DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Civmec Construction & Engineering Pty Ltd
v
Joel Minchin
(C2024/5873)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT CLANCY
DEPUTY PRESIDENT ROBERTS

SYDNEY, 8 JANUARY 2025

Appeal against decision [2024] FWC 2204 of Deputy President Beaumont at Perth on 20 August 2024 in matter number C2024/3969 – Application under s 365 of the Fair Work Act 2009 (Cth) for Commission to deal with general protections dismissal dispute – Jurisdictional objection on the basis that respondent to the application was not the correct employer – Applicant refused to amend application to name alternative employer – Jurisdictional objection dismissed at first instance – Whether identification of the correct employer is jurisdictional prerequisite to an application under s 365 – Whether application validly made – Permission to appeal granted – Appeal dismissed.

Introduction

[1] Civmec Constructions and Engineering Pty Ltd (**Civmec** or the **Appellant**) has lodged an appeal, for which permission is required, against the decision of Deputy President Beaumont in *Minchin v Civmec Constructions and Engineering Pty Ltd* [2024] FWC 2204. In that decision, the Deputy President dealt with a jurisdictional objection by Civmec to an application made by Mr Joel Minchin under s 365 of the *Fair Work Act* 2009 (Cth) (the **Act**) for the Commission to deal with a general protections dispute involving dismissal.

[2] Civmec objected to the application on the basis that it was not, at any time, the employer of Mr Minchin and that Mr Minchin was employed by another entity, Multidiscipline Solutions Pty Ltd (**MSP**). MSP is a wholly owned subsidiary of Civmec. Civmec argued that, in those circumstances, Mr Minchin had not been dismissed for the purposes of s 365 of the Act, that the Commission lacked jurisdiction to deal with the application and that the application should be dismissed.

[3] The Deputy President found that MSP was Mr Minchin's former employer.[1] However, the Deputy President concluded that she was required to determine "the fact of the Applicant's purported dismissal" and that Civmec's jurisdictional objection that there was no dismissal because Civmec was not Mr Minchin's employer should be dismissed.[2]

Procedural Background

[4] The background to the proceedings before the Deputy President can be briefly stated. Mr Minchin filed an originating application under s 365 of the Act in which Civmec was named as the respondent. The application alleged that Civmec had contravened the general protections provisions in Part 3-1 of the Act. In short, it is alleged that Mr Minchin was forced to resign after having reported a safety breach. A response was filed by MSP signed by Ms Baptist, Group HR/IR Manager, asserting that MSP was Mr Minchin's former employer and that Mr Minchin had not been dismissed by them but had voluntarily resigned from his employment.

[5] Mr Minchin, who was self-represented in the proceedings below and on appeal, declined to seek to amend his application to either substitute MSP for Civmec as the respondent or to add MSP as a respondent to the proceeding. Mr Minchin submitted forcefully at first instance and on appeal that he believed Civmec was his employer and that he had never had any interactions with MSP despite MSP being named the entity offering him employment in the letter of offer addressed to him.

[6] Civmec's jurisdictional objection to the effect that Mr Minchin had not been dismissed was initially listed for hearing on 8 August 2024. Prior to that scheduled hearing, Civmec confirmed with the Deputy President by email that it had not authorised MSP to file the response on its behalf. Civmec asserted that Mr Minchin's employer was MSP and urged the Commission to determine whether the application against it should be dismissed on the basis that because it was not the employer, it could not have dismissed Mr Minchin and that in the absence of a dismissal by it, the proceedings against Civmec could not be maintained.

[7] The Deputy President acceded to a request to deal first with Civmec's objection that there was no dismissal because it was not Mr Minchin's employer. A hearing was then listed on 15 August 2024 to deal with that objection. At the hearing, Ms Baptist appeared for Civmec. The decision at first instance did not deal with MSP's objection that Mr Minchin had not been dismissed because he had resigned and only with whether Mr Minchin's application should be dismissed because Civmec was not his employer.

Decision under appeal

[8] After setting out the background to the proceeding, the Deputy President considered the legislative framework within which the matter was to be determined. The Deputy President noted the definition of the term "dismissed" in ss 12 and 386 of the Act and then set out the terms of s 365 itself. The Deputy President noted that the text and structure of s 365 includes "the objective condition that there has been a dismissal *in fact*, in addition to there having been an allegation that the dismissal is for a prohibited reason" (original italics).[3]

[9] The Deputy President referred to the decision of the Full Court of the Federal Court of Australia in *Coles Supply Chain Pty Ltd v. Milford*[4] (***Milford***) noting that the Court in that matter had concluded that where there is a dispute as to the question of dismissal, this was "an antecedent dispute going to the entitlement of the applicant to apply."[5]

[10] The Deputy President summarised Civmec's argument at paragraph [21] of the reasons as being that, because the authorities support the view that the term "dismissal" takes its meaning from s 386 of the Act, it follows that the section contemplates that the dismissal is by

the person's employer as contemplated by s 386(1) and that there must be an allegation that the employer had thereby contravened Part 3-1.

[11] The Deputy President said that ultimately the issue in the proceeding was whether there has been a dismissal in fact, as identified in *Milford*. The Deputy President went on to note MSP's status as a wholly owned subsidiary of Civmec and one of three of its "employing entities". The Deputy President noted that the evidence did "not support an argument that MSP was siloed from its parent entity, rendering the parent entity unable to speak to the case that the (Respondent) had brought against it".[6]

[12] At paragraph [24], the Deputy President said:

> *[24] Although Civmec was not the Applicant's employer its argument on this occasion is not a complete defence to the application brought. Section 590 expressly empowers the Commission to inform itself in relation to 'any matter before it in such manner as it considers appropriate'. In the present case the 'matter' is whether the Commission possesses authority to deal with the dispute under s 368 of the Act. To determine whether that is the case, I am required to determine the fact of the Applicant's purported dismissal. In my view this can be achieved by requiring persons and/or representatives of MSP in addition to those of Civmec, to give evidence relevant to the factual dispute of whether the Applicant was 'dismissed'.*

[13] The Deputy President concluded that Civmec's jurisdictional objection that, as it was not Mr Minchin's former employer there had been no dismissal and, for that reason, the Commission had no jurisdiction to deal with the application, should be dismissed.[7] The Deputy President indicated that the matter would be listed for a further jurisdictional hearing to deal with the question of whether there had been no dismissal because Mr Minchin had voluntarily resigned.[8]

Grounds of appeal

[14] Civmec advanced the following grounds of appeal:

1. The Commission erred in fact and law by:

    1.1 finding that despite the Appellant not being the Applicant's former employer, this was not a complete defence to the Application;

    1.2 incorrectly using section 590 of the *Fair Work Act* 2009 (the Act) to empower itself to inform itself in relation to 'any matter before it in such manner as it considers appropriate', and defining "matter" as whether it possessed authority to deal with the Application (which it mischaracterised as a dispute) under s368 of the Act, and finally, to determine the fact of the Applicant's purported dismissal by way of a further hearing;

    1.3 after finding the Appellant was not the Applicant's former employer, not dismissing the Application.

Principles on Appeal

[15] Section 604(1) of the Act permits a person who is aggrieved by a decision of the Commission to appeal the decision. However, there is no right to appeal. An appeal may only be brought with the permission of the Commission. Section 604(2) requires the Commission to grant permission to appeal if it is satisfied that it is in the public interest to do so. In addition, the Commission has a general discretion as to whether to grant permission to appeal even if not satisfied that the public interest requirement has been met.

[16] The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[9] The type of circumstances that might warrant a conclusion that it is in the public interest to grant permission to appeal include where a matter raises issues of importance and general application, where there is a diversity of decisions at first instance so that guidance from the Full Bench is required, where the decision at first instance manifests an injustice or the result is counter intuitive, or where the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.[10] The grounds upon which the Commission might otherwise grant permission to appeal are not specified in the Act. Considerations which have traditionally been treated as justifying the grant of permission to appeal include that the decision is attended with sufficient doubt to warrant its reconsideration, and that substantial injustice may result if leave is refused.[11]

[17] The present appeal raises a novel question concerning the jurisdiction of the Commission to deal with an application under s 365 of the Act in circumstances where an applicant contends that they have been dismissed in contravention of Part 3-1 of the Act, but the application is brought against a party that neither employed nor dismissed them or in circumstances in which there is a dispute as to the identity of the employer. The appeal raises a question concerning the proper construction of s 365 of the Act and has potential implications as to when the jurisdiction of the Commission has been properly invoked under that section which may arise in other cases. For these reasons, we are satisfied that it is in the public interest to grant permission to appeal.

Submissions on appeal

[18] Civmec advanced two principal arguments on appeal, consistent with the grounds set out above. The first contention is that, in order for a valid application to be made under s 365, an applicant must establish not only that they have been dismissed, but that they were dismissed by the employer against whom the application is brought. As we understand the argument, this conclusion was said to follow from a proper reading of the term "dismissed" in s 365(a). Civmec contends that the Deputy President misdirected herself and misapplied the Full Court's conclusions in *Milford* by posing the wrong question for determination, namely, by asking whether there had been a "dismissal in fact", rather than whether there was a valid application at all in circumstances where Civmec itself did not employ, and therefore could not have dismissed, Mr Minchin.

[19] Secondly, Civmec contended that the Deputy President had conflated the procedural provisions in s 590 of the Act (which provides for the ways in which the Commission may inform itself in relation to a matter before it) with the source of its jurisdiction to deal with an application under s 365. Civmec asserted that this approach on the part of the Deputy President resulted in the erroneous conclusion that the "matter", that is, whether there was a "dismissal in fact", could be determined by simply dismissing the jurisdictional objection and relying on

s 590 to require both Civmec and MSP to give evidence at a further hearing to decide the question of whether Mr Minchin had been dismissed.

[20] Mr Minchin, for his part, maintained that there was no error in the reasons of the Deputy President and urged that permission to appeal should be refused. He submitted that Civmec's arguments do not raise any broader public interest issues or show that the decision of the Deputy President was wrong.

Consideration

[21] Where a person makes an application under s 365 of the Act, the Commission must deal with the dispute under s 368. The Commission may deal with the dispute by mediation or conciliation, or by making a recommendation or expressing an opinion.[12] If the dispute is not able to be resolved by conciliation, the Commission must issue a certificate under s 368(3). A certificate issued under that subsection is, unless the application includes an application for an interim injunction, a precondition to the commencement of a general protections court application[13] or alternatively, and if the parties agree, to the Commission dealing with the dispute by arbitration.[14]

[22] Section 365 appears in Subdivision A of Division 8 of Part 3-1 of the Act. It provides as follows:

> **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.

[23] Section 365 defines the persons who are entitled to make a general protections application involving dismissal to the Commission. For an application to be made under s 365, it must be made by a person described in the section. It must also be made within the time period provided for in s 366(1).[15]

[24] Section 368 relevantly provides:

> **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.

[25] In *Milford*, the Full Court was concerned to draw a distinction between the purpose and operation of s 365 and s 368. The Full Court observed that the non-determinative functions of the Commission under s 368 are only enlivened in the event that "an application is made under s 365", and then only in relation to "the dispute".[16] As to what constituted "the dispute" under s 368 the Court said:[17]

> The answer is found in s 365 and in the opening words to s 368 itself. As observed earlier, when s 368 refers to an "application" made under s 365, it refers to an application validly made by a person entitled to make it. The text and structure of s 365 is such that there has been a dismissal in fact and that there is an allegation that the dismissal was for a prohibited reason. Construed in the context of s 365, when s 368 refers to "the dispute" it must be taken to refer to the dispute agitated by the allegation: that is, the allegation concerning the reason for the dismissal, and not an allegation of dismissal per se. It does not assist Mr Milford to show that the power under s 368 is non-determinative. We are presently concerned with an antecedent question as to whether the non-determinative powers are enlivened at all.

[26] In relation to the possibility of the parties being "in dispute" as to whether or not a person had been dismissed under s.365(a) the Full Court said:[18]

> It is not difficult to conceive of cases where the parties may be in "dispute" as to whether or not a person has been dismissed. Most often that will occur in cases where the applicant alleges (and the respondent contests) that he or she has been constructively dismissed. But that dispute is not to be confused with the dispute forming the subject matter of the FWC's conciliation powers as just described. A dispute about whether a person has been dismissed raises an antecedent issue going to the existence of the FWC's authority to compel an employer to participate in its conciliation processes.

[27] Notably in *Milford*, in relation to s 365, the Full Court said:[19]

> 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) (sic), but not in the criterion in s 365(1)(a) (sic). In its ordinary meaning, the criterion in s 365(1)(a) (sic) 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.

[28] The point raised by Civmec, both at first instance and on appeal, is whether Mr Minchin has made a valid application under s 365 in circumstances where the application named as the respondent an entity that was not the entity that had employed and allegedly dismissed him. As was pointed out by the Full Court in *Milford* (at [54]) above and as is plain from the text of the section itself, there are two criteria conditioning the entitlement of a person to make an application under s 365. The first criterion is that the person was dismissed. The second is that the person alleges the dismissal was in contravention of Part 3-1 of the Act. Although the point raised here did not directly arise in *Milford*, there is no suggestion in the decision that there are any additional qualifications or criteria for the making of a valid application under s 365. Having regard to the plain language of the section, we see no reason to conclude otherwise.

[29] Section 365(a) refers to a person, the applicant, who has been dismissed. Section 12 defines what is meant by the term "dismissed" in the Act by simply stating "see section 386". Section 386 describes when a person has been "dismissed". Leaving aside the exceptions in s 386(2), the principal aspect of the definition is that "the person's employment with his or her employer has been terminated on the employer's initiative" or the person "has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer". For there to be a valid application, the applicant must have in fact been dismissed on his or her employer's initiative or have resigned in circumstances in which he or she was forced to do so by the employer.

[30] The question raised by Civmec's submissions is whether there is an additional jurisdictional prerequisite to a valid application under s 365 of the Act. It suggests that not only must an applicant have in fact been dismissed, but the application must also name the correct employer as a respondent to the application for an application to have been validly made. In our opinion, the submission cannot be accepted. Section 365 does not itself require that an applicant name his or her employer as a respondent to the application in order to make a valid application and we are unable to discern from the broader context of the provisions in Subdivision A of Division 8 of Part 3-1 any reason why that requirement should be imposed.

[31] A number of aspects of the statutory scheme support the conclusion that we have reached. First, an application under s 365 of the Act is for the Commission to deal with "the dispute". The "dispute" is identified at a high level of generality by reference to the occurrence of a person's dismissal which is alleged to have been in contravention of Pt 3-1. The Act itself does not otherwise specify the required content or form of an application under s 365. In *Shea v TruEnergy Services Pty Ltd (No 1)*[20] (***Shea***), for example, the respondent contended that "the dispute" in relation to which the court application referred to in s 371(1) is made must, in all essential and substantial aspects, be limited and conform to "the dispute" as expressed or described in the application to the Commission. Dodds-Stretton J rejected the contention and, among other things, observed:[21]

> While there are a number of different potential bases of contravention of Pt 3-1, the Act does not prescribe the content, essential inclusions or level of detail of the application which may be made to FWA under s 365. The Form F8 headed "Application for FWA to Deal with a General Protections Dispute — *Fair Work Act 2009* — ss 365, 372" completed by the applicant in this case is a short document setting out basic questions, including "Alleged contravention(s) of Part

> 3-1", "Section(s) allegedly contravened" and "Description of alleged contravention(s)". In the present case, the applicant's description was contained in an annexure. In practice, the dispute identified in general terms under s 365 is likely to be further elaborated or described not only in the FWA application but also in the respondent's response (if any) and/or the FWA conference conducted to deal with the dispute.

[32] Her Honour emphasised that, whilst in practice the dispute identified in s 365 may be elaborated by the applicant in the application to the Commission and by both parties in the context of that process, including any conference, the legislation does not, in terms, require such elaboration.[22] Those aspects of the statutory scheme suggest that, although the applicant must in fact have been dismissed, the jurisdiction of the Commission to deal with a dispute, and of a court to subsequently determine a general protections court application, is not dependent on the content of the application made to the Commission.

[33] Second, there is nothing to suggest that the failure of an applicant to name the correct employer in an application made under s 365 cannot be remedied by way of later amendment. In *Knight v Visionstream Australia Pty Ltd*[23](***Visionstream***), O'Callaghan J considered an appeal against a decision at first instance in which it had been found that s 368 of the Act operated to prevent an applicant in a s 365 general protections application from substituting one respondent party for another in the court proceedings following a conference in the Commission where the name of the proposed new respondent differed from the name of the entity on the Commission's certificate.

[34] O'Callaghan J concluded that the judge below had erred by determining that it was not possible to substitute a new respondent. His Honour observed that the Act did not create "a regime providing potential technical defects or traps that would deny a person's access to justice."[24] As a result, it was unnecessary for an application under s 365, and a resultant certificate under s 368(3)(a), to identify each potentially liable party, or even to correctly identify the employing entity, for there to be a valid court application under s 370.[25] The same conclusion had earlier been reached by what was then the Federal Magistrates Court in *Rutherford v Hausner*.[26]

[35] Based on the decisions in *Visionstream* and *Rutherford v Hausner*, if Mr Minchin is successful in obtaining a certificate from a member of the Commission under s 368(3), it would likely be possible for him to apply to substitute MSP for Civmec as the respondent, or add MSP as an additional respondent, in any subsequent court proceedings. If it is possible to substitute the correct employer at a later stage in the litigation, the identification of the correct employer as the respondent cannot represent a jurisdictional prerequisite to an initial application under s 365 of the Act. If naming the employer was a necessary requirement for a valid application to be made under s 365, the defect could not be remedied by later amendment or substitution.

[36] Admittedly, this is not a case in which Mr Minchin believes or accepts that he has made a mistake in identifying Civmec as the respondent to the application. Mr Minchin fervently believes that Civmec is his employer notwithstanding the finding of the Deputy President that he is wrong in that respect. However, in our opinion, the same conclusion must follow. If it is not a jurisdictional prerequisite for an applicant to identify the correct employer in cases where an error has been made, it cannot be a prerequisite where the applicant's choice is deliberate albeit mistaken.

[37] For the purposes of this appeal, it is unnecessary to consider the correctness of the Deputy President's conclusion as to the identity of Mr Minchin's employer. There is no reason to think it is not correct. We do note, however, that although MSP is named as the entity offering him employment in the letter of offer addressed to Mr Minchin, the letter appears on Civmec's letterhead. Mr Minchin asserts that he did not have dealings within any person from MSP. It is at least a case in which there is some potential for confusion. The fact that there will be cases in which there is genuine dispute as to the identity of the true employer (including where it is unclear which entity within a group of companies should be regarded at law as the employer of a particular employee or group of employees)[27] itself supports the conclusion that the correct identification of the employer is unlikely to have been intended to be a prerequisite for a valid application to be made.

[38] Third, persons other than the applicant's employer may be proper respondents to an application under s 365 of the Act. A person will be taken to have contravened a provision within Part 3-1 if the person was "involved in" the contravention for the purposes of s 550 of the Act. That may occur if the person aided, abetted, counselled or procured the contravention, induced the contravention, was knowingly concerned in or party to the contravention, or conspired with others to effect the contravention.[28] Generally speaking, an action can be maintained against persons alleged to have been involved in a contravention, although proceedings are not pursued against the primary contravener.[29]

[39] In the recent decision in *Kirkham v Monash University & Ors*[30] (*Kirkham*), a Full Bench considered an appeal from a decision involving an application under s 365 in which the applicant named as respondents the University, the National Tertiary Education Union and 17 individuals who were, or were previously, employed by the University. The Commissioner, who dealt with the application at first instance, dismissed the application insofar as it related to all parties other than the University on the basis that they were not the employer that had dismissed the applicant. The Full Bench concluded that the Commissioner had erred in doing so. The Full Bench indicated that the application had satisfied the two criteria in s 365(a) in that the applicant was in fact dismissed by the University and had alleged that the dismissal occurred in contravention of Part 3-1. The application in respect of the applicant's dismissal by the University had therefore been validly made.[31] The Full Bench explained:[32]

> 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 s365 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. Nor did *Milford* itself consider the question of who might be named as a respondent to an application validly made under s 365. (footnote omitted)

[40] The Full Bench was satisfied that there was nothing in ss 365 or 368 which 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.[33] The fact that persons other than the employer might be named as respondents to an application under s 365, and be

the subject of orders in a general protections court application, is inconsistent with the proposition that the identification of the correct employer is a jurisdictional prerequisite to a valid application having been made. There may be cases in which there are legitimate strategic or practical reasons for an applicant to name as respondents, and pursue relief against, persons other than his or her employer. There is no reason for s 365 to be construed as preventing that course being adopted.

[41] We are conscious that some practical difficulties might be encountered in the Commission fulfilling its function under s 368 of the Act to deal with the dispute other than by arbitration if an applicant fails or refuses to identify his or her employer as a respondent to an application under s 365. However, the Commission has a broad discretion as to the manner in which it deals with an application under s 365 when exercising its powers under s 368. In *Kirkham*, for example, the Full Bench explained:[34]

> 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.

[42] The manner in which the Commission deals with a dismissal dispute is likely to be affected by the circumstances of a particular case, including the parties named in an application. However, the Commission is empowered to address circumstances such as those presented by Mr Minchin's insistence that Civmec was his employer. Any practical difficulties that might arise do not provide a justification for construing s 365 as imposing additional jurisdictional hurdles that are not dictated by the text of the section.

[43] For these reasons, we do not accept that s 365(a) of the Act requires that the dismissal referred to in that subsection must be a dismissal by the respondent to the application or that the application is itself not valid because it failed to name Mr Minchin's former employer. We reject grounds 1.1 and 1.3 of the appeal.

[44] As to the remaining appeal ground, we do not read paragraph [24] of the Deputy President's reasons in the way contended for by Civmec. The Deputy President did not invoke s 590 as a separate source of power to determine an application made under s 365. Having concluded that Civmec was not Mr Minchin's employer but that the failure to name MSP as a respondent did not invalidate the application, the Deputy President did no more than identify that the "matter" with which the Commission was left to deal was whether the Commission had authority to deal with the dispute in accordance with s 368. That issue depends on the answer to the antecedent question of whether Mr Minchin had been dismissed. The Deputy President simply referred to s 590 as providing a means through which the Commission might inform itself in relation to the remaining objection to the application, that is, whether there had been a dismissal as a matter of fact. We reject ground 1.2 of the appeal.

Disposition

[45] For these reasons, permission to appeal should be granted but the appeal dismissed. The remaining jurisdictional objection will now need to be considered by the Deputy President.

[46] The Full Bench makes the following orders:

(a) Permission to appeal is granted; and
(b) The appeal is dismissed.

VICE PRESIDENT

Appearances:

A Randles, for the Appellant.
J Minchin, for himself.

Hearing details:

By Video using Microsoft Teams at 2:00pm AEDT on Monday, 9 December 2024.

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[1] *Minchin v Civmec Constructions and Engineering Pty Ltd* [2024] FWC 2204 at [23].

[2] [2024] FWC 2204 at [24] and [26].

[3] [2024] FWC 2204 at [17].

[4] [2020] FCAFC 152; (2020) 279 FCR 591.

[5] [2024] FWC 2204 at [18].

[6] [2024] FWC 2204 at [22].

[7] [2024] FWC 2204 at [26].

[8] [2024] FWC 2204 at [27].

[9] *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* [2011] HCA 4; (2011) 243 CLR 506 at [69] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Coal & Allied Mining Services Pty Ltd v Lawler and others* [2011] FCAFC 54; (2011) 192 FCR 78 at [44]-[46].

[10] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343; (2010) 197 IR 266 at [27].

[11] *Wan v Australian Industrial Relations Commission* [2001] FCA 1803; (2001) 116 FCR 481 at [30]; *Ferrymen Pty Ltd v Maritime Union of Australia* [2013] FWCFB 8205; (2013) 238 IR 258 at [12].

[12] *Fair Work Act 2009* (Cth), s 595(2).

[13] *Fair Work Act 2009* (Cth), s 370(a).

[14] *Fair Work Act 2009* (Cth), s 369.

[15] *Milford* at [51].

[16] *Milford* at [63].

[17] *Milford* at [64].

[18] *Milford* at [65].

[19] *Milford* at [54].

[20] [2012] FCA 628; (2012) 204 FCR 456.

[21] *Shea* at [64].

[22] *Shea* at [69].

[23] [2017] FCA 1513.

[24] *Visionstream* at [38].

[25] *Visionstream* at [32]-[34].

[26] [2011] FMCA 1033; (2011) 212 IR 343 at [18]-[22] (Riethmuller FM).

[27] See, for example, *Australian Insurance Employees Union v WP Insurance Services Pty Ltd* (1982) 1 IR 212; *Textile Footwear and Clothing Union of Australia v Bellechic Pty Ltd* [1998] FCA 1465; *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* [2011] FCA 1176; (2011) 198 FCR 174; *Revill v John Holland Group Pty Ltd* [2022] FCAFC 178; (2022) 295 FCR 269.

[28] *Fair Work Act 2009* (Cth), s 550(2).

[29] *Matheson Engineers Pty Ltd v El Raghy* (1992) 37 FCR 6 at 9 (French J); *Australian Competition & Consumer Commission v Black on White Pty Ltd* [2001] FCA 187; (2001) 110 FCR 1 at [41]-[53] (Spender J); *Fair Work Ombudsman v Contracting Solutions Australia Pty Ltd* [2013] FCA 7 at [3] (Lander J).

[30] [2024] FWCFB 429.

[31] *Kirkham* at [39].

[32] *Kirkham* at [42].

[33] *Kirkham* at [46].

[34] *Kirkham* at [47].