DECISION

Fair Work Act 2009
s.604—Appeal of decision

Dr Reuben Kirkham
v
Monash University & others
(C2024/5180)

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT MASSON
COMMISSIONER ALLISON

SYDNEY, 13 NOVEMBER 2024

Appeal against decision [2024] FWC 1757 of Commissioner Hunt at Brisbane on 10 July 2024 in matter number C2024/2913.

Introduction and background

[1] Dr Reuben Kirkham has applied for permission to appeal, and appeals, a decision made by Commissioner Hunt on 10 July 2024[1] to dismiss his application made pursuant to s 365 of the *Fair Work Act 2009* (Cth) (**FW Act**) against all the persons named as respondents to the application except for the first respondent, Monash University. Dr Kirkham's notice of appeal also contends that the Commission 'improperly' issued a certificate pursuant to s 368(3)(a) of the FW Act on the same day.

[2] Dr Kirkham's appeal was the subject of a hearing before us on 20 September 2024. At the hearing, all respondents to the appeal except for the NTEU jointly applied for permission to be legally represented pursuant to s 596(2). This was opposed by Dr Kirkham. We determined to grant permission for legal representation. We considered that the criterion in s 596(2)(a) was satisfied because the appeal raises issues of some legal complexity which would be dealt with more efficiently if we had the benefit of legal representation on the part of at least some parties to the appeal. We also considered it appropriate, for the same reason, to exercise our discretion to grant permission.

[3] The background to the matter is as follows. Dr Kirkham was previously employed as an academic by the University. He was dismissed by the University effective from about 14 April 2024 for performance-related reasons. On 4 May 2024, Dr Kirkham lodged an application under s 365 of the FW Act in which he alleged his dismissal occurred in breach of the general protections provisions in Part 3-1 of the FW Act. The application is substantially incoherent but appears to allege that Dr Kirkham was dismissed in breach of ss 340, 341 and 343 for making inquiries or complaints about workplace rights, ss 346–348 for his industrial activities, and s 351 for his race, colour, sex, sexual orientation, gender identity, age, family/carer's responsibilities, religion, political opinion, national extraction and/or social origin. More

importantly for present purposes, the application identified the NTEU and 17 individuals[2] then or previously employed or by the University as 'respondents' in addition to the University itself. Dr Kirkham alleged that the NTEU and each of these individuals was, in varying ways, complicit in his allegedly unlawful dismissal. He claims reinstatement and approximately $8 million in damages and $100 million in pecuniary penalties.

[4] A joint response to the application was filed on behalf of the University and the individuals named as respondents to the application (**individual respondents**). This response did not identify any jurisdictional objection to the application, but contended that Dr Kirkham's claim had no reasonable prospects of success. The NTEU filed a separate response which likewise contained no jurisdictional objection but contended that the NTEU was not Dr Kirkham's employer, was not involved in his dismissal and was not properly a party to the application.

[5] On 14 June 2024, the matter was allocated to the Commissioner. On 17 June 2024, the Commissioner's chambers sent an email to the parties concerning the programming of the matter. Notwithstanding that no party had raised any jurisdictional objection to Dr Kirkham's application, the email included the following:

> The Commissioner has formed a *preliminary view* that the s.365 application against all Respondents, excluding Monash University, cannot succeed as the Applicant will unlikely be able to demonstrate an employment relationship with those Respondents, and therefore will be unlikely to demonstrate that he was dismissed by them, as required by s.386 of the *Fair Work Act 2009*. The Commissioner's *preliminary view* is that the application against all Respondents, excluding Monash University, does not have jurisdiction.
>
> It would appear to the Commissioner that there would not be such a barrier if the Applicant wished to, instead, make an application against those Respondents in a s.372 application. That is a matter for the Applicant to consider. If such an application(s) were to be made, it is a matter for those Respondent(s) to determine whether they would agree to participate in a conference before the Fair Work Commission.
>
> In respect of the s.365 application, the Commissioner will convene a video conference by Microsoft Teams between the Applicant and Monash University, permitting Monash University to be represented at that video conference…
>
> The purpose of the video conference will be to deal with the dismissal dispute between the Applicant and Monash University. The conference will be conducted in private. If the dispute cannot be resolved, the Commissioner will likely issue a certificate to the Applicant so that he may pursue his application in a Court of competent jurisdiction.

[6] Dr Kirkham sent the Commissioner's chambers an email in response on the same day expressing his opposition to the approach foreshadowed by the Commissioner. The University and the individual respondents merely indicated the University's availability to attend the conference. The NTEU did not respond.

[7] On 18 June 2024, the Commissioner's chambers sent an email to the parties which notified them that a conference between Dr Kirkham and the University would be conducted on 27 June 2024. This email further stated:

> … As the Commissioner has indicated, she holds a preliminary view that the s.365 application against all Respondents other than Monash University must fail for want of jurisdiction. There is no employment relationship between the Applicant and those Respondents, and therefore there cannot have been a dismissal. The Applicant is encouraged to withdraw the s.365 application against those Respondents. He may do so by emailing to say that he wishes to withdraw the application against all Respondents other than Monash University.
>
> If the Applicant does not withdraw the application against all Respondents other than Monash University, the Commissioner is likely to issue a short decision dismissing the application against those Respondents on the basis that there is no employment relationship and therefore no dismissal. …

[8] Dr Kirkham sent an email to the Commissioner's chambers in response the same day stating:

> The proposal that I start a multiplicity of proceedings does not seem to be appropriate, especially given the provisions (Chapter 6, Division 3) concerning a multiplicity of proceedings at the Court stage of this process.
>
> It is my contention that all the conduct is related to dismissal. The Commissioner has the jurisdiction to deal with the entire dispute, including the behaviour of the individuals and to bring them before the Commission in their individual capacity. Whether they are parties or not is besides the point.
>
> If the Commission declines to deal with the full dispute (including by using the full panoply of powers available to it), then I would respectfully submit that I would (1) challenge any decision by way of an appeal and (2) in at the Federal proceedings stage, ask for the matter to be remitted back to the Commission to perform its functions.

[9] The Commissioner's chambers responded by email to the effect that the Commissioner did not intend to engage in any further exchange of emails about the matter, that the Commissioner would explain the applicant's jurisdictional issues in respect of the other respondents at the conference, and that the Commissioner's 'preliminary view' was that she would dismiss the application against the other respondents unless the applicant withdrew his application against them within a short time after the conference.

[10] The Commissioner conducted a conference with Dr Kirkham and the University on 27 June 2024. A file note concerning the conference discloses that Dr Kirkham was given until 4:00 pm on 10 July 2024 to advise whether he would withdraw his application against the other respondents and that, if he did not do so, the Commissioner would likely issue dismissal decisions in respect of those respondents and issue a certificate with respect to the University.

[11] On 3 July 2024, Dr Kirkham filed a submission in which he declined to discontinue against the respondents other than the University and submitted that the approach proposed to be taken by the Commissioner was incorrect. In this respect, he referred to the decision of Beaumont DP in *Starkey v Chemello & Early Years Learning and Development Pty Ltd*[3] and Easton DP in *Yang v Dijones Property Services Pty Ltd*[4] (***Yang***) and submitted, among other things, that the Commission should assess whether it was likely that the other respondents had accessorial liability.

[12] On 4 July 2024, the Commissioner's chambers sent an email to the parties acknowledging receipt of Dr Kirkham's submissions and stating:

> The Commissioner draws the parties' attention to the Full Bench decision of *Lipa Pharmaceuticals Ltd v Mariam Jarouche* [2023] FWCFB 101. In this decision, the Full Bench held that the Commission **must** first determine the jurisdictional objection prior to exercising any of its functions and powers under s.368 of the *Fair Work Act 2009*. In other words, where a jurisdictional issue is present, the Commissioner **must not** convene a conference for the purpose of conciliation of the matter. This Full Bench decision was issued on 31 May 2023.
>
> In light of the *Lipa Pharmaceutical*[*s*] decision, the parties are invited to provide submissions (if any) in respect of the Commission 'not dealing with' and hence, not convening conferences with the individual named Respondents and the NTEU until the jurisdictional objection is determined. Parties are to file their submissions in the Commission, copying in the other party, by no later than **4:00pm (AEST) on Friday, 5 July 2024**.
>
> Following receipt of the parties' submissions, if any, the Commissioner anticipates issuing a decision early next week. It is available to the Applicant to withdraw the applications against the individual named Respondents and the NTEU.

[13] On 5 July 2024, Dr Kirkham sent an email to the Commissioner's chambers which included the following:

> In respect of the Commissioner's email, I am somewhat confused. My understanding is that the jurisdictional objection was raised by the Commissioner, not the parties. So that does not seem to be on all fours with the case referenced by her (i.e. Lipa Pharmaceuticals), unless those objections are now being pursued by another party.
>
> Having pointed out that there is a weight of authority against the objection, I assume there is now no barrier to proceeding with the required individual conferences.

[14] On 8 July 2024, the Commissioner's chambers responded to Dr Kirkham by email. In this email, the Commissioner 'note[d] the jurisdictional issue was raised by the Commissioner and is one that must be determined', and extended time for Dr Kirkham to file submissions until the following day. Dr Kirkham filed submissions in which he stated:

> There has been a complete answer in my favour given by other Deputy Presidents in the authorities I have already provided. I have not been made aware of any contrary authority. The answer to both questions are thus straightforward.
>
> It is unclear why a certificate would be issued in respect of myself and Monash University until the conferences with the other defendants have taken place. My expectation is these conferences will move Monash University's position and bring them to the negotiating table, especially when they are no longer the messenger between myself and the other respondents. It follows that any certificate would be (1) premature and (2) result in a multiplicity of proceedings splinched across two levels of the legal process. Furthermore, the jurisdiction to issue a certificate under s.368 is only enlivened when all 'all reasonable attempts to resolve the **dispute**' (my emphasis) have been undertaken. The whole dispute is the general matter, not each individual proceeding in respect of each respondent.
>
> In any event. issuing a certificate before any appeal on the jurisdictional matter would not be appropriate. If the jurisdictional matter is not decided in my favour, an appeal is itself a step that

may help resolve the underlying dispute. Having a complete and clean certificate avoids further litigation down the line about that question and the complexity that would entail.

[15] Submissions were also filed on 9 July 2024 by, firstly, the University and the individual respondents and, secondly, the NTEU. In their submissions, the University and the individual respondents stated that:

- consistent with the decisions in *Coles Supply Chain Pty Ltd v Milford*[5] (***Milford***) and *Lipa Pharmaceuticals Ltd v Jarouche*[6] (***Lipa Pharmaceuticals***), the Commission must first determine that it has jurisdiction in respect of an application made under s 365 before it can deal with the dispute under s 368;

- a valid application under s 365 requires that the relevant dismissal has actually occurred as a matter of jurisdictional fact;

- in relation to the individual respondents, they were not the employer, and many of the allegations and assertions made in respect of them relate to conduct about treatment during employment beyond the relevant 'dispute' referenced in s 365 of the FW Act;

- accordingly, the Commission had a valid application under s 365 before it to the extent that Dr Kirkham alleged he was dismissed by the University in contravention of Part 3-1 of the FW Act and can deal with that application to the extent of that dispute, but was not otherwise empowered to deal with any other matters alleged by Dr Kirkham including matters against the individual respondents falling outside that dispute alleged;

- even if the Commission was satisfied it had the requisite jurisdiction, it was not required to conduct multiple conferences with individual respondents, order additional persons to attend particular conferences or require a process of discovery;

- to the extent that Dr Kirkham might ultimately have a cause of action against any of the individual respondents (which was denied), this did not give rise to a separate dispute within the meaning of ss 365 and 368;

- there was no reasonable prospect of the dispute being resolved, no further conference should be conducted, and a certificate under s 368(3)(a) should be issued, and if the Commissioner considered that arbitration under s 369 or a general protections court application in relation to the dispute, would not have a reasonable prospect of success, she was required to advise the parties accordingly.

[16] The NTEU declined to make a submission about the jurisdictional issue identified by the Commissioner, simply noting again that Dr Kirkham had not to that point disclosed any cause of action against it. Dr Kirkham also filed a reply submission on 9 July 2024 in which he submitted, among other things, that the University had 'raise[d] matters that were not the subject of the request of the Commissioner' and that it was 'wholly misleading to suggest that all the

individual respondents were not involved in my dismissal, when their names are all the way through the documentation'.

The decision and the certificate

[17] As earlier stated, the decision the subject of this appeal was made on 10 July 2024. The decision relevantly stated:

> [11] The Commission's usual process with general protections matters is to deal with the dispute by conducting a conciliation conference by a staff conciliator. If it is satisfied that all reasonable attempts to resolve the dispute have been or are likely to be unsuccessful, the Commission will issue a certificate that allows the applicant to commence proceedings in a court (s.368(3)) or by arbitration in the Commission if consent is given by each party (s.369). However, in an application where the respondent or respondents deny that it or they dismissed the applicant and object to the application on this basis, the Commission is required to determine whether the applicant was dismissed.
>
> [12] Consistent with the Commission's usual practice on these matters, this matter has been allocated to me to determine whether or not there was a dismissal. A person must have been dismissed to be entitled to make a general protections dispute application and before the Commission can exercise powers under s.368 to deal with a dispute.
>
> **Consideration**
>
> [13] Dr Kirkham was not employed by the individually named Respondents, nor was he employed by the NTEU. He was employed only by Monash University.
>
> [14] In the absence of an employment relationship with all Respondents other than Monash University, there cannot have been a dismissal of Dr Kirkham by any or all of the Respondents other than Monash University.
>
> [15] Pursuant to the decision in *Lipa Pharmaceuticals*, the Commission is not permitted to 'deal with' the dispute and accordingly, must not convene a conciliation conference with the Respondents other than Monash University.
>
> **Conclusion**
>
> [16] Dr Kirkham has not been dismissed by any of the Respondents other than Monash University.
>
> [17] The application against all Respondents other than Monash University is dismissed.[7]
>
> (citations omitted)

[18] The certificate issued by the Commissioner under s 368(3)(a) on 10 July 2024 states:

> An application pursuant to s.365 of the *Fair Work Act 2009* (Cth) (the Act) was made by Dr Reuben Kirkham alleging he was dismissed by Monash University in contravention of Part 3-1 of the Act.
>
> The Fair Work Commission conducted a conference to deal with the dispute on 27 June 2024.

Pursuant to s.368(3)(a) of the Act, the Fair Work Commission is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful.

Statutory framework

[19] Part 3-1 of the FW Act is entitled 'General Protections' and, broadly speaking and for relevant purposes, prohibits 'adverse action' being taken against employees for various identified proscribed reasons. Section 342 defines 'adverse action' to include dismissal from employment. In respect of allegations of dismissal in contravention of general protections provisions, Subdivision A of Division 8 establishes a compliance regime which is separate to that applying to other types of adverse action. Section 365 is contained within Subdivision A and provides:

> **365 Application for the FWC to deal with a dismissal dispute**
>
> If:
>
> (a) a person has been dismissed; and
>
> (b) the person, or an industrial association that is entitled to represent the industrial interests of the person, alleges that the person was dismissed in contravention of this Part;
>
> the person, or the industrial association, may apply to the FWC for the FWC to deal with the dispute.

[20] Section 366 prescribes a time limitation applying to the making of an application under s 365. Section 368 empowers the Commission to deal with a dismissal dispute raised by an application made under s 365 in the following terms:

> **368 Dealing with a dismissal dispute (other than by arbitration)**
>
> (1) If an application is made under section 365, the FWC must deal with the dispute (other than by arbitration).
>
> Note: The FWC may deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)). One of the recommendations that the FWC might make is that an application be made under Part 3-2 (which deals with unfair dismissal) in relation to the dispute.
>
> (2) Any conference conducted for the purposes of dealing with the dispute (other than by arbitration) must be conducted in private, despite subsection 592(3).
>
> Note: For conferences, see section 592.
>
> (3) If the FWC is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful, then:
>
> (a) the FWC must issue a certificate to that effect; and
>
> (b) if the FWC considers, taking into account all the materials before it, that arbitration under section 369, or a general protections court application, in relation to the dispute would not have a reasonable prospect of success, the FWC must advise the parties accordingly.
>
> (4) A ***general protections court application*** is an application to a court under Division 2 of Part 4-1 for orders in relation to a contravention of this Part.

[21] Section 595(2), to which the note to s 368(1) refers, provides:

> (2) The FWC may deal with a dispute (other than by arbitration) as it considers appropriate, including in the following ways:
> (a) by mediation or conciliation;
> (b) by making a recommendation or expressing an opinion.

[22] The procedural powers of the Commission apply when the Commission deals with a dispute under s 368. These powers include, in s 592(1), the power to direct a person to attend a conference at a specified time and place.

[23] Section 370, excluding the statutory notes, provides:

> **370 Taking a dismissal dispute to court**
>
> A person who is entitled to apply under section 365 for the FWC to deal with a dispute must not make a general protections court application in relation to the dispute unless:
> (a) both of the following apply:
> (i) the FWC has issued a certificate under paragraph 368(3)(a) in relation to the dispute;
> (ii) the general protections court application is made within 14 days after the day the certificate is issued, or within such period as the court allows on an application made during or after those 14 days; or
> (b) the general protections court application includes an application for an interim injunction.

[24] The relevant prohibitions in Part 3-1 are civil penalty provisions: s 539. A person affected by a contravention of these provisions may apply to the Federal Court of Australia or the Federal Circuit and Family Court of Australia for orders in relation to the contravention: s 539(2). A court can make a range of remedial orders under s 545 and pecuniary penalty orders under s 546. Section 550 provides for accessorial liability for contraventions of civil penalty provisions as follows:

> **550 Involvement in contravention treated in same way as actual contravention**
>
> (1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.
> Note: If a person (the ***involved person***) is taken under this subsection to have contravened a civil remedy provision, the involved person's contravention may be a serious contravention (see subsection 557A(5A)). Serious contraventions attract higher maximum penalties (see subsection 539(2)).
>
> (2) A person is ***involved in*** a contravention of a civil remedy provision if, and only if, the person:
> (a) has aided, abetted, counselled or procured the contravention; or
> (b) has induced the contravention, whether by threats or promises or otherwise; or
> (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
> (d) has conspired with others to effect the contravention.

Appeal grounds and submissions

[25] Dr Kirkham's appeal proceeds on the following three grounds:

> 1. The Commissioner erred in law by misunderstanding her jurisdiction and issuing a certificate when she had not taken any effective steps to resolve the dispute.
>
> 2. The Commissioner should not have issued a certificate before I had a chance to appeal to the Full Bench of the Commission.
>
> 3. The Commissioner erred in law by failing to involve the other respondents to this matter based on her asserted lack of Jurisdiction to do so.
>
> (numbering added)

[26] Dr Kirkham submits that the decision was in error in proceeding on the basis that the dispute resolution process could only involve the employer who dismissed him from his employment, and not the other respondents who were involved in the dispute. These other respondents were parties to the dispute because they were involved in the contraventions and thus faced liability under s 550 of the FW Act. It was submitted that, while s 365 requires there to have been a dismissal in order for the Commission's dispute resolution function to be enlivened, it says nothing about the parties to the dispute about the dismissal. The purpose of s 365 is for the Commission to attempt to resolve disputes about dismissals said to be in breach of the general protections provisions, but the approach taken by the Commissioner undermined this purpose, treated the process of issuing the s 368(3)(a) certificate as a mere formality and, 'by not involving the true actors', made it inevitable that the dispute would not be resolved. Dr Kirkham submits the dispute resolution process should have involved all respondents being separately required to attend a conference and to produce relevant documents.

[27] Specifically in relation to the issue of the certificate, Dr Kirkham submits that it may only be issued if all reasonable steps have been taken to resolve the dispute, and the approach taken by the Commissioner meant that no effective steps were taken whatsoever. However, Dr Kirkham did not ultimately submit that the certificate issued by the Commissioner should be quashed; rather, he submitted that the Commission should require that the dispute resolution process be conducted in respect of each respondent other than the University and that, if no resolution was reached, further certificates should be issued with respect to each respondent.

[28] The University and the individual respondents submitted that the Commissioner did not err in dismissing the applications against the NTEU and the individual respondents. They submit that 'the dispute' to which ss 365 and 368 refer must be solely about whether the relevant person was dismissed in contravention of Part 3-1 of the FW Act. The only person, it was submitted, who can take 'adverse action' as defined, by 'dismissing' a person is the employer of the dismissed employee. This is consistent with the common law understanding of the nature of a contract of employment as being between employer and employee. It follows that 'the dispute' as to whether 'the person was dismissed in contravention of this Part' can only be between the applicant (being either an employee or an industrial association representing them) and the employer. The University and the individual respondents submitted that ss 365 and 368(1) say nothing about a dispute as to whether any third parties engaged in some form of adverse action other than dismissal, or were 'involved in' (within the meaning of s 550) adverse action by the employer. Those kinds of disputes might have been able to be the subject of an application under s 372 of the FW Act, as the Commissioner suggested to Dr Kirkham.

[29] The University and the individual respondents separately submitted that, whether or not the NTEU and the individual respondents are to be regarded as respondents to the application, there was no appealable error in the decision not to require them to attend conferences in the Commission. The Commission was not required under s 368 to hold a conference, and s 595(2) makes clear that the Commission has a broad discretion as to how it 'deals with' a dispute, which *may* include the exercise of powers such as conducting a mediation or conciliation. There was no *House v The King* error in the Commissioner's decision not to require the NTEU and the individual respondents to attend a conference. Likewise, any asserted failure by the Commissioner to require the production of documents was not subject to appealable error.

[30] As to the issue of the s 368(3)(a) certificate, the University and the individual respondents submitted that the requirement for the issue of the certificate that the Commission be 'satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful' involved the formation of a broad evaluative judgment such that the principles applicable to appeals against discretionary decisions applied. No appealable *House v The King* error had been demonstrated by Dr Kirkham.

[31] The University and the individual respondents submitted that permission to appeal should be refused for reasons including that the appeal lacks utility. Dr Kirkham has, since the certificate was issued, commenced proceedings in the Federal Circuit and Family Court of Australia (**Court**) against the University, the NTEU and all the individual respondents, and it was submitted that the certificate which was issued satisfies the requirement in s 370 for the initiation of a general protections court application. If further mediation or discovery is desired, that may be dealt with in the Court proceedings. They submitted that Dr Kirkham should not be permitted to approbate and reprobate by taking the benefit of the certificate to initiate proceedings in the Court while challenging its validity in the appeal.

[32] The NTEU submitted that Dr Kirkham had not alleged the NTEU was involved in his dismissal and had not disclosed any cause of action against the NTEU, and the appeal as against the NTEU should therefore be dismissed.

Consideration

Recusal application

[33] At the commencement of the hearing of his appeal, Dr Kirkham made an application for the presiding member of the Full Bench to recuse himself. It appears that the basis of the application is that email correspondence concerning the appeal emanating from the presiding member's chambers contained, in the signature block, a small image of a diversity flag (in addition to Aboriginal and Torres Strait Islander flags) which Dr Kirkham described as the 'far-left progress pride flag'. The gist of Dr Kirkham's recusal application is encompassed in the following extract from his oral submissions:

> You have [indistinct]… as I have already said several times, there is a progress pride flag on your chambers, which I — emails, which I believe exists on the basis of being left inclusive propaganda. The far-left progress pride flag. You have — you know what the progress pride flag is? You do, because you correspond to that. Correct? So you're well aware of the concerns that people have who have other political views, like myself, with the progress pride flag at the bottom of your emails, uncorrected and under your instructions, I assume. That is one of the

> serious concerns I have. I also have serious concerns given the Governor of Victoria is a party to these proceedings and whether I'll get a fair hearing in Victoria …
>
> I have significant concerns, generally, about the fairness of [indistinct] not expecting you to address these concerns but rather returning to the recusal — but I obviously — as I say, I feel a bit like, say, an Israeli seeing a Palestinian flag, or a Palestinian seeing an Israeli flag — is — I don't know why there are any political statements at all, really, in the Fair Work Commission's emails. There shouldn't be any. There shouldn't be a political statement from any — this is supposed to be an impartial tribunal. And I've taken advice from [indistinct] legal that this sort of thing, political statements being made at the bottom of emails, is just, isn't appropriate. And unfortunately the problem is I am perceived to have a political view. I might've been accused of things like being anti-trans or not, but I have quite significant [indistinct] impact on my particular view. It just happens I'm pro-free speech. I'm pro, for example, being at liberty to say that a woman is a biological female. I'm someone that believes in reality. So… you, for whatever reason, I don't know why, I mean, I've asked for it to be addressed, and sent chambers correspondence, and never received a reply. But I've expressed very serious concerns, that there's a political statement in your emails, and there shouldn't be. I have no idea why the Commission has this sort of thing in its emails. I think you're alleging in correspondence, that it's to be inclusive. It's not. If you want to be inclusive, you could, for example, tell someone with a disability how they can access the building. Tell a litigant in person how they can get support. That's being inclusive. Not performativity. That is actually my objection. This is the sort of thing employers do. It seems actually pro-employer to have the performative initiatives without actually the substance. It's exactly what employers do, when they want to pretend to comply with their obligations. So it's a terrible look, I have no idea why this has happened, and it gives me great concern that I won't get a fair hearing…

[34] The presiding member declined to recuse himself in response to these submissions. The recusal application being pressed, it then fell to the Full Bench, in accordance with the view of a majority of High Court justices in *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[8] to determine whether the presiding member was disqualified because of a reasonable apprehension of bias. We determined at the hearing that the presiding member was not disqualified. Our reasons for this decision follow.

[35] We assume that Dr Kirkham's recusal application was founded on a contention of a reasonable apprehension of bias, although he did not explicitly state this. As stated in *Ebner v Official Trustee in Bankruptcy*,[9] the application of the apprehension of bias principle initially requires two steps: (1) identification of what it is said might lead the decision-maker to decide a case other than on its legal and factual merits; and (2) an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. Once these steps are undertaken, the reasonableness of the apprehension of bias may be assessed. As to the first step, Dr Kirkham identified the diversity flag at the foot of chambers emails as the basis for his apprehension. However, he was unable to articulate any logical connection between this and the subject matter of his appeal in order to satisfy the second step. Whatever Dr Kirkham's political views about the 'progress pride flag' may be, they are entirely irrelevant to his appeal and do not arise for consideration. There is no real possibility that the fair-minded lay observer might reasonably apprehend that the presiding member, as part of this Full Bench, might decide the discrete issues identified in the notice of appeal and the parties' submissions other than impartially by reason of Dr Kirkham's alleged political views.

Permission to appeal

[36] While the submissions made by the University and the individual respondents concerning the utility of the appeal have a degree of force, we nonetheless consider that permission to appeal should be granted. We accept Dr Kirkham's submission that the Commissioner's decision was inconsistent with the approach taken in other decisions of single members of the Commission, most notably *Yang* (which we discuss in greater detail later). We therefore consider that the determination of Dr Kirkham's appeal is therefore desirable, and in the public interest, in order to avoid any future divergence in the approach taken by single members in respect of s 365 applications in which respondents in addition to the employer are identified.

Merits of the appeal

[37] It must initially be observed that the Commissioner was mistaken when, at [12]–[13] of the decision, she stated that Dr Kirkham's matter had been allocated to her on the basis that she was required to deal with a jurisdictional objection concerning whether there had been a dismissal. None of the respondents had made any jurisdictional objection to the application in their respective responses, nor was it in contest that Monash University had in fact dismissed Dr Kirkham. Even after the purported jurisdictional issue was raised by the Commissioner, it was not embraced by any of the respondents, having regard in particular to the careful terms in which the submissions of the University and the individual respondents of 9 July 2024 were expressed.

[38] In the Federal Court decision in *Milford*[10] the Full Court characterised the entitlement to make an application under s 365 in the following terms:

> The second observation that may be made is that s 365 contains two criteria conditioning a person's entitlement to make an application. The first criterion is expressed in objective terms: *the person has been dismissed*. The second criterion is also expressed in objective terms, albeit by reference to the fact that an *allegation* has been made that 'the dismissal' was in contravention of a provision of Pt 3-1. The word 'alleges' is found in the criterion in s 365(1)(b), but not in the criterion in s 365(1)(a). In its ordinary meaning, the criterion in s 365(1)(a) will be fulfilled if there has been a dismissal *in fact*. It will not be fulfilled merely because an applicant asserts that he or she has been dismissed. The words 'the dismissal' to which subs (b) refers is clearly a reference back to subs (a) and so refers to 'the dismissal' that has occurred *in fact*.[11]

[39] It is clear that Dr Kirkham's application met the two criteria identified above: he was in fact dismissed by the University on or about 14 April 2024, and he alleged in his application that the dismissal occurred in contravention of various provisions of Part 3-1. In addition, his application was filed within 21 days of the date of the dismissal in accordance with s 366(1)(a). Accordingly, there is no doubt that Dr Kirkham was entitled to make an application under s 365 in respect of his dismissal by Monash University.

[40] Section 585 of the FW Act provides that an application to the Commission must be in accordance with the procedural rules, if any, relating to an application of that kind. Section 587(1)(a) provides that the Commission may dismiss an application when it is not made in accordance with the FW Act, and 'has work to do in cases where an otherwise valid application has not been made in accordance with procedural rules made under the FW Act'.[12] Dr Kirkham's application was lodged using the Commission's online lodgment service. The

relevant procedural rule is r 17(1) of the *Fair Work Commission Rules 2024*, which provides that '[a] person may lodge a document that is required or permitted to be lodged with the FWC under these Rules using the FWC's online lodgment facilities in accordance with the instructions provided by the FWC for the use of those facilities'. The inclusion of the additional respondents in Dr Kirkham's application was consistent with the instructions incorporated in the online facility for applications under s 365 on the Commission's website. These instructions relevantly include the following:

> **Additional Respondent**
>
> You should only add additional Respondents here if they are also the former employer (e.g. partners in a partnership) or you are alleging they were involved in the dismissal in contravention of Part 3-1 of the *Fair Work Act 2009*.

[41] Dr Kirkham, as earlier related, did allege in his application that the NTEU and the individual respondents were involved in his dismissal in contravention of Part 3-1. Accordingly, insofar as Dr Kirkham's application identified these as respondents in addition to the University in his application, it was made in accordance with the applicable procedural rules. There was, therefore, no ground for it to be dismissed under s 587(1)(a) for non-compliance with s 585.

[42] The Commissioner's decision appears to proceed on the premise that a person cannot be named as a respondent to an application under s 365 unless they are the employer which dismissed the applicant. The decision does not identify the source of that proposition. The Commissioner made reference at [15] to the Full Bench decision in *Lipa Pharmaceuticals*, but that decision does not deal with the issue of whom an applicant under s 365 may name as a respondent to their application. *Lipa Pharmaceuticals* merely applied *Milford* to say that where there is a contest as to whether the alleged dismissal the subject of an application under s 365 has actually occurred, this is an antecedent question which must be resolved in the applicant's favour before the dispute resolution powers under s 368 can be exercised.[13] Nor did *Milford* itself consider the question of who might be named as a respondent to an application validly made under s 365.

[43] An application validly made under s 365, and within the time period prescribed by s 366(1), is one by which the applicant applies to the Commission for it to 'deal with the dispute'. In *Shea v Truenergy Services Pty Ltd (No 1)*[14] (***Shea***), the Federal Court (Dodds-Streeton J) discussed the meaning of 'the dispute' in s 365 as follows:

> The dispute referred to in s 365 is not defined elsewhere in the legislation. It is simply assumed to co-exist with a person's dismissal allegedly in contravention of Part 3-1. 'The dispute' in s 365 may thus be characterised as a dispute concerning a person's dismissal allegedly in contravention of Part 3-1.
>
> …
>
> The introductory reference to 'the dispute' is contained in s 365, the first section of Subdivision A. Section 365 identifies the dispute at a high level of generality by reference to the occurrence of a person's dismissal alleged to be in contravention of Part 3-1, and permits an application to FWA to deal with 'the dispute' thus identified. Section 365 does not expressly, or, in my opinion, implicitly provide that 'the dispute' precisely coincides with the content of the FWA application. Rather, it permits the application to be made to FWA to deal with the dispute.[15]

[44] In *Shea*, Dodds-Streeton J went on to observe that the FW Act did not prescribe the 'content, essential inclusions or level of detail' of the application which may be made under s 365 and that the 'dispute identified in general terms' under s 365 was likely to be further elaborated or described not only in the application but also in the respondent's response and the conference conducted to deal with the dispute.[16] In relation to the references to 'the dispute' in ss 366 and 368, her Honour said:

> Neither ss 366 nor 368 defines, identifies or describes 'the dispute' differently from s 365, which does not expressly state or indicate that 'the dispute' is limited to the applicant's substantive claims in the FWA application.[17]

[45] Applying the reasoning in *Shea*, in *Knight v Visionstream Australia Pty Ltd*[18] (***Visionstream***), the Federal Court (O'Callaghan J) determined that it was not necessary for an application under s 365, and any certificate flowing from that application under s 368(3)(a), to identify each potentially liable party, or even to correctly identify the employing entity, for the purpose of the satisfaction of the requirement for a valid general protections court application in s 370.[19]

[46] Having regard to the reasoning and conclusions in *Shea* and *Visionstream*, we do not consider that anything in ss 365 or 368 establishes any jurisdictional impediment to an application validly made under s 365 identifying persons in addition to the applicant's employer as parties to the relevant dispute. Those provisions contain no prescription or limitation as to the persons who may be involved in the dispute resolution process. The purpose of the dispute resolution process in Subdivision A of Division 8 is, 'where possible, to avoid litigation about allegedly contravening dismissals by mandating (as a prerequisite to litigation) a preliminary, less costly and informal process … to facilitate conciliation and non-curial resolution' (*Shea*).[20] It is consistent with this purpose that an applicant may seek to include in the dispute resolution process any persons whom, the applicant alleges, have accessorial liability under s 550 for the dismissal alleged to be in contravention of the general protections provisions of Part 3-1. Such persons may, in our view, reasonably be characterised as persons involved in the relevant dispute, and their inclusion in the process would serve to maximise the prospects of all claims arising from an allegedly unlawful dismissal being resolved by the Commission under s 368 and thus avoiding any subsequent litigation.[21]

[47] This is not to suggest that the inclusion, or non-inclusion, of additional named respondents in an application made under s 365 operates to bind the Commission in the way it deals with the dispute under s 368(1). Section 368(1) is non-prescriptive as to the means by which the Commission may attempt to resolve the dispute, and s 595(2) provides that the Commission may deal with a dispute (other than by arbitration) 'as it considers appropriate', including by mediation, conciliation, arbitration, making a recommendation or expressing an opinion. If the Commission chooses to conduct a conference, it may under s 592(1) direct a person to attend a conference. Although it is the usual practice of the Commission to do so, it is not required that a conference be conducted and, if a conference is conducted, it is a matter for the Commission as to who may be invited or required to attend that conference, regardless of who might be identified as respondents in the applicant's application. In this respect, we agree with and adopt the analysis of Easton DP in *Yang* as follows:

> [55] Many applications to the Commission under s.365 are made against employers and additional persons named as alleged accessories. There are good reasons why an applicant might

> choose to include alleged accessories in their application to the Commission – the most obvious being that the conciliation or mediation process undertaken by the Commission would then be available to resolve claims against accessories.
>
> [56] It is also not essential that Mr Mukhi is named in Mr Yang's application as a party to the 'dispute' about his dismissal. The Commission is seized with power under s.368 and s.592 to deal with the dispute by way of a conference, and to direct Mr Mukhi to attend a conference under s.592 even if he is not a named party.
>
> [57] In the same way that it is not essential to the Commission's powers that Mr Mukhi be named as a party to the dispute or be cited on a certificate that is issued, there is no prohibition in the Act that would prevent these things occurring.
>
> [58] Understood this way, it is a matter of discretion for the Commission to recognise Mr Mukhi as a named respondent and/or to refer to Mr Mukhi in any certificate that is issued.

[48] For the above reasons, we consider that the Commissioner erred in treating the inclusion of the additional respondents in Dr Kirkham's application as involving an excess of the jurisdiction to deal with the dispute concerning his dismissal allegedly in contravention of Part 3-1 under ss 365 and 368.

[49] It remains necessary to consider whether this error had any consequences. We consider that two consequences are identifiable. First, Dr Kirkham, as earlier recounted, sought that the NTEU and the individual respondents be required to attend a conference or conferences conducted by the Commissioner as part of the process of dealing with his dispute. The Commissioner's erroneous view about the limits of her jurisdiction constrained her from giving proper consideration as to whether to exercise her discretionary power under s 592(1) to require these respondents' attendance at a conference as requested by Dr Kirkham. That was an error of law. Second, it appears to us that the Commissioner's discretionary consideration under s 368(3) as to whether all reasonable attempts to resolve the dispute had been or were likely to be unsuccessful miscarried because her erroneous view as to the extent of her jurisdiction operated to confine her consideration of the scope of the dispute and what reasonable attempts might have been taken to resolve it. This may, in *House v The King* terms, be characterised as a failure to take into account relevant considerations and an error of principle.

[50] We have given careful consideration as to what, if any, remedy we should order under s 607(3) in light of the conclusions we have reached. Dr Kirkham's final position about this, as best we understand it, was that we should not quash the certificate already issued by the Commissioner, but we should remit the matter to a single member of the Commission to undertake the dispute resolution process under s 368 with the NTEU and the individual respondents (that is, the respondents which the Commissioner had excluded from the process by her decision). Dr Kirkham submitted that if this did not result in a resolution being reached between him and any of the respondents, the Commission should then issue a certificate under s 368(3)(a) with respect to each such respondent.

[51] Dr Kirkham's submission in this respect is founded on a flawed understanding of the Commission's jurisdiction under s 368. The Commission is required, under that section to deal with 'the dispute', being the dispute concerning the dismissal which is contravention of Part 3-1. This involves a single process; it is not one that is divisible amongst different respondents or which involves separate proceedings. Nor does s 368(3)(a) contemplate more than one

certificate being issued in relation to a dispute the subject of an application under s 365. It is not necessary for Dr Kirkham to have a certificate which names the NTEU or the individual respondents in order to include them as respondents to his general protections court application.[22] Accordingly, we shall not take the course he proposes.

[52] Notwithstanding that it is possible that this may cast doubt upon the validity of Dr Kirkham's current general protections application before the Court, we consider that the proper course is to quash the decision and the certificate, and refer the matter back to the Commissioner to deal with Dr Kirkham's dispute consistent with the reasons we have given above. We accept that the inclusion of the NTEU and the individual respondents in the dispute resolution process under s 368 is unlikely to lead to any different outcome in terms of settling the dispute. In his submissions on appeal, Dr Kirkham in frank terms described his strategy for settling the dispute, if it involved all respondents, as follows:

> I sought individual conferences without the University with certain defendants for a simple reason. Those individuals actually have a rational interest in settling, and those interests are the opposite of the University and certain senior managers within it.
>
> In short, I sought to 'roll' those individuals so that:
>
> a. They would pay a more modest penalty, or perhaps no penalty at all.
> b. But in return, would give evidence and provide documents that would further damage the position of the other respondents.
>
> Of course, if some of the individuals were 'rolled', then the positions of the University and remaining individual managers being targeted becomes a lot more precarious.

[53] This appears somewhat fanciful. However, we cannot exclude entirely the possibility that the inclusion of all the respondents may bring about a different dispute resolution outcome. Moreover, having found that the s 368 process has miscarried for the reasons we have stated, we do not consider that we should nonetheless ignore this and leave the certificate issued by the Commissioner to stand, since this would vitiate the force and effect of s 370. As stated by the Federal Court (Pagone J) in *Ward v St Catherine's School*:[23]

> The entitlement under s 370 of the Act to make a general protections court application, in other words, is made to depend upon the Commission's evaluation of the facts and circumstances bearing upon the prospects of the parties resolving their dispute about dismissal by means other than arbitration and proceedings in Court (unless their application included an application for an interim injunction)… What is required to enliven the entitlement to make such an application to the Court is not the mere formality of a certificate by the Commission but, rather, the certification by the Commission of it being satisfied that the dismissal dispute is not able to be resolved by the alternative process specifically provided for by the legislature.

[54] We wish to make clear, consistent with our earlier reasoning, that the remittal of Dr Kirkham's dispute to the Commissioner does not imply that she is required to order the attendance of the NTEU and the individual respondents at a further conference or to take any further particular step. The Commissioner will need to give due consideration to any application that might be made by Dr Kirkham in that respect but, as earlier stated, there is a wide discretion as to how a dispute is to be dealt with under s 368. It may be sufficient for the Commissioner simply to proceed on the basis of the position stated by the respondents' representatives. It will

ultimately be a matter for the Commissioner to assess what might constitute 'all reasonable attempts to resolve the dispute' for the purpose of the consideration required under s 368(3)(a).

Orders

[55] We order as follows:

(1) Permission to appeal is granted.
(2) The appeal is upheld.
(3) The decision of Commissioner Hunt issued on 10 July 2024 ([2024] FWC 1757) is quashed.
(4) The certificate issued by Commissioner Hunt on 10 July 2024 pursuant to s 368(3)(a) of the *Fair Work Act 2009* in matter C2024/2913 is quashed.
(5) The dispute in matter C2024/2913 is remitted to Commissioner Hunt to deal with under s 368 of the *Fair Work Act 2009* in accordance with the above reasons for decision.

PRESIDENT

Appearances:

R Kirkham, the appellant, in person.
B Avallone, counsel, for Monash University & all individual respondents.
J Wells for the National Tertiary Education Industry Union.

Hearing details:

2024.

Melbourne with video link using Microsoft Teams:
20 September.

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[1] [2024] FWC 1757.

[2] Professor Ann Nicholson, Her Excellency Professor the Honourable Margaret Gardner AC, Professor Matthew Gillespie AM, Professor Susan Elliott AM, Professor Kimbal Marriott, Professor Maria Garcia de la Banda, Professor Jesper Kjeldskov, Professor Yiannis Ventikos, Professor Michelle Welsh, Associate Professor Kirsten McLean, Fiona Hunt, Irene Vidiniotis, Angelo Yoannidis, Caroline Kubis, Simone de Groot, Katherine Knight and Professor Helen Purchase.

[3] [2024] FWC 1484.

[4] [2023] FWC 1005.

[5] [2020] FCAFC 152, 279 FCR 591, 300 IR 146.

[6] [2023] FWCFB 101, 324 IR 375.

[7] [2024] FWC 1757.

[8] [2023] HCA 15, 409 ALR 65.

[9] [2000] HCA 63, 205 CLR 337 at [8] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

[10] [2020] FCAFC 152.

[11] Ibid [54].

[12] Ibid [69].

[13] [2023] FWCFB 101 [4], [23].

[14] [2012] FCA 628, 204 FCR 456, 222 IR 156 (‘*Shea*’).

[15] Ibid [55], [63].

[16] Ibid [64].

[17] Ibid [69].

[18] [2017] FCA 1513 (‘*Visionstream*’).

[19] Ibid [33]–[34].

[20] [2012] FCA 628, 204 FCR 456, 222 IR 156 [81].

[21] See ibid [82].

[22] *Visionstream* at [34].

[23] [2016] FCA 790 [6].