Federal Court of Australia

Ashby v Commonwealth of Australia [2021] FCA 40

|  |  |
| --- | --- |
| File number: | NSD 784 of 2020 |
|  |  |
| Judgment of: | **BROMWICH J** |
|  |  |
| Date of judgment: | 29 January 2021  |
|  |  |
| Catchwords: | **ADMINISTRATIVE LAW –** application for review of decision to refuse application for an act of grace payment under s 65(1) of the *Public Governance, Performance and Accountability Act 2013* (Cth) – where act of grace payment sought for the purpose of satisfying legal fees incurred in litigation relating to alleged conduct by a member of the Parliament of Australia – where previous litigation discontinued before trial by the applicant due to purported financial pressure – where the Member of Parliament was granted an act of grace payment in relation to his legal fees – whether there was an error by the delegate of the Minister in failing to assess the claim in support of the act of grace application that the applicant was a whistle-blower, alternatively that this claim was not assessed to the requisite level of detail – whether the delegate’s finding that there was no basis for an argument that the previous act of grace payment to a litigant had an influence over the litigation was irrational – whether the delegate failed to have regard to relevant evidence that the proceeding was not highly politicised – whether there was any error in the delegation rendering the decision-making power of the delegate void – held: the delegate did not fail to assess the whistle-blower claims made by the applicant and was not required to give further or better consideration to these claims – the delegate’s finding that the act of grace payment made to the Member of Parliament did not influence the litigation was not irrational and was not outside of the exercise of their jurisdiction – there was no failure to deal with evidence relating to the claims that the proceeding was highly politicised – the applicant’s construction of the delegation power was not sensible or pragmatic and the conduct of the delegate in this case was clearly contemplated by the delegation’s authorising Act – application dismissed with costs  |
|  |  |
| Legislation: | *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5, 16)*Fair Work Act* *2009* (Cth)*Financial Management and Accountability Act 1997* (Cth) s 33Secretary of the Department of Finance (Cth), *Public Governance, Performance and Accountability (Finance Secretary to Finance Officials) Delegation 2020 (No 1)* (22 January 2020) sch 1A pt 11*Members of Parliament (Staff) Act 1984* (Cth)*Judiciary Act 1903* (Cth) s 39B*Public Governance, Performance and Accountability Act 2013* (Cth) ss 65(1), 107, 109*Public Governance, Performance and Accountability Rule 2014* (Cth) s 24*Safety, Rehabilitation and Compensation Act 1988* (Cth) |
|  |  |
| Cases cited: | *Ashby v Commonwealth of Australia (No 4)* [2012] FCA 1411; 209 FCR 65*Ashby v Slipper (No 3)* [2015] FCAFC 9; 317 ALR 623*Ashby v Slipper* [2014] FCAFC 15; 219 FCR 322*Belmorgan Property Development Pty Ltd v GPT Re Ltd* [2007] NSWCA 171; 153 LGERA 450*Croker v Minister for Finance* [2011] FCA 1188*Fisk v Chief of the Defence Force (No 2)* [2017] FCA 1490*Foster v Minister for Customs and Justice* [2000] HCA 38; 200 CLR 442*GPT Re Ltd v Wollongong City Council* [2006] NSWLEC 303; (2006) 151 LGERA 116*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24*Minister for Immigration and Border Protection v Sabharwal* [2018] FCAFC 160*Sean Investments v MacKellar* (1981) 38 ALR 363*Simeon v Minister for Finance and Deregulation* [2012] FCA 286*Singh v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 90 ALR 397*Taylor v Public Service Board (NSW)* (1976) 137 CLR 208*Toomer v Slipper* [2001] FCA 981 |
|  |  |
| Division: | Fair Work Division |
|  |  |
| Registry: | New South Wales |
|  |  |
| National Practice Area: | Employment and Industrial Relations |
|  |  |
| Number of paragraphs: | 54 |
|  |  |
| Date of hearing: | 22 October 2020  |
|  |  |
| Counsel for the Applicant: | J Hyde Page |
|  |  |
| Solicitor for the Applicant: | Harmers Workplace Lawyers |
|  |  |
| Counsel for the Respondents: | J Davidson, L Howard |
|  |  |
| Solicitor for the Respondents: | Australian Government Solicitor |

ORDERS

|  |  |
| --- | --- |
|  | NSD 784 of 2020 |
|   |
| BETWEEN: | JAMES HUNTER ASHBYApplicant |
| AND: | COMMONWEALTH OF AUSTRALIAFirst RespondentMINISTER FOR FINANCESecond Respondent |

|  |  |
| --- | --- |
| order made by: | BROMWICH J |
| DATE OF ORDER: | 29 january 2021 |

THE COURT ORDERS THAT:

1. The claims made by paragraphs 1 and 2 of the originating application dated 17 July 2020, insofar as they are reflected in grounds 1, 3 and 4 of the amended statement of grounds of judicial review dated 7 October 2020, be dismissed.
2. The question of costs of and incidental to the above claims and grounds be reserved.
3. The parties confer and within 14 days, or such longer time as may be allowed, email the associate to Justice Bromwich agreed or competing draft procedural orders for the hearing and determination of the remaining parts of the applicant’s case, being:
	1. any part of the claims made by paragraphs 1 and 2 of the originating application dated 17 July 2020, to the extent they remain in ground 2 of the amended statement of grounds of judicial review dated 7 October 2020; and
	2. the claims made by paragraph 3 of the originating application dated 17 July 2020.
4. In the event that there are any outstanding procedural issues which require an in court adjudication, the balance of the applicant’s case as set out in order 3 above be listed for a case management hearing on a date to be fixed in February 2021 in consultation with the parties.

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

REASONS FOR JUDGMENT

BROMWICH J

## Introduction

1. The applicant, Mr James Ashby, by an originating application, sues the Commonwealth of Australia and the **Minister** for Finance in relation to the refusal of his application for an act of grace payment under s 65(1) of the *Public Governance, Performance and Accountability Act 2013* (Cth) (***PGPA Act***). Section 65 of the *PGPA Act* provides that the Minister may, on behalf of the Commonwealth, “*authorise, in writing, one or more payments to be made to a person*” if the Minister “*considers it appropriate to do so because of special circumstances*”. A decision to consider such an application and to authorise such a payment may be made by a delegate of the Minister: *PGPA Act* s 107. In the present case, the delegation enabling the delegate’s decision is itself challenged. The grounds pleaded in support of the applicant’s claims are contained in a document titled “*Amended Statement of Grounds of Judicial Review*” dated 7 October 2020, which expressly replaces the entirety of a concise statement that was filed by Mr Ashby at the same time as the originating application.
2. Mr Ashby accepts that the discretion to grant or refuse an act of grace application is broad and substantially unfettered, including by reference to authority on the predecessor to s 65(1), being s 33 of the *Financial Management and Accountability Act 1997* (Cth). This section is cast in substantially identical terms to the present section, including by reference to “*special circumstances*” which may authorise the making of a payment to a person: see *Toomer v Slipper* [2001] FCA 981 at [8], [29]-[32] and [47], a decision which was followed and applied in *Croker v Minister for Finance* [2011] FCA 1188 and *Simeon v Minister for Finance* [2012] FCA 286.
3. The originating application has two dimensions:
4. a judicial review application brought under ss 5 and 16 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (***ADJR Act***) and/or s 39B of the *Judiciary Act 1903* (Cth) in relation to the Minister’s delegate’s refusal of the act of grace application; and
5. a claim that this refusal was adverse action contrary to the *Fair Work Act* *2009* (Cth).
6. Most of the judicial review aspect was heard separately and first, by reference to grounds 1, 3 and 4 in the Amended Statement of Grounds of Judicial Review. This judgment is only concerned with those three grounds. Ground 2 is not part of this aspect of Mr Ashby’s case and therefore not a part of this judgment. Nor are the claims made in paragraph 3 of the originating application, based upon the *Fair Work Act*, addressed in this judgment.

## Background

1. In the period between 22 December 2011 and 23 October 2012, Mr Ashby was employed under the *Members of Parliament (Staff) Act 1984* (Cth) (***MOP(S) Act***) to work for the then Speaker of the House of Representatives, Mr Peter Slipper MP. On 20 April 2012, Mr Ashby brought a proceeding in this Court against Mr Slipper and against the Commonwealth. He alleged sexual harassment and misuse of parliamentary entitlement by Mr Slipper, and sought relief under the *Fair Work Act* and at common law. The history of that proceeding is summarised in a document that he furnished in support of his act of grace payment application. Aspects of the following, insofar as they are not disputed by the respondents, are drawn from that document, and also from the text of judgments referred to.
2. Mr Slipper and the Commonwealth each filed interlocutory applications, respectively on 8 June 2012 and 13 June 2012, seeking summary dismissal or a permanent stay of the proceeding brought by Mr Ashby. Those applications were heard together, commencing on 23 July 2012: see *Ashby v Commonwealth of Australia (No 4)* [2012] FCA 1411; 209 FCR 65.
3. On 4 October 2012, a deed of settlement was executed by Mr Ashby and the Commonwealth, in accordance with a without prejudice offer made by the Commonwealth. That deed resolved Mr Ashby’s claim against the Commonwealth and provided for certain mutual releases. The Commonwealth in turn agreed to pay Mr Ashby $50,000; to implement an improved education program for staff employed under the *MOP(S) Act* concerning the process by which issues of bullying and harassment could be brought to its attention and remedied; and to offer specific training for Members of the House of Representatives and Senators in relation to issues of sexual harassment. The deed did not contain any admissions.
4. On 12 December 2012, the interlocutory application maintained by Mr Slipper was granted and Mr Ashby’s proceeding was summarily dismissed as an abuse of process. On 27 February 2014, an appeal by Mr Ashby succeeded by majority: *Ashby v Slipper* [2014] FCAFC 15; 219 FCR 322. At [115] of that judgment, the majority made an observation about Mr Ashby’s apparent motivation in bringing the proceeding, being a goal of the prevention of future harm. The Full Court there noted that the pursuit of stopping a perceived harm through channels other than the seeking of legal advice did not render the litigation as meaningless or a sham. However, in a subsequent unanimous judgment, the same Full Court made it clear that this was only a qualitative assessment of the material advanced in support of the summary dismissal, not a positive finding in Mr Ashby’s favour about his reasons for bringing the proceeding, which was neither appropriate nor possible without a full factual hearing: *Ashby v Slipper (No 3)* [2015] FCAFC 9; 317 ALR 623 at [46]-[47].
5. After Mr Ashby’s appeal to the Full Court had been heard in May 2013, and before judgment was delivered on 27 February 2014, the then acting Special Minister for State announced, by a press release on 12 June 2013, that the Commonwealth would pay the legal costs incurred by Mr Slipper in connection with that proceeding. On 10 July 2013, a deed was entered into by the Commonwealth by which it agreed irrevocably to provide Mr Slipper with reimbursement for certain legal expenses incurred by him in various proceedings in this Court. The delegate explained why that deed and payment in favour of Mr Slipper was made as follows:

In 2014, the Government implemented insurance arrangements to ensure that all MPs have an entitlement to public and management liability insurance. On July 2014, the Government implemented management liability insurance for liabilities incurred by Federal MPs and Senators. This form of insurance is common for employers and managers. As the proceedings against Mr Slipper commenced prior to management liability insurance arrangements for MPs and Senators Mr Slipper was unable to access this coverage.

1. In June 2014, Mr Ashby withdrew the action against Mr Slipper before a trial could take place. By then, Mr Ashby had incurred substantial legal costs, described in the supporting documentation to his act of grace application as “*millions of dollars for legal fees and disbursements*”. These costs were owed to his lawyers at the time of his act of grace payment application and I understand that they remain outstanding.

**Act of grace payment application, decision and reasons**

1. Mr Ashby’s act of grace payment application was made in October 2018. In that application, Mr Ashby, through his lawyers, sought the payment of $4,537,000. The basis of the act of grace payment application was to redress an asserted injustice in relation to the proceeding that he had brought against Mr Slipper and the Commonwealth.
2. After a lengthy process of competing submissions to the delegate by Mr Ashby and by the Minister’s Department, on 8 May 2020 a delegate of the Minister decided not to authorise an act of grace payment. Reasons were subsequently sought and were provided on 19 June 2020.
3. In this proceeding, Mr Ashby submits that the two main reasons advanced to the delegate in support of his act of grace payment application were:
4. the fact that he was a whistle-blower and had sought to achieve a desirable public objective in the exposure and prevention of sexual harassment and misuse of parliamentary entitlements by a senior Commonwealth office-holder; and
5. the inequitable treatment in making an act of grace payment in favour of Mr Slipper, who already had greater resources and was the alleged wrongdoer.
6. On 19 October 2020, Mr Ashby sought an internal review of the delegate’s decision. The respondents rely upon that application having been made as being relevant to the exercise of the Court’s discretion to grant relief on the judicial review aspect of this proceeding.
7. The delegate advised by letter dated 8 May 2020 and addressed to the solicitors for Mr Ashby that he had decided, under s 65(1) of the *PGPA Act*, “*not to authorise an act of grace payment in this instance*”. That decision was made by the delegate, who agreed with a recommendation contained in a memorandum addressed to him and also dated 8 May 2020. A notation on that memorandum indicated that there may have been additional reasons to those in the memorandum if a statement of reasons was sought by Mr Ashby.
8. By a letter dated 29 May 2020, Mr Ashby’s solicitors requested reasons under s 13 of the *ADJR Act*. By a further letter dated 19 June 2020, the delegate furnished written reasons. Those reasons stated that in making the decision, the delegate had regard to the full contents of the Department’s file, including the request and competing submissions (a total of seven documents), and also had regard to the guidance contained in a document titled “***Resource Management Guide No. 401****, Requests for discretionary financial assistance under the Public Governance, Performance and Accountability Act 2013*”.
9. The delegate’s reasons summarised the claims made by Mr Ashby by way of detailed dot points, including in particular his claims to be a whistle-blower, and also his response to aspects of submissions made by the Minister’s Department. However, that specific claim did not expressly feature in the delegate’s findings on material questions of fact, nor in the reasons for deciding not to approve an act of grace payment.

## Ground 1 – error in addressing the whistle-blower claim

1. Mr Ashby submits that the delegate did not deal with his claim of being a whistle-blower who was motivated by the public interest in seeking to expose wrongdoing and prevent the sexual harassment of others. He alternatively submits that the failure to deal with this claim was a failure to complete the exercise of jurisdiction, a denial of procedural fairness, or a failure to take into account a mandatory relevant consideration or to give adequate reasons. Although expressed in different ways, the substance of this ground is that the required level of consideration of this aspect of his application did not take place on various bases.
2. Mr Ashby relies upon a body of authority in support of his submission that the delegate was required to consider all of the claims advanced by him or apparent on the face of the material, including the component integers of his claim. He submits in his act of grace payment application, and asserted in subsequent supporting submissions, that he was a whistle-blower acting in the public interest to raise serious allegations about a public figure and that his allegations were vindicated.
3. Mr Ashby submits that his allegations as to what had taken place and as to his corresponding motives in bringing the proceeding against Mr Slipper were factually correct. This submission was made by reference to a summary of parts of the majority decision of the Full Court dealing with his allegations contained in a schedule to the original application letter, and in a submission letter dated 26 April 2019. As noted above at [8], contrary to this particular submission, the Full Court did not make a final judicial determination on the making out of any allegations, or the actual existence of any relevant motive. In this way the statements of the Full Court appear to have been taken out of context for the purpose of the application, and maintained in this proceeding. The actual effect of the Full Court’s statement was that the factual circumstances of the matter did not render the proceedings illegitimate, and the statement merely served as an assessment of the material that was before the primary judge for the purposes of the summary judgment application.
4. Mr Ashby characterises this aspect of his act of grace payment application as “*important*”. He therefore urges this Court to conclude that the delegate did not deal with these claims, because no findings were made or conclusions reached about Mr Ashby’s motivations, whether his actions were in the public interest, or on any of the merits or truthfulness of the allegations made. In substance, he submits that even though these claims did not have to be accepted, they had to be dealt with, and could not be ignored, or merely noted or recorded as having been made, just because of the breadth of the discretion in s 65(1).
5. As conceded in Mr Ashby’s amended submissions, where a decision-maker does not expressly refer to a topic in their reasons, it does not mean that no consideration has been given to that topic. Further, the degree to which an administrative decision-maker is obliged to consider the granular details of claims made is first and foremost determined by the terms of the statute under which the decision is to be made. As Brennan J pointed out in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 55, in a passage quoted with approval by Gleeson CJ and McHugh J in ***Foster*** *v Minister for Customs and Justice* [2000] HCA 38; 200 CLR 442 at [22]:

The Court has no jurisdiction to visit the exercise of a statutory power with invalidity for failure to have regard to a particular matter unless some statute expressly or by implication requires the repository of the power to have regard to that matter or to matters of that kind as a condition of exercising the power.

1. In applying that principle, Gleeson CJ and McHugh J said at [23] in *Foster* that there had to be found in the legislation an implied obligation to examine and investigate the matter said to have been overlooked at the level of particularity which it is argued is required. In the present case, there is no proper reason for not taking the delegate at his express word that he had taken into account all the material advanced in support of Mr Ashby’s application for an act of grace payment: *Minister for Immigration and Border Protection v Sabharwal* [2018] FCAFC 160 at [76]. The only “*likely*” reason proffered by Mr Ashby to counter the delegate’s word, is that the delegate did not properly consider this point because of a supposed choice “*not to get into something that is a difficult topic*”. Especially given the express references to Mr Ashby’s claim to be a whistle-blower, this is not a sufficient foundation for submitting that there was no consideration at all of the matter. The real question is therefore whether more was required by way of consideration of this aspect of Mr Ashby’s application for an act of grace payment.
2. As Deane J pointed out in *Sean Investments v MacKellar* (1981) 38 ALR 363 at 375, where relevant considerations are not specified in relation to the exercise of an executive power, it is largely for the decision-maker, in the light of the material furnished, to decide relevance and comparative importance. These fundamental statements of principle are not diluted by Mr Ashby’s reliance on isolated passages in migration cases containing statements as to what needed to be considered. This is particularly so given the very different statutory context in migration cases in which factual claims may have elevated significance due to the statutory criteria for granting or refusing a visa, or for related decisions such as the cancellation and revocation of cancellation of a visa.
3. Merely declining to give a particular claim or part of a claim in support of an application for an act of grace payment weight or significance, including by way of making findings on material questions of fact about it and in reaching determinative conclusions, does not, without more, demonstrate that there is a vitiating deficiency in the decision-making process. Doubtless Mr Ashby considered that his asserted status as a whistle-blower, and his asserted public interest motive in bringing the proceeding against Mr Slipper and the Commonwealth, were of great and even determinative significance in his application for an act of grace payment. However, the delegate was not obliged to share that view or to treat such claims as being significant, let alone determinative.
4. There was nothing legally wrong, or inconsistent with the proper exercise of jurisdiction, or any denial of procedural fairness in the delegate deciding to give determinative weight, as he did, to other aspects of the material that was before him. Key amongst them, which may be seen to encompass the whistle-blower and public interest motivation claims in any event, is the delegate’s rejection of the argument that Mr Ashby had no option but to commence the proceeding in this Court. The delegate found, to the contrary, that there were alternative options available to Mr Ashby. Implicit in that conclusion is that Mr Ashby’s whistle-blowing and public interest motivations could have been advanced by other means than a court proceeding. The delegate noted in that regard that Mr Ashby:
5. had access to a confidential, professional counselling service, provided by contracted suppliers, to assist with work and personal issues through an Employee Assistance Program;
6. had access to the ***Bullying, Harassment and Workplace Violence Policy*** *and Procedure for MOP(S) Act Employees*, which was available from February 2012, and which set out a complaints resolution procedure for *MOP(S) Act* employees;
7. was able to lodge claims under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (***SRC Act***) in relation to any injuries arising out of his employment;
8. did not raise any concerns about Mr Slipper’s conduct with the Department prior to commencing proceedings, nor seek guidance on the complaints resolution procedure that was available to him; and
9. did not seek redress or remedy through non-litigious means, such as under the *Bullying, Harassment and Workplace Violence Policy*, and did not make any claim under the *SRC Act*, despite seeking compensation in the proceeding in this Court for costs relating to injury.
10. The delegate had earlier acknowledged Mr Ashby’s claim that the options of seeking redress under the *Bullying, Harassment and Workplace Violence Policy*, or raising his concerns with the Finance Department prior to commencing proceedings, or seeking guidance on the complaints resolution procedure were not viable. It is clear that these contentions were not accepted.
11. The delegate acknowledged that Mr Ashby had a right to commence proceedings under the *Fair Work Act*, but found that commencing such a proceeding should have been done acknowledging the potential cost involved. The delegate noted that legal costs are an issue for an individual and their legal representative to consider prior to commencing proceedings, and noted that all legal proceedings have risks as to costs. The conclusion reached by the delegate was as follows:

I do not consider there are special circumstances which would merit approving an act of grace payment when considering the facts of the matter as a whole.

With regard to Mr Ashby’s financial situation, Mr Ashby chose to instigate the legal action. Legal action always contains an element of risk in relation to both the outcome and the costs involved. The payment of legal expenses is a matter to be managed between an individual and their legal representative. Mr Ashby chose to pursue litigation where alternate, and potentially more economical, options were available to him to seek a remedy in relation to his matter.

Mr Ashby’s position, as instigator of the legal action is not analogous to that of Mr Slipper. While Mr Ashby may have sought redress through other mechanisms, Mr Slipper was required to respond to the legal action once it was instigated by Mr Ashby. Mr Slipper received an act of grace payment in lieu of management liability insurance that was not available to members of parliament at the time the legal action commenced. There is no clear basis for the argument that providing an act of grace approval to Mr Slipper influenced the manner in which the litigation was undertaken. The litigation was instigated in April 2012, and act of grace approval was provided in July 2013. As such the provision of the act of grace approval could not have influenced the management of the case in this period.

1. In light of the basis upon which the application for an act of grace payment was not approved by the delegate, I am not satisfied that the delegate was required to give any further or better consideration of Mr Ashby’s claims to be a whistle-blower, or his claimed motivation for commencing the proceeding against Mr Slipper and the Commonwealth. The delegate was entitled to give those considerations no separate weight and not to address them further in the findings of material facts or in the reasons or conclusions reached. Necessarily, that means no further or better reasons were required on this topic.
2. It follows that no vitiating error has been established, and this ground must therefore fail.

## Ground 3 – irrationality and constructive failure to exercise jurisdiction

1. The essence of the submissions on this ground are that:
2. the delegate’s finding that the act of grace payment approval in favour of Mr Slipper did not influence the proceedings brought by Mr Ashby was irrational, so as to constitute a decision beyond jurisdiction, an improper exercise of power, or an error of law, such that it would give rise to relief under s 5(1)(c), (e) or (f) of the *ADJR Act*; and
3. in the course of finding that the proceedings brought by Mr Ashby did not become highly political, the delegate failed to deal with relevant evidence, amounting to a constructive failure to exercise jurisdiction, an improper exercise of power or an error of law, so as give rise to relief under s 5(1)(e) or (f) of the *ADJR Act*.
4. The first aspect of this ground relies upon the delegate’s reasoning that it was necessary to examine any special circumstances which may make it appropriate to approve an act of grace payment: *Resource Management Guide No. 401* [9]. This was stated to include whether an act of a non-corporate Commonwealth entity had caused an unintended and inequitable result in Mr Ashby’s circumstances, which was outside the parameters of events for which he was responsible or had the capacity to adequately control: *Resource Management Guide No. 401* [10]. Mr Ashby expressly takes no issue with such criteria being applied by the delegate. However, he submits that it was irrational for the delegate to find, as set out in the conclusion of the delegate’s reasons reproduced at [28] above, that there was no clear basis for the suggestion that providing an act of grace approval to Mr Slipper influenced the manner in which the litigation was undertaken in the period between when it was commenced and when an act of grace payment was made in favour of Mr Slipper in July 2013. It should be noted that Mr Ashby’s appeal to the Full Court was heard in May 2013, prior to the act of grace payment decision in favour of Mr Slipper; that the Full Court’s decision was reserved until 27 February 2014; and that Mr Ashby abandoned his case against Mr Slipper several months later in June 2014.
5. Mr Ashby’s submissions construe the delegate’s reasons as though they extend to the period after the act of grace approval in favour of Mr Slipper took place. The reasons did not say that there was no basis for an argument that the act of grace payment would have influenced the course of the litigation after the act of grace payment was made, and they expressly refer to the relevant period being the period before the payment was made. Read literally, there was nothing irrational in this impugned aspect of the delegate’s reasons, as Mr Ashby’s submissions tacitly accept by attempting to have them apply to the period beyond that to which the delegate was expressly referring.
6. Even if the delegate’s reasons were not so confined, the Full Court hearing of Mr Ashby’s matter occurred in May 2013, so the relevant period which Mr Ashby says was logically influenced by the act of grace payment made to Mr Slipper was mostly consumed by the period during which the Full Court decision was reserved. Mr Ashby does not identify how there was any meaningful opportunity for any party to the matter to exert any asserted influence over the litigation while awaiting the decision of the Full Court. It would not have been irrational, and indeed would have been reasonably open for the delegate to reach a conclusion on the evidence that there was no reasonable basis for an argument that such an influence over the litigation existed. Instead, as already noted, the delegate stopped short of that, and found no clear basis for the argument that providing an act of grace approval to Mr Slipper had influenced the manner in which the litigation was undertaken. I can see no error in the delegate not being satisfied that there was enough to establish the existence of the influence that was asserted to exist, as apparently being self-evident rather than shown to exist.
7. The second aspect of this ground relies upon the following passage of the delegate’s reasons:

For completeness, I note that you do not believe these matters proceeded as normal litigation. You believe the proceedings became highly political, with the then ALP Commonwealth Government agreeing to indemnify the alleged perpetrator, Mr Slipper, for his legal costs allowing Mr Slipper to adopt expensive adversarial tactics. I do not have any evidence of these claims, and therefore give no weight to the same and they will not be addressed any further.

1. Mr Ashby’s complaint is based on characterising the above finding as being a conclusion that no evidence existed as to the proceedings he had commenced becoming highly political, when he submits that there was evidence before the delegate to that effect. He therefore characterises this as a constructive failure to exercise jurisdiction, so as to amount to an improper exercise of power or an error of law.
2. The basis for asserting that there was at least some evidence before the delegate that the proceeding had become highly political is said to be found in:
3. “*coordinated*” abuse of process applications by Mr Slipper and the Commonwealth;
4. the Commonwealth seeking to participate in the proceedings as amicus curiae after settling the proceeding with Mr Ashby (a point abandoned in Mr Ashby’s reply submissions); and
5. the decision to support Mr Slipper by paying his legal costs.
6. The short answer to that argument is that the delegate was not compelled to regard any of those characterisations, without more, as amounting to evidence that the proceeding had become highly political. No evidence was identified that there was any coordination in the filing of the two separate interlocutory applications seeking summary judgment, but even if there had been it is difficult to understand why any such coordination between co-respondents would amount to anything more than an ordinary incident of litigation. Even if the Commonwealth sought to participate amicus curiae, which is no longer pressed, that again falls well short of inevitably making the proceeding “*highly political*”. Nor did agreeing to meet Mr Slipper’s legal costs, for the reasons identified by the delegate, contribute in any clear way to the asserted conclusion that the proceeding was “*highly political”*. Viewed in that way, which does not require even a beneficial reading, it has not been established that there was any overlooking of evidence which established, let alone established in a way that the delegate was in some way bound to accept, that the proceeding had become “*highly political*”. Each of those arguments depends upon those factors being capable of being understood in only one way, when that is not even the better way to comprehend them, let alone the only way.
7. Mr Ashby has not made good any case of constructive failure to exercise jurisdiction, improper exercise of power or other error of law. It follows that this ground must also fail.

## Ground 4 – error in the delegation of authority to the delegate

1. In support of this ground of review, Mr Ashby submits that the delegation of authority to decide whether an act of grace payment application should be granted was flawed, with the consequence that the delegate either did not have authority to refuse the application, or alternatively, an impermissible fetter was placed on the delegate’s ability to exercise the discretion.
2. Section 107 of the *PGPA Act* gives the Minister the power to delegate the exercise of his or her power to the **Secretary** of the **Department** of Finance. That power of delegation was exercised by the Minister, authorising the Secretary to consider all applications for act of grace payment, but limiting written authorisation for act of grace payments to $100,000. Section 109 of the *PGPA Act* gives the Secretary power to, inter alia, further delegate powers to officials within the Department by an instrument in writing. The Secretary’s power of delegation was relevantly exercised by way of the Secretary of the Department of Finance (Cth), *Public Governance, Performance and Accountability (Finance Secretary to Finance Officials)* ***Delegation 2020 (No 1)*** (22 January 2020), being the instrument that is now challenged. Part 11 of Schedule 1A of *Delegation 2020 (No 1)* at cl 11.1 conferred on delegates, by reference to identified positions within the Department, two powers, in keeping with the delegation from the Minister. The clause provided:
3. for an unrestricted or plenary power, in common for all named delegate positions and in common with the delegation to the Secretary herself, to “*consider all applications for act of grace payment*”, without any stated cap or limit: cl 11.1(1) of *Delegation 2020 (No 1)*; and
4. that a delegate “*may not provide written authorisation for act of grace payments for amounts in excess of*” specified limits from $100,000 to $10,000 per payment by reference to particular positions held from Deputy Secretary to Director level: cl 11.1(2) of *Delegation 2020 (No 1)*.
5. It is common ground that the relevant delegate in the present matter was the Assistant Secretary of the Risk and Claims Branch, Procurement and Insurance Division, and that the applicable monetary cap for that delegation was “*$50,000 per payment*”.
6. Mr Ashby contends that this part of *Delegation 2020 (No 1)* can only be interpreted in one of two ways, both of which render the delegate’s decision invalid by reason of flaws in that delegation. That is because, on his argument, either:
7. the delegate purported to refuse his application on a final basis, which he did not have power to do because the application sought more than $100,000, such that he was authorised to consider it, but not to refuse it, those two aspects being part of a single discretion; or
8. the delegationpurported to give the delegate power to refuse the application, but not to approve it because it sought more than $100,000, which was invalid because the power under s 65 of the *PGPA Act* could not be bestowed only to refuse an application, but not to grant it.
9. A necessary part of Mr Ashby’s argument is therefore that there is but one decision-making step in either granting or refusing an act of grace application. Mr Ashby submits that the process of considering an application, and at that stage making a decision not to authorise an act of grace payment, is bundled up with the decision to authorise in writing the making of an act of grace payment. He argues further that both steps are required to be carried out by the same person.
10. The practical effect of this interpretation would be that the Minister or the Secretary would have to deal with all applications for act of grace payments that sought sums of money in excess of $100,000, irrespective of their merit. No proper process of screening would be possible in deciding the question of appropriateness by reason of special circumstances being shown to exist before such senior individuals had to become involved. At most, someone more junior could make a recommendation, but the decision would still have to be made at that level. The alternative would be to enlarge the pool of persons delegated to approve the payment of substantial sums of public money, noting that authorisation to pay any sum above $100,000 must be given by the Minister in person.
11. There needs to be a compelling reason to read a delegation and the statutory power to which it relates in such an impractical and improbable way, apparently contrary to its evident purpose: see ***Taylor*** *v Public Service Board (NSW)* (1976) 137 CLR 208 at 214 and 219; see also *Fisk v Chief of the Defence Force (No 2)* [2017] FCA 1490 at [32]. In *Taylor*, a delegate was able to determine that disciplinary charges had been made out, and the Board then adopted that finding in order to make the dismissal decision. The High Court decided there was nothing wrong in the function being divided in that way. Any other interpretation would have involved practical inconvenience and a frustration of the evident purpose of the power of delegation.
12. I do not consider that Mr Ashby’s construction is the sensible or correct way in which to read this part of *Delegation 2020 (No 1)* in relation to the power being delegated under s 65(1) of the *PGPA Act*. The plain words of s 65(1) contemplate two separate steps: first, to consider whether it is appropriate that an act of grace payment be made by reason of special circumstances being demonstrated, and if not, to decide upon that basis not to authorise an act of grace payment; and second, only if satisfied it is appropriate that an act of grace payment be made by reason of special circumstances being demonstrated, to decide whether to authorise such a payment being made.
13. Thus the way in which s 65(1) is expressed puts paid to the suggestion made by Mr Ashby that the general rule of administrative functions being indivisible must apply: cf *GPT Re Ltd v Wollongong City Council* [2006] NSWLEC 303; (2006) 151 LGERA 116 at [49], affirmed by *Belmorgan Property Development Pty Ltd v GPT Re Ltd* [2007] NSWCA 171; 153 LGERA 450 at [1], [53]-[54] and [75]; also cf *Singh v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 90 ALR 397 at 402. The present case concerns a very different statutory regime than one which, drawing from the examples in the authorities referenced above, provides for consent to be granted or refused by a council, or for a visa to be granted or refused, which are powers generally cast in terms that do not permit the binary nature of grant or refusal to be split and require the same considerations to be addressed either way. Rather, the two functions in s 65(1), one operating as a gateway to the other, are spelt out in the provision bestowing the power, being s 65(1). An application can fail at the first hurdle, without there being any need to consider authorisation of a payment if that point is not reached.
14. The design of this part of *Delegation 2020 (No 1)*, following the clear and express structure of s 65(1) of the *PGPA Act*,is to give much wider scope, by a wider pool of delegations descending down to lower (but still senior) levels of the bureaucracy, to consider act of grace applications, but to give much narrower scope to the approval of payments to be made by reference to the amount of money involved if the first hurdle is surmounted. As noted above, not even the Secretary may authorise an act of grace payment of over $100,000.
15. If the requirement of a payment being appropriate by reason of special circumstances is not met, the step of approval of a payment is never reached. The lower the amount sought, and considered appropriate by reason of special circumstances being established, the more likely it is that a single delegate can decide the second step if the threshold question has been met. In this case, had the delegate formed the view that a payment was appropriate because special circumstances had been established, then, if the amount in contemplation was above that delegate’s cap, the appropriate delegate to consider approval of a payment, perhaps by the Minister in person, would have been revealed by that amount, which might or might not have been at the level sought by the application.
16. For completeness, it should be observed that this interpretation of both s 65(1) of the *PGPA Act* and of this part of *Delegation 2020 (No 1)* is supported by s 24 of the *Public Governance, Performance and Accountability* ***Rule*** *2014*, made under the *PGPA Act*, the express purpose of which is to require the Minister to consider the report of an advisory committee before, inter alia, making an authorisation for an act of grace payment that involves an amount in excess of $500,000. Section 24 of the *Rule* contemplates appropriateness potentially requiring more than special circumstances being established. Section 65(2) of the *PGPA Act* provides that authorisation of a payment, thus recognised to be a separate exercise of power, must be in accordance with any requirements prescribed by such rules. It is therefore clearly contemplated, contrary to Mr Ashby’s argument, that when considering whether an application for an act of grace payment should result in a payment being authorised, it will first and separately be determined whether any such payment first meets the test of being appropriate by reason of special circumstances having been established.
17. Ground 4 must therefore fail.

## Conclusion

1. As none of grounds 1, 3 or 4 of the amended statement of grounds of judicial review have been made out, to the extent that paragraphs 1 and 2 of the originating application depend on those grounds they must fail. It is appropriate to defer the question of costs until the balance of Mr Ashby’s case is heard, not least because that may entail a consideration of the application of s 570 of the *Fair Work Act* to the balance of this proceeding, and thereby to this aspect of the proceeding.

|  |
| --- |
| I certify that the preceding fifty-three (53) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Bromwich. |

Associate:

Dated: 29 January 2021