



DECISION

Fair Work Act 2009

s.365 - Application to deal with contraventions involving dismissal

Ms Georgina McBride

v

Flexy Services Pty Ltd

(C2024/2298)

DEPUTY PRESIDENT O'KEEFFE

PERTH, 16 JULY 2024

Application under s365 – jurisdictional objection (not dismissed)

[1] Georgina McBride (**the Applicant**) was first employed by Flexy Services Pty Ltd (**the Respondent**) as a casual employee in May 2022. The Respondent is engaged in the business of providing labour to various other organisations. From 27 June 2022, Ms McBride was placed in a position where she undertook work for Rio Tinto, who are a client of the Respondent. In the first instance, this placement or “assignment” with Rio Tinto was scheduled to end on 25 June 2023. However, on 26 June 2023 the assignment was extended to 25 June 2024 and at that time Ms McBride received a pay increase.

[2] In December 2023 the Respondent conducted a review of Ms McBride’s casual employment to assess the possibility of conversion to permanent employment. However, as the assignment extension was scheduled to end on 25 June 2024, the Respondent advised Ms McBride by email that it could not offer her a permanent role. It appears Ms McBride was unsure of the purpose of that email and questioned Ms Cathy William – the Respondent’s Onboarding and Mobilisation Manager – about its effect. Ms McBride was assured that she would remain at Rio Tinto and that the assessment was part of the Respondent’s duties to its casual employees imposed by the *Fair Work Act 2009* (**the Act**).

[3] Thereafter Ms McBride continued to perform work for Rio Tinto until the middle of March 2024 when she was advised by officers of Rio Tinto that she would no longer be required to perform work for the company. On 27 March 2024, Ms McBride applied to the Fair Work Commission (**the FWC**) under s. 365 of the Act alleging she had been dismissed in contravention of the general protections provisions. This application was made against the Respondent in this matter. That application was subsequently withdrawn and on 9 April 2024 Ms McBride again applied to the FWC under s.365 with the application again made against the Respondent.

[4] It is against that second application that the Respondent has lodged its jurisdictional objection and to which I turn my attention. It is clear that for the FWC to have jurisdiction to deal with a s.365 application the applicant must have been an employee of the Respondent who was dismissed at the initiative of the Respondent. Before considering the submissions and

evidence of the parties on those issues, it is appropriate that I provide some background to the conduct of the case. Upon reading the submissions of both parties, I was concerned that Ms McBride had not properly explained how or when it was that her employment had been terminated by the Respondent. As a result, I had resolved to seek oral submissions from Ms McBride on this issue at the beginning of the scheduled hearing to determine how the matter should proceed.

[5] Unfortunately, Ms McBride's representative was also due to appear before Deputy President Millhouse in a separate FWC matter on the day of the hearing and as such the hearing before me could not commence. Given that the Respondent was legally represented, I resolved to require Ms McBride's representative to provide reasons for non-attendance and to also address the issues that I believed were unclear before I would take any further action with the claim. As such, my Chambers sent an email to the parties which stated, in part, as follows:

"...It does not appear to the Deputy President that there is any specific allegation of termination against the Respondent. Given this, there is a question as to whether the application itself is competent. The Deputy President notes the following items from the witness statement of Ms McBride:

(Court Book page 29 para 14) - it appears this was an undertaking made by Rio Tinto without consultation with Flexy Services.

(Court Book Page 29 Para 15) – "I was notified that my contract was being terminated." This appears to have been advice from within Rio Tinto and not from Flexy Services.

(Court Book Page 29 Para 16) – CBRE does not appear to be a related entity of Flexy Services and any actions taken by CBRE would not appear to be either sanctioned by or within the knowledge of Flexy Services.

(Court Book Page 30 Para 19) – Flexy Services sends a letter to Ms McBride (see Court Book page 97) making it clear that Ms McBride's employment with Flexy is not terminated and seeking her availability for other casual work. Ms McBride does not respond to this letter.

In light of these observations drawn from Ms McBride's witness statement, the Applicant is directed to provide additional written submissions as to when, by who, and by what specific mechanism the Applicant was terminated by the Respondent, and to provide reasons as to why the Commission should regard the current application before it as competent..."

[6] Ms McBride provided an email in response to my question and at my invitation the Respondent provided reply submissions to that email. Having read Ms McBride's email and the Respondent's reply submissions, I formed the view that it would be appropriate that the matter be determined on the material before the FWC as opposed to conducting a hearing. As such, I sought the views of the parties who both indicated that they agreed with this course of action.

Submissions and evidence for the Respondent

[7] The Respondent submitted that Ms McBride’s employment with it had not ended but that if it was found that it had, it had not done so because she had been dismissed. The Respondent noted that at no time had it given Ms McBride any notice of dismissal and provided witness statements from four of its employees to support this contention. Drawing from the oft-cited case law on the subject of dismissal, the Respondent says that the circumstances of Ms McBride’s employment do not fall within the scope of either s.386(1)(a) or s.386(1)(b) of the Act.

[8] It was the Respondent’s further position that under the terms of Ms McBride’s casual employment agreement - which was in evidence - there had been no dismissal at the Respondent’s initiative. The Respondent drew upon specific terms of that agreement to illustrate the nature of its employment relationship with Ms McBride. In essence, it says Ms McBride was a casual employee who could be engaged by the Respondent to perform work for its clients. Such engagements – called assignments – would operate according to the terms of the casual employment agreement plus any terms specific to the particular assignment. An assignment could be terminated during its term by the Respondent for a range of reasons as set out in the contract. Otherwise, at the end of an assignment, the employee’s employment would end, but the casual employment agreement may continue to operate.

[9] The Respondent submits that the evidence demonstrates no communication from the Respondent to terminate the assignment or the employment relationship. Instead, the only item of correspondence from the Respondent confirms that the employment relationship as established by the casual employment agreement remained in place. The Respondent also touches on the notion of constructive dismissal as contemplated by s.386(1)(b). It observes that in her originating application Ms McBride does not assert that she resigned or in any way suggest there may have been a constructive dismissal. However, I note that such an allegation was later made in Ms McBride’s submissions and is dealt with below.

[10] The evidence for the Respondent was provided by four witnesses being Ms Emily Allport (Senior Contract Advisor), Ms Catherine William (Onboarding and Mobilisation Manager), Ms Sophie Walker (Recruitment Administrator for Guidant Global, an associated entity of the Respondent) and Ms Kelly-Ann Lynch (Managing Director of Guidant Global). None of the witness evidence for the Respondent was directly challenged by Ms McBride. Although in her submissions there were statements alluding to inconsistencies in the witness evidence and suggesting there may be credibility issues, no such issues were actually identified. Further, the evidence from the witnesses went mainly to processes and was supported in most cases by documentary evidence of those processes. As such, I resolved to accept that the evidence from the Respondent’s witnesses should be regarded as reliable.

[11] From the evidence of the Respondent’s witnesses, it is possible to derive the history of their involvement in this matter and create a timeline of the most relevant events as perceived by the Respondent as an overall entity. Such timeline is as follows:

28 March 2024	Email from FWC received by Ms Allport advising that Ms McBride had lodged a s.365 application. ¹
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- 8 April 2024 FWC contacts Ms Allport regarding the s.365 application. Ms Allport consults the Respondent's internal system "Fieldglass" to check the status of Ms McBride's assignment with Rio Tinto. According to Fieldglass there have been no changes to the status of Ms McBride's engagement and Ms McBride had submitted a timesheet for the week ending 7 April 2024. Ms Allport advises the FWC correspondent of this. Ms Allport then performs further checks and finds that the usual process for terminating an assignment had been not completed with respect to Ms McBride.²
- Catherine William is contacted by Ms Allport regarding the first s.365 claim. Ms William was previously unaware that Ms McBride was alleging dismissal. Ms William had no knowledge at this time of any issues with Ms McBride's assignment with Rio Tinto, despite her being responsible for any cases of termination of an assignment or dismissal.³
- 9 April 2024 Ms Allport receives an email from the FWC confirming the s.365 application from Ms McBride had been discontinued and informs Ms William.⁴
- 15 April 2024 Ms Allport receives a further email from the FWC advising of a new s.365 application from Ms McBride and advises Ms William. Ms William is unaware of any correspondence to the effect that Ms McBride's assignment has been terminated. Ms Allport then checks Fieldglass and finds that Ms McBride's assignment with Rio Tinto had been closed.⁵
- 22 April 2024 Ms Allport contacts Ms Walker and queries the closure of Ms McBride's assignment in Fieldglass. Ms Walker checks and confirms that the assignment had been closed on 15 April by Ms Paula Skidmore of Rio Tinto. Ms Walker regarded this is most unusual as normally a client would not close off an assignment. Further, Ms Walker did not see any correspondence from Rio Tinto regarding the early cessation of Ms McBride's assignment.⁶
- 23/24 April 2024 Ms Kelly-Ann Lynch makes enquiries with various subordinates as to whether Rio Tinto had advised the Respondent they wished to terminate Ms McBride's assignment prior to its end date. She was advised that no such advice had been received. At the date of signing her witness statement, Ms Lynch had still not received any information from Rio Tinto regarding the closing of Ms McBride's assignment.⁷
- 26 April 2024 Ms William sends an email to Ms McBride confirming that Ms McBride was still an employee and asking her to confirm that she

wanted to be considered for other casual assignments. No response was received.⁸

[12] In its initial reply submissions, the Respondent took issue with the lack of specifics in Ms McBride's submissions regarding her dismissal. It noted that there was no identification of a specific act which was said to have brought about the dismissal and no evidence of communications from the unidentified person or persons who Ms McBride claims advised her she was dismissed. Further, the Respondent points out that Ms McBride concedes she was sent and received a letter asking her if she wanted further work and by her own admission made no response.

[13] The Respondent also took issue with Ms McBride's allegation that she was constructively dismissed, suggesting that apart from other considerations, there was no evidence of the actions Ms McBride attributed to the Respondent that would have created a situation in which constructive dismissal – forced resignation – could be claimed.

[14] The Respondent also noted the important distinction to be made between the termination of an employment contract and the termination of an employment relationship. It suggested that in the present circumstances the ending of an assignment indicates the end of an employment contract but not necessarily the employment relationship. It further suggested that should the employment relationship end by virtue of no further assignments being offered, then this would be consistent with the terms of the casual engagement as agreed between the parties.

[15] The Respondent made a final submission addressing what it suggested was Ms McBride's actual complaint: that she had been promised a permanent role with Rio Tinto and no such role was provided. The Respondent did not concede that this had happened due to the lack of evidence. However, it says that if it did, then those actions were not the actions of the Respondent and thus do not constitute a dismissal.

Submissions and evidence for Ms McBride

[16] Ms McBride says that contrary to the claims of the Respondent, she was dismissed at the Respondent's initiative. She submits that the evidence demonstrates the Respondent's actions and communications indicated a clear intention to dismiss her. She says that her employment ended when she was informed that she was no longer required to work for the Respondent's client Rio Tinto and that this communication, and the subsequent lack of any work assignments constituted a dismissal under the Act.

[17] Ms McBride further says that the Respondent's assertions that her employment is ongoing is contradicted by its own communications indicating a cessation of work assignments and no further engagement. She says that even if the Respondent did not dismiss her explicitly, its actions left her no reasonable option other than to regard her employment as at an end. As she states:

“The Respondent's failure to provide work assignments, coupled with the knowledge of the Applicant's pregnancy, contributed to the constructive dismissal.”⁹

[18] In her witness evidence, Ms McBride says that she was told repeatedly by management of Rio Tinto that she would be given a permanent position with Rio. She further says that despite advising Rio Tinto that she was pregnant, she was given an assurance about employment in a one-on-one Teams call in January 2024. The assurance was that if a permanent role was not available by the time of her expected due date, she would be contracted and allowed to work part time until a permanent role – presumably full time - became available.

[19] Ms McBride further states that notwithstanding this assurance on 14 March 2024 she was notified that her contract with Rio Tinto was being terminated. Ms McBride says that on 15 March 2024 she sought clarification from Rio Tinto management about her position. She does not specify what if any response was provided.

[20] It is important that I clarify the nature of the evidence provided by Ms McBride in her witness statement. She does not disclose by what method or by who she was advised on 14 March 2024 that she was being dismissed. It is perhaps implied that it was someone from Rio Tinto but there is no supporting evidence such as an email to allow me to clarify this. Certainly, there is no suggestion implied or otherwise that it was someone from the Respondent.

[21] It was for this reason that I sought the clarification as set out in paragraph 5 above. While I have received a response to my request from Ms McBride, it has not provided much clarity. In the response, Ms McBride states as follows:

“a. Notification of Termination:

- Date: 14 March 2024

- By Whom: Rio Tinto representatives informed Ms McBride of the termination of her engagement.

- Mechanism: Via email communication and meetings... ”¹⁰

As can be seen, while the above confirms that it was Rio Tinto representatives who informed Ms McBride of her dismissal, there are no specifics of who it was or copies of the email(s) to which Ms McBride refers.

[22] Ms McBride provided a further submission about the dismissal process in her response. She says that she:

“...sought clarification on her employment status multiple times (emails dated 15 and 19 March 2024), highlighting her concerns about the termination and the lack of alternative assignments from Flexy Services.”¹¹

The emails dated 15 and 19 March 2024 were in evidence, having been lodged with Ms McBride’s initial application. While they appear to be seeking answers from Rio Tinto, they do not pose any questions about alternative assignments and are not addressed to the Respondent in any case. As such, any assertion that these emails highlighted concerns about lack of alternative assignments and that the Respondent was aware of the emails is misconceived.

[23] As set out in paragraph 5, I requested that Ms McBride explain in response why her application was in fact competent as it appeared to me that it was not alleging any termination by the Respondent. In addressing this, Ms McBride says that:

“The termination of (her) engagement at Rio Tinto, facilitated by Flexy Services, constitutes a dismissal under section 386(1)(a) of the FW Act. Despite the letter from Flexy Services, the lack of further assignments and the termination of the only ongoing engagement indicate the end of her employment... Even if the termination was not explicit from Flexy Services, the actions of Rio Tinto and the subsequent inaction by Flexy Services left Ms McBride with no reasonable choice but to consider her employment ended, fulfilling the criteria for constructive dismissal under section 386(1)(b) of the FW Act.”¹²

I should note that later in the response, Ms McBride seems to suggest that the facilitation of her dismissal by the Respondent was due to its inaction.

[24] As noted above, I provided the Respondent with an opportunity to respond to Ms McBride’s response to my email. In that response, the Respondent identifies the same issues that I have outlined in paragraphs 21 and 22. It notes further that Ms McBride does not identify any communication between her and the Respondent that advises the Respondent that her assignment had been terminated by Rio Tinto. The Respondent also notes that Ms McBride has not specified the time period during which she expected to be offered assignments and reiterates that the Respondent did not become aware that she was no longer working at Rio Tinto until after the second s.365 application.

Consideration

[25] Ms McBride has variously alleged that she was dismissed by the Respondent who indicated such an intention, dismissed by Rio Tinto but with the Respondent’s facilitation and constructively dismissed. Relevantly, she has not at any time alleged that she was an employee of Rio Tinto and the facts as presented make it very clear that she was an employee of the Respondent. I should note here that if I were required to make a decision on whether Ms McBride was either alternatively or additionally an employee of Rio Tinto, I would find that she was not. It is clear from the modern authorities that no such employment relationship existed. As such, my consideration proceeds on what I regard as the uncontroversial premise that Ms McBride was employed by the Respondent and not by Rio Tinto. I will address all of the contentions regarding dismissal as set out above and will first deal with the allegation of constructive dismissal or forced resignation.

[26] This appears to be a difficult claim to sustain on any number of fronts and was not claimed in the originating application. In the first instance, Ms McBride has not identified any point in time where she has actually resigned. And I do not think she is able to do so as it appears that she has never advised the Respondent that she has resigned. It is long established that an employee is not dismissed until he or she is made aware of the dismissal. It seems correct to observe therefore that an employer cannot be aware that an employee has resigned in the absence of such notification.

[27] What may be the case is that an employer decides after a period of non-attendance that the employee has abandoned their employment. It may well be that an employee could be forced to abandon their employment due to a course of action from their employer and this might equate to a forced resignation. However, given that Ms McBride sought reinstatement in her application, it is difficult to conclude that she intended to abandon her employment. If she has neither abandoned her employment nor resigned, I do not think she can be said to have been forced to resign.

[28] Another difficulty comes with the requirement that there be action on the part of the employer that leaves the employee with no choice other than to resign. I note again that Ms McBride did not advise the Respondent that she was no longer working at Rio Tinto other than via her second s.365 application. I accept that the Respondent was unaware until that time that she was no longer working at Rio Tinto. When it found out, it took steps to investigate what was going on and then sent a letter to Ms McBride advising her that she was still an employee. And that she could nominate her availability for future placements.

[29] I do not accept that there was a failure to offer placements in what Ms McBride refers to as an interim period – a concept she does not clearly explain. The only slight delay I can see in the Respondent's process is the period between 15 April 2024 and 22 April 2024 where Ms Allport seems to have had a short delay in contacting Ms Walker. Once Ms Walker is made aware of the situation on 22 April 2024, Ms Lynch makes inquiries on 23 and 24 April 2024 as to what was going on with Ms McBride's placement. 25 April 2024 is a public holiday and then on 26 April the Respondent sends its letter to Ms McBride. I note that relevantly, Ms McBride herself has not contacted the Respondent during this time. In summary I cannot find that the actions of the Respondent are such that Ms McBride would be entitled to view herself as having no choice but to resign. As such, I reject the constructive dismissal / forced resignation argument.

[30] I then turn to the argument that the Respondent has facilitated the dismissal. Noting again the timeline of events, I cannot accept that the Respondent - who in the main was unaware of what was going on – can be said to have facilitated the process. The Respondent has been a passive participant who appears to me to have taken reasonable actions when it became aware of what had happened.

[31] This leaves the issue of Rio Tinto dismissing Ms McBride. Put in its simplest terms, Rio Tinto cannot dismiss Ms McBride in the usual industrial understanding of dismissal because Ms McBride was never an employee of Rio Tinto. The employment situation in labour hire arrangements has been the subject of much discussion in the case law. However in the case of Ms McBride the simple equation is that she was an employee of the Respondent, whose business involves providing labour to other employers on an "as needs" basis. Ms McBride, under a contract of employment with the Respondent, was sent to provide labour to Rio Tinto. She was not sent to Rio Tinto as an employee of Rio Tinto.

[32] Given this, Rio Tinto cannot dismiss Ms McBride in the industrial sense because it did not employ her. A third party cannot insert itself into the employment relationship and declare that relationship over. That is not to say that Rio Tinto cannot dispense with Ms McBride's services. For example, it can simply advise the Respondent that it no longer requires labour to be provided. There may be some contractual issues between the Respondent and Rio Tinto if

there had been prior agreement for labour to be provided for a fixed time period and no contractual ability to reduce that time period. But that is a contractual issue between the Respondent and Rio Tinto based on whatever services agreement they had struck. That dispute, while clearly having implications for Ms McBride, does not mean that she is dismissed by her employer, being the Respondent.

[33] I accept that in this case, the usual process for the ending of an assignment was not followed. Normally Rio Tinto would contact the Respondent to advise that labour was no longer required and the Respondent would terminate the assignment in its Fieldglass system. In this instance Rio Tinto has ended the assignment itself in Fieldglass without advising the Respondent. As such, the Respondent was not aware of what was happening to its employee.

[34] I make no criticism of the Respondent for this: I imagine its employees are spread far and wide and it relies on communication from its customer or its employee to advise of changes in circumstance. In this instance, it received no such communication. When it became aware of the circumstances of its employee it conducted investigations to determine what had occurred and then wrote to the employee to advise that she was still employed. Having chosen for whatever reason not to contact the Respondent to advise of her situation prior to receiving this letter, Ms McBride then chose not to respond to the letter. While in normal circumstances it might have been incumbent on the Respondent to follow up this letter, given that it had a s.365 application against it on foot, the Respondent can be excused for simply deciding to participate in the FWC's process.

[35] I should also comment on Ms McBride's concern about there being no further assignments offered. I make two points in response. Firstly, the Respondent was aware that Ms McBride was pregnant. Given this, it is understandable that it would seek to get some indication from her as to her assignment preferences and no response was provided. Secondly, Ms McBride is a casual employee and consistent with the terms of her contract, she had no guarantee of work and further, would not be obliged to accept any assignment offered. Given this, it is appropriate that the Respondent sought to understand Ms McBride's preferences before offering any further assignments.

Conclusion

[36] As I have found above, I do not accept that Ms McBride's situation is one of forced resignation or dismissal facilitated by the Respondent. While she might claim Rio Tinto dismissed her, it had no power to do so and such an action would have no legal effect. This may well give rise to the question: what is Ms McBride's status with the Respondent as of the present? In my view, she is either a casual who is still in an employment relationship but is refusing to advise her employer as to her availability for work, or she has chosen to abandon her employment. For completeness, such abandonment cannot be said to be in circumstances where it was forced by the Respondent because Ms McBride had no other options. Whichever of these two options is applicable makes no difference to the disposition of her s.365 application. She has not been dismissed at the initiative of the Respondent and as such the FWC has no jurisdiction to hear the matter. Ms McBride's application will be dismissed.



DEPUTY PRESIDENT

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¹ Witness Statement of Emily Allport, [9].

² Ibid, [10-12] and [15-16].

³ Witness Statement of Catherine William, [16-18].

⁴ Ibid [18], (n 1) [20-22].

⁵ (n 3) [20-21], (n 1) [20-22].

⁶ Ibid [22], Witness Statement of Sophie Walker, [4-10].

⁷ Witness statement of Kelly-Ann Lynch, [5-8].

⁸ (n 3), [22-23].

⁹ Applicant submissions, [15].

¹⁰ Applicant email, dated 25 June 2024, [2].

¹¹ Ibid, [2].

¹² Ibid, [4].