

[2024] FWC 1757 [[Note: This decision has been quashed - refer to Full Bench decision dated 13 November 2024 [\[2024\] FWCFB 429](#)] An appeal pursuant to s.604 (C2024/5180) was lodged against this decision.]



DECISION

Fair Work Act 2009
s.365—General protections

Dr Reuben Kirkham

v

Monash University, National Tertiary Education Industry Union & Others
(C2024/2913)

COMMISSIONER HUNT

BRISBANE, 10 JULY 2024

Application to deal with contraventions involving dismissal – applicant named 19 respondents – applicant employed by only one respondent – application against all other respondents dismissed.

[1] On 4 May 2024, Dr Reuben Kirkham made a claim pursuant to s.365 of the *Fair Work Act 2009* (the Act) alleging he was dismissed in contravention of the general protection provisions of the Act. Dr Kirkham named the following as Respondents to his application:

- Monash University;
- National Tertiary Education Industry Union;
- Professor Ann Nicholson;
- Dr Margaret Gardiner;
- Professor Matthew Gillespie;
- Professor Susan Elliott;
- Professor Kimbal George Marriott;
- Professor Maria Garcia De La Banda;
- Professor Jesper Kjeldskov;
- Professor Yiannis Ventikos;
- Professor Michelle Welsh;
- Associate Professor Kirsten McLean;
- Ms Fiona Hunt;
- Ms Irene Vidiniotis;
- Mr Angelo Yoannis;
- Ms Caroline Kubis;
- Ms Simone De Groot;
- Ms Katherine Knight; and
- Professor Helen Purchase.

(Collectively referred to as the Respondents.)

[2] The Respondents, except for the National Tertiary Education Industry Union (NTEU), are represented by Mr Stuart Pill and Mr Matthew Condello of Clayton Utz.

[3] The matter was allocated to me on 17 June 2024.

[4] Upon review of the application, I caused my chambers to inform the parties that I held a preliminary view that the application against all Respondents other than Monash University could not succeed before the Commission, as there was no employment relationship between Dr Kirkham and those Respondents, and therefore there cannot have been a dismissal, as required by s.365 of the Act. I informed the parties that there was essentially no prohibition on Dr Kirkham bringing a s.372 application in respect of all Respondents.

[5] Dr Kirkham requested a conciliation conference be held with all Respondents. I determined that was not appropriate and on 27 June 2024, I convened a conciliation conference between Dr Kirkham and Monash University. I informed the parties that I would provide to Dr Kirkham up until 3 July 2024 to withdraw his applications against all Respondents other than Monash University, or if he chose not to do that, I would likely issue a decision dismissing the applications against those Respondents.

[6] On 3 July 2024, Dr Kirkham filed written submissions to which I have had regard.

[7] On 4 July 2024, I caused my chambers to communicate with the parties, informing them of the Full Bench decision of *Lipa Pharmaceuticals Ltd v Mariam Jarouche*.¹ The parties were afforded until 4:00pm on 5 July 2024 to provide any views in respect of the *Lipa Pharmaceuticals* decision. The parties were ultimately afforded an extension to 9 July 2024.

[8] Dr Kirkham and the Respondents, excluding the NTEU, provided submissions which I have taken into consideration. The NTEU declined to make any submissions.

Legislative Provisions

[9] Section 365 of the Act provides as follows:

“365 Application for the FWC to deal with a dismissal dispute

If:

- (a) a person has been dismissed; and
- (b) the person, or an industrial association that is entitled to represent the industrial interests of the person, alleges that the person was dismissed in contravention of this Part;

the person, or the industrial association, may apply to the FWC for the FWC to deal with the dispute.”

[10] The meaning of “dismissed” is provided at s.386 of the Act:

“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 employer 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.”

[11] The Commission’s usual process with general protections matters is to deal with the dispute by conducting a conciliation conference by a staff conciliator. If it is satisfied that all reasonable attempts to resolve the dispute have been or are likely to be unsuccessful, the Commission will issue a certificate that allows the applicant to commence proceedings in a court (s.368(3)) or by arbitration in the Commission if consent is given by each party (s.369). However, in an application where the respondent or respondents deny that it or they dismissed the applicant and object to the application on this basis, the Commission is required to determine whether the applicant was dismissed.²

[12] Consistent with the Commission's usual practice on these matters,³ this matter has been allocated to me to determine whether or not there was a dismissal. A person must have been dismissed to be entitled to make a general protections dispute application and before the Commission can exercise powers under s.368 to deal with a dispute.⁴

Consideration

[13] Dr Kirkham was not employed by the individually named Respondents, nor was he employed by the NTEU. He was employed only by Monash University.

[14] In the absence of an employment relationship with all Respondents other than Monash University, there cannot have been a dismissal of Dr Kirkham by any or all of the Respondents other than Monash University.

[15] Pursuant to the decision in *Lipa Pharmaceuticals*, the Commission is not permitted to 'deal with' the dispute and accordingly, must not convene a conciliation conference with the Respondents other than Monash University.

Conclusion

[16] Dr Kirkham has not been dismissed by any of the Respondents other than Monash University.

[17] The application against all Respondents other than Monash University is dismissed.



COMMISSIONER

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¹ [2023] FWCFB 101.

² *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152, [67]; *Lipa Pharmaceuticals Ltd v Marouche* [2023] FWCFB 101, [23].

³ Following the decision in *Lipa Pharmaceuticals Ltd v Marouche* [2023] FWCFB 101 the Commission changed its case management practices from 1 June 2023 for General Protections cases involving dismissal where certain jurisdictional issues arise.

⁴ *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152, [54].