



DECISION

Fair Work Act 2009

s.536ND - Application for an unfair contract term remedy

Jacqueline Mary Margaret Bowden

v

Kenneth Brendon Dungan

(UC2025/3)

DEPUTY PRESIDENT SAUNDERS

NEWCASTLE, 18 FEBRUARY 2025

Application for an unfair contract term remedy – alleged breach of contract and contractual debt – no allegation of any unfair contract terms – application dismissed

Introduction

[1] Ms Bowden has made an application to the Fair Work **Commission** for an unfair contract term remedy pursuant to s 536ND of the *Fair Work Act 2009* (Cth). The application concerns Ms Bowden’s **services contract** with Mr Dungan. Mr Dungan is named as the respondent to Ms Bowden’s application for an unfair contract term remedy.

[2] The services contract is a written agreement. It governs the supply by Ms Bowden of personal care services to Mr Dungan. **Trilogy Care** Pty Ltd assists people such as Mr Dungan to self-manage their home care packages. Trilogy Care is not a party to the services contract.

[3] The services contract provides that Mr Dungan is liable for the payment of invoices issued by Ms Bowden for personal care services rendered to Mr Dungan, even though Trilogy Care may ordinarily arrange payment for such invoices from Mr Dungan’s home care package.

[4] Clause 5(a) of the services contract permits Mr Dungan, in his sole discretion and without liability to Ms Bowden, to vary, suspend or otherwise terminate any of the personal care services being provided by Ms Bowden by providing two weeks' written notice to Ms Bowden.

[5] In summary, Ms Bowden advances the following contentions in her application for an unfair contract term remedy:

- (a) On 3 December 2024, Mr Dungan told an unknown Trilogy Care staff member to immediately cease paying any of Ms Bowden’s invoices in relation to personal care services she had provided for Mr Dungan. Mr Dungan has not communicated this information to Ms Bowden.

- (b) Ms Bowden believes that Mr Dungan has breached clause 5(a) of the services contract because he has not provided two weeks' written notice of his decision to vary, suspend or terminate any of the personal care services.
- (c) Ms Bowden continued providing personal care services for Mr Dungan until 17 December 2024. Invoices have been issued for these services. They have not been paid.
- (d) Ms Bowden says she should be paid the \$1,320 she is owed for the personal care services she provided for Mr Dungan up until 17 December 2024.
- (e) Ms Bowden believes that Trilogy Care and its staff have failed to meet standards of good business practice, failed to apply common sense and do the right thing, and failed in their duty of care to communicate to Ms Bowden the termination instructions given by Mr Dungan.

[6] On 13 February 2025, Ms Bowden was given an opportunity to file submissions outlining why she says the Commission has jurisdiction in relation to her unfair contracts application, having regard to a concern previously communicated to Ms Bowden as to whether the unfair contracts jurisdiction allows the Commission to deal with a breach of contract case or a case where it is alleged that a debt is owed for services provided pursuant to the contract. Ms Bowden subsequently informed the Commission that she had no more to add to the application and supporting documentation she had already supplied.

Statutory framework

[7] Part 3A-5 of the Act concerns unfair contract terms of services contracts. It provides a mechanism by which some independent contractors may seek a remedy in the Commission in relation to an unfair contract term of a services contract. The Commission can only make an order under Part 3A-5 if it is “satisfied that the services contract includes one or more unfair contract terms which, in an employment relationship, would relate to workplace relations matters” (s 536NA of the Act).

[8] Section 536NB of the Act sets out a non-exhaustive list of matters which the Commission may take into account in determining whether a term of a services contract is an unfair contract term.

[9] The remedy which may be awarded by the Commission under Part 3A-5 is an order amending, varying, or setting aside all or part of a services contract which, in an employment relationship, would relate to a workplace relations matter (s 536NC of the Act).

[10] An unfair contract claim under Part 3A-5 of the Act is fundamentally distinct from a claim for breach of contract or the enforcement of a contractual debt, involving different considerations. The former examines the fairness of the terms of the contract, while the latter assesses whether the rights and obligations established by those terms have been fulfilled.

[11] In *Sydney Water Corporation Ltd v Industrial Relations Commission of NSW*,¹ the New South Wales Court of Appeal held that unfair conduct in breach of a contract of employment does not render a fair contract unfair and therefore amenable to relief under s 106 of the

Industrial Relations Act 1996 (NSW). It was also held that it is the contract itself which must be demonstrated to be or to have become unfair.

[12] Although *Sydney Water Corporation Ltd v Industrial Relations Commission of NSW* involved a different statutory regime to that which is governed by Part 3A-5 of the Act, there are similarities between the relevant statutory provisions which mean that the judgment of the New South Wales Court of Appeal should be given due consideration. In particular, s 106(1) of the Industrial Relations Act empowers the Industrial Relations Commission of New South Wales to make an “order declaring wholly or partly void, or varying, any contract whereby a person performs work in any industry if the Commission finds that the contract is an unfair contract”. Section 106(2) states that a contract may become unfair because of post-contract conduct of the parties, but Justice Mason made clear that it is the contract that must be held unfair, and not the conduct, in the final analysis.² Justice Mason rejected the notion that s 106 of the Industrial Relations Act permitted the Industrial Relations Commission of New South Wales to find contractual unfairness in particular cases based on no more than conduct in breach of contract.³ His Honour also emphasised the range of remedies available to a party for breach of contract:⁴

“If contractually prohibited conduct occurs, the innocent party is armed with a quiver of remedies under the general law. These include remedies for the payment of money due and for compensatory damages that are available as of right. If the guilty party’s conduct is repudiatory or involves a breach of a substantial nature, the innocent party may elect to be discharged from further performance. Discretionary remedies such as injunction and orders for specific performance may be available in particular circumstances. Restitutionary orders may follow. The remedies involve regard for the position of the guilty party as well, including rights of counter-restitution for value conferred.”

[13] It is clear from s 536NA(1) of the Act that the Commission cannot make an order in relation to a services contract unless it is satisfied that the services contract includes one or more unfair contract terms. It follows that, as is the case under s 106 of the Industrial Relations Act, there is no power to make any orders under Part 3A-5 of the Act unless a finding of unfairness is made in relation to the terms of the services contract. That is what the Part is concerned with. A claim that a contract term has been breached does not address the fairness of that term. Accordingly, the Commission does not have jurisdiction to deal with an application for an unfair contract term remedy where the only claim made is for breach of contract, or enforcement of a contractual debt, and there is no contention that one or more terms of the services contract are otherwise unfair.

Consideration

[14] Ms Bowden contends that Mr Dungan has breached clause 5(a) of the services contract and she has a contractual entitlement to be paid \$1,320 for the work she has performed pursuant to the services contract. There is no contention by or on behalf of Ms Bowden that any terms of the services contract are unfair. For the reasons explained above, the Commission does not have jurisdiction under Part 3A-5 to deal with such claims. Ms Bowden may file an application in a court of competent jurisdiction to pursue her claims for breach of contract and enforcement of the contractual debt of \$1,320.

[15] Insofar as Ms Bowden's application for an unfair contract term remedy involves allegations that Trilogy Care has failed in various ways to do what it should have done, the claim does not have any reasonable prospects of success in the Commission. First, Trilogy Care is not a party to the services contract. Secondly, a claim that Trilogy Care failed to comply with a duty of care owed to Ms Bowden, or failed to meet some other, non-contractual standard of care, is not within the jurisdiction of the Commission.

[16] Ms Bowden's application for an unfair contract term remedy is dismissed.



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¹ (2004) 61 NSWLR 661

² Ibid at [25], [29] and [31]

³ Ibid at [44]-[45]

⁴ Ibid at [39]