DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Pilbara Iron Company (Services) Pty Ltd T/A Rio Tinto Iron Ore
v
Mr Michael Ballam
(C2017/6782)

DEPUTY PRESIDENT BEAUMONT PERTH, 11 DECEMBER 2017

Appeal against decision [2017] FWC 6248 of Deputy President Binet at Perth on 28 November 2017 in matter number U2017/505 – Application for stay granted.

[1] On 28 November 2017, Deputy President Binet issued her decision in the matter of *Michael Ballam v Pilbara Iron Company (Services) Pty Ltd T/A Rio Tinto Iron Ore*[1] (the **Decision**). The Deputy President determined that the Respondent had been unfairly dismissed on the basis that the dismissal was unjust, unreasonable and harsh.

[2] On 7 December 2017, Pilbara Iron Company (Services) Pty Ltd T/A Rio Tinto Iron (the **Appellant**) filed a notice of appeal against the Decision[2]. The Appellant sought a stay of the whole order[3] for reinstatement and recognition of continuity of employment from the date of dismissal to the Respondent's reinstatement, under s.606 of the *Fair Work Act 2009* (Cth) (the **Act**).

[3] I heard the application for a stay of the Deputy President's order on 11 December 2017.

[4] Both parties sought permission to be legally represented. Having had regard to the submissions of the parties, I was satisfied that legal representation would enable the matter to be dealt with more efficiently taking into account the complexity of the matter.

[5] I stayed the order subject to conditions. These are my reasons for doing so.

Principles for staying the operation of a decision or order

[6] A person aggrieved by a decision made by a single member of the Commission may only appeal a decision with the permission of the Commission[4]. Permission to appeal a

[1] [2017] FWC 6248.

[2] *Michael Ballam v Pilbara Iron Company (Services) Pty Ltd T/A Rio Tinto Iron Ore* [2017] FWC 6248.

[3] *Michael Ballam v Pilbara Iron Company (Services) Pty Ltd T/A Rio Tinto Iron Ore* PR598093.

[4] Section 604(1).

decision related to an unfair dismissal remedy will only be granted if the Commission considers it to be in the public interest to do so[5].

[7] If an error of fact is said to have been made by the first instance decision-maker in an unfair dismissal remedy related decision, an appeal will only be available if that error of fact is a significant error of fact[6]. More generally, other errors said to have been made by a first instance decision-maker must be of a kind identified in *House v King*[7].

[8] The principles that are to be applied in considering whether to grant a stay order should be applied against the statutory constraints on appeals of this kind[8].

[9] Moreover, this Commission and its predecessors have approached applications for a stay on the basis that, unless otherwise established, there is a presumption that the order or decision that is subject to appeal has been regularly made[9].

[10] It is well established that in deciding whether to exercise discretion to grant a stay order, the Commission must be satisfied that there is an arguable case with some reasonable prospects of success, both in respect of permission to appeal and the merits of the appeal, and that the balance of convenience favours the granting of a stay order[10]. Each of the two elements must be established before a stay order will be granted.

[11] In applying those principles, the required assessment of an appeal's prospects of success for the purposes of determining a stay application is necessarily of a preliminary nature only[11]. This is because the Commission had not had the benefit of hearing the appellant's full argument and may not have had the opportunity to comprehensively review and consider the case materials[12].

The grounds of appeal

[12] The grounds of appeal are lengthy.

[13] In summary, the Deputy President is said to have treated ss.387(a), (b) and (c) of the Act as requirements or obligations to be discharged by the Appellant as opposed to factors the Commission was required to take into account in deciding if the dismissal was unfair.

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[5] Section 400(1).

[6] Section 400(2).

[7] (1936) 55 CLR 488; Note also the reference in the Explanatory Memorandum (EM) to the *Fair Work Bill 2008* at [2320] to the decision in *Coal and Allied Operations Pty Ltd v AIRC* (2000) 203 CLR 194 referring to the application of *House v King* to appeals in the AIRC, and the intention expressed in the EM to maintaining this jurisprudence in relation to FWA appeals.

[8] *Jetstar Services Pty Ltd v Laeth Ishak* [2013] FWC 5254 [4].

[9] Ibid.

[10] *Kellow-Falkiner Motors Pty Ltd v Edghill*, Full Bench AIRC, 17 March 2000 (Print S4216) and applied in this tribunal see for example *Boom Logistics Limited v Bell and Mackay*, [2013] FWC 1017 per Boulton J, *GM Holden Ltd v Symonds*, [2013] FWC 332 per Smith DP, *Vondoo Hair v Crockett*, [2012] FWA 9553 per Watson SDP, *Vita Property Group Pty Ltd v Clayworth*, [2012] FWA 6547 per Drake SDP, *DesignInc (Sydney) Pty Limited v Xu*, [2012] FWA 1088 per Watson SDP and *Suncorp Staff Pty Limited v Brewer*, [2012] FWA 823 per Boulton J.

[11] *National Union of Workers – New South Wales Branch v Nick Belan* [2017] FWC 1439 [6].

[12] Ibid.

[14] Further, the Deputy President erred in her finding that there was not a valid reason for dismissal under ss.387(a) of the Act having not made a finding regarding the gravity of the Respondent's conduct, having not taken into account material considerations, and having had regard to irrelevant considerations. It is said that the absence of not arriving at a finding regarding the gravity of the Respondent's conduct in turn tainted the Deputy President's finding regarding proportionality to the extent that it led her into error.

[15] Additional grounds were said to be that the Deputy President erred in finding that procedural fairness was not afforded and that her overall conclusion that the dismissal was unjust and unreasonable was made in circumstances where she had not taken into account the gravity of the misconduct.

[16] The final ground was that the Deputy President erred when finding she was not satisfied reinstatement was inappropriate.

Arguable case with some reasonable prospect of success

[17] I am satisfied that the Appellant has made out an arguable case with some reasonable prospect of success, both in respect of the grant of permission to appeal and the merits of the appeal.

[18] The existence of a valid reason is a very important consideration in any unfair dismissal case as the absence of such will almost invariably render the termination unfair.[13]

[19] The Deputy President outlined that the Respondent 'admitted breaching the isolation procedures'[14] and that the Respondent 'encroached into the Footprint of the Grader while the Grader was live when he adjusted the Pin'[15]. However, based on the material before me it is difficult to ascertain a finding by the Deputy President on the seriousness of the Respondent's misconduct.

[20] It does appear that the Deputy President was satisfied that there was misconduct. When considering remedy, the Deputy President refers to the criticality of compliance with safety rules, processes and procedures and clearly identifies that the Respondent did not diligently comply with all relevant safety practices and procedures[16].

[21] In the Decision the Deputy President does not appear to have taken into account material considerations that the safety protocols breached were established cardinal safety rules on which training had been provided.

[22] The Respondent is said to have held the view that 'his incursions into the Footprint were short in duration, limited in extent and did not create a risk of harm'.[17] Regard to the Respondent's apparent non-acceptance of the seriousness of his actions, or that his actions were not worth reporting[18], did not appear to have been factored in when arriving at a finding.

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[13] *Parmalat Food Products Pty Ltd v Wililp* (2011) 207 IR 243.

[14] Decision [90].

[15] Decision [74].

[16] Decision [106]

[17] Decision [82].

[18] Decision [89].

[23] Reference is made to the Respondent having not attached his personal lock, or completing a job hazard assessment or a Take 5.[19] It is open to argue that this was a material consideration that should have been taken into account albeit it is unclear whether it was. The Deputy President refers to the Respondent and a Mr Arvidson being equally at fault for failing to ensure a JHA was prepared[20]. However, there was no finding made on whether the failure to attach the personal lock, or complete a Take 5 or job hazard analysis, was contrary to established safety protocols and whether such breaches constituted misconduct.

[24] In the absence of determining the gravity of the Respondent's misconduct, and considering the aforementioned factors, I am satisfied that there is an arguable case with some reasonable prospects for success that the Deputy President erred in her finding that there was not a valid reason for the Respondent's dismissal.

[25] The Appellant submitted that the Deputy President treated the criteria under ss.387(a), (b) and (c) of the Act as requirements or obligations to be discharged and as a consequence approached the entire matter through an incorrect frame[21]. In this respect it was submitted that what are considered criteria under s.387 of the Act were elevated beyond what they are supposed to be under the statutory scheme[22]. Seemingly there is fundamental difference between an obligation or requirement, and criteria that are to be taken into account. I am satisfied that there is an argument with some reasonable prospect for success that the Deputy President erred when conflating the criteria in s.387 of the Act with obligations or requirements.

[26] A finding was made that the Respondent was not provided with a 'proper opportunity to respond' because a request for a modest extension to seek legal advice during the holiday period was denied[23]. The Deputy President appears to have made this finding by considering one factor and not the manifold factors that make up procedural fairness or the evidence that was presented. There is an apparent lack of consideration whether denying an extension of time in the circumstances of this matter fatally compromised the Respondent's opportunity to respond to any reason for his dismissal relating to his conduct or capacity. It follows there is an arguable case that the Deputy President erred when determining the Respondent was not provided with a proper opportunity to respond.

[27] These aforementioned factors give weight to there being an arguable case that the Deputy President erred in concluding that the dismissal of the Respondent was unjust and unreasonable.

[28] The dismissal was said to be disproportionate to the Respondent's misconduct[24]. Having not made an objective finding on the gravity or seriousness of the misconduct it follows it is therefore difficult to gauge the harshness of the dismissal. There is an arguable case that the absence of a finding concerning the gravity of the Respondent's conduct gave rise to an error in the Deputy President's assessment of proportionality, and therefore harshness.

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[19] Decision [21]

[20] Decision [80].

[21] Decision [67],

[22] Decision [67], [92] and [93].

[23] Decision [93].

[24] Decision [95]

[29] An appeal lies when it is in the public interest, or where an appeal is on a question of fact, the decision must involve a significant error of fact.

[30] The Appellant believes that it is in the public interest to grant permission for the appeal because the matter is one of public importance in circumstances where the Deputy President has erred in relation to the statutory task entrusted to the Commission being the application of the criterion in s.387 of the Act.

[31] As to the question of public interest, I am satisfied given the nature of the arguable errors discussed that the Appellant has made out an arguable case with some prospects of success in persuading a Full Bench that it should grant permission to appeal, and with regard to the appeal. The Appellant's appeal raises important questions concerning the interpretation of s.387 of the Act and that of the balance between the rights of employees and the statutory obligations of employers to fulfil their duty under safety legislation.

Balance of convenience

[32] Earlier in these reasons, I indicated the Commission and its predecessors have approached applications for a stay on the basis that, unless otherwise established, there is a presumption that the order or decision that is subject to appeal has been regularly made[25].

[33] On the face of it therefore, the Respondent is entitled to the benefit of the order for reinstatement. I place significant weight on the fact that the Respondent was successful at first instance and should generally be entitled to the benefit of the outcome of his unfair dismissal application[26].

[34] However, on the day of the hearing Counsel for the Respondent submitted that his client had consented to stay the order in question, the reinstatement order. The basis for the provision of consent was that the Appellant would pay the Respondent the remuneration that he would otherwise have earned in his employment with the Appellant under the terms of the reinstatement order. It was understood by the parties that the remuneration would be directly deposited into the Respondent's bank account as it would have been had the Respondent commenced employment under the terms of the reinstatement order.

[35] The Appellant submitted it would not seek to recoup such monies in circumstances where it was successful with its appeal. The Appellant submitted it valued the Respondent's consent.

[36] The stronger the arguable case advanced the less reliance needed to be placed on exceptionally strong balance of convenience factors in order to warrant a stay order[27]. Conversely, the weaker the arguable case, the stronger must be the balance of convenience[28].

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[25] *Jetstar Services Pty Ltd v Laeth Ishak* [2013] FWC 5254 [4]; See for example *Kellow-Falkiner Motors Pty Ltd v Edghill*, Full Bench AIRC, 17 March 2000 (Print S4216) at [6].

[26] *Jetstar Services Pty Ltd v Laeth Ishak* [2013] FWC 5254 [11].

[27] Ibid.

[28] Ibid.

[37] I am persuaded on the material before me, albeit my assessment is necessarily of a preliminary nature only[29], there is a seriously arguable case in relation to the aforementioned matters. Further, the agreement of the parties regarding a stay of the order in question is not an insignificant factor to weigh in the balance[30].

Conclusion

[38] Taking all of the abovementioned matters into account and being mindful that the appeal will be listed in a reasonably short period I am satisfied that I should make the order staying the operation of the order of the Deputy President. I will make an order that pending the hearing and determination of this appeal or further order, that the order of the Deputy President in PR598093, be stayed. That order will be subject to the condition that the Appellant pays the Respondent the remuneration that he would otherwise have earned in his employment with the Appellant under the terms of the reinstatement order.

DEPUTY PRESIDENT

Appearances:

R Dalton of counsel with *G Giorgio* solicitor for the Appellant.
T Kucera solicitor for the Respondent.

Hearing details:

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[29] *National Union of Workers – New South Wales Branch v Nick Belan* [2017] FWC 1439 [6].

[30] *Coal and Allied Operations Pty Limited v Crawford and Others* (2001) 109 IR 409.