



DECISION

Fair Work Act 2009
s.604—Appeal of decision

Marel Food Systems Pty Ltd T/A Marel

v

Michael Hall

(C2017/5330)

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT SAMS
COMMISSIONER GREGORY

SYDNEY, 17 NOVEMBER 2017

Appeal against decision [2017] FWC 4560 of Commissioner Simpson at Brisbane on 5 September 2017 in matter number C2017/3684.

[1] Marel Food Systems Pty Ltd T/A Marel (“the Appellant”) has applied under s.604 of the *Fair Work Act 2009* (Cth) (“the Act”) for permission to appeal against a Decision¹ of Commissioner Simpson issued on 5 September 2017. Commissioner Simpson found in that decision that “exceptional circumstances” existed under s.366 of the Act to extend time to the Applicant in that matter, Mr Michael Hall, to file a general protections application under s.365 of the Act.

[2] On 3 October 2017, Vice President Catanzariti issued a stay order pursuant to s.606(1) of the Act providing that the decision of Commissioner Simpson be stayed pending the determination of the appeal, or until further order of the Commission. The application for the stay order was not opposed.

[3] The application for permission to appeal was heard on 3 November 2017 and we reserved our decision at that time. Mr M. Proctor, solicitor, appeared on behalf of the Appellant and Mr M. Brown, solicitor, appeared on behalf of the Mr Hall. Both parties were granted permission to be legally represented pursuant to s.596 of the Act.

The Decision at First Instance

[4] Mr Hall was dismissed from his employment on 13 June 2017. He then lodged a general protections application with the Commission on 5 July 2017, one day after the 21 day time period prescribed by the Act. However, s.366(2) of the Act provides the Commission with a discretion to grant additional time in which to make application in circumstances where exceptional circumstances are found to exist. It continues to set out the matters, in the following terms, that the Commission must take into account in determining whether to exercise this discretion.

¹ [2017] FWC 4560.

“(2) The FWC may allow a further period if the FWC is satisfied that there are exceptional circumstances, taking into account:

(a) the reason for the delay; and

(b) any action taken by the person to dispute the dismissal; and

(c) prejudice to the employer (including prejudice caused by the delay); and

(d) the merits of the application; and

(e) fairness as between the person and other persons in a like position.”²

[5] Commissioner Simpson concluded after having regard to each of the matters in s.366(2)(b) that he was satisfied that there were exceptional circumstances existing to warrant an exercise of the Commission’s discretion to grant additional time in which to make application. He noted, in particular, in regard to the “reason for the delay”:

“[23] In this case I am satisfied on the evidence that Mr Hall made a bona fide attempt to file his application electronically within time, and further believed that he had in fact filed his application just prior to 10pm on Tuesday evening 4 July 2017, and for reasons which are not clear from the evidence the electronic application was not received through the FWC portal. On being advised of this by a telephone call the next day from the FWC he filed the application.”³

[6] Commissioner Simpson also made reference to a series of actions taken by Mr Hall to dispute his dismissal.

Permission to Appeal Principles

[7] Section 400 of the Act applies in this matter. It provides that:

“(1) Despite subsection 604(2), FWA must not grant permission to appeal from a decision made by FWA under this Part unless FWA 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.”⁴

[8] The task of assessing whether the public interest requirement referred to in s.400(1) has been met is a discretionary one, which has been held to involve a broad value judgement.⁵ In *GlaxoSmithKline Australia Pty Ltd v Makin* a Full Bench of the Commission identified some of the considerations that may attract the public interest:

² *Fair Work Act 2009* (Cth) s 366(2).

³ *Hall v Marel Food Systems Pty Ltd T/A Marel* [2017] FWC 4560, [23].

⁴ *Fair Work Act 2009* (Cth) s 400.

⁵ *O’Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Gaudron, Brennan, Dawson, Toohey JJ; applied in *Hogan v Hinch* (2011) 243 CLR 506, [69] per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel, Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* [2011] FCAFC 54, [44]-[46].

“...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 ...”⁶

[9] In summary, s.400(1) provides that permission to appeal can only be granted if the Commission considers that it is in the public interest to do so. In addition, the fact that the member at first instance made an error in regard to a question of fact is not a sufficient basis to grant permission to appeal; it must instead involve a significant error of fact.⁷

Grounds of Appeal

[10] The Appellant submitted that there was an error in the exercise of the Commissioner’s discretion to grant additional time in which to make application in that he misapplied the relevant test and failed to take into account relevant material considerations. In particular, that the Commissioner did not provide a sufficient explanation as to why Mr Hall was prevented from filing his application prior to 4 July 2017. In addition, it contended there was no finding of technological failure, beyond Mr Hall’s control, that prevented him from lodging his application within the requisite 21 day period.

[11] The Appellant also indicated in its oral submissions that “this was a case that was ripe for the Commissioner to explore the merits of the case.”⁸

[12] The Appellant continued to submit that the absence of any finding about the existence of a technological failure beyond Mr Hall’s control is “at odds”⁹ with previous Commission decisions, and issues to do with “consistency”¹⁰ provide that it is in the public interest to grant permission to appeal.

Consideration

[13] The question of whether the Commission should grant additional time in which to make application was required to be determined in accordance with the relevant provisions contained in s.366(2) of the Act. The decision at first instance indicates that Commissioner Simpson had due regard to each of these requirements, and dealt with them in a considered way.

[14] In terms of the grounds particularly relied upon by the Appellant the Commissioner set out a detailed chronology in his decision of the steps taken by Mr Hall to dispute his dismissal from when it took effect, until the point at which he believed his application had been lodged with the Commission within the 21 day time period. This included his email correspondence

⁶ *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWA 5343, [27] (*‘GlaxoSmithKline’*).

⁷ *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWA 5343, [27]; *Lawrence v Coal & Allied Mining Services Pty Limited, T/A Mt Thorley Operations/Warkworth* [2010] FWA 10089, [28], affirmed on judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler and others* [2011] FCAFC 54; *NSW Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663, [28].

⁸ Transcript at PN7.

⁹ Appellant’s submissions, dated 17 October 2017, [14].

¹⁰ Appellant’s submissions, dated 17 October, [13].

with his former employer and the assurances he received in response. The decision also made reference to his attempts to obtain legal advice and his subsequent exchanges with the Fair Work Commission. Commissioner Simpson concluded that Mr Hall had provided credible reasons for the whole of the period to explain the delay in lodging.

[15] The Commissioner also concluded, after reviewing the available evidence, that Mr Hall had made a bona fide attempt to file his application within time, but had been prevented from doing so based on his electronic application not being received through the FWC portal. He also had a reasonable belief that it had been accepted. Commissioner Simpson also addressed the requirements contained in s.366(2)(d), together with the other considerations contained in the subsection that he was required to have regard to.

[16] The Appellant also submitted that the decision is not consistent with previous Commission decisions, and this provides the basis for granting permission to appeal on public interest grounds. However, we do not accept this submission. The determination of the extension of time application before Commissioner Simpson turned essentially on the facts before him at the time, and we are not satisfied the Commissioner's approach was disharmonious when compared with other decisions dealing with similar matters. In addition, the grounds of appeal do not raise any other issues of law or policy which can be said to have broader implications.

Conclusion

[17] We are not satisfied, in conclusion, that there is an arguable case of error in relation to any of the Commissioner's findings, or that an arguable case of error has been made out in relation to any other aspect of the decision. We are also not satisfied that the appeal attracts the public interest in terms of the considerations identified by the Full Bench in the decision in *GlaxoSmithKline*.

[18] Accordingly, we do not propose to grant permission to appeal.

[19] Permission to appeal is refused.

[20] The stay order made by Vice President Catanzariti on 3 October 2017 is also revoked as a consequence of this decision.



VICE PRESIDENT

Appearances:

M. Procter, solicitor, for the Appellant.
M. Brown, solicitor, for the Respondent.

Hearing details:

2017

Melbourne via video link to Brisbane:

3 November.

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