Federal Court of Australia

Tucker v Broderick [2022] FCAFC 174

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| Appeal from: | *Tucker v Broderick* [2021] FCA 1492 |
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| File number: |  |
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| Judgment of: | **BROMBERG, BROMWICH AND MCEVOY JJ**  |
|  |  |
| Date of judgment: | 28 October 2022 |
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| Catchwords: | **INDUSTRIAL RELATIONS** – appeal from orders summarily dismissing proceeding pursuant to r 26.01 of the *Federal Court Rules 2011* (Cth) – primary judge determined that claims in the Federal Court were plainly founded on an issue already pleaded and resolved in the Supreme Court of Victoria and that the causes of action pleaded had merged in the judgment of the Supreme Court – cause of action estoppel – proceeding determined to be an abuse of process which sought to vex the respondents with the same claim – primary judge found appellant’s claim based on the Victorian Model Litigant Guidelines was hopeless as no relevant cause of action – appellant makes no challenge to key aspect of primary judge’s finding that the proceeding constitutes an abuse of process – primary judge adequately explained findings – appeal had no prospect of success – appeal dismissed. |
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| Legislation: | *Fair Work Act 2009* (Cth) ss 50, 546, 570(2)(a), 570(2)(b)*Federal Court of Australia Act 1976* (Cth)ss 51A, 52*Federal Court Rules 2011* (Cth) r 26.01*Judiciary Act 1903* (Cth) s 39(2) *Civil Procedure Act 2010* (Vic)*Jurisdiction of Courts (Cross-Vesting) Act 1987* (Vic) s 5*Public Administration Act 2004* (Vic) ss 8(b), 20(3), 20(3)(c)  |
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| Cases cited: | *Bass v Permanent Trustee Company Ltd* (1999) 198 CLR 334; [1999] HCA 9 *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256; [206] HCA 27*Boensch v Pascoe* (2019) 268 CLR 593; [2019] HCA 49*Clayton v Bant* (2020) 272 CLR 1; [2020] HCA 44 *Comaz (Aust) Pty Ltd v Commissioner of State Revenue* (2015) 101 ATR 339; [2015] VSC 294*Gronow v Gronow* (1979) 144 CLR 513; (1979) FLC 90-716*House v R* (1936) 55 CLR 499; [1936] HCA 40*North West Melbourne Recycling Pty Ltd v Commissioner of State Revenue (No 2)* [2017] VSC 726*Oswal v Burrup Fertilisers Pty Ltd (Receivers and Managers Appointed)* (2011) 85 ACSR 531; [2011] FCAFC 117*Perkins v County Court of Victoria* (2000) 2 VR 246; [2000] VSCA 171*R v Carroll* (2002) 213 CLR 635; [2002] HCA 55*Razzy Australia Pty Ltd v Commissioner of State Revenue* [2021] VSC 409*Stoker v Adecco Gemvale Constructions Pty Ltd* [2004] NSWCA 449*Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507; [2015] HCA 28*Tucker v Broderick* [2021] FCA 1492*Tucker v State of Victoria* [2018] VSC 389*Tucker v State of Victoria* [2019] VSC 420*Tucker v State of Victoria* [2021] VSCA 120*Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447; [2003] HCA 48  |
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| Division: | Fair Work Division |
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| Registry: | Victoria |
|  |  |
| National Practice Area: | Employment and Industrial Relations |
|  |  |
| Number of paragraphs: | 50 |
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| Date of hearing: | 5 August 2022  |
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| Counsel for the Appellant: | Mr Dober |
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| Solicitors for the Appellant:  | SGM Legal |
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| Counsel for the Respondents: | Mr Bourke QC with Ms Preston |
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| Solicitor for the Respondents: | Maddocks |

ORDERS

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|  | VID 775 of 2021 |
|   |
| BETWEEN: | TOBIAS JOHN TUCKERAppellant |
| AND: | PAUL BRODERICK (SUED IN HIS CAPACITY AS COMMISSIONER OF STATE REVENUE)First RespondentTHE STATE OF VICTORIASecond Respondent |

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| order made by: | BROMBERG, BROMWICH AND MCEVOY JJ |
| DATE OF ORDER: | 28 October 2022 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the costs of the respondents on an indemnity basis.

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

REASONS FOR JUDGMENT

THE COURT:

# introduction

1. By notice of appeal dated 23 December 2021, Tobias John Tucker appeals from orders made in *Tucker v Broderick* [2021] FCA 1492. Those orders summarily dismissed his proceeding pursuant to r 26.01 of the *Federal Court Rules 2011* (Cth) (the **Rules**) and ordered that he pay the respondents’ costs on an indemnity basis.
2. From 28 November 2011 until his employment was terminated on 19 July 2019, Mr Tucker was employed by the second respondent, the State of Victoria, as a senior solicitor at the State Revenue Office (**SRO**). The first respondent, Mr Broderick, is the Commissioner of State Revenue and exercises delegated powers with respect to SRO employees.
3. The primary judge found, amongst other things, that Mr Tucker’s proceeding in this Court was an abuse of process in circumstances where he sought relief in relation to matters already determined in long running proceedings in the Supreme Court of Victoria. His Honour concluded (at [3], [64]-[70]) that the proceedings in this Court were an abuse, including because:
4. the proceedings in the Supreme Court finally settled the real controversy between the parties that was the subject of the claims Mr Tucker sought to bring in this Court;
5. Mr Tucker elected to continue the proceedings in the Supreme Court in full knowledge of the fact that the Supreme Court could not make pecuniary penalty orders or orders for compensation under the *Fair Work Act 2009* (Cth) (the **FW Act**) of the type he sought in this Court;
6. the fact that Mr Tucker made no claim in the Supreme Court for loss or damage in respect of the matters pleaded in his proceeding in this Court, limiting his relief to permanent injunctive relief, meant that he could not now press such a claim in this Court; and
7. by pursuing his claims in this Court Mr Tucker was seeking to vex the respondents again with the same claims he had pursued in the Supreme Court.
8. Insofar as Mr Tucker also pleaded a claim based on the Victorian Model Litigant Guidelines (the **Guidelines**), the primary judge concluded that such a claim was bound to fail because any breach of the Guidelines does not give rise to a cause of action and, in any event, this Court has no jurisdiction to adjudicate non-compliance with them.
9. For the reasons that follow, we have concluded that the primary judge’s finding that the proceeding in this Court is an abuse of process because it seeks to vex the respondents again with the same claim, which finding was not challenged on the appeal, is a sufficient basis to sustain his Honour’s orders summarily dismissing the proceeding pursuant to r 26.01. Accordingly, the appeal will be dismissed. Mr Tucker will be ordered to pay the respondents’ costs on an indemnity basis.

# the proceedings in the supreme court of victoria

1. Mr Tucker’s proceeding in this Court was commenced after the conclusion of proceedings he had commenced in the Supreme Court of Victoria on 11 December 2017. The course of the proceedings in the Supreme Court is described in some detail by the primary judge (at [7]-[55]), but it is necessary to provide some explanation of the conduct of those proceedings here also.
2. In the Supreme Court proceedings Mr Tucker initially sought relief in the form of declarations and injunctions in relation to an investigation pursuant to clause 21 of the Victorian Public Service Enterprise Agreement 2016 (the **VPSEA**) arising from allegations against him of workplace misconduct (the **Klug investigation**). He alleged a want of procedural fairness in the conduct of the Klug investigation, that the defendants in the Supreme Court proceedings had failed to disclose relevant information to him, that he had not been given a real opportunity to be heard in respect of matters upon which the defendants might rely in determining a disciplinary outcome in accordance with the VPSEA, and that the defendants had failed to provide him with information or material before the decision maker, including an un-redacted copy of the investigator’s report (the **Klug report**).
3. Shortly after the commencement of the Supreme Court proceedings the SRO advised Mr Tucker that it proposed to terminate his employment by reason of the findings of another investigation (the **e-Sys investigation**) about his conduct. Mr Tucker was given leave to amend his claim to include relief with respect to the e-Sys investigation and the termination of his employment. He claimed that there had been a failure to comply with relevant provisions of the VPSEA in the conduct of both investigations, and that the SRO had breached obligations it owed to treat him fairly under the *Public Administration Act 2014* (Vic) (the **PA Act**). The defendants undertook not to finalise either the Klug or e-Sys investigations until the proceedings in the Supreme Court were determined, and Mr Tucker gave an undertaking as to damages in this respect.
4. Mr Tucker subsequently sought leave in the Supreme Court proceedings, relevantly, to file a further amended statement of claim (**FASOC**) and to have the Supreme Court proceedings transferred to the Federal Court or the Federal Circuit Court pursuant to s 5 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Vic). The proposed FASOC alleged that the defendants had breached s 50 of the FW Act and sought to reformulate the relief claimed, including declarations that the defendants had contravened the VPSEA and/or the PA Act, the imposition of penalties in relation to the alleged breaches of the FW Act, and permanent injunctions preventing the defendants from finalising both investigations.
5. In *Tucker v State of Victoria* [2018] VSC 389 McDonald J gave Mr Tucker leave to file the FASOC, but excluded the FW Act claims on the basis that the Supreme Court did not have jurisdiction to hear them. The transfer application was refused. Whatever might be said about the refusal to transfer the proceeding, McDonald J observed at [19] of his judgment that senior counsel for Mr Tucker had acknowledged that the parties were in ‘heated agreement’ that if Mr Tucker wished to pursue claims alleging contraventions of the FW Act he would need ‘to go somewhere else to do it’.
6. Mr Tucker subsequently filed his FASOC. It alleged that:
7. it was an implied term of his employment agreement that the SRO would adhere to any internal policy it implemented, including in relation to the management of misconduct;
8. it was an implied term of his employment agreement that the defendants would exercise any right, duty, power, or authority as an employer under the relevant policy in good faith;
9. by virtue of ss 20(3) and 8(b) of the PA Act, the defendants had an obligation to conduct any disciplinary process against him in accordance with clause 21 of the VPSEA;
10. certain obligations arose under clause 21 of the VPSEA;
11. the defendants failed to comply with various obligations of clause 21 in the conduct of the investigations; and
12. the defendants breached obligations under the PA Act in the conduct of the investigations.
13. Mr Tucker sought permanent injunctions preventing the defendants from finalising the investigations, and declarations that they had contravened the VPSEA and/or the PA Act. He did not seek compensation in relation to the alleged breaches of his employment agreement, the PA Act, or the VPSEA. Consistently with the orders of McDonald J, the claim for penalties for breach of s 50 of the FW Act was not pursued.
14. Notwithstanding the absence of the FW Act claim from the case then pressed by Mr Tucker, his outline of submissions in the Supreme Court proceedings nonetheless contended that a contravention of the obligations imposed by the VPSEA constituted a breach of the FW Act. He claimed to be entitled to a declaration that contraventions of this kind had occurred. The defendants’ outline of submissions contended in response that the Supreme Court did not have jurisdiction to entertain a claim that there had been an actionable breach of the VPSEA per se under s 50 of the FW Act.
15. Prior to the hearing of the Supreme Court proceeding Mr Tucker proposed a further amendment to his claim to make it clear that it was his position that the Supreme Court could and should grant relief for a contravention of the VPSEA. His solicitors stated in correspondence that if the defendants did not agree to a further amendment the appellant remained at liberty to commence proceedings in the Federal Court.
16. The defendants did not consent to Mr Tucker’s proposed amendments to his claim. They noted in correspondence that:
17. McDonald J had already dealt with the Supreme Court’s jurisdiction to deal with alleged contraventions of the VPSEA;
18. it would be an abuse of process for Mr Tucker to commence Federal Court proceedings whilst the Supreme Court proceedings remained on foot; and
19. if Mr Tucker wished to discontinue the Supreme Court proceeding and pursue new proceedings in the Federal Court, he could and should have done so at an earlier time.
20. Shortly thereafter Mr Tucker sought to rely on a proposed second further amended statement of claim (**2FASOC**). There was no reference to the FW Act in this document and it was filed by consent, with the defendants also filing an amended defence.
21. Subsequently Mr Tucker filed an outline of submissions which advanced a new argument – namely that the Supreme Court had jurisdiction to determine a claim for a contravention of the FW Act under s 39(2) of the *Judiciary Act 1903* (Cth) (the **Judiciary Act**).
22. The proceeding was heard in February 2019 by an associate judge of the Supreme Court. Mr Tucker abandoned several allegations contained in the 2FASOC, and after an exchange of submissions the matter came back before the associate judge on 7 May 2019 for argument on Mr Tucker’s Judiciary Act and FW Act claims. Shortly thereafter Mr Tucker served a proposed third further amended statement of claim which alleged that certain of the breaches alleged were contraventions of s 50 of the FW Act as they were contraventions of the VPSEA. The parties identified for the Supreme Court that Mr Tucker’s assertion that the Court had jurisdiction to deal with allegations of contraventions of s 50 of the FW Act was a matter for determination.
23. On 16 July 2019 in *Tucker v State of Victoria* [2019] VSC 420 the Supreme Court made orders:
24. dismissing the proceedings against the defendants;
25. releasing the defendants from their undertaking not to finalise the Klug or e-Sys investigations;
26. that Mr Tucker pay the defendants’ costs of and incidental to certain of the written submissions on the application for amendment made after 7 May 2019 on an indemnity basis, and otherwise on a standard basis;
27. referring the question of whether Mr Tucker should be ordered to pay the defendants’ damages on his undertaking for hearing and determination; and
28. consequential procedural and timetabling orders.
29. Shortly thereafter the SRO wrote to Mr Tucker advising that his employment was terminated with immediate effect, noting also that this outcome was not related in any way to the Klug investigation.
30. Mr Tucker then sought to stay the trial of the defendants’ claim for damages arising on his undertaking on the basis that he should first be permitted to pursue an unfair dismissal claim in the Fair Work Commission. The associate judge denied that application, including because she regarded his Fair Work Commission claim as being concerned with an altogether separate question.
31. Ultimately the Supreme Court ordered Mr Tucker to pay the defendants $199,681.46 in damages, that sum being the wages paid to him by the SRO from the time of his undertaking until the termination of his employment.
32. Mr Tucker then sought leave to appeal to the Court of Appeal. He contended that the associate judge had erred in concluding that his contract of employment did not incorporate clause 21 of the VPSEA by reference, that the PA Act did not require compliance with the SRO’s Managing Misconduct Policy and clause 21 of the VPSEA, and by failing to conclude that the defendants had breached various obligations in clause 21 of the VPSEA with respect to the conduct of the investigations.
33. Mr Tucker’s application for leave to appeal and the appeal was heard by the Court of Appeal on 10 March 2021. In the present context it is relevant to record the following exchange between Kyron JA and Mr Tucker:

KYROU JA: Just to clarify something that you’ve already touched upon, in the substantive proceedings before the judge, you sought interlocutory and final injunctions and you also sought declarations.

…

KYROU JA: Do you accept that the relief in the nature of injunctions [is] now not possible, because they go to stopping something which has already happened? Do you accept that? And therefore, the only live relief really is the declarations, or some of the declarations.

MR TUCKER: That’s – yes, yes, I accept that, and of course, you know, if everything goes well and I get the declarations and there’s no appeal, then I would have to go to the Federal Court somehow and get the penalty. You know, the personal pecuniary penalties for breaches of the enterprise agreement. So, yes, so as long as – yes.

KYROU JA: Okay. And that was going to be my next – sorry, I interrupted you. What was the balance of your answer?

MR TUCKER: Sorry, I was just going to, yes, complete the circle. Your Honours asked a very reasonable question of what’s the point of all this. Well, the point is declaration for very personal reasons, as I passionately expressed, but also there is money in it for me, in the sense that in theory, I believe I can get those declarations and go the Federal Court and say, ‘Yes, sir, I was in the – whatever it is, the – for breaching the enterprise agreement.’

KYROU JA: Well, that’s – that was going to be my next question; what is the utility of the declarations? And from your answer it appears that you want to obtain a declaration so that you can use a declaration in a different proceeding in a different forum, is that correct? That may not be an appropriate use of the declaration relief in this Court, you see.

MR TUCKER: Well, I – that was my understanding, from this long saga, was that the declaration could be enforced in the Federal Court. I mean, that’s why the – I don’t know, Your Honour, I hadn’t put my mind to that particular scenario in any detail.

KYROU JA: Well, I just want to ask you – I want to ask you this; leaving aside possible use of the declaration in another forum in another proceeding, what is the utility of the declaration in this proceeding in this Court?

MR TUCKER: It’s a vindication. It’s a vindication. I can go and say, ‘Look at what the SRO has alleged against me, that cuts deep to my professional reputation, to my name, to my family’s name reputation, and look, they stuffed the process up.’ And there is a lot of weight, I – I know that, you know, that’s – you know, like, well there’s no direct financial benefit from this Court, but it’s – it means a lot to me. I mean, that’s why I’m fighting this.

KYROU JA: All right. So, the declaration first – it would not say that the allegations were false, the declaration would say that that the process was flawed?

MR TUCKER: Correct.

1. On 12 May 2021 the Court of Appeal made orders in *Tucker v State of Victoria* [2021] VSCA 120 granting the application for leave to appeal, allowing the appeal, and substituting the associate judge’s order of 16 July 2019 dismissing the proceeding with an order that there be judgment for Mr Tucker against the defendants in respect of the subject matter of a declaration in the following terms:

The defendants have failed to conduct the investigation into harassment allegations against the plaintiff in accordance with the procedural fairness requirements of clause 21.11(a) of the Victorian Public Service Enterprise Agreement 2016 and section 20(3)(c) of the *Public Administration Act 200*4, read together with section 8(b).

The Court of Appeal otherwise dismissed Mr Tucker’s proceeding against the defendants.

# the proceedings in the federal court

1. Mr Tucker filed an originating application on 2 July 2021 which claimed:
2. pecuniary penalty orders in respect of each of the contraventions set out in the declaration made by the Court of Appeal pursuant to s 546 of the FW Act;
3. an order that any pecuniary penalty ordered be paid to him within 21 days, pursuant to s 546(3) of the FW Act;
4. damages, including exemplary, general, aggravated, *Andrews*, and special damages;
5. a declaration that the respondents had breached their obligations under the Guidelines by reason of various failures; and
6. costs and interest pursuant to ss 51A and 52 of the *Federal Court of Australia Act 1976* (Cth), including interest on costs.
7. In broad terms the statement of claim alleged that:
8. the SRO was obliged to comply with clause 21 of the VPSEA, it did not do so, and thereby it contravened s 50 of the FW Act in alleging that Mr Tucker had harassed another employee;
9. the SRO was obliged to comply with s 20(3)(c) of the PA Act, read together with s 8(b), and thereby breached its obligations to treat Mr Tucker reasonably and fairly in alleging that Mr Tucker had harassed another employee; and
10. the SRO was contractually bound to comply with the provisions of the VPSEA and breached that contractual promise in making allegations that the applicant harassed another employee.
11. Insofar as damages are concerned, the statement of claim alleged that by reason of the matters complained of, Mr Tucker had been brought into hatred, ridicule and contempt and had been gravely injured in his character and reputation as a lawyer and employee and had suffered hurt and embarrassment and had suffered and will continue to suffer loss and damage. Particulars were provided of aggravated, exemplary, and special damages.
12. The statement of claim also alleged that the SRO was obliged to comply with the Guidelines and that it breached its obligations under various sub-paragraphs of the Guidelines. Detailed particulars were given of the alleged failures.

# the determination of the primary judge

1. The primary judge noted that in the Supreme Court proceeding Mr Tucker alleged, and the defendants had denied, that the SRO was obliged to provide an un-redacted (or less redacted) copy of the Klug report to him pursuant to clause 21.11(a) of the VPSEA, by virtue of the terms of his employment, which included s 20(3) of the PA Act. His Honour also observed that the particulars of the three matters complained of in the Federal Court proceeding (other than the claim about the Guidelines), constituting the whole of the matters complained of, relied on the declaration made by the Court of Appeal.
2. The primary judge regarded it as significant that each of Mr Tucker’s three Federal Court claims (other than the Guidelines claim) was founded on, and only on, the declaration – that is, the claims for:
3. compensations and penalties in respect of s 50 of the FW Act;
4. damages in contract for breach of the duty to comply with clause 21.11(1) of the VPSEA; and
5. damages in relation to a breach of s 20(3)(c) of the PA Act.
6. In these circumstances the primary judge took the view that the three claims pursued in the Federal Court were plainly founded on an issue that had already been pleaded and resolved in Mr Tucker’s favour in the Supreme Court proceedings – namely that clause 21.11(a) of the VPSEA entitled Mr Tucker to receive an un-redacted (or less redacted) copy of the Klug report in the conduct of the disciplinary process which was on foot against Mr Tucker.
7. The primary judge also regarded it as relevant that:
8. in the Supreme Court proceeding Mr Tucker sought injunctive and declaratory relief based on claims in contract and under the PA Act, but not damages;
9. Mr Tucker unsuccessfully attempted to persuade the Supreme Court that it had jurisdiction to hear a claim under the FW Act; and
10. after his unsuccessful application to transfer the Supreme Court proceeding to this Court, Mr Tucker did not discontinue the Supreme Court proceeding and instigate any proceeding, including a claim under the FW Act, in this Court.
11. Thus the primary judge concluded (at [64]-[65]) that Mr Tucker’s rights and obligations in respect of his claim that the SRO was obliged to provide an un‑redacted (or less redacted) copy of the Klug report to him pursuant to clause 21.11(a) of the VPSEA, by virtue of the terms of his employment, including s 20(3)(c) of thePA Act, merged into a final judgment upon the making of the declaration by the Court of Appeal that the defendants had “failed to conduct the investigation into harassment allegations against [Mr Tucker] in accordance with the procedural fairness requirements of clause 21.11(a) of the [VPSEA] and section 20(3)(c) of the [PA Act] read together with section 8(b)”: ***Tomlinson*** *v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507at 516 [20] (French CJ, Bell, Gageler and Keane JJ); *Bass v Permanent Trustee Company Ltd* (1999) 198 CLR 334 at 356-357 [48] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
12. The primary judge held (at [66]) that the causes of action sought to be pleaded in this Court (other than the Guidelines claim) are no longer available, because they merged in the judgment in the Supreme Court and are extinguished.
13. The primary judge also found (at [67]-[68]) that, in any event, a cause of action estoppel applied in respect of each of the s 50, contract and PA Act claims, referring in this regard to *Clayton v Bant* (2020) 272 CLR 1 at 13-14 [34]. These findings, his Honour concluded, operated to preclude Mr Tucker from validly commencing any proceedings in this Court in relation to any asserted failure of the SRO to provide him with an un-redacted copy of the Klug report.
14. As has been mentioned, the primary judge also found that the bringing of the proceeding in this Court was also an abuse of process. Referring to *Tomlinson* at 518-519 [25]-[26], and the observations made by French CJ, Bell, Gageler and Keane JJ about the inherently broader and more flexible nature of abuse of process as a doctrine of application in any circumstance in which the use of a court’s procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute, his Honour concluded that the proceeding should be so regarded, not only because Mr Tucker was seeking to raise before this Court issues which could have been raised before (the FW Act claim and claims for damages), but because he was seeking to vex the respondents again with the same claims. In this regard his Honour accepted the respondents’ submission that:

… it is an abuse of process to seek to use the outcome of the Supreme Court Proceedings, namely, the Declaration, to then pursue the s 50 Claim, the Contract Claim and the PA Act Claim.

Mr Tucker elected to commence, and then continue, the Supreme Court Proceedings, rather than commencing proceedings in this Court, in full knowledge that the Supreme Court could not order penalties or compensation under the FW Act. He did so when it was in the interests of the parties and in the public interest for all claims to be resolved simultaneously in a single proceeding. Mr Tucker himself recognised the importance of these matters when seeking to cross vest the Supreme Court Proceedings to this Court.

Also, conducting the litigation in this way deprived the First Respondent of his right to claim penalty privilege in respect of the s.50 Claim. The conduct of the litigation in this way undermines the processes of the Court and the protections afforded by the law. It will bring the administration of justice into disrepute if this proceeding is not stayed.

Further, Mr Tucker did not seek damages for his claims in contract and under the PA Act in the Supreme Court proceedings, but now seeks damages in this Court for what are in substance identical claims.

Accordingly, Mr Tucker could have brought all his claims in a single proceeding in this Court. Knowing this, he sought to cross vest the proceeding to this Court. Mr Tucker argued that it was in the interests of all parties and the Court that his claims be heard together in this Court. When his application to cross vest the proceeding failed, it was incumbent on Mr Tucker, if he wanted to make claims under the FW Act, to then discontinue the Supreme Court Proceedings and commence proceedings in this Court.

Mr Tucker raises in his affidavit affirmed 26 May 2021 his ‘understanding based on advice that it was inappropriate to discontinue the Supreme Court proceeding to commence a new proceeding in the Federal Court or the Federal Circuit Court’ for reasons which included the non transferability of the SRO’s undertaking not to finalise the disciplinary process and costs concerns.

The fact that Mr Tucker made a forensic decision, in what he considered to be his own interests, not to commence proceedings in this Court, is no answer to the abuse of process now alleged against him, let alone an answer based on the principles of res judicata or cause of action estoppel.

1. On the subject of Mr Tucker’s failure to comply with his undertaking as to damages in the Supreme Court, and whether that is a prima facie contempt of the Supreme Court such that it would not be in the interests of justice for this Court to permit him to pursue his claims here, the primary judge accepted that this might well be the position. However, he declined to say anything about this in circumstances where he regarded the other grounds for the making of the orders the respondent sought as so clearly made out.
2. As has been mentioned the primary judge regarded the appellant’s claim under the Guidelines as hopeless on the basis that there was no relevant cause of action.

# the appeal

1. By his notice of appeal Mr Tucker appeals from “the whole of the judgment and the orders” of the primary judge as follows:
2. The learned primary judge erred in summarily dismissing the proceeding (‘**proceeding**’). Specifically, the learned primary judge erred in:
3. concluding that the doctrine of merger or, alternatively, an estoppel applied to the proceeding by reason of the Victorian Court of Appeal’s decision in *Tucker v State of Victoria* [2021] VSCA 120 (‘***Tucker***’) in circumstances where:
4. the relief sought in the Federal Court, including access to pecuniary penalty orders under the *Fair Work Act 2009* (‘**FWA**’), was not available in the Supreme Court;
5. the principal issue determined in *Tucker*, that is, whether the Respondents **breached** a term of an enterprise agreement, is different to the principal issue in the proceeding, that is, the **quantum** and **imposition** of penalties flowing from those breaches;
6. in *Tucker*, the Court of Appeal made a declaration (‘**declaration**’) that recorded the Respondent’s breaches of a term of an enterprise agreement notwithstanding the following exchange which, in the circumstances, was not surplusage:

KYROU JA: Sorry, Mr Bourke, just to take you back. If this court were to make a declaration in the form sought by Mr Tucker; would that be binding on the Fair Work Commission or the Federal Court or any other court because I think you'd assume that it would be binding; is that a correct assumption?

MR BOURKE: Potentially it may be binding.

KYROU JA: Potentially

MR BOURKE: Because it is an adjudication of a fact that was in issue. But we would say in circumstances where the purpose is to secure a penalty because of a breach of s.50 of the Fair Work Act which makes it unlawful to breach an enterprise agreement and where the legislature has given the Federal Court, and some other courts but not this court, jurisdiction in relation to those types of cases that would be inappropriate for such a declaration to be made and for the Federal Court's hands to be tied; and

1. there is no substantial correspondence between the Appellant’s rights asserted in *Tucker*, that is, the right to procedural fairness under *inter alia* a term of an enterprise agreement, and the rights asserted in the Federal Court including the right to apply for pecuniary penalty orders undersection 546 of the FWA;
2. misapplying the High Court’s reasoning in *Clayton v Bant* [2020] HCA 44 (in particular at [84] per Edelman J) and *Tomlinson v Ramsey Food Processing Pty Limited* [2015] HCA 28 by reason of the circumstances set out above in subparagraph 1(a);
3. concluding that the proceeding was an abuse of process in the circumstances set out above in subparagraph 1(a);
4. failing to enforce the civil penalty regime in the FWA by:
5. depriving the Appellant access to pecuniary penalties orders under the FWA as a consequence of the Respondents’ breaches of a term of an enterprise agreement; and
6. absolving the Respondents from liability with respect to their unlawful conduct that is recorded in the declaration; and
7. concluding that the claim in the proceeding which pertained to the Model Litigant Guidelines (**Guidelines Claim**) was “hopeless” in circumstances where:
8. the Guidelines impose binding obligations on the Respondents;
9. the Court has power to make declarations under section 21 of the *Federal Court of Act 1976*;
10. the Court has jurisdiction to determine all aspects of the proceeding because the relevant matter is one arising under the FWA; and
11. there is utility in granting the relief sought given the Respondents’ repeated breaches of the Guidelines.
12. The learned primary judge erred in failing to provide adequate reasons.

Specifically, the learned primary judge erred in failing to provide adequate reasons which addressed:

a. any of the Appellant’s submissions including written submissions filed 7 October 2021;

b. any of the authorities relied on by the Appellant including *Miller v University of New South Wales* (2003) 132 FCR 147; [2003] FCAFC 180 (in particular at [48] –[76] and [83] – [85] per Ryan and Gyles JJ); and

c. the exchange in the Court of Appeal refer to in subparagraph 1(a)(iii) above.

3. The learned primary judge erred in failing to set aside the Respondents’ Notice to Produce dated 13 September 2021 (‘**NTP’**), with costs, given:

a. the NTP did not seek “documentation” in accordance with rule 20.31 of the *Federal Court Rules 2011*;

b. the NTP was akin to discovery;

c. the Respondents declined to withdraw the NTP;

d. the Respondents issued their NTP in the context of a summary judgment application; and

e. in the above circumstances, the NTP was issued without a proper basis.

(Footnotes omitted)

(Original emphasis)

## Ground 1

1. It will be observed that there are several errors asserted against the reasoning of the primary judge in ground 1 of the notice of appeal. Ground 1(a), and collaterally ground 1(b), are expressly complaints about his Honour’s conclusion that the causes of action sought to be pleaded in this Court (aside from the Guidelines claim) are no longer open to Mr Tucker because they merged in the judgment in the Supreme Court and are extinguished or are otherwise the subject of a cause of action estoppel. Insofar as ground 1(c) is a complaint about his Honour’s finding that the proceeding in this Court was an abuse of process, that complaint is based on the finding of the primary judge that the proceeding in this Court was an abuse by reason of his conclusions regarding the operation of the doctrines of merger and cause of action estoppel which are the subject of grounds 1(a) and (b) of the notice of appeal.
2. However, the primary judge’s finding that the proceeding in this Court constituted an abuse of process was not based only on the fact that Mr Tucker was seeking to raise issues which could have been raised before. It was a critical further aspect of his Honour’s reasoning that the proceeding in this Court was an abuse of process because the effect of the proceeding was to vex the respondents again with the same claims in a manner which was unjustifiably oppressive or would bring the administration of justice into disrepute (at [69]-[70]). In its terms, ground 1(c) makes no complaint about his Honour’s conclusion in this regard. Nor was any complaint to this effect made in Mr Tucker’s written or oral submissions on this appeal.
3. In order for Mr Tucker to succeed in this appeal, it is not enough for him to succeed only on his merger or cause of action estoppel case. He must also succeed on his abuse of process case. However, whether or not Mr Tucker’s conduct in bringing his further proceeding in this Court rises to the level necessary to constitute an abuse of process in the sense essayed by the High Court in *Tomlinson* at [25]-[26] is not a question even raised for determination on this appeal, let alone established on the submissions advanced in support of it. The primary judge, in the exercise of his discretion on the question of whether the proceeding should be summarily dismissed pursuant to r 26.01, has determined that it should be, including on the basis that the proceeding constitutes an abuse of process. No challenge whatsoever is made by Mr Tucker to the key aspect of his Honour’s finding that the proceeding constitutes an abuse because it seeks to vex the respondents with the same claim. And even if it were, any such challenge would plainly need to demonstrate that an error had been made in the exercise of the discretion in order to surmount the high hurdle necessary to disturb the exercise of a judicial discretion by a primary judge: *House v R* (1936) 55 CLR 499 at 504-505 (Dixon, Evatt, McTiernan JJ); *Gronow v Gronow* (1979) 144 CLR 513 at 519-520 (Stephen J); *R v Carroll* (2002) 213 CLR 635 at 657 [73] (Gaudron and Gummow JJ); *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at 264 [7] (Gleeson CJ, Gummow, Hayne and Crennan JJ); *Oswal v Burrup Fertilisers Pty Ltd (Receivers and Managers Appointed)* (2011) 85 ACSR 531 at 534 [8] (Mansfield and Foster JJ). No such error has been suggested, still less demonstrated.
4. In these circumstances the primary judge’s finding that the proceeding in this Court is an abuse of process because it seeks to vex the respondents again with the same claim is a sufficient basis to sustain his Honour’s orders summarily dismissing the proceeding pursuant to r 26.01 and must stand. It is unnecessary to consider the complex questions which surround the scope and effect of the declaration made by the Court of Appeal and whether the doctrines of merger and cause of action estoppel would, in all the circumstances, preclude the maintenance of related claims in this Court.
5. Nor is it necessary to resolve whether ground 1(d), alleging a failure to enforce the civil penalty regime in the FWA, can be established. Ground 1(d), although directed at the consequence of Mr Tucker not being able to maintain his action, is a function of the error asserted in ground 1(a). While we are not satisfied that any error is established by ground 1(d), it is unnecessary to address it substantially as the failure to demonstrate error in the finding of an abuse of process more generally is fatal to the success of the appeal.  Not every ground of appeal must be addressed if a failure on any one of them is dispositive of the appeal: ***Boensch*** *v Pascoe* (2019) 268 CLR 593 at 600-601 [7]-[8] (Kiefel CJ, Gageler and Keane JJ), 629-630 [101] (Bell, Nettle, Gordon and Edelman JJ).
6. The same can be said in relation to ground 1(e), the claim based on his Honour’s determination that the Guidelines claim was “hopeless”. Nonetheless, we do not doubt his Honour’s conclusion in this respect. It is to be noted that the authorities cited by Mr Tucker on the appeal in support of the proposition that the Guidelines impose binding obligations which are regularly enforced by the courts do not support the existence of a free-standing cause of action based on the Guidelines: *Razzy Australia Pty Ltd v Commissioner of State Revenue* [2021] VSC 409 at 19 [78] (Delany J); *North West Melbourne Recycling Pty Ltd v Commissioner of State Revenue (No 2)* [2017] VSC 726 at 5-8 [11]-[17] (Croft J); *Comaz (Aust) Pty Ltd v Commissioner of State Revenue* (2015) 101 ATR 339 at 368-371 [71]-[79] (Croft J). The observations in these cases about the significance of the Guidelines are properly to be understood in the statutory context of the *Civil Procedure Act 2010* (Vic).

## Ground 2

1. Insofar as it is alleged that the primary judge erred in failing to provide adequate reasons, we reject this ground of appeal. His Honour’s explanation of his critical finding that the proceeding in this Court constituted an abuse of process was adequately explained. It was unnecessary for his Honour to address, in terms, the submissions made by the parties and the various authorities brought to his attention: *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447 at 463-464 [62] (Gleeson CJ, McHugh and Gummow JJ); see also *Stoker v Adecco Gemvale Constructions Pty Ltd* [2004] NSWCA 449 at [41] (Santow JA, with whom Mason P and Sheller JA agreed); *Perkins v County Court of Victoria* (2000) 2 VR 246 at 270-271 [56] (Buchanan JA, with whom, relevantly, Phillips and Charles JJA agreed).

## Ground 3

1. The assertion that there was any error on the part of the primary judge in failing to set aside the respondents’ notice to produce dated 13 September 2021 is without foundation and must also be rejected. It was unnecessary for his Honour to deal with this matter in determining on the application before him whether summarily to dismiss the proceeding pursuant to r 26.01, and at no stage did his Honour indicate that he would deal with it. The complaint has emerged only on appeal and, even were it to have substance, could not operate to displace his Honour’s finding that Mr Tucker’s proceeding in this Court constitutes an abuse of process. We accept the respondents’ submissions that, in any event, Mr Tucker’s application to have the notice to produce set aside was devoid of merit.

# disposition

1. There will, accordingly, be an order dismissing the appeal. Given that the failure to demonstrate error in the finding of an abuse of process more generally is fatal to the success of the appeal it is unnecessary to consider the notice of contention in relation to Mr Tucker’s failure to comply with his undertaking as to damages in the Supreme Court proceeding: *Boensch* at 600-601 [7]-[8] (Kiefel CJ, Gageler and Keane JJ), 629-630 [101] (Bell, Nettle, Gordon and Edelman JJ).
2. Insofar as the costs of the appeal are concerned, in circumstances where a critical finding of the primary judge sufficient to sustain his Honour’s order summarily dismissing the proceeding was not ever the subject of challenge, we accept the submissions of the respondent that the appeal had no prospect of success and that s 570(2)(b) of the FW Act is engaged. It may be that s 570(2)(a) of the FW Act is also engaged. In any event, Mr Tucker should be ordered to pay the costs of the appeal on an indemnity basis.

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| I certify that the preceding fifty (50) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Bromberg, Bromwich and McEvoy . |

Associate:

Dated: 28 October 2022