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HUMAN RESOURCES & INDUSTRIAL RELATIONS

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Employee Relations Newsletter

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Quote of the day

"The more we admit we do not know, the more opportunities we gain to learn" – Mark Manson, The Subtle Art of not Giving a F*ck.

Four years and one hundred and ninety-seven days, ex-employee applies to FWC for payment of settlement

Mrs Rina Centofanti v Transfield Services T/A Light City Buses. [2018] FWC 755 (U2013/9080), Anderson, DP. 6 February 2018

The most interesting part of this FWC decision is the DP's references to the Unfair Dismissal provisions and a High court decision going back to 1954 relating to contract law.

In this matter, the FWC was required to decide whether the matter should be thrown out or dealt with in accordance with the unfair dismissal provisions of the Fair Work Act.

But the overall message is to ensure that a well written and binding settlement agreement is reached (ie the "go away" money is paid promptly), so that the matter is indeed "settled" and everybody can go away equally unhappy to get on with their collective lives.

Background

The Applicant, a bus driver, was dismissal following an incident on 17 April 2013 involving the striking of another road user on a public road. The employer in its response lodged in 2013 said that the incident was investigated at the time and the dismissal supported by CCTV footage. The Applicant was represented by her union, the TWU.

The matter was "settled" at Conciliation for **$10,000.00**, however no action was taken to pursue the monies, (presumably) the employer reluctant to do so because there has been no notice of discontinuance filed to the FWC by the TWU – as put to the parties at the time by the FWC.

Why so long?

According to the applicant, she was given the run around by the union, work commitments, family commitments, moving interstate, "a court case about my ex", "my injury and my case taking nearly 4 years" and certain other personal and health issues.

No doubt the death of the TWU representative was a factor.

The "settlement" agreement

The DP considered the form of settlement agreement:

> *"It is evidence that a settlement agreement had been reached at that conference. The notation on the Commission's electronic case history to the effect "no cooling off period settlement email sent" is an indication that a cooling off period was not applicable to the settlement made before Conciliator Cashen. The conciliator's letter is evidence that the agreement was to be reduced to writing between the parties, and that the responsibility for doing so and giving effect to the terms of settlement would be a matter for the parties. There is no evidence that the agreement was conditional in the sense of being 'subject to agreement', or further consideration or re-consideration or subject to further negotiation; rather the evidence is that an agreement itself was reached and that agreement included a mutual intent to record its terms in writing.*

"The submission to me by the TWU on the applicant's behalf says:

- *The Application was subject to a conciliation by consent and it is the Applicants understanding that the matter was resolved by way of an agreed monetary settlement.*
- *However, no written Deed/Terms of Settlement was executed by either party and the matter was not formally discontinued."*

> *"The question of whether there was or was not a binding settlement agreement is a question of fact, informed by legal principles. On the basis of the material before me, I am satisfied on the balance of probabilities that a binding and operative settlement agreement had been reached on 30 May 2013 between the parties at the telephone conciliation conference before Conciliator Cashen, and I make that finding.*
>
> *"I further find that Conciliator Cashen forwarded documentation to the parties to record and sign the terms of their settlement agreement and in doing so indicated that the Commission would have no further role in the matter and did not require the written settlement agreement to be relayed back to the Commission".*

The DP then noted that no party had pursued the matter in the intervening time, finding:

> *"…the settlement agreement was not expressed to be 'subject to contract' or an expression of similar import such as to create an overriding condition to the effect that what was agreed was the intended basis of a future contract, rather than constituting a contract of itself.*
>
> *"The fact that a binding and operative settlement agreement was reached between the parties* [including the TWU] *is a factor that weighs strongly against the matter being relisted".*

And in citing the 1954 High court decision, the DP added:

> *I further find that the settlement agreement was not expressed to be 'subject to contract' or an expression of similar import such as to create an overriding condition to the effect that what was agreed was the intended basis of a future contract, rather than constituting a contract of itself".*

Frivolous vexatious, no reasonable prospects of success

The DP examined his powers under the "the statutory scheme":

> The power to dismiss a matter is provided for in section 587 of the FW Act:
>
> "587 Dismissing applications
>
> Without limiting when the FWC may dismiss an application, the FWC may dismiss an application if:
>
> - the application is not made in accordance with this Act; or
> - the application is frivolous or vexatious; or
> - the application has no reasonable prospects of success.

The FWC may dismiss an application:

- on its own initiative; or
- on application."

The DP stating:

*"Whether Mrs Centofanti's application should be relisted or alternatively dismissed is a discretionary matter. It is a discretion to be exercised objectively and according to **judicial principles**. [My emphasis]. In considering whether to relist the matter or alternatively dismiss the matter, an appropriate starting point is the Commission's general obligations expressed in section 577 and 578 of the FW Act:*

"577 Performance of functions etc. by the FWC

The FWC must perform its functions and exercise its powers in a manner that:

(a) is fair and just; and

(b) is quick, informal and avoids unnecessary technicalities; and

(c) is open and transparent; and

(d) promotes harmonious and cooperative workplace relations."

"578 Matters the FWC must take into account in performing functions etc.

In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this Part), the FWC must take into account:

(a) the objects of this Act, and any objects of the part of this Act; and

(b) equity, good conscience and the merits of the matter; and

(c) the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin."

The DP gave considerable thought to his duties under the FWA:

"I have regard to these general duties and apply them in the context of the following matters I consider of particular relevance to determining this matter:

- The unfair dismissal statutory scheme;
- The history of the matter (including the conduct of the parties);
- The length of the delay;
- The reason for the delay;
- Prejudice (if any) should the matter be relisted or dismissed; and
- Relevant authorities on the operation of sections 587 and 589.

The unfair dismissal statutory scheme

According to the DP, the statutory scheme establishes a framework that does not exclusively focus on a dismissed employee. The framework seeks to balance "the needs of business" and "the needs of employees". It has the further object of providing procedures that are "quick, flexible and informal" It provides remedies with an emphasis on reinstatement. It requires applications to be made within a short time period after dismissal (21 days), with an extension of time only in exceptional circumstances. Compensation orders for an

unfair dismissal can only be made if reinstatement is inappropriate and even then, only at the discretion of the Commission.

This statutory framework places emphasis on accessing the jurisdiction and having matters determined in relative close proximity to the date a dismissal takes effect. There are clear policy reasons for doing so. The primary remedy (reinstatement) is less viable the longer a dismissed employee has been absent from the workplace. An employer's business is not a static concern. A dismissed employee needs to know of their rights and get on with their life, one way or the other, within a reasonable period after dismissal.

The FW Act's statutory scheme also places emphasis on conciliation and settlement between the parties as a precursor to Commission arbitration.

Prejudice (if any) should the matter be relisted or dismissed

The DP considered prejudice in three contexts:

- Prejudice to the applicant;
- Prejudice to the respondent; and
- Prejudice to the administration of justice.

Finding:

> *"I accept that the effluxion of a very substantial period of time since the incident of 17 April 2013 took place would create substantial prejudice to the employer in its defence of this matter. Further, although the employer is a large business this fact alone does not mitigate the prejudice. The prejudice to the employer in its defence of the claim that would be likely to arise is a factor that weighs against it being relisted.*
>
> *"I also take into account the impact on the administration of justice and in particular the Commission's obligations to determine matters in a fair and just manner according to law. Proceedings of this nature require the taking of evidence, findings as to credit of witnesses, the application of facts (as found) to the law and the capacity to provide timely and meaningful remedies that are appropriate to the circumstances.*
>
> *"There is a high likelihood that after such an extraordinary effluxion of time it would be difficult if not impossible to access relevant witnesses, to secure a reliable recall from those witnesses and to access or reliably rely on documentary or CCTV material relevant to the case. Compromising proceedings in this manner would, if those proceedings were to occur, compromise the administration of justice. Moreover, the TWU submissions filed on behalf of the applicant indicate that the TWU's files on the matter (including the settlement agreement) are "scarce". They also indicate that "the TWU organiser who had assisted the Applicant died in or about November 2015".*

In bringing the matter to its (logical) conclusion, the DP stated:

> *"If the matter is not relisted, the Commission file will remain closed and the matter not proceed. However, in circumstances where a Notice of Discontinuance has not been filed by the applicant and the matter not otherwise dismissed or disposed of, the prospect remains that a request of the type before me could again be made. This is to be avoided. The Commission rules, and the proper administration of matters before the Commission, require matters to be disposed of to finality, either by determination or discontinuance.* ***Where settlement occurs, the Commission rightly expects parties to file notices of discontinuance****.* [My emphasis]. *This has not occurred in this case despite the applicant being advised at the outset of these proceedings that it was the parties' obligation to advise the Commission and discontinue proceedings if agreement was reached (as I have found it was).*

Further adding:

> *"The decision of a Full Bench of the Commission in Curtis v Darwin City Council is authority for the proposition that if there is a binding agreement between parties to an unfair dismissal application then the application has no reasonable prospects of success and may be dismissed. That decision gave*

effect to well-established authority set out by the Federal Court in Australian Postal Corporation v Gorman.

"I have made findings that a settlement agreement was made on 30 May 2013, that it was not subject to a cooling-off period and that it was not conditional or subject to a written agreement. I have found that it was a binding and operative agreement in its own right which was intended to be reduced to writing. As such, it formed an agreement that…it was a binding contract".

Conclusion and commentary

Whilst an excellent, well researched decision by a relatively new member of the FWC (going to some 21 pages), without saying so directly concluded that the matter should be better pursued via civil remedies.

"I take into account the assertion by Mrs Centofanti supported by the TWU submission that the 2013 settlement agreement has not been given effect to. If that is so, it has been open to Mrs Centofanti over this period to exercise her rights to enforce such an agreement. As the Federal Court said in Australian Postal Corporation v Gorman 'any action to enforce the contract may need to be taken in another jurisdiction and that is almost certainly so. However, that circumstance is not a reason to conclude that FWA cannot recognise a binding settlement agreement.'"

And putting a full-stop on the matter the DP found:

"It is in the interests of justice that these proceedings be brought to a finality.

"…that the extreme delay would render further proceedings before the Commission unsafe.

"I draw to the attention of Broadspectrum my finding that a binding and operative settlement agreement was reached on 30 May 2013. I draw to the attention of Mrs Centofanti and her advisers the legal right a party to a contract has to seek the enforcement of binding agreements should it be the case that the terms of an agreement have not been given effect to". [My translation: mate, you made a deal, pay up].

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Until next time....

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