[2024] FWC 2840

The attached document replaces the document previously issued with the above code on 14 October 2024

Removing "*J Youssef and P Larkin* for the Applicant" from appearances.

Associate to Deputy President O'Keeffe

Dated 29 October 2024

DECISION

Fair Work Act 2009
s.365—General protections

Flexy Services Pty Ltd
v
Mr Brian Newman
(C2024/2298)

DEPUTY PRESIDENT O'KEEFFE PERTH, 14 OCTOBER 2024

Application for costs against paid agent pursuant to s.376(2)(a) and s.376(2)(b) – costs to be awarded.

[1] Flexy Services Pty Ltd (Flexy) has applied to the Fair Work Commission (FWC) under s.376(2)(a) and s.376(2)(b) of the *Fair Work Act 2009* (Cth) (the Act) for costs against Mr Brian Newman of 1800Advocates (Mr Newman) for his actions in the matter of McBride v Flexy Services Pty Ltd C2024/2298 (McBride matter).

Background

[2] The McBride matter involved an application under s.365, being an application involving alleged dismissal in breach of general protections. Flexy lodged a jurisdictional objection to the FWC dealing with the matter on the basis that Ms McBride had not been dismissed. As there had been a jurisdictional objection raised, the matter was not conciliated by a staff conciliator but rather was allocated directly to my Chambers.

[3] Due to a number of factors, we were unable to schedule a mention hearing prior to the jurisdictional hearing. As such, the first opportunity to deal directly with the matter was at the jurisdictional hearing set down for 9.00am (AWST) on 21 June 2024. The listing notice for this hearing was sent to parties on 10 May 2024. On 24 May 2024 Flexy provided its submissions to the FWC. Ms McBride's submissions were due on 7 June 2024 at 4.00pm (AWST).

[4] At 5.41am (AWST) on 7 June 2024 my Chambers received a request for an extension of time to file submissions from Mr Newman and, subsequently, a request from Flexy to be given an equivalent extension. Both parties were granted an extension of five days, meaning Ms McBride's submissions were due at 4.00pm (AWST) on 12 June 2024. At 4.48am (AWST) on 13 June 2024 my Chambers received a request from Mr Newman for a further extension of time to file submissions until 5.00pm (AWST). I granted this further extension and Ms McBride's submissions were filed within the new deadline. On 19 June 2024 the Respondent provided its submissions in reply.

[5] At 6.02am (AWST) on 21 June 2024 Mr Newman emailed my Chambers advising that he was scheduled to appear in a matter before Deputy President Millhouse that morning and may not be available for the start time of Ms McBride's hearing. My Chambers kept in contact with Deputy President Millhouse's Associate to determine if their matter was likely to conclude at a time that would allow Ms McBride's matter to proceed. After waiting for over two hours I determined that the McBride hearing could not go ahead and advised both Ms McBride and Flexy accordingly.

[6] Having read all of the materials submitted by the parties, I had concerns that the application was ill-conceived in that I could find no evidence that Flexy had actually terminated Ms McBride. It had been my intention to canvass this matter at the outset of the hearing and seek further submissions from Mr Newman. However, as the hearing did not proceed, I resolved to put my concerns to Mr Newman in writing and seek a response. Later in the day on 21 June 2024 I sent the following email to parties:

> *"Dear Parties,*
>
> *Following the non-attendance on the Applicant's representative at this morning's scheduled hearing, Deputy President O'Keeffe advises parties that he **directs** as follows:*
>
> *1. It is noted that the listing for the matter before DP O'Keeffe on 21 June 2024 was sent to parties on 10 May 2024, and the listing for the matter before DP Millhouse on 21 June 2024 was also sent to the parties in that matter on 10 May 2024. Given this, the Applicant's representative is directed to provide a written explanation for his non-attendance and for providing notice of potential non-attendance on the morning of 21 June 2024. Such explanation should be received no later than **4.00pm (AWST) Tuesday 25th June 2024.***
>
> *2. Deputy President O'Keeffe also has concerns regarding the Applicant's claim and submissions. 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. Such additional submissions should be received in Chambers by no later than ***4.00pm (AWST) Tuesday 25th June 2024.***

3. The Respondent is invited to reply to the additional submissions by no later than ***4.00pm (AWST) Tuesday 2nd July 2024.***

The Deputy President advises that he will consider the submissions made by the parties and determine if the matter ought to proceed to a re-scheduled hearing. The Applicant is further advised that the Respondent has reserved its position with respect to the matter of costs."

[7] Mr Newman subsequently provided reasons for his non-attendance but requested that those reasons not be divulged to Flexy. I accepted those reasons and the request for confidentiality and advised Flexy accordingly. Mr Newman also provided responses to my questions as set out in paragraph 2 of my email above, as follows:

"1. Allegation of Termination Against Flexy Services
The applicant, Georgina McBride, was engaged as a casual employee by Flexy Services Pty Ltd, on-hired to Rio Tinto. The crux of the applicant's case is the termination of her engagement at Rio Tinto, which effectively ended her employment with Flexy Services. The termination notification and subsequent actions by Rio Tinto constitute a dismissal within the meaning of the Fair Work Act 2009 (Cth) (FW Act).

2. Specific Mechanism and Timeline of Termination
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, Ms McBride was advised that her contract was terminated to facilitate a replacement, as detailed in her witness statement (Court Book, Page 29, Para 15).

b. Formal Communication:
- Follow-Up: Ms McBride 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.

3. Respondent's Position and Actions
- Letter from Flexy Services: On 26 April 2024, Flexy Services sent a letter to Ms McBride (Court Book, Page 30, Para 19), indicating that her employment was not terminated and seeking her availability for other casual work. However, this letter was sent more than a month after the initial notification of termination by Rio Tinto, and no alternative assignments were provided in the interim.

4. Competence of the Application
The application is competent based on the following grounds:

a. Termination at the Initiative of the Employer:
- The termination of Ms McBride's 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.

b. Constructive Dismissal:
- 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.

c. Adverse Action and Discrimination:
- The termination was influenced by Ms McBride's pregnancy, as detailed in her witness statement and supporting emails (Court Book, Page 29, Paras 14-16). This constitutes adverse action under section 340 and discrimination under section 351 of the FW Act.

5. Legal Precedents:
- Coles Supply Chain Pty Ltd v Milford [2020] FCAFC 152 establishes that a dismissal occurs if the employer's actions effectively terminate the employment relationship.
- Bayford v Maxxia Pty Ltd [2011] 207 IR 50 confirms that discrimination on the basis of pregnancy is unlawful and can form the basis for a dismissal claim.
- Hochster v De La Tour (1853) 2 E&B 678 is a seminal case in English contract law that was decided in 1853. This case established the principle that if one party to a contract announces their intention to breach the contract prior to the date of performance, the other party can consider the contract breached immediately, rather than having to wait until the contract performance date.

Conclusion
The termination of Ms McBride's engagement with Rio Tinto, facilitated by Flexy Services' inaction, constitutes a dismissal under the FW Act. The application before the Commission is competent, and the claim should proceed to address the adverse action and discrimination faced by Ms McBride."[1]

[8] Flexy subsequently provided submissions in reply to Mr Newman's email responding to my questions. In essence, Flexy noted that there was no detail of what was actually said to Ms McBride regarding termination and that in any case whatever had been said had come from Rio Tinto, not Flexy. It noted that the correspondence referred to by Mr Newman was correspondence between Ms McBride and Rio Tinto and not with Flexy. The only exception was the letter from Flexy that confirmed Ms McBride was still an employee. Flexy rejected the notion that it had not provided assignments "in the interim" noting that it had not been aware that Ms McBride was no longer working at Rio Tinto and noting further that Ms McBride had not herself advised them as such.

[9] Given the history of the matter and given that no material facts seemed to be in dispute, I wrote to the parties advising that I was intending to decide the matter on the basis of the materials submitted and sought their views. Both parties agreed with the matter being determined on the papers.

[10] On 16 July 2024 I published my decision on the jurisdictional matter and found that Ms McBride had not been terminated at the initiative of Flexy and thus the FWC had no jurisdiction to deal with the matter. The citation of that decision is [2024] FWC 1839. On 29 July 2024 Flexy applied to the FWC for a costs order against Ms McBride and Mr Newman. I conducted a conference between the parties on 22 August 2024 and arising from that conference Flexy advised that it no longer sought a costs order against Ms McBride but continued to pursue such an order against Mr Newman. I note that pursuant to s.586 I allowed the application for costs to be amended accordingly.

The hearing

[11] Flexy has made an application for costs under s.377 of the Act. Under s.377, an order for costs in relation to an application under s.365 must be made within 14 days after the FWC finishes dealing with the dispute. As the decision in the McBride matter was handed down on 16 July 2024 and the costs application was made on 29 July 2024, the costs application has been made within the required time limit.

[12] I conducted a hearing of the costs application on 26 September 2024. Flexy was granted permission to be represented on the basis that the matter involved a level of complexity that suggested that the FWC would be assisted by the presence of counsel. Mr Newman represented himself. Both parties made written submissions and expanded upon those submissions at hearing.

Submissions

[13] Section 376 of the Act provides as follows:

> ***376 Costs orders against lawyers and paid agents***
>
> *(1) This section applies if:*
>
> *(a) an application for the FWC to deal with a dispute has been made under section 365 or 372; and*
>
> *(b) a person who is a party to the dispute has engaged a lawyer or paid agent (the representative) to represent the person in the dispute; and*
>
> *(c) under section 596, the person is required to seek the FWC's permission to be represented by the representative.*
>
> *(2) The FWC may make an order for costs against the representative for costs incurred by the other party to the dispute if the FWC is satisfied that the representative caused those costs to be incurred because:*
>
> *(a) the representative encouraged the person to start, continue or respond to the dispute and it should have been reasonably apparent that the person had no reasonable prospect of success in the dispute; or*
>
> *(b) of an unreasonable act or omission of the representative in connection with the conduct or continuation of the dispute.*
>
> *(3) The FWC may make an order under this section only if the other party to the dispute has applied for it in accordance with section 377.*
>
> *(4) This section does not limit the FWC's power to order costs under section 611.*

[14] Flexy submitted that both parts of s.376(2) were relevant in this case, stating as follows:

> *"s.376(2)(a) – on the basis that 1800 Advocates encouraged Ms McBride to either start or otherwise continue her Application, when it ought to have been reasonably apparent that her Application had no reasonable prospects of success; and*
>
> *s.376(2)(b) – on the basis of the unreasonable acts and omissions in connection with the conduct and continuation of the dispute."*[2]

Distilling the arguments of Flexy in its initiating application and its further submissions, I regard its justification for this position as being as follows:

1. In the initiating s.365 application, there was no identification of any action taken by Flexy that could be said to have terminated Ms McBride's employment; and
2. There was no evidence provided in subsequent submissions or evidence that identified any action by Flexy that could be said to have terminated Ms McBride's employment; and
3. Further, on 21 June 2024 Ms McBride was directed by me to provide written submissions as to when, by who and by what specific mechanism her employment was terminated by Flexy. Those submissions failed to provide the requested information; and
4. Those submissions referred to "email communications and meetings" for which no evidence was provided and which were between Rio Tinto and Ms McBride in any case; and
5. Flexy's response to the s.365 application included a copy of an email from Flexy to Ms McBride dated 26 April 2024 confirming that Ms McBride's employment had not been terminated; and
6. Flexy's legal representatives wrote to Mr Newman on 16 May 2024 advising him that it regarded the claim as without merit and without reasonable prospects of success and invited withdrawal of the claim which did not happen; and
7. Mr Newman forced Flexy to respond to "various unsatisfactory arguments" which were raised at different points of the proceedings and without any evidential / factual basis; and
8. The raising of constructive dismissal later in proceedings without any evidence to support the contention was an example of such behaviour.

[15] At hearing, Flexy relied on its written submissions and its application but expanded upon them. With respect to s.376(2)(a) and the issue of encouragement, Flexy drew my attention to the decision of Deputy President Bartel in *Mr Narong Khammaneechan v Nanakhon Pty Ltd*[3] *(Nanakhon)* where it was found that encouragement required there to be a definite act rather than merely the absence of discouragement. While Flexy argued that Mr Newman had indeed encouraged Ms McBride, it nevertheless conceded that this was a matter where I would need to be satisfied that he had taken some action.

[16] Flexy noted that the concept of "reasonably apparent that there were no reasonable prospects of success" involved an objective test of belief – belief formed on an objective basis rather than the subjective belief of the Applicant. It noted the findings in *Baker v Salva Resources Pty Ltd*[4]*(Salva)* and also *Keep v Performance Automobiles Pty Ltd*[5]*(Keep)* in support of this contention. It conceded however, that such cases also found that the FWC should exercise caution in arriving at such a finding.

[17] Flexy also noted that the FWC needed to be mindful of the information known to the Applicant at the time the application was made or continued. It cited *Kammaneechan v Nanakhon Pty Ltd*[6] where Deputy President Bartel noted previous findings that:

> *"…there is no doubt a difference between the meaning of the words "without reasonable cause" and "no reasonable prospect of success". In my view, the point of consideration is the difference between the reasonableness of taking a point and its prospects of success being reasonable. I think that reasonable prospects for success involve an assessment of the chances of the point being successfully argued in the relevant evidentiary and statutory context"*

Flexy submitted that on the facts known to Ms McBride and Mr Newman at the time of initiating the proceedings they should have known that there were no prospects of success, and noted further that those facts did not change in any appreciable way during the conduct of the matter.

[18] While noting that the jurisdictions differ in terms of awarding of costs, Flexy also cited the decision of the Full Court in *Levick v Deputy Commissioner of Taxation* [2000] FCA 674[7] *(Levick)* where the Court observed as follows:

> *"What constitutes unreasonable conduct must depend upon the circumstances of the case; no comprehensive definition is possible. In the context of instituting or maintaining a proceeding or defence, we agree with Goldberg J that unreasonable conduct must be more than acting on behalf of a client who has little or no prospect of success. There must be something akin to abuse of process; that is, using the proceeding for an ulterior purpose or without any, or any proper, consideration of the prospects of success."*

Flexy submitted that this passage had been cited by other members of the FWC and noted its use by Deputy President Dean in *Stephen Baskin v Friends Resilience Pty Ltd*[8]. Flexy argued that the relevance of the passage to the present matter was the lack of any proper consideration of the prospects of success by Mr Newman.

[19] Flexy also highlighted the contention made in the initiating application at section 3.1, where the form, which was signed by Mr Newman, states as follows:

> *"The employer terminated the employment contract on the basis that the host employer had engaged in direct discrimination (pregnancy) against the applicant when it told the applicant it was going to terminate the employment agreement because the applicant is pregnant."* [9]

Flexy submitted that this allegation raises the allegation of discrimination on the basis of pregnancy with no supporting evidence having ever been provided to the FWC – either with the application or during proceedings. It was submitted that this was another clear weakness in the case that should have been apparent to Mr Newman.

[20] Flexy also drew my attention to the email exchange between Ms McBride and Mr Newman[10] regarding an email from Rio Tinto. Flexy submitted that the contents of that email should have given Mr Newman cause to reconsider his action against Flexy. Instead, he advised Ms McBride that it constituted a "very thinly veiled discrimination" and in doing so, Flexy submitted that he had encouraged Ms McBride to continue with her application.

[21] Mr Newman submitted that he had made an assessment of the merits of Ms McBride's case and formed the view that she had an arguable case, based on the information she had provided. Notwithstanding this, he submitted that he had not encouraged Ms McBride to proceed with the matter. He submitted that he had adhered to professional standards and provided competent representation throughout the conduct of the matter and had tried to resolve the matter amicably with a *Calderbank* offer to Flexy's representatives.

[22] He further submitted that there was no indication that the matter had been pursued in a frivolous or vexatious manner or without a genuine belief in its merits. In his supplementary submissions he argued that the position he took was entirely reasonable given the facts as presented by Ms McBride, the position with her employment as she perceived it and the legal framework applicable at the time. Mr Newman also advanced the argument that Flexy's application for costs:

> *"…fails to account for the complex nature of the employment relationship and the ambiguous communications from the Respondent regarding the Applicant's employment status."*[11]

[23] The remainder of Mr Newman's written submissions essentially focused on the notion that he had provided competent advice based on the information provided, that such advice was a reasonable interpretation of the law and he had not engaged in any unreasonable acts or omissions during the conduct of the matter.

[24] In his further submissions at hearing, Mr Newman stated that Ms McBride had advised him that she had been terminated, she believed that this was due to her pregnancy, that Flexy had discussed the termination of her employment with Rio Tinto, and that there had been no offers of alternative employment to the best of his knowledge.

[25] He acknowledged that there had been no letter of termination but submitted that the central theme of his argument was that there had been a constructive dismissal. Mr Newman stated that he had taken Ms McBride's statements at face value when forming his view of her case and that he was entitled to do so. He also stated that he regarded it as highly unlikely that there was no collusion between Rio Tinto and Flexy regarding the ending of Ms McBride's employment.

[26] With respect to s.376(2)(a) Mr Newman submitted that support of a client does not meet the standard of "encouraged" as required by that section. He argued that if a client presented in a situation such as Ms McBride where she was not in paid employment and was in a circumstance – in this case pregnancy – that suggested that her discrimination claims were credible, and he agreed with her assessment, then his advocacy was simply supporting Ms McBride and not encouraging her.

[27] With respect to s.376(2)(b), Mr Newman rejected that his actions had been unreasonable. He stated that in his view had the application not been dismissed on jurisdictional grounds, then at a substantive hearing of the merits the evidence would have led to a favourable outcome for Ms McBride. He again submitted that he believed there had been collusion between Rio Tinto and Flexy.

[28] With respect to the s.365 application that was ultimately pursued, Mr Newman submitted that he had advised Ms McBride of her options, including options such as raising a

complaint to the Australian Human Rights Commission. However, Ms McBride had chosen the FWC and that was her choice and not his. He stated that he could "only do what he was instructed to do and only prepare the documents as he was told to prepare them".

[29] Mr Newman further submitted that Ms McBride's circumstances were clearly not devoid of merit. He stated that there were a number of what he described as "absolutes" to her case, being as follows:

1. Ms McBride was pregnant; and
2. She had enjoyed a positive relationship with both Rio Tinto and Flexy; and
3. This relationship changed when she announced her pregnancy; and
4. Her employment contract was withdrawn; and
5. Ms McBride is now, in effect, unemployed.

[30] Mr Newman's submissions contained a number of assertions that I found difficult to accept, and I questioned him about them at the hearing. In the first instance, I addressed his claim that there had been collusion between Rio Tinto and Flexy. I put it to Mr Newman that there was simply no evidence whatsoever that had been adduced to support this claim. Further, the unchallenged evidence of Flexy had been that it was not even aware that Rio Tinto had ended Ms McBride's engagement with them until it had received the second s.365 application.

[31] I also challenged Mr Newman on his assertion that he simply did as he was told by Ms McBride and that his role was simply to follow instructions. I put it to him that his clients came to him for advice based on his knowledge of the system. I suggested that he had a duty to apply some rigour to his assessment of a client's case and if they did not have any evidence to support that case then he should convey that to them and not simply lodge it. Mr Newman did not challenge this assertion.

[32] Mr Newman suggested that he had in fact put options to Ms McBride and that, based on his explanation of the timing of the various jurisdictions she had chosen the FWC. Further, sometimes the necessary evidence was not available in the initial stages of assessment, and he had to proceed based on the advice of Ms McBride. As such, he had taken her information at face value given the circumstances supported her explanation.

[33] I suggested to Mr Newman if he had proceeded without any evidence that supported Ms McBride's claim – noting none emerged at a later time – then he must have been given cause to reconsider when he received the Form F3 response which included a letter from Flexy to Ms McBride specifically stating that she was not dismissed and inviting her to contact them to advise her availability for other work. Mr Newman argued that nonetheless Ms McBride remained without work and that Flexy had made "no effort" to find work for her.

[34] I challenged Mr Newman on this on the basis that Ms McBride's own evidence was that she deliberately chose not to respond to Flexy's letter inviting her to set out her availability. As such, it was not the case that Flexy had not tried to find work for Ms McBride. Rather, it was Ms McBride who had chosen not to engage with Flexy. Nonetheless, at the time of Flexy's Form F3 response, the only evidence relating to the employment relationship between Ms McBride and Flexy was a letter from Flexy stating that she was still an employee. All of the other material was correspondence between Ms McBride and Rio Tinto, who were not her employer.

[35] Given the suspicions Mr Newman clearly had, I asked him if he had considered treating Ms McBride as a prospective employee, who had been refused employment by Rio Tinto – the prospective employer – on the basis that she was pregnant. I put it to him that such a scenario would in my view have suggested a s.372 application. Mr Newman stated that he had raised this with Ms McBride but she had instead insisted that the application be made against Flexy because she wanted her contract paid out.

[36] I put it to Mr Newman that Ms McBride's views on proceeding in that manner notwithstanding, he should have given the matter further consideration. Specifically, it was clear from the terms of engagement that Ms McBride was engaged as a casual, reaffirmed by the letter in evidence from Flexy writing to her about casual conversion. I noted the relevant case law on what happens when a labour hire firm's client says that the labour hire employee is no longer required – or in some cases allowed – on site. I further noted that there was no suggestion at any time that somehow the employment relationship of Ms McBride was with Rio Tinto. Given this, Ms McBride's casual contract had not been ended when she was removed from the Rio Tinto site, and she remained a casual employee of Flexy.

[37] I questioned Mr Newman further on a number of other matters arising from the case. I asked him about the email exchange referred to at paragraph 20 above and his assertion that the email did not "help their situation". I asked Mr Newman who "they" referred to and he advised he meant Flexy. When I pointed out the exchange was between Ms McBride and Rio Tinto and Flexy were not included he submitted that at the time the email was sent Flexy were the respondent in the case. This is incorrect as the email was sent some three weeks before the s.365 application was lodged.

[38] I also asked Mr Newman about the letter from Flexy's representatives[12] outlining their concerns about the case and what he had made of this letter. Mr Newman accepted that there were concerns but suggested that he had been intending to rely on Flexy's behaviour in not offering any alternative employment. When I queried this assertion on the basis on the letter sent by Flexy themselves seeking Ms McBride's availability, he conceded that Flexy had sent the letter claimed it had been sent at a later time. I corrected him as the letter from Flexy had been sent almost three weeks prior to the letter from their representatives. Mr Newman then persisted with his argument that he intended to look to Flexy's conduct and the collusion between Rio Tinto and Flexy.

[39] I advised Mr Newman that I could not accept this submission on the basis that it was simply not appropriate to have an aggrieved employee allege collusion with no evidence and lodge a claim with nothing more than that. Further, it was a claim lodged with no evidence that the organisation against who it was lodged had even terminated her employment. Worse still, such evidence as there was indicated that she was in fact not dismissed. Mr Newman did not provide a persuasive response.

[40] I further questioned Mr Newman about the directions I issued on 21 June 2024 wherein I asked him to provide particulars of how Flexy had affected the termination of Ms McBride. I took Mr Newman through his answers to my questions and put to him that nothing in his answers had anything to do with Flexy, but rather they were allegations about Rio Tinto. Mr Newman was not able to demonstrate anything in his answers that had identified Flexy but again he suggested that the case was about Flexy's conduct. I put it to him that having considered and answered – or in fact not answered – my questions at that time, he should have

developed some reservations about the case he was running. Mr Newman did not concede that this was so.

[41] I put to Mr Newman that as things stood when he was pursuing the application, by his own answers to my questions Rio Tinto had been responsible for the end of Ms McBride's placement. Rio Tinto was not a party to Ms McBride's employment contract and thus only Flexy or Ms McBride could terminate that contract. Ms McBride had not resigned. Flexy had not terminated her. Flexy had in fact confirmed her ongoing employment. In those circumstances, it was not reasonable to prosecute an argument that Flexy had dismissed Ms McBride. Mr Newman did not provide a persuasive response.

[42] I re-visited my comments about a s.372 application against Rio Tinto and put it to Mr Newman that he had simply chosen the wrong path. He responded that Ms McBride had chosen the option of s.365 because she wanted to have her contract paid out and that only Flexy could do that because Rio Tinto was not her employer. I again challenged Mr Newman on this because it was very clear that Ms McBride was a casual employee. On that basis, she had no arguable entitlement to be "paid out" her contract. Such an argument seemed to be operating under the misapprehension that Ms McBride was on a fixed term contract with no early termination provisions, and I put it to Mr Newman that he should have made this clear to Ms McBride.

[43] Mr Newman stated that he had believed Ms McBride did in fact have such a guarantee and that she had been working for some time at Rio Tinto on a full-time basis. I reminded him that her engagement was as a casual and that this had been confirmed by Flexy's letter to her in early 2024 addressing the issue of casual conversion. In that letter it had been made clear that Ms McBride was a casual and could not be converted due to the likelihood of the placement at Rio Tinto coming to an end.

[44] I also took Mr Newman to the language of the originating application at section 3.1, which is set out in paragraph 19 above. I put to Mr Newman that the language was somewhat difficult to navigate but it nevertheless suggested that Flexy terminated the contract – which was not correct – but also that Rio Tinto had told Ms McBride it was terminating her engagement because she was pregnant. However, there was no evidence of Rio Tinto ever having done so. In fact, Rio Tinto had been at pains to advise Ms McBride via an email - that was in evidence - that her pregnancy was in no way a factor in their decision. In summary, the application made two allegations that were not based on any evidence and were in fact contrary to the available evidence. Mr Newman suggested that he had perhaps simply written that part as Ms McBride had dictated. I advised him that his signature appeared on the application and that it was not acceptable to simply say, in effect, this is what the applicant wanted.

[45] In paragraph 22 above I set out Mr Newman's assertions about ambiguous communications from Flexy about Ms McBride's employment status. I asked him about this at hearing as it did not seem to me that there were any such communications in evidence. Mr Newman suggested that those communications were in fact phone calls. I reminded him that there was no evidence – or indeed even reference to – such calls in any of Ms McBride's material. Mr Newman conceded that this was so but suggested that such phone calls would have been part of a merits case. I put to Mr Newman that these calls, if they existed, were an important part of the jurisdictional case. Mr Newman conceded that with the benefit of hindsight this was correct.

[46] I put it to Mr Newman that by the time he had received all of Flexy's materials and had been required to answer my questions of 21 June 2024, that he should not have continued to prosecute the application. Mr Newman submitted that he had not continued but rather it had been Ms McBride who had continued. Given her circumstances, he had not wanted to abandon her and so did not withdraw his representation.

[47] In reply submissions at hearing, Flexy proposed that Mr Newman's claim that he was merely a conduit for Ms McBride was not consistent with the evidence before the FWC. Particularly, Flexy directed my attention to the submissions of Ms McBride[13] and suggested that her submissions led to a conclusion that she had been encouraged by Mr Newman. The relevant section of Ms McBride's submissions is as follows:

> *"When seeking legal representation in this matter, I was referred to Mr Brian Newman…by Shine Lawyers. They had recommended Mr Newman as an expert in employment law and cases such as mine and I trusted their recommendation.*
>
> *My application to the Fair Work Commission was made under the direct instruction of my paid legal representative [Newman], who assured me that the approach we took was the correct and lawful course of action.*
>
> *Mr. Newman reviewed all the evidence and, with full knowledge of the circumstances surrounding my termination, assured me that I had a strong case. As an eight-month pregnant woman with no legal qualifications or background, I relied on his expertise and paid him an upfront fee of $3,850."*

[48] Flexy also noted that much of the material Mr Newman claimed to rely upon was never tendered, even though it would have been important to the jurisdictional case. While Mr Newman had suggested that the material belonged in the merits hearing, Flexy submitted that this was simply incorrect. Further, the application authored by Mr Newman had made claims that were not supported by the evidence and in fact contradicted by such evidence as there was.

[49] Flexy also took issue with Mr Newman's repeated claim that the case was always going to be about constructive dismissal based on the actions of Flexy. It noted that there was no support for that proposition in the material filed, particularly given that the concept was not raised in the originating application but rather raised at a later time. Finally, the allegation of collusion was made with no evidence and once Flexy had filed its submissions and evidence it should have been clear that there were no grounds for this allegation.

Consideration

[50] Put simply, this case should never had been run. Mr Newman was not able to provide any credible rebuttal to my questions at hearing and I find that it is clear that at the time Mr Newman lodged the s.365 application he had no evidence whatsoever to suggest that there was any collusion – as he alleges - between Rio Tinto and Flexy and no evidence whatsoever that Ms McBride's employment had even been terminated. At the time of lodgment, such evidence as he did have of Ms McBride's employment status with Flexy was an email from Flexy making it clear that Ms McBride was still an employee. Further, he either was or should have been aware that Ms McBride had deliberately chosen not to respond to that letter, which was seeking her availability for alternative work.

[51] As an experienced advocate, Mr Newman should have also been well aware that no employment relationship existed between Rio Tinto and Ms McBride. And yet when asked to explain when, by who and how Flexy had terminated Ms McBride his answers related only to conduct by Rio Tinto – an entity that had no standing to terminate the employment relationship between Ms McBride and Flexy.

[52] Mr Newman and Ms McBride made no direct response to the letter from Flexy's representatives warning that the case had no prospects. What Mr Newman did instead was send an offer of settlement seeking $45,363 from Flexy. At the time of sending this offer, Mr Newman had the advantage of having seen Flexy's submissions and evidence in support of its jurisdictional objection. That evidence clearly showed that there was no termination by Flexy. Mr Newman should also have been aware that Ms McBride was a casual, again based on the clear evidence available to him. Given this, he should have been aware that he was making a claim that was based on the "paying out" of a casual contract, a concept that is extremely unusual. It is hard to see how an experienced industrial practitioner could then suggest – as Mr Newman does in his submissions - that such an offer was "amicable" and "pragmatic". It was instead ill-conceived and doomed to summary rejection.

[53] I find that the behaviour of Mr Newman with respect to this claim has been highly inappropriate. It seems that at least some of his motivation came from a belief – restated at the costs hearing – that there was collusion between Flexy and Rio Tinto. As this point deserves emphasis, I again highlight that there was no evidence ever tendered that supported this theory, and evidence tendered that firmly rebutted it. Further, there were no submissions made to the effect that there had been collusion. To the extent that Mr Newman persisted with this claim based on collusion between Rio Tinto and Flexy it was a grave error to do so.

[54] However, the question to be answered is whether Mr Newman's behaviour falls within the ambit of the behaviour envisaged by s.376(2) of the Act. The first issue to consider is s.376(2)(a) and whether it can be said that Mr Newman encouraged Ms McBride to commence and continue her application in circumstances where it should have been reasonably apparent that she had no reasonable prospects of success.

[55] This consideration clearly has two limbs: firstly, that it was apparent the case had no reasonable prospects of success and secondly, that the representative encouraged the applicant to take and continue the case in spite of this. I find that on an objective assessment of the material available to Mr Newman at the time the application was made, it should have been reasonably apparent to an experienced industrial advocate that the claim against Flexy under s.365 of the Act had no reasonable prospects of success. I make this finding mindful of the admonitions in *Salva* and *Keep* that such a finding should be made with great caution. Even exercising such caution, the more material that was received - such as Flexy's submissions and evidence – the more apparent it should have become that the case could not possibly succeed.

[56] I must then turn to the issue of whether Mr Newman encouraged Ms McBride. I am mindful of the caution found in *Nanakhon* that the mere absence of discouragement is not sufficient to demonstrate encouragement but rather there needs to be definite act. In this instance, I think it is proper that I consider whether there was a definite act with respect to initiating the claim, and whether there was a definite act with respect to continuing the claim. With respect to initiating, the submissions of Ms McBride, found at paragraph 47 above would lend themselves to a finding that Mr Newman had encouraged Ms McBride in telling her that her case was correct and lawful and had good prospects.

[57] However, I am mindful that these are submissions and not sworn evidence and not tested at hearing. I am also mindful that it is clear that Ms McBride – rightly or wrongly – felt very aggrieved and was anxious to pursue a case. Mr Newman has stated that he was simply following Ms McBride's instructions and was in essence not responsible for her beginning and continuing the case. While Flexy took issue at this "mere conduit" defence, for the purposes of s.376(2)(a) I believe it needs to be carefully considered. I share Flexy's concerns that a person who is an experienced industrial advocate would simply follow instructions and lodge a case simply because a client asked him to.

[58] Such behaviour is to be discouraged: advocates and lawyers should not tie up the resources of the FWC and respondents simply because an applicant feels aggrieved. More is needed by way of filtering and proper consideration of the evidence and the prospects of the case. Nevertheless, does Mr Newman's behaviour in – as he put it – "supporting" Ms McBride meet the test of encouragement. It is clearly a lack of discouragement. However, I find I cannot be satisfied that it rises to the standard of encouragement. Further, I am not satisfied that there is any evidence that having lodged the matter Mr Newman then encouraged Ms McBride to continue. Again, there was a lack of discouragement but no definite act that I can be comfortable took place to encourage Ms McBride. Given this, I cannot find that s.376(2)(a) is enlivened.

[59] I then turn to the provisions of s.376(2)(b) which require me to consider if there has been any unreasonable act or omission of the representative in connection with the conduct or continuation of the dispute. On this ground I am satisfied that Mr Newman's behaviour meets the test of an unreasonable act in connection with the continuation of the dispute. Even if Mr Newman did not encourage Ms McBride to commence her action and did not encourage her to continue the case he has behaved unreasonably in being involved in continuing to press the case when it became more and more clear that the case that he had lodged could not possibly succeed. Such clarity came both from the additional material and evidence from Flexy, from his inability to answer my questions posed on 21 June 2024 and from the lack of evidence from Ms McBride corroborating her allegations. In Summary, Mr Newman has behaved unreasonably in not advising Ms McBride to withdraw her claim and by continuing to represent her.

[60] In making such a finding I should make it clear that I am in effect finding that even if a representative offers no encouragement, they may still fall foul of s.376(2) where they continue to prosecute a case that clearly cannot succeed. In this instance I make no criticism of Mr Newman's motives. He said and I accept that he believed there was an injustice and that he continued on because he did not feel it was proper for him to in effect abandon Ms McBride. Nevertheless, he has caused Flexy to incur a large legal bill to defend itself in circumstances where it clearly did not have a case to answer. Advocates who wish to appear at the FWC must apply more rigour to the cases they run and not be swayed by emotion or sentiment but rather focus on the evidence and the law and ensure that they are pursuing an application that is appropriate to the circumstances. They should not simply seek to get the matter before the FWC and hope that a member will be swayed as they have been.

[61] I have found that Mr Newman has acted unreasonably in continuing to press a case with no prospects of success and thus S.376(2)(b) is enlivened. Despite this, the FWC retains discretion over whether to make an award of costs. I am mindful that the FWC awards costs only in rare cases, and that case precedent makes it clear that it should only do so with great

care and discretion. In making my decision, I am guided by some observations from previous cases that I believe are apposite to this case.

[62] In the first instance, I turn to the finding of the Full Court of the Federal Court in *Levick* as set out in paragraph 18 above, where the Full Court found that failure to consider, or properly consider the prospects of success can amount to an abuse of process. I am satisfied that Mr Newman has not properly considered the prospects of success of the case that he has run for Ms McBride. In my view it is irrelevant that Ms McBride wanted a s.365 application run against Flexy. Mr Newman should have considered how that case was unfolding and have concluded that he did not have any evidence to support his argument and some significant evidence from Flexy that rebutted it. I cannot accept that an experienced industrial advocate who had given proper consideration to such things would have been concluded it was reasonable to continue to act in the case or to not advise Ms McBride to withdraw.

[63] I also note the principle drawn from *Ashby v Slipper*[14] that a solicitor may run a case where the supporting evidence is weak but arguable. In this instance, there was in fact no evidence other than the assertions of Ms McBride which were contrary to the more concrete evidence such as emails and letters. Further, such assertions were never in the course of proceedings backed up by any further evidence and in some instances were not even included in submissions. In this instance I am persuaded that the evidence that Flexy had terminated Ms McBride was not merely weak but non-existent. Given this, there are no grounds for Mr Newman to have thought that he could persuade the FWC with his argument. He should have advised Ms McBride that she could not meet even the most modest of evidentiary requirements and that if she wished to proceed he could not continue to represent her.

[64] As a consequence, I am satisfied that this matter is one of the clear cases where costs should be awarded, and I will order that Mr Newman pay costs. I note that Flexy has submitted a number of its legal bills and that based on their letter to Mr Newman the total of those and further bills is a significant figure in excess of $80,000. I regard this figure as being excessive for the running of a jurisdictional case on a s.365 application and I am not minded to award costs on an indemnity basis. In the first instance, I will require the parties to attend a mention hearing and canvass with them the most appropriate method of determining the amount of costs to be awarded.

DEPUTY PRESIDENT

Appearances:

G Fredericks of Counsel for the Applicant.

Brian AJ Newman for the Respondent.

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[1] Email from Mr Newman to Chambers dated 25 June 2024

[2] Cost Applicant's submissions filed 29 July page 2 paragraph 4

[3] *Mr Narong Khammaneechan v Nanakhon Pty Ltd* [2011] FWA 651 at [22]

[4] *Baker v Salva Resources Pty Ltd* [2011] FWAFB 4014 at [10]

[5] *Keep v Performance Automobiles Pty Ltd* [2015] FWCFB 1956 at [18]

[6] *Kammaneechan v Nanahkon Pty Ltd* [2011] FWA 651 at [38]

[7] *Levick v Deputy Commissioner of Taxation* [2000] FCA 674 at [44]

[8] *Stephen Baskin v Friends Resilience Pty Ltd* [2018] FWC 1536

[9] See Court Book page 7

[10] See Court Book pages 86-88

[11] Supplementary submissions of Mr Newman page 2 paragraph 9

[12] See Court Book page 40

[13] See Court Book pages 192-194

[14] *Ashby v Slipper* [2014] FCAFC 15 at [177]