

[2024] FWC 2204 [Note: An appeal pursuant to s.604 (C2024/5873) was lodged against this decision - refer to Full Bench decision dated 8 January 2025 [\[2025\] FWC FB 2](#) for result of appeal.]



DECISION

Fair Work Act 2009
s.365—General protections

Joel Minchin

v

Civmec Construction & Engineering Pty Ltd
(C2024/3969)

DEPUTY PRESIDENT BEAUMONT

PERTH, 20 AUGUST 2024

Application to deal with contraventions involving dismissal; jurisdictional objection that the Respondent was not the Applicant's former employer; Applicant employed by wholly owned subsidiary of the Respondent; fact of a dismissal; jurisdictional objection dismissed

Dispute and outcome

[1] Mr Joel Minchin (the **Applicant**) applied under s 365 of the *Fair Work Act 2009* (Cth) (the **Act**) for the Commission to deal with a general protections dispute involving dismissal. The Applicant submitted that Civmec Construction & Engineering Pty Ltd (the **Respondent** or **Civmec**) contravened the general protections provisions in Part 3-1 of the Act.

[2] Notwithstanding the Applicant naming the Respondent as a party to the proceedings, Multidiscipline Solutions Pty Ltd (**MSP**) responded to the application by filing a Form F8A – Response to a general protections application involving dismissal. This was despite the Applicant naming Civmec as the Respondent. The contact person named on the Form F8A was Stephanie Baptist, Civmec Construction and Engineering, Group Manager HR and IR.

[3] Whilst MSP responded to the application asserting that it was the Applicant's former employer and consequently filed materials in accordance with the directions issued, the Applicant, who was self-represented, pressed that he did not seek to amend his application to include MSP as a party in addition to Civmec, or to otherwise press his application solely against MSP.

[4] MSP and Civmec were therefore asked, given the materials MSP had filed, whether MSP was authorised to deal with the matter on behalf of the Respondent. In response, Ms Baptist, who had filed the Form F8A on behalf of MSP, responded that Civmec had not authorised MSP to respond to the application and to comply with the directions on its behalf. This is notwithstanding Ms Baptist having been copied to correspondence from Chambers concerning the matter and having been named as the contact on MSP's Form F8A.

[5] Whilst the matter was listed for hearing on 15 August 2024 to deal with MSP's jurisdictional objection that the Applicant was not dismissed but voluntarily resigned from his employment, the Respondent asserted that it was now at the disadvantage of finding itself dealing with the application when it had contended that it was not the Applicant's employer. The Respondent requested that the hearing be vacated or otherwise be used to consider the dismissal of the Applicant's application.

[6] I acceded to the request for the hearing to be vacated but was not minded to consider whether, at that time, the Applicant's application should be dismissed. The matter was relisted to 15 August 2024 and the parties were directed to present their cases regarding the Respondent's jurisdictional objection that, as it was not the Applicant's former employer, there had been no dismissal and therefore the Commission was absent jurisdiction to deal with the application.

[7] Briefly stated, the Respondent's first jurisdictional objection that there was no dismissal because the Respondent was not the Applicant's former employer, is dismissed.

Legislative framework

[8] Part 3-1 of the Act is titled 'General Protections'. Section 340(1) provides that a person must not take 'adverse action' against another person because the other person has exercised (or proposes to exercise) a 'workplace right'. Adverse action is, for example, taken by an employer against an employee if the employer dismisses the employee and that action is not authorised by law: s 342(1), item 1. There are other defined adverse actions that do not involve dismissal.

[9] The term 'dismissed' is not defined in Part 3-1 of the Act, although 'dismissed' is defined in Part 3-2 in respect of the unfair dismissal jurisdiction, under ss 12 and 386.

[10] Section 12 defines the word 'dismissed' by reference to s 386 of the Act.

[11] The word 'dismissed' as defined in ss 12 and 386 of the Act reads:

(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 or her employer.

[12] There are exceptions under s 386(2) regarding when a person has been dismissed; however, those exceptions are not relevant to this case.

[13] In *Coles Supply Chain v Milford (Milford)*,¹ the Full Court of the Federal Court of Australia unanimously applied the definition in ss 12 and 386 in respect of an application made under Part 3-1, without further discussion, therefore perhaps indicating that any issue as to whether the definition in s 386 applies to Part 3-1 had been settled.

[14] Division 8 of Pt 3-1 is titled ‘Compliance’. It establishes two regimes for dealing with disputes in which allegations of contravention of general protection provisions are made: a regime for dismissal disputes (Subdiv A) and a regime for non-dismissal disputes (Subdiv B).

[15] Section 365 and s 366 of the Act are contained in Subdiv A. They provide:

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.

366 Time for application

(1) An application under section 365 must be made:

- (a) within 21 days after the dismissal took effect; or
- (b) within such further period as the FWC allows under subsection (2).

(2) The FWC may allow a further period if the FWC is satisfied that there are exceptional circumstances, taking into account:

- (a) the reason for the delay; and
- (b) any action taken by the person to dispute the dismissal; and
- (c) prejudice to the employer (including prejudice caused by the delay); and
- (d) the merits of the application; and
- (e) fairness as between the person and other persons in a like position.

[16] Section 368 of the Act confers authority on the Commission to deal with a dismissal dispute in the event that an application is made under s 365. For current purposes it is unnecessary to repeat the section in full, save to say that the Commission is obliged to deal with the dispute other than by arbitration (*see* s 595(2) of the Act).

[17] To bring an application under s 365 of the Act the person applying to the Commission to deal with the dispute must have been ‘dismissed’. The text and structure of s 365 includes the objective condition that there has been a dismissal *in fact*,² in addition to there having been an allegation that the dismissal is for a prohibited reason.

[18] To explain further, in *Milford* the Full Court held that where an application is purportedly lodged under s 365 it is open to a respondent to assert that there has been no dismissal, so giving rise to a dispute on that question. The issue of whether the employee had been dismissed is a jurisdictional issue by reason of the wording in s 365 of the Act. The Full

Court held that where there is a dispute on the question of dismissal, the dispute falls to be determined under s 365 because it is an antecedent dispute going to the entitlement to the applicant to apply.³ The jurisdictional issue of whether there has been a dismissal must be decided by the Commission at the point at which the application is filed if the objection is taken by the employer respondent.⁴

Consideration

[19] Whether the Applicant was dismissed is controversial in this case for two reasons. First, MSP has clearly indicated that there was no dismissal because the Applicant voluntarily resigned from his employment from MSP. Second, the Respondent whilst not disagreeable to that proposition presses an argument, the gravamen of which, is that there was no dismissal because the Respondent was not the Applicant's employer.

[20] Turning to that latter argument. In circumstances where a respondent asserts that there has been no dismissal, so giving rise to a dispute on that question, the Commission is charged with determining whether there has been a dismissal *in fact*. Leaving aside the contentious issue of whether the Applicant voluntarily resigned from his position, the Respondent's argument is premised on there having been no dismissal because it, rather than MSP, did not dismiss the Applicant.

[21] That reasoning appears to arise from the following proposition. Section 365 evidently states that if a person has been dismissed and alleges that the dismissal contravened Part 3-1, the person may apply to the Commission to deal with the dispute. Because s 365 refers to a 'dismissal' and authorities to date appear to accept that the term 'dismissal' takes its meaning from s 386 of the Act,⁵ it therefore follows that the section contemplates that the 'dismissal' is by the person's employer as contemplated by s 386 of the Act, and an allegation that the employer thereby contravened Part 3-1.⁶

[22] Ultimately however, the issue before me is whether there has been a dismissal in fact, as identified in *Milford*. MSP is a wholly owned subsidiary of Civmec.⁷ The Applicant's letter of offer states at much. Evidence at hearing was that Civmec had approximately three wholly own subsidiary companies that were its employing entities, one of which was MSP. Civmec assumed responsibility for administrating the payroll, recruitment and human resources functions of those entities and itself. Further, it was entirely feasible that the Applicant, whilst employed, had been supervised, managed or otherwise worked alongside employees employed by one of those three employing entities, whilst all the while working under the auspices of the Civmec brand or umbrella. The evidence does not support an argument that MSP was siloed from its parent entity, rendering the parent entity unable to speak to the case that the Applicant had brought against it.

[23] It, however, should not be assumed that I have found Civmec to be the Applicant's employer, an assertion that the Applicant appears to press. Based on the materials filed, it is evident that the Applicant had entered into an employment contract with MSP and he was paid by that same entity. It is therefore open to find, and I do so, that MSP was the Applicant's former employer. Further, to the extent that there is an argument that the Applicant was jointly employed by the Respondent and MSP, it would seem that the argument must fail given that no concept of joint employment appears to apply in the Australian jurisdiction.

[24] Although Civmec was not the Applicant's employer its argument on this occasion is not a complete defence to the application brought. Section 590 expressly empowers the Commission to inform itself in relation to 'any matter before it in such manner as it considers appropriate'. In the present case the 'matter' is whether the Commission possesses authority to deal with the dispute under s 368 of the Act. To determine whether that is the case, I am required to determine the *fact* of the Applicant's purported dismissal. In my view this can be achieved by requiring persons and/or representatives of MSP in addition to those of Civmec, to give evidence relevant to the factual dispute of whether the Applicant was 'dismissed'.

[25] Insofar as it is relevant, I observe that MSP has already submitted evidence in the form of four witness statements on the issue of whether the Applicant was dismissed or whether he voluntarily resigned. Further, MSP has filed its submissions on the matter. Similarly, the Applicant has filed his materials on this point.

Conclusion

[26] The Respondent's jurisdictional objection that, as it was not the Applicant's former employer there had been no dismissal and therefore the Commission was absent jurisdiction to deal with the application, is dismissed. Accordingly, an Order⁸ issues concurrently with this decision.

[27] The matter will now be listed for hearing to deal with the further jurisdictional objection that there was no dismissal because the Applicant voluntarily resigned from his position. A Notice of Listing will issue shortly. The four witnesses, as identified by MSP in its written materials, will be required to attend the hearing. Orders will be issued shortly compelling the attendance of the four witnesses.



DEPUTY PRESIDENT

Appearances:

J Minchin, Applicant
S Baptist of the Respondent

Hearing details:

2024
15 August

Perth (by telephone)

Printed by authority of the Commonwealth Government Printer

<PR778434>

¹ (2020) 300 IR 146.

² *Ibid Milford* 160-1 [64].

³ *Milford* (n 1) 161 [67]-[68].

⁴ *Milford* (n 1) 161 [67].

⁵ *Morris v Allied Express Transport* [2016] FCCA 1589; *Fair Work Ombudsman v Austrend International* (2018) 273 IR 439; *Milford* (n 1).

⁶ See for example, *Wallace v KDR Victoria Pty Ltd and others* [\[2024\] FWC 1647](#).

⁷ Digital Hearing Book page 63 Applicant's letter of offer.

⁸ [PR778440](#).