[2019] FWCFB 1767

FAIR WORK COMMISSION

APPEAL DECISION

Fair Work Act 2009
s.604—Appeal of decision

Smerff Electrical
v
Jordan Lamacq
(C2019/739)

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT SAMS
COMMISSIONER SIMPSON SYDNEY, 26 MARCH 2019

Appeal against decision [2019] FWC 181 of Deputy President Asbury at Brisbane on 14 January 2019 in matter number U2018/5137.

Introduction

[1] On 16 May 2018 Jordan Lamacq (**the Respondent**) was dismissed from his employment with Smerff Electrical (**the Appellant**).

[2] In a decision 1 given on 14 January 2019 (**the Decision**), Deputy President Asbury found that the Respondent's dismissal was inconsistent with the Small Business Fair Dismissal Code and was harsh, unjust and unreasonable under s.387 of the *Fair Work Act 2009* (Cth) (**the Act**). The Deputy President ordered that the Appellant pay the Respondent an amount of $11,400.00 as compensation for his unfair dismissal, to be paid no later than 4 February 2019.2

[3] On 3 February 2019 the Appellant lodged an application seeking permission to appeal and appeal of the Decision orders of the Deputy President. The Appellant sought a stay of the whole Decision and Order pending the hearing and determination of the appeal. The stay application was heard by Deputy President Sams on 7 February 2019. In his decision 3 Deputy President Sams dismissed the stay application. In the body of that decision Deputy President Sams observed that there was no evidence before him that the Appellant could not pay the compensation order.

[4] On 4 March 2019 the matter was listed for permission to appeal before the Full Bench. Both parties were self-represented.

Appellant's submissions

[5] The Appellant seeks permission to appeal on the basis that the Deputy President made a number of errors of fact. The Appellant is self-represented and did not clearly set out grounds of appeal. However, it can be discerned from the material filed that the alleged errors are:

• The Deputy President's finding at [50] that the Appellant did not dispute the Respondent being at the Sunshine Coast with permission, when the Appellant asserted that the parking ticket was the first he had heard about the Respondent being on the Sunshine Coast;

• The Deputy President's statement at [50] that "Mr Hickey also alleged that Mr Lamacq claimed an amount of $40 per month for use of his personal mobile telephone. According to Mr Hickey that amount was excessive." The Appellant submitted that he stated at the hearing that the Respondent was entitled to $40 a month for phone expenses and instead he started to claim monthly, fortnightly then weekly.

• The Deputy President's finding at [67] that the evidence against the Respondent in relation to the use of the Company fuel card and his personal vehicle appeared to have been obtained by the Appellant after the dismissal, and that the Appellant allowed employees to use the Company fuel card to fuel their own vehicles. The Appellant appears to seek to appeal on the basis that the Deputy President did not take into account evidence obtained by the Appellant after the dismissal;

• The Deputy President allowed the Respondent to rely on text messages provided to the Commission by him that were exchanged between the Respondent and the Appellant, when those text messages did not represent a full record of text messages exchanged.

• The Deputy President made an error of fact as the Respondent admitted he was doing a 'cash job' and refused to give the Appellant details concerning another former employee.

[6] At the hearing the Appellant sought to raise a further ground of appeal in that the Respondent claimed at the matter at first instance, that he did not receive any payslips when the Appellant had in fact provided the Respondent payslips or group certificates. This demonstrated that the Respondent should not have been believed.

Appeal Principles

[7] An appeal under s.604 of the Act is an appeal by way of rehearing and the Commission's powers on appeal are only exercisable if there is an error on the part of the primary decision maker. 4 There is no right to appeal and an appeal may only be made with the permission of the Commission.

[8] This appeal is one to which s.400 of the Act applies. Section 400 provides:

"(1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under this Part unless the FWC considers that it is in the public interest to do so.

(2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under this Part can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact."

[9] In *Coal & Allied Mining Services Pty Ltd v Lawler and others*, Buchanan J (with whom Marshall and Cowdroy JJ agreed) characterised the test under s.400 of the Act as "a stringent one". 5 The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.6 In *GlaxoSmithKline Australia Pty Ltd v Makin* a Full Bench of the Commission identified some of the considerations that may attract the public interest:

"… the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate

court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters." 7

[10] It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated. This is so because an appeal cannot succeed in the absence of appealable error. 8

Consideration

[11] Having considered the oral submissions and materials filed by the Appellant, we are not satisfied that there is an arguable case of error or any other basis warranting the grant of permission to appeal. The Decision discloses an orthodox approach by the Deputy President to the Respondent's unfair dismissal application.

[12] The Deputy President's finding at [67] that the evidence against the Respondent in relation to the use of the Company fuel card and his personal vehicle appeared to have been obtained by the Appellant after the dismissal was made in the context of the Deputy President deciding whether the dismissal was consistent with the Small Business Fair Dismissal Code. Given the dismissal was a summary dismissal, the Deputy President was required to form a view about whether the Appellant believed on reasonable grounds that the employee's conduct was sufficiently serious to justify immediate dismissal. That view pertains to the state of mind of the Appellant at the relevant time. 9 The Deputy President's approach to the issue she was dealing with in that part of the Decision was appropriate and does not give rise to a basis to grant permission to appeal.

[13] The Deputy President admitted into evidence text messages exchanged between the Respondent and Appellant in circumstances where the Appellant complained at the hearing at first instance, and on appeal that they were not a full record of text messages exchanged between them. However, the Appellant was unable to produce any other text messages. 10 The Respondent submitted messages left out were not related to the dismissal, and an exchange over the issue occurred in the course of the proceedings.11 It is apparent the text messages tendered in evidence were relevant to the facts in issue and there was nothing out of the ordinary in the Deputy President's approach. This issue does not provide a basis for the granting of permission to appeal.

[14] The Deputy President's comment at [50] that the Appellant did not dispute the assertion made by the Respondent that he sought to use his work vehicle to travel to the Sunshine Coast on 4 April 2018 does appear to be inconsistent with the evidence, as the transcript reveals that the Appellant's evidence was to the effect that the first he knew about it was when he became aware of a parking fine. 12 Also at [50], it would appear that the Deputy President's comment that the Appellant alleged that the Respondent claimed an amount of $40 per month for the use of his personal mobile phone and that according to the Appellant this was excessive, did not correctly reflect the nature of that part of the evidence. The Appellant's evidence was that the Respondent was claiming the $40 more frequently than monthly.13 It is clear however, at [68], that the Deputy President was aware that the Appellant allowed the Respondent to charge $40 per month for his mobile phone.14

[15] In our view, the Deputy President's commentary at [50] must be considered in the context of the Decision when read as a whole. Such commentary was contained in a part of the Decision summarising the evidence but prior to the part of the Decision where the Deputy President considered whether there

was a valid reason for dismissal in [71] to [81]. These errors of fact had little bearing on the gravamen of the Decision and are not significant errors warranting the grant of permission to appeal.

[16] The Appellant has also complained that the Deputy President made an error of fact as the Respondent admitted he was doing a 'cash job' and refused to give the Appellant details concerning another former employee. It is apparent from the Decision that the Deputy President concluded that the Appellant had been in the practice of allowing employees to perform 'cash jobs' and that the Appellant had allowed the Respondent to do so in the specific case given particular attention in the course of the hearing. This matter does not give rise to a basis to grant permission to appeal.

[17] In considering the reasons given for the dismissal and each of the remaining elements of s.387 of the Act to conclude that the Respondent's unfair dismissal was unfair, the Decision discloses an orthodox approach to the Respondent's unfair dismissal application.

[18] The new ground of appeal sought to be argued by the Appellant at the hearing was that the Respondent had claimed he had not received payslips or group certificates, when he had received them. The Decision includes consideration of payslips for the purpose of determining whether the Respondent satisfied the minimum employment period and the transcript reveals extensive discussion regarding payslips. 15 This issue is remote to the Deputy President's conclusion that the Respondent's dismissal was unfair and does not provide a basis to grant permission to appeal.

[19] On a separate matter, at the commencement of the permission to appeal hearing the Appellant was asked if he had complied with the order issued by the Deputy President for the Appellant to pay compensation to the Respondent. The Appellant responded that he had not. He claimed this was because he did not have $11,400. The Appellant was asked if he had made an application to the Deputy President that he did not have capacity to pay the order. He responded that he did not know he could.

[20] In the permission to appeal hearing the Appellant was also asked if his business was trading and whether the Police had returned his computer equipment that he had previously advised the Commission had been confiscated. The Appellant indicated he had purchased new computers and was operating the business on skeleton staff. Such a response does not support a view that he is unable to comply with the Deputy President's order.

[21] In a decision of a Full Bench of the Industrial Relations Commission of New South Wales in the matter of *Maldoc Pty Ltd v Bollard* 16 (*Maldoc*), the Full Bench was faced with the question of whether the Appellant should be allowed to proceed with an appeal where it had not complied with an order of a member of the New South Wales Commission following the conclusion of the matter at first instance, and in circumstances where the Appellant had not obtained a stay of the Commission's order. The Full Bench determined not to hear the Appellant further, until it 'regularised its conduct'.

[22] In a later decision of a Full Bench of the Industrial Relations Commission of New South Wales in Court Session in the matter of *Nutshack Franchise Pty Ltd and others v Smith and another* 17 the Court found that an appellant seeking to pursue an appeal without complying with an earlier order, and without seeking a stay was a clear abuse of the appeal process. The Court endorsed and applied the approach in *Maldoc.*

[23] Aside from our conclusion that the Appellant has failed to establish a basis to grant permission to appeal, we are also of the view that it would not be in the public interest to allow an appeal to proceed

in circumstances where a party seeking to pursue an appeal has not complied with an order of the Commission.

Conclusion

[24] For the reasons set out above, we are not satisfied, for the purpose of s.400(1) of the Act, that it would be in the public interest to grant permission to appeal.

[25] Permission to appeal is refused.

VICE PRESIDENT

Appearances:

Mr Simon Hickey appearing for the Appellant.

Mr Jordan Lamacq appearing on his own behalf.

Hearing details:

2019.

Sydney with videolink to Brisbane.

4 March.

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1 *Lamacq v Smerff Electrical* [2019] FWC 181

2 PR703797.

3 [2019] FWC 796.

4 *Coal and Allied Operations Pty Ltd v AIRC* (2000) 203 CLR 194 at [17] per Gleeson CJ, Gaudron and Hayne JJ.

5 (2011) 192 FCR 78; (2011) 207 IR 177 at [43].

6 *O'Sullivan v Farrer and another* (1989) 168 CLR 210 at 216-217 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* (2011) 243 CLR 506 at [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78; (2011) 207 IR 177 at [44]-[46].

7 *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 at [27]; (2010) 197 IR 266.

8 *Wan v AIRC* (2001) 116 FCR 481 at [30].

9 Section 388 of the Act; and see generally the application of the Code in *Pinawin T/A RoseVi.Hair.Face.Body v Domingo* [2012] FWAFB 1359 and *Ryman v Thrash Pty Ltd* [2015] FWCFB 5264.

10 Transcript of hearing before DP Asbury Monday 27 August 2018 PN 98 – 101.

11 Transcript of hearing before DP Asbury Monday 27 August 2018 PN 308- 346.

12 Transcript of hearing before DP Asbury Monday 27 August 2018 PN 274-275.

13 Transcript of hearing before DP Asbury Monday 27 August 2018 PN175-176.

14 [2019] FWC 181 at [68].

15 [2019] FWC 181 at [27].

16 (1997) 90 IR 29.

17 (1999) 90 IR 355.