[2025] FWC 72

The attached document replaces the document previously issued with the above code on 9 January 2025.

Details of Change:

- The word ‘extend’ in paragraph [45] is amended to read “extent”.

Associate to Deputy President Anderson

Dated 10 January 2025

DECISION

Fair Work Act 2009
s.66M - Application to deal with a dispute about the right to request casual conversion

Sachi Udadewa Arachchige Dona Sachithra Thathsarani Udadewa Arachchi

v

Adecco Industrial Pty Ltd
(C2024/8544)

DEPUTY PRESIDENT ANDERSON ADELAIDE, 9 JANUARY 2025

Casual conversion dispute – redundancy – employment ceased – jurisdiction – utility – application dismissed

[1] On 27 November 2024 Ms Sachithra Thathsarani Udadewa Arachchi (Ms Arachchi or the applicant) applied to the Commission to deal with a casual conversion dispute. The application is made under s 66M of the *Fair Work Act 2009* (Cth) (FW Act).

[2] The respondent is Adecco Industrial Pty Ltd (Adecco, the respondent or the employer).

[3] I convened a conference of the parties on 20 December 2024. I drew attention to the fact that the application appears to have been made after the applicant's employment ceased and that the applicant is no longer employed by the respondent. I invited the parties to consider whether that circumstance raises jurisdictional or utility issues, and if the applicant wished to proceed with the matter.

[4] I issued directions inviting written submissions on these questions.

[5] On 26 December 2024 the applicant advised that she intended to proceed. Ms Arachchi filed a written submission contending that jurisdiction exists, and that there is utility in determining whether the employer had acted appropriately when it refused casual conversion.

[6] On 3 January 2025, the respondent filed written submissions seeking dismissal of the application on jurisdictional grounds. In the alternative, the respondent contends that there is no utility in dealing with the application as Ms Arachchi is no longer employed.

[7] The parties have consented to these preliminary issues being determined on the papers. I proceed to do so.

Facts

[8] Adecco is a labour hire agency. Amongst its clients is BlueScope Steel.

[9] In June 2023, Ms Arachchi commenced employment with Adecco as a casual business analyst. Throughout her period of employment she was placed to work at BlueScope, averaging between 20 (initially) and (later) 30 hours per week.

[10] On 19 September 2024, Adecco advised Ms Arachchi that she had reached her twelve month employment anniversary and that consequently it was "required to assess your eligibility to become a permanent employee". Adecco advised that "we have determined that you are not eligible because you have not worked a regular pattern of hours for the last 6 months or your pattern of work could not continue as a permanent employee without significant changes".

[11] On 20 September 2024, Ms Arachchi informed Adecco that she disputed this decision and sought its internal review.

[12] On 15 November 2024, Ms Arachchi's employment was terminated on account of redundancy. Her placement at BlueScope ceased as did her casual employment with Adecco.

[13] An Employment Separation Certificate dated 6 December 2024 was sent to the applicant.

[14] At the time of her redundancy, Ms Arachchi had not received a formal response by Adecco to her request to review its casual conversion decision.

[15] On 27 November 2024, twelve days after her employment ceased, Ms Arachchi applied to the Commission under s 66M of the FW Act to deal with a casual conversion dispute. She seeks an order "to become a permanent employee to enhance job security" or receive compensation.

Submissions

Ms Arachchi

[16] Ms Arachchi contends that she had been employed on a regular pattern of hours for at least the six months prior to the casual conversion decision, and that Adecco did not have lawful or reasonable grounds under the FW Act to refuse conversion.

[17] On jurisdiction, Ms Arachchi submits that the application is within jurisdiction because at the time of the conversion decision she was eligible to be converted to a part time employee. The redundancy did not extinguish the rights she had prior to her employment ceasing.

[18] On utility, Ms Arachchi submits that the matter is of significant importance warranting a determination by the Commission because her rights on redundancy would have been greater had she been converted in September 2024 to a part time employee as opposed to being made redundant as a casual.

Adecco

[19] Adecco submit that the application is beyond jurisdiction because, under relevant transitional legislation applying to amendments to the FW Act operating from 26 August 2024,

the casual conversion dispute falls to be dealt with under the pre-amended s 66M as the application concerns a casual conversion dispute of a "continuing casual employee".

[20] In the alternative, Adecco submit that the application is beyond jurisdiction because, at the time of making the application, the applicant was not an employee of the respondent.

[21] In the further alternative, Adecco submit that the application is beyond jurisdiction because a fair work instrument applied to the applicant, and/or the applicant failed to utilise a dispute settlement procedure in a fair work instrument, and/or the amended s 66M (from 26 August 2024), if it applies, requires the applicant to be an employee at the time of making an application.

[22] On the question of utility, Adecco submit that as no meaningful remedy could be ordered in light of the fact that a continuing employment relationship does not exist, there is no utility in hearing and determining the matter even if jurisdiction existed to do so.

Consideration

[23] Section 66M falls within Part 2-2 Division 4A of the FW Act. The Division deals, as part of the National Employment Standards, with rights to casual conversion and disputes over such matters.

[24] Division 4A and s 66M in particular were amended by the *Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024*. Those amendments relevantly commenced from 26 August 2024. The amendments included a right to arbitration of casual conversion disputes for eligible employees (as distinct from the pre-amendment provisions providing for consent arbitration only). The amendments also included transitional provisions concerning continuing casual employees.

[25] Section 66M, in the terms operating since 26 August 2024 provides:

> **"Disputes about the operation of this Division**
>
> *Application of this section to disputes about employee choice*
>
> (1) This section applies to a dispute between an employer and an employee about the operation of Subdivision B of this Division.
>
> *Resolving disputes*
>
> (4) In the first instance, the parties to the dispute must attempt to resolve the dispute at the workplace level, by discussions between the parties.
>
> Note 1: Modern awards and enterprise agreements must include a term that provides a procedure for settling disputes in relation to the National Employment Standards (see paragraph 146(b) and subsection 186(6)).

Note 2: Subsection 55(4) permits inclusion of terms that are ancillary or incidental to, or that supplement, the National Employment Standards. However, a term of a modern award or an enterprise agreement has no effect to the extent it contravenes section 55 (see section 56).

FWC may deal with disputes

(5) If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the dispute to the FWC.

(6) If a dispute is referred under subsection (5):

(a) the FWC must first deal with the dispute by means other than arbitration, unless there are exceptional circumstances; and

(b) the FWC may deal with the dispute by arbitration in accordance with section 66MA.

Note: For the purposes of paragraph (a), the FWC may deal with the dispute as it considers appropriate, including by mediation, conciliation, making a recommendation or expressing an opinion (see subsection 595(2)).

Representatives

(10) The employer or employee may appoint a person, or an employer organisation or employee organisation, that is entitled to represent the industrial interests of the employer or employee to provide the employer or employee (as the case may be) with support or representation for the purposes of:

(a) resolving the dispute; or

(b) the FWC dealing with the dispute.

Note: A person may be represented by a lawyer or paid agent in a matter before the FWC only with the permission of the FWC (see section 596).

Procedural rules

(11) Without limiting section 609, the procedural rules may provide, in relation to a dispute between an employer and employee that has been referred to the FWC under (5) of this section, for the joinder of the following as parties to the dispute:

(a) any other employee that has a dispute to which this section applies with the same employer;

(b) any employee organisation that is entitled to represent the industrial interests of such an employee."

[26] The transitional provisions, in the terms operating since 26 August 2024, provide (ss 102(5), (6AA) and (7):

> **"102 Application of amendments**
>
> *Application of employee choice and casual conversion provisions*
>
> (5) The amendments of Division 4A of Part 2-2 made by the amending Act apply on and after commencement in relation to employment relationships entered into before, on or after commencement.
>
> ……
>
> (6AA) Despite subclause (5), sections 66B and 66C as in force immediately before commencement continue to apply after commencement for a period of 6 months from commencement in relation to employment relationships entered into before commencement where the employer is not a small business employer at commencement.
>
> ……
>
> (7) Despite subclause (5), sections 66M, 548 and 739 as in force immediately before commencement continue to apply after commencement to: (a) disputes that arose before commencement relating to the operation of Division 4A of Part 2-2; and (aa) disputes that arise after commencement relating to the operation of sections 66B to 66E (as those sections continue to apply because of subclauses (6AA) and (6AB)); and (b) disputes that arise after commencement relating to the operation of sections 66F to 66J (as those sections continue to apply because of subclauses (6A) and (6B))."

[27] I now deal with the jurisdictional objections raised by the respondent.

Transitional provisions preclude compulsory arbitration

[28] I agree with Adecco that, whilst the casual conversion decision it advised on 19 September 2024 and which was disputed by Ms Arachchi on 20 September 2024 fell after the 26 August 2024 amendments, the effect of the transitional provisions is that this application falls to be determined under the pre-amended provisions of Division 4A. This is because Ms Arachchi was a "continuing casual employee" and s 102(7) of the transitional provisions expressly provide that section 66M "as in force immediately before commencement" continues to apply to a dispute with a continuing casual employee "that arises after commencement".

[29] However, dealing with this application under the pre-amended s 66M does not mean that jurisdiction does not exist on that ground. The pre-amended s 66M provided:

> **"66M Disputes about the operation of this Division**
>
> *Application of this section*

(1) This section applies to a dispute between an employer and employee about the operation of this Division.

(2) However, this section does not apply in relation to the dispute if any of the following includes a term that provides a procedure for dealing with the dispute:

(a) a fair work instrument that applies to the employee;

(b) the employee's contract of employment;

(c) another written agreement between the employer and employee.

Note: Modern awards and enterprise agreements must include a term that provides a procedure for settling disputes in relation to the National Employment Standards (see paragraph 146(b) and subsection 186(6)).

Resolving disputes

(3) In the first instance, the parties to the dispute must attempt to resolve the dispute at the workplace level, by discussions between the parties.

FWC may deal with disputes

(4) If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the dispute to the FWC.

(5) If a dispute is referred under subsection (4):

(a) the FWC must deal with the dispute; and

(b) if the parties notify the FWC that they agree to the FWC arbitrating the dispute—the FWC may deal with the dispute by arbitration.

Note: For the purposes of paragraph (a), the FWC may deal with the dispute as it considers appropriate, including by mediation, conciliation, making a recommendation or expressing an opinion (see subsection 595(2)).

Representatives

(6) The employer or employee to the dispute may appoint a person or industrial association to provide the employer or employee (as the case may be) with support or representation for the purposes of resolving, or the FWC dealing with, the dispute.

Note: A person may be represented by a lawyer or paid agent in a matter before the FWC only with the permission of the FWC (see section 596)."

[30] It is apparent that under the pre-amended s 66M the Commission has jurisdiction to "deal with" a casual conversion dispute (pre-amended s 66M(5)(a)). This includes doing so (as the statutory note indicates) by mediation, conciliation or recommendation, amongst other non-arbitrary tools. Jurisdiction also exists for consent arbitration (pre-amended s 66M(5)(b)).

[31] Accordingly, whilst no jurisdiction exists for compulsory arbitration, I conclude that (subject to the applicant being employed by the respondent at the time of making the application, considered below) jurisdiction exists to otherwise deal with the dispute.

[32] Adecco's submission in this regard is rejected.

Not an employee at relevant time

[33] It is not in dispute that Ms Arachchi was an employee at the time Adecco decided not to grant casual conversion rights but was no longer an employee at the time she made the application under s 66M.

[34] The express terms of the pre-amended s 66M confer jurisdiction on the Commission with respect to "disputes between an employer and an employee about the operation of the Division" (s 66M(1)).

[35] The Commission's jurisdiction only exists where the dispute is "referred" under ss (4), and this can only occur after attempts have been made "to resolve the dispute at the workplace level".

[36] The plain meaning of these provisions, including that they are cast by the legislature in the present tense, indicates that the Commission's jurisdiction exists only with respect to an employment relationship that was in existence at the time of the dispute being referred; that is, at the time of an application being made by a party to the dispute under s 66M for the dispute to be dealt with by the Commission.

[37] As no employment relationship existed between the applicant and Adecco when Ms Arachchi referred the dispute to the Commission, no jurisdiction exists to "deal with" the dispute.

[38] Adecco's jurisdictional challenge on this ground is made out.

[39] I observe that this conclusion, which I have made by reference to the pre-amended s 66M, would apply equally had Ms Arachchi's application fallen to be determined under the post 26 August 2024 amended provisions. Under the amended s 66M the relevant provisions concerning jurisdiction (including the use of the present tense in s 66M(1) and the requirement for referral after workplace discussions) are relevantly unaltered.

Other jurisdictional objections

[40] As the application fails for want of jurisdiction on the ground that Ms Arachchi was not an employee at the time of making the application, it is not necessary to deal with the third, fourth or fifth jurisdictional objections raised by Adecco. I observe however that the third

jurisdictional objection raised (that a fair work instrument applied) appears to lack merit in that it fails to take into account that the relevant instrument relied upon (Clerks Private Sector Award 2020) does not provide a discrete dispute resolution process of its own for casual conversion disputes, but simply references back to the statutory dispute provisions in Division 4A.

Utility

[41] As I have concluded that the application fails for want of jurisdiction, it is not necessary to determine whether, in the exercise of discretion, the application should be dismissed on the ground that there is no utility in dealing with the casual conversion dispute where no employment relationship exists between the applicant and respondent and none is in prospect.

[42] Were I required to do so, there would be weighty discretionary reasons against further dealing with the application in these circumstances.

[43] Firstly, the remedies sought by Ms Arachchi could not be meaningfully ordered, even if on merit she was correct in contending that Adecco had wrongly refused to convert her to a part time employee. This is because there is no consent to arbitration by Adecco. Further, even if compulsory arbitration rights existed, the Commission has no power to order the compensation sought. The amended compulsory arbitration power in s 66M(4) (if it applied) only empowers the Commission to make an order as to employment status from a particular date, and that date must be prospective (not retrospective).

[44] Secondly, a declaration in the terms sought by Ms Arachchi could not have practical or meaningful effect. The Commission has no power under the pre or post amended s 66M to re-create an employment relationship and impose onto it a different employment status.

[45] Thirdly, to the extent the applicant seeks a declaration as to past rights, there is a long line of authority that only courts in the exercise of judicial power, and not administrative tribunals, are empowered to make binding declarations of that nature.

[46] Fourthly, even if I was empowered to make the declaration sought by Ms Arachchi, it would be inappropriate to determine whether to do so. The Commission has statutory jurisdiction under the FW Act (and related Acts) only, and no inherent jurisdiction. As an administrative tribunal exercising multiple complex jurisdictions across national system employers and national system employees, and compelled to do so efficiently and justly to all applicants and respondents, it would likely materially compromise the Commission's statutory charter to conduct proceedings in order to simply opine on what rights may or may not have existed between parties had a matter been brought before it at an earlier stage when determination was capable of a meaningful or practical impact.

Conclusion

[47] Application C2024/8544 fails for want of jurisdiction. It must be dismissed.

[48] An order giving effect to this decision is issued in conjunction with its publication.[1]

DEPUTY PRESIDENT

Hearing details:

Determined 'On the Papers'.

Written submissions:

Ms Sachithra Thathsarani Udadewa Arachchi: 26 December 2024

Adecco Commercial *for and on behalf of* the respondent: 3 January 2025

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[1] PR783104