

## FEDERAL COURT OF AUSTRALIA

### Chambers v University of Western Australia [2023] FCA 322

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| File numbers:     | WAD 245 of 2022<br>WAD 246 of 2022                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| Judgment of:      | <b>BANKS-SMITH J</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| Date of judgment: | 11 April 2023                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| Catchwords:       | <b>COURTS</b> - practice and procedure - whether an order by a judge of the Federal Circuit and Family Court of Australia ( <b>FCFCOA</b> ) to transfer civil proceedings to the Federal Court of Australia should be confirmed pursuant to s 32AD of the <i>Federal Court of Australia Act 1976</i> (Cth) - where matters to be considered are prescribed - where primary judge did not consider all matters - proceedings relate to <i>Fair Work Act 2009</i> (Cth) regime - where despite some complexity the FCFCOA has experience in determining such matters - |
| Legislation:      | <i>Fair Work Act 2009</i> (Cth) ss 341, 342, Part 3.1<br><i>Federal Circuit and Family Court of Australia 2021</i> (Cth) ss 153, 154<br><i>Federal Court of Australia Act 1976</i> (Cth) s 32AD<br><i>Federal Circuit and Family Court of Australia (Division 2) (General Federal</i>                                                                                                                                                                                                                                                                                |
| Cases cited:      | <i>Chambers v University of Western Australia</i> [2022] FedCFamC2G 977<br><i>KDSP v Secretary of the Department of Home Affairs</i> [2022] FCA 1406<br><i>Panagiotidis v IProsper Financial Planning Pty Ltd</i> [2022] FCA 1508<br><i>Van den Berg v Monash Health</i> [2022] FCA 796                                                                                                                                                                                                                                                                              |

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|-------------------------------|-----------------------------------------------------------|
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| Division:                     | Fair Work Division                                        |
|                               |                                                           |
| Registry:                     | Western Australia                                         |
|                               |                                                           |
| National Practice             | Employment and Industrial Relations                       |
|                               |                                                           |
| N u m b e r o f               | 42                                                        |
|                               |                                                           |
| Date of last submissions:     | 4 April 2023 (applicant)<br>14 December 2022 (respondent) |
|                               |                                                           |
| Date of hearing:              | Determined on the papers                                  |
|                               |                                                           |
| Counsel for the               | The applicant was self-represented                        |
|                               |                                                           |
| Counsel for the Respondent:   | Ms E Hartley                                              |
|                               |                                                           |
| Solicitor for the Respondent: | HWL Ebsworth Lawyers                                      |

## ORDERS

|                 |                                                  |
|-----------------|--------------------------------------------------|
|                 | <b>WAD 245 of 2022</b><br><b>WAD 246 of 2022</b> |
|                 |                                                  |
| <b>BETWEEN:</b> | <b>SHANE CHAMBERS</b><br>Applicant               |
| <b>AND:</b>     | <b>UNIVERSITY OF WESTERN AUSTRALIA</b>           |

|                       |                      |
|-----------------------|----------------------|
| <b>order made by:</b> | <b>BANKS-SMITH J</b> |
| <b>DATE OF ORDER:</b> | <b>11 april 2023</b> |

**THE COURT ORDERS THAT:**

1. Pursuant to s 32AD(1) of the *Federal Court of Australia Act 1976* (Cth), the Court declines the orders made by the Federal Circuit and Family Court of Australia on 11 November 2022 transferring proceedings PEG 48 of 2021 and PEG 106 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**

### **BANKS-SMITH J:**

- 1 The applicant, Shane Chambers, has issued two proceedings in the Federal Circuit and Family Court of Australia (**FCFCOA**) against the University of Western Australia (**UWA**).
- 2 Mr Chambers alleges that UWA contravened the general protections of the *Fair Work Act 2009* (Cth) (**FW Act**).
- 3 On 11 November 2022 a judge of the FCFCOA ordered that the proceedings, which were being managed concurrently in that Court, be transferred to the Federal Court of Australia: *Chambers v University of Western Australia* [2022] FedCFamC2G 977.
- 4 The transfer order was made under s 153 of the *Federal Circuit and Family Court of Australia 2021* (Cth) (**FCFCOA Act**). Such an order cannot take effect until confirmed by this Court under s 32AD(1) of the *Federal Court of Australia Act 1976* (Cth).
- 5 The question for determination is whether the transfer order should be confirmed.

## **Statutory framework for transfer**

6 Section 153 of the FCFCOA Act provides as follows:

### **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.

7 Section 154 of the FCFCOA 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.

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

9 Section 32AD of the *Federal Court Act* relevantly provides:

**32AD Confirmation of civil proceedings transferred from the Federal Circuit and Family Court of Australia (Division 2)**

- (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*.

...

10 So, it can be seen that both s 153 of the FCFCOA Act and r 8.02 of the FCFCOA Rules mandate that certain matters *must* be taken into account by the FCFCOA judge in considering whether proceedings should be transferred.

**Mr Chambers' claims**

11 Mr Chambers commenced proceeding PEG 48 of 2021 in March 2021 and proceeding PEG 106 of 2021 in May 2021. It appears that since about July 2021 the proceedings were managed by the FCFCOA judge who made the

transfer order. In the earlier stages of the proceedings UWA sought to have the proceedings summarily dismissed. However, matters moved on and on 26 April 2022 Mr Chambers filed a single statement of claim and submissions with respect to both matters. It is not necessary for the purpose of this decision to address the proceedings separately.

12 The statement of claim alleges 20 separate claims against UWA. Mr Chambers has drafted the statement of claim himself and it is fair to say that some effort is required to follow some of the allegations made. However, that may be the case even in circumstances where parties are represented, and so no criticism is directed at Mr Chambers in that regard. It is apparent, however, that mediation with a registrar may be valuable to at least assist in defining issues, even if the claims cannot be resolved out of Court. Importantly, UWA's solicitors have drafted a 'Respondent's **Position Outline**' that greatly assists in understanding the nature of the claims brought against it and the issues for determination that may arise.

13 According to UWA, Mr Chambers was a PhD candidate at UWA between approximately 2005 and 2018. During that period there were long episodes when his candidature was suspended or when he was on sick leave. UWA contends that his status as a PhD candidate did not constitute him an employee of UWA.

14 Between 2013 and 2014 Mr Chambers was employed to carry out various duties in UWA's biophysics and physics laboratories. Between 2015 and 2020 he was employed as a senior technician on UWA's 'shark project'. UWA says his employment terminated when the shark project terminated. UWA contends that to the extent he was employed, Mr Chambers was subject to enterprise agreements known as *The University of Western Australia Academic Staff Agreement 2014* (**2014 EA**) and *The University of Western Australia Academic Employees Agreement 2017* (**2017 EA**).

15 Mr Chambers alleges that in addition to such employment, even in his capacity as a PhD student he received a stipend and was an employee of UWA.

16 Mr Chambers alleges in the proceedings that UWA has contravened the general protections of the FW Act as set out in Part 3.1 of the FW Act. He claims that a range of adverse action was taken against him. Section 342(1) of the FW Act sets out the types of adverse action which can be taken against an employee. These include dismissing the employee, injuring them or altering their position.

17 Mr Chambers alleges that UWA took adverse action against him because he had a workplace right; did or did not exercise a workplace right; did or did not propose to exercise a workplace right; or in order to prevent him from exercising a workplace right. Section 341(1) of the FW Act sets out when a person has a workplace right. Circumstances include where a person has a benefit or responsibility under a workplace law or instrument, or where they are entitled to make a complaint or inquiry. Mr Chambers alleges that he had workplace rights under a range of legislation or instruments, including the FW Act, the *Disability Discrimination Act 1992* (Cth) and the *Equal Opportunity Act 1984* (WA), as well as the 2014 EA and the 2017 EA.

18 UWA in its Position Outline pulls together the various threads of the purported adverse action claims brought by Mr Chambers relating to each of his periods as a PhD candidate, as a prospective employee and as an employee. Claims as an employee relate to events over different periods of time, which in turn requires a factual inquiry and assessment of whether Mr Chambers was in fact an employee during those times. Many of the claims relate to closure of a laboratory and whether closures or withdrawal of electricity were undertaken for health and safety grounds. Some of Mr Chambers' allegations are said to relate to complaints made by him or directions to cease work, which have not been fully articulated by Mr Chambers. Other allegations relate to purported

arrangements about funding for the shark project and non-payment of entitlements said to be due to Mr Chambers.

19 In its Position Outline UWA has been able to identify and respond to the workplace rights aspect of Mr Chambers' adverse action claim by listing each potential statutory provision and provisionally assessing whether any relevant workplace right arises.

20 UWA has also identified that Mr Chambers has separately brought workers' compensation claims against it, and notes they may be characterised as exercising a workplace right, albeit that the substance of the claims is outside the jurisdiction of the FCFCOA.

21 Leaving aside arguments as to the time periods when Mr Chambers was an employee of UWA, UWA's primary position is that it will put on evidence to disprove that any of the adverse action which occurred was taken because Mr Chambers held or exercised a workplace right. It also raises limitation period points with respect to some claims.

22 What is apparent from this summary of the claims in the FCFCOA proceedings is that the nature of the claims, focussed as they are on the identification of adverse action and workplace rights, are matters well within the experience and jurisdiction of the FCFCOA.

### **Reasons for decision of FCFCOA**

23 At a case management hearing before the FCFOA judge on 11 November 2022 the primary judge raised the question of transfer of the proceedings to this Court. It is said in the reasons that such course was 'not opposed': at [14]. It was also said that Mr Chambers 'welcomed such a move' because he had 'been told' his efforts to find pro bono legal assistance had a 'hugely increased chance of success' if the matter were in the Federal Court. Neither the basis of this information nor any consideration of its veracity by the primary judge were disclosed.

24 The primary judge observed the following:

- (a) there are 20 claims and there will be a voluminous amount of material;
- (b) the matter will require a court to invest some time so that the 20 claims can all be properly analysed, particularised and understood - that will take 'quite a long time';
- (c) the question is whether the FCFCOA has the resources to deal with the matter and whether it is of such complexity that it should be dealt with by the Federal Court;
- (d) a legal issue arises as to whether and when as a PhD student Mr Chambers was also an employee;
- (e) the issue of Mr Chambers' employment may need to be resolved without the benefit of a written contract;
- (f) the workers' compensation claims in a different court constitute a complicating factor regarding the continuation of payments to Mr Chambers; and
- (g) these are 'complex matters of law' and a great deal of time will be needed.

25 His Honour then said:

[12] To my mind, this Court simply does not [have] the resources to properly consider the matter. This Court is a Court of large intake and large turnover. The Court, at the moment, has backlogs of, approximately, 14,000 matters in Family Law and over 16,000 in Migration, and it is that pressure that every Judge within this Court, especially those like myself who have a mixed docket, are under.

[13] Today is the first time I have been able to mention the matter in person. This is because I am based in Brisbane and this is a Perth matter. It seems to me, and endorsed by both parties, that any hearing on the merits of the matter needs to occur in person. This is an extra strain on the resources of the Court.

## Consideration

26 There are a number of points that should be observed in response to this.

27 First, nothing in the reasons indicates that the primary judge properly considered the mandatory considerations listed in r 8.02 of the FCFCOA Rules. His Honour instead described the position as follows:

[6] The question is whether the FCFCOA has the resources to deal with the matter, and whether the matter is of such complexity that it is matter that should be dealt with by the Federal Court.

28 By then addressing the position by reference to the question as he has described it, his Honour touches on some matters relevant to the factors enunciated in r 8.02, but without sufficient particularity.

29 For example, there is no discussion of whether the proceedings are 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. His Honour does discuss the alleged complexity of addressing the circumstances of employment of a PhD student and the absence of a written contract, but the discussion is about complexity, rather than general importance.

30 There is no discussion as to whether if the proceedings are transferred, they are likely to be heard and determined at less cost and more convenience to the parties than if the proceeding were not transferred, other than the potential that Mr Chambers referred to of accessing pro bono legal services.

31 There is no discussion as to the availability of particular procedures appropriate for the class of proceeding in either Court.

32 The failure to address these matters indicates that the judge misunderstood his task under the FCFCOA Act and the FCFCOA Rules and did not have regard to mandatory considerations: *KDSP v Secretary of the Department of Home Affairs* [2022] FCA 1406 at [29], [32] (Kenny J). Where an order is not made in conformity with those provisions, and there is a failure

to have regard to a mandatory consideration, then such error may be one going to jurisdiction. Regardless of the parties' current consent to the transfer in this case, the position as to the legal force of the FCFCOA order of 11 November 2022 is left 'tolerably unclear', and in such circumstances it would be inappropriate to confirm the order, consistent with the reasons and outcome in *KDSP* at [32]. Notably in *KDSP*, the parties either consented to or did not oppose the transfer at the time the confirmation orders was considered and declined by Kenny J (at [22]-[24]).

33 Similarly, in *Panagiotidis v IProsper Financial Planning Pty Ltd* [2022] FCA 1508, Raper J declined to make a confirmation order, observing that the FCFCOA judge should have given attention to each of the prescribed factors (at [27]).

34 I also have regard more generally to the interests of the administration of justice, as referred to in s 153(3)(d) of the FCFCOA Act.

35 In this regard, and noting the comments of the primary judge quoted at [25] above, it is not apparent that the primary judge had been or would be allocated the trial of the matter, as against its case management. It may well be that a FCFCOA judge located in the Perth registry or readily able to travel to the Perth registry could or would be allocated the trial for hearing. Such practical issues are not uncommon in a Commonwealth Court. Absent further information, this issue is not of any significant weight.

36 Second, I do not assess the case as one which raises questions of general importance. It appears to be one which wholly turns on facts peculiar to it.

37 Third, as to the alleged complexities, it is to be borne in mind that the FCFCOA routinely hears and determines adverse action and breach of contract claims and hears and determines matters involving serious contraventions under the FW Act. Certainly some work should be undertaken in order to streamline the various claims but there is no reason this could not be done with proper case management, the filing of agreed statements of fact and bundles, and the use of

a registrar as appropriate to assist (all of which can be undertaken in the FCFCOA). Similarly, both *Panagiotidis* and *Van den Berg v Monash Health* [2022] FCA 796 (O'Callaghan J) involved a number of claims under the FW Act. In *Van den Berg*, there were some 41 separate alleged contraventions. The nature and number of the claims did not prevent confirmation of the transfer orders being declined in both cases.

38 Fourth, it can be accepted that the FCFCOA undertakes high volume work. However, there is nothing in the reasons that indicates the likely length of trial. Instead general expressions are used, such as the work required being likely to occupy 'quite a long time'. It can safely be assumed that judges in the FCFCOA and this Court operate under listing and writing pressures. That is not to say that this Court could *not* deal with the matter more speedily - but his Honour's generalised assessment of the time that might be occupied in addressing the proceedings does not assist in undertaking a measured comparison of how the proceedings might be pursued in the different courts. In any event, even if it were considered that trial dates would exceed five days, that length of itself is not a sufficient basis for ordering a transfer: *Van den Berg* at [16]. It should not be assumed that a proceedings such as this would be heard and determined at less cost and more convenience in the Federal Court: *Van den Berg* at [32]-[33].

39 Fifth, the fact that the parties do not oppose a transfer is relevant but not of itself determinative. I invited the parties to file submissions with respect to whether the transfer order should be confirmed. UWA filed brief submissions indicating that it consented to the transfer. Publication of these reasons was delayed at Mr Chambers' request as he sought extensions of time in which to file submissions. He filed detailed submissions on 4 April 2023. Mr Chambers focussed on the alleged complexity of the matter, the difficulties he has faced with pleading it and its importance from his perspective. He claims that the question of whether a PhD student is an employee is one of broader importance that should be considered by this Court and refers to other legal issues that

might arise. He fears appealable error by the FCFCOA should it continue to hear his case and fears that this will add to the cost of the pursuit of his claims. He considers that a trial judge 'who is more specialised and experienced in the areas of dispute' would be of benefit to the management of the case. He expresses a preference for a trial by video hearing.

40 Having considered Mr Chambers' submissions, they do not alter the outcome in this matter. It remains the case that the task that was to be undertaken by the primary judge was not properly undertaken. For the reasons discussed in *KDSP* at [32], even if it were open to me to confirm the transfer order, it is not appropriate that it be confirmed. Therefore, the fact that Mr Chambers now seeks to retrospectively fill some of the gaps in the reasoning below does not assist with the decision I am asked to make.

41 In any event, I do not consider on the information available to me that there are sufficient grounds to warrant a transfer. I would give no weight to claims such as the need for an experienced trial judge or the alleged risk of appealable error. The FCFCOA, as I have already observed, routinely hears and determines adverse action and breach of contract claims, including matters involving serious contraventions under the FW Act. Further, as O'Callaghan J noted in *Van den Berg* at [30], the FCFCOA decides questions of general importance every day of the week. The FCFCOA also utilises the skills of registrars to assist with aspects of case management and mediation, and there is no reason to believe that the parties will not be assisted in that manner, regardless of the Court in which they proceed. A judge is required to utilise the tools of case management to do all that they can to ensure that parties act appropriately. I remain of the view that the proceedings issued by Mr Chambers largely turn on facts peculiar to them or of a nature the FCFCOA is well able to determine. Other difficulties to which Mr Chambers refers, such as defining facts in issue, identifying legal issues and pleading his case, will not dissolve simply by a transfer to this Court.

## **Outcome**

42 For these reasons, I decline to confirm the transfer of the proceedings.

I certify that the preceding  
forty-two (42) numbered  
paragraphs are a true copy  
of the Reasons for  
Judgment of the Honourable

Associate:

Dated: 11 April 2023