

Summary of Decision

3 September 2013



Hewitt v Topero Nominees Pty Ltd t/as Michaels Camera Video Digital

C2013/5100

[2013] FWCFB 6321

[1] The issue in this appeal was whether the Commission must make a determination that the applicant in a s.365 proceeding has been ‘dismissed’ from their employment (within the meaning of s.365), *before* the Commission can conduct a conference in relation to the dispute. The Appeal Bench concluded that the answer to this question is no and that the Commission does not have jurisdiction to effectively dismiss a s.365 application on the basis of a finding that the applicant was not ‘dismissed’ from their employment.

[2] Section 365 is part of Subdivision A of Division 8 of Part 3-1 of the *Fair Work Act* 2009 which establishes a scheme whereby persons who allege a dismissal in contravention of one or more of the prohibitions contained in Part 3-1 (general protections) may apply to the Commission for it to conduct a dispute resolution process.

[3] The appellant resigned from her employment with the respondent on 29 October 2012. On 9 January 2013 the appellant made an application to the Commission pursuant to s.365 of the Act. The appellant contended that she was forced to resign her employment because of the respondent’s conduct.

[4] In a decision of 19 June 2013, the Commissioner at first instance concluded:

“... that the Applicant was not dismissed from her employment. A dispute of requisite kind for an application under s.365 of the Act therefore does not exist. The Commission therefore has no power to issue a certificate as required under s.369 of the Act.”¹

[5] The effect of the Commissioner’s decision is that the appellant was unable to pursue her general protections application in the Federal Court or Federal Circuit Court because of the operation of s.371(1)(a) of the Act.

[6] On appeal, the question was whether it is sufficient for a s.365 application to state on its face that the applicant has been dismissed and that it is alleged that the dismissal was in contravention of Part 3-1, or is the Commission required to determine whether the applicant was dismissed from their employment as a jurisdictional prerequisite to a conference being conducted pursuant to s.368.

[7] The Appeal Bench held that:

“The content and structure of the Subdivision tells against the proposition that s.365 is to be read as imposing jurisdictional pre-conditions beyond the mere filing of an application alleging dismissal in contravention of Part 3-1. The Subdivision does not contemplate that the Commission would engage in any sort of determinative process in dealing with a s.365 application.

... it is sufficient to give the Commission jurisdiction to conduct a conference under s.368 that a s.365 application to state on its face that the applicant has been dismissed and it is alleged that the dismissal was in contravention of Part 3-1.” ([2013] FWCFB 6321 at [23] and [40])

[8] In reaching its conclusion, the Appeal Bench applied the decision of the Appeal Bench in *Hetherington-Gregory v Harrington Village Motel* and the decision of Vice President Hatcher in *Dr Linda Munjoma v Salvation Army (NSW) Property Trustee for Social Work*.

[9] The appeal was upheld and the Commissioner’s decision quashed. The appellant’s s.365 application will be remitted to Commissioner Johns for the purpose of conducting a conference pursuant to s.368.

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- ***This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission’s reasons.***

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¹ [2013] FWC 3711 at [69]