DECISION

Fair Work Act 2009
s.365 - Application to deal with contraventions involving dismissal

Julie Hourigan

v

Australian Financial Complaints Authority Limited
(C2024/174)

COMMISSIONER WILSON MELBOURNE, 8 JULY 2024

Application to deal with contraventions involving dismissal. Revocation of certificate issued pursuant to s.368(3)(a).

[1] An application pursuant to s.365 of the Fair Work Act 2009 (the Act) was made by Ms Julie Hourigan (the Applicant), alleging she was dismissed by the Australian Financial Complaints Authority Limited (the Respondent) in contravention of Part 3-1 of the Act.

[2] On 26 June 2024, a certificate was issued pursuant to s.368 of the Act, certifying that the Fair Work Commission (the Commission) is satisfied that all reasonable attempts to resolve the dispute have been, or are likely to be, unsuccessful. The Applicant vigorously contests the issuance of that certificate.

[3] When the certificate was issued to the parties the following reasons for its issue were provided;

> "For the reasons set out below, I have determined to issue a certificate under s.368(3)(a) and to close the file in this matter.
>
> On 9 January 2024 Ms Hourigan lodged a general protections application in relation to her dismissal by the Australian Financial Complaints Authority Ltd which took effect on 19 December 2023.
>
> In her application Ms Hourigan asserts adverse action in several forms coupled with proscribed reasons or protected attributes of several types. While the application form does not precisely state the contraventions she alleges, at least the following may be discerned from the application form:
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> - Injury in her employment for unspecified reasons;
> - Complaints made about her manager, which led to unequal treatment and bullying;
> - Unequal treatment and bullying after moving teams;
> - A refusal to agree to a request to be moved to a further team; and

- Discrimination due to a mental disability.

On 6 February 2020, the application was referred to me to be dealt with, meaning for the conduct of the conciliation conference, in order to endeavour to settle the matter without it progressing to a consent arbitration or a court hearing.

After allocation of the file to me the matter was initially listed for a conciliation conference to be held on Friday, 8 March 2024. The conference did not proceed when the Applicant advised the Commission she was unwell. The conciliation conference was then relisted for Tuesday, 12 March 2024. The listing for that conference was also vacated at the Applicant's request due to illness. On 14 March 2024, the Applicant provided material reinforcing she is unable to participate in the conciliation conference.

Attempts were then made to relist the conciliation conference to 23 April 2024 and later to 17 May 2024 which were also unsuccessful, also for reasons of the Applicant's ill-health.

In endeavouring to list the matter for a conciliation conference the Commission has proposed the conference be conducted with the parties in separate rooms, in order to ensure safe and respectful discussion. The Applicant has also been referred to the Commission's Workplace Advisory Service for the provision of free legal assistance.

In deciding to issue the s.368(3)(a) certificate I have taken into account not only the matters above, but also that the obligation cast on the Commission in relation to this matter by reason of the *Fair Work Act 2009* is to "deal with" the matter other than by arbitration (s.369(1)) and that the certificate is to be issued if the Commission "is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful" (s.368(3)). The limited exception to dealing with the dispute on these bases is if the parties notify the Commission after a certificate has been issued that they agree to the Commission arbitrates the dispute (s.369(1)(b)).

In relation to s.368(3), I consider that all reasonable attempts to resolve the matter other than by arbitration have been made. To list the matter on four separate occasions over an extended period and none of them take place is extraordinary, notwithstanding matters of illness of the type set out by the Applicant in the material provided to me. I also take account of the provisions of s.577 of the Act, which obliges the Commission to perform its functions and exercise its powers in a manner that is fair and just and is quick, informal and avoids unnecessary technicalities.

To maintain the file for a conciliation listing that may never take place would fail to satisfy the mandate in s.577. On the other hand, to proceed as I have will create no injustice for the Applicant as provision of the s.368(3)(a) certificate enables her to continue to agitate her claim of contraventions of the Act by the Respondent, albeit in a Court, rather than the Commission."

[4] On 4 July 2024, the Applicant requested that the certificate be revoked by the Commission, pursuant to s.603 of the Act (the Revocation Application). Consequently, the parties were directed to provide such further material as they sought me to take into account in the making of my decision on the revocation application.

[5] The Applicant's submissions dealt with several issues, including what she said was an agreement of the Respondent to adjourn the application, with her being available for conciliation from 21 August 2024. She also put forward that she had not been asked to provide any additional support for the matter to be scheduled for a conciliation or to ensure the file was not closed and a certificate issued. Further, the Applicant argued that she was not provided with an opportunity to respond to the Commission's concerns prior to the decision to close the file and issue a certificate.

[6] The Respondent, the Australian Financial Complaints Authority Ltd, objected to the revocation application, arguing that it is a further attempt to relitigate the question of whether a further adjournment should be granted to the Applicant. It also rejected that it had agreed to an adjournment of the length sought by the Applicant.

[7] The Respondent's submissions noted the authorities that should be applied in consideration of a matter such as this, namely: *Asmar v Fair Work Commission* [2015] FCA 16; *Grabovsky v United Protestant Association of NSW Ltd* [2015] FWC 5161; *Health Services Union v Victoria No.1 Branch, Diana Asmar and Nick Katsis* [2015] FWCFB 5261.

[8] The President, Justice Ross, in *Grabovsky* after giving consideration to the statutory development of ss.602 – 603, drew a distinction between the two sections, putting forward that it was apparent that s.603 is intended be broader than the statutory form of the "slip rule" which is otherwise dealt with in s.602 and, pertinent to s.603;

> "[37] It is apparent from its terms and the legislative context that s.603 is intended to be broader than a statutory form of the slip rule. So much is clear from s.602, which is directed at slip rule problems. The question is how broad the power is and in what circumstances should it be exercised?
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> [38] The power to vary or revoke a decision has generally only been exercised where there has been a change in circumstances such as to warrant the variation or revocation of the original decision or, where the initial decision was based on incomplete or false information, fraudulently procured or otherwise.
>
> [39] As a general proposition applications to vary or revoke a decision should not be used to re-litigate the original case. After a case has been decided against a party, that party should not be permitted to raise a new argument which, deliberately or by inadvertence, it failed to put during the original hearing when it had the opportunity to do so."[1] (citations omitted)

[9] After consideration of all matters on the file to date, I accept that there may be two instances in which it could be said that the issue of the certificate relied upon incomplete information. Those instances are first with respect to the content of a medical certificate provided to the Commission by the Applicant on 18 June 2024; and second whether the Applicant was adequately put on notice that the Commission was considering issuing the certificate over her objections.

[10] The medical certificate provided by the Applicant on 18 June 2024 differed in content from the earlier certificates provided by her on 12 June 2024. These latter certificates certified that the Applicant was "unable to follow their daily occupation" between defined dates and that she has "no capacity for employment" between two dates. The third medical certificate dated 18 June 2024 declared the Applicant to be "unfit to participate in any conciliation for her work related issues, or make decisions related to it until she is cleared by the cardiologist to do so".

[11] Proceedings before the Fair Work Commission are not synonymous with attendance at work and a certification to the effect that a person has no capacity to perform their daily occupation or their employment is not usually a sufficient declaration to the effect that they are unable to commence, maintain or participate in proceedings before the Fair Work Commission. In fact, many people do so on a daily basis despite medical certificates which might otherwise suggest an inability for them to perform work.

[12] Plainly the third certificate is in a different category to the first two certificates, proffering an altogether different opinion.

[13] While different, a certificate of the third type does not stand to force an indefinite adjournment of proceedings. The Applicant herself said she would be available "after 21 August 2024" and the third certificate needs to be read in that context, to adjourn the proceedings for a finite period.

[14] With respect to the second matter, the file indicates that on 14 June 2024, solicitors acting for the Respondent provided submissions in response to an invitation from the Commission, which submitted that the most recent request on the part of the Applicant contemplated "a further indefinite adjournment of the matter in the manner that the Commission has previously identified is not appropriate". Following receipt of this correspondence, and also on 14 June 2024, the Applicant was invited "to provide her responsive view" about this submission of the Respondent.

[15] While seeking "responsive views", it was not said to the Applicant that the views were required for the purpose of the Commission considering whether the s.368(3)(a) certificate should be issued, notwithstanding her objections.

[16] In the circumstances, I consider these matters in combination are sufficient to allow the view that the original decision to issue the certificate was made on the basis of incomplete information.

[17] I consider that it is appropriate, in the interest of fairness and efficiency, to revoke the certificate, to allow the issues pursuant to s.366 of the Act to be determined.

[18] Accordingly, I grant the Applicant's application, pursuant to s.603 of the Act, to revoke the certificate under section 368 issued on 26 June 2024.

[19] The matter will be relisted for a conciliation conference to be held on Tuesday 3 September 2024 at 10 AM by Microsoft Teams.

COMMISSIONER

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<PR776733>

[1] *Grabovsky v United Protestant Association of NSW Ltd* [2015] FWC 5161