



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**VICE PRESIDENT ASBURY
DEPUTY PRESIDENT MASSON
DEPUTY PRESIDENT O'NEILL**

C2023/2201

s.604 - Appeal of decisions

**Emma Croker v Erndit Logistics Pty Ltd
(C2023/2201)**

Melbourne

10.30 AM, THURSDAY, 8 JUNE 2023

PN1

VICE PRESIDENT ASBURY: Good morning, parties. Apologies for the delay. We have had some technical issues this morning connecting everybody, so we apologise for keeping you waiting. If I can just start by taking the appearances, please.

PN2

MS E CROKER: Yes, I'm Emma Croker, the applicant, and I have my disability advocate as support. I'm representing myself, but Sean Connelly is my disability support person.

PN3

MR S CONNELLY: Yes, Mr Sean Connelly of People with Disability Australia.

PN4

VICE PRESIDENT ASBURY: Thank you. Thanks, Ms Croker. For the respondent?

PN5

MR J LAMB: Lamb, John, paid agent seeking permission to represent Mr Kory Jennings, the respondent in this matter.

PN6

VICE PRESIDENT ASBURY: Thanks, Mr Lamb. Ms Croker, do you have any view in relation to whether permission should be granted to the respondent to be represented by a paid agent?

PN7

MS CROKER: I'm not being represented by a paid agent and I'm psychologically stuffed up at the moment, and I just – I have always just wanted a mutual consent to conciliation and I still haven't been afforded that with Kory Jennings. He won't show his face, he won't talk to me. I can't see why Kory can't represent himself. He can speak, I can speak, even when I'm psychologically effed up. I find John Lamb to be quite direct and misleading. It causes me – I'm shaking actually. I would rather just have it between Kory and myself, and you, you know, hearing - - -

PN8

VICE PRESIDENT ASBURY: Okay, well, you understand this isn't going to be a conciliation process. This is an appeal against the decision of Lake DP not to grant you an extension of time.

PN9

MS CROKER: Yes.

PN10

VICE PRESIDENT ASBURY: All right. Thank you. Mr Lamb, do you have anything you want to say in response?

PN11

MR LAMB: No, your Honour, other than I sent a submission yesterday with three points in regards to why I believe that it would be beneficial if I represented Mr Jennings.

PN12

VICE PRESIDENT ASBURY: All right. We'll just mute for a minute. We're just discussing representation, just bear with us for a moment. Given that the matter is an appeal and it could involve some issues of complexity, and on the basis that Mr Lamb appears to have been involved from the outset, we are prepared to grant Mr Lamb permission to represent the respondent on the basis that it will allow the matter to be dealt with more efficiently and on the basis that Mr Lamb will continue to allow the matter to be dealt with efficiently. That is our ruling in respect of representation.

PN13

From the outset, Ms Croker, you have made a submission in relation to why you say permission to appeal should be granted and your appeal should be upheld, which we have read, but would you like to speak to that submission? Would you like to take an opportunity to speak to it or elaborate on it?

PN14

MS CROKER: I don't think I can articulate, I'm sorry. I would – yes.

PN15

VICE PRESIDENT ASBURY: Take your time, Ms Croker.

PN16

MS CROKER: I put everything in writing. There is pages and pages of it.

PN17

DEPUTY PRESIDENT MASSON: Ms Croker, can I just put to you one of the bases on which I understand you are appealing with the Deputy President's decision.

PN18

MS CROKER: Yes.

PN19

DEPUTY PRESIDENT MASSON: Am I right in discerning from your material that you say that the Deputy President failed to take into account the medical evidence relating to your mental health issues at the time of November/December? Is that one of the grounds on which you say - - -

PN20

MS CROKER: Yes, yes.

PN21

DEPUTY PRESIDENT MASSON: - - - he was in error?

PN22

MS CROKER: Yes, it is, yes.

PN23

DEPUTY PRESIDENT MASSON: Is it also one of your grounds that you say that the termination of your employment on 14 November was or wasn't clear to you that you had been dismissed? Was there an issue as to whether you understood to have been dismissed on that day?

PN24

MS CROKER: I didn't believe that I had been dismissed. I hadn't been called in for any meetings. Kory had not contacted – the respondent hadn't contacted me at all. The investigation, he said that it was going to happen. I hadn't heard anything. I hadn't been called in with the Australia Post manager and my employer to have a meeting, so, no, I didn't believe at all that I had been dismissed. I couldn't understand why I would be dismissed either.

PN25

DEPUTY PRESIDENT MASSON: And also in terms of the merits of your application, I understand your complaint about the Deputy President's decision to be that the manner of your dismissal in terms of without due process in your view render the dismissal unfair and that that wasn't given sufficient weight by the Deputy President. Is that what you also say? I'm looking at paragraph – I think it's paragraphs 29 and 30 of your submissions where you talk about the merits of your application. It's on page 6 of your written submissions.

PN26

MS CROKER: Yes, yes, yes. Sorry, he didn't initiate contact with me. He didn't follow the Small Business Fair Dismissal Code.

PN27

DEPUTY PRESIDENT MASSON: Yes, I understand that.

PN28

MS CROKER: Yes.

PN29

DEPUTY PRESIDENT MASSON: So the manner of your dismissal following the accident on 2 November – so between 2 November and 14 November – after you were discharged from hospital on the 2nd I understand that you say there was no contact made with you, either you calling - - -

PN30

MS CROKER: Not to do with - - -

PN31

DEPUTY PRESIDENT MASSON: - - - the respondent on the 14th, at which point after it was indicated to you that because it was a safety breach that would result in instant dismissal. You say the manner of that process renders your dismissal unfair; is that correct?

PN32

MS CROKER: Yes, yes.

PN33

DEPUTY PRESIDENT MASSON: I'm just trying to summarise. I can see you're having some difficulty articulating. I'm just trying to summarise what I understand to be the grounds of appeal.

PN34

MS CROKER: Thank you, thank you. I appreciate that.

PN35

VICE PRESIDENT ASBURY: Ms Croker, can I just also understand is it that you were upset by the manner in which you were dismissed on the 14th, but you understood you had been dismissed on the 14th, or is that you did not understand you had been dismissed on the 14th?

PN36

MS CROKER: I didn't – I was upset, very much. I didn't believe I had been dismissed. I didn't understand – he had no grounds to dismiss me. I hadn't done anything wrong. I didn't cause an accident, I wasn't at fault, I wasn't on the wrong side of the road and the other person in the other vehicle will say that, as well. Residents even said that, so to have no contact and then he – it wasn't even - he didn't say that it was his choice, he said that it was the Australia Post manager Simon's choice to dismiss me and I had to go.

PN37

VICE PRESIDENT ASBURY: Do you agree or disagree that you were told, 'Safety breach, instant dismissal', on 14 November?

PN38

MS CROKER: Kory did say that on the phone. He said he was going to call me back. I called him, he then said he was going to call me back. He called me back and said, 'Simon said safety breach, instant dismissal.' I said to him, 'Does that mean I don't have a job?' and he said, 'Yeah, sounds like it.' That was on 14 November.

PN39

DEPUTY PRESIDENT MASSON: I think one of the text messages you sent on that day – it was in the material that you filed at first instance - - -

PN40

MS CROKER: Yes.

PN41

DEPUTY PRESIDENT MASSON: I think it was marked as – I think it was document A. It was a text message sent by yourself to the respondent. You don't need to find it, but I'll read it. It says:

PN42

I'm sorry I couldn't stay on the phone to you. I'm gut-wrenchingly broken to hear I've been sacked for an unavoidable situation while others are still employed and have broken safety breaches more than one.

PN43

That seems to indicate that you were aware that you had been dismissed.

PN44

MS CROKER: Like I said, I heard Kory say that safety breaches are instant dismissal, but I didn't see he had grounds for that at all.

PN45

DEPUTY PRESIDENT MASSON: I know you don't agree with the fact that you were dismissed. You think that there was a basis to – I understand that, but it seems from reading that text message that you understood you had been dismissed even though you disagreed.

PN46

MS CROKER: Yes.

PN47

DEPUTY PRESIDENT MASSON: Yes, I see. Thank you.

PN48

VICE PRESIDENT ASBURY: With respect to the incapacity that you say you were suffering from at the time you were attempting to make this application or considering to make this application, can we just identify the documents that you have relied on before the Deputy President; the medical documents that you relied on.

PN49

MS CROKER: Document G - - -

PN50

DEPUTY PRESIDENT MASSON: Document H, I think.

PN51

MS CROKER: - - - and document H. Document G was from my GP and document H was from the counsellor; the Women's Health mental health counsellor.

PN52

VICE PRESIDENT ASBURY: All right. Are there any other matters that you want to raise?

PN53

MS CROKER: I'm not sure. I'm happy to answer any questions that you have.

PN54

VICE PRESIDENT ASBURY: Do you say that you put information to the Deputy President about your personal circumstances involving the care for your daughter?

PN55

MS CROKER: Sorry, can you - - -

PN56

VICE PRESIDENT ASBURY: Did you tell the Deputy President that the issues associated with caring for your daughter had affected your ability to make the application?

PN57

MS CROKER: I'm not sure. I don't think I – I'm not sure. I don't think I did verbally say that at the hearing. I may have had it written in the submissions and maybe it was wrong of me to assume that he had remembered. It's hard to remember everything, I understand. I don't think I verbally said it in the hearing.

PN58

VICE PRESIDENT ASBURY: All right. Thank you.

PN59

DEPUTY PRESIDENT MASSON: Can I just ask one question in relation to the medical certificate you received from Dr Jeffrey Lee; that was document G. This was a consult, I believe – well, the medical certificate is dated 17 February 2023. Do you have a copy of that?

PN60

MS CROKER: Yes, I do, yes.

PN61

DEPUTY PRESIDENT MASSON: Now, I'm not sure, was that certificate requested or did you have a consult with the GP on that day? Did you just request he provide you with a certificate retrospectively in relation to a consult you had had on or about 30 December?

PN62

MS CROKER: I had been taking my daughter to see – he's my daughter's GP, as well, and in the appointment that I took my daughter to, I said to him that I need help, I'm – you know, I'm not good. I then had made the appointment and the earliest I could get an appointment with him was 30 December and - - -

PN63

DEPUTY PRESIDENT MASSON: I understand that, but I'm - - -

PN64

MS CROKER: Yes.

PN65

DEPUTY PRESIDENT MASSON: Did you sometime in February request the doctor to produce this report?

PN66

MS CROKER: I asked him – yes.

PN67

DEPUTY PRESIDENT MASSON: Yes.

PN68

MS CROKER: Yes, in – yes, because by that stage I then had been afforded the support I needed to put in the unfair dismissal claim and that we need to - - -

PN69

DEPUTY PRESIDENT MASSON: All right, but it seems the report which is written on 17 February seems to indicate that at least at that date you didn't yet have a mental health treatment plan. He says:

PN70

We have a consult booked to create a mental health treatment plan in order for you to see a therapist.

PN71

So did that occur after 17 February?

PN72

MS CROKER: I had been asking him since before my appointment on 30 December. He said I had to wait until my appointment on 30 December. When I saw him on 30 December he said that he was going to – he could only deal with one thing and I said, 'I need help – I need mental help. I need to talk' – yes, 'I'm struggling' I said 'with the dismissal', you know, and he said, 'Well, I can only deal with one thing', and he then – like he then performed this CT on my right arm because I said I've got an injury - - -

PN73

DEPUTY PRESIDENT MASSON: I understand that.

PN74

MS CROKER: Yes.

PN75

DEPUTY PRESIDENT MASSON: I'm just trying to understand did you see him after 17 February to establish a mental health plan, because that is what the certificate seems to suggest.

PN76

MS CROKER: I have seen him again - I have seen him for further appointments after 17 February, yes, and we do – there is a mental health plan in place.

PN77

DEPUTY PRESIDENT MASSON: Right, but the treatment you're referring to – the support you're referring to, is that related to the other report from the Gympie Women's Health which seems to indicate you were seeing a counsellor in that period?

PN78

MS CROKER: The first time I had help was in January. Before then I was left on my own. I had no contact from any doctors, any specialists - - -

PN79

DEPUTY PRESIDENT MASSON: I understand that.

PN80

MS CROKER: - - - any people.

PN81

DEPUTY PRESIDENT MASSON: I understand. I'm just asking you whether in your evidence the support you say you were getting ultimately, was that support through the counsellor referred to in document H?

PN82

MS CROKER: Yes, yes.

PN83

DEPUTY PRESIDENT MASSON: Okay. That's what I was trying to understand. Thank you.

PN84

VICE PRESIDENT ASBURY: Thank you. Ms Croker, can you just advise have you made any claims, for example, for workers compensation or similar - - -

PN85

MS CROKER: I have only recently – and I can't remember the date of it – contacted WorkCover. It was after the hearing decision of Lake DP. I was told that I had – I can't remember what he said, but to contact WorkCover. I was still – I still was suffering with weakness in my hands since the accident and so they said to put – and the psychologist – they said call WorkCover, so I did and I let them know that I was in the process of a Fair Work Commission – they are still in assessment and they've got it on hold.

PN86

VICE PRESIDENT ASBURY: Okay. Thank you for that. Is there anything else you would like to say? We will hear from Mr Lamb and maybe you can make a note of anything that Mr Lamb says because we're going to give you an opportunity to respond after Mr Lamb has made his submission, okay?

PN87

MS CROKER: Yes.

PN88

VICE PRESIDENT ASBURY: All right. Thank you. If you think of something that you didn't raise, you can ask us to have an opportunity to raise it and then we can give Mr Lamb an opportunity to further respond. All right?

PN89

MS CROKER: Yes.

PN90

VICE PRESIDENT ASBURY: Thank you. Mr Lamb?

PN91

MR LAMB: Thank you, your Honour. I will just keep our submission very, very brief because the Bench has already covered the issues that I was going to talk about. Number 1, the medical evidence, referring to the certificate from Dr Lee, if

you read that – and it has been identified that it was after the fact – it really looked like it was an issue relating to a physiological injury with regards to her arm and something like that; tennis elbow and things like that. It finishes up by saying:

PN92

At both of these consults Emma did mention she was suffering with stress and depression.

PN93

Now, that sentence there and the statement from the Gympie clinic as far as I can see is the only evidence provided to say that Ms Croker is suffering from some psychological injury and it was that reason why she couldn't complete her form. In a submission to Lake DP, Ms Croker admitted that she was filling out the form – she was about halfway through it – and this is supported by her witness statement, as well. Her witness statement of Mr Aaron Evans states to that effect, that it got too complex for Ms Croker and she then walked away from it.

PN94

The other issue is that Ms Croker was aware that she was dismissed and there is a conversation beforehand. So with regard to the extension of time, I believe that Ms Croker is relying on the fact that she was suffering from some psychological trauma, some injury or a condition. I believe it's reasonable to assume that if that had been the cause of it, there would have been some documentation from a psychologist or psychiatrist or even the general practitioner to that effect and I don't believe that has been provided.

PN95

The other one I just want to touch base on, your Honours, is in relation to a threshold matter I raised. I don't want to speak too much about that, but in relation to the fact that Ms Croker was employed by Erndit for two weeks as a casual employee before basically – we'll say dismissed, but not offered any further work, I believe that - - -

PN96

MS CROKER: I object. This hasn't - - -

PN97

VICE PRESIDENT ASBURY: Ms Croker, just wait for one moment, thank you. Sorry, Mr Lamb, continue.

PN98

MR LAMB: Thank you, your Honour. So without going into that in some detail, I believe that Ms Croker was employed as a casual by a carrier. KG Jennings and Son took over the run and they employed Ms Croker as another casual – on a casual basis – then it was the day after she was employed by Erndit Logistics that she had that accident, and it was two weeks later that she was told there's no further work. So I don't believe there is any continuity of employment when it comes to casuals and that's why I'm saying that this may be a jurisdictional matter that the Bench wants to consider with regards to that.

PN99

VICE PRESIDENT ASBURY: Well, Mr Lamb, I don't know how we can and I'll put this proposition to you. The respondent did not raise that matter in its form F3. It didn't object to the application on that basis, point 1. Point 2, your submission at first instance to Lake DP at point 2 – and you've signed and prepared the submission – says:

PN100

The applicant's engagement as a casual employee continued through the three employers.

PN101

So I don't know why you should be permitted to raise this issue in an appeal in circumstances where you could have raised it at first instance and in fact appear to have put a contrary submission before the Deputy President.

PN102

MR LAMB: Well, I withdraw that then, your Honour.

PN103

VICE PRESIDENT ASBURY: Okay. Thanks for that. Can you confirm that your client did not inform the applicant of its own initiative? There doesn't seem to be any written correspondence or anything from your client informing the applicant – or the appellant that she had been dismissed.

PN104

MR LAMB: No, I don't believe a letter was sent or any email.

PN105

VICE PRESIDENT ASBURY: No.

PN106

MR LAMB: It was just done verbally, your Honour.

PN107

VICE PRESIDENT ASBURY: And again you can agree or disagree with this: there doesn't seem to be any evidence contrary to what the appellant is putting and that is had she not picked up the telephone and rung your client, she wouldn't have known that she had been terminated.

PN108

MR LAMB: Could you speak with her Honour about that?

PN109

SPEAKER: There was a conversation a week prior to - - -

PN110

VICE PRESIDENT ASBURY: I'm sorry, I'm not asking for further evidence to be given. I'm saying point me to any evidence that the respondent put before the Deputy President to indicate that it took any step to inform the appellant that she had been dismissed other than a conversation that she initiated, during which she was extremely distressed seeking an update about what had happened with respect to her employment.

PN111

MR LAMB: Just on that, your Honour, I'm looking at a submission to Lake DP and I'm looking at the part with regards to the applicant's outlining of argument, merits.

PN112

VICE PRESIDENT ASBURY: Yes.

PN113

MR LAMB: It reads:

PN114

The words written by the applicant tend to support the fact that the applicant and the respondent did discuss the matter.

PN115

Yes, they did.

PN116

VICE PRESIDENT ASBURY: Other than relying on the appellant's own statements about what transpired in this conference or in this discussion, there is no evidence from the respondent where any person says, 'I unequivocally told the appellant she had been dismissed. I did it on this date. I sent her a letter, I sent her a text, I rang her', anything. The only evidence about it is what came from the appellant who also said – and it doesn't seem to be challenged:

PN117

I was extremely distressed. I was sobbing on the floor, I was so distressed.

PN118

MR LAMB: So I would suggest from that, your Honour, that there was a verbal notification that Ms Croker had been dismissed. I see that as self-evident. The fact that Mr Jennings didn't send anything down by email or anything in writing, I think that's accepted that it was a - - -

PN119

VICE PRESIDENT ASBURY: Is it also the case that there is no evidence – so what we have is a vehicle accident that was so serious the appellant was caused an injury that required her go and seek treatment at a hospital. The vehicle was written off and there was no contact with the appellant in respect of her wellbeing or any contact during that period other than when she initiated contact to find out what the status of her position was.

PN120

MR LAMB: I can't talk to that.

PN121

VICE PRESIDENT ASBURY: Well, Mr Lamb, you ran - - -

PN122

MR LAMB: A discussion - - -

PN123

VICE PRESIDENT ASBURY: No, Mr Lamb, I'm sorry, you ran the case at first instance. I'm asking you to point to any evidence that was before the Deputy President that indicates that anybody conducted a welfare check or took any step to ascertain the wellbeing of the appellant during that period, before she rang to find out what had happened with respect to this investigation and her employment.

PN124

MR LAMB: I'm not aware of any, your Honour.

PN125

VICE PRESIDENT ASBURY: Okay. So notwithstanding that, the respondent says there is insufficient evidence of the appellant's incapacity either physically or mentally preventing her from filing an application in time.

PN126

MR LAMB: Sorry, your Honour, I missed that point.

PN127

VICE PRESIDENT ASBURY: So despite the appellant(sic) taking no steps to independently ascertain anything about the appellant's wellbeing, it makes the submission that the Full Bench should be satisfied that there was insufficient medical evidence to support a finding that the appellant was prevented from filing her application within the required time because of a physical or mental incapacity. You're saying the evidence doesn't support that.

PN128

MR LAMB: That's correct, your Honour.

PN129

VICE PRESIDENT ASBURY: All right. I understand your submission. Is there anything else you want to add?

PN130

MR LAMB: No, thank you.

PN131

VICE PRESIDENT ASBURY: Thank you. Ms Croker, do you have anything in response?

PN132

MS CROKER: I believe the medical evidence does prove that I wasn't in the capacity because I couldn't get to a doctor – I wasn't afforded a doctor's appointment until 30 December. Before that date I was – I had nobody. I live on 50 acres, so it's rural not remote. It's rural, it's seven minutes out of Gympie, but I'm – and I had nobody contact me. I couldn't get into an appointment with doctors or any counselling.

PN133

The doctor was 30 December. The first time I could get an appointment with the counsellor at Women's Health wasn't until March. That's how long – and in the meantime I had to just try and survive. It's a blank to me, that period of time. I have not much memory because of my disability. I have disassociated because of the trauma and it's hard for me to articulate, because it's - - -

PN134

VICE PRESIDENT ASBURY: Yes, we understand. We have read the statement from the Women's Health treating practitioner and we understand what that difficulty is. Ms Croker, we're not unsympathetic - - -

PN135

MS CROKER: Yes.

PN136

VICE PRESIDENT ASBURY: - - - but the real issue whether that existed at the relevant time and it prevented you from being able to - - -

PN137

MS CROKER: A hundred per cent.

PN138

VICE PRESIDENT ASBURY: - - - effectively deal with the unfair dismissal application, and that's a matter we'll have to decide.

PN139

MS CROKER: Yes.

PN140

VICE PRESIDENT ASBURY: So we understand your submission in that regard. Is there anything else you want to say?

PN141

MS CROKER: Just that I wasn't able to even – no, I don't know. I can't – no.

PN142

VICE PRESIDENT ASBURY: I understand. We understand the difficulty from the Women's Health medical certificate. Thank you for that. All right. Thank you, parties, for your submissions. We will reserve our decision and we will issue it in due course. On that basis we'll adjourn.

ADJOURNED INDEFINITELY

[11.05 AM]