HIGH COURT OF AUSTRALIA

BEECH-JONES J

QIZHI CHEN PLAINTIFF

AND

A JUDGE OF THE FEDERAL COURT OF AUSTRALIA & ORS DEFENDANTS

[2024] HCASJ 20
Date of Judgment: 24 May 2024
M3 of 2024

ORDER

1. The application is dismissed without a hearing.

Representation

The plaintiff is unrepresented

The first defendant is unrepresented

The second, third and fourth defendants are represented by Clayton Utz Lawyers

1 BEECH-JONES J. On 9 January 2024, the plaintiff, Qizhi Chen, filed an application in this Court seeking certiorari in respect of the decision and orders of McEvoy J given on 20 December 2023[1] refusing her an extension of time within which to seek leave to appeal from orders made by North J on 3 June 2016.[2] North J summarily dismissed proceedings commenced by the plaintiff seeking the reinstatement of her employment with the second defendant, Monash University.[3] The plaintiff also seeks the issue of a writ of mandamus commanding the Federal Court of Australia to hear an appeal from McEvoy J's decision.

2 Rule 25.09.1 of the *High Court Rules 2004* (Cth) provides that the Court or a Justice may dismiss an application for a constitutional or other writ, without listing it for hearing, on the ground that "the application does not disclose an arguable basis for the relief sought or is an abuse of the process of the Court". For the reasons that follow, the application and the materials filed in support do not disclose an arguable basis for the relief sought. The application is also an abuse of process. The application should be dismissed without a hearing.

Background - other proceedings

3 On 27 February 2015, Tracey J dismissed proceedings brought by the plaintiff against the second to fourth defendants, namely Monash University and two staff members, alleging sex discrimination and sexual harassment in the workplace.[4] The plaintiff filed a notice of appeal from that decision but discontinued the appeal. On 12 May 2016, the Full Court of the Federal Court (Barker, Davies and Markovic JJ) refused an application to reinstate the appeal.[5]

4 On 26 April 2022, the plaintiff filed an application in this Court seeking writs of certiorari quashing both of those decisions and other relief directed to the Judges of the Federal Court. Rule 25.02.2(a) of the *High Court Rules* requires that an application for a writ of certiorari be filed "within 6 months after the day the decision sought to be quashed was made". Rule 4.02 of the *High Court Rules* enables a Court or a Justice to enlarge that period of time even after it has expired.

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1 *Chen v Birbilis* [2023] FCA 1644.

2 *Chen v Birbilis* [2016] FCA 661.

3 *Chen v Birbilis* [2016] FCA 661 at [2]-[3], [19]-[20].

4 *Chen v Monash University* [2015] FCA 130.

5 *Chen v Monash University* [2016] FCAFC 66.

5 On 13 September 2022, Keane J dismissed the plaintiff's application.[6] His Honour refused an extension of time to apply for the writs of certiorari. His Honour found there was "no satisfactory explanation" for the delay in the bringing of the proceedings and no substantial argument was advanced that would warrant a grant of certiorari.[7] His Honour dismissed the balance of the claims for relief as an abuse of process.[8]

6 On 8 December 2022, Edelman and Gleeson JJ refused an application seeking leave to appeal from Keane J's decision.[9] Their Honours noted that Keane J's decision was "plainly correct".[10]

The present proceedings

7 In the meantime, on 8 January 2016, the plaintiff filed an application in the Federal Court seeking reinstatement to her position at Monash University. This application was summarily dismissed by North J on the basis that the Federal Court did not have jurisdiction to hear a claim alleging acts of victimisation contrary to s 94 of the *Sex Discrimination Act 1984* (Cth)[11] and had no jurisdiction to entertain a claim for reinstatement under the provisions of the *Fair Work Act 2009* (Cth) ("the FWA") in the absence of a certificate from the Fair Work Commission issued under s 368(3)(a) of the FWA.[12]

8 The decision of North J to summarily dismiss the plaintiff's application for reinstatement was an interlocutory decision. An appeal from such a decision requires a grant of leave to appeal from the Federal Court or a Judge of that Court.[13] An application for leave must be filed "within 14 days after the date on which the

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6 *Chen v A Judge of the Federal Court of Australia* (unreported, High Court of Australia, 13 September 2022).

7 *Chen v A Judge of the Federal Court of Australia* (unreported, High Court of Australia, 13 September 2022) at [9].

8 *Chen v A Judge of the Federal Court of Australia* (unreported, High Court of Australia, 13 September 2022) at [10]-[11].

9 *Chen v A Judge of the Federal Court of Australia* [2022] HCASL 212.

10 *Chen v A Judge of the Federal Court of Australia* [2022] HCASL 212 at [2].

11 *Chen v Birbilis* [2016] FCA 661 at [11].

12 *Chen v Birbilis* [2016] FCA 661 at [18].

13 *Federal Court of Australia Act 1976* (Cth), s 24(1A).

judgment [the subject of the application] was pronounced",[14] after which an application for an extension of time must be sought and granted.[15]

9 On or about 19 March 2023, the plaintiff filed an application for an extension of time within which to seek leave to appeal from North J's decision. As noted, on 20 December 2023, McEvoy J refused that application with costs. His Honour did not accept that the plaintiff had provided a satisfactory explanation for the "lengthy delay" in bringing the application.[16] His Honour also found that North J's decision was not attended with sufficient doubt to warrant an extension of time.[17] His Honour did not accept that the plaintiff would suffer a "substantial injustice" if the application was refused but, given the passage of time, accepted that the second to fourth defendants would suffer prejudice if the application was granted.[18] His Honour also found that the application for reinstatement had no utility given the passage of time (being "over six years"), the plaintiff's residency overseas and the "numerous unfounded accusations" she had made against her former employer.[19]

No arguable case for relief and abuse of process

10 The plaintiff's application filed in this Court is discursive. As best as can be ascertained, it contends that McEvoy J's decision to award costs to the second to fourth defendants was affected by jurisdictional error on the basis that his Honour's awarding of costs in the proceedings was governed by s 570 of the FWA, which restricts the circumstances in which a court may award costs. However, those circumstances include a court being satisfied that the party being ordered to pay costs "initiated the proceedings ... without reasonable cause" or that the party's "unreasonable act or omission caused the other party to incur the costs".[20] The findings made by McEvoy J meant that the statutory provisions allowing the awarding of costs in such circumstances would have been enlivened if s 570 was applicable to the proceedings before McEvoy J. Thus, even if s 570 of the FWA was applicable to an application for an extension of time within which to seek

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14 *Federal Court Rules 2011* (Cth), r 35.13(a).

15 *Federal Court Rules* (Cth), r 35.14(1).

16 *Chen v Birbilis* [2023] FCA 1644 at [54].

17 *Chen v Birbilis* [2023] FCA 1644 at [55].

18 *Chen v Birbilis* [2023] FCA 1644 at [56].

19 *Chen v Birbilis* [2023] FCA 1644 at [56].

20 *Fair Work Act 2009* (Cth), s 570(2)(a)-(b).

leave to appeal, McEvoy J clearly had jurisdiction to make a costs order against the plaintiff.

11 The plaintiff also contends that the McEvoy J's reasons for refusing her application for an extension of time were unreasonable in that his Honour supposedly ignored relevant material concerning the explanation for the delay in bringing the application, made no assessment of the "overarching merit of the proposed appeal" and made an unreasonable assessment of the prejudice flowing to each party from a grant or refusal of the application. In relation to the material concerning the delay, it is said that his Honour ignored a reference in the plaintiff's reply to a legislative change that occurred in 2021 (which is not said to be retrospective).

12 However, McEvoy J considered all these factors and otherwise made assessments that were well open on the material. Far from being unreasonable, his Honour's decision to refuse the extension of time sought was the only reasonable decision that could have been made. Nothing raised in this part of the plaintiff's application, or the balance of the application, comes close to raising an arguable case of jurisdictional error.

13 The application does not disclose an arguable basis for the relief sought.[21] Moreover, given the passage of time and the futility of considering reinstatement, the application is simply a continuation of the abuse of process identified by Keane J. The application is dismissed without a hearing.

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21 *High Court Rules 2004* (Cth), r 25.09.1.