DECISION

Fair Work Act 2009
s.604—Appeal of decision

Qantas Airways Limited
v
David Dawson
(C2016/7312)

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT GOOLEY
COMMISSIONER WILSON

SYDNEY, 23 JANUARY 2017

Appeal against decision [2016] FWC 8249 of Deputy President Lawrence on 23 November 2016 in matter number U2016/2341.

[1] Mr David Dawson was employed by Qantas Airways Limited until he was dismissed on 28 April 2016. Mr Dawson lodged an unfair dismissal application which was heard by Deputy President Lawrence. On 23 November 2016, Deputy President Lawrence issued a Decision,[1] which found that Mr Dawson's dismissal from employment was unfair. The Deputy President found there was a valid reason for the dismissal, noting the dismissal was not unreasonable or unjust. However, the Deputy President concluded that the dismissal was harsh having regard to the unfair dismissal provisions contained in Part 3-2 of the *Fair Work Act 2009* (Cth) ("the Act") and, in particular, section 387(h) of the Act. On this basis, the Deputy President made an Order[2] granting relief from unfair dismissal and ordering that Mr Dawson be compensated.

[2] On 13 December 2016, Qantas Airways Limited (hereafter "the Appellant") lodged a Notice of Appeal, appealing the Deputy President's Decision. We heard the matter regarding the application for permission to appeal and the appeal on 12 January 2017. We have decided to grant permission to appeal, uphold the appeal and quash the original Decision.

[3] At the hearing on 12 January 2017, Mr M. Follett of Counsel sought permission to appear for the Appellant and Mr M. Seck of Counsel sought permission to appear for Mr Dawson (hereafter "the Respondent"). Given the complexity of the matter, and having regard to section 596 of the Act, permission was granted to both parties to be represented.

[1] [2016] FWC 8249.
[2] PR587782.

The Decision

[4] In reaching his decision, the Deputy President adopted the approach of the Full Bench in *B, C and D v Australian Postal Corporation T/A Australia Post*.[3] In particular, the Deputy President stated that:

> "[58] Reaching an overall determination of whether a given dismissal was "harsh, unjust or unreasonable" notwithstanding the existence of a "valid reason" involves a weighing process. The Commission is required to consider all of the circumstances of the case, having particular regard to the matters specified in s.387, and then weigh:
>
> (i) the gravity of the misconduct and other circumstances weighing in favour of the dismissal not being harsh, unjust or unreasonable; against
>
> (ii) the mitigating circumstances and other relevant matters that may properly be brought to account as weighing against a finding that dismissal was a fair and proportionate response to the particular misconduct."

[5] The Deputy President noted that the Respondent changed his story regarding how the alcohol came into his possession during the random search. In any event, the Deputy President found that the Respondent admitted to stealing two beers. Further, the Deputy President found that the Respondent's explanation for inadvertently taking the other items was not credible. On this basis, the Deputy President was satisfied that there was a valid reason for the Respondent's dismissal.

[6] Having found that there was a valid reason for the Respondent's dismissal, the Deputy President noted that section 387(h) of the Act allowed the Commission to consider any other matters it considered relevant. The Deputy President highlighted a number of factors which the Respondent relied on to support the argument that his dismissal of the Respondent was disproportionate to the act that the Respondent committed. These factors included:

- His 28 years of unblemished service for Qantas as a long-haul flight attendant;
- The small value of the items stolen;
- The Applicant's age of 50 meant it would be difficult to get another job, certainly as a flight attendant;
- Although he gave an incorrect explanation, he did correct it; and
- He had a number of medical and family issues prior to the incident.[4]

[7] In light of these factors, the Deputy President found that the dismissal of the Respondent was harsh pursuant to section 385 of the Act. As a consequence of this finding, the Deputy President awarded the Respondent $33,731.00 by way of compensation.

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[3] [2013] FWCFB 6191.
[4] [2016] FWC 8249, [56].

The Appeal

[8] The Appellant's submissions referred to grounds 1 to 14, in particular, of the 18 grounds set out in the Notice of Appeal.

[9] At the heart of the dispute was whether the Deputy President erred in his construction of the unfair dismissal provisions contained in Part 3-2 of the Act. Specifically, the appeal centred upon whether the Respondent was harshly dismissed and, therefore, entitled to compensation.

Appellant's Submissions

[10] In grounds 1 and 2, the Appellant submitted that, absent the erroneous finding that Mr Dawson had corrected his previously incorrect explanation, the Deputy President could not be satisfied that the conclusion of harshness could be reached.

[11] In ground 3, the Appellant contended that it was not apparent how, on the one hand, the Deputy President could find that the ongoing employment relationship had broken down beyond repair, but at the same time, find that the Appellant should have continued to employ the Respondent.

[12] In grounds 4, 8, 12 and 14, the Appellant contended that the Deputy President made a number of important factual findings without providing reasons for them.

[13] In ground 5, the Appellant asserted that something unusual or special would ordinarily have needed to be identified before a finding of harshness was open to the Deputy President.

[14] In grounds 6 and 9, the Appellant submitted that the Deputy President's conclusion that the Respondent's evidence was not truthful was fundamentally relevant to the assessment of whether compensation was appropriate.

[15] In ground 7, the Appellant contended that the Deputy President gave no consideration to contingencies at all, which was a demonstrable error of principle.

[16] In grounds 10 and 11, the Appellant asserted that there was no evidence before the Deputy President to conclude that the Respondent acted reasonably given his personal and family circumstances pursuant to paragraph [75] of the Decision.

[17] In ground 13, the Appellant contended that the effect of the Deputy President's analysis was that section 392(3) would be meaningless as, in almost any case where the dismissed employee would have remained employed for at least two more years, maximum compensation under the Act would likely be payable.

Respondent's Submissions

[18] The Respondent contended that the Deputy President followed the Act and authorities and, that therefore, the Deputy President was not in error.

[19] The Respondent further submitted that there was no significant error of fact. In particular, the Respondent noted that the Commission would not ordinarily grant permission

to appeal unless the alleged errors were exceptional, momentous or telling and where the Commission, at first instance, did not have an advantage sufficient to justify the findings made.

[20] The Respondent submitted that the Deputy President set out the proper test as to harshness, being that the dismissal was disproportionate to the gravity of the misconduct. On this basis, the Respondent asserted that the Deputy President was entitled to reach the conclusion that he reached. Further, the Respondent stipulated that a dismissal may be harsh, but not lead to reinstatement due to the breakdown of the relationship between an employer and employee.[5] The Respondent also contended that the Appellant's submission that a finding of harshness was unavailable in the context of knowing theft and dishonesty was unsupported by reference to the Act or any other authorities.

[21] In relation to the Appellant's submission that the Commission erred in dealing with the question of compensation, the Respondent submitted that the Commission should not grant leave on a point not previously raised by the Appellant in circumstances where it was competently represented.[6] Further, the Respondent asserted that the Deputy President set out the proper statutory test and gave clear and orthodox reasoning for his findings.

[22] For the above reasons, the Respondent submitted that the Commission should not grant permission to appeal and dismiss the appeal.

Consideration – Permission to Appeal

[23] The FWC will grant permission to appeal only if it is in the public interest to do so.[7] The test of assessing whether a matter is in the public interest is discretionary and involves a broad value judgement.[8] In *GlaxoSmithKline Australia Pty Ltd v Colin Makin,*[9] the Full Bench summarised the test for determining the public interest as follows:

> "[26] Appeals have lain on the ground that it is in the public interest that leave should be granted in the predecessors to the Act for decades. It has not been considered useful or appropriate to define the concept in other than the most general terms and we do not intend to do so. The expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only by the objects of the legislation in question. [*Comalco v O'Connor* (1995) 131 AR 657 at p.681 per Wilcox CJ & Keely J, citing *O'Sullivan v Farrer* (1989) 168 CLR 210]
>
> [27] Although 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, it seems to us that none of those elements is present in this case."

[5] *Tabro Meat Pty Ltd v Heffernan* (2011) 208 IR 101 at [18].
[6] *Curtis v Darwin City Council* [2012] FWAFB 8021; (2012) 224 IR 173 at [80].
[7] *Fair Work Act 2009* (Cth) s 604(2).
[8] *Esso Australia Pty Ltd v AMWU; CEPU; AWU* [2015] FWCFB at [6].
[9] [2010] FWAFB 5343 at [27].

[24] Alternately, the second ground for granting permission to appeal is that the decision is attended with sufficient doubt to warrant its reconsideration or that substantial injustice may result if leave is refused.[10]

[25] In determining whether permission to appeal should be granted we have reviewed and considered all material filed by the parties including all submissions, correspondence and relevant authorities.

[26] We find that permission to appeal should be granted in this matter. We are of the view that the appeal raises important questions concerning the application of Part 3-2 of the Act in circumstances where the Deputy President's discretion to determine whether the Respondent was harshly dismissed and, therefore, entitled to compensation, is an issue in the dispute. We consider this to be an important matter regarding the Deputy President's approach in making such a determination and, therefore, the dispute arising in this case is a matter of public interest. It is on this basis that permission to appeal is granted.

Consideration – The Appeal

[27] We note that a decision under appeal is of a discretionary nature and such a decision can only be successfully challenged on appeal if it is shown that the discretion was not exercised correctly. We note that it is not open for us to substitute our view on the matters that fell for determination before the Deputy President in the absence of error of an appellable nature in the Deputy President's original Decision. As the High Court said in *House v The King*[11]:

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

[28] On 4 March 2016, the Respondent sent a letter to Ms Claire Elliott, Service and Performance Manager at Qantas, stating that:

> "In relation to the miniature bottle of Beefeater Gin; the day prior to the flight we had lunch with friends at the Frisco hotel in Woolloomooloo, where my wife obtained bottles of gin."

[10] *Esso Australia Pty Ltd v AMWU; CEPU; AWU* [2015] FWCFB 210 at [7].
[11] [1936] HCA 40.

[29] On 11 March 2016, Ms Elliott contacted Mr Adam Micola, Manager of the Frisco Hotel, as part of the investigation into the Respondent's conduct. After consulting with Mr Micola, and upon completion of the investigation, Ms Elliott found that the Frisco Hotel did not stock miniature bottles of any liquor. This indicated that the Respondent could not have obtained the alcohol from the Frisco Hotel, as he claimed in his letter dated 4 March 2016.

[30] At paragraph [45] of the Decision, the Deputy President described the aforementioned events that took place as follows:

> "… As well, the Applicant charged [sic] his story during the investigation after giving an incorrect explanation."

[31] It is clear from the findings of the investigation that the Respondent did not provide a truthful explanation as to how the alcohol came into his possession. We are of the view that the conclusion reached by the Deputy President at paragraph [45], namely, that the Respondent gave an "incorrect explanation", understates the severity of the events which took place. The Respondent admitted that his explanation regarding how the alcohol came into his possession was "not true" in his letter to Ms Elliott dated 22 March 2016. However, it was only after the Respondent was directly confronted by Ms Elliott's findings that he subsequently altered his explanation as to how the alcohol came into his possession. In this regard, the Respondent's conduct cannot be described as a mere "incorrect explanation". We are of the view that the Deputy President, by describing the Respondent's conduct as merely an "incorrect explanation", understated the severity of the Respondent's conduct and, that as a consequence, mistook the facts before him.

[32] Therefore, we are of the view that the Deputy President mistook the facts in the *House v The King* sense, namely, that it was only after the Respondent was confronted by Ms Elliot's investigation findings that he admitted his explanation of how the alcohol came into his possession was untrue. In light of this, and having considered the relevant principles of law, we are of the view that the Appellant has demonstrated a *House v The King* error in the Deputy President's decision.

[33] We are of the view that when the Deputy President determined that, notwithstanding there was a valid reason for the dismissal the dismissal was harsh, the Deputy President, by mistaking the facts in this regard, subsequently failed to take into account an important material consideration. That is, he failed to take into account the dishonesty of the Respondent. This is exemplified in paragraph [56] where the Deputy President says that:

> "… Although he [the Respondent] gave an incorrect explanation, he did correct it."

[34] We are of the view that the Deputy President, in this regard, failed to acknowledge and take into account that the Respondent was dishonest, and, that the Respondent only corrected his explanation when he was confronted by Ms Elliot.

[35] We are not required to identify an appellable error in every ground of appeal for there to be a quashing of a decision – quashing a decision is warranted upon an appeal bench identifying an error in accordance with *House v The King*. Having identified that the Deputy President, in our view, mistook the facts and failed to take into account a material consideration in accordance with *House v The King*, we are satisfied that the appeal must be upheld and that the original Decision must be quashed.

Conclusion

[36] Permission to appeal is granted.

[37] The appeal is upheld.

[38] The Decision is quashed.

[39] The matter is referred to us for rehearing.

[40] Directions for the rehearing of the matter will be issued separately to this document.

VICE PRESIDENT

Appearances:

Mr M. Follett for the Appellant
Mr M. Seck for the Respondent

Hearing details:

9.30am
12 January 2017
Melbourne

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