

[2024] FWC 466

The attached document replaces the document previously issued with the above code on 21 February 2024.

Added '[sic]' in paragraph 7.

Mahmoud Al Rifai
Associate to Justice Hatcher, President

Dated 21 February 2024.



STATEMENT

Fair Work Act 2009
s.365—General protections

Samuel Howell

v

Elite Elevators Corporation Pty Ltd
(C2023/5486)

JUSTICE HATCHER, PRESIDENT

SYDNEY, 21 FEBRUARY 2024

Application to deal with general protections contraventions involving dismissal – conciliation conference conducted – settlement reached – notice of discontinuance filed by applicant’s representative – dispute regarding whether applicant instructed or authorised filing of notice of discontinuance – discontinuance held to be invalid – conference conducted – recommendation made – recommendation accepted – payment not made to applicant – constructive failure to comply with directions – matter referred to Full Bench.

[1] Following the Full Bench decision issued in this matter on 22 December 2023,¹ I conducted a conference in this matter on 19 January 2024, and then made a recommendation on 24 January 2024.² The substance of the recommendation was as follows:

- (1) Employee Dismissals should repay the settlement sum to Elite Elevators Corporation Pty Ltd (respondent).
- (2) The respondent should then pay the settlement sum into a bank account nominated by Mr Howell.
- (3) On receipt of the settlement sum, Mr Howell should file a notice of discontinuance forthwith.

[2] The recommendation went on to state:

In the event that the recommendation is not accepted by the parties and Employee Dismissals, the matter will be returned to the Full Bench for consideration as to whether a certificate should be issued under s 368(3)(a) of the FW Act. Because of the opinions I have expressed herein, I will not participate further in this Full Bench and the Full Bench will be reconstituted accordingly.

[3] Parties were directed to provide written advice to my chambers by 5:00 pm (AEDT) on 31 January 2024 as to their acceptance, or otherwise, of my recommendation. Parties could only

¹ [2023] FWCFB 265.

² [2024] FWC 206.

accept the recommendation in its entirety, and any partial acceptance would be treated as a rejection.

[4] On 31 January 2024, at 12:17 pm, Mr Howell’s representatives emailed my chambers confirming Mr Howell’s acceptance of the recommendation in its entirety. Shortly thereafter, at 12:28 pm, the respondent’s representatives informed my chambers by way of email that the respondent also accepted the recommendation in its entirety. At 2:39 pm, that same day, Employee Dismissals informed my chambers that they accepted the Recommendation in the following terms:

... in the spirit of good faith and on a “without prejudice” basis, Employee Dismissals accepts the recommendations outlined at paragraph 23 of the [Recommendation]. Employee Dismissals shall take the necessary actions to implement the same forthwith.

Employee Dismissals shall also conduct a thorough review of its internal processes with a view to continuous improvement, and we shall be in touch with the Commission under separate cover in this regard.

...

(underlining added)

[5] On the basis that the parties, and Employee Dismissals, had accepted my recommendation, I made the following directions, which were sent to the parties at 3:36 pm on 31 January 2024:

1. The applicant, Samuel Howell, is to provide the solicitors acting for Elite Elevators Corporation Pty Ltd (the respondent) with the details of the bank account into which he wishes the settlement sum to be paid by **5:00 pm (AEDT) tomorrow, Thursday, 1 February 2024**.
2. Employee Dismissals is to advise chambers by email as soon as it has repaid the settlement sum to the respondent.
3. The respondent is to advise chambers by email as soon as it has paid the settlement sum to the applicant.
4. The applicant is to advise chambers by email as soon as he receives the settlement sum, and discontinue the matter on that basis. He may advise of discontinuance in the body of the email or file a Form F50 — Notice of Discontinuance.

[6] On 2 February 2024, upon my request, my associate emailed Mr Howell’s representatives seeking an update on whether his bank details had been provided as directed. Mr Howell’s representatives promptly replied and confirmed Mr Howell had complied with direction 1 above.

[7] On 5 February 2024, I instructed my associate to contact the representatives of both the applicant and the respondent for an update on compliance with the directions of 31 January 2024. Mr Howell’s representative informed my associate that Mr Howell had not yet been reimbursed the settlement sum pursuant to the directions above. Upon receipt of this information, the following amended directions were sent to the parties at 1:11 pm:

In light of correspondence with Mr Howell’s representatives which disclosed that the respondent has not been reimbursed the settlement sum from Employee Dismissals, notwithstanding

Employee Dismissals' acceptance of the recommendation of 24 January 2024, Justice Hatcher has amended the directions of 31 January 2024 and now directs as follows:

1. Employee Dismissals is to repay the settlement sum to Elite Elevators Corporation Pty Ltd (the respondent) and advise the chambers of Justice Hatcher (chambers) upon doing so, providing evidence of the transfer of the sum, by **5:00 pm (AEDT) on Tuesday, 6 February 2024**.
2. The respondent is to pay the settlement sum into the account nominated by Mr Samuel Howell (the applicant) and advise chambers upon doing so, providing evidence of the transfer of the sum, by **5:00 pm (AEDT) on Wednesday, 7 December [sic] 2024**.
3. The applicant is to advise chambers by email as soon as he receives the settlement sum, and discontinue the matter on that basis. He may advise of discontinuance in the body of the email or file a Form F50 — Notice of Discontinuance.

If the above directions are not complied with, the matter will be returned to a Full Bench for further consideration as detailed at paragraph [25] of [2024] FWC 206.

[8] Employee Dismissals neither complied with the first direction nor communicated further with my chambers. At 9:26 am on 7 February 2024, the respondent's legal representative emailed to my chambers the following update in respect of the amended directions:

...
For the reasons set out herein, the respondent is unable to comply with Direction Number 2, as it is predicated upon the Employee Dismissals' compliance with Direction Number 1.

In this regard, unfortunately, we are advised that our client has not yet received reimbursement of the settlement sum from Employee Dismissals, or otherwise received any communication from Employee Dismissals explaining their failure to do so, in compliance with Direction Number 1.

The Respondent will continue to monitor their accounts throughout the day, and intends to pay the settlement sum into the Applicant's nominated bank account upon receipt of the settlement sum from Employee Dismissals. We have been in contact with the Applicant's representative in this regard and have confirmed the details of his nominated bank account.

We will revert with any further updates in due course.

...

[9] On 13 February 2024, the respondent's representative notified my chambers that on 7 February 2024, at 8:47 pm, Employee Dismissals had sought confirmation of the respondent's bank details, and on 8 February 2024, at 9:42 am, the respondent had confirmed its account details.

[10] On 14 February 2024, I directed Ms Belinda Solomon of Employee Dismissals to provide an update on compliance with the amended directions by no later than 4:00 pm (AEDT) on 15 February 2024. Employee Dismissals neither responded to nor complied with this direction.

[11] Given Employee Dismissals' failure to comply with the amended direction and the direction of 14 February 2024, I will refer the matter to a Full Bench composed of Deputy President Wright, Deputy President Slevin and Commissioner Crawford for consideration as to whether a certificate should issue under s 368(3)(a) of the *Fair Work Act 2009* (Cth) (FW Act).

[12] In addition, in light of Employee Dismissals' conduct described in the Full Bench decision of 22 December 2023 and my recommendation of 24 January 2024, and the further conduct identified in this Statement, I have directed that all applications made pursuant to s 365 (general protections involving dismissal) and s 394 (unfair dismissal) of the FW Act that identify Employee Dismissals as the applicant's representative as paid agent be referred to the same Full Bench in the first instance (that is, prior to the conduct of any conciliation process) to determine whether permission should be granted for Employee Dismissals to appear as a paid agent on behalf of the applicant pursuant to s 596 of the FW Act.



PRESIDENT

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