[2018] FWC 237

The attached document replaces the document previously issued with the above code on 11 January 2018.

There has been some amendment to the wording used in paragraph 17.

Associate to Vice President Hatcher

Dated 19 January 2018

DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Electrical Home-Aids Pty Limited t/a Godfreys

v

Employee represented by the Shop, Distributive and Allied Employees' Association

(C2018/134)

VICE PRESIDENT HATCHER SYDNEY, 11 JANUARY 2018

Appeal against an interlocutory decision of Deputy President Clancy at Melbourne on 5 January 2018 in matter number AG2017/5488 – stay application.

Introduction and background

[1] Electrical Home Aids Pty Ltd t/a Godfreys (Godfreys) has lodged an appeal, for which permission to appeal is required, under s.604 of the *Fair Work Act 2009* (FW Act) against an interlocutory decision of Deputy President Clancy of 5 January 2018 (Decision). Its notice of appeal seeks a stay of the Decision pending the hearing and determination of the appeal. This decision is concerned with that stay application.

[2] The Decision was made in respect of an application by an employee of Godfreys represented by the Shop, Distributive and Allied Employees' Association (SDAEA) pursuant to s 225 of the FW Act to terminate the *Godfreys Employee Collective Agreement 2009* (the Agreement). Under s 225, such an application may only be made by an employer, employee or employee organisation covered by the agreement sought to be terminated. The SDAEA was not covered by the Agreement and was thus not competent to make the application in its own name. The applicant was not identified by name in the application, and an initial issue arose as to whether he or she was in fact a current employee of Godfreys entitled to make the application under s 225 when Godfreys, on 4 December 2017, wrote to the Deputy President seeking that the application be dismissed for want of jurisdiction because of the applicant's lack of standing.

[3] The Deputy President convened a teleconference on 7 December 2017 to deal with this issue. At that teleconference the SDAEA requested that the applicant's name not be disclosed on the basis that the applicant feared that disclosure would result in reprisal action being taken, and that this was the reason that the applicant was not identified in the application. Godfreys contends in its appeal that there was no evidence or material to support this concern, and it vehemently denies that it would ever take such reprisal action. The Deputy President proposed at the teleconference that the issue raised by Godfreys of the applicant's standing to make the application be determined by him by requiring the SDAEA to disclose to

him the name of the applicant, by requiring Godfreys to provide him with a list of its employees, and by him then identifying whether the applicant's name was on the list. The Deputy President also indicated that he would disclose the applicant's name to Godfrey's legal representative on the condition that they would not disclose the name to Godfrey's.

[4] On 20 December 2017 Godfreys lodged a written submission opposing the course proposed by the Deputy President at the teleconference. These submissions included the proposition that it was fundamental to the requirement for openness and transparency that that the identity of parties to proceedings be publicly known, that the non-disclosure of the applicant's identity should not be allowed unless the Commission was satisfied that the applicant's fear of retribution was real and well-founded, that non-disclosure of the applicant's identity might damage Godfrey's reputation because it might give rise to the suggestion that the Commission was satisfied that it was necessary to protect the applicant from unlawful reprisal action by Godfreys, and that there was no evidence to support the applicant's concerns in this regard.

[5] On 21 December 2017 the Deputy President's Associate advised the parties by email that the Deputy President had determined to proceed with the process proposed at the teleconference to resolve the issue of the applicant's standing. On 4 January 2018 Godfreys provided the list of the names of its employees to the Deputy President. Its legal representative also advised that he was prepared to give the undertaking required in order to obtain access to the name of the applicant, but on the proviso that "*if the Deputy President is satisfied of the applicant's standing, and proposes to allow the application to proceed on anonymous basis despite our objection, that he issue a written decision to that effect*".

[6] The Decision made on 5 January 2018 had two elements. The first was an email to the parties from the Deputy President's Associate, which has not been published on the Commission's website or otherwise made publicly available, which stated:

> "As you will recall, on 21 December 2017, Deputy President Clancy emailed both parties. In this email, he requested the SDA provide the Fair Work Commission with the identity of the Applicant employee and that the Respondent provide a list of current employees by noon on Thursday 4 January 2018. He indicated the parties were not required to copy in the other party when forwarding this information to him. Thank you both for your recent email correspondence in response, which the Deputy President has now reviewed.
>
> As has previously been conveyed, at this stage, the Deputy President has sought to be satisfied that the Application has been made by an employee covered by the *Godfreys Employee Collective Agreement 2009* (s.225).
>
> In this regard, separately, the SDA has provided the Fair Work Commission with the identity of the Applicant employee and the Respondent has provided a list of current employees covered by the subject enterprise agreement in response to the Deputy President's email to the parties dated 21 December 2017. A review of this material provided by the SDA and the Respondent has satisfied the Deputy President that the Application has been made by an employee covered by the *Godfreys Employee Collective Agreement 2009*.

Mr Garozzo, as the solicitor acting for Godfreys, was requested to provide an undertaking to the Commission that he would not disclose the identity of the employee Applicant to his client. In his email to the Deputy President dated 4 January 2018, which was also sent to Mr Pardo of the SDA, Mr Garozzo did not give the undertaking sought by the Deputy President. The Deputy President has noted the position of the Respondent is that an undertaking will only be given subject to a further proviso. Accordingly, as the undertaking sought by the Deputy President has not been given, the information going to the identity of Applicant employee will not be forwarded to Mr Garozzo. To the extent that the Respondent wishes to maintain its objection to the process the Deputy President has decided to adopt in resolving the question of whether the Application has been validly made, it will have the opportunity to address this in submissions at the final hearing and such submissions will be considered by the Deputy President and determined as part of his determining the broader Application. The parties should be mindful that at this stage, no matters regarding the Application have been published by the Commission.

As the Deputy President has previously indicated, the parties should not conclude he will reach the same view about the disclosure or non-disclosure of the identity of the employee making the Application or indeed any other employee who puts forward his or her view about whether it is appropriate that the Agreement be terminated, their circumstances and the likely effect termination would have on them (s.226(b)). In this respect, fairness requires that all sides have the opportunity to respond to and test the case of the others.

The Deputy President has made the following **attached Directions** for the future conduct of the Application. They have been made so there is the opportunity for the position of the employee making the Application to be assessed, having regard to the views and position of other employees of the Respondent in relation to the Application, prior to the requirement for the employee making the Application to file and serve material.

The parties are at liberty to apply in relation to the Directions."

[7] The second element was the directions attached to the email. The direction of the most immediate concern to Godfreys is the first (first direction), as follows:

"[2] By 4.00pm on Friday 12 January 2018, Electrical Home Aids Pty Ltd (T/A Godfreys) (the Employer) is to provide a copy of the Form F28 application dated 13 November 2017, the Form F24C statutory declaration made by Julia Fox on 13 November 2017 and these Directions to all employees via email and a copy should also be placed on the staff noticeboard at each workplace."

[8] Godfrey's grounds of appeal, as stated in its notice of appeal, are as follows:

1. In making the decision to proceed in accordance with the Directions, and in circumstances where the identity of the Applicant remains anonymous to the Respondent, its representatives and the public at large, the Deputy President erred by:

    a) Acting without sufficient evidence as to justify the approach of allowing the application to proceed on the basis of the Applicant's anonymity; and/or

b) Failing to act in accordance with ss 577(a) and 577(c) of the FW Act and the principles of open justice; and/or

c) Failing to give appropriate (or any) weight to the submissions made by the Respondent in relation to its objection to the approach; and/or

d) Acting in a manner which was unreasonable and/or plainly unjust.

2. Further and alternatively, in determining that the FWC had jurisdiction to hear the Application pursuant to s 226 of the FW Act:

a) The Deputy President was required to satisfy himself that the Application was made by someone with standing to make it pursuant to s 2 25 of the FW Act;

b) In purporting to reach the state of satisfaction set out at paragraph 2.1.2(a) herein, the Deputy President declined to provide the identity of the purported Applicant to the Respondent or its representatives, thereby denying the Respondent the opportunity to be satisfied of, and/or make submissions about, the FWC's jurisdiction to hear the matter.

c) By reason of paragraph 2.1.2(a) and 2.1.2(b) above, the Deputy President did not accord the Respondent procedural fairness, and thereby constructively failed to reach the state of satisfaction required by s 225 of the FW Act.

[9] Its notice of appeal contends that permission to appeal should be granted for the following reasons:

"It is in the public interest for the Full Bench to grant the Respondent permission to appeal given that:

(a) the appeal ground identified at paragraph 2.1.1 herein, reveals a failure of the FWC to act pursuant to appropriate evidence and/or in accordance with the principles of open justice, which would result in a substantial injustice to the Respondent if leave to appeal is refused; and/or

(b) the appeal ground identified at paragraph 2.1.2 herein, demonstrates a denial of procedural fairness which would result in a substantial injustice to the Respondent if leave to appeal is refused; and/or

(c) the decisions which are the subject of this appeal are otherwise attended by sufficient doubt to warrant their reconsideration by the Full Bench."

Submissions in support of the stay application

[10] Godfreys seeks a stay of the Decision – in particular the first direction set out above – pending the hearing and determination of its appeal. In support of its stay application it is submitted that:

- its appeal grounds disclosed an arguable case with some reasonable prospects of success on the questions of leave to appeal and the substantive merits;

- the Deputy President proceeded without any evidence to support the serious allegations that the applicant had a fear of reprisal action being taken by Godfreys;

- the s 577 requirements of openness and transparency required the identity of parties to be disclosed to other parties and the public unless there was evidence to support the making of confidentiality orders;

- the detailed submissions made by Godfreys on 20 December 2017 were not taken into account or given any weight, as the Decision did not indicate any basis for their rejection;

- the Deputy President erred by denying Godfreys procedural fairness by not disclosing the applicant's identity prior to determining the issue of standing, in circumstances where its legal representative was prepared to make the required undertaking to gain access to the name subject only to a proviso which was in any event satisfied by the issue of the undertaking;

- the Deputy President has deprived Godfreys of the opportunity to address the Commission in any meaningful way on the question of jurisdiction;

- the balance of convenience favoured the granting of a stay, in that if the application were to proceed on the basis contemplated by the Deputy President in circumstances where the applicant's name is to remain anonymous, this will give rise to rumour and innuendo in the workforce and the broader community about who the anonymous applicant is and why the applicant has been allowed to remain anonymous and may thereby cause reputational damage to Godfreys and unnecessary disruption at its workplaces;

- compliance with the first direction was required by 4.00pm on 12 January 2018, and to require Godfreys to comply with it pending the appeal would effectively deprive it of the remedy it seeks in the appeal and give rise to the speculation which it wishes to avoid;

- further, if the application proceeds to its conclusion with the applicant being named, Godfreys will be deprived of procedural fairness and substantial time and expense might be incurred by the parties in circumstances where the applicant has no standing to bring the application; and

- there was no material demonstrating any prejudice to the applicant if a stay was granted, and a slight delay in the hearing of the application did not tip the balance of convenience against the grant of the stay.

Consideration

[11] The principles applying to the determination of stay applications are well established, and the practice of the Commission is to adopt the two-part test is enunciated in a decision of

the Australian Industrial Relations Commission in *Edghill v Kellow-Falkiner Motors Pty Ltd*[1] This decision has been followed in a number of cases decided under the FW Act. Paragraph [5] of that decision states:

> "[5] In determining whether to grant a stay application the Commission must be satisfied that there is an arguable case with some reasonable prospects of success, in respect of both the question of leave to appeal and the substantive merits of the appeal. In addition, the balance of convenience must weigh in favour of the order subject to appeal being stayed. Each of the two elements referred to must be established before a stay order will be granted."

[12] In assessing whether the purpose of a stay application in an appeal has the requisite prospects of success, the Commission necessarily engages in an assessment of the merits of a preliminary nature, since the Commission will not have had the benefit of hearing the appellant's full argument and usually will not have had the opportunity to properly peruse the case materials.[2]

[13] In respect of the first limb of the test for the grant of a stay, that is that there is an arguable case with some reasonable prospects of success, it is necessary to emphasise that applies to the requirement for permission to appeal as well as the substantive merits of the appeal. Section 604(2) of the FW Act requires the Commission to grant permission to appeal if satisfied that it is "in the public interest to do so". The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgement.[3] The public interest is not satisfied simply by the identification of error[4], or a preference for a different result.[5] In *GlaxoSmithKline Australia Pty Ltd v Makin* a Full Bench of Fair Work Australia identified some of the considerations that may attract the public interest:

> "... the public interest might be attracted where a matter raises issue 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]

[14] Other than the special case in s 604(2), the grounds for granting permission to appeal are not specified. Considerations which have traditionally been adopted in granting leave and which would therefore usually be treated as justifying the grant of permission to appeal include that the decision is attended with sufficient doubt to warrant its reconsideration and that substantial injustice may result if leave is refused.[7] It will rarely be appropriate to grant

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[1] [2000] AIRC 785, Print S2639

[2] *Supreme Caravans Pty Ltd v Hung Pham* [2013] FWC 4766 at [9]

[3] *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ: applied in Hogan v Hinch (2011) 85 ALJR 398 at [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Alllied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78 at [44]-[46]

[4] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343, 197 IR 266 at [24]-[27]

[5] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343, 197 IR 266 at [26]-[27], *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/ Warkworth* [2010] FWAFB 10089 at [28], affirmed on judicial review; *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 178; *NSW Bar Association v Brett McAuliffe*; *Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663, 241 IR 177 at [28]

[6] [2010] FWAFB 5343, 197 IR 266 at [24] – [27]

[7] Also see *CFMEU v AIRC* (1998) 89 FCR 200 at 220; and *Wan v AIRC* (2001) 116 FCR 481 at [26]

permission to appeal unless an arguable case of appealable error is demonstrated. This is so because an appeal cannot succeed in the absence of appealable error.[8] However, the fact that the Member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.[9]

[15] Permission to appeal would rarely be granted in appeals against interlocutory or procedural decisions which do not involve the determination of any substantive issue, for the reasons explained by the Full Bench in *Hutton v Sykes Australia Pty Ltd*[10] (footnote omitted):

> "[3] The fact that this appeal challenges an interlocutory or procedural decision is relevant to the determination of permission to appeal. Courts and tribunals have generally discouraged appeals from preliminary or procedural rulings. Permitting appeals against interlocutory or procedural rulings may prolong the proceedings overall and increase the costs to the parties. There are other reasons why appellate intervention at an early stage may be undesirable. Procedural rulings may be altered later in the case and the party complaining about a procedural decision might ultimately be successful in the substantive proceedings. In such a case any earlier appeal in relation to a preliminary or procedural issue would be rendered futile."

[16] I am not satisfied on the basis of the material before me and the submissions made by Godfreys that it has demonstrated that it has an arguable case with some reasonable prospects of success with respect to permission to appeal. In reaching that conclusion, it is important to properly characterise what the Deputy President did and, perhaps more pertinently, what he did not do, in the Decision. In relation to the email element of the Decision, I consider that it is truly an interlocutory decision in relation to the issue of the non-identification of the applicant. The Decision was made in response to Godfrey's correspondence seeking dismissal of the application on the basis of the applicant's lack of standing. The Deputy President satisfied himself that the applicant was in fact employed by Godfreys, and was thus entitled to make the application, using an expedient course which is reasonably commonly used by members of the Commission in varying contexts. What the Deputy President did not do was to determine in any final way whether the applicant should remain permanently de-identified in the proceedings, and he expressly stated in the Decision that this issue would be re-visited at the hearing. Concomitantly, he did not make any finding, express or implied, that there was any substance to the concern expressed on the applicant's behalf by the SDAEA that there might be retribution if his or her name was disclosed. I read the Decision to mean that it will be necessary to deal with that allegation at the final hearing. In that context, the appeal grounds contending that the Deputy President acted on a basis entirely unsupported by evidence are misconceived. Additionally, Godfrey's contention concerning an alleged lack of openness and transparency as required by s 577 is premature because the issue of the identification of the applicant has not been finally determined.

[17] Having regard to the process adopted by the Deputy President, there is no real room to doubt the correctness of the Deputy President's conclusion that the applicant was a current employee of Godfreys and therefore had standing to make the application. Godfreys,

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[8] *Wan v AIRC* (2001) 116 FCR 481 at [30]

[9] *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089 at [28], 202 IR 288, affirmed on judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78; *NSW Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663, 241 IR 177 at [28]

[10] [2014] FWCFB 3384

notwithstanding its complaint of a denial of procedural fairness, did not suggest that there was any basis upon which the Deputy President could have made a substantive error in this respect. I do not consider that the complaint of a denial of procedural fairness has substance given the opportunity the Deputy President gave to the legal representative of Godfreys to obtain the name of the applicant and thus undertake the same cross-checking process that he had undertaken. It was not suggested that the undertaking which the Deputy President required in order for this to occur was unreasonable, and indeed the legal representative was prepared to give that undertaking. The legal representative did not gain access to the name only because he took the step of seeking to impose a condition on the Deputy President under which this could occur. The written decision which the legal representative requested the Deputy President to produce, namely that the applicant's name would remain anonymous in the proceedings, was clearly not the decision which the Deputy President issued on 5 January 2018 or one which he intended to make prior to the final hearing. There is no merit to the proposition that the Deputy President should have acceded to the legal representative's request in this respect and that, in not doing so, he denied the legal representative procedural fairness.

[18] Nor do I consider that there is any merit to the proposition that Godfreys would suffer substantial injustice by the refusal of permission to appeal. The injustice it complains of is that the Decision would cause it reputational damage because it raises the question as to why the applicant is to remain de-identified. This is purely speculative. No step taken by the Deputy President would give substance to the allegation that Godfreys might take retributive action if the applicant's name was exposed. In particular:

- the email element of the Decision has not been published, but merely sent to the parties;

- the email does not in any event even mention the retribution allegation let alone make a finding about it;

- as earlier stated, the Deputy President has not made a decision to keep the applicant de-identified, but has merely adopted a course which would preserve the position of the applicant in that respect pending the final hearing; and

- the documents required to be distributed to its employees by Godfrey pursuant to the first direction, namely the application and the supporting statutory declaration, do not mention this allegation at all.

[19] The proposition that the Deputy President did not take into account Godfrey's submissions of 20 December 2017 may be rejected. Once the Decision is properly characterised, it is clear that for the most part those submissions were directed at matters not determined by the Deputy President. I consider that the Decision was in a form appropriate to its nature as an interlocutory decision.

[20] Finally, I note two further matters:

(1) I do not consider that the Commission could become *functus officio* on a question going to its jurisdiction because of an interlocutory decision of the nature of that under appeal here. I consider that it would be entirely open to Godfreys to re-visit the issue if it has some new matter to raise in that respect. I

also consider that, notwithstanding what has already occurred, it would still be open to the legal representative of Godfreys to obtain access to the name of the applicant by giving in unconditional terms the undertaking requested by the Deputy President. This would allow the process undertaken by the Deputy President to establish the applicant's standing to be confirmed (or otherwise).

(2) The directions made by the Deputy President included the grant of liberty to apply. This may be exercised by Godfreys if any real, as opposed to speculated, difficulty arises in complying with the directions.

[21] Because I am not satisfied that Godfreys has demonstrated that it has an arguable case with some reasonable prospects of success with respect to permission to appeal, it is not necessary for me to deal to finality with the issue of the balance of convenience. However, for the reasons already stated, the lack of any substance to the proposition that injustice or prejudice would follow if the first direction had to be complied with does not suggest that the balance of convenience weighs positively in favour of the grant of a stay. Further, I note the concession made by counsel for Godfreys that the non-identification of the applicant would not prejudice its capacity to advance its substantive case against the grant of the application.

[22] For these reasons, the stay application is dismissed.

VICE PRESIDENT

Appearances:

M. Minucci of counsel and *M. Garozzo* on behalf of Electrical Home Aids Pty Ltd t/a Godfreys.
D. Macken and *J. Fox* of the Shop, Distributive and Allied Employees' Association.

Hearing details:

2018.
Sydney:
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