DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Ms Jillian Troutbeck-Noy

v

Department of Education (State of Victoria)
(U2024/10033)

COMMISSIONER REDFORD MELBOURNE, 25 OCTOBER 2024

Application for an unfair dismissal remedy, whether application statute-barred; whether application to Merit Protection Board made "under another law of a State" in relation to the dismissal.

[1] On 27 August 2024 Ms Jillian Troutbeck-Noy filed an application pursuant to s 394 of the *Fair Work Act 2009* (**FW Act**) seeking an unfair dismissal remedy in respect to dismissal of employment from the Department of Education in the State of Victoria (**Department of Education**) (**the unfair dismissal application**).

[2] On 9 September 2024 the Department of Education filed a Form F3 Response in relation to the application, seeking that the application be dismissed pursuant to s 725 and 732 of the FW Act, on the basis that Ms Troutbeck-Noy had made an application or complaint under another law relating to the dismissal (**the objection**).

[3] It is possible that the unfair dismissal application was not filed within the standard time limit prescribed by s 394(2) of the FW Act (21 days), depending on when the dismissal of Ms Troutbeck-Noy's employment took effect. No objection on this ground was raised by the Department of Education in its Form F3 Response because of the confusion over when the dismissal took effect. As a result, this matter has unfolded such that focus has been given to the objection identified by the Department of Education pursuant to s 725. I did call for supplementary submissions on the question as to whether, if I were to dismiss the objection, it was necessary for me to consider whether to extend the time limit based on exceptional circumstances, and if so, whether I should. It appeared to me the supplementary submissions made by the Department of Education were to the effect that the application was probably *not* filed out of time[1]. However, for the reasons outlined below it is not necessary for me to determine these questions because I have determined to dismiss this application on the basis of s 725 of the Act.

[4] The application was allocated to my chambers on 3 September 2024. I conducted a mention in relation to it on 16 September 2024 in which the parties agreed that I determine the objection on the papers, after the parties first file and serve an outline of argument.

[5] The Department of Education filed an outline of argument on 20 September 2024 and Ms Troutbeck Noy on 27 September 2024.

[6] On 14 October 2024 I called for further submissions on a particular aspect of the objection, and on the extension of time question. These were filed by both parties on 18 October 2024.

Evidentiary matters

[7] There is no dispute about the evidentiary matters relevant to the objection. In particular:

a. A letter dated 2 August 2024 was sent from the Principal of Baden Powell College which said that a decision had been made to annul Ms Troutbeck-Noy's probationary employment with the consequence that her employment with "the department" is terminated.

b. On 15 August 2024, Ms Troutbeck-Noy lodged a personal grievance. This complaint was called MPB/2024/0091 and is described in a document "Probation Annulment"[2] (**annulment complaint**).

b. On 27 August 2024, Ms Troutbeck-Noy filed this unfair dismissal application in the Commission. At that time, the annulment complaint had not been suspended or withdrawn.

c. On 13 September 2024, Ms Troutbeck-Noy withdrew her annulment complaint, which was confirmed by an email from the Merit Protection Board (**MPB**) on that date[3].

d. Presently, the only application or complaint on foot in relation to Ms Troutbeck-Noy's dismissal of employment is this unfair dismissal application.

[8] Before it was withdrawn, the annulment complaint was suspended by the MPB. This occurred on 5 September 2024[4].

[9] Ms Troutbeck-Noy submitted she believed that "suspended" meant "withdrawn"[5].

The objection - the issues

[10] Section 725 of the FW Act provides that:

> ***725 General rule***
>
> *A person who has been dismissed must not make an application or complaint of a kind referred to in any one of sections 726 to 732 in relation to the dismissal if any other of those sections applies.*

[11] Sections 726 – 731 of the FW Act relate to applications such as dismissal remedy bargaining order applications, general protections applications, unfair dismissal applications unlawful termination applications, none of which are relevant to this matter.

[12] Section 732 of the FW Act provides:

> ***732 Applications and complaints under other laws***
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> *(1) This section applies if:*
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> *(a) an application or complaint under another law has been made by, or on behalf of, the person in relation to the dismissal; and*
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> *(b) the application or complaint has not:*
>
> *(i) been withdrawn by the person who made the application; or*
>
> *(ii) failed for want of jurisdiction.*
>
> *(2) An **application or complaint under another law** is an application or complaint made under:*
>
> *(a) a law of the Commonwealth (other than this Act); or*
>
> *(b) a law of a State or Territory.*
>
> *(3) For the purposes of this Subdivision, if a complaint under the Australian Human Rights Commission Act 1986 relates to a dismissal only as a result of an amendment of the complaint, the complaint is taken to be made when the complaint is amended.*

[13] The determination of the objection requires several sections of the FW Act to be construed to determine their meaning. The contemporary approach to questions of statutory construction is reasonably well settled and requires the ascertainment of the meaning of the text of the statute, while at the same time having regard to its context and purpose[6].

[14] As a Full Bench of this Commission put it, these provisions have the purpose of restricting a person with multiple remedies in relation to the person's dismissal from applying for more than one available remedy[7] - to prevent "double dipping"[8].

[15] A complaint "made under another law" will be "in relation to the dismissal" if it provides for a remedy referable to dismissal, such as reinstatement, re-employment or compensation[9].

[16] There is no doubt that, on 27 August 2024, when Ms Troutbeck-Noy filed this application in the Commission, there was an extant complaint which had been made by her -

the annulment complaint - and that this complaint had not been withdrawn at that time or had not failed for want of jurisdiction. Accordingly, it remains for determination as to:

a. Whether the annulment complaint "relates to" the dismissal; and

b. Whether the annulment complaint is an "application or complaint under another law" within the meaning of s 732(2); and

c. Whether the withdrawal of the annulment complaint by Ms Troutbeck-Noy on 13 September 2024 (or 5 September 2024 in so far as the suspension may have been understood to be withdrawal) renders inoperative the prohibition that applies pursuant to s 725.

The Respondent's submissions in relation to the objection.

[17] The Respondent's submissions in support of its objection may be summarised as follows:

a. That once an applicant pursues one application in relation to dismissal, section 725 operates to restrict them from pursuing another avenue of redress in respect of that dismissal until such time as their first application has been withdrawn or has failed for want of jurisdiction. An applicant must "make an election" of which application to pursue in consideration of the multiple forums in which they can dispute their dismissal and the different remedies available to them.

b. That whether or not circumstances exist which enliven the statutory bar must be determined at the time of an applicant making the second application. The statutory bar will operate if, at the time of an applicant making the second application, the first application has not either been withdrawn or failed for want of jurisdiction.

c. The fact that an applicant has commenced, or sought to commence, multiple proceedings in order to pursue a "more appropriate" remedy is irrelevant.

d. The provisions allow an applicant to pursue a second application where a first application has been withdrawn or failed for want of jurisdiction, providing that this second application is a valid application.

e. The statutory bar continues to operate unless and until the first application has been withdrawn or failed for want of jurisdiction.

f. The FW Act does not restrict the meaning of "application or complaint under another law" to human rights forums.

g. The Applicant's annulment complaint was a an application made under a law of a State, being clause 5.1.2 of *Ministerial Order 1388 – Teaching Service (Employment Conditions, Salaries, Allowances, Selection and Conduct) Order 2022* which is a

Ministerial Order made by the Minister for Education pursuant to s 5.10.4(1), 5.10.5 and Item 8 of Schedule 6 of the *Education and Training Reform Act 2006* (**ETR Act)**. It was thus a complaint or application made under "another law" as defined in s 732(2)(b) and for the purposes of s 732(1).

h. The annulment complaint "related to" the Applicant's dismissal, because it sought to dispute the annulment of her probation and employment and further, sought the reinstatement of her employment, which was within the powers of the MPB to grant.

The Respondent's further submissions on the question as to the meaning of "a law of a state".

[18] Specifically in respect to the question of whether the annulment complaint was an application or complaint "under another law", the Department of Education further submitted:

a. There is a "settled meaning" in relation to the phrase "a law of a State or Territory". The phrase means "a law made … under the authority of the parliament of Victoria"[10].

b. The Ministerial Order is a legislative instrument as defined by the *Subordinate Legislation Act 1994* (Vic) (**SL Act**)[11].

The Applicant's submissions in relation to the objection.

[19] Ms Troutbeck-Noy made the following submissions relevant to the objection:

a. Sections 725 and 732 of the Act do not apply because the annulment complaint was withdrawn, and therefore Ms Troutbeck-Noy was eligible to make her unfair dismissal application[12].

b. The Explanatory Memorandum to the *Fair Work Bill 2009* supports the notion that Ms Troutbeck-Noy should be permitted to pursue her unfair dismissal application – particularly clause 2710 of the Explanatory Memorandum which states:

In all cases the anti-double dipping provisions will not apply where the initial application has: been withdrawn; or failed for want of jurisdiction …

This is intended to ensure that a person does not miss out on a remedy because they were unable to make a competent application for another remedy or where they have realised another remedy may be more appropriate than the remedy they initially sought[13].

c. That Ms Troutbeck-Noy is unlikely to have the opportunity to have what she claims was an unfair dismissal remedied at all[14], or would "miss out" on any remedy if the Commission does not dismiss the Department of Education's jurisdictional objection[15].

d. That several decisions of the Commission support Ms Troutbeck-Noy's position (these are explored below).

e. That Ms Troutbeck-Noy is not legally represented in this matter, has not had the benefit of legal advice and is reliant on advice from the MPB and the Fair Work Commission. And further that the annulment complaint was promptly withdrawn once the Ms Troutbeck-Noy was advised she had to elect a single remedy[16].

f. That the Department of Education and the MPB acknowledged, in an email sent to her on 4 September 2024, that Ms Troutbeck-Noy was entitled to elect her preferred remedy[17].

The Applicant's further submissions on the question as to the meaning of "a law of a state".

[20] On 18 October 2024 Ms Troutbeck-Noy made further submissions as to the reference to "a law of a state" in s 725. Those submissions are addressed below.

Complaints made to the MPB.

[21] The MPB is created pursuant to s 2.4.44 of ETR Act. Its functions include to hear reviews and appeals in relation to any decision prescribed by the regulations or Ministerial Order to be a decision in respect of which there is a right of review by or appeal to a Merit Protection Board[18].

[22] The ETR Act provides at s 5.10.4 for the power of the Minister for Education to make Ministerial Orders which are required or permitted to be made for carrying out or giving effect to the Act[19]. Section 5.10.4(2) of the ETR Act provides Orders may be made with respect to any of the matters provided for in Schedule 6 of the Act, which includes employment in the teaching service (item 8 of Schedule 6).

[23] Ministerial Order No. 1388 – *Teaching Service (Employment Conditions, Salaries, Allowances, Selection and Conduct) Order 2022* (**the Ministerial Order**) was made by the Victorian Minister for Education on 11 October 2022. It was published in the Victoria Government Gazette on 18 October 2022 pursuant to s 5.10.4(4) of the ETR Act and s 16A of the SL Act. Its authorising provision is stated to be sections 5.10.4 and 5.10.5 of the Act, and item 8 of Schedule 6 of the Act[20].

[24] The Ministerial Order provides for a process to deal with "personal grievances" of employees[21].

[25] A personal grievance is, subject to exclusions, a grievance in respect of any action taken which directly relates to the employee and affects them in their employment[22]. Actions in respect to termination of employment are excluded, *other than the annulment of the employment as a probationer*[23] meaning that the action of the annulment of employment as a probationer can be the subject of a personal grievance.

[26] A personal grievance of the kind made by Ms Troutbeck-Noy is not made to the MPB, but to the "Senior Chairperson"[24]. The Senior Chairperson is the person appointed as Senior Chairperson of the Merit Protection Boards pursuant to the ETR Act[25].

[27] The Senior Chairperson will refer the personal grievance to a MPB for determination[26] provided it has jurisdiction to entertain it[27].

[28] Order 5.1.6 of the Ministerial Order provides that on consideration of such a request the MPB can affirm the action, vary or set aside the action, make a determination for another action to be taken in substitution for the action set aside or remit the matter for reconsideration in accordance with recommendations or directions provided by the Board. The MPB must have regard to the operational requirements of the Department and, if relevant, the educational requirements of the school including the interests and welfare of the students. Where a decision made will impact on these matters, the MPB must consult the Senior Chairperson prior to making a decision[28].

[29] An application for a personal grievance must be lodged within 14 days of the action that is the subject of the personal grievance, or of the date of notification of that action, whichever is the later. The MPB must not accept a referral from the Senior Chairperson of an application for a personal grievance that is lodged out of time except in special circumstances and cannot hear and determine a personal grievance application lodged outside of this 14-day period if it has not approved an application made by the applicant in relation to special circumstances[29].

Did the annulment complaint "relate to" the dismissal?

[30] The annulment complaint made by Ms Troutbeck-Noy seeks the review of a decision to annul her employment as a probationer. The decision to annul her probationary period and employment was made on 2 August 2024 by the Principal of the Baden Powell College, exercising delegated authority of the Secretary to the Department of Education and Training, and resulted in the termination of her employment which was confirmed in the letter communicating the annulment decision.

[31] The letter recording the action to annul Ms Troutbeck-Noy's employment was dated 2 August 2024. In her Submissions, Ms Troutbeck-Noy claimed not to have received or seen this letter until 5 or 6 August 2024. Her annulment complaint was made on 15 August 2024. It was therefore made within 14 days of date Ms Troutbeck-Noy was notified of the relevant action, whether this notification occurred on 2 August 2024 or 5 August 2024 or 6 August 2024.

[32] The outcome sought by Ms Troutbeck—Noy's in her annulment complaint was "to be employed with intent to return to work"[30].

[33] It appears it was within the power of the MPB pursuant to Part 5 of the Ministerial Order to set aside the decision to annul the probationary period, or the termination of Ms Troutbeck-Noy's employment which would have had the effect of resulting in her reinstatement.

[34] Accordingly, the "remedy" sought by Ms Troutbeck-Noy's annulment complaint – reinstatement of her employment - is a remedy referable to unfair dismissal. Adopting the

reasoning of the Full Bench in *Qantas*, it therefore relates to dismissal for the purposes of s 732 of the Act[31].

[35] In her submissions, Ms Troutbeck-Noy identified that in *Qantas* the Full Bench dismissed the jurisdictional objection brought in pursuant to s 725 in relation to the application. To the extent that this submission was to the effect that the reasoning of the Full Bench in *Qantas* is not relevant in this matter because in that case, the jurisdictional objection was dismissed, I do not accept that submission.

Is the annulment complaint an "application or complaint under another law" for the purposes of s 732?

[36] It appears clear to me that the annulment complaint was made under the Ministerial Order and not, for example, under the ETR Act. While this distinction may not be determinative, it is the case that Ms Troutbeck-Noy's annulment complaint was not made under an Act of a Parliament but instead, was made under a different type of instrument or provision. Regardless, the Department of Education submitted that the Ministerial Order is a "law of a state" for the purposes of s 732(2)(b) of the FW Act[32].

[37] Ms Troutbeck-Noy submitted that the Ministerial Order is not a "law" for the purposes of s 732. In support of this proposition, Ms Troutbeck-Noy's made several submissions including the following:

a. That the Ministerial Order is not listed on the Victorian "legislation in force" webpage[33].

[38] That the Ministerial Order lacks the characteristics of the process for "making a law" provided for on the "How a law is made" section of the Victorian Parliament website, such as the creation of a Bill, passing through the two houses of the Parliament and receiving Royal Assent[34].

[39] I find neither of these submissions particularly persuasive. A provision or instrument that is a "law" for the purposes of s 725 would not lose that characteristic simply because it is not published on a website. And, as I discuss further below, a provision or instrument could be a "law" for the purposes of s 725 even though it is not a piece of legislation made by a Parliament. The question is whether the Ministerial Order is such a provision or instrument.

"Legislative character".

[40] Ms Troutbeck-Noy appeared to make two further submissions in support of her proposition, both of which require further analysis. These were that:

(a) That the Ministerial Order is not a "legislative instrument" for the purposes of the SL Act, because it is "purely of an administrative character"; and

(b) That the Ministerial Order is exempt from the operation of specified provisions of the SL Act (within the meaning of s 4A(1)(c) of the SL Act) and therefore lacks "legislative character".

[41] Both of these submissions are predicated on the proposition that a "legislative character" is required for something to be a "law" for the purposes of s 732. There may be some merit in this submission. Both parties appeared to consider important the question as to whether the Ministerial Order is a "legislative instrument" for the purposes of the SL Act[35]. A "legislative instrument" for the purposes of the SL Act is, subject to exceptions, an instrument "made under an Act or statutory rule that is of a *legislative character* … [*my emphasis*]"[36].

[42] Traditionally, a distinction may be drawn between rules that are of a legislative character and those that are of an executive character. Latham CJ, after acknowledging that it is not always easy to draw the distinction, said in *Commonwealth v Grunseit*[37]:

The general distinction between legislation and the execution of legislation is that legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases.

[43] Latham CJ's formulation of this distinction has been drawn upon on many occasions[38]. For example, when considering particular provisions of the *Industrial Relations Act 1996* (NSW), French CJ, citing *Grunseit*, said:

The point should also be made that the mechanism created b s 146C, read with the regulation-making power in s 407, differs from an Act or regulation which authorises a Minister to do an executive act to which the Act or regulation attaches legal consequences. Examples in the latter class include a provision for the making of a ministerial direction which must be complied with[39].

[44] Section 26(2) of the FW Act includes a definition of a State or Territory industrial law. It provides that for this part of the Act, an industrial "law" includes "an instrument made under a law … in so far as the instrument is of a legislative character". While this definition is for the purpose of s 26 of the FW Act and relates the term "*industrial* law" the inclusion of the reference to "legislative character" may inform the interpretation of similar provisions of the Act, such as 732[40].

Does the Ministerial Order have a "legislative character"?

[45] While I return to the *Grunseit* formulation below, I consider the proposition that the Ministerial Order has a "legislative character" is assisted if, as is contended by the Department of Education, it is a "legislative instrument" for the purposes of the SL Act. The SL Act defines a legislative instrument as one which has a legislative character.

[46] Ms Troutbeck-Noy submitted that the Ministerial Order is not a legislative instrument for the purposes of the SL Act because it is "overwhelmingly of administrative character" and thus falls within the exception in s 3(g) of the SL Act – that it is "an instrument of purely administrative character".

[47] I do not agree that the Ministerial Order is "overwhelmingly of administrative character, or more to the point, that it is "purely" of administrative character. Section 3(2) of the SL Act provides examples of instruments which are purely of administrative character, such as an

instrument of delegation, an instrument of appointment, an instrument which changes conditions or terms of appointment or an instrument for the principal purpose of taking disciplinary or enforcement action to ensure compliance with an Act, subordinate instrument or any other law. The Ministerial Order has a scope which extends beyond such limited instruments. It establishes, among other things, a system for employees to make personal grievances relating to their employment which can be heard and determined by a Merit Protection Board and be the subject of binding decisions including that they be varied or set aside. It also fixes salary levels for a range of different classes of employees[41]. It creates a regime for dealing with eligibility for employment, transfer or promotion. It also creates a code of conduct which employees are required to adhere to.

[48] In relation to the question of "legislative character" Ms Troutbeck-Noy further submits that the Ministerial Order is prescribed as exempt from particular provisions of the SL Act, by operation of the *Subordinate Legislation (Legislative Instruments) Regulations 2021* (**the SL Regulations**). I deal with this submission below – however at the outset I observe that the SL Regulations themselves refer specifically to the Ministerial Order[42], including by reference to it as a "legislative instrument"[43], which references seem to indicate that it is considered a legislative instrument for the purposes of the SL Act. The Victorian Government Gazette also publishes the Ministerial order as a "Notice of Making of Legislative Instruments" [44]. These references fortify my view that the Ministerial Order is a legislative instrument for the purposes of the SL Act.

[49] Ms Troutbeck-Noy's further submission – that the Ministerial Order is prescribed as exempt from particular provisions of the SL Act – does not persuade me that it is thus deprived of "legislative character". In short:

(a) Section 4A(b) of the SL Act allows for regulations to be made exempting an instrument or class of instrument from the operation of the Act or any specified provision of the Act;

(b) Schedule 3 of the SL Regulations provides that a Ministerial Order made under the ETR Act under s 5.10.4 with respect to a matter in clause 8 of Schedule 6 of that Act is exempt. The Ministerial Order in question here is such an Order, and is thus exempt.

(c) Regulation 8 of the SL Regulations provides that the provisions of the SL Act from which a legislative instrument specified in Schedule 3 of the Regulations is exempt are:

    i. Part 2A, which requires a range of procedures to occur in relation to the preparation of legislative instruments, including matters such as consultation, the preparation of human rights and exemption certificates, etc.

    ii. Part 5A, which relates to matters such as the review of legislative instruments by the Scrutiny Committee, disallowance etc.

    iii. Section 16B and 16E, which relates to the circumstances in which legislative instruments are to be laid before Parliament.

iv. Section 16C, which requires legislative instruments to be sent to the Scrutiny Committee

v. Section 16F, which relates to the availability of a consolidated version of a legislative instrument.

(d) The Ministerial Order is no prescribed not to be a legislative instrument by operation of regulation 6 and Schedule 1 of the SL Regulations, which allow for instruments to be so prescribed.

(e) The exemption of the operation of these provisions of the SL Act in respect to the Ministerial Order does not deprive it of its status as a legislative instrument for the purposes of that Act nor does it remove its legislative character.

[50] Accordingly, the Ministerial Order is a legislative instrument for the purposes of the SL Act.

[51] This is consistent with the terms of the Ministerial Order itself which, returning to the test in *Grunseit*, includes rules of conduct and declarations as to power, right or duty. The exclusion of some of the provisions of the SL Act to not alter that fact. For example, the Ministerial Order contains a range of provisions of legislative character, such as a code of conduct for employees which must be complied with, the requirement that particular salaries and allowances to be paid and creates a range of other binding rights and obligations. It also creates a complaints regime which provides for Merit Protection Boards to make binding decisions with respect to employee grievances (which are themselves subject to administrative review[45]). It is, in the words of Latham CJ, a Ministerial direction that must be complied with[46].

The provision of a binding remedy.

[52] The Ministerial Order's status as a legislative instrument under the SL Act, and its legislative character assists the proposition that it is a "law" for the purposes of s 732. However, I do not consider this to be determinative.

[53] While the term "law" may have a meaning of general import, I must construe the term dealing first with the text of the section of the Act in which it appears, while at the same time, having regard to its context and purpose. The context and purpose of s 732 when read in conjunction with s 725 is to restrict persons with multiple remedies referable to dismissal from applying for more than one available remedy[47].

[54] An application under another "law" which does not give rise to a remedy which, if granted, would have binding force, would not give rise to a multiple remedy scenario. Similarly, a multiple remedy will not arise through an application under a rule, provision or instrument, whatever its legislative character, unless the remedy it provides is binding.

[55] Accordingly, it is the existence in the relevant provision of a remedy which, if granted, has binding force, which will imbue it with the character of a "law" for the purposes of s 732, taking into account that provision's context and purpose.

[56] It is clear to me that if, upon dealing with a complaint made under the Ministerial Order, the MPB makes a decision, that decision is binding upon the Department of Education. For example, if the MPB had decided to set aside the decision to annul Ms Troutbeck-Noy's annulment of employment in accordance with item 5.1.6(1)(c) of the Ministerial Order and in so doing, reinstate her employment, I can see no basis in any of the material as to how the Department of Education could resist that decision, save for seeking administrative review of that decision, and would have been bound to follow it. In this sense, it is a "law" under which a complaint relating to the dismissal can be made.

[57] I note for completeness that the decision of Bromberg J in *AEU v State of Victoria (Department of Education and Early Childhood Development)*[48] considered s 324(1) of the FW Act - another reference in the statute to the term "a law of a State". The decision concerned the limited circumstances in which deductions may be made from amounts payable to employees for the performance of work, which included (and continue to include) deductions "authorised under a law of the Commonwealth, a State or a Territory …". In the matter under consideration the Victorian Minister for Education had made a Ministerial Order pursuant to the ETR Act purporting to authorise an amount to be deducted from teaching employees' salaries amounts such persons had agreed to be deducted pursuant to a particular form of agreement. A question therefore arose as to whether this meant particular deductions made by the Department of Education were authorised by a law of the State for the purposes of s 324(1)(d). The question was ultimately answered in the negative, particularly because of the purportedly retrospective nature of the Ministerial Order. But there seems no question that his honour accepted the proposition that the Ministerial Order was a "Victorian law" being a Ministerial Order made under the ETR Act[49].

Conclusion – is the Ministerial Order a "law" for the purposes of s 732?

[58] I therefore conclude that the Ministerial Order is a law for the purposes of s 732 of the FW Act. It creates a process for the making of a complaint to the MPB whose decision about such a complaint is binding on the Department of Education. It therefore creates a "rule of conduct" in respect to which the subjects of any such decisions are bound. In this way it has "legislative character" - which is reinforced by its status as a legislative instrument under the SL Act.

Is Ms Troutbeck-Noy allowed to pursue her unfair dismissal application, because she withdrew the annulment complaint?

[59] Section 725 states that a person who has been dismissed *must not make* an application of a kind including an application for an unfair dismissal remedy (s 729), if another complaint has been made relating to dismissal under another law.

[60] On the plain meaning of these words, this results in the somewhat inescapable conclusion that if a complaint relating to dismissal of employment exists at the time an application is made in the Commission for a remedy in relation to alleged unfair dismissal, that unfair dismissal complaint cannot be made and if it is, must be dismissed in accordance with s 723, even if the initial complaint – whatever it is – is *later* withdrawn. Put another way, the first complaint must be withdrawn before the second complaint is made.

[61] Ms Troutbeck-Noy urged me in her submissions to have regard to the Explanatory Memorandum to the *Fair Work Bill 2009* which says among other things that "in all cases the anti-double dipping provisions will not apply where the initial application has been withdrawn or failed for want of jurisdiction"[50]. It appears to me that nothing in this reference alters the temporal nature of the requirement that the initial application be withdrawn *before* the subsequent application is made.

[62] It appears to me that, save for one exception[51], this approach has been adopted consistently by the Commission in its approach to these provisions of the Act.

[63] In *Peter Ioannou v Northern Belting Services Pty Ltd*[52] a Full Bench of this Commission said:

> ***[28]*** *In relation to the present matter, the effect of s.725 is that the applicant must not make an application in relation to his dismissal under s.365 unless the unfair dismissal application has been withdrawn, failed for want of jurisdiction or failed because the dismissal was a case of genuine redundancy (s.729(1)(b)). In other words, s.725 of the Act operates to preclude the applicant from bringing a general protections application in circumstances where there is an extant s.394 application before the Commission.*
>
> ***[29]*** *The applicant's submission that the power in s.586 should be exercised so as to allow the applicant to pursue the "more appropriate" cause of action misses the point. The multiple action provisions are, for amongst other reasons, designed to allow that to happen. The Explanatory Memorandum to the Fair Work Bill 2008 makes this clear. It provides:*
>
> > *"2710.In all cases the anti-double dipping provisions will not apply where the initial application has:*
> >
> > - *been withdrawn; or*
> > - *failed for want of jurisdiction.*
> >
> > *2711.This is intended to ensure that a person does not miss out on a remedy because they were unable to make a competent application for another remedy or where they have realised another remedy may be more appropriate than the remedy they initially sought."*
>
> ***[30]*** *It follows from s.725 of the Act that the applicant is statutorily barred from making a general protections application unless the unfair dismissal application is withdrawn (or otherwise fails for jurisdiction reasons). Section 588 of the Act allows an applicant to discontinue an application in accordance with any procedural rules, whether or not the matter has been settled. Rule 10 of the Rules deals with the discontinuance of applications before the Commission by the applicant lodging a notice of discontinuance or giving appropriate notice that, inter alia, the applicant wishes to withdraw the application.*

> ***[31]*** *The appropriate course for the applicant in the present matter to take if he seeks to pursue an application under s.365 of the Act in relation to his dismissal in lieu of the unfair dismissal application, is to withdraw the s.394 application and to file a s.365 application. In such circumstances, the appropriate procedural and other requirements under the Act for the making of the s.365 application will need to be met and an extension of time sought in accordance with s.366 of the Act*

[64] A similar approach was taken by Deputy President Gostencnik in *Bosco Alex v Costco Wholesale Australia*[53] and the approach has been endorsed by a number of decisions of the Commission including Full Benches of the Commission in *Karren Hazledine v Kirk Wakerley & Ben Giddings*[54], and more recently in *JHC Corporate P/L*[55] and by Deputy President Masson in *Bryce Hamilton v Platypus Outdoors Group Pty Ltd T/A Platypus Outdoors Group*[56]. In her submissions, Ms Troutbeck-Noy appeared to seek to distinguish some of these decisions. In respect to *Bosco* Ms Troutbeck-Noy argued that the application claimed to have withdrawn its claim, but had not provided evidence of such, whereas Ms Troutbeck-Noy has provided this evidence. In respect to *Hazledine* Ms Troutbeck-Noy argued that in that matter, neither of the relevant applications were withdrawn, while Ms Troutbeck-Noy's MPB grievance has been. In respect to *Platypus Outdoor Group*, Ms Troutbeck-Noy argued that the applicant had in that matter answered "no" when asked in its application form whether another application had been made – Ms Troutbeck-Noy in her application answered "yes" to this question. I do not consider these differences in these matters compared to Ms Troutbeck-Noy's circumstances alter the relevance of those decisions in relation to the proper approach to the question of the operation of s 725 and 732 when an earlier application is withdrawn.

[65] Ms Troutbeck-Noy filed her Form F2 application through the Fair Work Commission on-line application portal. The on-line application alerts the applicant to the question as to whether another claim in relation to the dismissal has been made and advises the applicant that they will need to decide "which claim is the most appropriate one".

[66] Ms Troutbeck-Noy's failure to withdraw her MPB grievance before lodging her unfair dismissal application means that the unfair dismissal application could not be brought. Her later withdrawal of the MPB grievance does not overcome this problem in respect to the application which is before me .

Conclusion

[67] It follows that, when Ms Troutbeck-Noy filed this application, an application or complaint had been made by her under another law in relation to her dismissal that had not been withdrawn or failed for want of jurisdiction.

[68] Ms Troutbeck-Noy submitted that she withdrew her annulment complaint at the urging of the MPB Registrar[57] and that, she would "miss out" on any remedy if the Commission does not dismiss the Department of Education's jurisdictional objection[58]. This may well be an implication of this decision and, if that is the case, Ms Troutbeck-Noy may feel a sense of injustice at the outcome. However, this submission cannot bear on the proper construction of the statute and its applicability to this matter. As the Full Bench observed in *Ioannou* the appropriate course may be for the applicant to pursue a fresh application, albeit that the

appropriate procedural requirements under the Act in respect to such an application, including seeking an extension of time, will need to be met.

[69] The application must be dismissed.

COMMISSIONER

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[1] Respondent's Supplementary Submissions [15]

[2] Respondent's submissions [8]; Applicant's submissions [2 1) i]

[3] Respondent's submissions Annexure 1

[4] Ibid

[5] Applicant's submissions [2 1) vii]

[6] *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 [14]; *Project Blue Sky v ABA* [1998] HCA 28 [69]

[7] *Qantas Airways Limited v David Lawless* [2014] FWCFB 3582 [26] (***Qantas***)

[8] Explanatory Memorandum, *Fair Work Bill 2009* [2695], [2707]

[9] *Qantas* [37]

[10] Respondent's Supplementary Submissions [5] – [7]

[11] Respondent's Supplementary Submissions [10]

[12] Applicant's Submissions [2(1)(viii)]

[13] Explanatory Memorandum, *Fair Work Bill 2009* [2710] – [2711]

[14] Applicant's Submissions [4]

[15] Applicant's Submissions [7]

[16] Applicant's Submissions [4]

[17] Applicant's Submissions 2(1 iii and [14]

[18] ETR Act s 2.4.44

[19] ETR Act s 5.10.4(1)

[20] Victoria, Victoria Government Gazette, No s 559, 18 October 2022 1

[21] Ministerial Order Part 5

[22] Ministerial Order ord 5(a)

[23] Ministerial Order ord 5(b)(iii)

[24] Ministerial Order ord 5.1.2

[25] Ministerial Order ord 2.4.45(2)

[26] Ministerial Order ord 5.1.4

[27] Ministerial Order ord 5.1.2

[28] Ministerial Order ord 5.1.7

[29] Ministerial Order ord 5.1.8

[30] Respondent's Submissions [Annexure 1]

[31] *Qantas* [26], [37]

[32] Respondent's Submissions [37]; Respondent's Supplementary Submissions [3] – [10]

[33] Applicant's Supplementary Submission [4]

[34] Applicant's Supplementary Submission [5] – [6]

[35] Respondent's Supplementary Submissions [9], [10]

[36] SL Act s 3

[37] (1943) 67 CLR 58 [82]

[38] See for example *New South Wales v Commonwealth* [2006] HCA 52 [400]; *Plaintiff S157/2002 v Commonwealth of Australia* [2003] FCA 2 [102]

[39] *The Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* [2012] HCA 58 [44]

[40] See *Tabcorp Holdings Limited v Victoria* [2016] HCA 4 [65]

[41] Order 1.1.1 of the Ministerial Order provides that in the event of an inconsistency between the Order and an award, agreement or employment condition applying under the FW Act, that award, agreement or employment condition prevails to the extent of any inconsistency

[42] See in particular SL Regulations, Schedule III, items 31.10 – 31.38

[43] SL Regulations reg 8

[44] Victoria, Victoria Government Gazette, No s 559, 18 October 2022 1

[45] See for example *State of Victoria v Tutos* [2018] VSCA 213

[46] *The Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* [2012] HCA 58 [44]

[47] *Qantas* [26]

[48] [2015] FCA 1196

[49] Ibid [231]

[50] Explanatory Memorandum, *Fair Work Bill 2009* [2710]

[51] *Stephen Isles v Northern Territory Police, Fire and Emergency Services T/A NTPSES* [2010] FWA 9147

[52] [2014] FWCFB 6660

[53] [2014] FWC 1904 [12]

[54] [2017] FWCFB 500 [12]

[55] [2022] FWCFB 16 [21]

[56] [2018] FWC 4245 [33] – [35]

[57] Applicant's Submissions [(1)v]

[58] Applicant's Submissions [7]