Summary of Decision

2 October 2014

Peter Ioannou v Northern Belting Services Pty Ltd

(U2014/5530)

1. On 21 July 2014 the President of the Fair Work Commission (the Commission) referred to a Full Bench two matters involving applications to allow amendments to applications made under s.394 of the *Fair Work Act 2009* (the Act) so that they may proceed as general protections applications under s.365 of the Act. However, before the hearing date, the applicant in the second referred matter wholly discontinued their application before the Commission.

2. The Full Bench received submissions from the parties involved, as well as peak industry bodies: the Australian Chamber of Commerce and Industry (ACCI), the Australian Industry Group (AiG) and the Australian Council of Trade Unions (ACTU).

3. In considering this matter, the Full Bench looked at two main issues:

(i) does the Commission have power to amend an application made under s.394 of the Act (unfair dismissal) so that it may proceed as an application under s.365 of the Act (general protections); and

(ii) if there is such power, what considerations are relevant in determining whether the power should be exercised.

4. In relation to the first issue, the Full Bench found that s.586 of the Act did not allow the Commission to amend an unfair dismissal application so that it becomes a general protections application. This was based on the nature of the power conferred by s.586 and the limitations in s.725 on the making of multiple applications or complaints in relation to the dismissal.

5. The Full Bench determined that the power in s.586 could not be used to allow an amendment to an application that fundamentally changes the kind of application that was originally made. An unfair dismissal application is fundamentally different to a general protections application even though both may arise from the same set of circumstances involving the dismissal of an employee.

6. This is demonstrated as the matters for consideration by the Commission set out in the Act in relation to unfair dismissal or general protections applications differ greatly. General protections provisions cover a range of different protections (including in relation to workplace rights, industrial activities and discrimination) and do not involve a broader assessment of 'unfairness' or 'harshness' against statutory criteria. The remedies available under both applications are also different.

7. Further, the determination of general protections applications involves the exercise of judicial power whereas the Commission exercises arbitral power in respect of unfair dismissal applications. There is also no general ability to apply to the Commission for relief, as s.585 of the Act requires an application to be in accordance with the procedural rules relating to applications of that kind.

8. The Full Bench observed that s.586 did not provide a source of power to revoke or set aside an application. It also did not enable the Commission to 'correct' or 'amend' an application made under one type of statutory provision so that it can become an application under a fundamentally different provision.

9. In relation to the first issue for determination, the Full Bench also considered that the use of any power under s.586(a) of the Act to allow an unfair dismissal application to be converted into a general protections application cannot be allowed due to the multiple actions provisions of the Act. They found that if the power of s.586 was exercised to permit the applicant to amend his application, it would indirectly achieve what is directly prohibited by the multiple applications provisions.

10. The general rule in regards to applications relating to dismissal is set out in s.725 of the Act, which has the effect of barring a person from bringing multiple actions in relation to the same dismissal.

11. The Full Bench noted at paragraph 28 of the decision:

> "That in relation to the present matter, the effect of s.725 is that the applicant must not make an application in relation to his dismissal under s.365 unless the unfair dismissal application has been withdrawn, failed for want of jurisdiction or failed because the dismissal was a case of genuine redundancy (s.729(1)(b)). In other words, s.725 operates to preclude the applicant from bringing a general protections application in circumstances where there is an existing s.394 application before the Commission."

12. The Full Bench subsequently determined that the appropriate course for the applicant to take, if he sought to pursue a general protections application in lieu of the unfair dismissal application, was to withdraw the unfair dismissal application and to file a general protections application. They noted that the appropriate procedural and other requirements would need to be met and an extension of time sought in accordance with s.366 of the Act.

13. Given this conclusion in relation to the first issue, the Full Bench did not need to deal with the discretionary considerations which might have been relevant in determining whether to make the orders sought by the applicant in these proceedings.

14. As a result the Full Bench decided not to make the orders sought.

[2014] FWCFB 6660

- ***This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission's reasons.***

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