



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**VICE PRESIDENT CATANZARITI  
DEPUTY PRESIDENT CLANCY  
COMMISSIONER BISSETT**

**C2022/8190**

**s.604 - Appeal of decisions**

**Appeal by Scott  
(C2022/8190)**

**Sydney**

**11.00 AM, FRIDAY, 10 FEBRUARY 2023**

PN1

VICE PRESIDENT CATANZARITI: Thank you. I will take the appearances. Mr Scott?

PN2

MR D SCOTT: Present.

PN3

VICE PRESIDENT CATANZARITI: Thank you. And for the respondent?

PN4

MR CRILLY: Yes. May it please the Commission I seek permission to appear. With me is Ms Gall, initial R.

PN5

VICE PRESIDENT CATANZARITI: Yes. And what's the basis you seek permission, Mr Crilly?

PN6

MR CRILLY: On the basis that pursuant to section 596(2)(a) it would allow the matter to be dealt with more efficiently. We rely on the written submissions filed on 21 December last year. The short point is this; there are some in particular statements made in the grounds of appeal about the way that the matter below unfolded, and I appeared below, and we are without appeal books so far as I am aware. So in my submission it is in the interest of efficiency that the respondent be represented by myself today.

PN7

VICE PRESIDENT CATANZARITI: Mr Crilly, you are aware that today's matter is listed for an extension of time and PTA only, not for the substantive merits of the appeal. And ordinarily what would happen is if the extension of time was granted and the PTA granted that would then trigger a second hearing, but it's only at that point. Similarly the directions as issued did not require the respondent to do anything.

PN8

MR CRILLY: Yes, that is so, I accept that.

PN9

VICE PRESIDENT CATANZARITI: And you might bear that in mind going forward when you are appearing in these matters. In any event, Mr Scott, do you have an objection for Mr Crilly appearing given that he appeared at first instance?

PN10

MR SCOTT: With respect, can I ask if I did would that make a difference?

PN11

VICE PRESIDENT CATANZARITI: It might. We're here to sort of hear your views and then we will have a chat about it.

PN12

MR SCOTT: Okay. I object then.

PN13

VICE PRESIDENT CATANZARITI: What are you concerned about, what's your objection?

PN14

MR SCOTT: Well, I was just thinking (indistinct) the entire process that it's not a level playing field. I don't know the legal terms of which he's just described, which is (indistinct), but I just (indistinct) the fact that if he's not really needed here then I don't see a point of him being here. However - - -

PN15

VICE PRESIDENT CATANZARITI: Yes, I understand your point, and written material hasn't been filed in this matter. We will take a short adjournment. Thank you.

**SHORT ADJOURNMENT**

**[11.05 AM]**

**RESUMED**

**[11.06 AM]**

PN16

VICE PRESIDENT CATANZARITI: Yes, thank you. We have considered the material and we have decided, Mr Scott, that we are not going to allow at this hearing the legal representation. Written material has been filed. There are people from the respondent present. If they wish to make any submissions on the written material they can, but we are well able to read the written material which is quite extensive in this matter in any event.

PN17

So where we are at now is the next question for you, Mr Scott. Mr Scott, you are seeking to file additional material on the appeal. We have got that material. Ordinarily on an appeal we don't allow the filing of material. We need to know why you say we should consider that material.

PN18

MR SCOTT: Sir, I'd like to ask that you consider the material because it is part of this entire process that I've been through as far as - well, the investigative journey that I've been through as to how I've gotten here, and that is basically why. The crux of the matter is, and just to abbreviate it, there's a process by which these policies were meant to be implemented, and this is the way that it's been explained to me, and they haven't followed that matter, and that's basically what the material says.

PN19

Even by Telstra's own admission the only people that they consulted with were - and I say consulted with inverted commas up the top, because they basically just dictated to us - they didn't consult with any of the other bodies that would be involved in implementing such policy, and the transcript previous shows that, but also in that email from Queensland Health indicates the process by which Queensland Health have their best practice in regards to implementing the type of

policy in relation to consultation with them and consultation with even the Human Rights Commission in Queensland.

PN20

VICE PRESIDENT CATANZARITI: Yes, thank you. Yes, we have reviewed that material. We are not going to allow the new material in. The material will stand as it was filed in the proceedings. We don't see the relevance of that material, nor that it enlivens any new material that was otherwise available at the time of hearing. So the material will be as it was.

PN21

We then go to the actual appeal itself. There are two matters in this appeal that we are dealing with today. One is the extension of time, that is why did you file late; and secondly permission to appeal. You have put on material that you want to rely upon. Is there anything additional you want to say to us today in support of those two matters?

PN22

MR SCOTT: Yes, sir. My understanding, and I need correction and a bit of guidance in this, is that the reason why we have work Commission and Human Rights Commission is that you guys are an extension of those Acts and under those Acts it's basically your role to uphold them objectively. I strongly believe with everything that I've been through that that law has been ignored, especially with the implementation of this policy, and everything that could be done in order to sort of back door it, so to speak, or to go around the back way to implement this policy and to thereby terminate my employment, which I believe is unfair, has been done.

PN23

And the lack of duty of care, the lack of active researching, and implementing the policy in a correct, fair and objective manner I feel has been disregarded and overlooked. And it's all in the material as you said, all in the submissions. I still don't have an understanding of what lawful and reasonable means. And also when I asked about it in the actual hearing I was just dismissed, and that's what led me to do more investigations and more research with regard to the role of the Fair Work Ombudsman, the role of the Fair Work Commission, and also the role of human rights as it relates to the respective Acts that they look after.

PN24

And so I need some understanding as to how this should be done to people, to us, especially because even from (indistinct) and again my knowledge of the law and applications is just what I can read and understand from my life experience. I haven't had any particular training on it, but everything that I've read in the Fair Work Act says that changes to an enterprise agreement need to go via the Commission, and the fact that they used a contract that was signed four years ago where COVID was not around to justify implementing and then terminating me under what they call lawful and reasonable I still - I can't wrap my head around it, because even when I was selling and selling for Telstra I would never go back to a client two years later or three years later with a change in the terms of the contract. So there's just a few things that I need to understand here, and again that's why I'm choosing to address the premise by which we were terminated,

rather than the process, and understanding how the Fair Work Commission has jurisdiction over that particular part, because as far as I understand the Fair Work Commission looks after the entire Act and ensures that the relationship between employer and employee is fair and just. And that's all I'm asking, a bit of justice, because I was done wrong by. I believe I was done wrong by.

PN25

VICE PRESIDENT CATANZARITI: Yes. Is there anything further you want to say as to why the appeal was filed late?

PN26

MR SCOTT: Sir, because I've been working for the past year again doing these investigations, going back and forth with Queensland Health. I actually have them - I'm dealing with the Queensland Ombudsman right now with Queensland Health in trying to get more information out of them in relation to (indistinct) and how it's (indistinct), and all I've gotten has been ambiguous answers, and I'm trying to get those answers defined, clearly defined, just so that I can understand.

PN27

The thing about it is I have been also chasing up Industrial Relations, I've been chasing up human rights, because these are all the things that I believe have been impeded upon. My understanding of law in Australia is that all - we've got the Constitution, then we've got Federal law and we've got state law, and they all lead back to that Constitution. And as far as workers with work goes it's the worker's health - sorry, Fair Work Act, the WHS Act, Industrial Relations Act, the Human Rights Act, and they all tie into each other in relation to how - in relation to the employer and employees relationship. And again a few of these - quite a few of these - - -

PN28

COMMISSIONER BISSETT: Mr Scott - - -

PN29

MR SCOTT: - - - which is why I've been - - -

PN30

COMMISSIONER BISSETT: I don't mean to interrupt you, Mr Scott, but an appeal against the decision in the Commission has to be lodged within 21 days of the decision being issued. It took you 123 days to lodge your appeal. So why did it take an extra 100 days for you to make your appeal to the Commission; why was there the delay?

PN31

MR SCOTT: The bottom truth, ma'am, is I only found out that I could appeal after seeing Senator Gerard when he - in one of his YouTube video clips talking to the Fair Work Commission about this entire thing, and then learning that the process after a decision was appeal. And so after I lost - well, after I was dismissed by Deputy Chambers(sic) I went on to seek other avenues via the Industrial Relations and the Human Rights and all that to seek justice, and it was upon seeing the video from Senator Gerard, well I could appeal that. I just - after it was dismissed I was like, well, look, just my view of it was if this Commission

is not going to give me the justice that I require I will go get justice via other lawful avenues, and that's where I went.

PN32

I've got the documentation to prove that I've been trying to talk to the Industrial Relations people as well as the Human Rights people, and it was after seeing that video where - I don't who Senator Rennick was talking to, but they said that the process after that - also I did try to complain. So I complained about the way that the thing was handled, the hearing was handled, and it was Deputy Chambers' associate that sent me the link to complain, and then after the complaint was lodged I was told that I should appeal and then try to seek an avenue through that way. So that's the bottom truth, that's how we've arrived here.

PN33

VICE PRESIDENT CATANZARITI: Yes, thank you. We will then go to - Ms Gall, are you going to be the spokesperson that Telstra wants to say beyond the written submissions, or is it Mr Small?

PN34

MR SMALL: It's me. It's me, thank you, your Honour.

PN35

VICE PRESIDENT CATANZARITI: Is there anything you want to say beyond the written submissions you've put on?

PN36

MR SMALL: I think the written submissions largely cover it, your Honour. I might just make a couple of comments and you can let me know whether or not I'm going too far.

PN37

VICE PRESIDENT CATANZARITI: You will remember as I said to your representative we are only dealing with extension of time and permission to appeal today.

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MR SMALL: Correct.

PN39

VICE PRESIDENT CATANZARITI: We are not dealing with the substantive merits of the appeal.

PN40

MR SMALL: I understand that, yes. Apologies for my delay, I was quite unwell actually, I've got a stomach complaint. Your Honour, obviously the submission of Fone Zone is that permission to appeal should be refused. The factors relevant to the Commission's discretion in deciding whether to extend time for filing of the appeal are well established in Jobs, Telstra and Eland, where there's a satisfactory reason for the delay, the length of delay, the nature of the ground of the appeal and the likelihood that one or more of those grounds being upheld if time was extended, and any prejudice to the respondent.

PN41

The overall policy consideration in that time ought not to be extended as a matter of course as time limits such as those in rule 56 exist for a reason. In this case consideration speak with one voice against the extended time to file the appeal. The delay was exceptionally long. Deputy President Lake issued his decision on 11 August 22. That means the final day to file an appeal within time was 1 September 2022. The applicant did not file his appeal until 13 December 2022, so as you mentioned earlier, your Honour, he's 103 days late.

PN42

The Full Bench of the Commission and its predecessor have described days of between 33 and 78 days as being considerable and significant. Asia Pacific Cleaning Services Pty Ltd - - -

PN43

VICE PRESIDENT CATANZARITI: Every case will play on its merits and there has certainly been at least one decision which was over 100 days and it was allowed in.

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MR SMALL: That's correct, your Honour.

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VICE PRESIDENT CATANZARITI: So it's very much on the facts of the case - - -

PN46

MR SMALL: Understood.

PN47

VICE PRESIDENT CATANZARITI: - - - to justification for why was there a delay, and we have heard from the appellant say why they say they were late. So that's the only material we can consider. There is no general rule that a particular number of days will wipe you out.

PN48

MR SMALL: In this case, your Honour, the explanations proffered by the applicant are, you know, he was licking his wounds, he was engaged with an application in the Human Rights Commission, of which he leads no evidence, but which if it is the complaint we're aware of it was dismissed on 6 September 2022. And third, seemingly he did not in fact read the entirety of Deputy President Lake's decision until the Human Rights matter was dismissed, and again it seems that might still have been over three months before filing the appeal.

PN49

So most of the delay, your Honour, is unexplained. So far as it goes what the explanation demonstrates is that he simply chose to attempt to pursue other avenues rather than an appeal. There's no evidence he was not able to engage with the Commission and could not have filed an appeal. Indeed, in our submission, it's action to show the opposite.

PN50

In relation to prejudice the usual issues of having to deal with an appeal would arise in the context of having to defend a scrawling and ill-defined appeal. We don't say there's any great deal of material prejudice additional to that visited if the applicant had filed within time.

PN51

Finally, there are no appeal grounds in which the Commission should grant permission which is relevant to both of the applications before the Full Bench today. The notice of appeal and submissions are difficult to understand. We have sort of tried to distil the following propositions: first, that the Deputy President favoured the respondent, this is an allegation of bias. Second, he didn't have regard to the relevant evidence of the applicant's medical circumstances.

PN52

And third, there's a catalogue of complaints which appear to add up to assertions that the Deputy President only dealt with the termination procedure adopted by the respondent and not the standard reason for decision. Fourth, there's some criticism of a consultation in which the respondent engaged. There is just no prima facie case made out, in our submission. I won't go into any of those matters in any more detail. You have made it clear that you're only considering the delay in this case.

PN53

VICE PRESIDENT CATANZARITI: And also permission to appeal, which was the (indistinct) at this point.

PN54

MR SMALL: Yes. This being an appeal from an unfair dismissal decision it's not sufficient that the Commission be satisfied there's an arguable case of appealable error due to section 400 of the Act, you also must be satisfied there's a public interest. There's no basis, we say, in which it can be said that this appeal is in the public interest. The case is an attempt to reagitate matters that were put below and deals with matters where the relevant principles are well-established and well known following the Mt Arthur case.

PN55

As to the matters that are historically indicative of public interest in an appeal first there's no diversity decisions at first instance to that guidance from an appellate body as found in the Tytula appeal at paragraph 21. Indeed the principles applicable to both the hearing of unfair dismissal matters and its determination of what is a lawful and reasonable direction have been the subject of close scrutiny by the Full Bench and in courts routinely.

PN56

The appeal raises no issue of importance or general application. The suggestion in the written submissions that the Deputy President's reasoning sets a precedent allowing for a lawful and reasonable direction that an employee commit murder is just patently wrong. Both an understanding of stare decisis and in that decision was confined to the facts of the case.



PN57

Setting aside the appellant's person views the decision is neither manifestly unjust, nor is it counterintuitive, certainly in line with many recent decisions from the Commission. The Deputy President applied, in our view, legally orthodox and unexceptional principles in reaching his decision.

PN58

For all those reasons we say you should not grant permission to appeal. In the circumstances of an appeal that is over three months out of time for no good reason there should be no extension of time for the filing of the appeal. There's no difference between this appeal and many brought by persons who are dismissed following a choice not to be vaccinated against COVID-19, (indistinct) to reargue matters rather than advancing a serious case of appealable error in a determination of their case. This is not that type of case in which the Commission should depart from the usual finality that time limits such as those which the rules intend to be the case. That's all I have. Thank you, your Honour.

PN59

VICE PRESIDENT CATANZARITI: Mr Scott, is there anything you would like to say in reply?

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MR SCOTT: There is a lot - - -

PN61

VICE PRESIDENT CATANZARITI: Sorry, the Deputy President wants to ask a question.

PN62

DEPUTY PRESIDENT CLANCY: Mr Small, you seem to have some knowledge of the Fair Work Act and the Fair Work Commission decisions and procedure. I just have a question. Do you think you're appropriately attired to appear before a Full Bench of the Commission?

PN63

MR SMALL: Your Honour, I just got out of bed. I'm very unwell, extremely unwell.

PN64

DEPUTY PRESIDENT CLANCY: That's a matter for you, but you just got out of bed - - -

PN65

MR SMALL: Yes.

PN66

DEPUTY PRESIDENT CLANCY: - - - is not acceptable, and I think you and your organisation ought to reflect on how you approach matters before the Commission. Thank you.

PN67

MR SMALL: Thank you, your Honour.

PN68

VICE PRESIDENT CATANZARITI: Mr Scott, is there anything you want to say in reply to the submissions you've heard?

PN69

MR SCOTT: Firstly, I'm sorry for the way I'm dressed too, I didn't (indistinct) like that, you know.

PN70

VICE PRESIDENT CATANZARITI: I think there's more latitude - there is more latitude to people who don't regularly appear in front of the Commission, albeit that it's not ideal the way you have suited up today, but we certainly understand in dealing with people who don't appear regularly or have a knowledge of the Fair Work Commission.

PN71

MR SCOTT: We see you're (indistinct). I believe that there is a lot of public interest in this case, specifically in the fact that there's over 8,000 people that I know that have been terminated under the lawful and reasonable point, and with no specific description of what that actually means. So my understanding of everything that's happened is that the Fair Work Ombudsman is an impartial body that sets directions, and in this case even by the directions that they have set Telstra hasn't followed that. They've gone and implemented the policy that was never - like never really - there was never really a mandate for it, and that's why I went to Queensland Health to get that confirmation from them.

PN72

I understood what Mr Small was saying, with some of what he was saying, but there was some terms that I didn't quite understand. But specifically around the public interest part there is a lot of interest around this and there has been a lot of corporations or businesses that had no - I don't want to say - - -

PN73

VICE PRESIDENT CATANZARITI: Mr Scott, I don't want to interrupt, but you are aware there have been a lot of cases in the Commission, or you (indistinct) aware, in relation to COVID and the lawful and reasonable direction. So one of the issues that Mr Small is drawing our attention to is what makes your case different that should revisit a lot of these other decisions.

PN74

MR SCOTT: The fact that there's so many other decisions, there's so many other cases about this particular thing, we've got a whole bunch of people - I know for myself that I'm healthy, you know, and even after not being vaccinated against COVID and catching COVID I was fine within a couple of days, even while I tested positive. So my thing around this is the whole entire policy has not taken into consideration like people's personal situations, but also there's quite a bit of risk that has come about with these COVID vaccines.

PN75

I've got three publications by professionals who (indistinct) review who speak to some of these issues that have been raised. Even the Pfizer nonclinical report had spoken to death and adverse reactions, which is why I wanted to bring this before the Commission was to just get an understanding of how that kind of information translates into allowing these types of policies to proceed, being cognisant of that knowledge and having that knowledge and how that relates to workers' health and the Act that - because even throughout the entire Fair Work Act it speaks to the duty of care and the responsibility being to the employer.

PN76

In this instance Telstra has said that it was our responsibility to keep the community safe, but there's been information as well that has been released that talks to issues with preventing transmission in the vaccine that Pfizer itself has even listed, and Telstra, they have admitted that while there's been no change to the policy in the time that they've implemented it, even as far as what vaccines are approved and disproved, you know, and so - like as far as public interest goes there's a lot of public interest around this (indistinct) and that's why I believe that I should be heard and allowed to challenge Telstra again, especially because I still don't believe that a person, whether a person is able to do a job should be dependent upon whether they take some sort of medical intervention, especially in something where the mainstream has (indistinct).

PN77

When COVID first came out you had a 99.6 per cent of survival rate, like it just - it doesn't compute as far as employees' personal rights, and even as people, you know, and allowing Telstra and other businesses to set this precedent whereby we can implement the policy and you have to take a vaccine, or you have to do this, it's just a very dangerous - it's tyrannical if I may even say, a policy where because I want to work with somebody I get to dictate how they - how it (indistinct) my health. That just doesn't compute with me. It's immoral, I believe it's unethical.

PN78

Sorry, just to round it all off that that's why I believe there's a lot of public interest in this type of stuff. Businesses like Telstra and other businesses that have terminated people under lawful and reasonable that have not been mandated by the Chief Health Officer I believe that those are unfair dismissals in themselves. So that's all I can say about that, sir.

PN79

VICE PRESIDENT CATANZARITI: All right. Thank you for your further submissions. The decision is reserved. The Commission is adjourned.

**ADJOURNED TO A DATE TO BE FIXED**

**[11.29 AM]**