



DECISION

Fair Work Act 2009

Section 394 - Application for unfair dismissal remedy

Mr Robert Caruana

v

Shace Toop Trading Trust T/A Toop & Toop Real Estate
(U2018/1192)

DEPUTY PRESIDENT ANDERSON

ADELAIDE, 19 APRIL 2018

Application for an unfair dismissal remedy – section 596 representation – request by employer opposed by applicant – jurisdiction issue concerning whether applicant a person protected from unfair dismissal – further threshold issue concerning alleged genuine redundancy – jurisdiction issues raise complexity – permission granted on conditions

[1] Mr Robert Caruana has applied to the Fair Work Commission (the Commission) under section 394 of the *Fair Work Act 2009* (the FW Act) for an unfair dismissal remedy in relation to his (alleged) dismissal by Shace Toop Trading Trust trading as Toop & Toop Real Estate (Toop or ‘the employer’). He claims to have been unfairly dismissed on 22 January 2018. At the date of dismissal he was employed as General Manager – Sales.

[2] Toop oppose the application and raise two jurisdictional issues.

[3] Firstly, the employer says that the Commission has no jurisdiction to hear the substantive application as Mr Caruana is not a person protected from unfair dismissal within the meaning of the FW Act. In particular, the employer says the sum of Mr Caruana’s annual rate of earnings exceeds the high income threshold under section 382(b)(iii), which was \$142,000 at the date of dismissal.

[4] In response, Mr Caruana says that he is a person protected from unfair dismissal. He disputes that his annual rate of earnings exceeded the high income threshold. In any event, he contends that his employment was governed by a modern award, the Real Estate Award 2010.

[5] Secondly, the employer claims that if Mr Caruana was a person protected from unfair dismissal then his dismissal was not unfair in that it was a case of genuine redundancy within the meaning of section 385(d) and 389 of the FW Act.

[6] In response, Mr Caruana says that the requirements of section 389 were not met by the employer and that his dismissal was, in all the circumstances, harsh, unjust or unreasonable. He seeks compensation.

[7] On 2 March 2018 conciliation of the application was conducted by a Commission-appointed conciliator. It was not resolved. It was then referred to a member of the Commission for hearing and determination.

[8] The application was originally allocated to Commissioner Platt, who issued directions on 26 March 2018¹ and set the matter down for hearing on 23 April. The Commissioner conducted further conciliation on 29 March 2018. The matter again did not resolve. Having conducted an in depth conciliation, the Commissioner considered it prudent to excuse himself from arbitrating the matter. It was reallocated to me for hearing and determination.

[9] On 5 April 2018 I conducted a directions hearing and issued further directions.² I directed that the hearing on 23 April would deal with the first of the jurisdictional issues only, namely whether Mr Caruana was a person protected from unfair dismissal. At the directions hearing the employer foreshadowed that it would seek to be represented by a legal practitioner at the hearing of the matter. Mr Caruana foreshadowed that he would oppose such a request. The parties were directed to make written submissions on representation.

[10] I received written submissions³ from the employer seeking to be represented by a legal practitioner Mr Andrew Clare of Tindall Gask Bentley at the jurisdictional hearing on 23 April. I received a written submission from Mr Caruana opposing this request.⁴

[11] This decision determines the employer's request for representation at the hearing on 23 April 2018.

The Legal Principles

[12] Section 596 of the FW Act provides as follows:

“596 Representation by lawyers and paid agents

(1) Except as provided by subsection (3) or the procedural rules, a person may be represented in a matter before the FWC (including by making an application or submission to the FWC on behalf of the person) by a lawyer or paid agent only with the permission of the FWC.

(2) The FWC may grant permission for a person to be represented by a lawyer or paid agent in a matter before the FWC only if:

(a) it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or

(b) it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or

(c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.

Note: Circumstances in which the FWC might grant permission for a person to be represented by a lawyer or paid agent include the following:

- (a) where a person is from a non English speaking background or has difficulty reading or writing;
 - (b) where a small business is a party to a matter and has no specialist human resources staff while the other party is represented by an officer or employee of an industrial association or another person with experience in workplace relations advocacy.
- (3) The FWC’s permission is not required for a person to be represented by a lawyer or paid agent in making a written submission under Part 2 3 or 2 6 (which deal with modern awards and minimum wages).
- (4) For the purposes of this section, a person is taken not to be represented by a lawyer or paid agent if the lawyer or paid agent:
- (a) is an employee or officer of the person; or
 - (b) is an employee or officer of:
 - (i) an organisation; or
 - (ii) an association of employers that is not registered under the Registered Organisations Act; or
 - (iii) a peak council; or
 - (iv) a bargaining representative;
- that is representing the person; or
- (c) is a bargaining representative.”

[13] The granting of permission under section 596 involves a two-step process. The first is that there must be satisfaction that at least one of the criteria in section 596(2) is satisfied. The consideration required by this first step “involves the making of an evaluative judgment akin to the exercise of discretion”.⁵ The second is that the discretion conferred by section 596(2) must be exercised in favour of the applicant for permission.⁶

[14] The meaning of section 596 was recently considered by a Full Bench of this Commission in *Fitzgerald v Woolworths Limited*⁷. While that decision concerned whether a lawyer not acting as an advocate could be said to be “representing” a party, the Commission made the following general observations about the application of section 596 and its legislative history:

“[30] There is little authority on the scope or operation of s.596. Only two decisions are of significance. In *Warrell v Fair Work Australia*⁸ the Federal Court (Flick J) dealt with a situation where, in an unfair dismissal proceeding before Fair Work Australia (as the Commission was then known), a lawyer was permitted to appear on behalf of the employer in a proceeding without the Senior Deputy President hearing the matter having given consideration to the requirements of s.596. The Court said:

[24] A decision to grant or refuse “permission” for a party to be represented by “a lawyer” pursuant to s 596 cannot be properly characterised as a mere procedural decision. It is a decision which may fundamentally change the dynamics and manner in which a hearing is conducted. It is apparent from the very terms of s 596 that a party “in a matter before FWA” must normally appear on his own behalf. That normal position may only be departed from where an application for permission has been made and resolved in accordance with law, namely where only one or other of the requirements imposed by s 596(2) have been taken into account and considered. The constraints imposed by s 596(2) upon the discretionary power to grant permission reinforce the legislative intent that the granting of permission is far from a mere “formal” act to be acceded to upon the mere making of a request. Even if a request for representation is made, permission may be granted “only if” one or other of the requirements in s 596(2) is satisfied. Even if one or other of those requirements is satisfied, the satisfaction of any requirement is but the condition precedent to the subsequent exercise of the discretion conferred by s 596(2): i.e., “FWA may grant permission...”. The satisfaction of any of the requirements set forth in s 596(2)(a) to (c) thus need not of itself dictate that the discretion is automatically to be exercised in favour of granting “permission”.

[25] The appearance of lawyers to represent the interests of parties to a hearing runs the very real risk that what was intended by the legislature to be an informal procedure will be burdened by unnecessary formality. The legislative desire for informality and a predisposition to parties not being represented by lawyers emerges, if not from the terms of s 596, from the terms of the Explanatory Memorandum to the Fair Work Bill 2008 which provided in relevant part as follows:

1. FWA is intended to operate efficiently and informally and, where appropriate, in a non-adversarial manner. Persons dealing with FWA would generally represent themselves. Individuals and companies can be represented by an officer or employee, or a member, officer or employee or an organisation of which they are a member, or a bargaining representative. Similarly, an organisation can be represented by a member, officer or employee of the organisation. In both cases, a person from a relevant peak body can be a representative.
2. However, in many cases, legal or other professional representation should not be necessary for matters before FWA. Accordingly, cl 596 provides that a person may be represented by a lawyer or paid agent only where FWA grants permission... In granting permission, FWA would have regard to considerations of efficiency and fairness rather than merely the convenience and preference of the parties.

[32] The other authority is the Full Bench decision in *NSW Bar Association v McAuliffe*.⁹ That decision is, for relevant purposes, authority for two propositions. The first is that the power to grant or refuse permission for legal representation in s.596(2)

does not carry with it the power to select who that legal representative would be either by reference to the individual identity of the lawyer or whether the lawyer is a barrister or solicitor, nor did it empower the Commission to choose which member of a party's legal team might represent the party in proceedings. Section 596(2) was not intended to interfere with a party's right to choose who its legal representative would be. The second proposition is that an error in the application of s.596 at a hearing does not necessarily require the decision that results from the hearing to be quashed if it does not result in any prejudice to a party."

[15] The following extract of the decision of the Commission in *CEPU v UGL Resources Pty Ltd*¹⁰ is also relevant:

"...Before permission to be represented can be granted, a person must be unable to represent himself, herself or itself effectively, and following the plain language definitions of the Macquarie Dictionary (Revised Third Edition) and the Australian Concise Oxford Dictionary (Third Edition), this means the person must be unable to represent himself, herself or itself in a manner that creates a "striking impression", or which has an "impressive" effect or which is "powerful in effect".¹¹

The Submissions

[16] Toop say that the jurisdictional issues, and in particular the issue as to whether Mr Caruana was a person protected from unfair dismissal raise complex matters concerning the interpretation and application of the Real Estate Industry Award 2010. It says that legal representation would enable the matter to be dealt with more efficiently and cost effectively, having regard to complexity.

[17] It says that representation by Toop would not be unfair to Mr Caruana as it claims that the materials filed by Mr Caruana "demonstrate a reasonable understanding of this jurisdiction".

[18] Mr Caruana opposes the request on multiple grounds:

- The employer's legal representative participated in the conciliation by Commissioner Platt without providing prior notice, seeking permission or providing documents in advance as required by the Commissioner;
- The employer acted presumptively by not attending the directions hearing on 5 April 2018 and sending its legal representative only;
- The issue of award coverage is not complex and has only arisen since the employer's lawyer became involved;
- The involvement of a lawyer has created cost and inefficiency as the issue of award coverage had not been previously raised;
- Mr Caruana's "reasonable understanding" of the jurisdiction is only a result of his personal research which should not be used to disadvantage him;

- Toop’s CEO is a legally qualified lawyer and also operates as the company’s in-house legal representative. In addition, the employer has a Human Resource Manager.
- Toop is not unfamiliar with the fair work jurisdiction.

[19] I conducted a telephone hearing on the representation issue on 18 April 2018 in order to hear the parties further on their submissions and to provide each an opportunity to adduce evidence on the contentions, if they so wished. In response to questions from the Commission, Ms Susannah Toop, the employer’s Chief Executive, provided additional information concerning her qualifications and expertise, and that of the employer’s Human Resource Manager. Mr Caruana indicated that he did not dispute the additional information provided by Ms Toop. For the purposes of this decision, I regard that additional information as agreed facts on which I can rely. I reserved my decision.

Consideration

[20] Toop (or Mr Caruana for that matter) can only be represented by a lawyer (or paid agent) at the hearing with permission of the Commission.¹² Whether to grant permission is a discretionary matter made having regard to the factors set out in section 596(2) of the FW Act: efficiency (in the context of the complexity of the matter); fairness (in the context of the capacity of the person seeking permission to effectively represent themselves); and fairness between the parties.

[21] A relevant starting point for the exercise of the discretion is that granting permission should be seen as a departure from the default position that a party in a matter before the Commission must normally appear on its own behalf (to paraphrase the words of Flick J in *Warrell*). This proposition is consistent with the statutory scheme:

“FWA is intended to operate efficiently and informally and, where appropriate, in a non-adversarial manner. Persons dealing with FWA would generally represent themselves.”¹³

[22] I now turn to the considerations in section 596(2).

Section 596(2) Efficiency

[23] In this matter, the coverage of the Real Estate Award 2010 (the Award) as it applies to Mr Caruana in his role as General Manager - Sales is directly in issue. Resolving questions of this nature involve complexity. Whether a modern award applies to an employee is not necessarily straightforward, particularly where the upper reaches of an award need to be examined in the context of managerial employees.

[24] Mr Caruana also intends to advance the proposition that the employer is estopped from claiming that he is not covered by the Award given that (he says) the employer has previously claimed he is so covered. Legal principles of issue estoppel may arise.

[25] I also note that Mr Caruana’s reply to the jurisdictional objection claims that his annual earnings did not exceed the statutory high income threshold. This would appear to be a matter concerning the meaning of the phrase “annual rate of earnings” in section 382(b)(iii). It

may involve some complexity depending on the submission being advanced, but I consider that it is likely to be less complex than the issue of determining award coverage.

[26] As a general proposition, an application which raises substantive jurisdictional issues (such as whether the applicant was a person protected from unfair dismissal) involves an additional degree of complexity. Even where facts associated with a jurisdictional issue are simple or not contested, determining that question is a legal matter.

[27] I agree with the general observation of the Commission in *CEPU v UGL Resources Pty Ltd* where it was said:¹⁴

“...where the Respondent (in this case) seeks to agitate a jurisdictional issue then it would follow that representation by a lawyer would be a reasonable course. Jurisdictional issues by their nature are prospectively complex in their own right, and/or else may require a degree of familiarity with court and tribunal jurisprudence or authorities.”

[28] Also of general note, but not expressed in the context of the FW Act’s specific statutory scheme, are the observations of Mason CJ in *Giannarelli v Wraith*¹⁵:

“In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow... our system of justice as administered by the courts has proceeded on the footing that, in general, the litigant will be represented by a lawyer who, not being a mere agent for the litigant, exercises an independent judgment in the interests of the court.”

[29] I am of the view that participation by a legal practitioner in proceedings like these that concern a jurisdictional point dealing with the scope of an award as it relates to managerial employees would enable this matter to be dealt with more efficiently.

[30] I do not consider that Toop or its legal representative has acted improperly in raising this jurisdictional issue. However, it has done so in a somewhat confusing way. Its response to the application expressly raised the jurisdictional challenge concerning the high income threshold (at 2.2) but somewhat inconsistently (at 1.1) said that Mr Caruana was covered by the Real Estate Award 2010. By email dated 29 March 2018 to the Commission and to Mr Caruana, the employer’s representative advised that Toop would be contesting that the applicant was covered by the award at the time of termination.

[31] Whether or not raised by the employer or its representative, the Commission has an obligation to satisfy itself that an applicant in section 394 proceedings is a person protected from unfair dismissal before deciding if a dismissal was unfair. In exercising its proper role the Commission would be duty bound to raise this issue with the parties whether or not the employer or its representative had first done so.

[32] The contention by Mr Caruana that he is entitled to procedural fairness in being given adequate prior notice of the legal point and an opportunity to respond is well founded. Despite the employer’s confusing earlier position, the Commission has provided Mr Caruana that

opportunity through the filing of written materials in advance of the hearing. He has done so. Mr Caruana has a further opportunity to call evidence and make submissions on the jurisdictional matter at the hearing.

[33] I conclude that section 596(2)(a) is made out. Granting permission for Toop to be represented by a lawyer in these proceedings would enable the jurisdictional matter listed for hearing on 23 April 2018 to be dealt with more efficiently, taking into account its complexity.

Sections 596(2)(b) and (c) - Fairness

[34] The fact that sub-section (1) of section 596 is made out does not compel the exercise of the discretion in favour of the person requesting permission.¹⁶ All factors in the section need to be considered, including fairness. Sub-sections 596(2)(b) and (c) require fairness to be considered in two contexts: fairness in the context of the capacity of the person seeking permission to effectively represent themselves; and fairness between the parties.

[35] Toop is able to be represented at the hearing without a lawyer. It is an established business employing (according to its response to the application) 102 persons. It employs a Human Resources Manager. Its Chief Executive Officer is legally qualified.

[36] However, section 596(2)(b) concerns itself with “effective” representation. This requires the nature of the hearing to be taken into account. This hearing concerns a technical legal question about award coverage. It includes the potential need to examine and cross examine witnesses, and consider and debate past authorities about the interpretation and coverage of awards. Not all human resource practitioners are equipped to effectively discharge this obligation. In this case, I am satisfied that Toop’s Human Resource Manager has no such specific expertise. I was informed that the Human Resource Manager obtains specialist advice from either the Real Estate Employers Federation or lawyers on workplace matters if they involve complexity or go beyond day-to-day human resource issues.

[37] Mr Caruana points to the fact that the company Chief Executive is a lawyer. Ms Toop is legally qualified, having completed a degree in 2010 and admitted six years later (2016). However she has not held a practising certificate and does not currently do so. She has occasionally (twice at least) appeared in a civil court or tribunal for the employer but on relatively simple matters and in her capacity as an executive, not as legal practitioner. She says she has no specialist industrial relations knowledge or experience.

[38] I note that it is not the Commission’s role to determine who the representative of a party is or should be.¹⁷ Nor should it be assumed that persons working in industry with legal qualifications are necessarily effective representatives at a hearing dealing with specialist industrial issues. I consider it relevant that this Chief Executive is legally qualified, and it weighs somewhat towards refusing permission, but it is not determinative.

[39] For a party to be effectively represented, that party is entitled to expect its representative to make a “striking impression” or be “powerful in effect”.¹⁸ In this matter, the potential representative of the employer (the Chief Executive) is also a company witness. If permission is not granted, she would essentially be required to lead her own evidence in chief whilst presenting her employer’s case. That may dilute the impact of the evidence or at least its efficient delivery. This is a relevant factor, though I note that Mr Caruana is in the same position given that he has elected (for reasons of cost) to be self-represented. More relevant is

that seeking to make out a case that is “powerful in effect” when arguing that a manager is not award covered requires some specialist expertise, or at least the ability to navigate the application of evidence to a number of legal and industrial principles.

[40] Having regard to the overall circumstances, I find that internal Toop representatives would be unlikely to “effectively” represent the employer in this sense of the word.

[41] I conclude that it would be unfair not to allow Toop permission having regard to my finding that they would not be able to represent themselves effectively on the jurisdictional issue.

[42] I now turn to sub-clause 596(2)(c) of section 596. This sub-section requires the Commission to take into account fairness between the person seeking permission (Toop) and other persons in the matter (Mr Caruana). This consideration does not support Toop’s request and is not made out.

[43] Mr Caruana is not legally qualified and has no specific background or expertise in industrial or legal matters. He intends to be self-represented at the hearing. As noted, he has done so given the cost of representation. He has acquired some familiarity with the fair work unfair dismissal jurisdiction but only as a lay person and only as a consequence of seeking to exercise his unfair dismissal rights.

[44] That said, Mr Caruana was a managerial employee in a responsible role and is not an uneducated person. The materials he has filed thus far in the Commission suggest the hand of an intelligent lay person and are thorough and to the point. Nonetheless, I accept his submission that he should not be disadvantaged simply because he has diligently tutored himself on the fair work system.

[45] Having regard to fairness between the parties, it would not be unfair to refuse the employer’s request.

Conclusion

[46] The considerations of efficiency in the proceedings and effective representation by the employer weigh towards a grant of permission under section 596.

[47] The issue of fairness between the parties weighs against such a grant.

[48] In exercising the discretion each factor in section 596(2) does not have to be made out although each should be considered.

[49] I am satisfied that permission should be granted particularly having regard to the fact that the hearing is a jurisdictional hearing considering a complex issue of fact and law.

[50] However, I will impose conditions on the grant of permission that take into account fairness between the parties. They are:

1. I will conduct proceedings on 23 April 2018 by determinative conference, not in open court. As noted by the Commission in *Asciano Services Pty Ltd v Hadfield*:

“The more informal procedures of a determinative conference may be more appropriate for a self-represented litigant...”¹⁹;

2. Should it be necessary, I will, consistent with my independent role as a statutory decision-maker, intervene directly during the hearing and provide an appropriate level of guidance to Mr Caruana on the conduct of proceedings and the taking and testing of evidence, so as to be satisfied that he is able to understand the issues, present his case and test that of the employer; and
3. Should circumstances alter or if I form the view that the employer’s legal representative is not contributing to the efficient conduct of proceedings, I will consider whether the grant of permission should be revoked.

[51] This application remains listed for hearing of the jurisdictional matter (by determinative conference) on 23 April 2018, as set out in my directions of 5 April 2018.

[52] The parties should note that this decision only concerns proceedings on the jurisdictional issue as to whether Mr Caruana was a person protected from unfair dismissal. Should the matter proceed to determination of the further jurisdictional issue (genuine redundancy) or merits and remedy, a party seeking to be represented by a lawyer or paid agent in those proceedings will need to make a fresh request for permission under section 596 of the FW Act.



DEPUTY PRESIDENT

Appearances:

R. Caruana, *on his own behalf*

A. Clare, *with permission*, and S. Toop, *for the Respondent*

Hearing details:

2018.

Adelaide; by telephone.

18 April.

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¹ Directions, Commissioner Platt, 26 March 2018

² Further Directions, Deputy President Anderson, 5 April 2018

³ Respondent’s Submissions on Representation 9 April 2018

⁴ Applicant’s Submission on Representation, 16 April 2018

⁵ *Asciano Services Pty Ltd v Hadfield* [2015] FWCFB 2618 at [19]

⁶ *Calleri v Swinburne University of Technology* [2017] FWCFB 4187 at [36]

⁷ *Fitzgerald v Woolworths Limited* [2017] FWCFB 2797, 17 October 2017 VP Hatcher, DP Dean, Wilson C

⁸ *Warrell v Fair Work Australia* [2013] FCA 291

⁹ *NSW Bar Association v McAuliffe* [2014] FWCFB 1663

¹⁰ [2012] FWA 2966, Senior Deputy President Richards

¹¹ *Ibid* at [16]

¹² Section 596(4) does not apply in this matter

¹³ Explanatory Memorandum to the *Fair Work Bill 2008* at paragraph 2291

¹⁴ [2012] FWA 2966 per Senior Deputy President Richards at [23]

¹⁵ (1988) 165 CLR 543; see also *Applicant v Respondent* [2014] FWC 2860 at [18] per Deputy President Sams: “I have found the skills and expertise of an experienced industrial legal practitioner will be more of a help than a hindrance, particularly bearing in mind a legal practitioner’s professional obligations to the Commission and the Courts.”

¹⁶ *Warrell v Fair Work Australia* [2013] FCA 291 at [24]

¹⁷ *NSW Bar Association v McAuliffe* [2014] FWCFB 1663 at [32]

¹⁸ *CEPU v UGL Resources Pty Ltd* [2012] FWA 2966 per Senior Deputy President Richards at [16]

¹⁹ *Asciano Services Pty Ltd v Hadfield* [2015] FWCFB 2618 at [20]