Van den Berg v Monash Health [2022] FCA 796

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| File number(s): |  |
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| Judgment of: | **O'CALLAGHAN J** |
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| Date of judgment: | 11 July 2022 |
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| Catchwords: | **COURTS** – practice and procedure – whether order by a judge of the Federal Circuit and Family Court of Australia (Division 2) to transfer civil proceeding to the Federal Court of Australia should be confirmed pursuant to s 32AD of the *Federal Court of Australia Act 1976* (Cth) – where judge failed to consider mandatory criteria for transfer – where no sufficient grounds to warrant transfer – transfer not confirmed |
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| Legislation: | *Federal Circuit and Family Court of Australia Act 2021* (Cth) ss 153, 153(3), 154  *Federal Court of Australia Act 1976* (Cth) ss 20(1A), 32AD, 32AD(1)  *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth) rr 8.02, 8.02(4), 8.02(4)(a) |
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| Cases cited: | *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 3; (2022) 397 ALR 1  *Van Den Berg v Monash Health* [2022] FedCFamC2G 456 |
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| Date of last submission/s: | 7 July 2022 |
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| Date of hearing: | Determined on the papers |
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| Counsel for the Applicant: | The Applicant appeared in person |
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| Solicitor for the Respondent: | Lander & Rogers Lawyers |

ORDERS

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|  | | VID 318 of 2022 |
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| BETWEEN: | STEVEN VAN DEN BERG  Applicant | |
| AND: | MONASH HEALTH  Respondent | |

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| order made by: | O'CALLAGHAN J |
| DATE OF ORDER: | 11 JULY 2022 |

THE COURT ORDERS THAT:

1. Pursuant to section 32AD(1) of the *Federal Court of Australia Act 1976* (Cth), it declines to confirm the order made by Judge O’Sullivan on 10 June 2022 transferring proceeding no. MLG 859 of 2021 to the Federal Court of Australia.

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

REASONS FOR JUDGMENT

O’CALLAGHAN J:

## Introduction

1. On 10 June 2022, a judge of the Federal Circuit and Family Court of Australia (Division 2) (the **FCFCOA**) ordered that:

Pursuant to s.153 of the *Federal Circuit and Family Court of Australia Act 2021* (Cth), these proceedings be transferred to the Federal Court of Australia to be listed with such priority as that Court deems appropriate.

See *Van Den Berg v Monash Health* [2022] FedCFamC2G 456.

1. That order cannot take effect unless it is confirmed by a judge of this court pursuant to s 32AD(1) of the *Federal Court of Australia Act 1976* (Cth).

## Relevant provisions

1. Section 153(3) of the *Federal Circuit and Family Court of Australia Act 2021* (Cth) provides as follows:

**Division 2—Transfer of proceedings to the Federal Court**

**153 Discretionary transfer of proceedings**

(1) If:

(a) a proceeding is pending in the Federal Circuit and Family Court of Australia (Division 2); and

(b) the proceeding is not a family law or child support proceeding;

the Court may, by order, transfer the proceeding from the Court to the Federal Court.

(2) The Federal Circuit and Family Court of Australia (Division 2) may transfer a proceeding:

(a) on the application of a party to the proceeding; or

(b) on its own initiative.

(3) In deciding whether to transfer a proceeding to the Federal Court, the Federal Circuit and Family Court of Australia (Division 2) must have regard to:

(a) any Rules of Court made for the purposes of subsection 154(2); and

(b) whether proceedings in respect of an associated matter are pending in the Federal Court; and

(c) whether the resources of the Federal Circuit and Family Court of Australia (Division 2) are sufficient to hear and determine the proceeding; and

(d) the interests of the administration of justice.

(4) If an order is made under subsection (1), the order takes effect on the day that the order is confirmed by the Federal Court under section 32AD of the *Federal Court of Australia Act 1976*.

(5) The Federal Circuit and Family Court of Australia (Division 2) may make such orders as it considers necessary pending the order transferring the proceeding being confirmed by the Federal Court.

(6) An appeal does not lie from a decision of the Federal Circuit and Family Court of Australia (Division 2) in relation to the transfer of a proceeding under this section.

(7) This section does not apply to proceedings of a kind specified in the regulations.

1. Section 154 of the Federal Circuit and Family Court of Australia Act provides:

**154 Rules of Court**

(1) The Rules of Court may make provision in relation to transfers of proceedings to the Federal Court under subsection 153(1), including in relation to the scale of costs that applies to any order made in respect of proceedings that are transferred.

(2) In particular, the Rules of Court may set out factors that are to be taken into account by the Federal Circuit and Family Court of Australia (Division 2) in deciding whether to transfer a proceeding to the Federal Court under subsection 153(1).

(3) Before Rules of Court are made for the purposes of this section, the Chief Judge of the Federal Circuit and Family Court of Australia (Division 2) must consult the Chief Justice of the Federal Court.

1. Rule 8.02 of the *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth) provides:

**8.02 Transfer to Federal Court**

(1) The Court may, at the request of a party or on its own initiative, transfer a proceeding to the Federal Court.

(2) Unless the Court otherwise orders, a request for transfer must be made on or before the first court date for the proceeding.

(3) Unless the Court otherwise orders, the request must be included in a response or made by application supported by an affidavit.

(4) In addition to the factors to which the Court must have regard under subsection 153(3) of the Act in deciding whether to transfer a proceeding to the Federal Court, the Court must take the following factors into account:

(a) whether the proceeding is likely to involve questions of general importance, such that it would be desirable for there to be a decision of the Federal Court on one or more of the points in issue;

(b) whether, if the proceeding is transferred, it is likely to be heard and determined at less cost and more convenience to the parties than if the proceeding were not transferred;

(c) whether the proceeding will be heard earlier in the Court;

(d) the availability of particular procedures appropriate for the class of proceeding;

(e) the wishes of the parties.

1. Section 32AD of the Federal Court Act is headed “Confirmation of civil proceedings transferred from the Federal Circuit and Family Court of Australia (Division 2)” and provides:

(1) If the Federal Circuit and Family Court of Australia (Division 2) makes an order under subsection 153(1) of the *Federal Circuit and Family Court of Australia Act 2021* transferring a proceeding to the Court, the Court may, by order, confirm the transfer of the proceeding to the Court.

Note: The transfer of a proceeding takes effect on the day the Court makes an order under this section in relation to the proceeding: see subsection 153(4) of the *Federal Circuit and Family Court of Australia Act 2021*.

(2) The Court may, in its discretion, receive further evidence to decide whether to make an order under subsection (1) …

(3) The Court has jurisdiction in a matter that:

(a) is the subject of a proceeding transferred to the Court by the Federal Circuit and Family Court of Australia (Division 2); and

(b) is a matter in which the Court does not have jurisdiction apart from this subsection.

To avoid doubt, the Court’s jurisdiction under this subsection is not subject to limits set by another provision.

(4) An appeal does not lie from a decision of the Court in relation to an order made under subsection (1) confirming the transfer of a proceeding.

## Background

1. The Chief Justice referred to me to hear and determine the question whether this court should, pursuant to s 32AD(1) of the Federal Court Act, confirm the order to transfer the proceeding.
2. In my view, for the reasons that follow, the judge misunderstood his statutory task and there are, in any event, insufficient grounds to warrant confirmation of the order to transfer the proceeding.
3. The applicant, who is self-represented, filed a 167 page statement of claim in the proceeding before the FCFCOA.
4. It is, to be sure, prolix. The applicant makes claims in respect of 41 separate alleged contraventions of the *Fair Work Act 2009* (Cth) (**FW Act**) and the associated *Fair Work Regulations 2009* (Cth), including one contravention which is described as a “serious contravention” in the statement of claim. Some of the individual contraventions are repeated, but in relation to different dates or periods of time worked. By way of example only, “Contravention 20” is headed “Failure to pay wages for 43 minutes worked on Thursday 24th October 2019 between 06:00-06:43 in contravention of Section 323(1) of the [FW] Act”. Contraventions 21 to 26 have similar headings, the only difference being that they each specify a different period of time worked and in respect of a different date. Similarly, Contravention 27 is titled “Altering the record of hours worked by the Applicant on 14th September 2020 in breach of Subregulation 3.44(4) of the Fair Work Regulations 2009 (Cth)”, and Contraventions 28 to 34 repeat that allegation in relation to different dates. The statement of claim is replete with allegations along the same lines.
5. The respondent has filed a defence, and the applicant has replied. The matter was unsuccessfully mediated in the FCFCOA. The matter was then brought on for a directions hearing, at which the judge made orders, of his own volition, that the parties file submissions on the question of whether the FCFCOA should transfer the proceeding to this court.

## The judge’s reasons

1. The judge’s reasons for making the transfer order were set out at [12]ff of his reasons, relevantly as follows:

In making this decision, having considered the relevant matters in the Rules, the Court has also taken into account that the transfer of the matter is opposed by the respondent, supported by the applicant and the matters raised in the submissions provided by both parties.

The Court is satisfied that it is reasonable for the Court to consider, at this point of time, making an order for the transfer of the matter to the Federal Court of Australia, noting the discretion of the Court to do so, after any first Court date.

In terms of the discretionary matters, the Court notes that there are no associated matters pending in the Federal Court of Australia. In terms of the resources of the Court to hear the matter, whilst there is no affidavit material before the Court as such, in the Court’s view, this matter is likely to take a considerable period of time to hear and will involve a number of witnesses other than the applicant and a large amount of documentary information.

Jurisdiction under the FW Act is not exclusive and as acknowledged in *Bullock v AJ & Co Lawyers Pty Ltd* [2021] FCA 149 (‘*Bullock*’) is shared with the Federal Court. Unlike the proceedings in that matter (putting to one side the issue of penalty) the applicant’s prayer for relief in this matter runs to thirty two sub-paragraphs. Moreover, I note the concession in the respondent’s submissions that the s.557A issue involves a question of general importance.

Whilst the submissions of the parties illustrate their views on the complexity of the matter, the issue of cost and conveniences should be looked at in the context of the likely length of the proceedings. … This Court cannot proceed on the basis that the parties will act in a “sensible and pragmatic manner” particularly if the history of this matter is any guide. In that context the respondent’s “good faith” estimate seems more likely.

…

Division 2 of the Federal Circuit and Family Court of Australia is a high-volume trial Court with limited resources to hear lengthy and difficult matters. Such matters are better heard in the Federal Court of Australia that has the resourcing and time to hear such matters. By way of reference, any matter which is likely to involve a hearing over five days in the Family Law Division of the Court, can be transferred from Division 2 to Division 1. As the respondent conceded, the matter is “finely balanced”.

In circumstances of this matter where the Court holds considerable concerns that the matter will go for more than five days and involve a significant amount of both affidavit and documentary evidence, the Court is of the view that it is in the interests of the administration of justice that the matter be transferred.

## Submissions on confirmation hearing

1. I invited the parties to make any submissions in writing as to whether they consented to or opposed the transfer. Having read those submissions, my view is that it is appropriate to determine the matter on the papers.
2. The applicant supported the transfer for the same reasons he advanced below, namely:
3. he accepted the respondent’s estimate that the trial would take eight days, and submitted that the Federal Court’s “view as to when a matter should be transferred hinged upon whether the case would take more than five days to hear”;
4. the respondent conceded that the allegations alleging breach of s 557A of the FW Act involved a question of general importance;
5. his claim involved “widespread practices” across the respondent’s work force and any decision in his favour would have “widespread ramifications” for the respondent’s practices; and
6. the proceeding would place considerable strain on the resources of the FCFCOA.
7. The respondent opposed the transfer for the following reasons:
8. the fact that a trial may occupy more than five hearing days is not a “rule of thumb” sufficient to warrant a transfer;
9. the FCFCOA is skilled and experienced in the determination of FW Act proceedings;
10. the matter was squarely within the original jurisdiction of the FCFCOA; and
11. the interests of the administration of justice requires an evaluative assessment.

## Consideration

1. The respondent correctly submitted that the fact that a hearing of a trial is anticipated to exceed five days is not a sufficient basis for ordering a transfer of a proceeding from the FCFCOA to this court.
2. The applicant submitted, and the judge seems to have thought, that there was a “rule of thumb” arising from a “practice” that if a proceeding is to occupy more than five days, it should be transferred to this court. There is no such rule.
3. Reading the Federal Circuit and Family Court Act and the Rules together, the following is a list of matters which a judge of the FCFCOA ***must*** take into account in deciding whether to transfer a proceeding from that Court to the Federal Court:
4. the interests of the administration of justice;
5. whether proceedings in respect of an associated matter are pending in the Federal Court;
6. whether the resources of the FCFCOA are sufficient to hear and determine the proceeding;
7. whether the proceeding is likely to involve questions of general importance, such that it would be desirable for there to be a decision of the Federal Court on one or more of the points in issue;
8. whether, if the proceeding is transferred, it is likely to be heard and determined at less cost and more convenience to the parties than if the proceeding were not transferred;
9. whether the proceeding will be heard earlier in the FCFCOA;
10. the availability of particular procedures appropriate for the class of proceeding; and
11. the wishes of the parties.
12. The factors relating to “the interests of the administration of justice” referred to in s 153(3) of the Federal Circuit and Family Court Act, however, are not to be confined by the Rules. Those interests will always depend on the nature of the case. Other factors may include whether in any given case:
13. the proceeding involves any properly identified and serious and substantial issue about difficult points of legal principle, or some significant question of public interest;
14. the estimates of the hearing times given by the parties or their representatives are justified; and
15. the issues apparently in dispute can be limited or more narrowly focussed.
16. In some cases the interests of the administration of justice may also involve consideration of the importance of the matters to the parties; and the need for expedition and despatch in the finalisation of the controversy.
17. As to those last two factors, compare *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 3; (2022) 397 ALR 1 at 4-5 [13]‑[15] (Allsop CJ and Besanko and O’Callaghan JJ). In that case, after the proceeding had been transferred from the FCFCOA to this court, and the transfer had been confirmed, the Chief Justice made a direction under s 20(1A) of the Federal Court Act, which is in these terms: “If the Chief Justice considers that a matter coming before the court in the original jurisdiction of the court is of sufficient importance to justify the giving of a direction under this subsection, the Chief Justice may direct that the jurisdiction of the court in that matter or a specified part of that matter shall be exercised by a Full Court”.
18. Although the question that arises under s 20(1A) is of a different kind and arises in a different context, the interests of the administration of justice lie at the core of it. In that regard, and to highlight the wide range of circumstances that may in any given case be relevant to assessing those interests, it is instructive to set out what the Chief Justice said at the commencement of the hearing of the appeal in *Djokovic* on 16 January 2022:

[J]ust before we commence, it’s appropriate that I deal with the matter that arose before Justice O’Callaghan yesterday in relation to the constitution of the bench of the court. Justice O’Callaghan yesterday raised with the parties a matter that I requested be raised and that was the [possible] engagement of section 20 subsection (1A) of the Federal Court of Australia Act …

The question arose whether it was appropriate to make a direction under that subsection. One consequence of the invocation of the section – the subsection is that there is no appeal to another bench of this court from this exercise of an original jurisdiction. The appellate jurisdiction of the court is exercisable in appeals from judgments of the court constituted by a single judge. The right to an appeal from the original jurisdiction is a statutory right but it takes its place within the structure of the Act, including section 20 subsection (1A).

Section 20(1A) gives the Chief Justice authority to constitute the court sitting in the original jurisdiction if the Chief Justice considers that a matter that is a controversy before the court in the original jurisdiction is of sufficient importance to justify giving a direction. The Minister yesterday, before Justice O’Callaghan, opposed the direction stating that there was nothing out of the ordinary in the legal issues before the court to warrant the direction. That, in my view, is too narrow a view of the words “sufficient importance.”

The phrase refers to the controversy but that does not require that the Chief Justice’s consideration be limited to the novelty or importance of the legal issues and their character within the controversy. The controversy is a wider conception and the phrase permits the evaluative consideration of not only the legal issues which are, of course, relevant, but the importance of the matter that is the controversy to the parties and otherwise. I considered the matter of sufficient importance for a number of reasons not the least of which was the fact that the Minister himself said in his decision … :

*That the matters involved in the decision, and thus the matters involved in the controversy, go to the very preservation of life and health of many members of the community and further are crucial to the maintaining of the health system in Australia.*

The applicant said, contrary to the conclusions reached by the Minister, that he acted illogically and irrationally. The importance of the matter in those circumstances is also heightened by the need for expedition and despatch in the finalisation of the controversy not just as an incident of the administration of justice or in the interests of the parties and third parties in the conduct of a major sporting event. But if the Minister is correct … it is important to resolve this controversy as quickly as possible for the reasons the Minister gave.

That this approach is not novel is revealed by how the courts on a regular basis has dealt with other cases. For instance, the practice of the court, both while I have been Chief Justice and in years past, to use section 20(1A) to deal swiftly with cases of arrest of seagoing ships when the court’s jurisdiction to arrest is questioned. The importance of those matters is not often from the nature of the legal issues but from the importance of the question of jurisdiction to arrest highly valuable vessels, usually foreign, interrupting their participation in world trade and commerce.

The importance of these circumstances, not the legal issues, lead, in those cases, to the invocation of the provision. The nature of the legal issues are, of course, not irrelevant, especially the fact that, as a matter of judicial review, they are unlikely – there are unlikely to be any advantages of the trial judge as they are – as is the case here. The provision is, of course, to be used sparingly given the call on the court’s resources and the affectation of the rights of appeal of the parties. But, in my view, it was appropriate in this case, notwithstanding the Minister’s attitude, and recognising that minds may differ.

The question of … the discretion to exercise the power, once satisfied of the sufficient importance of the matter, was also affected here by a consideration that the decision, not having been made or notified until Friday evening, having been under consideration since Monday, I assume because of the need to consider an important matter for the Minister, Mr Djokovic and the public, meant that unless the court, as a court, not just a single judge subject to appeal, finalised the matter by today or at the latest tomorrow, any right of appeal of Mr Djokovic, if he lost, would or may be, at least in part, made inutile because of the proximity of the commencement of the event, being the purpose of his visit and the purpose of his visa previously granted to him.

1. The first and most obvious thing to say about the judge’s reasons in this case is that he did not, as he was bound to do, give consideration to each of the factors listed in [18] above. His Honour confined his consideration to the parties’ estimate of the length of the hearing (which he described as “lengthy and difficult”) and to the respondent’s concession that part of the case involved some ill-defined question of “general importance”.
2. As to the first of those points, I am not satisfied that the hearing of this proceeding will be “lengthy and difficult”. But in any event, as the combined operation of the Federal Circuit and Family Court Act and the Rules makes quite clear, in considering whether to make an order transferring a proceeding, a judge of the FCFCOA is obliged to take into account a wide range of circumstances that extend far beyond the parties’ estimates of a hearing.
3. Further, in my view, the judge erred in the exercise of his discretion, because he seems to have regarded himself as powerless to do anything about the parties’ estimates. But that is simply not so.
4. There are many ways in which courts can and should ensure that hearings are conducted expeditiously. And the need to give consideration to doing so is more pressing where an applicant is self‑represented, and necessarily unfamiliar with the processes of the court and the conducting of a trial. It is the duty of a judge in such matters to do her or his best to ensure that submissions are put as effectively as possible, that witnesses that are proposed to be called are likely to give relevant evidence, and that cross‑examination be limited to matters of relevance. As I say, the need to do so can be particularly acute in matters involving self‑represented litigants.
5. The judge was, with respect, also wrong to proceed, as he put it, on the basis that the parties would not “act in a sensible and pragmatic manner particularly if the history of this matter is any guide”. The tools of case management available to a judge both permit and require the judge to do all within her or his authority to ensure that parties act appropriately and consistently with their duties to the court.
6. In that regard, I also note that the respondent’s submission before me, in addition to urging further mediation, said this:

Further, despite our good faith estimate, this need not be a proceeding exceeding 5 days or an approximate time. The parties should reach agreement on key questions of fact and written outlines can identify matters in issue. The Respondent is open to a judge‑engineered trial plan in which time is allocated according to the nature of the contested issue.

1. It is true that r 8.02(4)(a) provides that one of the factors to be considered is “whether the proceeding is likely to involve questions of general importance, such that it would be desirable for there to be a decision of the Federal Court on one or more of the points in issue”.
2. But that is not to say, as the judge appears to have suggested, that the FCFCOA should not decide questions of general importance. It does so, with respect, every day of the week.
3. The critical question to address under r 8.02(4)(a), which the judge did not address, is whether the proceeding involves a question of general importance such that it would be desirable for there to be a decision of the Federal Court. Here, the judge did not address that question, and from my review of the pleadings, I cannot identify anything remotely resembling a question of general importance in respect of which “it would be desirable for there to be a decision of the Federal Court”.
4. As I said, the primary judge did not have regard to any of the other factors, as he was obliged to do. They included whether, if the proceeding were transferred, it would be likely to be heard and determined at less cost and more convenience, whether the proceeding would be heard earlier in the FCFCOA, and whether there are any procedures appropriate for this proceeding (which would include mediation).
5. There is nothing to suggest that a proceeding such as this would be heard and determined at less cost and more convenience in the Federal Court. I would have thought the opposite was true. And there is no reason that I know of that would lead me to believe that the proceeding would be heard significantly later were it to remain in the FCFCOA. (Mediation, of course, is a procedure available in both courts.)
6. For those reasons, I decline to confirm the transfer of the proceeding.

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| I certify that the preceding thirty-four (34) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Callaghan. |

Associate:

Dated: 11 July 2022