Federal Court of Australia

Walker v Southcott Pty Ltd [2022] FCA 864

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| File number: |  |
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| Judgment of: | **BESANKO J** |
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| Date of judgment: | 27 July 2022 |
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| Catchwords: | **PRACTICE AND PROCEDURE** — Interlocutory application by applicant for leave to file amended pleading — where in Originating application, applicant brought claims under *Fair Work Act 2009* (Cth) (FW Act) in relation to his standing down and dismissal by respondent and claims for breach of contract — where respondent issued Interlocutory application seeking summary judgment in its favour — where in response, applicant seeks leave to amend on basis that amendments deal with respondent’s complaints — where respondent opposes application on basis that grant of leave would be futile in that matters raised in proposed amended pleading liable to be summarily dismissed and applicant has proffered no reasonable explanation for delay in bringing application — whether applicant has no reasonable prospects of successfully prosecuting claim that respondent has contravened s 351 of FW Act on basis that there is no causative link between physical or mental disability alleged by applicant and stand-down and dismissal — whether applicant has no reasonable prospects of successfully prosecuting claim under s 351 of FW Act on basis that in relation to stand-down, no plea of “comparator” — whether applicant has no reasonable prospects of successfully prosecuting claim under s 351 of FW Act on basis that respondent not aware of alleged physical or mental disability at time of stand-down and dismissal — whether applicant has no reasonable prospects of successfully prosecuting claim for breach of contract on basis that term(s) of employment contract respondent alleged to have breached not identified — whether applicant has no reasonable prospects of successfully prosecuting breach of contract claim on basis that insofar as term(s) relied on can be inferred, respondent cannot be said to have breached them — whether applicant has proffered reasonable explanation for delay in bringing application for leave to amend — application granted |
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| Legislation: | *Fair Work Act 2009* (Cth) ss 340, 341, 342, 351  *Federal Court of Australia Act 1976* (Cth) s 31A  *Federal Court Rules 2011* (Cth) rr 8.21, 8.23, 16.21, 16.53, 26.01 |
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| Cases cited: | *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd* [1995] FCA 1368; (1995) 58 FCR 26  *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27; (2009) 239 CLR 175  *Ferella v Official Trustee in Bankruptcy (No 2)* [2018] FCA 18  *Hennessy v Barminco Limited* [2022] FCA 9  *RailPro Services Pty Ltd v Flavel* [2015] FCA 504  *Research in Motion Ltd v Samsung Electronics Australia Pty Limited* [2009] FCA 320; (2009) 176 FCR 66 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 62 |
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| Date of hearing: | 9 December 2021 |
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| Counsel for the Applicant: | Mr R Grealy |
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| Solicitor for the Applicant: | Australian Law Partners |
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| Counsel for the Respondent: | Ms K Stewart |
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| Solicitor for the Respondent: | Gilchrist Connell |

ORDERS

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|  | | SAD 54 of 2021 |
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| BETWEEN: | DAMIEN WALKER  Applicant | |
| AND: | SOUTHCOTT PTY LTD ACN 007 870 662  Respondent | |

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| order made by: | BESANKO J |
| DATE OF ORDER: | 27 JULY 2022 |

THE COURT ORDERS THAT:

1. The Interlocutory application filed by the respondent dated 27 August 2021 be dismissed.
2. The applicant be granted leave to amend the document attached to his Originating application in terms of the document Exhibit “RG1” attached to the affidavit of Robert Grealy sworn on 3 December 2021, such document to be titled “Statement of Claim”.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BESANKO J:

## Introduction

1. This is an application for leave to file an Amended application under the *Fair Work Act 2009* (Cth) (the FW Act) alleging dismissal in contravention of a general protection provision. The Amended application contains the allegations constituting the applicant’s claim and this has been treated by the parties as, and is, the applicant’s Statement of Claim.
2. The application for leave to amend is opposed by the respondent on the basis that the proposed Amended Originating application (the PAOA) contains claims which cannot succeed and the delay in bringing the application means that it should be refused.
3. The circumstances leading to the application are relevant and are as follows.
4. With respect to the Originating application (the OA), the respondent brought an Interlocutory application dated 27 August 2021 pursuant to r 26.01 of the *Federal Court Rules 2011* (Cth) (the Rules) in which it sought an order that summary judgment be given in its favour. The Court’s power to make an order of the kind sought by the respondent is contained within s 31A of the *Federal Court of Australia Act 1976* (Cth). In the alternative, the respondent sought an order under r 16.21 of the Rules that the OA issued by the applicant and dated 13 April 2021, be struck out in whole or in part.
5. In response, the applicant brought an Interlocutory application dated 3 December 2021 in which he sought leave to file the PAOA. He claimed that the PAOA deals with all of the respondent’s complaints in relation to the OA.
6. It is convenient first to summarise the applicant’s case as set out in the OA.

## The Applicant’s Case as set out in the OA

1. The following is a summary of the allegations contained in the section headed, “Details of claim under the Fair Work Act” in the OA.
2. On 13 November 2020, the applicant received a letter from the respondent confirming his employment as a storeman at the respondent’s “Place of Employment”, commencing on 16 November 2020. The letter is referred to as the “Employment Contract” and it contained the terms on which the applicant would be employed by the respondent.
3. The terms of the Employment Contract included the following:
4. the respondent may make policies relating to the conduct of its business (referred to as “Company Policies”);
5. Company Policies do not form part of the Employment Contract;
6. the respondent is committed to equality of opportunity for all employees;
7. the respondent would provide all employees with fair access to employment-related opportunities and benefits, regardless of race, gender, age and other characteristics not relevant to the performance of employment duties; and
8. the terms and conditions of employment would not be fundamentally varied without the applicant’s consent.
9. The applicant alleged that as at 13 and 16 November 2020, the respondent did not have in place any Company Policy relating to the wearing of face masks by employees at the Place of Employment.
10. On 1 February 2021, the respondent introduced a Company Policy requiring all of its employees to wear face masks while performing duties of their employment at the Place of Employment (referred to as the “Mask Mandate”).
11. Certain key allegations are made in paras 6 to 10 of the OA and they are as follows:

6. On 1 February 2021:

a. The Applicant attended on his Place of Employment;

b. The Applicant did not wear a face mask;

c. The respondent’s representative, Andrew, asked the Applicant to wear a face mask;

d. The Respondent [sic] advised Andrew that he was unable to wear a face mask, because he suffered from a medical condition likely to be exacerbated by him doing so;

e. The Applicant was referred to Clare Kelly, Head of People and Culture for the Respondent;

f. Clare Kelly demanded that the Applicant disclose particulars of his medical condition;

g. The Applicant advised Clare Kelly that the Respondent had no lawful right to ask for his personal medical information;

h. Clare Kelly asked the Applicant to provide details of why the Respondent had no lawful right to ask for details of the Applicant’s medical condition;

i. The Applicant provided Clare Kelly with links to websites and other information;

j. Clare Kelly asked for the source of the Applicant’s information;

k. The Applicant declined to provide same;

l. Clare Kelly stood the Applicant down from work; and

m. The Applicant was required to leave the Place of Employment.

7. On 2 February 2021, the Applicant provided a medical certificate from his treating doctor, confirming that the Applicant was unable to work from 1 February to 5 February 2021.

8. The Applicant was unable to work from 1 February to 5 February 2021, because the Respondent refused to allow him to perform the duties of his employment at the Place of Employment without a face mask.

9. The Respondent did not accept that the medical certificate was suitable evidence of the Applicant’s medical condition and inability to work without a face mask.

10. On 8 February 2021, the Respondent terminated the Applicant’s employment on the following grounds:

a. That he declined to wear a face mask at work;

b. That he declined to disclosed details of the medical condition that prevented him from wearing a face mask;

c. That he declined to provide the source of information concerning his privacy rights;

d. That he declined to provide evidence that he was exempt from wearing a face mask; and

e. That he had thereby engaged in serious and wilful misconduct in the course of his employment at the Place of Employment.

1. The applicant alleged that the respondent breached the Employment Contract, in that: pursuant to the Employment Contract, the respondent was and is not permitted to fundamentally vary its terms without the applicant’s fully informed consent (para 11); as a matter of law, the Mask Mandate amounts to a fundamental variation to the Employment Contract (para 12); the applicant did not consent to the Mask Mandate and the respondent was not entitled to force the applicant to wear a face mask during the performance of his employment duties at the Place of Employment (para 13); and in the absence of the applicant’s consent, the respondent’s insistence that the applicant abide by the Mask Mandate amounted to a breach of his Employment Contract.
2. The applicant alleged that in contravention of s 340 of the FW Act, the respondent took certain “Adverse Action” against the applicant, as a result of the applicant’s exercise of his “Workplace Rights”. It is alleged in para 20 of the OA that by operation of s 341 of the FW Act, the applicant had the workplace right to insist on the respondent’s compliance with the law and with his Employment Contract and that in exercising his Workplace Rights, the applicant had the right to (para 21):

a. Refuse consent to any fundamental variation to the Employment Contract;

b. Refuse to comply with the Mask Mandate; and

c. Refuse to provide details of the medical condition that would be exacerbated by wearing a face mask, for the following reasons:

i. The Applicant did not suffer any medical condition that prevented him from performing the duties of his employment;

ii. The Respondent was only entitled to sufficient information to determine whether the Applicant could discharge the duties of his employment;

iii. The Respondent had sufficient information to determine whether the Applicant could perform the duties of his employment;

iv. The Respondent had no lawful right to enforce any Public Health Directives by the state of Western Australia;

v. It was sufficient for the Applicant to confirm the fact of the medical condition which would be exacerbated by wearing a face mask and the Respondent did not need to know, and was not entitled to know, the details of that medical condition.

1. Paragraph 22 set out the adverse action which the respondent is alleged to have taken against the applicant. It comprises the following: (1) the respondent stood the applicant down from 1 February 2021; (2) the respondent did not pay the applicant from 1 February 2021 to 5 February 2021; (3) the respondent terminated the applicant’s employment on 8 February 2021; and (4) the respondent misrepresented in the applicant’s “Separation Certificate” that he was dismissed for serious and wilful misconduct.
2. Finally, the applicant alleged that by making the Mask Mandate and then dismissing the applicant because he declined to wear a face mask for a valid medical reason, the respondent has discriminated against the applicant in breach of the Employment Contract, “the *Equal Opportunity Act*” and the FW Act (para 27). In the case of the latter, the applicant relies on s 351 of the FW Act and he alleges that pursuant to that section, the respondent was not permitted to take any adverse action against him as a result of the medical condition that made it undesirable for him to wear a face mask.
3. The applicant alleges that as a result of the respondent’s breaches of the Employment Contract, “the *Equal Opportunity Act*” and the FW Act, he has suffered from increased stress, anxiety and depression and he will continue to suffer from increased stress, anxiety and depression in the future and he seeks the following relief:
4. Loss of income – $10,352;
5. Future loss of income – $53,182;
6. General damages – $20,000;
7. Aggravated damages – $25,000; and
8. Exemplary damages – $25,000.

## The Respondent’s Interlocutory application

1. The respondent’s Interlocutory application sought the following orders:

1. Pursuant to s 31A of the *Federal Court of Australia Act 1976*, summary judgment be given in favour of the Respondent.

2. In the alternative to 1 above, the applicant’s Originating Application filed on 13 April 2021 be struck out in whole or in part pursuant to rule 16.21 (a) to (e) of the *Federal Court Rules 2011* (Cth) …

1. The respondent’s application was supported by an affidavit of Mr Jamie Leo Ling affirmed on 27 August 2021. Mr Ling is a principal of Gilchrist Connell Lawyers, the solicitors for the respondent.
2. Mr Ling deposed to the fact that on 20 August 2021, he caused a letter to be sent to the applicant’s solicitor in which he outlined various allegations in the OA which had no reasonable prospects of success and invited the applicant to withdraw the OA on the basis that the respondent agreed not to pursue any costs order and indicated that in the event that the applicant did not withdraw the proceedings, the respondent would file an application seeking summary judgment. Mr Ling deposes to the fact that on 20 August 2021, he received an email from the applicant’s solicitor stating the following:

If you have read the material disclosed and still believe it was reasonable to force employees to wear masks for long periods of time every day, then you are either breathtakingly stupid or complicit in the ongoing fraud.

Needless to say, your client’s offer is rejected.

1. It is not necessary for me to determine the merits of the respondent’s application because the applicant does not intend to rely on his existing pleadings. He has indicated that he seeks to rely on the PAOA and hence his application for leave to amend. While the basic facts of his claim remain the same, the amendments which the applicant proposes are significant. The alleged breach of the “*Work Health and Safety Act 2020*” is withdrawn as is the allegation of a direct breach (as distinct from a breach through the FW Act) of the “*Equal Opportunity Act*”. The allegation of a contravention of s 340 (i.e., adverse action because of the exercise of a workplace right) is withdrawn and the claim of a breach of the Employment Contract has been substantially reformulated. In the circumstances, it is not necessary to address the respondent’s challenge on the OA.

## The Applicant’s Application for Leave to Amend

1. On 18 November 2021, the applicant’s solicitor sent an email to the Court and the solicitors for the respondent attaching a document titled “Applicant’s Outline of Argument”, which indicated that he proposed to amend the OA and in the email he attached an Amended application which was not in the same terms as the OA, or indeed, the later PAOA. The applicant’s solicitor confirmed that the applicant sought leave to file and serve an Amended application and that an application to that effect “is being prepared”. No application for leave to amend was filed and at the hearing of the respondent’s application on 30 November 2021, I made an order that the applicant file and serve any application for leave to amend the OA by 3 December 2021. I adjourned the hearing to 9 December 2021.
2. As I have said, the applicant’s application is dated 3 December 2021 and he seeks the following order, relevantly:

1. That, pursuant to Rules 8.21 and 8.23 of the Federal Court Rules, the Applicant be given leave to file and serve the Amended Originating Application annexed to the affidavit of Robert Grealy filed contemporaneously with this Application.

1. The applicant’s reliance on rr 8.21 and 8.23 of the Rules is misplaced because the OA, in the section headed “Details of claim under the Fair Work Act” sets out the allegations of fact the applicant makes against the respondent and both parties approached the matter on the basis that the document is the applicant’s Statement of Claim. I have recently considered a similar issue in another case (*Hennessy v Barminco Limited* [2022] FCA 9 at [5] and [18]) and as I did on that occasion, I will make an order that the applicant have leave to amend the OA to the effect that the heading on page 2, “Details of claim under the Fair Work Act”, be removed and in place thereof the words “Statement of Claim” appear.
2. The applicant applies for leave to amend his pleading pursuant to r 16.53 of the Rules. Leave to amend will not be granted where the proposed amendment would be futile, including because the pleading does not disclose a reasonable cause of action (*Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd* [1995] FCA 1368; (1995) 58 FCR 26 at 36) or it is likely to be struck out and generally, leave to amend will not be given if the matter(s) that the amendment seeks to raise is unlikely to succeed (*Research in Motion Ltd v Samsung Electronics Australia Pty Limited* [2009] FCA 320; (2009) 176 FCR 66 at [21]–[22]; see also *Ferella v Official Trustee in Bankruptcy (No 2)* [2018] FCA 18 at [6]). Furthermore, substantial delay in bringing the application and no, or no sufficient, explanation for the delay may be a basis for a refusal of leave (*Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27; (2009) 239 CLR 175 at [5], [30], [102] and [111]–[114]).
3. The applicant’s application is supported by an affidavit of Mr Robert Grealy, sworn on 3 December 2021. Mr Grealy states that he is a solicitor engaged by Australian Law Partners, the solicitors for the applicant and that he has the conduct of the proceeding on behalf of the applicant.
4. Mr Grealy deposes to the fact that on or about 2 June 2021, the respondent filed and served a Defence to the applicant’s OA and that in that pleading, the respondent alleged, inter alia, that the applicant’s dismissal was not a breach of his employment contract because it arose out of his failure to comply with certain lawful and reasonable employment directions. Mr Grealy deposes to the fact that on or about 29 June 2021, the applicant filed and served a Reply to the Defence. In that pleading, the applicant alleged, inter alia, that the alleged employment directions were neither reasonable nor lawful, such that any dismissal premised upon a failure of compliance was also unlawful.
5. Mr Grealy states that the pleadings made reference to various scientific and medical matters relevant to the SARS-COV2 pandemic and the wearing of face masks and that at this time, that is, at the time of filing and service of the Reply, he had spoken with a number of experts and conducted significant research to support the matters pleaded. However, he immediately found difficulty finding suitable medical and scientific experts in Australia for reasons stated in his affidavit sworn on 19 November 2021. It is not necessary to set out the details of those matters.
6. Mr Grealy states that he was unable to finalise the PAOA until such time as he had received expert reports from suitable experts, including:

(a) Michiko Myers, biotechnologist;

(b) Dr Michael Palmer – Biochemist;

(c) Michelle Saminaden – Microbiologist;

(d) Voula Antoniadis – Psychologist; and

(e) Megan Mansell – PPE Expert.

Mr Grealy states that in particular, it was necessary to obtain a report from Ms Antoniadis to confirm the applicant’s mental illness and that this report was not provided until very recently.

1. The PAOA is annexed to Mr Grealy’s affidavit and the applicant seeks leave to amend in terms of that document.
2. In addition to Mr Grealy’s affidavit sworn on 3 December 2021, the applicant read the following affidavits:
3. Affidavit of the applicant sworn on 17 November 2021;
4. Affidavit of Mr Grealy sworn on 16 November 2021;
5. Affidavit of Dr Palmer sworn on 4 November 2021; and
6. Affidavit of Ms Mansell sworn on 11 August 2021.
7. The respondent objected to the Court receiving the affidavits of Dr Palmer and Ms Mansell on the basis that they are not relevant to the issues that the Court has to determine on the application.
8. I will receive the affidavits of Dr Palmer and Ms Mansell. On the applicant’s case, they are relevant to the issue of delay, which the respondent raises in opposition to a grant of leave to amend. Both Dr Palmer and Ms Mansell are referred to by Mr Grealy in his affidavit as being individuals whose evidence it was necessary for him to obtain before he could finalise the PAOA. Mr Grealy does not depose to the dates on which he obtained the affidavits of Dr Palmer and Ms Mansell and, on the applicant’s case, their affidavits are relevant in that regard, i.e., the date on which they were made.
9. I make the point that my task at this stage is not to determine finally the merits of the various allegations made by the applicant and challenged by the respondent. I am simply determining whether they have a sufficient prospect of success to support a grant of leave to amend.
10. There are many allegations in the PAOA, but the causes of action are a claim that the respondent contravened s 351 of the FW Act and a claim that the respondent breached the Employment Contract. The pleading of both these causes of action is challenged by the respondent.

## The Applicant’s Claim that the Respondent has Contravened s 351 of the FW Act

1. The respondent submits that the applicant’s claim that it has contravened s 351 of the FW Act should not be allowed because it cannot succeed. The applicant’s pleading of a contravention of s 351 is as follows:

24. The Employment Contract expressly provided that the Respondent would not discriminate against its employees on a variety of grounds, which would include medical conditions.

25. Pursuant to the *Fair Work Act* (and, by reference, the *Equal Opportunity Act*), the Respondent was not permitted to discriminate against its employees on the basis of any medical condition or disability.

26. Pursuant to S.351 of the *Fair Work Act*, the Respondent was not permitted to take any adverse action against the Applicant as a result of any medical condition.

26A. The Respondent was aware that the Applicant suffered from the Disability because:

a. The Applicant told Andrew that he suffered a medical condition;

b. The Applicant told Clare Kelly that he suffered a medical condition;

c. The Applicant provided a medical certificate from his doctor;

26B. It was not necessary, as a matter of law, for the Respondent to be aware of the full nature of the Disability; it is sufficient that it was aware on 1 February 2021 (through its employees or agents) that the Applicant suffered a Disability.

26C. By making the Mask Mandate and Medical Evidence Mandate, in circumstances where:

a. They exceeded the requirements of the Face Covering Directions; and

b. They required employees to give up their right to medical privacy without reasonable or legitimate operational need; and

c. They automatically treated employees who suffered from medical conditions making it unsuitable to wear a face mask differently to other employees,

the Respondent discriminated against any employee who could not safely wear a face mask for a medical reason, including the Applicant (**the Discriminatory Conduct**).

26D. By making the Mask Direction, Medical Evidence Direction and Exemption Direction, in circumstances where:

a. They exceeded the requirements of the Face Covering Directions; and

b. They required the Applicant to give up his right to medical privacy without reasonable or legitimate operational need; and

c. They treated him differently from other employees solely because of his Disability,

the Respondent further discriminated against the Applicant personally (**the Further Discriminatory Conduct**).

26E. The Respondent stood the Applicant down from work and then dismissed him from his employment in reliance on his purported failure to comply with the Mask Mandate, Mask Direction, Medical Disclosure Mandate, Medical Disclosure Direction and Exemption Direction.

26F. Where the Respondent has taken the aforesaid action in reliance on the Discriminatory Conduct and Further Discriminatory Conduct, the taking of those actions is, in itself, discriminatory.

26G. For the reasons pleaded in paragraphs 24 to 26F herein, by:

a. Standing the Applicant down from his employment from 1 to 5 February 2021 without pay; and

b. Dismissing him from his employment on 8 February 2021,

the Respondent has taken adverse action against him in contravention of S.351 of the *Fair Work Act*.

1. Paragraph 26G identifies two forms of adverse action, being the standing down of the applicant for five days without pay (1 February 2021 to 5 February 2021) and the dismissal of the applicant from his employment on 8 February 2021. The latter is expressly identified in s 342(1) Item 1(a) as adverse action and the former is certainly capable of being characterised as adverse action (s 342(1) Item 1(c)).
2. Although the applicant’s pleading often refers to the applicant’s “medical condition”, it is clear from the pleadings read as a whole that the physical or mental disability within s 351 which he alleges is anxiety when the applicant tries to wear a face mask, difficulty breathing and feeling faint (para 6.b.), anxiety or breathing difficulties from or whilst wearing a face mask (para 6A.b.), or anxiety progressing to severe difficulties breathing (para 7A.).
3. Section 351(1) prohibits an employer from taking adverse action against (relevantly) an employee because of the employee’s physical or mental disability. That requires a causative link between the adverse action and the employee’s physical or mental disability.
4. The use of the word “because” in s 351(1) means that the key question is “why was the adverse action taken?” (*RailPro Services Pty Ltd v Flavel* [2015] FCA 504 (*RailPro*) at [81] per Perry J and see the authorities referred to therein).
5. In the case of an existing employment relationship, s 342 identifies four forms of adverse action. The fourth item, 1(d), is that the employer “discriminates between the employee and other employees of the employer”. Putting that particular form of adverse action to one side for present purposes, the other forms of adverse action do not require that a comparison be undertaken between the treatment of the applicant employee and any other employee(s). In *RailPro*, Perry J said (at [112]):

… However, the question under subs (1) is simply “why did RailPro dismiss Mr Flavel?”: see at [81] above. Thus, if the dismissal was “*because of”* Mr Flavel’s mental disability, s 351(1) is breached unless the dismissal falls with one of the “carve-outs” in s 351(2)(a), (b) or (c). Save therefore where the adverse action is that defined in column 2, para (d) of item 1 of the table in s 342(1) (i.e. that the employer “*discriminates between the employee and other employees of the employer”*), s 351(1) does not require that any comparison be undertaken between the treatment of the employee in question and any other employee(s): *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14; (2011) 191 FCR 212 at [35] (Gray and Bromberg JJ (overruled on appeal but not on this point)); *Stephens v Australian Postal Corp* [2011] FMCA 448; (2011) 207 IR 405 (***Stephens v APC***) at 439 [83]-[84] (Smith FM). …

1. It follows that insofar as the applicant’s case is that the adverse action is the standing down without pay and dismissal, the key question is “why did the respondent stand the applicant down and dismiss him?”.
2. The respondent submits that there can be only one answer to that question and that is that the applicant was stood down without pay and dismissed because he failed to comply with the Mask Mandate and the associated instructions or directions. That, the respondent submits, is not only clear from the letter of dismissal, but is the case the applicant himself appears to assert in his pleading. In para 10 of the PAOA, he alleges the following:

10. On 8 February 2021, the Respondent indicated that it terminated the Applicant’s employment on the following grounds:

a. That he declined to follow the direction to wear a face mask at work (**Mask Direction**);

b. That he declined to disclose details of the medical condition that prevented him from wearing a face mask, despite the Respondent’s request (**Medical Evidence Direction**);

c. That he declined to provide the source of information concerning his privacy rights, being the Snippet, despite the Respondent’s request (**Snippet Direction**);

d. That he declined to provide evidence that he was exempt from wearing a face mask despite the Respondent’s request (**Exemption Direction**); and

e. That he had thereby engaged in serious and wilful misconduct in the course of his employment at the Place of Employment.

1. The respondent submits that that being the reason or reasons for the action it took, it could not be because of the applicant’s “physical or mental disability” and the claim under s 351 of the FW Act must fail.
2. That submission undoubtedly has force, but the issue at this stage is whether the applicant’s case on causation has a reasonable prospect of success. I consider that it does because of the (arguable) close link between the applicant’s physical or mental disability and his failure to comply with the Mask Mandate and the associated instructions or directions.
3. There is a further reason for not acceding to the respondent’s submission that the pleading under s 351 should not be allowed. A plea of a contravention of s 351 will, in any event, remain in the PAOA insofar as the adverse action relied on is the respondent discriminating between the applicant and other employees of the employer (s 342(1) Item 1(d)).
4. In my opinion, there is a pleaded case of discrimination in the applicant’s pleading. Although it is not entirely clear to what extent para 26D is merely repetitive of para 26C, there is a plea of discrimination in each paragraph amounting to, I infer, adverse action within s 351. In para 26C.c., the applicant pleads that by the Mask Mandate and the associated instructions or directions, the respondent automatically treated employees who could not safely wear a face mask for a medical reason, including the applicant, differently from other employees and, in para 26D.c., the applicant pleads that the respondent treated the applicant differently from other employees solely because of his disability. In para 26F, the applicant alleges that the standing down and dismissal was taken on the basis of the discriminatory conduct, and “the taking of those actions is, in itself, discriminatory”.
5. The respondent submits that there is no proper plea of discrimination because there is no plea of a “comparator”, that is to say, the treatment of the hypothetical person in the same position as the applicant but without the disability. I reject that submission. In my opinion, the plea in para 26C.c. is sufficient for that purpose. The comparison is between employees who suffer from medical conditions making it unsuitable to wear a face mask and employees who do not suffer medical conditions making it unsuitable to wear a face mask. The respondent submits that the comparator is a person who is unwilling to wear a face mask, although the person does not have a medical condition. The respondent submits that it would treat such a person no differently from the applicant and, therefore, the discrimination case will fail and that the applicant seems to acknowledge this in his own pleading (see para 10B.f.viii.). With respect to this submission, it is sufficient for me to say that it is not obvious to me that the relevant comparator must be a person who is unwilling to wear a face mask. In my opinion, this is an issue for trial.
6. Finally, the respondent submits that the applicant’s claim under s 351 of the FW Act must fail because it is not in dispute between the parties that at the time of the standing down and dismissal of the applicant, the respondent was not aware of the applicant’s physical or mental disability. There cannot be adverse action, including discrimination, because of a physical or mental disability if the decision-maker is, at the relevant time, unaware of the disability. The applicant asserted to the respondent that he was entitled to a medical exemption because of a medical condition, but he refused to disclose the nature of that medical condition. At a general level, the respondent submits that it cannot be found to have acted in a particular way *because of* a physical or mental disability in circumstances in which it did not know of the disability. In support of this submission, the respondent relied on certain observations of Perry J in *RailPro.* In that case, her Honour said that knowledge that an applicant had an “attack of nerves” did not amount to knowledge that an applicant had a physical or psychological condition that constituted a physical or mental disability within s 351 of the FW Act. Her Honour said (at [126]–[128]):

126 … In this case, in my view the evidence went no higher than to suggest that the decision-makers were aware that Mr Flavel had had an “attack of nerves”.

127 Added to this, it was found by the primary judge or established by unchallenged evidence that:

a) the statement by Mr Flavel that he felt violently ill when told he could not use his notes was the first manifestation of the disability;

b) no other symptoms were communicated by Mr Flavel to RailPro;

c) Mr Flavel elected to sit with the driver after refusing to undertake the assessment rather than take up his offer of retiring to the crew van;

d) before feeling violently ill at the assessment, Mr Flavel made no claims in the six weeks following the accident to have suffered any ill effects to his employer, made no claims for sick leave or workers compensation, and did not take any days off;

e) he also denied suffering any ill effects to Mr McNaught and Mr Yates, and had refused any counselling;

f) nor, despite keeping a watchful eye on him as well as Mr Fischer, were any changes in his behaviour observed by Mr Yates or Mr McNaught.

128 Despite these matters, the primary judge found that the three decision-makers were aware that Mr Flavel had a physical or psychological condition, that resulted in him becoming violently ill when required to drive a train (*Flavel (No. 1)* at [81]). I consider that that finding was glaringly improbable given the matters to which I have referred and do not consider that the contextual matters to which the primary judge had regard were a sufficient foundation for the finding. Rather the findings and uncontested evidence were such that his Honour should have found that the statutory presumption in s 361 of the *FW Act* had been rebutted, as, in the absence of knowledge of a disability and, more particularly that Mr Flavel’s behaviour at his assessment was a symptom of a disability, the decision-makers could not be found to have dismissed Mr Flavel because of his disability.

1. In my opinion, the circumstances in this case are different from those in *RailPro*. The applicant asserted that he was entitled to a medical exemption because of a medical condition. It is an available inference that reasonably understood, he was asserting that because of a medical condition, wearing a mask was unsuitable in his case. In my opinion, the proposition has a sufficient prospect of success to warrant a grant of leave to amend and whether it will succeed or fail is a matter for trial.
2. I reject the respondent’s submission that the applicant’s claim under s 351 of the FW Act is so lacking in merit (or lacks a reasonable prospect of success) that an application for leave to amend to advance it should be refused.

## The Applicant’s Claim that the Respondent Breached the Employment Contract

1. The applicant pleads that the respondent breached his Employment Contract by making the Mask Mandate and the associated instructions or directions and then in reliance on those “invalid employment directions” which were not “reasonable and lawful employment directions”, standing him down and then dismissing him.
2. The respondent submits that the applicant does not identify in his pleading the terms and conditions of the Employment Contract the respondent is alleged to have breached. The respondent further submits that insofar as the terms and conditions breached can be inferred, the applicant’s case of breach of those terms and conditions cannot succeed. I will return to this further submission below.
3. The letter dated 13 November 2020 containing the terms and conditions of the Employment Contract is before the Court, as is the respondent’s letter dated 8 February 2021 wherein the applicant was advised by the respondent that he was dismissed. On the face of it, the applicant was dismissed for serious and wilful misconduct and failure of his probation period and the basis of the serious and wilful misconduct is the failure to follow reasonable and lawful instructions, being the Mask Mandate and the associated instructions or directions.
4. The case the applicant is seeking to advance is that he was not guilty of serious and wilful misconduct because the Mask Mandate and associated instructions or directions were not reasonable and lawful instructions.
5. In my opinion, such a case is sufficiently pleaded. Paragraphs 10 and 10A in the PAOA are as follows:

10. On 8 February 2021, the Respondent indicated that it terminated the Applicant’s employment on the following grounds:

a. That he declined to follow the direction to wear a face mask at work (**Mask Direction**);

b. That he declined to disclose details of the medical condition that prevented him from wearing a face mask, despite the Respondent’s request (**Medical Evidence Direction**);

c. That he declined to provide the source of information concerning his privacy rights, being the Snippet, despite the Respondent’s request (**Snippet Direction**);

d. That he declined to provide evidence that he was exempt from wearing a face mask despite the Respondent’s request (**Exemption Direction**); and

e. That he had thereby engaged in serious and wilful misconduct in the course of his employment at the Place of Employment.

10A. At no time did the Respondent indicate to the Applicant that his employment was terminated in accordance with the probation period terms in the Employment Contract.

1. In para 10B, the applicant pleads that for various reasons he sets out, but which I will not repeat (although I note that I am not called upon at this stage to determine whether some of the matters raised in para 10B can be agitated at trial in the form presently advanced), the Mask Mandate and the associated instructions or directions were not lawful and reasonable employment directions. The applicant then pleads the breach of the Employment Contract as follows:

13. The Applicant did not consent to the Mask Mandate.

14. For the reasons pleaded in paragraphs 5 to 10B herein, none of the Mask Mandate, Mask Direction, Medical Evidence Mandate, Medical Evidence Direction, Snippet Direction or Exemption Direction were reasonable or lawful employment directions.

14A. By:

a. Making the Mask Mandate, Mask Direction, Medical Evidence Mandate, Medical Evidence Direction, Snippet Direction or Exemption Direction in circumstances where they were not reasonable and lawful employment directions;

b. Standing the Applicant down from his employment from 1 to 5 February in reliance on the invalid employment directions; and

c. Dismissing the Applicant from his employment in reliance on his failure to comply with the invalid employment directions,

the Respondent breached the Employment Contract.

In my opinion, what I have set out is a sufficient answer to the respondent’s complaint concerning the pleading of a breach of the Employment Contract.

1. As I have said, the respondent sought to identify two terms that it inferred the applicant was alleging the respondent had breached and then to submit that the applicant had no arguable case with respect to these alleged breaches. These terms were as follows:
2. The provision and maintenance of a safe, healthy, injury-free and environmentally responsible workplace. The breaches are alleged in para 10B.l. and m.; and
3. An obligation on the respondent employer to accept medical certificates. The breaches are alleged in para 10B.n.
4. With respect to (1), the respondent submits that the applicant’s case cannot succeed because the Employment Contract provides that the applicant will perform his duties in accordance with the “relevant Government Legislation and Regulations” and that includes the Face Covering Directions made by the Commissioner of Police and State Emergency Coordinator. With respect to (2), the respondent submits that the applicant’s case cannot succeed because the Employment Contract provides that the respondent “reserves the right to require the production of a medical certificate/evidence in any specific instance where there are justifying circumstances”.
5. I do not need to deal with these arguments in view of my principal conclusion with respect to the Employment Contract. However, I would make the observation that I would be disposed to reject the respondent’s submissions in relation to (1) on the basis that the applicant’s case is that the respondent went beyond the Face Covering Directions and, in relation to (2), on the basis that whether there are “justifying circumstances” in the Employment Contract is likely to be a question of mixed fact and law appropriate for determination at trial.

## Delay

1. The respondent submits that the applicant has not explained the delay in making the application for leave to amend and that this is fatal to his application. The applicant has not explained the reason he did not make the application shortly after the respondent indicated that it would seek summary judgment if the claim was not discontinued. The respondent did that in its letter dated 20 August 2021. Instead of responding to this letter in a balanced and sensible way by acknowledging difficulties or seeking further time to investigate the issues, the applicant’s solicitor responded in the way he did suggesting “breathtaking[] stupid[ity]” or “complicit[y] in the ongoing fraud”. As it happens, the applicant has substantially amended his claim, including abandoning substantial claims (see above at [21]). It is difficult to see how that aspect of what followed was contingent on the receipt of experts’ reports. Furthermore, there is force in the respondent’s submission that the applicant’s solicitor did not need experts’ reports for the purposes of pleadings and that it was open to him to take instructions from the applicant. It is not without significance that the applicant was able (and willing) to file an extensive Reply containing matters or assertions said to be relevant to the COVID-19 virus. Notwithstanding these matters, and not without hesitation, I do not consider the delay to be of such an order to lead to a refusal of leave to amend.

## Conclusion

1. I will grant leave to the applicant to amend the document attached to his OA in terms of the document Exhibit “RG1” attached to the affidavit of Robert Grealy sworn on 3 December 2021, such document to be titled “Statement of Claim”.

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| I certify that the preceding sixty-two (62) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Besanko. |

Associate:

Dated: 27 July 2022