



DECISION

Fair Work Act 2009

s.615 – the President may direct a Full Bench to perform function etc.

Kara Le

v

Virgin Australia Airlines Pty Ltd

(C2022/301)

JUSTICE ROSS PRESIDENT

MELBOURNE, 10 FEBRUARY 2022

Application to refer a matter to a Full Bench – s.615 Fair Work Act 2009 (Cth) – application refused

1 Introduction

[1] Ms Le (the Applicant) lodged a general protections application involving dismissal on 4 January 2022 under s.365 of the *Fair Work Act 2009* (FW Act). The matter is presently listed for a conference before a Commission staff conciliator on 17 March 2022.

[2] On 19 January 2022, the Applicant lodged a Form F48 Application for directions on procedure seeking guidance on how to refer questions of law or fact to a Full Bench of the Commission.

[3] On 21 January 2022, the Applicant made an application to me under s.615 of the FW Act to have four ‘questions of law and fact’ (the Questions) referred to a Full Bench of the Commission. The Applicant lodged a revised version of that application on 24 January 2022. The Questions concern the lawfulness and reasonableness of the Respondent’s direction to all front line and airport-based team members to be fully vaccinated against COVID-19 by 15 November 2021.

[4] The Applicant submits that her general protections dispute cannot be resolved at conciliation conference unless the Questions are first ruled on by a Full Bench. She says that it is critical that the Questions be answered by a Full Bench Ruling prior to any analysis or argument of the merits of either party’s case and further submits that referral of the Questions to a Full Bench is in ‘the interests of justice and the lives of the Australian community’.

[5] The Applicant is represented in this matter by a paid agent and has provided emails from 9 individuals, who are represented by the same paid agent in other matters before the Commission, each seeking to be joined to the Applicant’s request to have the Questions referred to a Full Bench. Of those individuals:

- 7 have made general protections involving dismissal applications against the Respondent – Mr Atsas, Ms Suleman, Mr Mihailidis, Mr Dolevski, Ms Fellows, Mr Douglass and Ms Tannous. The matter numbers for their Commission applications are, respectively, C2022/248, C2022/332, C2021/8948, C2021/8930, C2022/363, C2022/8948, C2022/10.
- 2 have made general protections involving dismissal applications against Sydney Night Patrol & Inquiry Co Pty Ltd T/A Certis Security Australia – Mr Leocata and Mr Rapisardi. The matter numbers for their Commission applications are, respectively, C2022/477 and C2022/545.

[6] The Questions are predicated on the correctness of the following points (emphasis in the original):

1. ‘The Federal Health Department ‘Australian Immunisation Handbook ‘Criterion 2. For Valid Consent’ PROHIBITS Covid-Injections under ANY FORM of undue pressure, coercion or manipulation. Criterion 2. for Valid Consent, at law, EXPLICITLY declares, that Valid Consent for Covid-Injections, MUST be given voluntarily in the absence of undue pressure, coercion, or manipulation’, and
2. ‘Moreover, this lawful obligation places absolute lawful commitment and COMPULSION upon ALL Injecting Practitioners to Screen and Determine IF any person presents for Covid-Injection under ANY FORM of undue pressure, coercion, or manipulation; and at law; an Injecting Practitioner CANNOT Covid-Inject and MUST REFUSE to Covid-Inject ANY person found to be attending NOT voluntarily and not in the absence of undue pressure, coercion or manipulation.’

[7] The Questions are as follows (emphasis in the original):

1. ‘...is the Non-negotiable Company ‘Directive’ to be Covid-Injected or face draconian Employment Termination UNLAWFUL and UNREASONABLE; BECAUSE Jayne Hrdlicka – CEO of Virgin Australia, Knew, or Should Have Known, her Directive to get Covid-Injected or face draconian Employment Termination in FACT WAS, undue pressure, coercion or manipulation and created by the her, and therefore, the Directive unlawfully breached the Federal Health Department ‘Australian Immunisation Handbook Criterion 2. for Valid Consent; which PROHIBITS Covid-Injections under ANY FORM of undue pressure, coercion, or manipulation?’
2. ‘... is the Company ‘Directive’ to get Covid-Injected or face draconian Employment Termination an UNLAWFUL and UNREASONABLE Directive, BECAUSE Jayne Hrdlicka issued a Direction that they Knew, or Should Have Known, COULD NOT POSSIBLY BE COMPLIED WITH LAWFULLY OR PRACTICALLY when she issued the Directive?’
3. ‘... DOES the non-negotiable DIRECTION to be Covid-Injected under direct undue pressure, coercion or manipulation, specifically of threats of force leave and/or employment termination; CONSTITUTE BEING ‘UNLAWFUL-TERMS’ OF BEING Unlawful and Unreasonable non-negotiable DIRECTIONS and Conditions Unlawfully Applied, ‘BECAUSE’ THEY BREACH ‘BOTH’ the Fair Work Act 2009 Subdivision B Approval of enterprise agreements by the FWC, Section 186(4) Basic Rule PROHIBITING UNLAWFUL TERMS and the Australian Immunisation Handbook Criterion 2. for Valid Consent?’

4. ‘..given the employers’ false and unsubstantiated assertions that as a ‘non-vaccinated’ person, I pose a risk to myself and/to team members or Virgin guests, when ONLY an infected person can pose ANY infectious risk, **are such assertions (of unvaccinated persons posing ANY infection risks) erroneous and misguided because they clearly breach the lawfully binding (INFECTION-RISK) definitions of the BIOSECURITY ACT 2015 – SECT 8 Contacting officer with health status (of ANY INDIVIDUAL) whereby specified signs or symptoms of the listed human disease MUST be proven (by a specific written human biosecurity control Order) to be present OR not present? Accordingly, I ask the Full Bench to rule that ONLY a Covid-Infected person can pose ANY infection risk to anybody else; and a non-Covid injected person CANNOT; and the Burden of Proof rests upon the employer to demonstrably show uninfected persons pose ANY risk at all to anyone; which if not proven in science, utterly nullifies its Directive as Unlawful and Unreasonable if this cannot be proven as medical-science FACT.’**

[8] Section 615 of the FW Act states:

‘The President may direct a Full Bench to perform function etc.

- (1) A function or power of the FWC may be performed or exercised by a Full Bench if the President so directs.
- (2) The President may direct that the function or power be exercised by a Full Bench generally, or in relation to a particular matter or class of matters.
- (3) To avoid doubt, a reference in this section to a Full Bench includes a reference to more than one Full Bench.

Note: For the constitution of a Full Bench, see section 618.’

[9] It is well settled that s.615 confers a broad discretion upon the President to direct that a function or power be exercised by a Full Bench. However, while that power is broad, it does not mean that the President can direct a Full Bench to perform a function or exercise a power outside the Commission’s jurisdiction. For the reasons set out below, I consider that the Commission does not have the jurisdiction to determine the Questions posed.

The Commission’s role in dealing with general protections disputes involving dismissal

[10] The FW Act limits how the Commission may deal with general protections applications involving dismissal. Section 368(1) provides that if an application is made to the Commission under s.365, the Commission must deal with the dispute, other than by arbitration. The note to s.368(1) says that the Commission may deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion.

[11] The Commission only has jurisdiction to arbitrate, that is, to hear and make a binding determination, in relation to a general protections dismissal dispute if the preconditions in s.369(1) are satisfied, namely that:

- the Commission has issued a certificate pursuant to s.368(3) of the FW Act (FW Act, s.369(1)(a)). The issue of such a certificate is also a precondition to the applicant making a general protections court application (FW Act, s.370),
- the parties to the dispute must have notified the Commission that they agree to the Commission arbitrating the dispute (FW Act, s.369(1)(b)). This requires both the applicant and respondent’s consent,

- the notification must comply with the Commission's procedural rules and be given to the Commission within 14 days after the day the certificate was issued, or within such period as the Commission allows (FW Act, s.369(1)(c)), and
- the provisions in the FW Act preventing multiple applications must not apply (FW Act, s.369(1)(d)).

[12] Section 368(3) provides that if the Commission is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful, then the Commission must issue a certificate to that effect. Further, if the Commission considers that arbitration by the Commission under s.369 or a general protections court application in relation to the dispute would not have a reasonable prospect of success, it must advise the parties accordingly.

[13] A s.368(3) certificate has not been issued to the Applicant or any of the other 9 individuals identified at [5] above, and the conditions in s.369(1) have not been satisfied in respect of the Applicant or any of the other 9 individuals. The Commission's jurisdiction to deal with their applications is presently limited to dealing with them in a non-determinative way, such as by conference.

Judicial power

[14] In light of my conclusion at [13] above, it is not necessary for me to determine whether ruling on the Questions would involve an impermissible exercise of judicial power by the Commission. However, to the extent that through the Questions, the Applicant and the other 9 individuals effectively seek relief in the form of a declaration of existing legal rights, such as whether the Respondent has breached a provision of the FW Act, granting such relief would involve the exercise of judicial power. Determining existing legal rights is a matter for the courts.¹ The Commission may form an opinion about existing legal rights as a step in arriving at the ultimate conclusions on which it determines the future rights of the parties, but such an opinion does not bind the parties and cannot operate as a binding declaration of rights.²

Conclusion

[15] For the reasons given I am not persuaded that it is appropriate to refer the Questions to a Full Bench. Accordingly, I dismiss the Applicant's application.



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¹ *Construction, Forestry, Maritime, Mining and Energy Union v DP World Melbourne Ltd* [2020] FWC 4147 at [46].

² *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* [1987] HCA 29 at [9].