



DECISION

Fair Work Act 2009

s.365 - Application to deal with contraventions involving dismissal (consent arbitration)

Joseph Yoon

v

Go Traveling Pty. Limited

(C2024/384)

DEPUTY PRESIDENT CROSS

SYDNEY, 6 JUNE 2024

Application to deal with contraventions involving dismissal – consent arbitration.

[1] Mr Joseph Yoon (the Applicant) made an application under s.369 of the *Fair Work Act 2009* (the Act) for the Fair Work Commission to deal with a general protections dismissal related dispute. Mr Yoon alleged that Go Travelling Pty Ltd (the Respondent) had dismissed him because he exercised his workplace right to inquire about his entitlements to study pay.

[2] A conference was conducted by Deputy President Wright, but the parties were unable to reach an agreement and a certificate was issued on 8 January 2024 under s.368(3)(a) of the Act.

[3] On 22 January 2024, the parties gave notice under s.369(1)(b) that they had reached an agreement for the Commission to deal with the dispute by arbitration.

Background

[4] Mr Yoon commenced employment with the Respondent on 5 September 2022. Mr Yoon was employed as an Apprentice/Trainee working as an on-line Content Producer. Mr Yoon was employed as a part time employee. He worked approximately 20 hours a week¹ and earned an annual salary of approximately \$20,000.00.²

[5] Mr Yoon raised issues regarding his entitlement to paid study leave on 25 August 2023. Mr Yoon asserted that he believed the reason for his dismissal was because he raised the issue regarding his entitlement to paid study leave. On 26 September 2023, Mr Yoon was made redundant. The bulk of the relevant background is contained in the emails exchanged between the period of 25 August 2023 to 18 October 2023.

[6] On or about 25 August 2023, after being advised by Apprenticeship Support that he was entitled to paid study time per week, Mr Yoon emailed the Respondent as follows:

Hi Tina,

Hope you're doing well. I've got some interesting news to share regarding my work at FirstClass.travel.

ACBC recently reached out and let me know that I should have been receiving three hours of paid study leave per week. Surprisingly, it seems this wasn't factored into my schedule since I started. ACBC mentioned the possibility of back pay for the missed weeks.

I wanted to notify you to prevent any further increase to the potential back payment. My goal is to sort this out smoothly and collaboratively.

I'm thinking it might be good for us to sit down and chat about this. One idea is to allocate the three hours on the original extra day, or we could explore having them within the regular office hours. Of course, if you have any other payment plans in mind, I'm all ears.

Could we set up a meeting sometime soon to discuss this? Your input would be really valuable to find the best way forward.

*Looking forward to your thoughts on this,
Thanks!*

*Kind regards,
Joseph*

[7] After some discussion, Ms Tong, the Proprietor of the Respondent, responded to the above email as follows:

*Hi Joseph,
I believe 3 hours /week is based on full time.
Ramesh can confirm,*

Joseph, if you want us to pay for the study time, in proportion, pls advise have you started any studies? And how many hours you spend in total since you enrolled? which modules you have finish, so Ramesh can ask the school. how many hours those modules is allocated for.

and please let ramesh know, how many hours you claimed in the past , when you worked less than 7 hours per day, by working around 9.40am till 5pm, with lunch, which you said some days maybe shorter, some days maybe longer, so that we can work out the balance of hours, whether its overpaid or under paid.

*Ramesh, and us are very busy atm.
please send us your calculation analysis, detailing the hours in question, in an excel sheet. so its easy for us to understand.*

thank you

[sic]

[8] Similarly, on 27 August 2023, Ms Tong sent Mr Yoon an email in the following terms:

*Joseph,
Imagine if you only work 1 day a week.
How can a biz afford to pay you 3 hrs a week?
Please also advise, how many units you have completed?
Businesses pay for your time to complete studies.
Its 3 hours study time for full timers.
You are working 2 days a week. Or previously 3 days a week. i.e. 1.2-1.5hrs.
You can send the send the calculation of hours short of 7.6hours since you taking lunch
break, and not made up on the Thursdays.
Ramesh, pls check with the school, how many units Jospeh has completed and how many
hours are allocated to those units to each student.*

Thanks

[9] Thereafter there was further communication between the parties, with the Respondent asserting, but then abandoning, a contention that as Mr Yoon only worked part-time, his entitlement to study leave was only 1.5, rather than 3.0, hours per week.

[10] On 19 September 2023, Ms Tong sent the following email to Mr Yoon:

*Hi Joseph, further to our conversation only work out how much \$ we owe you consider
all the study time, and difference in your pay rate and minimum marketing trainee rate,
please let me know by this Friday?*

Please stay at home it's in the meantime. I think you fall behind your study schedule.

[11] Mr Yoon responded with calculations and Ms Tong replied seeking corrections of the calculations proposed. On 21 September 2023, the parties exchanged the following emails:

Hi Tina,

*Here are the calculations to the best of my ability. Ive also attached the minimum pay
rate information from fair work below. Please don't hesitate to reach out if you have
any questions or alternative payment methods such as working hours or payment
instalments.*

Pay From 8/7/2022 to 6/1/2023

\$20.2429 - \$20.16 (minimum pay rate before 1 July 2023) = \$0.0829

*\$20.2429 - \$0.0829 = \$20.16 x 3 hours study time per week = \$60.48 x 27 weeks =
\$1,632.96*

Pay From 20/1/2023 to 19/09/2023

\$25.3036

$25.3036 - 21.32$ per hour (minimum pay rate since 1 July 2023) = 3.9836
 $25.3036 - 3.9836 = 21.32 \times 3$ hours study time per week = 63.96×36 weeks = 2,302.56
 $1,632.96 + 2,302.56 = 3,935.52$

And:

*Hi Joseph,
You calculated the pay for your study time,
What about the extra pay above the award rate,
The balance should be what we paid on top on award minus your study pay.*

[12] Despite Ms Tong's requests for clarification regarding the calculation of study leave, the Applicant failed to respond, prompting Ms Tong to send emails on 23 September 2023. The email relevantly stated:

*Hi Joseph,
Do you have any update?
According to your calculation,
Your study pay till 19sep is \$3,935.52
We paid above award
27 weeks x 23hrs/week (3 days a week initially) x \$0.0829 = \$51.48
36 weeks x 15hrs/week (2 days/week) x \$3,9836 = \$2,151
Total above award rate paid \$2,200 approx.*

*The difference between your study pay and extra pay above award is approx. \$1,735.
The actually figure will be less, cos you worked more than 3 days sometimes and since Jan, worked more than 2 days a week till about Aug. so the pay above award will be higher than \$2,200.*

*The above figures are not accurate, this is just to show you how its calculated.
Please recalculate, and advise by Monday noon if possible.*

And:

Btw, please minus the $15.2 - 3 = 12.2$ hours from your study hours from this week

[13] The parties exchanged multiple emails on 25 September 2023. They included:

(a) At 11.39am on 25 September 2023, Mr Yoon wrote:

Hey Tina, unfortunately I wont be able to give you a response yet as I am waiting for a call back. I will respond as soon as I can. In the meantime would you like me to come in this week or continue stay at home study?

(b) At 3.18pm on 25 September 2023, Ms Tong wrote:

Hi Joseph,

*Can you please update us with your study pay calculation?
You can study at home tmr too and reduce the hours from your calculation.
Any progress on your study units?*

(c) At 5.56pm on 25 September 2023, Ms Tong wrote:

*Hi Joseph,
Cynthia said, your calculation was not correct.
The \$20.16 rate is till 30Jun, the \$21.32 rate starts from 1 July not from 20Jan*

[14] On 26 September 2023, the parties once again exchanged emails. They relevantly stated:

(a) At 6.06pm on 25 September 2023, Mr Yoon wrote:

*Hi Tina,
Yes ill try and calculate as accurately as possible but I am waiting on a call back because as far as I'm aware you cannot offset the money you owe with the above award rate difference as that would not make it a pay rise only a pay-reallocation, which would mean ity was never above the award rate to begin with. So I'm waiting on further instructions from apprenticeship support as this will become more and more confusing as time goes on. In the meantime I can stay home to offset any more study time owed or I can come into the office if you prefer.*

I was informed that I would get a call back by this week.

*If you would like to speak to someone in the meantime I suggest apprenticeship support
1300 363 831*

(b) At 7.33pm on 25 September 2023, Ms Tong wrote:

Hi Joseph,

Thanks for your effort trying to resolve the issue.

Im sorry to advise you, Joseph

As I mentioned multiple times, the business has been suffering loss since March/April,

This is a tough decision to make, and I don't take it lightly,

We can no longer support your part time role in this company.

We have to cut costs to survive. We have no plan to hire more marketing trainee or marketing staff in the near future, till the business is getting better.

Re. study hours you believe you are entitled to,

Please calculate the total hours due till today, after deducting the study hours from last week.

We will continue to pay you every week till those hours are completed,

i.e. it is 15.2hrs a week we are paying you to study at home,

if its 152 hours left, (waiting for your recalculation)

we are giving you 10 weeks' notice for termination

and we will pay you every week 15.2 hours to study.

And the final pay will include your annual leave accumulated.

And if our business turns around in the future, we can reconsider hiring your services if you are available.

Hope the extra long notice period will help you find new employment as soon as possible, and new employee can continue the traineeship I believe.

Please continue with your studies and complete it as soon as you can.

Let me know if you have any other questions.

[Emphasis added]

[15] On 28 and 30 September 2023, Ms Tong again provided further clarification to the Applicant regarding the decision to make his position redundant, and further attempted to resolve the study leave issue. Ms Tong issued the following emails:

(a) At 11.54pm on 28 September 2023, Ms Tong wrote:

Ok hope you will hear from them tmr.

I am not sure what you meant by 'being abrupt'. I have been communicating with you about the company's financial situation for months, in person.

We have tried to keep your employment as long as we could. But we have been suffering from loss for months. We have to focus on staff or activities that are directly helping the company's profitability for survival. I hope you understand.

Im sure with your skills, you will find employment, possibly at a better pay. Or continue your own projects for development.

If our situation gets better, we may continue our plan for YouTube marketing, and if you are available by then, we are happy to discuss hiring your services again.

(c) At 5.01pm on 30 September 2023, Ms Tong wrote:

Hi Joseph,

Do you have update for your calculation?

According to your previous calculation, I assume you want us to pay over 150 hours study time,

Hence giving you 10 weeks notice to terminate your permanent employment with us. Last Tues on 26Sep, and advised you to spend the next 10 weeks time study.

The balance and your accrued annual leaves will be included in the final pay.

If theres any videos you've worked on, and can be completed within a couple hours, can you send me a list, so we can decide which ones to complete?

If you have any questions with this or studies, or references for your future employment, feel free to contact me any time

[16] On 6 and 7 October 2023, numerous emails passed between Mr Yoon and Ms Tong regarding calculation of the outstanding study leave balance, and Ms Tong's request that Ms Yoon attend the office for a meeting.

[17] The Fair Work Ombudsman was involved on behalf of Mr Yoon in his study leave claim. The claim was resolved between the parties on 31 October 2023, with a payment of approximately \$3,100.00 being made.³

[18] Regarding the final payments made to Mr Yoon, while essentially irrelevant to the matter before the Commission, I note that Mr Snead, the Chief Operating Officer of the Respondent, made the following concession:⁴

MR SNEAD: While Mr Yoon is doing that, Deputy President, I can already see now that Ms Tong did promise 10 weeks, and then it ended up – I've just looked at the timeline – and ended up only paying him two weeks. So I acknowledge straight away that eight weeks' pay is owed to Mr Yoon, because that was agreed upon, and then she rescinded that, which is inappropriate.

[19] The above concession was repeated numerous times during the Hearing.⁵

The Issues to be Determined

[20] The issues to be determined in deciding Mr Yoon's claim are:

1. Did Mr Yoon exercise a workplace right?
2. Did the Respondent take adverse action against Mr Yoon?
3. Did the Respondent take the adverse action because of a prohibited reason or reasons that included that reason?

Did Mr Yoon exercise a workplace right?

[21] Section 341 of the Act defines a workplace right as follows:

341 Meaning of workplace right Meaning of workplace right

(1) A person has a workplace right if the person:

(a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or

(b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or

(c) is able to make a complaint or inquiry:

(i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or

(ii) if the person is an employee—in relation to his or her employment.

[22] In his submissions, Mr Yoon made reference to his exercising a workplace right to study leave entitlements, and a right to enquire about payment of those entitlements. The Respondent made no submissions contradicting that put by Mr Yoon.

[23] In *Shea v TRUenergy Services Pty Ltd (No 6)*⁶, Dodds-Streeton J observed:

“As held in Ratnayake , it is, in my view, unnecessary that the employee, in making a complaint that he or she is able to make, expressly identifies the communication as a complaint or grievance, or uses any particular form of words. It is necessary only that relevant communication, whatever its precise form, would be reasonably understood in context as an expression of grievance or a finding of fault which seeks, whether expressly or implicitly, that the employer or other relevant party at least take notice of and consider the complaint.

Whether an employee has made a complaint is a matter of substance, not form, which should be determined in the light of all the relevant circumstances. It does not depend solely on the words used. An employee's communication of a grievance or accusation could amount to making a complaint within the meaning of s 341(1)(c)(ii) despite an express disavowal of any intention to complain if a reasonable observer would conclude from the employee's words and conduct in the circumstances (including the nature and gravity of the grievance or accusation) that he or she intended to bring the grievance to the employee's attention for consideration or other appropriate action.”

[24] I consider that Mr Yoon’s request to access his study leave entitlements was reasonably understood by the Respondent to be an expression of grievance and inquiry that the Respondent should take notice of and rectify. As such it was an exercising of a workplace right pursuant to s.341(1)(c) of the Act.

Were the actions of the Respondent 'adverse action' within the meaning of that phrase at section 342(1) of the Act?

[25] Section 342(1) of the Act provides that an employer takes adverse action against an employee where:

Item	Adverse action is taken by...	If...
1	An employer against an employee	the employer: (a) dismisses the employee; or (b) injures the employee in his or her employment; or

(c) alters the position of the employee to the employee's prejudice; or

(d) discriminates between the employee and other employees of the employer.

[26] It was not disputed that termination of employment is adverse action. I therefore find that, by terminating the employment of Mr Yoon on 25 September 2023, the Respondent took adverse action against Mr Yoon.

Was the adverse action taken because of the workplace right or exercise/purported exercise of that workplace right?

[27] This issue brings into consideration the reverse onus provision of s.361 of the Act, which provides:

“Reason for action to be presumed unless proved otherwise

(1) If:

(a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and

(b) taking that action for that reason or with that intent would constitute a contravention of this Part; it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

(2) Subsection (1) does not apply in relation to orders for an interim injunction.”

[28] In *Construction, Forestry, Mining and Energy Union v De Martin & Gasparini Pty Ltd (No 2)*,⁷ Wigney J provided a distillation of the principles in relation to the application of s.361 from the decisions of the High Court in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay*,⁸ and *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd*,⁹ as follows:

“As has already been noted, s 361 creates a statutory presumption that operates in cases where it is alleged that a person contravened s 340. Relevantly, where it is alleged that a person has taken adverse action against another person because that other person has a workplace right, or has exercised a workplace right, it is presumed that the action was taken for that reason, unless the person proves otherwise. Here, the CFMEU alleged that De Martin & Gasparini took adverse action against its employees for reasons that included that the employees had or had exercised workplace rights. Those workplace rights were the benefit of the Enterprise Agreement (a workplace instrument), and the ability to approve or not approve a variation of the Enterprise Agreement (a process

under the Fair Work Act). By reason of s 361, it is to be presumed that De Martin & Gasparini took the adverse action for those reasons unless it proves otherwise.

*One might be forgiven for thinking, at least at first blush, that the question whether a person took certain action for a particular prohibited reason is a fairly straightforward question. It is, however, a question which, in the context of s 340 and cognate provisions (for example s 346 of the Fair Work Act), has excited some considerable debate and controversy. Following the decisions of the High Court in *Barclay* and *BHP Coal*, however, it could now be said that the relevant principles are relatively well-settled. The key principles, in simple terms, are as follows.*

*First, the question is one of fact: *Barclay* at [41], [45], [101]; *BHP* at [7].*

*Second, the question is why the adverse action was taken: *Barclay* at [5], [44]. The focus of the inquiry is the reason or reasons of the relevant decision-maker: *Barclay* at [101], [127], [140], [146]; *BHP Coal* at [7], [19], [85]. More particularly, the question is whether the alleged prohibited reason was a “substantial and operative” reason for taking the adverse action: *Barclay* at [56]-[59], [104], [127]; or an operative or immediate reason: *Barclay* at [140].*

*Third, the test does not involve any objective element: *Barclay* at [107], [121], [129]; *BHP Coal* at [9]. To speak of objectively obtained reasons risks the substitution by the court of its view, rather than making a finding of fact as to the true reasons of the decision-maker: *Barclay* at [121]; *BHP Coal* at [9].*

*Fourth, the inquiry is not concerned with mere causation, in the sense that it is not sufficient that there is factual or temporal connection between the relevant protected workplace rights and the adverse action: *BHP Coal* at [18]-[20]. Any such connection, however, may necessitate some consideration as to the true motivation or reasons of the decision-maker: *BHP Coal* at [22].*

*Fifth, the question must be answered having regard to all of the relevant facts and circumstances and the inferences available from them: *Barclay* at [45], [127]; *BHP Coal* at [7].*

*Sixth, direct testimony from the decision-maker as to why the adverse action was taken is capable of discharging the burden imposed by s 361: *Barclay* at [45], [71]; *BHP Coal* at [38]. However, declarations that the action was taken for an innocent reason may not discharge the onus if contrary inferences are available on the facts: *Barclay* at [54], [79], [141]. The reliability and weight to be given to such evidence must be assessed having regard to the overall facts and circumstances: *Barclay* at [127].*

*Seventh, it is not necessary for the decision-maker to establish that the reason for the adverse action was entirely disassociated from the relevant protected workplace right: *Barclay* at [62].”*

[Emphasis added]

[29] In determining why the alleged adverse action was taken, there is a focus on the reason or reasons of the relevant decision-maker, who in this case was Ms Tong. Her evidence under cross-examination was as follows:¹⁰

So you borrowed eight more weeks than what you were - - -? I borrow a lot more. We – did you hear my answer? We lost \$250,000 at the time I gave you notice. A position like yours which is generating zero income for the company, it was for a hobby. You knew that, right?

I refute that? ---We're doing videos. That's generally zero income on (indistinct) and that's most of Joseph's job is editing videos so that we get subscribers but those things takes long-term investment. I can afford to do that when I make money when you join. When in June 2022, when you join, we have making money and we're big so I employed two people to do that. This is a long-term investment but I couldn't afford it when the company is losing \$250,000 and I could have made your position redundant months before that but because it's my hobby. I didn't want to let anyone go.

[Emphasis added]

[30] I closely observed Ms Tong give evidence and formed the view that I could accept her evidence as to the reason why the adverse action was taken. Her evidence was consistent and withstood scrutiny. The reason for the adverse action was not the prohibited reason as alleged but was due to the financial position of the Respondent.

[31] I hasten to observe that the above finding as to the acceptability of Ms Tong's evidence does not in any way reflect adversely upon Mr Yoon. He could only reasonably suppose as to the reason for the adverse action, however, as the authorities make clear, the enquiry is subjective as to the reasons of the decision maker.

[32] I am also satisfied that the reason for the adverse action stated by Ms Tong was supported by all of the relevant facts and circumstances and the inferences available from them. In particular:

(a) The evidence of Mr Snead was consistent with that of Ms Tong. While he had only recently been employed by the Respondent,¹¹ as Chief Operating Officer of the Respondent he was clearly fully aware of the Respondent's financial Position. He was also, in my observation, a forthright and honest witness, who would readily make concessions against the interests of the Respondent where appropriate. His evidence was:¹²

Under section 340 and 341 of the Fair Work, adverse action should not be taken against me for exercising a workplace right. Are you saying the email that I sent about the study pay at 6.06 pm, after working hours, did not factor at all into the decision to dismiss me at 7.33 pm?--- No, it didn't. What it did do is it created a greater financial loss, which then – the timing clearly – I'm not going to dispute the timing, but the reality is that your position as content producer was in fact redundant months earlier, and you knew the financial situation of the company. Ms Tong kept you on to her own financial detriment, as well as others', continuing to incur losses.

(b) While Mr Yoon asserted his position was replaced, and that advertisements for positions were placed for positions after he ceased, I accept Mr Snead's evidence that such advertisements were not for specific positions, and certainly not for Mr Yoon's former position. Mr Snead's evidence was:¹³ Against the position of the Respondent is the fact that a job advertisement was put out seemingly for the same position the Applicant held. The Respondent asserted the following in response to this:¹⁴

Do you acknowledge, in my response statement, the ads on Indeed job? - - -Recent ads?

They're not recent, because I have – there is messages back and forth around September. I've seen these, and I have recollection of seeing these my entire tenure? --- Yes. There were multiple ads that have come out particularly – so let's start with, nobody has been hired to replace your position. In fact, the first replacement in any marketing role in the company was this Monday. This Monday, the first person – because the company is doing better financially since December. But there have been no roles filled. What Ms Tong has done, and if you go back through her ads, she puts adverts in all the time, to basically get a portfolio of potential applicants, that might not even be contacted for three or six months. I personally don't think that's particularly effective, because a lot of people get jobs in between that time. But the first serious ad that we put in about marketing was a month ago, or approximately – a little over a month ago, where we actually hired somebody, that started this Monday. There have been no other marketing positions filled, and certainly not your position filled, the position you were sitting in.

(c) While Mr Yoon was the only employee made redundant around 25 September 2023, all other employees of the Respondent's relatively small operation were salespeople who generated income. Mr Yoon was in the only division producing videos for YouTube that did not generate any income.¹⁵

(d) Despite Mr Yoon's claim that he was made redundant as a result of his inquiries into his study leave entitlements, the chain of correspondence discloses that Ms Tong was, both before and after the redundancy, genuinely attempting to rectify any outstanding payments that Mr Yoon believed he was owed. This is corroborated by her offer of a 10 week notice to account for the study leave pay owed. Rather than taking adverse action because of a claim to an entitlement, Ms Tong was continually attempting to crystalize that entitlement.

Conclusion

[33] I find that the Respondent has discharged the onus of proving that no part of that action was taken for the prohibited reason alleged. On that basis the application is dismissed.



DEPUTY PRESIDENT

Appearances:

Mr J Yoon the Applicant.

Mr A Snead on behalf of the Respondent.

Hearing details:

3 April 2024.

Sydney.

In-person.

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¹ Transcript PN 216.

² Exhibit R5.

³ Transcript PN 89.

⁴ Transcript PN 173.

⁵ Transcript PN 197, 213, 303 and 627.

⁶ 2014) 242 IR 1, at [626] and [627].

⁷ [2017] FCA 1046, at [295] to [303].

⁸ (2012) 248 CLR 500.

⁹ (2014) 253 CLR 243.

¹⁰ Transcript PN 496 and 497.

¹¹ Transcript PN 300.

¹² Transcript PN 290.

¹³ Transcript PN 331 and 332.

¹⁴ Transcript PN 332.

¹⁵ Transcript PN 665.