her application that she was notified of the dismissal on 24 August 2023. The application was filed on 13 September 2023 and as such is within the timeframe required by s.366(1)(a) of the FW Act.

[3] Adecco has objected to the application on the ground that Ms Raskov was not dismissed from her employment.

[4] Before dealing with the dispute under s.368, I must be satisfied that Ms Raskov was dismissed.

[5] In summary, I have found that Ms Raskov was dismissed by Adecco on 24 August 2023 within the meaning of s.365 of the FW Act.

Directions and submissions

[6] Ms Raskov initially commenced proceedings against Amazon Commercial Services Pty Ltd (**Amazon**). On 16 October 2023, Amazon filed a Form 8A – Response to general protections claim in which it claimed that it did not employ and did not dismiss Ms Raskov. Ms Raskov subsequently made an application to amend her general protections claim on 23 October 2023 to add Adecco as a respondent to the claim and to remove Amazon. In the application to amend, Ms Raskov stated that her application would proceed as a ‘constructive dismissal’ as she is ‘technically still employed by Adecco’. Adecco did not object to the amendment so I amended the claim pursuant to s.586(a) in accordance with Ms Raskov’s application.

[7] The matter was listed for directions on 7 November 2023. Directions were made for the filing and serving of evidence and submissions.

[8] On 22 and 23 November 2023 and 6 December 2023, Ms Raskov filed submissions and other material.

[9] On 5 December 2023, Adecco filed submissions and a witness statement of Lisa Cammareri, Onsite Manager dated 5 December 2023.

[10] The matter was listed for hearing on 12 December 2023. At the hearing, Ms Raskov represented herself and Adecco was represented by Mr Michael Carter, ER/IR Manager.

Factual background

[11] Adecco is a labour hire agency and its employees are assigned to particular clients based on client requirements.

[12] Ms Raskov gave evidence that a former employer advised her that Amazon was recruiting so she did an internet search to find the advertisement. Ms Raskov then made an online application to work at Amazon which involved filling out an online form and a tax file declaration in about July 2023. She was initially contacted by email to advise that recruitment had been paused. Some time later, she received a further email advising that Amazon was ready to recruit and that Ms Raskov should provide her availability and when she was able to start work. Ms Raskov was then asked to attend an online induction on 19 August 2023 and an in person induction a few days after that at the Amazon Kemps Creek site.

[13] Following the induction, Ms Raskov commenced work at the Amazon site as an employee of Adecco, initially working 38 hours per week comprising 4 shifts from 6pm-4am every day from Monday to Thursday. She continued to work four 9.5 hour shifts per week throughout her employment until she eventually requested to reduce the shifts to three 9.5 hour shifts per week. Ms Raskov gave evidence that she never took sick leave while employed by Adecco but she did take 1.5 weeks off as annual leave for which she did not receive any payment.

[14] Ms Raskov was employed pursuant to a 'Candidate Declaration and Consent' which relevantly provided:

This document sets out the terms and conditions on which you will be employed as a casual employee with members of the Adecco Group of Companies, being Adecco Australia Pty Ltd, Adecco Industrial Pty Ltd and Adecco Projects Pty Ltd (**Adecco**) and constitutes your employment contract with Adecco.

From time to time, Adecco will offer you a place with one of its clients (**the client**) to which you will be required to provide services consistent with your skills, qualifications and experience (**client assignment**)....each client assignment is a separate period of employment with Adecco. However, unless otherwise varied in writing, the terms and conditions in this Candidate Declaration and Consent continue to apply to each period of employment with Adecco.

[15] Other relevant provisions of the ‘Candidate Declaration and Consent’ are:

2. I am employed as a casual employee. I acknowledge that I have no guarantee of ongoing employment and may from time to time be offered client assignments by Adecco.

...

7. The length of any client assignment is determined according to the needs of the client and is not controlled by Adecco.

8. The client may vary or terminate the client assignment at any time by giving me one (1) hours notice.

9. Variation of a client assignment or commencement of a new client assignment does not alter the terms and conditions set out in this Candidate Declaration and Consent unless otherwise specified in writing by Adecco.

...

39. Adecco may terminate my employment at any time by giving me one (1) hours notice.

40. Notwithstanding the above, Adecco reserves the right to dismiss me immediately in the event of serious misconduct or for any other reason that enables summary dismissal at law.

[16] Ms Raskov gave evidence that it was common knowledge amongst Adecco employees that Amazon did not employ anyone directly until they had worked for Adecco for at least three months. Every three months, Amazon would ‘open its books’ and offer Adecco employees the opportunity to become permanently employed by Amazon. At the site where Ms Raskov worked, there was an Adecco human resources desk and a separate Amazon human resources desk. Ms Raskov initially made inquiries at the Adecco human resources desk about when permanent opportunities would become available at Amazon and she was told this would occur in December 2022. When nothing happened in December 2022 Ms Raskov made inquiries at the Amazon human resources desk and was told permanent opportunities would become available at Amazon in February 2023. This never occurred and no permanent employment opportunities became available at Amazon while Ms Raskov worked for Adecco.

[17] Ms Cammareri gave evidence that she was the on-site human resources representative for Adecco at Amazon. In this role, Ms Cammareri was responsible for managing injuries, incidents, rosters and minor performance management of employees of Adecco who worked at Amazon.

[18] On or about 16 June 2023, the HR team from Amazon contacted Ms Cammareri to inform her of allegations of misconduct made against Ms Raskov by employees of Amazon. The allegations included that Ms Raskov had stared at another employee in an intimidating

manner and laughed in her face and that Ms Raskov had made inappropriate comments. Based on this information, Ms Cammareri decided to suspend Ms Raskov.

[19] On the afternoon of 16 June 2023, Ms Cammareri spoke to Mr Anthony Nguyen, Adecco Day Shift Supervisor about the allegations. Ms Cammareri asked Mr Nguyen to call Ms Raskov to suspend her from her employment due to the allegations that had been raised and pending an investigation into them. Ms Cammareri asked Mr Nguyen to do this prior to Ms Raskov attending for her night shift that evening.

[20] Mr Nguyen then called Ms Raskov to advise her that she would be stood down due to the allegations and while they were being investigated. Ms Raskov ceased receiving any income from Adecco from this date.

[21] On 23 June 2023, Adecco was served with a Form F72 – Application for an order to stop bullying at work made by Ms Raskov. Adecco claims that this application delayed Adecco’s investigation into the allegations of serious misconduct made against Ms Raskov.

[22] On 9 August 2023, Adecco issued an invitation to attend a disciplinary meeting to Ms Raskov to provide her with an opportunity to respond to the allegations of serious misconduct. On 14 August 2023, Ms Raskov attended the disciplinary meeting with Adecco and responded to the allegations. Ms Cammareri was not involved in the disciplinary process in relation to Ms Raskov.

[23] On 24 August 2023, Ms Cammareri telephoned Ms Raskov to inform her that, following the conclusion of the investigation into the allegations of serious misconduct made against her, Ms Raskov’s assignment with Amazon had been withdrawn. During this phone call, Ms Cammareri advised Ms Raskov that Ms Raskov’s employee profile would go back to the recruitment team within Adecco and that Ms Raskov could also call the recruitment team for them to advise on what other assignments Ms Raskov may be interested in.

[24] Ms Cammareri then sent a letter via email to Ms Raskov which relevantly provided:

Based on your responses during the formal disciplinary meeting and the evidence available to Adecco regarding the serious allegations, this letter serves as confirmation that your casual assignment with Amazon has been ended effective immediately.

You remain employed by Adecco and, as such, please contact me should you wish to be considered for a particular assignment in the future. In the interim, you can also visit our website and express your interest for alternate assignment. We are also currently working with our internal talent teams to look into your eligibility to have you re-assigned with a different client as soon as possible.

[25] Ms Raskov said that she did not make contact with Adecco as she did not believe she had any prospect of being seriously considered for any other work. I asked Ms Cammareri about what efforts she had made with the internal talent team to have Ms Raskov re-assigned with a different client as soon as possible. Ms Cammareri said that Ms Raskov would have been referred back to the recruitment team and that Ms Cammareri did not have much to do with the

process. Ms Cammareri was unable to say what efforts the recruitment team had made to have Ms Cammareri reassigned.

[26] I asked Ms Cammareri about the impact that the allegations against Ms Raskov would have on her being reassigned. Ms Cammareri said that when a person is rehired by Adecco for a different client, the previous manager is invited to provide feedback by the recruitment team. I asked Ms Cammareri what feedback she would give about Ms Raskov if asked by the recruitment team. Ms Cammareri said that she would advise that there were allegations made against Ms Raskov of inappropriate behaviour. I asked Ms Cammareri to provide her opinion on the impact that this feedback would have on Ms Raskov, based on her experience as a human resource professional. Ms Cammareri said words to the effect that personally, she would not go ahead with the recruitment if she received such feedback about a potential candidate.

Legislation

[27] The application has been brought under s.365 of the FW Act which 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.

[28] The issue between the parties which the Commission has been asked to determine is whether Ms Raskov was dismissed by Adecco. The dictionary at clause 12 of the FW Act refers to section 386 for the definition of “dismissed”.

[29] Section 386 of the FW Act provides:

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.
- (2) However, a person has not been *dismissed* if:
 - (a) the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or
 - (b) the person was an employee:
 - (i) to whom a training arrangement applied; and

- (ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement; and the employment has terminated at the end of the training arrangement; or
 - (c) the person was demoted in employment but:
 - (i) the demotion does not involve a significant reduction in his or her remuneration or duties; and
 - (ii) he or she remains employed with the employer that effected the demotion.
- (3) Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person's employment, to avoid the employer's obligations under this Part.

[30] Section 15A of the FW Act is relevant to the application because it contains the definition of casual employee. Section 15A provides:

15A Meaning of *casual employee*

- (1) A person is a *casual employee* of an employer if:
 - (a) an offer of employment made by the employer to the person is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person; and
 - (b) the person accepts the offer on that basis; and
 - (c) the person is an employee as a result of that acceptance.
- (2) For the purposes of subsection (1), in determining whether, at the time the offer is made, the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person, regard must be had only to the following considerations:
 - (a) whether the employer can elect to offer work and whether the person can elect to accept or reject work;
 - (b) whether the person will work as required according to the needs of the employer;
 - (c) whether the employment is described as casual employment;
 - (d) whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument.

Note: Under Division 4A of Part 2-2, a casual employee who has worked for an employer for at least 12 months and has, during at least the last 6 months of that time, worked a regular pattern of hours on an ongoing basis may be entitled to be offered, or request, conversion to full-time employment or part-time employment.

- (3) To avoid doubt, a regular pattern of hours does not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work.
- (4) To avoid doubt, the question of whether a person is a casual employee of an employer is to be assessed on the basis of the offer of employment and the acceptance of that offer, not on the basis of any subsequent conduct of either party.
- (5) A person who commences employment as a result of acceptance of an offer of employment in accordance with subsection (1) remains a **casual employee** of the employer until:
 - (a) the employee's employment is converted to full-time or part-time employment under Division 4A of Part 2-2; or
 - (b) the employee accepts an alternative offer of employment (other than as a casual employee) by the employer and commences work on that basis.

Consideration

[31] I have considered the submissions made by the parties and all the evidence in my determination of this matter and the conclusions I have reached.

[32] Mr Raskov alleged that she was terminated by Adecco because she made enquiries about her employment and made an application for an order to stop bullying at work. However, these claims cannot be determined until the Commission deals with the matter under s.368, and only if the Commission issues a certificate of attempted conciliation under s.368(3). Under s.368, the Commission may deal with the matter in numerous ways including by mediation or conciliation, or by making a recommendation or expressing an opinion.

[33] If there is a dispute as to whether an alleged dismissal has occurred, this is a preliminary issue which, according to the Federal Court Full Court decision in *Coles Supply Chain Pty Ltd v Milford*,¹ “must be resolved before the powers conferred by s 368 can be exercised at all”.²

[34] In this regard, the Full Bench in *Lipa Pharmaceuticals Ltd v Mariam Jarouche*³ stated,

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.⁴

[35] As Adecco has claimed that Ms Raskov was not dismissed, I must find that a dismissal occurred before conducting a conciliation conference or otherwise dealing with this matter under s.368.

[36] Adecco submitted that as it is a labour hire agency, its employees are assigned to particular clients based on client requirements. Inherent to the nature of Adecco's operations (and all labour hire agencies) is that employees are assigned to a particular client at one point

in time and are withdrawn and reassigned to other clients from time to time while maintaining their employment.

[37] The ‘Candidate Declaration and Consent’ which applied to Ms Raskov’s employment indicates that Ms Raskov was employed on a casual basis. The common law position with respect to casual employment is that each time an employer offers work to an employee and the employee accepts work, a new contract of employment is created between the employer and employee.⁵ The common law position is modified by s.15A of the FW Act which provides that a person’s status as a casual employee is assessed on the basis of the offer of employment and the acceptance of that offer, not on the basis of any subsequent conduct of either party.

[38] In *Khayam v Navitas English Pty Ltd t/a Navitas English*⁶, the majority acknowledged the conventional understanding of casual employment that if a casual employee completes their engagement on a particular day and is never again engaged by the employer, contractually the employment has come to an end by agreement rather than by any act by the employer to terminate the contract. The majority explained, however, that if the cessation of casual employment is incapable of ever being characterised as a dismissal under s.386(1)(a) of the FW Act this would be inconsistent with casual employees being able to make an application for an unfair dismissal remedy.⁷

[39] The majority goes on to explain how the ending of a contract of employment could be characterised as dismissal as follows:

- (1) The analysis of whether there has been a termination at the initiative of the employer for the purpose of s 386(1)(a) is to be conducted by reference to termination of the employment *relationship*, not by reference to the termination of the contract of employment operative immediately before the cessation of the employment. This distinction is important in the case of an employment relationship made up of a sequence of time-limited contracts of employment, where the termination has occurred at the end of the term of the last of those contracts. In that situation, the analysis may, depending on the facts, require consideration of the circumstances of the entire employment relationship, not merely the terms of the final employment contract.
- (2) As stated in *Mohazab*, the expression “termination at the initiative of the employer” is a reference to a termination that is brought about by an employer and which is not agreed to by the employee. In circumstances where the employment relationship is not left voluntarily by the employee, the focus of the inquiry is whether an action on the part of the employer was the principal contributing factor which results, directly or consequentially, in the termination of the employment.⁸

...

[40] Although *Khayam* dealt with the issue of whether there had been a termination at the initiative of the employer for the purpose of s.386(1)(a) where the termination occurred at the end of a sequence of time-limited contracts of employment, the findings are applicable to an ongoing casual employment relationship comprised of separate contracts of employment offered on a per shift basis.

[41] This position is consistent with the ‘Candidate Declaration and Consent’ which provides that each client assignment is a separate period of employment with Adecco. In other words, although each shift Ms Raskov performed for Adecco may be regarded as a distinct contract of employment, each of these contracts when viewed together created an ongoing employment relationship from when Ms Raskov commenced employment on 19 August 2022 and throughout the period she worked at the Amazon site.

[42] The issue of whether a labour hire employee who is removed from their placement with the host employer has been dismissed has been considered on numerous occasions by the Commission.

[43] In *Jayleen Kool v Adecco Industrial Pty Ltd T/A Adecco (Kool)*,⁹ Ms Kool worked for Nestle, one of Adecco’s clients for a 2.5 year period. Adecco was advised by representatives of Nestle that Ms Kool was no longer required at the site after concerns were raised that Ms Kool had ‘clocked out’ another employee. Adecco then advised Ms Kool that her assignment was ending effective immediately but that it would attempt to find her alternative employment. Adecco submitted that although Ms Kool’s placement with Nestle had ended, she remained an employee of Adecco and had not been dismissed. Deputy President Asbury, as she then was, found that Ms Kool was dismissed by Adecco for reasons which included that the placement was not short term or ad hoc, Ms Kool’s assignment at Nestle ended because it was concluded that she had engaged in some kind of misconduct in relation to clocking off and Adecco did little, if anything, to place Ms Kool in another position after the termination of her assignment at the Nestle site.¹⁰

[44] In *Patrice Tait v Spinifex Australia Pty Ltd (Tait)*,¹¹ Ms Tait commenced employment with Spinifex as a casual employee and was assigned to work with the Department of Justice – NSW Trustee & Guardian (DOJ) as a Conveyancing Officer. Ms Tait worked for DOJ on a full-time basis for approximately nine months until DOJ advised Spinifex that DOJ no longer wanted Ms Tait working for DOJ due to performance concerns. Spinifex told Ms Tait that it would continue looking at other opportunities for her, although there was no evidence that it took any particular action in this respect. Spinifex submitted, while the assignment with the DOJ had ceased, the ending of the assignment did not bring Ms Tait’s employment to an end and that there was no dismissal. At first instance, Senior Deputy President Hamberger concluded that Ms Tait had been dismissed, noting that the only work Ms Tait had performed for Spinifex was for DOJ, and that in reality, her work for Spinifex began when she commenced her assignment at the DOJ and ceased when that assignment was terminated.¹² The Decision was confirmed by a Full Bench on appeal.¹³

[45] In both of these cases, the removal of the applicant from the host employer’s site was initiated by the host employer. This is different from the current proceedings, in which the involvement of Amazon appeared to be limited to conveying the allegations of misconduct to Ms Cammareri. There is no evidence about what action Amazon asked Adecco to take in relation to the allegations. The evidence produced by Adecco shows that the decision to suspend Ms Raskov was made by Adecco, the investigation in relation to the allegations was initiated and undertaken by Adecco and that Amazon had no involvement in relation to the investigation.

[46] Further, the letter provided by Adecco to Ms Raskov on 24 August 2024 stated that ‘based on [her] responses during the formal disciplinary meeting and the evidence available to

Adecco regarding the serious allegations' Ms Raskov's 'casual assignment with Amazon has been ended effective immediately'. The letter did not convey to Ms Raskov whether the allegations were substantiated. There is no suggestion in the letter that Ms Raskov was removed from the workplace at the request of Amazon. I therefore find that Ms Raskov was removed from the Amazon site by Adecco.

[47] These circumstances do not readily fall within the terms of the 'Candidate Declaration and Consent' which applied to Ms Raskov's employment. For example clause 7 of the Declaration provides that 'the length of any client assignment is determined according to the needs of the client and is not controlled by Adecco'. However it clear from the facts of the matter that Adecco did control the length of Ms Raskov's assignment with Amazon by terminating it immediately on 24 August 2023. Further, clause 8 of the Declaration provides that the client may vary or terminate the client assignment at any time by giving one hours notice and clauses 39 and 40 provide that Adecco may terminate the employment at any time by giving one hours notice, or immediately in the case of serious misconduct. There is no provision which permits Adecco to terminate the client assignment. The removal of Ms Raskov from the Amazon site by Adecco was not therefore in accordance with her contract of employment.

[48] In *Kool and Tait*, the fact that the applicant in each case worked for a single host employer for an extended period, was removed from the host employer's site for conduct or performance reasons rather than operational requirements and was not the provided with an alternative assignment were all matters weighing in favour of a finding of dismissal. Those factors are present in the current proceedings.

[49] The evidence shows that Ms Raskov made an application for employment with Adecco, specifically to be employed at Amazon. She worked at Amazon regularly every week, apart from a short period of leave, for approximately nine months until she was suspended. During this period, Ms Raskov worked full time hours which were then reduced to 28.5 hours per week at her request. The reasons for Ms Raskov's removal from the worksite were not due to a downturn in work or because of operational requirements. At the time of the hearing, Ms Raskov had not worked for Adecco for a period of more than three months. There was no evidence from Adecco that it had made any attempts to find alternative work for Ms Raskov. I believe that it is disingenuous on the part of Adecco to say on one hand that the allegations against Ms Raskov were so serious that they justified removing her from the Amazon site and depriving her of income but not so serious that they make her ineligible for future client assignments. In circumstances where Adecco has made no attempt to find alternative work for Ms Raskov, there is no reasonable basis upon which Adecco could contend that Ms Raskov remains employed by Adecco and has not been dismissed.

[50] Taking into account the parties' submissions and the evidence before me, I find that the removal of Ms Raskov from the Amazon site by Adecco due to allegations of misconduct on 24 August 2023 was the principal contributing factor which resulted directly or consequentially in the termination of Ms Raskov's employment. Therefore, Ms Raskov's employment was terminated on the initiative of Adecco on 24 August 2023.

[51] There is no evidence that establishes, and the parties have not submitted, that the exemptions in s.386(2)(a)-(c) apply. Accordingly, I find that Ms Raskov has been dismissed within the meaning of s.365 of the FW Act.

[52] The jurisdictional objection raised by Adecco is dismissed and I order accordingly.

[53] The matter will shortly be listed for Conference so that the Fair Work Commission can deal with the matter as required by s.368 of the FW Act.



DEPUTY PRESIDENT

Appearances:

Ms Z. Raskov for the Applicant.
Mr M. Carter for the Respondent.

Hearing details:

2023
December 12
Sydney

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¹ [2020] FCAFC 152.

² Ibid, [67].

³ [\[2023\] FWCFB 101](#).

⁴ Ibid, [23].

⁵ *Wayne Shortland v The Smiths Snackfood Co Ltd* [\[2010\] FWAFB 5709](#), [10].

⁶ [\[2017\] FWCFB 5162](#).

⁷ Ibid, [71].

⁸ Ibid, [75].

⁹ [\[2016\] FWC 925](#).

¹⁰ Ibid, [62]-[64].

¹¹ [\[2018\] FWC 3686](#)

¹² Ibid, [16]-[18].

¹³ [\[2018\] FWCFB 6267](#).