DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Mathrew Priestley and Mika Tyson
v
Blackfisch Films Pty Ltd
(C2024/8619; C2024/8863)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT ROBERTS
DEPUTY PRESIDENT BUTLER

SYDNEY, 20 FEBRUARY 2025

Appeal against decision of Deputy President Boyce at Sydney on 22 November 2024 in matter number C2024/6827 and C2024/6831 – Applications made by two applicants under s 365 of the Fair Work Act 2009 (Cth) – Applications dismissed for want of prosecution – Failure to file submissions and evidence in reply in accordance with directions – Power to dismiss proceedings for want of prosecution – Applicants did not receive communications from the Commission prior to dismissal of applications – Decision to dismiss the application unreasonable – Failure to consider relevant matters – Denial of procedural fairness – Permission to appeal granted and appeal allowed – Proceedings remitted to another member of the Commission.

Introduction and background

[1] This appeal concerns an *ex tempore* decision of a member of the Fair Work Commission (the **Commission**) to dismiss applications made by Mathrew Priestley and Mika-Rose Tyson under s 365 of the *Fair Work Act 2009* (Cth) (the **Act**) for want of prosecution.

[2] Mathrew Priestley and Mika-Rose Tyson are Aboriginal persons. Mr Priestley requested to be referred to as Uncle Matt at the hearing of the present appeal and we will do so in this decision. Uncle Matt is a member of the Terry Hie Hie clan of the Gomeroi Nation. Ms Tyson is also a member of the Gomeroi Nation. Both Uncle Matt and Ms Tyson performed work for the respondent, Blackfisch Films Pty Ltd until September 2024. Blackfisch Films is a majority indigenous owned media and film company. Malinda Rutter is the co-director and majority shareholder of Blackfisch Films. Ms Rutter is also a member of the Gomeroi Nation and described herself as Uncle Matt's third cousin. She is also related to Ms Tyson. Ms Rutter requested to be referred to as Auntie Malinda.

[3] There is a dispute as to the nature of the engagement of both Uncle Matt and Ms Tyson by Blackfisch Films and the circumstances in which the relationships came to an end. It is sufficient for present purposes to say that Uncle Matt and Ms Tyson ceased performing work for Blackfisch Films during September 2024 and Blackfisch Films ceased making payments to them at that time. On 24 September 2024, Uncle Matt and Ms Tyson lodged applications under

s 365 of the Act for the Commission to deal with a general protections dispute involving dismissal. In the applications, Uncle Matt and Ms Tyson allege that they had been dismissed by Blackfisch Films and that the dismissals involved contraventions of ss 340 and/or 351 of the Act.

[4] Blackfisch Films filed responses to the applications on 9 October 2024. In its responses, Blackfisch Films identified jurisdictional objections to the applications. Blackfisch Films contended that Uncle Matt and Ms Tyson were not employees and had not been dismissed. It says Uncle Matt was a director of Blackfisch films and resigned from that role and that Ms Tyson was engaged on her "sole trader ABN" and had left without notice. Blackfisch Films later raised a question as to whether Uncle Matt and Ms Tyson also require an extension of time under s 366 of the Act.

[5] The primary role of the Commission in relation to an application under s 365 of the Act is to assist the parties to resolve the dispute. Section 368(1) provides that, if an application is made under s 365 of the Act, the Commission must deal with the dispute (other than by arbitration). The Commission may, for example, deal with the dispute by mediation or conciliation or making a recommendation or expressing an opinion.[1] The Full Court of the Federal Court has determined that, where there is a dispute as to whether an applicant had been dismissed or whether the application was made within time, the Commission must resolve that antecedent dispute before the powers conferred by s 368 can be exercised.[2]

[6] The applications by Uncle Matt and Ms Tyson were allocated to Deputy President Boyce. On 15 October 2024, the following directions were issued by the Deputy President in both matters in relation to the jurisdictional objections made by Blackfisch Films:

> **[3]** By **4.00pm AEDT** on **Tuesday, 29 October 2024**, the Applicants must file in the Commission and serve upon the Respondent an outline of submissions, witness statements, and any documents in opposition to the Respondent's contentions that the Applicants were not "employees" of the Respondent for the purposes of Part 3-1 of the Fair Work Act 2009 (**Act**), and/or were not "dismissed" by the Respondent (see ss. 12 and 386 of the Act) (**together, 'the Respondent's Objections'**).
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> **[4]** By **4.00pm AEDT** on **Tuesday, 12 November 2024**, Respondent must file with the Commission and serve upon the Applicants an outline of submissions, witness statements, and any documents in support of the Respondent's Objections.
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> **[5]** By **4.00pm AEDT** on **Tuesday, 19 November 2024**, the Applicants must file and serve on the Respondent an outline of submissions in reply, witness statements in reply, and any documents in reply.
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> **[6]** The matter is listed for hearing in person in Sydney to resolve the Respondent's Objections at **10:00am AEDT** on **Wednesday, 27 November 2024.** Should the Respondent's Objections (or either of them) be successful, matter numbers C2024/6827 (Matthew Priestly) and C2024/6831 (Mika-Rose Tyson) shall be dismissed.

[7] On 29 October 2024, Uncle Matt and Ms Tyson filed written submissions and witness statements in accordance with direction 3. On 8 November 2024, Blackfisch Films filed material in accordance with direction 4. Uncle Matt and Ms Tyson did not file submissions,

evidence or documents in reply before 4pm on 19 November 2024 in accordance with direction 5.

[8] On 20 November 2024 at 1.12pm, the Deputy President's chambers sent an email to the parties indicating that the Commission had not received materials in compliance with direction 5. That email set out two further directions made by the Deputy President which were as follows:

> [1] The Applicant is to file with the Commission, and serve on the Respondent, written submissions regarding their non-compliance with directions. Further, the Applicant is to make submissions as to why this matter should not be dismissed. The Applicant is to comply with this Direction by no later than **4:00pm AEDT Tomorrow, 21 November 2024.**
>
> [2] If the Applicant does not comply with Direction [1] above, or if the Deputy President is not satisfied by the Applicant's submissions, the matter will be **dismissed** without further notice.

[9] The email was sent to representatives of Blackfisch Films as well as to the email address of Uncle Matt. The email was not sent to Ms Tyson's email address. We infer that this occurred because, in her initial application to the Commission, Ms Tyson named Uncle Matt as her representative, although the application also included an email address for Ms Tyson.

[10] On 21 November 2024 at 3:37pm, the Deputy President's chambers sent a further email to Uncle Matt and representatives of Blackfisch Films stating as follows:

> Dear Mr Priestly and Ms Tyson,
>
> Chambers refers to the email below sent to you yesterday, and reminds you that you need to engage with the contents of the email by **4pm today** or your applications will be **dismissed**.

[11] No response was received by the Deputy President's chambers from Uncle Matt or Ms Tyson. At 4.31pm on the same day, a notice of listing was sent to the parties for a hearing by telephone to be held at 12.00pm the following day, 22 November 2024. The notice of listing contained the following text:

> The above matters are listed for **Strike Out Hearing, by telephone, before Deputy President Boyce** at:
>
> **12:00 PM**
> Friday, 22 November 2024
> By Telephone AEDT
> (NSW Time)
>
> **Note: If the Applicants fail to attend the above listing, the proceedings will be struck out and the files closed.**

[12] The Deputy President conducted a hearing by telephone at 12pm on Friday, 22 November 2024. Uncle Matt and Ms Tyson did not participate in the hearing. The Deputy President announced his decision to dismiss the application for want of prosecution during the hearing, and it is recorded in the transcript of the hearing.

[13] In his reasons for decision, the Deputy President recorded the communications which had been sent by his chambers on 20 and 21 November 2024. The Deputy President recorded that Uncle Matt and Ms Tyson had failed to comply with direction 5 of the directions made on 15 October 2024, failed to comply with the show cause email of 20 November 2024 and the reminder email of 21 November 2024 and failed to attend the hearing on 22 November 2024. The Deputy President continued:

> PN23 The applicants have failed to attend today. I note that the email addresses for the applicants is the one on the Commission's file that the applicants provided. It is an obligation from the applicants to update any change to their contact details, otherwise the Commission is entitled to engage with parties in accordance with what it has on its file as supplied by them.
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> PN24 There has been no email bounce-backs from either of the applicants' emails indicating that they did not receive the email. Indeed, the Commission's records indicate that the emails were sent to the applicants at the time they were relevantly sent.
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> PN25 Section 587 of the Act provides that the Commission may dismiss an application in particular circumstances, set out in (1)(a) to (c).
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> PN26 However, as Gooley C stated in *Rebecca Tomas v Symbian Health* [2011] FWA 5458 with respect to the operation of section 587 of the Act, section 587 gives the tribunal the power to dismiss a matter. Section 587(1)(a), (b) and (c) do not limit the Fair Work Commission's power to dismiss a matter for other reasons.
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> PN27 In this case the Commission and the respondent are both faced with gross non-compliance with directions that have been issued.
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> PN28 For the record, I note that reply evidence is important given that it was part of the directions, but also noting that the purpose of reply evidence is to ensure that relevant issues are contained and confined for the hearing, that parties do not need to prepare for arguments or issues that are otherwise unconfined by the non-filing of reply evidence, and it also removes the situation whereby a party who hasn't filed reply evidence attends upon a hearing and seeks to advance reply evidence or reply submissions, thereby taking the other party by surprise.
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> PN29 All in all the applicants have made no attempt to comply with the directions of the Commission as far as the filing and serving of their reply evidence. They have failed to comply with the show cause email, the reminder email, and have failed to attend today's strike-out hearing or contact the Commission to otherwise explain the non-compliance or non-attendance.
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> PN30 In the circumstances I have decided to dismiss each of their applications. In dismissing each of the applicants' applications I find that both of the applicants' non-compliance and non-communication for non-attendance is totally unsatisfactory and wholly unexplained.
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> PN31 Pursuant to section 587 of the Act I dismiss each of the applications in this matter made by each of the applicants for reasons of want of prosecution.

[14] The Deputy President published orders dismissing the applications made by Uncle Matt and Ms Tyson on the same day.

[15] On 27 November 2024, an email was sent to the Deputy President's chambers by Mr Simon Heath who was assisting Uncle Matt and Ms Tyson. The email included the following:

Please do consider the following points:

- Uncle Matt and Mika clearly intended to be heard and participate in the jurisdictional hearing as they filed substantial submissions and evidence in accordance with order 3 of the Directions dated 15 November 2024 (attached);
- Uncle Matt and Mika did not understand that they were required to file further evidence in accordance with the Directions. Had they been aware of this fact, they would have filed reply submissions or asked the Commission whether they could rely on their substantive submissions filed on 29 October 2024;
- Uncle Matt was homeless at the time that the FWC issued correspondence, and a notice of listing for a strikeout hearing and was unable to access wifi/internet, and thus, unaware of the notice, hearing and orders made until today;
- To give only 3.5 business hours of notice before the strikeout hearing did not afford Uncle Matt or Mika with sufficient time to address any concerns the Commission may have had and understand and prepare for such hearing; and
- Mika Tyson was the person who had filed the submissions and evidence; yet she was left off the emails regarding the notice of listing of the strikeout hearing. Mika was the email point of communication, as Uncle Matt is currently homeless and sleeping in a park because of the circumstances the dismissal caused. Uncle Matt has only a level of schooling up to Year 6 (age 10), so Mika was in a much better place to review and act on any written communication.

In the circumstances, we kindly request that the Orders made on 22 November 2024 be vacated and that Uncle Matt and Mika be afforded the opportunity to file submissions regarding the misunderstanding with reply evidence (and non-receipt of email correspondence) or alternatively, file appropriate reply submissions so that the matter can proceed to a jurisdictional hearing as the parties intended.

[16] On 27 November 2024, the Deputy President's chambers replied to the Parties and advised the following:

> The Deputy President has issued orders dismissing Matter Numbers C2024/6827 and C2024/6831 ("the Matters") on 22 November 2024.
>
> This followed a hearing on 22 November 2024, at which the Deputy President issued a decision on transcript, providing reasons for dismissing the Matters.
>
> It follows that the Deputy President is now *functus officio*, and is thus unable to redetermine the orders that he has already made.
>
> As a courtesy, the Deputy President will order a copy of the transcript of the hearing on 22 November 2024, and forward a copy of same (via email) to the parties when it arrives.
>
> Ms Tyson listed Mr Priestley listed as her representative on her Form F8, and for that reason all correspondence in both matters were sent to Mr Priestley.

[17] Uncle Matt and Ms Tyson filed applications for permission to appeal, and to appeal, on 3 December 2024. Further witness statements were filed by Uncle Matt and Ms Tyson in relation to the appeal, both dated 5 February 2025. The witness statements addressed their personal circumstances in the period following the cessation of their engagement with Blackfisch Films and indicated that neither Uncle Matt nor Ms Tyson saw the email communications from the Deputy President's chambers on 20 and 21 November 2024 prior to

the applications being dismissed on 22 November. A witness statement by Auntie Malinda dated 7 February 2025 and a bundle of documents in a supplementary appeal book were also relied upon by Blackfisch Films. The Full Bench determined to accept the witness statements and additional documents as further evidence on appeal under s 607(2) of the Act. The witnesses were not required for cross-examination.

[18] For the reasons that follow, permission to appeal should be granted, the appeal allowed, and the decision of the Deputy President quashed. The applications under s 365 of the Act by Uncle Matt and Ms Tyson should be remitted to be dealt with by another member of the Commission.

Consideration

Permission to appeal

[19] The Full Bench is satisfied it is appropriate to grant permission to appeal under s 604(1) of the Act. Uncle Matt and Ms Tyson have suffered an injustice by reason of the dismissal of their applications without reasonable grounds existing for that step to be taken and without affording them procedural fairness. That, in itself, justifies permission to appeal being granted. We also believe that the decision of the Deputy President raises issues of importance and general application as to the approach to be adopted by the Commission when considering whether proceedings should be dismissed at a preliminary stage on grounds they have not been pursued with due despatch, or as a result of non-compliance with procedural directions, such that it is in the public interest to grant permission to appeal.

Power to dismiss an application for want of prosecution

[20] The reasons given by the Deputy President indicate that the applications made by Uncle Matt and Ms Tyson were dismissed on grounds of "want of prosecution". The basis of the power relied upon by the Deputy President to do so was not made clear. The Deputy President simply observed that the s 587(1)(a), (b) and (c) of the Act do not limit the Commission's power to dismiss a matter for other reasons and referred to the decision of Gooley C in *Tomas v Symbion Health* [2011] FWA 5458.

[21] The decision in *Tomas v Symbion Health* does not deal with dismissal for want of prosecution. That case involved a circumstance in which there had been a binding agreement to settle the claim subject of the proceedings.[3] Subsequent authority, including of the Federal Court, indicates that the Commission is able to dismiss an application in circumstances in which there has been a binding agreement to settle the proceedings under the express grounds set out in either s 587(1)(b) or (c).[4] At least once a settlement agreement has been concluded, the application would then be frivolous or vexatious or have no reasonable prospects of success.

[22] Identifying a power of the Commission to dismiss proceedings properly brought before it[5] on grounds of want of prosecution is not a straightforward matter. No generally applicable express power is conferred on the Commission to dismiss proceedings for want of prosecution. Section 587 of the Act deals with the subject of "dismissing applications" and confers a power on the Commission to dismiss proceedings on three identified grounds. The section provides:

> **587 Dismissing applications**

(1) Without limiting when the FWC may dismiss an application, the FWC may dismiss an application if:

(a) the application is not made in accordance with this Act; or

(b) the application is frivolous or vexatious; or

(c) the application has no reasonable prospects of success.

Note: For another power of the FWC to dismiss an application for a remedy for unfair dismissal made under Division 5 of Part 3-2, see section 399A.

(2) Despite paragraphs (1)(b) and (c), the FWC must not dismiss an application under section 365, 536LU or 773, or an application under section 527F that does not consist solely of an application for a stop sexual harassment order, on the ground that the application:

(a) is frivolous or vexatious; or

(b) has no reasonable prospects of success.

(3) The FWC may dismiss an application:

(a) on its own initiative; or

(b) on application.

[23] The introductory words of s 587(1) indicate that the three specific bases upon which the Commission may dismiss an application do not limit when the Commission might otherwise do so. The statutory note which appears under s 587(1) identifies that another express power to dismiss an application before the Commission is found in s 399A. That section provides that the Commission may dismiss an unfair dismissal application if the applicant has unreasonably failed to attend a conference or hearing, failed to comply with a direction or order of the Commission or failed to discontinue the application after a settlement agreement has been concluded. The section provides:

399A Dismissing applications

(1) The FWC may, subject to subsection (2), dismiss an application for an order under Division 4 if the FWC is satisfied that the applicant has unreasonably:

(a) failed to attend a conference conducted by the FWC, or a hearing held by the FWC, in relation to the application; or

(b) failed to comply with a direction or order of the FWC relating to the application; or

(c) failed to discontinue the application after a settlement agreement has been concluded.

Note 1: For another power of the FWC to dismiss applications for orders under Division 4, see section 587.

Note 2: The FWC may make an order for costs if the applicant's failure causes the other party to the matter to incur costs (see section 400A).

(2) The FWC may exercise its power under subsection (1) on application by the employer.

(3) This section does not limit when the FWC may dismiss an application.

[24] Notably, s 399A(2) provides that the discretion conferred by s 399A(1) to dismiss an unfair dismissal application can only be exercised on application by an employer and not on the Commission's own initiative.

[25] A number of decisions of the Commission have adopted the view that the words "[w]ithout limiting when FWC may dismiss an application" at the commencement of s 587(1) themselves establish a jurisdiction to dismiss an application for reasons other than those set out in subsections (1)(a), (b) and (c), including for want of prosecution.[6] There is room to doubt

whether that is the effect of the introductory words to s 587(1). Another reading of those words is that they are only intended to ensure that s 587(1) does not curtail any other power the Commission may have to dismiss an application which arises under another provision of the Act, such as s 399A. The proposition that the Commission has a broad and unconstrained discretion to summarily dismiss an application without determining its merits is particularly problematic in the case of applications under ss 365, 536LU or 773 (and s 527F to the extent it does not consist solely of an application for a stop sexual harassment order). Section 587(2) provides that the Commission must not dismiss those types of applications on grounds the application is frivolous or vexatious or has no reasonable prospects of success. That provision is, on the face of it, difficult to reconcile with the Commission possessing a broad discretion to dismiss that type of application at a preliminary stage on unspecified grounds.[7]

[26] Equally, it would be surprising if the Act requires that the Commission must persevere with an application in circumstances where the applicant's conduct demonstrates an unwillingness to participate in proceedings commenced at their initiative.[8] It may be that a power to dismiss proceedings on grounds of want of prosecution can be implied into the powers conferred on the Commission elsewhere in the Act, such as the Commission's procedural powers under s 589 (when read with the capacity to determine a matter in the absence of a person who has been required to attend before it under s 600). In some cases, the substantive provision conferring power on the Commission to grant the relief sought may not need to be addressed if the applicant has not attended or put forward material in support of the application.[9] In other cases, the Commission might form the view that an application has no reasonable prospects of success for the purposes of s 587(1)(c) if the applicant has failed to put forward material to support their claim for relief or attended to pursue the claim.

[27] It is not necessary or appropriate for the Full Bench to resolve these questions in the present appeal. The power of the Deputy President to dismiss Uncle Matt and Ms Tyson's application was not the subject of full argument before us. That is unsurprising in circumstances in which the parties were not legally represented. These questions should be addressed in a case in which they squarely arise, and it is necessary for them to be determined. It is sufficient for present purposes to say that, assuming that the Deputy President had the power to dismiss the applications for want of prosecution, there was no proper basis to do so in this case and the Deputy President erred in dismissing the applications.

Dismissal of Uncle Matt and Ms Tyson's applications

[28] Where a power to dismiss proceedings for want of prosecution exists,[10] it is well established that the power involves the exercise of a discretion.[11] An exercise of a discretion of that type is capable of being disturbed on appeal only in the event of error of the type discussed in *House v The King* (1936) 55 CLR 499. That might occur, for example, if the decision-maker acts upon a wrong principle, allows extraneous or irrelevant matters to guide or affect them, mistakes the facts, does not take into account some material consideration, or the outcome is unreasonable or plainly unjust.[12] We are satisfied that the decision of the Deputy President was affected by this type of error for three reasons. Each of the reasons is sufficient to justify allowing the appeal.

[29] The first error concerns the approach adopted to dismissing the applications for want of prosecution. The courts have identified a range of considerations and principles that are relevant

in the exercise of a discretion to dismiss proceedings for want of prosecution. A commonly cited formulation of relevant principles is found in the decision of Simpson J in *Hoser v Hartcher* [1999] NSWSC 527. Relevant aspects of the principles set out in that decision can be paraphrased as follows (excluding references):[13]

(a) the ultimate question is whether, on balancing the prejudice to the respective parties by making or not making an order, justice demands that the action be dismissed:
(b) the discretion should be exercised only in a clear case where it is manifestly warranted;
(c) any explanation offered by the plaintiff for the delay in proceeding must be considered;
(d) personal blamelessness on the part of a plaintiff (as distinct from any tardiness or other fault on the part of a legal representative) is relevant;
(e) a defendant who takes no steps to secure progress in the proceedings, or to activate an apparently inactive plaintiff, runs the risk that that very behaviour will operate to their disadvantage;
(f) delay between the date the cause of action arose and the commencement of the proceedings may be a relevant factor, but this circumstance must be treated with some caution and the weight that can be accorded to that delay is limited;
(g) the onus lies on the defendant to establish any prejudice upon which reliance is placed;
(h) prejudice to a defendant caused by delay has to be balanced against prejudice to a plaintiff deprived of an otherwise valid claim;
(i) what the defendant has (or has not) done by way of preparation for trial may be a factor;
(j) the plaintiff's prospects of success is a relevant factor and if it appears that the prospects are minimal, the discretion is more likely to be exercised in favour of the defendant; and
(k) the exercise of the discretion to strike out should not incorporate any element of punishing a tardy plaintiff, or of excluding one who may appear to have some unworthy characteristics.

[30] Those principles have been frequently applied. More recent decisions have emphasised that, although the summary provided by Simpson J remains a valuable guide, the discretion to dismiss proceedings for want of prosecution must also be exercised having regard to the recognition of the importance of case management to just and efficient determination of claims for the benefit of all litigants and the community as a whole.[14] The appreciation of the significance of case management is evident from the decision of the High Court in *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27; (2009) 239 CLR 175 and statutory provisions such as ss 56-57 of the *Civil Procedure Act 2005* (NSW) and s 37M of the *Federal Court of Australia Act 1976* (Cth). As Gummow, Hayne, Crennan, Kiefel and Bell JJ observed in *Aon Risk Services*:[15]

> [The relevant court rule] recognises that delay and costs are undesirable and that delay has deleterious effects, not only upon the party to the proceedings in question, but to other litigants.

[31] Effective case management is also critical to the functioning of the Commission. The Commission is required to perform its functions and exercise its powers in a manner that is fair

and just and is quick, informal and avoids unnecessary technicalities.[16] The Commission has a large volume of cases and cannot justly and efficiently determine the proceedings before it without implementing an appropriate system of case management. The Commission expects that parties will comply with directions and orders made for the purpose of permitting the orderly preparation of proceedings for hearing.

[32] Although compliance with directions of the Commission is important to its efficient operation, rules and case management procedures are the servants, not the masters, of justice.[17] The exercise of a power to dismiss proceedings for want of prosecution without determination on the merits is a serious step which has the effect of curtailing an applicant's substantive rights and "must not be lightly exercised".[18] That step will generally be reserved for a clear case where it is manifestly warranted.[19] Full Benches of this Commission have emphasised that the Commission's power to dismiss a substantive application at a preliminary stage should be exercised with caution.[20]

[33] The exercise of a discretion by a member of the Commission to summarily dispose of proceedings on grounds of want of prosecution, under s 399A in the case of unfair dismissal proceedings or otherwise, involves a balancing exercise in which a variety of factors are to be considered. Considerations such as those set out by Simpson J in *Hoser v Hartcher* are likely to be relevant. The ultimate question is whether, having balanced the prejudice to each party, justice demands that the application be dismissed. That assessment must also be undertaken taking into account the obligations of the Commission under s 577(1) of the Act and the impact of any non-compliance with directions on the operations of the Commission more broadly.

[34] The reasons of the Deputy President do not suggest that he engaged in a balancing exercise of any kind or gave consideration to matters relevant to the exercise of a discretion to dismiss a proceeding for want of prosecution. The Deputy President did not consider the extent of any prejudice to the Blackfisch films, whether any delay or additional costs were likely to be incurred as a result of the failure to file reply evidence and submissions on time, the impact of the dismissal of their substantive claims on Uncle Matt or Ms Tyson or whether the default would cause inconvenience to the Commission. The mere fact of non-compliance with a direction was regarded as, in itself, sufficient. At most, the Deputy President referred in general terms to the possible importance of reply evidence. He did not relate that observation to the specific applications before him and does not appear to have exercised caution before dismissing the applications or have acknowledged the seriousness of that step. For those reasons, the discretion of the Deputy President miscarried.

[35] The second error is that, in our opinion, the decision to dismiss the applications made by Uncle Matt and Ms Tyson for want of prosecution was unreasonable and plainly unjust. As has been described, the Deputy President dismissed the applications as a result of a failure to file submissions and evidence in reply in accordance with the directions. The decision to take that step was made in a two-day period between the show cause email sent at 1.12pm on 20 November 2024 and the telephone hearing conducted at 12pm on 22 November 2024. That occurred in circumstances in which the jurisdictional objections were already listed for hearing on 27 November 2024. There was no reasonable cause for the Deputy President to take that step in the circumstances.

[36] Uncle Matt and Ms Tyson had filed evidence and submissions in chief addressing the jurisdictional objections and Blackfisch Films had filed its own material. There is no apparent reason the jurisdictional objections could not have been determined on the material already filed. There is not necessarily an obligation for a party in any case to file material in reply. If a litigant believes that they have put all necessary material before the Commission in chief, there may be no need to do so. Of course, a party that does not file evidence in reply may be disadvantaged if the evidence filed by another party is unanswered. However, that does not mean the matter cannot proceed. The failure to file submissions and evidence in reply provided no basis to infer that Uncle Matt and Ms Tyson were not seeking to pursue their claims or that the matter could not be determined.

[37] Blackfisch Films did not raise the procedural non-compliance with the Commission or complain of any prejudice. It did not ask the Deputy President to dismiss the applications. There was nothing before the Commission to suggest that prejudice of any substance would be caused or that the hearing of the jurisdictional objection would be delayed. The Deputy President appears to have apprehended that Uncle Matt and Ms Tyson might seek to advance evidence and submissions in reply at the hearing. If they sought to file or rely on additional material outside of the directions, the Deputy President would then have been required to make a discretionary decision as to whether to accept it. The significance of the evidence, any prejudice that would be caused by its reception, the reasons for the late filing of the evidence and whether an adjournment of the hearing might become necessary would all be relevant to that decision. The speculative possibility that Uncle Matt and Ms Tyson might seek to rely on late evidence provided no reasonable basis to dismiss the applications.

[38] There was, in our opinion, no basis to say the Commission was "faced with gross non-compliance with directions". The Deputy President dismissed the applications of Uncle Matt and Ms Tyson in their absence less than two days after sending an email notifying them of that possibility and after giving less than one day's notice of the show cause hearing. The reply evidence and submissions were less than three days late. Uncle Matt and Ms Tyson had filed material in chief and, up to that point, participated in the proceedings to the extent required. The possibility that Uncle Matt and Ms Tyson failed to respond to the correspondence because it had not been received or read, because they had misunderstood the directions or for some other legitimate reason, was obvious. Although there are times when the Commission must act quickly, we do not believe there was any need to deal with the question of whether the applications should be dismissed immediately and in the absence of Uncle Matt and Ms Tyson or to assert there had been a gross disregard of the procedural directions.

[39] The third error is that Uncle Matt and Ms Tyson were denied procedural fairness. The Commission is required to act judicially and the principles of natural justice are applicable to proceedings before the Commission.[21] Procedural fairness was not accorded to Uncle Matt and Ms Tyson because they did not actually receive notice of the direction to file submissions in relation to the foreshadowed dismissal of their applications or the notice of listing for the hearing conducted on 22 November 2024 prior to the applications being dismissed.

[40] In his witness statement, Uncle Matt explained that he had been homeless from early September 2024. He indicated that he initially stayed with a friend and, from mid-October 2024, had been living at the Aboriginal Tent Embassy in Victoria Park in Sydney. He said he had limited access to the internet and did not see the emails from the Commission until Monday, 25

November 2024 when he was able to use the internet at a charity in Redfern. In her witness statement, Ms Tyson indicated that, from early September 2024, she had been "couch hopping" between family members. She said she ordinarily assists Uncle Matt with his emails but had been unable to do so from mid-November 2024 because she had been in and out of Moree hospital. She said she did not receive any of the emails from the Commission in this period. Those emails were not sent to Ms Tyson's email address.

[41] Blackfisch Films relied on a series of documents which, it said, indicated that Uncle Matt and Ms Tyson had accessed and posted on social media and undertaken various professional and social activities in the period after 2 September 2024. It referred to evidence that free Wi-Fi is available at a large number of locations in the Sydney CBD and nearby. Blackfisch Films submitted that this evidence indicated that Uncle Matt and Ms Tyson should have been able to prepare and file reply submissions and evidence and respond to the communications from the Commission. We have considered this material and the submissions made by Blackfisch Films. However, the evidence before the Full Bench does not demonstrate that the direct evidence of Uncle Matt and Ms Tyson that they did not receive the communications from the Commission on 20 and 21 November 2024 should not be accepted. We accept, and find, that Uncle Matt and Ms Tyson did not receive the communications from the Commission until after the applications were dismissed on 22 November 2024. That evidence is consistent with the subsequent communication sent to the Deputy President's chambers by Mr Heath on 27 November 2024.

[42] The consequence is that Uncle Matt and Ms Tyson did not receive notice of the hearing conducted on 22 November 2024 and were deprived of any opportunity to be heard as to whether their applications should be dismissed. That gives rise to error on grounds there was a denial of procedural fairness.[22] A finding that a denial of procedural fairness occurred does not depend on there being fault on the part of the Commission.[23] The fact is that Uncle Matt and Ms Tyson did not actually receive notice of the possibility their claims would be dismissed through no fault on their part. As we have observed, however, the possibility that Uncle Matt and Ms Tyson failed to respond to the Commission's correspondence because it had not been received or read, or for some other legitimate reason, was obvious. It was a precipitous step to dismiss the applications in the circumstances.

[43] Blackfisch Films submitted that the general protections applications have no merit because Uncle Matt and Ms Tyson were not employees, had not been dismissed and were not subject to discrimination on any ground. As we have observed, the merits of the underlying claims may be relevant to whether the applications should have been dismissed for want of prosecution and might be relevant to whether permission to appeal should be granted. However, on the material before the Full Bench, the question of whether Uncle Matt and Ms Tyson were employees and the circumstances in which their engagements (whatever their nature) came to an end is subject of contested evidence which has not yet been heard. It is not possible for the Full Bench to make a detailed assessment of the merits of the claims, and we certainly could not form the view that the claims have no merit on the material before us.

[44] Finally, we observe that the fundamental purpose of case management is to enable the efficient and just disposition of proceedings. The dismissal of proceedings at a preliminary stage might sometimes appear to be an economy. It is appropriate to bear in mind that the premature or unwarranted dismissal of proceedings will often not result in savings in time and expense for

the parties or in the resources of the Commission. It has not in this case. The dismissal of the applications has caused additional delay and inconvenience to both of the parties and has exacerbated the distress caused to them by the proceedings themselves. It has necessitated a Full Bench being convened and that three members of the Commission consider and decide the appeal. The jurisdictional objections of Blackfisch Films remain to be determined.

Conclusion

[45] Permission to appeal should be granted, the appeal should be allowed and the decision and orders of the Deputy President quashed. The applications of Uncle Matt and Ms Tyson under s 365 of the Act should be remitted for the jurisdictional objections to be determined and, if appropriate, the applications to be dealt with under s 368 of the Act. In the circumstances, we believe the better course is for the applications to be remitted to a different member of the Commission.

[46] The Full Bench makes the following orders:

(a) Permission to appeal is granted;
(b) The appeal is allowed;
(c) The decision and orders of Deputy President Boyce in Matter No. C2024/6827 and C2024/6831 given on 22 November 2024 are quashed; and
(d) The applications in Matter No. C2024/6827 and C2024/6831 are remitted to a different member of the Commission.

VICE PRESIDENT

Appearances:

M Priestly with *S Heath* for the appellants.
M Rutter with *K Burgess* for the respondent.

Hearing details:

Sydney (in-person):
11 February 2024

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[1] *Fair Work Act 2009* (Cth), ss 368(1) and 595(2).

[2] *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152; (2020) 279 FCR 591 at [67].

[3] *Tomas v Symbion Health* [2011] FWA 5458 at [59].

[4] *Australian Postal Corporation v Gorman* [2011] FCA 975; (2011) 196 FCR 126 at [33]; *McMahon v Ventura Bus Lines Pty Ltd* [2020] FWCFB 4853 at [26].

[5] It is not necessary to identify an express power in the FWC to decline to act upon an application on the basis that it fails for want of jurisdiction: *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152; (2020) 279 FCR 591 at [69].

[6] See, for example, *McLeod v Kulgera Trading Company Pty Ltd* [2014] FWC 2112 at [10]-[11]; *Baillie v PJDH Pty Ltd (t/as Brazilian Beauty Fairfield)* [2020] FWC 163 at [32]; *Bentley-Gates v El Gringos Locos Pty Ltd* [2022] FWCFB 70 at [8]-[9]; *Bosworth v Coles Supermarket Beechboro* [2022] FWCFB 153 at [48].

[7] See discussion in *Bosworth v Coles Supermarket Beechboro* [2022] FWCFB 153 at [49]-[50].

[8] The Full Bench in *Viavattene v Health Care Australia* [2013] FWCFB 2532 suggested (at [39]) that the Act did not have that effect albeit not in the context of the preliminary dismissal of an application.

[9] *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498 at [16].

[10] See, for example, *Uniform Civil Procedure Rules 2005* (NSW), rule 12.7.

[11] *Stollznow v Calvert* [1980] 2 NSWLR 749 at 751, *Micallef v ICI Australia Operations Pty Ltd* [2001] NSWCA 274 at [45]; *Walker v Fedex Express Australia Pty Ltd* [2024] FCA 1095 at [55]; *Saffari v Latitude Financial Services Australia Holdings Pty Ltd* [2025] FCA 6 at [42]-[44].

[12] *House v The King* (1936) 55 CLR 499 at 505; *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194 at [21] and [28]; *Micallef v ICI Australia Operations Pty Ltd* [2001] NSWCA 274 at [45].

[13] *Hoser v Hartcher* [1999] NSWSC 527 at [20]-[30].

[14] See, for example, *Bi v Mourad* [2010] NSWCA 17 at [28], [41] and [49]; *Beavan v Industrial Relations Secretary (No 1)* [2016] NSWIC 1; (2016) 92 NSWLR 473 at [71]-[107].

[15] *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27; (2009) 239 CLR 175 at [114].

[16] *Fair Work Act 2009* (Cth), s 577(1)(a) and (b).

[17] *Harding v Bourke* [2000] NSWCA 60; (2000) 48 NSWLR 598 at [26] referred to in *Ultra Tune Australia Pty Ltd v Australian Competition and Consumer Commission* [2025] FCAFC 1 at [118].

[18] *Van Reesema v Giameos* (1979) 27 ALR 525 at 530; *Moss v Aquisite Pty Ltd* [2024] FCA 455 at [29].

[19] *Hoser v Hartcher* [1999] NSWSC 527 at [21]; *Weston v Publishing and Broadcasting Ltd* [2011] NSWSC 433 at [502]-[503].

[20] *Raschilla v Ausino West Pty Ltd* [2017] FWCFB 5952 at [9]; *Sharma v VED Financial Services Pty Ltd* [2024] FWCFB 282 at [9].

[21] *R v Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 552; *Enterprise Flexibility Agreements Test Case* (1995) 59 IR 430 at 444; *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54; (2011) 192 FCR 78 at [25]; *Hot Wok Food Makers Pty Ltd v United Workers Union (No 3)* [2024] FCAFC 51; (2024) 304 FCR 136 at [71].

[22] *Minister for Immigration and Multicultural and Indigenous Affairs v George* [2004] FCAFC 276; (2004) 139 FCR 127 at [53]; *Brennan v Land and Housing Corporation (NSW)* [2011] NSWCA 298; (2011) 83 NSWLR 23 at [81].

[23] *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51; (2002) 210 CLR 438 at [22]; *Minister for Immigration and Multicultural Affairs v SZFDE* [2006] FCAFC 142; (2006) 154 FCR 365 at [100]-[101]; *Brennan v Land and Housing Corporation (NSW)* [2011] NSWCA 298; (2011) 83 NSWLR 23 at [81].