DECISION

Fair Work Act 2009
s.604—Appeal of decision

Jonathon Dixon and Pareen Minhas
v
United Workers' Union
(C2024/2452)

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT BELL
DEPUTY PRESIDENT O'NEILL

BRISBANE, 25 NOVEMBER 2024

Appeal against decision [2024] FWC 805 of Deputy President Colman at Melbourne on 28 March in matter number U2023/13042.

[1] The Appellant, Ms Minhas, has lodged an appeal under s 604 of the *Fair Work Act 2009* (Cth) (Act) against a decision (the decision)[1] issued by Deputy President Colman dismissing her application for an unfair dismissal remedy.

[2] The Deputy President dismissed Ms Minhas' unfair dismissal application finding that the making of the unfair dismissal application contravened the prohibition in s 725 of the Act because, at the time the unfair dismissal application was made, there was a 'general protections court application' of the kind in s 728 of the Act that also applied.

[3] Having regard to there being no Full Bench consideration of the circumstances in the matter, we consider it is in the public interest to grant permission to appeal and do so, but for the reasons that follow, the Deputy President's decision was correct, and the appeal must be dismissed.

Statutory context

[4] Section 725 is found in Part 6-1 ("Multiple actions"), Division 3 ("Preventing multiple actions"), Subdivision B ("Applications and complaints relating to dismissal") of the Act.

[5] Section 725 states:

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

[6] Section 728 applies to "general protections court applications". Section 728 states:

"**728 General protections court applications**

This section applies if:
(a) a general protections court application has been made by, or on behalf of, the person in relation to the dismissal; and
(b) the application has not:
(i) been withdrawn by the person who made the application; or
(ii) failed for want of jurisdiction."

[7] Section 729 applies to unfair dismissal applications. There is no dispute that Ms Minhas made an unfair dismissal application within the meaning of s 729.

[8] Subdivision C of Part 6-1 is titled "General protections actions that do not relate to dismissal". The section states:

"**734 General rule**

(1) A person must not make a general protections court application in relation to conduct that does not involve the dismissal of the person if:
(a) an application or complaint under an anti-discrimination law or the *Australian Human Rights Commission Act 1986* has been made by, or on behalf of, the person in relation to the conduct; and
(b) the application or complaint has not:
(i) been withdrawn by the person who made the application; or
(ii) failed for want of jurisdiction.

(2) A person must not make an application or complaint under an anti-discrimination law or the *Australian Human Rights Commission Act 1986* in relation to conduct that does not involve the dismissal of the person if:
(a) a general protections court application has been made by, or on behalf of, the person in relation to the conduct; and
(b) the application has not:
(i) been withdrawn by the person who made the application; or
(ii) failed for want of jurisdiction."

[9] For the purposes of s 728 and s 734, s 12 of the Act defines a "general protections court application" by reference to the definition in s 368(4). Section 368(4) states:

"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."

[10] The reference in s 368(4) to "this Part" is to Part 3-1 ("General protections"), which is where s 368(4) is located within the Act. Relevantly for this appeal, Part 3-1 of the Act contains s 340(1), which prohibits (among other matters) an employer taking "adverse action" of any kind described in s 342 against an employee for having or exercising various "workplace rights" in s 341. Section 340(1) of the Act is a "civil remedy provision".

[11] By item 1 of the table, read in conjunction with s 342(1) of the Act, adverse action is taken by an employer against an employee if the employer "dismisses the employee". Other types of adverse action described in item 1 are injuring the employee in their employment, altering the position of the employee in their employment to their prejudice, and discriminating between the employee and other employees of the employer. By section 342(2)(a) of the Act, adverse action includes "threatening to take action covered by the table in subsection (1)".

[12] Part 4-1 of the Act is titled "Civil remedies" and Division 2 of Part 4-1 is titled "Orders". Division 2 comprises sections 539 – 547 of the Act. Section 539 of the Act allows for various persons to make applications to courts for orders "in relation to a contravention or a proposed contravention" of a provision listed in the table joined to s 539(2) of the Act. Item 11 of s 539(2) provides that a person affected by a contravention of s 340(1) of the Act may apply to the Federal Court of Australia for orders. Among other types of orders that can be applied for under Part 4-1, by s 545(2)(a), the Federal Court may make "an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention".

The decision under appeal

[13] We adopt the factual chronology set out in the decision, noting none of it is in dispute:

> "[2] On 27 November 2023, the applicants filed an originating application in the Federal Court of Australia alleging that the UWU had taken adverse action against them for prohibited reasons in connection with their involvement in organising a petition of UWU employees in support of bargaining for an enterprise agreement. In the concise statement that accompanied the application, the adverse action was said to comprise the following episodes of conduct on the part of the UWU: an investigation into the applicants' alleged misconduct; the imposition of certain restrictions on the applicants' duties; a request on 19 October 2023 that the applicants show cause why they should not be dismissed for breaching policies and their contracts of employment; the suspension of the applicants; and the UWU's advice to the applicants on 27 November 2023 that it had determined that the relevant allegations were substantiated, that the appropriate penalty was dismissal, and that the applicants were invited again to show cause why they should not be dismissed. The UWU's conduct on 27 November 2023 was referred to in the concise statement as the '*Proposed Dismissal*'.
>
> [3] The originating application sought declarations of contraventions of the Act, orders for compensation and pecuniary penalties, and interlocutory and final injunctions to restrain the UWU from dismissing the applicants because of their conduct as alleged in the show cause letter. The application also sought reinstatement if the applicants were dismissed.
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> [4] On 7 December 2023, Snaden J dismissed the application for interlocutory relief. On 18 December 2023, the UWU terminated the employment of each of the applicants.
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> [5] On 22 December 2023, Ms Minhas lodged an unfair dismissal application in the Commission. On 5 January 2024, Mr Dixon did the same.
>
> [6] On 14 February 2024 Ms Minhas discontinued her involvement in the Federal Court application. On the same day, Mr Dixon amended the application to remove reference to the Proposed Dismissal."

[14] Before the Deputy President (and before us), it was uncontroversial that the time for assessing whether s 725 was engaged was at the time the second application was made, referred to as the "test time" in the decision and in the submissions before us.[2] For Ms Minhas, the test time was 22 December 2023, when she lodged her unfair dismissal application.

[15] The Deputy President identified the question for determination as being whether on 22 December 2023, when Ms Minhas lodged her unfair dismissal application, s 728 of the Act applied. The Deputy President determined that it did because Ms Minhas' Federal Court application was a general protections court application "in relation to the dismissal".[3]

[16] Ms Minhas made an argument to the effect that her general protections court application was conduct that "does not involve dismissal" within the meaning of s 734 of the Act. Without derogating from the careful reasoning of the Deputy President, his conclusion is reflected in paragraph [22] and [23] of the decision (original emphasis):

> "**[22]** The originating application and concise statement identified among the species of adverse action at issue '*the Proposed Dismissal*', as defined above. It sought interlocutory and final injunctive relief in respect of the Proposed Dismissal. The dismissal was precisely foreshadowed in the application. The intervention of the court was sought to prevent it. An injunction was refused by the court. The dismissals occurred. The applicants then lodged unfair dismissal applications. At the time when they did so, the applicants were persons who had been dismissed; contrary to s 725, they made an application '*of a kind referred to*' in one of the identified sections (s 729) '*in relation to the dismissal*', when another of the identified sections (s 728) applied. It does not matter that, after the unfair dismissal applications were lodged, Ms Minhas discontinued her involvement in the general protections court application and Mr Dixon amended the application's reference to the Proposed Dismissal. Section 725 prohibits a second application in defined circumstances. It is not concerned with what happens after a prohibited second application is lodged.
>
> **[23]** The applicants contended that their court claim was really one of the kind referred to in s 734, which states that a person must not make a general protections court application in relation to conduct that does not involve the dismissal of a person if an application or complaint under anti-discrimination law has been made by the person in relation to the conduct, and that application or complaint has not been withdrawn and has not failed for want of jurisdiction. They said that their claim fundamentally challenged the pre-dismissal conduct of the UWU, rather than the dismissal. But this is an assessment made from the point in time when the first application was made. From the point in time when the second application was lodged, the application was one that was '*in relation to the dismissal*'."

Grounds of appeal

[17] The Appellant identified three grounds of appeal as follows (noting again that one of the Appellants has resolved his dispute with the respondent):

> "1. The learned Deputy President erred in applying section 725 of the ***Fair Work Act*** *2009* (Cth) when determining that the Fair Work Commission does not have jurisdiction to hear and determine unfair dismissal applications U2023/13042 and U2024/183.
>
> 2. The Deputy President erred in law by characterising Federal Court of Australia Proceeding VID992/2023 (**Court Proceeding**) as a general protections court application made by the applicants in relation to the dismissal of each of the applicants within the meaning of section 728 of the Fair Work Act.
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> 3. The Deputy President ought to have found that the Court Proceeding was a general protections court application in relation to conduct that does not involve the dismissal of a person within the meaning of section 734 of the Fair Work Act."

Consideration

[18] At issue in this appeal is whether the Deputy President reached the correct conclusion in relation to the application of s. 728 of the Act to Ms Minhas' unfair dismissal application.[4] We are satisfied that the Deputy President did reach the correct conclusion for reasons we

consider are free of error. The Deputy President clearly and comprehensively dealt with the appellant's arguments and his consideration is set out at paragraphs [15] – [25] of the decision.

[19] We agree with the Deputy President's conclusion that the Appellant's general protections court application was an application made "in relation to the dismissal", as the following summary makes clear:

- *First*, the concise statement that accompanied the application, alleged that the "Show Cause" and "Proposed Dismissal" were each adverse actions in the form of injuring in employment, a prejudicial alteration of the employment, and discriminating between the employee and other employees (item 1, column 2(b), (c) & (d) of s 342 of the Act and see also item 7, column 2(b)).

- *Second*, item 1, column 2(a) of s 342 encompasses *dismissing* an employee as adverse action. Ms Minhas has relied on the *threat* of dismissal as adverse action (s 342(2) of the Act);

- *Third*, Ms Minhas relied upon s 545 of the Act for orders in the nature of a permanent injunction restraining the respondent from "dismissing" her from employment because of the conduct alleged in the Show Cause and Proposed Dismissal. As set out above, s 545 of the Act allows for orders "in relation to a contravention or a proposed contravention" that include "an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention".

- *Fourth*, the concise statement sought, as an alternative remedy, an order on the basis that "if the Applicants are dismissed from their employment, reinstatement."

- *Fifth*, in addition to reinstatement if Ms Minhas was dismissed, she also sought orders for continuity of service and backpay. Ms Minhas further sought orders for compensation and pecuniary penalties, which also appear framed to encompass such relief in the event Ms Minhas was dismissed from her employment.

- *Sixth*, there is no dispute that Ms Minhas' Federal Court claim was a "general protections court application" at all relevant times. The dispute is whether that application was "in relation to" her dismissal.

- *Sixth*, Ms Minhas was dismissed from her employment on 18 December 2023.

- *Seventh*, on 22 December 2023, Ms Minhas lodged an application in the Commission for an unfair dismissal remedy.

[20] The phrase "in relation to" is a well-known relational term of generally wide import, the nature and breadth of which depends on the statutory context and purpose.[5] In *Birch v Wesco Electrics (1966) Pty Ltd*[6] (*Birch*), Lucev FM considered that phrase within the context of section 725 – 733 of the Act and concluded that the phrase does "not extend to tenuous or remote relationships".[7]

[21] A Full Bench of the Commission cited *Birch* with approval in *Qantas Airways Ltd v Lawless*[8] (original emphasis, footnotes omitted):

> "It is evident therefore that the provisions of Subdivision B of Division 3 of Part 6-1 have the purpose of restricting a person with multiple *remedies* in relation to the person's dismissal from applying for more than one available *remedy*. In this respect, we agree with the statement of Lucev FM in *Birch* that "The statutory purpose, put simply, is to limit an applicant to a single remedy"." [9]

[22] In *Hazledine v Wakerley*,[10] a differently constituted Full Bench upheld a decision of a member who considered whether there was a relationship, other than a "tenuous or remote relationship", for the purposes of s 726 of the Act (which is relevantly in the same terms as s 727). Consistently, that test was applied by Driver J in *Dias v Commonwealth Bank Group*[11], where his Honour stated (footnotes omitted):

> "The use of the phrase "in relation to" in s 725 of the Fair Work Act does not require exclusivity or predominance, but rather a relationship, other than a tenuous or remote relationship. The relationship must be a "relevant relationship" read in the context of the provision and bearing in mind the statutory purpose of the provision."[12]

[23] Ms Minhas was seeking permanent injunctive relief against dismissal in an application that was on foot at the time she made an application for an unfair dismissal remedy (we note that the application for interim relief had been determined prior to her dismissal). Were it necessary to do so, we would consider that Ms Minhas' unfinalised application for permanent injunctive relief alone was "in relation to" her dismissal at the point in time she was dismissed.

[24] But Ms Minhas' application went much further than seeking an injunction preventing dismissal. At the time she made her application for an unfair dismissal remedy, Ms Minhas' *expressly* claimed as relief, reinstatement, continuity of service, and backpay for the very dismissal she anticipated might occur and which became the subject of her unfair dismissal application. Ms Minhas' general protections court application was not merely "in relation to" her dismissal; it was crafted to directly obtain relief for any dismissal that ensued. The remedies sought were plainly and significantly overlapping between her earlier court application and her later Commission application.

[25] Ms Minhas submits that the Deputy President made an error by characterising a court application dealing, when initially made, with "possible, threatened or hypothetical dismissals" as an application "in relation to" her dismissal when dismissed. [13]

[26] Ms Minhas asserts that at the time her court application was made on 27 November 2024, it was an application falling under s 734. So much can be accepted. However, Ms Minhas then asserts that an applicant "must actually have been dismissed before the applicant can make an application "in relation to the dismissal".[14] In part, Ms Minhas points to the jurisdictional precondition to be issued a certificate under s 368 before a person who has been "dismissed" can take a general protections dismissal dispute to court: s 370. Ms Minhas contends that, in those circumstances, a court application commenced prior to dismissal cannot "morph" into an application in relation to the dismissal once that dismissal takes place.

[27] There is some superficial appeal to the Appellant's argument that the requirement for a certificate under s 368 confines the circumstances when a general protections court application might be made "in relation to the dismissal". However, accepting that argument would require disregarding the ordinary language of the phrase, in its context, and involves reading s 728 in isolation from the identical connective term – "in relation to" that appears in sections 726, 727, and 729 – 732 of the Act. Section 732, in particular, broadly applies to an application or

complaint "under another law" being made by a person "in relation to the dismissal". The section casts a broad net and does not suggest an inquiry to ascertain if there is some jurisdictional bar, such as the absence of a certificate issued under s 368 or some analogue "under another law", or other procedural requirement which might be an absolute bar or one incapable of curing.

[28] The focus in sections 726 – 732 is on an application having been "made". The legislative intention is that "there be a prohibition on a second claim being *commenced*."[15] For the application to have been "made", it is not necessary for it to have been validly made in the sense that jurisdictional or procedural requirements are met. So much is made clear by the exception in sections 726 – 732 to an application that has "failed for want of jurisdiction". There is no basis to place a gloss on the statutory text to limit what circumstances might be "in relation to the dismissal" where the statute expressly contemplates that an application or complaint might fail entirely for want of jurisdiction. To the contrary, the express reference to an application failing for want of jurisdiction suggests the connective term "in relation to" is to be given a broad scope.

[29] As to section 734, that provision does not in terms or by implication, confine when a different application might be "in relation to" a dismissal. The focus of s 734 is on "the conduct"[16] and whether that conduct, at the relevant time, does not "involve" the dismissal of the person. On its face, the term "involve" suggests a closer connection between the subject matters dealt with under s 734 than the connective "in relation to". As a matter of logic, if later conduct involves a dismissal, then the terms of s 725 may apply, depending on the nature of the claims. So much appears implicit in the following statement of Mortimer J (our emphasis): [17]

> "86 In other words, as the parties accepted, the legislative intention revealed by the two limbs of s 734 is that *in circumstances not caught by the prohibition in s 725*, a person will only be able to seek final resolution of either their claim under anti-discrimination law or their general protections claim."

[30] There was otherwise no dispute that Ms Minhas' general protections court application had not been withdrawn or failed for want of jurisdiction at the time she made her unfair dismissal application. There is also no dispute that as a result of Ms Minhas' application for an unfair dismissal remedy, s 729 (Unfair dismissal applications) applied for the purposes of s 725 of the Act.

Order and disposition

[31] For the foregoing reasons, the appeal is dismissed.

VICE PRESIDENT

Appearances:

B. Holding of Counsel, for the Appellants

W. Friend, Kings Counsel and *L. Martin* of Counsel, for the Respondent.

Hearing details:

2024.
Melbourne (by video via Microsoft Teams).
June 11.

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[1] *Pareen Minhas and Jonathon Dixon v United Workers Union* [2024] FWC 805. The decision of the Deputy President dealt concurrently with applications by Ms Minhas in matter U2023/13042 and Mr Dixon in matter U2024/183. The Deputy President dismissed both applications and both of the applicants appealed. However subsequent to the hearing before the Full Bench, Mr Dixon and the respondent resolved his matter. This decision concerns Ms Minhas' application.

[2] Decision at [17]; Applicant's Outline of Submissions on appeal at [28].

[3] Decision at [15].

[4] *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30, 264 CLR 541 at [46]-[49] per Gageler J.

[5] *R v Khazaal* [2012] HCA 26, 246 CLR 601 at [31] (French CJ).

[6] (2012) 218 IR 67.

[7] Ibid at [74].

[8] [2014] FWCFB 3582

[9] Ibid at [26].

[10] [2017] FWCFB 500.

[11] [2021] FCCA 601.

[12] Ibid at [49].

[13] Applicant's Outline of Submissions on appeal at [15] and see also [13].

[14] Applicant's Outline of Submissions on appeal at [26].

[15] *Deam v Starlight Children's Foundation Australia* [2023] FCA 259 (Mortimer J) at [89]-90] (original emphasis).

[16] *Deam v Starlight Children's Foundation Australia* [2023] FCA 259 (Mortimer J) at [85].

[17] Ibid at [86].