



DECISION

Fair Work Act 2009

s.365 - Application to deal with contraventions involving dismissal

Paul Poltorasky

v

Pinnacle Hire Pty Ltd

(C2023/8196)

COMMISSIONER DURHAM

BRISBANE, 8 APRIL 2024

Application to deal with contraventions involving dismissal – jurisdictional objection – deed signed by employee – potential application to set aside deed – whether adjournment should be granted – application to be dismissed if proceedings not commenced

Background

[1] Mr Paul Poltorasky (**Mr Poltorasky**) has made an application to the Fair Work Commission (**the Commission**) under s.365 of the *Fair Work Act 2009* (Cth) (**FW Act**) for the Commission to deal with a dispute arising out of Mr Poltorasky's allegations that he had been dismissed from his employment with Pinnacle Hire Pty Ltd (**Pinnacle/the Respondent**) in contravention of Part 3-1 of the FW Act.

[2] Mr Poltorasky commenced full-time employment with Pinnacle on 10 October 2022 in the position of IT Support. The employment relationship ended on 11 December 2023, it is contested whether Mr Poltorasky resigned or whether Pinnacle's conduct amounts to constructive dismissal.

[3] On 11 December 2023, a meeting was held between Mr Poltorasky and Mr Jeremy Salisbury, Managing Director, regarding a number of concerns, in particular an allegation that Mr Poltorasky inappropriately accessed Pinnacle's IT system to ascertain the salary being paid to a new IT Co-ordinator. Mr Poltorasky denied the allegation and Mr Salisbury advised that it was likely his employment would end but if he wished he may elect to resign his employment as an alternative to being dismissed. Subsequently, Mr Poltorasky signed a deed of release in conjunction with his alleged resignation.

[4] The Deed of Settlement/Deed of Release (**the Deed**) required Pinnacle to pay Mr Poltorasky, in addition to his usual employment entitlements and accrued but untaken annual leave benefits calculated up to and including the resignation date, an amount equal to his salary in lieu of required notice, two months' pay before tax.

[5] The Deed contains a one-way release, where Mr Poltorasky releases Pinnacle from all or any present and future claims, whether known or unknown, in any way relating to matters

including employment and the resignation. Further that Pinnacle may plead the Deed as a bar to any relevant claim.

[6] There is no dispute that Mr Poltorasky signed the Deed, however Mr Poltorasky contests its enforceability on the basis that he was forced to sign the Deed.

[7] Mr Poltorasky filed a Form F8 general protections application involving dismissal on 26 December 2023, which was within the 21-day filing period.

[8] Pinnacle filed a Form F8A response to general protections claim on 24 January 2024. Though no jurisdictional objection was indicated on the F8A that Mr Poltorasky was not dismissed, it was subsequently confirmed by way of email on 6 February 2024. This email further confirmed a jurisdictional objection based on the Deed, and their view that Mr Poltorasky is jurisdictionally barred from bringing the proceeding because of the release.

[9] Given the jurisdictional objections, I issued separate directions with respect to the contested non-dismissal and the Deed. I issued directions on 18 March 2024 for submissions to be provided with respect to the Deed and whether the application should be dismissed. I found it appropriate to determine this matter on the papers, to which neither party objected.

[10] On 22 March 2024, both parties filed their submissions. Mr Poltorasky submitted that the application should not be dismissed due to the following:¹

- The Deed was not set out to settle any dispute, as there was no dispute between Pinnacle and Mr Poltorasky, noting that Pinnacle had already had the Deed printed for him to sign at the meeting on 11 December 2023.
- The meeting and the Deed were set out to end Mr Poltorasky's employment by intimidating/pressuring him to resign and enter a deed of release by putting multiple allegations of misconduct (one being serious) to him.
- Mr Poltorasky was forced into signing the Deed due to misrepresentations made by Mr Salisbury regarding Pinnacle's ability to dismiss Mr Poltorasky for serious misconduct and what he believes were uncorrected assertions that he would not be entitled to his annual leave/notice period if he did not sign the Deed.
- Mr Poltorasky submits that he was made to feel guilty which in turn made him feel responsible and to blame for what he was being accused of, however he maintains that his actions in signing the Deed were due to his post-traumatic stress disorder and Mr Salisbury's bullying.

[11] Pinnacle submitted that the application should be dismissed due to the following:²

- That Mr Poltorasky had executed the Deed, on 11 December 2023 in the presence of Ms Salisbury and again on 13 December 2023 by Dropbox signature.
- There is no evidence that Mr Poltorasky disputes having signed either version of the Deed. To the contrary Mr Poltorasky confirms that he signed the Deed on both dates.
- The terms of the release were clear, unambiguous and complete and reflected a clear intention by the parties to the release; namely Mr Poltorasky and Pinnacle, to be bound to the performance of those terms.

- There is no evidence to suggest that Mr Poltorasky was under duress when he signed the Deed on either date, in particular that he had no alternative but to sign the Deed.
- The release clause provides that the Deed operates as an absolute bar to any claims including Mr Poltorasky's current application.
- It is clear from the Deed that it is a contract of compromise where the consideration bargained for is an actual release of the cause of action, such that there is an accord and satisfaction. In accordance with the terms of the Deed, Pinnacle has paid to Mr Poltorasky the amount provided for under the Deed; namely two months' salary, in reliance on being provided the Deed signed by Mr Poltorasky, to which he has both accepted and has made no effort to repay.
- In all of these circumstances, the application should be dismissed in accordance with section 587(1)(b) and (c) of the FW Act.

[12] After reviewing the above submissions, I have determined that the application cannot proceed due to the Deed, which was clearly signed by Mr Poltorasky. Further, I do not have jurisdiction to set aside the Deed as I am not satisfied any provision of the FW Act could be relied upon to set aside the Deed of release and that the Commission's powers as a statutory tribunal are limited to those contained in the FW Act.

Statutory Provisions

[13] Given Pinnacle's position is effectively that no further steps can be taken in relation to Mr Poltorasky's application because a binding settlement agreement has been reached, s.587 of the FW Act, which deals with the Commission's power to dismiss applications, is also relevant to this case. Section 587 of the FW Act states:

Dismissing applications

(1) Without limiting when the FWC may dismiss an application, the FWC may dismiss an application if:

- (a) the application is not made in accordance with this Act; or
- (b) the application is frivolous or vexatious; or
- (c) the application has no reasonable prospects of success.

Note: For another power of the FWC to dismiss an application for a remedy for unfair dismissal made under Division 5 of Part 3-2, see section 399A.

(2) Despite paragraphs (1)(b) and (c), the FWC must not dismiss an application under section 365 or 773, or an application under section 527F that does not consist solely of an application for a stop sexual harassment order, on the ground that the application:

- (a) is frivolous or vexatious; or
- (b) has no reasonable prospects of success.

(3) The FWC may dismiss an application:

- (a) on its own initiative; or

(b) on application.

[14] A Full Bench of the Commission has previously determined an application under s.365 of the FW Act can be dismissed pursuant to the general power in s.587(1) on the basis that the underlying dispute has been extinguished by a settlement agreement after the application was made.³ Alternatively, the Commission can utilise its implied power to decline to act on an application where it fails for want of jurisdiction.⁴

[15] Section 589 of the FW Act provides the Commission with jurisdiction to make procedural and interim decisions and states:

Procedural and interim decisions

- (1) The FWC may make decisions as to how, when and where a matter is to be dealt with.
- (2) The FWC may make an interim decision in relation to a matter before it.
- (3) The FWC may make a decision under this section:
 - (a) on its own initiative; or
 - (b) on application.
- (4) This section does not limit the FWC's power to make decisions.

[16] In an appeal concerning a first instance decision to set aside directions in unfair dismissal proceedings due to the existence of related Federal Court proceedings, a Full Bench of the Commission in *Visy Board Pty Ltd T/A Visy Board v Ulben Rustemovski and Fahim Ahmadyar*⁵ referred to the Commission's broad discretion concerning procedural decisions in the following terms (endnotes omitted):

“It is important to bear in mind that the Commissioner at first instance was exercising a general discretion. In *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* the High Court made the following observations about the nature of ‘discretion’:⁶

“Discretion” is a notion that “signifies a number of different legal concepts”. In general terms, it refers to a decision-making process in which “no one [consideration] and no combination of [considerations] is necessarily determinative of the result.” Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made. The latitude may be considerable as, for example, where the relevant considerations are confined only by the subject matter and object of the legislation which confers the discretion. On the other hand, it may be quite narrow where, for example, the decision-maker is required to make a particular decision if he or she forms a particular opinion or value judgment.⁷ [Emphasis added]

The discretion exercised in the present case was only confined by the subject matter and objects of the FW Act and, as such, the decision maker had considerable latitude as to the decision to be made.

In such circumstances the *McMahon v Gould* principles may be of some assistance, by way of broad guidance, but each case must be determined having regard to its particular circumstances and to the statutory framework within which the discretion is to be exercised. The discretion was required to be exercised having regard to the Commission's central obligation to provide a fair hearing to parties in proceedings before it. Such an obligation arises directly from s.577(a) of the FW Act, which directs the Commission to perform its functions and exercise its powers in a manner that 'is fair and just', and from the implied obligation to act judicially. One aspect of the duty to act judicially is the obligation to afford a party a reasonable opportunity to allow his or her case to be put."

[17] Given the objects of the FW Act are relevant to the making of a discretionary procedural decision, the objects prescribed in s.336 of the FW Act for the general protections part of the FW Act need to be considered. Section 336 of the FW Act prescribes the objects for Part 3-1 – General Protections and states:

(1) The objects of this Part are as follows:

(a) to protect workplace rights;

(b) to protect freedom of association by ensuring that persons are:

(i) free to become, or not become, members of industrial associations;
and

(ii) free to be represented, or not represented, by industrial associations;
and

(iii) free to participate, or not participate, in lawful industrial activities;

(c) to provide protection from workplace discrimination;

(d) to provide effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of this Part.

(2) The protections referred to in subsection (1) are provided to a person (whether an employee, an employer or otherwise).

[18] The objects of the unfair dismissal part of the FW Act focus upon balancing the interests of employers and employees and emphasise procedures that are "quick, flexible and informal". In contrast, the objects for the general protections part of the FW Act in s.336 are focused solely upon the protection of rights and persons and providing effective relief.

[19] The general requirements regarding the performance of the Commission's functions in s.577 of the FW Act are also relevant to a discretionary procedural decision. Section 577(1) of the FW Act states:

- (1) The FWC must perform its functions and exercise its powers in a manner that:
 - (a) is fair and just; and
 - (b) is quick, informal and avoids unnecessary technicalities; and
 - (c) is open and transparent; and
 - (d) promotes harmonious and cooperative workplace relations.

Consideration

[20] Given the Full Federal Court's judgment in *Coles Supply Chain Pty Ltd v Milford*, and its application by a Full Bench of the Commission in *Bradley William Lewer v Australian Postal Corporation*,⁸ I consider there is jurisdiction to dismiss Mr Poltorasky's application. This would be pursuant to the general power in s.587(1) of the FW Act, or alternatively via the implied power for the Commission to decline to act on an application that fails for want of jurisdiction.

[21] However, the issue of the validity of the Deed of release remains. If the Deed of release was set aside by a court, then Mr Poltorasky's application would be valid, at which point the matter would proceed to determine Pinnacle's jurisdictional objection that Mr Poltorasky resigned.

[22] Noting I have the power to grant an adjournment rather than immediately dismissing Mr Poltorasky's application, the main practical difference between the two courses of action is that if I dismiss Mr Poltorasky's application, he is subsequently successful in having the Deed of release set aside, he would have to make another application pursuant to s.365 of the FW Act and the application would be filed outside of the 21-day filing period in s.366 of the FW Act.

[23] As a result, Mr Poltorasky would be required to seek an extension of time for the filing of the application based on exceptional circumstances taking into account the factors identified in s.366(2) of the FW Act.

[24] I return to the objects of the general protections part of the FW Act prescribed in s.336 of the FW Act. The objects are squarely directed at protecting persons, and providing effective relief. I consider an outcome whereby Mr Poltorasky subsequently succeeds in having the Deed set aside, but then fails to convince the Commission an extension of time should be granted under s.366(2) of the FW Act, to be contrary to the objects of the part. Mr Poltorasky would lose his access to the protections in Part 3-1 of the FW Act on the basis of a deed that has been set aside. I consider this factor weighs strongly in favour of not dismissing the application at this point in time. I consider the reference in s.577(1)(b) of the FW Act to the Commission acting "quickly" must be considered with reference to the objects of Part 3-1. Further, speed is not the only priority identified in s.577(1), the Commission must also perform its powers in a manner that is "fair and just".

[25] I consider the prejudice that will be suffered by the parties from the respective options to be relevant to the exercising of my discretion.

[26] If I decide to adjourn the application, I accept Pinnacle will suffer some prejudice because it may be required to attend further Commission proceedings. Noting, these proceedings will be somewhat extended given the jurisdictional objection that will need to be determined however, subject to the outcome of any separate proceedings to determine whether or not the Deed should be set aside, Pinnacle's position on whether they wish to press that Mr Poltorasky resigned may change. Pinnacle may incur some legal costs if they seek permission to be represented at these proceedings.

[27] However, I consider the prejudice suffered by Mr Poltorasky if his application is dismissed, may significantly exceed that suffered by Pinnacle if the application is adjourned. Subject to the validity of the Deed, Mr Poltorasky will consequently be required to file an application outside the 21-day period and seek an extension of time. This weighs in favour of adjourning the application.

[28] I consider Mr Poltorasky's failure to take any significant steps to contest the Deed until now weighs against granting an adjournment.

[29] Having considered all the factors in this case, I have determined to exercise my discretion under s.589 of the FW Act to delay the dismissal of Mr Poltorasky's application. I will do this to allow Mr Poltorasky an opportunity to seek advice and/or seek to have the Deed set aside by commencing proceedings in a jurisdiction that can determine the validity of the Deed. This is an approach that was previously adopted by Deputy President Gooley in *Wayne Neal v Light Pass Enterprises Pty Ltd*⁹ and recently by Commissioner Crawford in *Ms Annette Tselikas v Cuscal Limited*.¹⁰

[30] I have decided that unless I am advised by the close of business on 29 April 2024 that proceedings have been commenced in a court to have the Deed set aside, I will issue a decision dismissing Mr Poltorasky's application without further reference to the parties. I will require evidence of the filing of an originating application as proof that proceedings have been commenced.

Conclusion

[31] I am satisfied I have jurisdiction to dismiss Mr Poltorasky's application pursuant to the general power in s.587(1) of the FW Act, or alternatively via the implied power for the Commission to decline to act on an application that fails for want of jurisdiction.

[32] I have determined it is appropriate to dismiss Mr Poltorasky's application unless I am advised by the close of business on 29 April 2024 that proceedings have been commenced in a court to have the Deed set aside. I will require evidence of the filing of an originating application as proof that proceedings have been commenced. In the absence of this proof, I will issue an order dismissing Mr Poltorasky's application without further reference to the parties.

[33] In the event that Mr Poltorasky establishes that he has commenced proceedings in a court by the close of business on 29 April 2024, I will list the application for report-back on a date to be confirmed.



COMMISSIONER

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¹ Applicant Submissions.

² Respondent Submissions.

³ *Bradley William Lewer v Australian Postal Corporation* [\[2023\] FWCFB 56](#) at [55].

⁴ *Ibid* at [57].

⁵ [\[2018\] FWCFB 1255](#) at [45] to [47].

⁶ (2000) 174 ALR 585.

⁷ *Ibid* at [19].

⁸ *Coles Supply Chain Pty Ltd v Milford* (2020) 279 FCR 591 at [67].

⁹ [\[2015\] FWC 2930](#) at [37] and [38].

¹⁰ [\[2023\] FWC 3171](#).