[2025] FWCFB 212

The attached document replaces the document previously issued with the above code on 18 September 2025.

The originating matter number referenced in paragraph 61 (c) and (d) has been corrected.

Associate to Vice President Gibian

Dated 19 September 2025

[2025] FWCFB 212

DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Yuri Humeniuk
v
Sculpture by the Sea Incorporated
(C2025/2654)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT ROBERTS
DEPUTY PRESIDENT SLEVIN

SYDNEY, 18 SEPTEMBER 2025

Appeal against decision [2025] FWC 742 of Commissioner Sloan at Sydney on 14 March 2025 in matter number C2024/6798 – Application under s 365 of the Fair Work Act 2009 (Cth) – Applicant engaged over many years to perform work in relation to the installation of sculptures and artworks – Employer communicated that it "would like to take a pause" on the working relationship – Commissioner found that the applicant had not been "dismissed" for the purposes of s 386 of the Act – Whether the applicant had been "dismissed" – Termination of employment relationship or contract of employment – Permission to appeal granted – Appeal allowed and decision at first instance quashed.

Introduction

[1] Sculpture by the Sea Incorporated has, since 1997, staged a well-known annual exhibition of public sculpture along the walking track between Bondi and Tamarama in Sydney. Since 2005, it has staged a similar exhibition at Cottesloe in Perth and also undertakes various other activities. Yuri Humeniuk performed work for Sculpture by the Sea between 2004 and 2024 involving the installation and de-installation of sculptures and art works associated with these exhibitions. He worked on each Bondi exhibition between 2004 and 2024 (with the exception of the exhibitions in 2020 and 2021 which were cancelled because of the COVID-19 pandemic) as well as performing other work for Sculpture by the Sea.

[2] On 3 September 2024, Mr Humeniuk was informed that he would not be required for the 2024 Bondi exhibition. On 24 September 2024, Mr Humeniuk applied to the Commission under s 365 of the *Fair Work Act 2009* (Cth) (the **Act**) for the Commission to deal with a general protections dispute involving dismissal. Sculpture by the Sea denied that it had dismissed Mr Humeniuk. Commissioner Sloan dealt with the jurisdictional objection by way of a preliminary hearing which took place on 23 December 2024. The Commissioner handed down his decision

on 14 March 2025.[1] The Commissioner found that Mr Humeniuk had not been dismissed and, as a result, dismissed his application under s 365 of the Act.[2]

[3] On 7 April 2025, Mr Humeniuk filed a notice of appeal seeking permission to appeal, and to appeal, from the decision of the Commissioner. Mr Humeniuk contends that the Commissioner's conclusion that he was not dismissed was wrong and that the Full Bench should grant permission to appeal, allow the appeal and remit the matter for a member of the Commission to deal with the dispute under s 368 of the Act.

Factual background

[4] The factual background to the appeal is reasonably complex but can be summarised as follows. As we have observed, Mr Humeniuk performed work for Sculpture by the Sea over the period from 2004 to 2024. It appears that he did so under various arrangements under which he was described, at different times, as being engaged as an independent contractor and an employee. At times, Mr Humeniuk invoiced Sculpture by the Sea for providing a vehicle and tools but was also paid wages as an employee. He was provided with a number of employment contracts periodically over the years.

[5] On 15 January 2024, Mr Humeniuk was working at Sculpture by the Sea's depot at Kingswood in Sydney when he suffered severe facial lacerations as a result of a workplace accident. Following the accident, an issue arose in relation to whether Mr Humeniuk was covered by the company's workers compensation insurance. Apparently to address that concern, Mr Humeniuk was provided with a new employment contract by letter dated 19 January 2024. The letter was entitled "Casual Contract of Employment with Sculpture by the Sea Incorporated". Clauses 1.1 to 1.5 of the contract provide:

> 1.1 Your start date will be Monday 22 January 2024.
> 1.2 Your employment will be on a casual basis, as required.
> 1.3 In this position, you will report to the Site & Logistics Manager, Trent Marwick.
> 1.4 Each occasion that you work will be a separate contract of employment which ceases at the end of that engagement.
> 1.5 As a casual employee, there is no guarantee of ongoing or regular work. You are entitled to accept or reject work that is offered to you.

[6] Clause 6.1 of the contract provides:

> 6.1 Your start date will be Monday 22 January 2024. Your employment will be on a casual basis, as required. In this position, you will report to the Site & Logistics Manager, Trent Marwick. Each occasion that you work will be a separate contract of employment which ceases at the end of that engagement. As a casual employee, there is no guarantee of ongoing or regular work. You are entitled to accept or reject work that is offered to you.

[7] The contract otherwise provided for the duties to be performed by Mr Humeniuk, his rate of pay, leave and other entitlements and hours of work. Clauses 22.1, 23.1 and 23.2 provide as follows:

> 22.1 You agree that the terms of your employment with SXSINC will be governed by and construed in accordance with the laws applicable in NSW.

> 23. 1 The terms and conditions referred to in this letter constitute all of the terms and conditions of your employment and replace any prior understanding or agreement between you and SXSINC.
>
> 23.2 The terms and conditions referred to in this letter may only be varied by a written agreement signed by both you and SXSINC.

[8] Mr Humeniuk performed work for Sculpture by the Sea on various occasions between January and July 2024 and was paid wages for performing that work. This included working on the Cottesloe exhibition in February and March 2024, the Snowy Valley Sculpture Train in New South Wales in April 2024, and other engagements in June and July 2024.[3]

[9] Davina Corti is Company Manager for Sculpture by the Sea. On 12 March 2024, Ms Corti sent an email to Mr Humeniuk to provide an update in relation to various issues. Mr Humeniuk sent a lengthy email in response on 25 March 2024. Among other things, the email set out Mr Humeniuk's dissatisfaction with the response to the accident in January, his concerns regarding the "shortfalls" of the Kingswood depot, his criticisms of the changes that Sculpture by the Sea had introduced to its safety policies and on-site procedures, his concerns as to whether he was covered by Sculpture by the Sea's workers compensation insurance and some other grievances. The email continued:

> Having worked for SXS for twenty years, every Bondi event, all but two Cottesloe events, every international exhibition and every other project SXS has undertaken, it would be an understatement to say I am not invested in the idea, the staff and the artists. I am open to and in fact demand that these conversations take place. It is unfortunate that it has taken a workplace accident to bring these issues to the forefront of peoples minds. It is also the reason I am writing this email as I have voiced concerns verbally, for what seems like forever.
>
> …
>
> I acknowledge that both of you are upset by the injury and subsequent events. I however believe I am justified in wanting something other than a chat, coffee or dinner in response to what happened on January 15, I personally would like to get back to an easy trusting discourse with you Davina.
>
> I informed David Handley on the phone call Friday 22 January that I will discharge all works I have agreed to to date so as not to disadvantage Trent and Justin on their respective projects. After this time I will assess working for SXS on a case by case basis. On the proviso that SXS comply with their legal requirements and make meaningful change toward a working environment beneficial to the artists creations and those individuals that organise and physically handle these artworks.
>
> If you can advise when this process has commenced we can move on together towards another 20 years of Sculpture By the Sea.

[10] Ms Corti responded by email on the same day. In her email, Ms Corti thanked Mr Humeniuk for setting out his concerns in detail, indicated some steps which had already been taken to address the "short comings" and promised to provide a more detailed response when she had more time to do so. Mr Humeniuk provided a further response on 26 March 2024 in

which he expanded on some of his concerns about the Kingswood depot and the workplace culture at Sculpture by the Sea.

[11] Ultimately, on 7 June 2024, Ms Corti provided a more substantive response in relation to the matters raised in Mr Humeniuk's email of 25 March 2024. Ms Corti's email concluded as follows:

> We will await the outcome of a workers compensation claim you may make, and then we would like to meet to talk through issues that you have raised. We suggest we engage a facilitator at our cost to assist us in finding a way forward.
>
> Thank you for your patience while we sought advice on the definition of 'deemed worker' and thank you for raising with me that you thought you would be covered.
>
> I too hope that we can go back to an easy, trusting discourse with you, Yuri. Please let us know if you would like to discuss anything further with me at this stage.

[12] Earlier, on 4 June 2024, the Site & Logistics Manager, Trent Marwick, sent an email to Mr Humeniuk in relation to the Bondi exhibition which was to take place later that year. The email was addressed to various people and commenced by saying:

> Many thanks for coming onboard to take part in the SERP of Sculpture by the Sea, Bondi 2024.

[13] Mr Humeniuk responded to the email on 5 June 2024 in the following terms:

> Morning Trent.
>
> I have still not received any thing from David or Davina regarding what SXS is doing, or planning to do, regarding the issues raised pertaining to safety and suitability of the Kingswood depot. Nor any response to the issue of organisational culture and decision making processes that compound these logistical shortcomings.
>
> If SXS is unwilling to even talk with me about these critical issues I can see no reason to be involved in an engineering review. My input cannot be valued at one part of this process and ignored or avoided in the wider operational setting.

[14] On 30 July 2024, Mr Marwick sent a further email message to

> Hi Yuri
>
> Nick and I would greatly appreciate your skillset and experience onsite as either a casual employee or contractor for whatever of the below dates you may be available for the install and de-install periods.
>
> Thought best to get some dates to you now considering your availability is undoubtably in-demand.
>
> We'll look to manage the same schedule as last year, this year with Nick, myself, TBC Justin and hopefully Jacko for the first half-week for infrastructure bump-in, then onwards with the usual Pre-Install.

…

Once you've had some time to look into your schedule, would be great to lock in any availability.

[15] The email also provided the dates for pre-install, crew induction, installation and de-installation work. The Commissioner recorded that Mr Humeniuk gave evidence that he had a conversation with Mr Marwick on about the same day in which he told Mr Marwick that he would work for Sculpture by the Sea on the dates set out in the email and that he rearranged other commitments in order to be able to work on the 2024 Bondi exhibition.[4]

[16] On 3 September 2024, Ms Corti sent another lengthy email to Mr Humeniuk which said, in part:

I hope this email finds you well.

I am writing in regard to my email of 7 June and your subsequent conversations with Andrew Williams and me in which you said you did not want to lodge a workers compensation claim. As mentioned in my emails of 5 and 26 July, whenever you are ready please send me the cost of your holiday to New Zealand so we can arrange payment of this and your out of pocket medical expenses. If it is not easy to collate the cost of the New Zealand holiday please feel free to send me an itemised estimate for the costs you paid eg airfares, accommodation etc. For ease of reference, I have included my earlier emails below.

My email of 7 June mentions our offer that we engage a facilitator at our cost to talk through issues that you have raised to assist us in finding a way forward to work together. We believe this process will be beneficial for all of us and will hopefully result in all of us wanting to work together again, and from there to re-build our relationships. To give you confidence in the process we will be happy to pay for your time to meet a highly regarded facilitator to ensure you are happy with the person and the process before any meeting with us. We suggest that those who participate in one on one meetings with you and the facilitator, and or a group meeting, are Wayne Middleton, Phil Spelman, David Handley and myself. Please suggest anyone else you would like to include. If you do not think this is the best way forward please let us know now or in the future if or how you would like to meet.

Acknowledging your concerns about working with us again, and that you may not want to do so, and as we are in the final stages of preparing for this year's Bondi exhibition and unfortunately no longer have time to meet with you prior to commencing final preparations for the install of the exhibition, we would like to take a pause on our working relationship until after this year's Bondi exhibition. We suggest having a meeting in either mid-December or mid-January if you wish and are available, or any mutually convenient time later. Hopefully after these meetings we will all be happy to work together again.

(emphasis added)

[17] Mr Humeniuk responded to the email on 4 September 2024 saying "I acknowledge from your email that my services are not required for the Bondi show" and inquiring whether other staff had been informed of the decision. Ms Corti responded substantively on 10 September 2024 in the following terms:

> We have been waiting for you to get back to us since my email of 7 June and have been hoping to meet with you to discuss our respective concerns, including those concerns you listed in your email of 25 March that you said needed to be addressed before you would work with us again. Accordingly, we have not told anyone apart from Trent and Nick Hill anything in relation to you and whether you might be working on the Bondi exhibition. As we finalise the crew for the exhibition we will start to let senior crew know who else is working on this exhibition. As a general rule, we do not tell artists who is on our site crew from one exhibition to the next.
>
> In answer to your question, Safe Work has only contacted us to request a report.
>
> When you are ready please send me the amount for payment re the holiday you were unable to take and your thoughts on the idea of having a facilitator to assist with a meeting between us in December or January or another time that suits you and is mutually convenient. In the meantime, we will pay your medical expenses while we wait for details regarding your holiday expenses.

[18] Mr Humeniuk then filed his application under s 365 of the Act on 24 September 2024. The application asserted that Mr Humeniuk had been dismissed on 3 September 2024. The position of Sculpture by the Sea, as related in the evidence of Ms Corti, was that Mr Humeniuk's employment has not been terminated and that he remained employed on a casual basis.

Further evidence on appeal

[19] Mr Humeniuk sought to rely upon further evidence on appeal in the form of two witness statements.

[20] First, Mr Humeniuk sought to tender a further witness statement made by him dated 16 June 2025. In summary, the witness statement addresses two matters: that Mr Humeniuk had accepted further engagements with Sculpture by the Sea after 25 March 2024 and that Sculpture by the Sea had work available which could have been allocated to Mr Humeniuk after 3 September 2024. The Full Bench declined to accept the further witness statement of Mr Humeniuk. As to the first matter, the issue of whether Mr Humeniuk accepted further work after 25 March 2025 arose in cross-examination of Ms Corti during the hearing at first instance. Mr Humeniuk had the opportunity to seek to call further evidence in relation to that matter at that time and did not do so. It is not now appropriate to permit evidence on that issue to be admitted on appeal, particularly as it is likely to produce a further factual dispute which would need to be resolved. As to the second matter, we do not consider that evidence as to the availability of work which could have been undertaken by Mr Humeniuk later in 2024 and in 2025 is relevant to whether he was dismissed in September 2024. That question turns on the inferences to be drawn from the conduct of the parties at that time in light of the circumstances that existed, and were known to the parties, at that time.

[21] Second, Mr Humeniuk sought to rely on a witness statement of his solicitor, Rohan Burn. The witness statement of Mr Burn set out various events relating to a "facilitated discussion" which took place on 5 February 2025 involving the Commissioner and the parties and their representatives. The content of the witness statement is relevant to a contention advanced by Mr Humeniuk that the decision of the Commissioner should be quashed as a result of the involvement of the Commissioner in the facilitated discussion or, at least, that permission to appeal should be granted to consider that question. As a result, the Full Bench determined that it was appropriate to admit the witness statement of Mr Burn as further evidence on appeal

under s 607(2) of the Act other than one part of the statement which purported to set out part of what the Commissioner said during the discussion.

Decision of the Commissioner

[22] In his decision, the Commissioner set out the background to the proceedings in some detail before turning to consider whether Mr Humeniuk had been dismissed. The Commissioner summarised the submissions of Mr Humeniuk as being based on an assertion that he had an expectation, if not entitlement, to perform work on the Bondi exhibition. The Commissioner regarded the submission as inviting the Commission to disregard the contract of employment entered into between the parties and indicated that he was not willing to do so.[5]

[23] The Commissioner accepted that Mr Humeniuk and Mr Marwick had reached an understanding that he would work on the Bondi exhibition in 2024, but found that this fell short of a legally binding arrangement. In that respect, the Commissioner said:[6]

> That said, I accept that there was an understanding reached between Mr Humeniuk and Mr Marwick in late July 2024 that Mr Humeniuk would work on the 2024 Bondi Exhibition. Mr Humeniuk's evidence that he had reached such an agreement with Mr Marwick was not challenged. But the evidence falls short of establishing an enforceable contract between the parties that Mr Humeniuk would work on the 2024 Bondi Exhibition.
>
> Under cross-examination, Ms Corti accepted that SXS would begin giving thought to who would be working on the exhibition, and the make-up of the crew, "several months out". She also accepted that Mr Marwick's email to Mr Humeniuk of 30 July 2024 was to be read as Mr Marwick stating that he wanted Mr Humeniuk to be part of the crew, subject to his availability. However, Ms Corti's evidence also suggested that Mr Marwick was not in a position to finalise a contract with Mr Humeniuk.

[24] The Commissioner indicated that, contrary to the submissions of Mr Humeniuk, he regarded the email of 25 March 2024 as relevant to the dismissal issue as it "set in train" the correspondence which provided context to the email of 3 September 2024.[7] The Commissioner considered the interactions between Mr Humeniuk and Ms Corti to be relevant. The Commissioner observed that he had no reason to consider Ms Corti's attempts to meet with Mr Humeniuk to resolve his issues to be anything other than genuine and said that he struggled to understand Mr Humeniuk's failure to engage with Ms Corti to set up a meeting.[8]

[25] The Commissioner noted that there was a controversy between the parties as to whether the email of 3 September 2024 operated to "remove" Mr Humeniuk from the Bondi exhibition. The Commissioner again stated that there was no binding contract for Mr Humeniuk to perform work on the Bondi exhibition. The Commissioner said:[9]

> As I have said, there was an understanding between Mr Humeniuk and Mr Marwick that Mr Humeniuk would work on the 2024 Bondi Exhibition. However, for the reasons I have previously canvassed, to the extent Ms Corti went "over the top of" Mr Marwick, she was not displacing a binding contract under which Mr Humeniuk had been engaged to work on the 2024 Bondi Exhibition, or an enforceable commitment that SXS would enter into a contract with him to do so.

[26] The Commissioner expressed the view that, in light of the events throughout 2024, it was understandable and reasonable for Ms Corti to put a "pause" on the relationship and that Ms Corti regarded the employment relationship as continuing throughout 2024.[10] The Commissioner then turned to the email of 3 September 2024 and said:[11]

> That leads to an examination of the language of the email itself. Read properly and in its entirety, nothing in its terms evinces an intention to terminate the relationship. To the contrary, it is consistent with Ms Corti's earlier emails in seeking to acknowledge Mr Humeniuk's concerns, putting forward a constructive suggestion as to how those concerns might be addressed, and expressing a desire to maintain the employment relationship.
>
> I accept SXS's submissions that Ms Corti's email of 10 September 2024 is significant in this regard. It repeats SXS's wish to meet with Mr Humeniuk in an effort to resolve his concerns. This is inconsistent with SXS considering the relationship to have been terminated a week earlier.

[27] In that regard, the Commissioner did not regard the failure of Sculpture by the Sea to offer further work to Mr Humeniuk after 3 September to be significant.

[28] The Commissioner concluded that the email of 3 September did not operate to terminate Mr Humeniuk's employment. The Commissioner said:[12]

> It is apparent that Mr Humeniuk feels a strong sense of grievance towards SXS. This is reflected in his emails to Ms Corti of 25 and 26 March 2024, and to Mr Marwick of 5 June 2025. This helps to explain why he did not consider the offer of a meeting set out in Ms Corti's email of 7 June 2024 to be genuine and why he did not engage with it.
>
> However, a more dispassionate examination of Ms Corti's emails leads to a different conclusion. SXS had (including at the date of the hearing) no intention to end its relationship with Mr Humeniuk. He was clearly a valued and highly regarded member of the team.
>
> …
>
> In that context, the "pause" in the relationship suggested by Ms Corti was exactly that. It was a decision consistent with the casual nature of the employment and the terms of the Employment Contract. It was not a decision to sever the relationship.

[29] As a result, the Commissioner found that there was no termination of employment at the initiative of the employer and that Mr Humeniuk was not entitled to bring an application under s 365 of the Act.

Statutory provisions

[30] Section 365 provides that if a person has been dismissed, and the person (or an industrial association) alleges that the person was dismissed in contravention of Part 3-1 of the Act, the person (or the industrial association) may apply to the Commission for it to deal with the dispute. A person is only able to make an application under s 365 of the Act if they have *in fact* been dismissed.[13]

[31] Section 386 is entitled "Meaning of *dismissed*" and 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.

[32] In accordance with s 386(1), a person has been "dismissed" if the person's employment has been "terminated on the employer's initiative" or if the person resigned "but was forced to do so because of the conduct, or a course of conduct, engaged in by his or her employer". Section 386 appears within Part 3-2 of the Act dealing with "Unfair dismissal". However, the definition is applied generally throughout the Act. Section 12 defines what is meant by the term "dismissed" in the Act by simply stating "see section 386". It has not been doubted that the definition in s 386 is to be applied to determine whether a person "has been dismissed" for the purposes of s 365(a).[14]

Grounds of appeal

[33] Mr Humeniuk relies on an amended notice of appeal which contains four grounds. The grounds may be summarised as follows:

(a) Ground 1 contends that the Commissioner acted on a wrong principle by failing to consider whether there had been a termination at the employer's initiative for the purposes of s 386(1)(a) because the decision not to engage Mr Humeniuk for the 2024 Bondi exhibition had the "consequence" of bringing the employment relationship to an end.

(b) Ground 2 contends that the Commissioner committed an error of law by requiring Mr Humeniuk to establish that there was a "binding contract" or an

"enforceable contract" for him to perform work on the 2024 Bondi exhibition for there to have been a termination at the employer's initiative.

(c) Ground 3 contends that the Commissioner took into account a number of irrelevant considerations by considering whether Ms Corti's decision to not offer Mr Humeniuk work was reasonable, the content of the 25 March 2024 email, the tone of Mr Humeniuk's communications and Mr Humeniuk's asserted failure to set up a meeting with Ms Corti.

(d) Ground 4 contends that the Commissioner made errors of fact by accepting Ms Corti's oral evidence that the work performed by Mr Humeniuk after 25 March 2024 had been accepted prior to that date and that there was no further work to offer Mr Humeniuk after 3 September 2024.

[34] It is to be observed that ground 4 sought to rely on the further evidence contained in Mr Humeniuk's witness statement of 16 June 2024. As the Full Bench determined not to admit Mr Humeniuk's statement, ground 4 falls away.

[35] Each of grounds 1 to 3 seek to identify errors of approach or principle in the reasoning of the Commissioner which resulted in him concluding that Mr Humeniuk had not been dismissed. It is common, and understandable, for an appeal to be framed in that manner. The identification of errors in the approach adopted in the decision at first instance may be instructive as to whether the conclusion reached is correct. Whether errors can be identified in the reasoning at first instance may also be relevant to whether permission to appeal should be granted for the purposes of s 604(1) and (2) of the Act. However, the question of whether a person "has been dismissed" for the purposes of s 365(a) is a matter upon which the jurisdiction of the Commission depends and is a question amenable to one correct answer.[15] As such, if permission to appeal is granted, the question on appeal is whether the Commissioner was correct to find that Mr Humeniuk was not dismissed.

Facilitated discussion

[36] Mr Humeniuk's written submissions raise a further issue concerning the "facilitated discussion" in which the Commissioner participated on 5 February 2024. In his written submissions, Mr Humeniuk contends that the Commissioner exceeded his powers under s 368 of the Act by conducting a conference prior to determining the jurisdictional objection raised by Sculpture by the Sea. He also contends that the present circumstances provide an opportunity for the Full Bench to consider when an apprehension of bias arises as a result of a member participating in conciliation after the commencement of arbitration. The issue is not addressed in any of the grounds recorded in the notice of appeal but is raised as a reason why permission to appeal should be granted. To the extent that Mr Humeniuk seeks permission to appeal on the basis that the Commissioner's decision is affected by error by reason of the "facilitated discussion", we do not accept that an arguable case of appealable error is raised which would justify permission to appeal being granted in relation to that ground.

[37] The Commissioner conducted a hearing in relation to the jurisdictional objection on 23 December 2024. The witness statement of Mr Burn indicates that, on 21 January 2025, solicitors for Sculpture by the Sea emailed the Commissioner's chambers to request assistance from the

Commission to facilitate settlement discussions between the parties. The request was made jointly by the parties. The "facilitated discussion" was subsequently arranged to take place on 5 February 2025. The parties and their representatives then participated in a conference process involving the Commissioner on that date. Mr Burn's statement indicates that the Commissioner participated by way of attending a joint session, followed by private discussions separately with the parties. The "facilitated discussion" lasted for more than two hours, but the parties were unable to reach a resolution.

[38] Two issues are raised by Mr Humeniuk. The first is whether an apprehension of bias arises with respect to the Commissioner determining the jurisdictional objection by reason of his participation in the "facilitated discussion". There is no absolute rule that a member of the Commission who has conducted a conference, or another type of discussion aimed at resolving a dispute, cannot then arbitrate or decide the matter.[16] A member may be disqualified if a reasonable apprehension of bias arises as a result of participating in a conference, for example, if the member has been told something in conference that might influence, or appear to influence, their decision or has themselves said something that exhibits prejudgement.[17] If that occurs, the member is disqualified from further dealing with the matter and must recuse themselves.[18] There is nothing before the Full Bench to suggest that anything occurred in the "facilitated discussion" that gives rise to a reasonable apprehension of bias in relation to the Commissioner determining the jurisdictional objection or actual bias on the part of the Commissioner.

[39] In any event, a party to civil proceedings may waive an objection to a judge or tribunal member who would otherwise be disqualified on the ground of actual bias or a reasonable apprehension of bias.[19] Mr Humeniuk plainly waived any capacity he might have had to object to the Commissioner determining the jurisdictional objection. The "facilitated discussion" took place as a result of a joint request by Mr Humeniuk and Sculpture by the Sea. Furthermore, even after the "facilitated discussion" was unsuccessful, Mr Humeniuk did not object to the Commissioner deciding the jurisdictional objection. Mr Humeniuk was represented by counsel and solicitors. He cannot now complain about the Commissioner's decision on the basis that he participated in the "facilitated discussion" having made no objection at the time or prior to the Commissioner's decision being handed down.

[40] The second issue raised by Mr Humeniuk is whether the Commissioner exceeded his powers under s 368 of the Act by participating in the "facilitated discussion" prior to deciding the jurisdictional objection. The Full Court of the Federal Court has determined that, where objection is made to an application under s 365 of the Act on the basis that there had been no dismissal, that dispute must be resolved before the powers conferred by s 368 can be exercised.[20] The powers under s 368(1) involve dealing with the dispute (other than by arbitration). It is unnecessary to express a concluded view as to whether, by participating in a discussion at the joint request of the parties prior to deciding the jurisdictional objection, the Commissioner exceeded his powers. Even if he did, Mr Humeniuk does not explain how that would deprive the Commissioner of authority to determine the jurisdictional objection (leaving aside any question of bias, or a reasonable apprehension of bias, which might arise from participation in a conference or discussion process). We do not consider that any error in the Commissioner's ultimate decision can be established on that basis.

[41] For those reasons, permission to appeal should be refused to the extent that Mr Humeniuk contends that error arose as a result of the Commissioner's participation in the "facilitated discussion".

Permission to appeal

[42] A person aggrieved by a decision of the Commission may appeal only with permission under s 604(1) of the Act. The Commission is required, by s 604(2), to grant permission to appeal if it is satisfied it is in the public interest to do so and otherwise has a general discretion as to whether to grant permission to appeal. We are satisfied that permission to appeal should be granted with respect to grounds 1 to 3 in the notice of appeal because it is in the public interest to do so. We would, in any event, exercise our discretion to grant permission to appeal. Mr Humeniuk's appeal raises questions of general interest and importance as to the circumstances in which a casual employee will have been "dismissed" for the purposes of s 386(1) of the Act. We also consider that, for the reasons which follow, Mr Humeniuk has raised arguable grounds of appeal which it is appropriate for the Full Bench to consider.

Consideration

[43] As has been explained, the question which is raised by grounds 1 to 3 in the notice of appeal is ultimately whether the Commissioner was correct to find that Mr Humeniuk was not dismissed as a result of the email from Ms Corti dated 3 September 2024.

[44] That question requires some reflection on the nature of Mr Humeniuk's engagement as a casual employee and the circumstances in which the employment of an employee is terminated on an employer's initiative for the purposes of s 386(1)(a). The analysis of whether a person's employment "has been terminated on the employer's initiative" has long been understood as being conducted by reference to termination of the employment relationship rather than only termination of the contract of employment.[21] For example, a wrongful dismissal (that is, one which is not authorised by the terms of the contract of employment) terminates the employment relationship notwithstanding that the contract may continue in operation until the employee accepts the repudiation.[22] We note that an employee may also be dismissed within the terms of s 386(1)(a) if the employer repudiates the employee's contract of employment by demoting the employee and the employee accepts the repudiation but continues to be employed under a new employment contract.[23]

[45] In *Alouani-Roby v National Rugby League Ltd* [2024] FCAFC 161; (2024) 307 FCR 65, the Full Court commented on the distinction between the contract of employment and the employment relationship. That case concerned whether the expiry of a fixed term contract of employment resulted in dismissal. The Full Court observed, albeit in *obiter dicta*, that "[a]t least for present purposes, distinctions between employment relationships and employment contracts are artificial; the termination of an employment relationship and the termination of an employment contract are the same thing". The Full Court continued that "the reference to "the person's employment with his or her employer [having been] terminated" can only be understood as a reference to the person's contract of employment being brought to an end (or, perhaps in some cases, repudiated)".[24] We do not understand the Full Court to have altered the long-standing understanding of the expression "terminated on the employer's initiative". In our view, the comments of the Full Court are best understood merely as recognising that, most

commonly, the termination of the employment relationship and the contract of employment will coincide. That reflects that the employment relationship is contractual in origin such that there can be no employment without a contract of employment.[25]

[46] The concentration on the termination of an existing contract of employment has the potential to cause some uncertainty in the context of casual employment. The Act contemplates that a casual employee is able to apply for an unfair dismissal remedy if the person has completed the minimum employment period as a "regular casual employee" and, during the period of service, had a reasonable expectation of continuing employment by the employer on a regular and systematic basis.[26] That is premised on the casual employee having a "period of service" of at least six months, being the period the employee was employed by the employer.[27] That is, it is contemplated that a casual employee will continue to be employed over a period of time in which they perform work on various occasions for the employer which may, or may not, be regular and systematic.

[47] No issue is raised in this matter as to whether Mr Humeniuk was employed by Sculpture by the Sea throughout 2024 until at least 3 September 2024 or that Mr Humeniuk had not completed the minimum employment period for the purposes of s 384(2)(a) as a "regular casual employee". Mr Humeniuk contends that he was dismissed on 3 September 2024 whereas Sculpture by the Sea asserted that Mr Humeniuk continued to be employed at the time of the jurisdictional objection hearing on 23 December 2024. We consider that it is correct for the parties to understand the relationship created by the contract of employment entered into in January 2024 as providing that Mr Humeniuk remained employed by Sculpture by the Sea on a casual basis until the contract was terminated.

[48] The contract has potentially contradictory features. On the one hand, the letter indicates that it provides Mr Humeniuk with "a new contract of employment in the position of Senior installer with Sculpture by the Sea Incorporated". Clauses 1.1 and 1.2 provide that the employment has a "start date" and the employment will be "on a casual basis, as required". The contract elsewhere provides for the duties associated with the employment, the rate of pay, hours of work, leave entitlements, payment of expenses and other conditions of employment. Notably, clause 13 provides for a request to be made to convert to full or part time employment after "12 months of regular casual employment" and clause 14 provides for "termination of employment". Clauses 15.2, 16.4, 16.6 and 19.1 impose obligations with respect to intellectual property, confidential information and receipt of inducements or rewards which continue to apply "during your employment". Clause 23.1 provides that "[t]he terms and conditions referred to in this letter constitute all of the terms and conditions of your employment". Each of these provisions contemplate that the contract created an ongoing employment relationship albeit of a casual nature.

[49] On the other hand, clause 6.1 provides that "… you will only be employed at such times and for such periods as are necessary to meet our operational needs". There is some ambiguity in the reference to Mr Humeniuk only being "employed" at such times and for such periods as are necessary for Sculpture by the Sea's operational needs. In our view, the better reading of the word "employed" in clause 6.1 is that it refers to the actual performance of work rather than the existence of an employment relationship. That understanding is consistent with the final sentence of clause 6.1 which states that "[w]e are not in a position to guarantee a certain minimum number of hours' employment each week or each month, or work on a continuing

basis". That sentence unquestionably uses the word "employment" to refer to the performance of work. In the context of the remaining provisions of the contract, we do not consider that clause 6.1 is inconsistent with the contract creating an ongoing employment relationship.

[50] Clause 1.4 provides that "[e]ach occasion that you work will be a separate contract of employment which ceases at the end of that engagement". The clause is difficult to reconcile with the remainder of the contract which, in our view, plainly contemplates an ongoing employment relationship. However, understood together with clause 1.5 which provides that "as a casual employee, there is no guarantee of ongoing or regular work", the intention appears to be to emphasise that there is no guarantee of particular periods of actual work. The assertion that there is a separate contract for each engagement is not inconsistent with the existence of an umbrella contract providing for ongoing obligations associated with a continuing employment relationship.[28] In any event, in our opinion, when the contract is viewed as a whole, it provides for ongoing employment of a casual nature.

[51] The remaining question is whether the email of 3 September 2024 from Ms Corti to Mr Humeniuk terminated Mr Humeniuk's employment "on the employer's initiative". That question will commonly require consideration of whether the act of the employer resulted directly or consequentially in the termination of the employment and the employment relationship was not voluntarily left by the employee.[29] In other matters, the Commission has framed the inquiry as involving consideration of whether there was some action on the part of the employer which is either intended to bring the employment to an end or has the probable result of bringing the employment to an end.[30]

[52] Mr Humeniuk submits that the Commissioner erred by considering only whether Sculpture by the Sea intended to bring his employment to an end and failed to consider whether the email from Ms Corti had the probable result of bringing the employment relationship to an end. It is correct to say that the Commissioner considered, at a number of points, whether the language of the email evinced "an intention to terminate the relationship".[31] However, we do not accept that the approach of the Commissioner involved error in the circumstances of this matter. This is not a case in which it is alleged that Sculpture by the Sea engaged in conduct which repudiated the contract of employment or forced Mr Humeniuk to resign. Mr Humeniuk's case, as we understand it, is that the email of 3 September 2024 involved an overt termination of his employment.

[53] That submission requires consideration of whether, assessed objectively, Sculpture by the Sea should be understood to have intended to bring the relationship to an end through the email of 3 September 2024. The question of whether a party to a contract of employment has given notice of termination does not depend on the subjective intention or understanding of the employer or employee, but an objective assessment of the intentions of the parties.[32] The question is whether a reasonable person in the position of the parties would have understood Sculpture by the Sea to have terminated Mr Humeniuk's employment through the email of 3 September 2024.

[54] With respect, we disagree with the conclusion of the Commissioner in that regard. The use of the language in the 3 September 2024 email "we would like to take a pause on our working relationship until after this year's Bondi exhibition" would, in the circumstances, be understood by a reasonable person in the position of the parties as conveying an intention to

terminate the employment. A number of aspects of the circumstances are significant. Mr Humeniuk had worked on each Bondi exhibition since 2004 (leaving aside the exhibitions which were cancelled as a result of the COVID-19 pandemic) and he had agreed with Mr Marwick to undertake work on the 2024 exhibition. In those circumstances, a reasonable person would understand that Sculpture by the Sea did not wish to engage Mr Humeniuk further, at least for the time being. Similarly, Ms Corti's statement that the pause was prompted by acknowledgement of "your concerns about working with us again, and that you may not want to do so" would suggest to a reasonable person that the "pause" was envisaged to be a cessation of the relationship.

[55] The email of 3 September 2024 did convey that Sculpture by the Sea might consider employing Mr Humeniuk in the future. Ms Corti proposed that a meeting take place in mid-December or mid-January and that "[h]opefully after these meetings we will all be happy to work together again". The fact that an employer indicates that it might be open to recommencing an employment relationship in the future does not remove the possibility that the employment has been terminated for the time being. Ms Corti's email contemplated that Mr Humeniuk would perform no work at all for at least three or four months in circumstances in which he had been regularly performing work for Sculpture by the Sea up to that point. Whether the parties would "work together again" was said to be dependent on a positive outcome to the meeting envisaged by the email. It was no more than a possibility.

[56] We do not consider that the decision to "pause" the relationship can be said to be consistent with the casual nature of the employment.[33] The fact that Ms Corti conveyed that a decision had been made to "pause" the relationship, in itself, suggests that Sculpture by the Sea did not regard the decision as simply the continuation of the existing casual employment. Furthermore, as we have observed, Mr Humeniuk had been performing work on a regular basis up to that point in time and the decision meant that there would be a period of at least three or four months in which Mr Humeniuk would not be engaged and that whether the employment would resume would depend on a positive outcome to a meeting proposed to be conducted months into the future. Each of those aspects to the email of 3 September 2024 are inconsistent with the relationship as it had existed up to that time.

[57] A number of the matters relied upon by the Commissioner are not, in our opinion, relevant or persuasive. The Commissioner considered Mr Humeniuk's email of 25 March 2024, the tone of his communications and his alleged failure to engage with Ms Corti to set up a meeting and whether the decision to pause the relationship was reasonable.[34] Although whether a reasonable person would have understood Sculpture by the Sea to have terminated the employment must be assessed in light of the whole of the circumstances, we do not consider that those matters assist the analysis. Whether the actions taken by Ms Corti were understandable or reasonable, and whether Mr Humeniuk acted reasonably, is not relevant when assessing whether the inference to be drawn is that Sculpture by the Sea terminated the employment. Indeed, if an employer has good reason to terminate the employment of an employee, that might favour a conclusion that the employer intended to do exactly that. The email of 25 March 2024, if anything, favours a conclusion that Sculpture by the Sea intended to terminate the relationship because Ms Corti conveyed that she understood Mr Humeniuk may not wish to work for Sculpture by the Sea at all in the future. That was emphasised in Ms Corti's email of 10 September 2024.

[58] Finally, we consider that the fact that Mr Marwick had asked Mr Humeniuk to perform work on the Bondi exhibition in 2024, and that Mr Humeniuk had agreed to do so, is relevant to the inferences a reasonable person would draw from the "pause" to the relationship. Contrary to the view formed by the Commissioner, that does not depend upon a determination of whether there was a "binding contract" or an "enforceable contract" to undertake that work. A decision to pause the working relationship which involved an employee not performing work which he had been asked to undertake is relevant to an objective understanding of the intentions of the employer. Similarly, the dispute as to whether there was work available to Mr Humeniuk after September 2024 does not assist. The email of 3 September 2024 conveyed that Mr Humeniuk would not be engaged to perform any work unless there was a positive outcome to the foreshadowed meeting. The decision did not suggest that Mr Humeniuk was not to be engaged to undertake further work because none was available.

[59] For these reasons, the decision of the Commissioner was affected by error of the type identified in grounds 2 and 3 and, in any event, the conclusion of the Commissioner that Mr Humeniuk was not dismissed was wrong.

Conclusion and disposition

[60] For these reasons, permission to appeal should be granted with respect to grounds 1 to 3 in Mr Humeniuk's notice of appeal. The appeal should be allowed, the decision of the Commissioner should be quashed and Mr Humeniuk's application remitted to the Commissioner to be dealt with under s 368 of the Act.

[61] The Full Bench makes the following orders:

(a) Permission to appeal is granted with respect to grounds 1 to 3;
(b) The appeal is allowed;
(c) The decision of Commissioner Sloan in [2025] FWC 742 in Matter Number C2024/6798 made on 14 March 2025 is quashed; and
(d) The application in Matter Number C2024/6798 is remitted to the Commissioner to be dealt with under s 368 of the Act.

VICE PRESIDENT

Appearances:

H Nguyen, of counsel, instructed by Burn Legal for the appellant.
E Gillman, solicitor, with S *Hatzipavlis* of Allens for the respondent.

Hearing details:

19 June 2025.
Sydney (in person).

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[1] *Humeniuk v Sculpture by the Sea Incorporated* [2025] FWC 742.

[2] *Humeniuk v Sculpture by the Sea Incorporated* [2025] FWC 742 at [75]-[77].

[3] *Humeniuk v Sculpture by the Sea Incorporated* [2025] FWC 742 at [37].

[4] *Humeniuk v Sculpture by the Sea Incorporated* [2025] FWC 742 at [32].

[5] *Humeniuk v Sculpture by the Sea Incorporated* [2025] FWC 742 at [43]-[44].

[6] *Humeniuk v Sculpture by the Sea Incorporated* [2025] FWC 742 at [46]-[47].

[7] *Humeniuk v Sculpture by the Sea Incorporated* [2025] FWC 742 at [52].

[8] *Humeniuk v Sculpture by the Sea Incorporated* [2025] FWC 742 at [57]-[58].

[9] *Humeniuk v Sculpture by the Sea Incorporated* [2025] FWC 742 at [62].

[10] *Humeniuk v Sculpture by the Sea Incorporated* [2025] FWC 742 at [64]-[65].

[11] *Humeniuk v Sculpture by the Sea Incorporated* [2025] FWC 742 at [66]-[67].

[12] *Humeniuk v Sculpture by the Sea Incorporated* [2025] FWC 742 at [71]-[72] and [74].

[13] *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152; (2020) 279 FCR 591 at [54] and [64]-[67].

[14] *Alouani-Roby v National Rugby League Ltd* [2024] FCAFC 161; (2024) 307 FCR 65 at [12]. See also *Fair Work Ombudsman v Austrend International Pty Ltd* [2018] FCA 171; (2018) 273 IR 439 at [22]-[27] and *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152; (2020) 279 FCR 591 at [14]-[15].

[15] *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152; (2020) 279 FCR 591 at [79].

[16] *Amec Foster Wheeler Australia Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2021] FWCFB 3191; (2021) 307 IR 119 at [38].

[17] *Re Heap* [2003] FCAFC 36; (2003) 127 FCR 475 at [27].

[18] *Amec Foster Wheeler Australia Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2021] FWCFB 3191; (2021) 307 IR 119 at [29] and [45](2).

[19] See, for example, *Michael Wilson & Partners Limited v Nicholls* [2011] HCA 48; (2011) 244 CLR 427 at [76] (Gummow ACJ, Hayne, Crennan and Bell JJ).

[20] *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152; (2020) 279 FCR 591 at [67].

[21] *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200 at 205-206; *Mahony v White* [2016] FCAFC 160; (2016) 262 IR 221 at [21]-[23]. See also, in the context of s 772(1) of the Act, *Lattouf v Australian Broadcasting Corporation (No 2)* [2025] FCA 669 at [409].

[22] *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 427 (Brennan CJ, Dawson and Toohey JJ); *Visscher v Giudice* [2009] HCA 53; (2009) 239 CLR 361 at [53] (Heydon, Crennan, Kiefel and Bell JJ).

[23] *NSW Trains v James* [2022] FWCFB 55; (2022) 316 IR 1 at [45].

[24] *Alouani-Roby v National Rugby League Ltd* [2024] FCAFC 161; (2024) 307 FCR 65 at [63].

[25] *Broadlex Services Pty Ltd v United Services Union* [2020] FCA 867; (2020) 296 IR 425 at [61]; *Lattouf v Australian Broadcasting Corporation (No 2)* [2025] FCA 669 at [410]-[411].

[26] *Fair Work Act 2009* (Cth), s 384(2)(a).

[27] *Fair Work Act 2009* (Cth), s 22(1).

[28] See discussion in M Irving, *The Contract of Employment (2nd Edition)*, at [4.44].

[29] *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200 at 205-206; *Mahony v White* [2016] FCAFC 160; (2016) 262 IR 221 at [21]-[23].

[30] *Rheinberger v Huxley Marketing Pty Ltd* (1996) 67 IR 154 at 160-161; *O'Meara v Stanley Works Pty Ltd* (AIRCFB, Print PR973462, 11 August 2006) at [19]-[23]; *Barkla v G4S Custodial Services Pty Ltd* [2011] FWAFB 3769; (2011) 212 IR 248 at [24].

[31] *Humeniuk v Sculpture by the Sea Incorporated* [2025] FWC 742 at [66] and [72].

[32] See, in relation to notice of resignation, *Koutalis v Pollett* [2015] FCA 1165; (2015) 235 IR 370 at [43]; *Dahdah v Platinum Distributors Australia Pty Ltd* [2022] FCA 416 at [215]; *Sawyer v Wards Accounting Group Pty Ltd* [2025] FWCFB 167 at [64]-[66].

[33] *Humeniuk v Sculpture by the Sea Incorporated* [2025] FWC 742 at [74].

[34] *Humeniuk v Sculpture by the Sea Incorporated* [2025] FWC 742 at [52]. [58] and [64].