DECISION

Fair Work Act 2009
s.604—Appeal of decision

Ralf Rodl

v

QANTAS Airways Pty Ltd
(C2018/4855)

DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT BULL
COMMISSIONER BISSETT

SYDNEY, 30 OCTOBER 2018

Appeal against decision [2018] FWC 4363 of Deputy President Sams at Sydney on 13 August 2018 in matter number U2018/193; permission to appeal refused.

[1] This is an appeal for which permission is required by Mr Ralf Rodl (Appellant) against a decision[1] (Decision) of Deputy President Sams. The Decision concerned an application made by the Appellant for an unfair dismissal remedy under s.394 of the *Fair Work Act 2009* (the Act) with respect to the termination of his employment by Qantas Airways Pty Ltd (Respondent).

[2] The application for permission to appeal was heard on 24 September 2018.

[3] The circumstances leading to the Decision were unusual in that the application was part heard by Commission Riordan but, for reasons beyond the Commissioner's control, was finalised and a decision issued by Deputy President Sams.

The Decision

[4] The Appellant was employed by the Respondent as an International Flight Attendant. In September 2015, while on holidays in Germany, he sustained an ankle injury. At the time of his dismissal he had not returned to work from that injury. His employment was terminated on 15 December 2017 after 22 years' service on medical grounds because he was unable to perform the inherent requirements of his job.

[5] On 26 May 2017 the Appellant met with Ms Claire Elliot of the Respondent and apparently asked her if the Respondent was able to hold his position open until the beginning of 2018 calendar year. A return to work at that time was the Appellant's goal although he conceded that no doctor could predict that far into the future. The Appellant said that Ms Elliot gave her "implied consent" to his proposal.

[1] [2018] FWC 4363

[6] On 26 June 2017, and with the permission of the Appellant, Ms Elliot sent a letter to the Appellant's doctor (Dr Wong) setting out the Appellant's task analysis and position description and asking the Doctor to comment on his role in the context of his injury.

[7] Dr Wong provided her medical report on 6 July 2017. That report said:

> As requested is a medical report for the above regarding left ankle fracture sustainedby [sic] the above in Sept 2015 while overseas.
>
> 1) the diagnosis of injury was that of an ankle fracture that required open reduction and internal fixation. The surgery was performed overseas in Oct 2015. A further operation was performed to remove one of the screws soon after. Additional surgery to remove the rest of the hardware was performed in early 2016 while again overseas.
> 2) Mr Rodl is currently not taking any prescribed medication and has been doing his own regular exercises for his ankle after seeing a physiotherapist in the past.
> 3) While (sic) his current situation it would be difficult for him to perform the work duties as described in the Position Description and Work Task Analysis
> 4) As he has not been working since September 2015 and due to ongoing pain with his ankle it would be difficult to state prognosis or a timeframe when he is able to return to work 'full-time duties'. He further stated 'if work restrictions were imposed, it is difficult to state how likely resolve (sic) or whether they will remain long-term'.
> 5) Mr Rodl states that he continues to suffer from pain and swelling after prolonged standing or walking for more than 30 minutes.
>
> Due to these symptoms it would be difficult for him to safely perform his role as a international Flight Attendant with the hours and duties stated. The task that involves the need for constantstanding (sic) and dynamic walking would also be difficult for him.
>
> If work restrictions were imposed, it is difficult to state how likely the symptoms would resolve or whether they will remain long term. The option of a trial of shorter or light duties would allow the opportunity to assess his work capacity/symptoms.
>
> Yours sincerely
>
> Dr Katrina Wong[2] [sic]

[8] The Appellant then met with Ms Theresa Jorgensen from the Respondent on 27 October 2017. The purpose of that meeting was to discuss any further support, information relevant to the Appellant's recovery and the option of seeking redeployment to an alternative position in Qantas. This was in the context of the Appellant's doctor having identified it would be difficult to state a prognosis or timeframe as to when the Appellant would be fit to return to work. While the Appellant rejected that he had discussed Dr Wong's report with Ms Jorgensen the Deputy President found that he:

[2] [2018] FWC 4363 at [1]; Appeal Book p.30

> "agreed he produced no medical evidence in this meeting that he would be fit to RTW in a few months and he acknowledged Ms Jorgensen did not commit to keeping his role open until January 2018. He denied they discussed options for redeployment rather they had agreed he should concentrate on a full recovery, rather than taking on a redeployment role, so he could come back in January 2018. He conceded he had no medical evidence to support this, because his doctor would not 'sign off' two months ahead.[3]"

[9] The Appellant received a "show cause" letter from the Respondent on 15 November 2018 advising him that, based on the medical report from Dr Wong of 6 July 2017, the Respondent was considering terminating his employment. He was invited to provide the Respondent with any further information as to why his employment should not be terminated. In his reply to the show cause letter the Appellant agreed:

- he did not mention he was confident to RTW to his pre-injury role in January 2018;
- he did not provide any medical evidence he would be fit to RTW in January 2018, and
- he did not assert any commitment by Ms Elliot or Ms Jorgensen of keeping his role open until January 2018.[4]

[10] Ms Jorgensen said it was her decision to terminate the Appellant's employment after consultation with Industrial Relations and the Performance, Culture and Customer Operations leadership. She was not given any direction in relation to that decision by Mr Chaseling, her manager, and she was not aware that the Appellant had made a bullying allegation against Mr Chaseling.

[11] Ms Jorgensen did not involve Qantas medical in the matter as she relied on the history, including Dr Wong's treatment of the Appellant. She said that it was "Dr Wong's consistent opinion that [the Appellant] was unfit for work due to his chronic ankle pain."[5] Ms Jorgensen accepted that the Appellant had a goal of a return to work in January 2018. She did not mention this in correspondence as she considered it the Appellant's goal and not based on medical evidence, his recovery or prognosis.

[12] Dr Wong's medical certificates consistently stated that "[I]n my opinion the patient is suffering from medical illness/chronic ankle pain and is therefore unfit to work"[6] with the most recent certificate having been issued for the period 27 November 2017 until 3 January 2018.[7]

[13] The Deputy President found that:

> "the only medical evidence [the Respondent] had was the applicant's GP's/Dr Wong's consistent medical certification over two years, and 14 certificates, that the applicant was unfit for work due to his ankle injury. Importantly, there was no indication or prognosis of when he might be fit to resume his pre injury duties. The highest the

[3] [2018] FWC 4363 at [23]; Appeal Book p.40

[4] [2018] FWC 4363 at [25]; Appeal Book p.40-1

[5] [2018] FWC 4363 at [59]; Appeal Book p.51

[6] [2018] FWC 4363 at [6]; Appeal Book p.32

[7] [2018] FWC 4363 at [68]; Appeal Book p.53-54

> applicant's evidence reached was his 'goal' or 'hope' that he would be able to resume pre injury duties in January 2018. This was based on his own self-diagnosis *'after consulting with fellow patients and recreational runners'*. I do not accept the applicant's oral submission that this '*goal*' had been discussed with 'my orthopaedic surgeons and my treating doctor'. There is simply no evidence that any medical practitioner was aware of the applicant's goal of a RTW in January 2018; let alone, had expressly agreed it was likely. It hardly needs to be said that this aspiration … could give Qantas no comfort that he could safely RTW." [8]

[14] The Deputy President commented that he found it extraordinary "that the applicant did not take any steps, to satisfy Qantas of his complete fitness in January 2018 - his own expected RTW .he took no steps until 22 May 2018 to seek medical confirmation of his fitness to RTW."[9] He expressed this view in the context of the relevant authorities which, he said:

> **[85]** …make perfectly clear … that the decision of the employer to dismiss an employee on capacity grounds, is to be assessed on the material available to the employer '**at the time of dismissal**'. So much so is clear from the following passage in *Jetstar* at para [55]:
>
> > 'However, it is well-established that, although the validity of a reason for dismissal may be determined by reference to facts discovered after the dismissal, those facts must have existed at the time of dismissal. Thus in *Dundovich v P&O Ports* - a case which concerned the dismissal of an injured employee who was dismissed because, for the foreseeable future, he would not be able to perform all the duties of his position - a Full Bench of the Commission found that it was necessary to take into account a court judgment that the employee's injury was work related, even though that judgment post-dated the dismissal, because the judgment was declaratory of facts and legal rights in existence **at the time of dismissal**.' [Deputy President's emphasis]

[15] As to whether there was a valid reason for the dismissal the Deputy President concluded:

> **[90]** In my view, at the time of the applicant's dismissal, Qantas had no evidence available, for it to be satisfied he would be fit to return to his preinjury duties or any modified duties, at any time in the foreseeable future. Accordingly, I am satisfied Qantas had a valid reason (for) the applicant's dismissal. The decision was '*sound, defensible and well founded*'; see: *Selvachandran.*

[16] The Deputy President found that the Appellant was notified of the reason for his dismissal and given an opportunity to respond; was invited to have a support person with him during meetings on 26 May 2017; 7 October 2017 and 15 December 2017; that the dismissal was not related to the Appellant's performance and that the Respondent's policies and procedures were applied consistently and appropriately.

---

[8] [2018] FWC 4363 at [82]; Appeal Book p.67

[9] [2018] FWC 4363 at [84]

[17] The Deputy President further considered the length of the Appellant's employment with the Respondent and the Appellant's attitude to redeployment. The Deputy President rejected the Appellant's criticism of Ms Elliot and Ms Jensen[10] [sic] in not offering him a voluntary redundancy package. He did consider, but rejected on lack of evidence, the Appellant's claim that the dismissal was otherwise harsh because he had lost a substantial sum of money in a failed investment.

[18] The Deputy President concluded:

> **[106]** In summary then, and to make it abundantly clear, the Commission is satisfied that at the time of the applicant's dismissal, he was unable to perform the inherent requirements of his job as a Long Haul Flight Attendant; that there was no reasonable basis to presume he would be fit to perform his pre-injury duties in the foreseeable future, and that Qantas was not obliged to redeploy the applicant to alternative duties without his consent, and in the face of his determination to focus on a full recovery. There was a valid reason for the applicant's dismissal.

Grounds of appeal

[19] The Appellant articulated several grounds of appeal:

1. The Respondent, although denied permission to be represented by a lawyer or paid agent was accompanied by an 'industrial relation' lawyer at all hearings;
2. There are significant errors of fact in the decision, including that the Deputy President failed to take into account or properly consider:
    a. the medical report relied on the justify dismissal was 6 months old;
    b. the Respondent did not contact the Appellant's doctor prior to dismissal;
    c. the Appellant was only given seven business days to respond to the 'review of employment' letter and was unable to provide specialist medical advice in the time frame;
    d. the Respondent failed to abide by its own Management of Ill & Injured Employees Guidelines in that it did not arrange a follow up meeting after the 'review of your employment' letter;
    e. the Respondent failed to produce documents in accordance with an order of the Commission; and
    f. the Appellant had the implied consent of the Respondent to return to work in January 2018.
3. The Deputy President made a comment at the commencement of the last day of hearing suggesting he had reached a conclusion prior to the Appellant having an opportunity to present further evidence or cross examine the Respondent's witnesses.

[20] As to why it is in the public interest to grant permission to appeal, the Appellant submits that the appeal raises issues:

1. as to the use of 'shadow lawyers';

[10] The reference to Jensen is a typographical error and should have been a reference to "Jorgensen"

2. in relation to support for those from non-English speaking backgrounds;
3. of the importance of access by employees of policies in the workplace;
4. with respect to advice to employees of outstanding leave entitlements;
5. with respect to reliance on medical reports to inform decisions as to fitness for duty; and
6. with respect to implied consent or agreement.

Consideration

[21] An appeal under s.604 of the Act is an appeal by way of rehearing and the Fair Work Commission's (the Commission) powers on appeal are only exercisable if there is error on the part of the primary decision maker.[11] There is no right to appeal and an appeal may only be made with the permission of the Commission.

[22] Being an appeal from a decision made under Part 3-2 of the Act, s.400 of the Act also applies. Section 400 of the Act provides:

> "(1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under this Part unless the FWC 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."

[23] The notice of appeal alleges that the Decision contains significant errors of fact and that the public interest is invoked.

[24] Granting permission to appeal will rarely be appropriate unless an arguable case of appealable error is demonstrated. In the absence of appealable error an appeal cannot succeed.[12] The fact that the member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.[13]

[25] As can be seen from the above, an appeal against an unfair dismissal decision can only proceed on the ground that it is in the public interest that permission to appeal be granted and where an error of fact is alleged it must be a *significant* error of fact.

[26] These proceedings are restricted to permission to appeal considerations only. The Appellant is not required to present full or developed argument about their appeal grounds. Our task is to determine whether it is in public interest that permission to appeal against the

---

[11] This is so because on appeal the Commission has power to receive further evidence, pursuant to s.607(2); see *Coal and Allied v AIRC* (2000) 203 CLR 194 at [17] per Gleeson CJ, Gaudron and Hayne JJ

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

[13] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 at [26]-[27], 197 IR 266; *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089 at [28], 202 IR 388, 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 at [28]

Decision should be granted, and relevantly in doing so to consider whether an arguable case of appealable error has been made out.

[27] In *O'Sullivan v Farrer*[14], the High Court stated (at 216):

> "… 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 "in so far as the subject matter and the scope and purpose of the statutory enactments may enable … given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view": *Water Conservation and Irrigation Commission (N.S.W.) v. Browning*, per Dixon J.
>
> (Citations omitted, editing in original.)

[28] In *Coal & Allied Mining Services Pty Ltd v Lawler and others*, Buchanan J (with whom Marshall and Cowdroy JJ agreed) characterised the test under s.400 of the Act as "a stringent one".[15] The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment[16]. In *GlaxoSmithKline Australia Pty Ltd v Makin,* a Full Bench of the Commission identified some of the considerations that may attract the public interest:

> "... 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."[17]

Significant errors of fact (appeal ground 2)

[29] The Appellant was dismissed on medical grounds. In June 2017 the Appellant gave permission to the Respondent to seek a report from his treating doctor. That report was provided on 6 July 2017. It was the only medical report before the Deputy President. The Deputy President considered that report along with the claim of the Appellant that his goal of returning to work in January 2018 had been discussed with his orthopaedic surgeon and treating doctor. The Deputy President rejected, for lack of evidence, that any medical practitioner was aware of the Appellant's goal of returning to work in January 2018 "let alone had agreed that it was likely".[18] The Deputy President concluded that "the applicant was given every opportunity to provide any further verifiable information as to when he was likely to RTW. Either he failed to do so, or no medical practitioner was prepared (including his own GP) to give a prospective RTW date, which frequently is sought and given in such cases."[19]

---

[14] (1989) 168 CLR 210

[15] (2011) 192 FCR 78 at [43]

[16] *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 & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78 at [44] -[46]

[17] [2010] FWAFB 5343; 197 IR 266 at [27]

[18] [2018] FWC 4363 at [82]; Appeal Book p.67

[19] Ibid

[30] The provision of relevant, up to date medical information to the Respondent or to the Commission was in the hands of the Appellant. He produced no such information at or prior to the hearing but did, following the last day of hearing provide a medical clearance from a doctor other than Dr Wong.

[31] We are not satisfied that there is any arguable case of error in the approach taken by the Deputy President. He properly considered the medical information before him as provided by the Appellant and Respondent. The Deputy President's conclusion that "With nothing more than the Applicant's self-diagnosed role Qantas was left with no option"[20] does not disclose an arguable case of error.

[32] To the extent that the Appellant says that the Respondent should have sought further medical advice from his doctor, the Deputy President considered that the Appellant had ample opportunity to provide further medical evidence but did not do so. He further took into account that the Appellant's doctor had issued a medical certificate on 27 November 2017 which continued to indicate that the Appellant remained unfit for work.

[33] We are not satisfied that any arguable case of error is identified by the Appellant in this regard.

[34] On the 15 November 2017 the Appellant received a "next steps" letter, or, as the Appellant refers to it as a "review of employment" letter. This was referred to by the Deputy President as a "show cause" letter. The Appellant was given until 29 November 2017 to respond.

[35] The Appellant says that he only had seven business days to respond to the letter. In his notice of appeal the Appellant indicates that he did not open the email from the Respondent containing the letter until 17 November 2017, two days after it was sent. He then counts the week days after 17 November and before 29 November 2017 to reach his conclusion that he only had seven business days to respond.

[36] The Appellant agreed during the permission to appeal hearing that he had not sought an extension of the time provided to him to respond.

[37] The Deputy President considered whether the Appellant had been given a reasonable opportunity to respond. He concluded:

> **[92]** The applicant was very critical of Qantas's 'show cause' letter of 15 November 2017 requiring him to provide any further information, including medical information, by 29 November 2017. I do not accept the applicant's contention that he only had seven business days to respond and arrange medical appointments. Firstly, it was not seven business days; but 10 business days. Secondly, it was 14 days, including that he could have easily arranged a medical specialist appointment during this time for a point beyond the 14 days and request an extension of time to reply until he could attend such an appointment. I have no reason to doubt that Qantas would accept such a reasonable request. In any event, it is difficult to reconcile the applicant's criticism of the shortness of time to respond, with the following circumstances:

[20] [2018] FWC 4363 at [83]; Appeal Book p.68

(a) He could not have been in any doubt, at least at the 27 October 2017 meeting with Ms Jorgensen, that Qantas was seriously considering his future employment. Ms Jorgensen said that during this meeting, the applicant said '*I understand that the Company needs to make a decision at a point in time which may lead to termination*'. I accept this evidence of Ms Jorgensen and note the applicant did not unequivocally reject this evidence.

(b) The applicant responded to the 'show cause' letter, inter alia, on 28 November 2017 as follows:

> 'at this stage, I cannot provide any medical evidence, confirming that it would be safe for me to safely perform my preinjury role without risk of harm and/or aggravation of my condition'.

(c) At no time did the applicant seek an extension of time to respond. Given the extensive history from his injury, it would not have been unreasonable for Qantas to give him further time to respond had he asked. The harsh reality was that he did not.

(d) In any event, the applicant did obtain an updated medical certificate of unfitness from Dr Wong on 27 November 2017. In other words, the short timeframe was not an impediment to providing exactly what Qantas asked for. Presumably, he had told Dr Wong of his goal of a RTW in January 2018, but Dr Wong would not provide even a possible prognosis of any RTW then, or at any other time.

[38] During the hearing of permission to appeal the Appellant stated that he did not consider he could request an extension of time as the Respondent runs their business on a definite, inflexible basis.

[39] The evidence demonstrates that the Appellant had 10 business days and 14 days in total to respond to the Respondent's request. In that time he visited his treating doctor and obtained a medical certificate on 27 November 2018 indicating that he could have sought a fresh opinion from Dr Wong had he wished to do so.

[40] There is no arguable case of error or any arguable significant error of fact made out by the Appellant arising from the Deputy President's analysis or the conclusion.

[41] The Management of Ill & Injured Employees Guiding Principles is a document produced by the Respondent in response to an Order issued by the Commission. Whilst the Appellant raised an issue as to the tardiness of the Respondent in producing that material, we are not satisfied that there was any prejudice to the Appellant in this regard. Further, we note that, once the documents were produced the proceedings before Commissioner Riordan were adjourned at lunch time on 2 May 2018, the first day of hearing, until the following Monday 7 May 2018. The Appellant was also given permission to recall witnesses of the Respondent should he wish to do so. As it transpired the matter did not resume until 21 May 2018. Ultimately the Appellant had almost three weeks to consider the documents. In these circumstances there is no argument of prejudice to the Appellant. The Appellant was afforded

procedural fairness in relation to the documents late production. No arguable case of error is thereby established.

[42] We note that, on the basis of the decision of Commissioner Riordan to adjourn the matter until the following week, the Appellant was afforded much more time then he otherwise would have had to examine the documents if they had been produced at 9.30am in accordance with the directions.

[43] The Appellant says that the guiding principles require that, following his response to the show cause letter, a further meeting should have been held with him to discuss his response and outline the next steps. He says that this did not occur. He says the failure of the Deputy President to take this into account was an error.

[44] The status of the guiding principles was clearly an issue before the Deputy President. Ms Jorgenson gave evidence, in response to questions from the Appellant about the guidelines in respect to a fitness for work assessment and their interaction with the ongoing advice received from the Appellant's own treating doctor.[21] In re-examination Ms Jorgenson said that the guidelines raised by the Appellant kicked in circumstances where the Respondent had insufficient information on which to make a decision.[22] The Respondent submitted that the guidelines were not policy. The Appellant made closing submissions with respect to the guidelines in which he submitted that "Next steps or agreement on a termination date were also not discussed as outlined in the Qantas Injury Management Guidelines" on the day of dismissal.

[45] We are not satisfied that there was any arguable error in this regard on the part of the Deputy President. Whilst not spelt out in great detail the Deputy President considered the guiding principles. He concluded that:

> **[96]** …As might be expected, Qantas has a wide and comprehensive suite of policies and procedures dealing with all employment related matters, specifically relating to managing employees who are ill or injured and the process which might ultimately lead to an employee's dismissal. I am satisfied that all of Qantas's policies and procedures relevant here were applied consistently and appropriately, given the applicant's circumstances and history of the matter.

[46] No case of arguable case of error is thereby established.

[47] The Appellant said that he had the "implied consent" of the Respondent to return to work in January 2018. On this matter the Deputy President concluded:

> **[88]** I deal now with the applicant's claim that he had received 'implied consent' for his RTW in January 2018 from Ms Elliott and/or Ms Jorgensen. Both Ms Elliott and Ms Jorgensen strongly denied ever giving the applicant such a guarantee, expressly or impliedly. I accept the applicant had raised this goal with Ms Elliott in May 2017 – speculating some 6 to 7 months ahead – as Ms Elliott's notes from the meeting disclose; see: para [36] above. However, there is no cogent evidence that any such guarantee or approval was ever given by anyone. The fact the applicant may have

[21] Transcript PN133-6; Appeal Book p.166-7

[22] Transcript PN157; Appeal Book p.169

> expressed his opinion, and they did not object cannot be construed as 'implied consent'. Moreover, it is utterly implausible that Ms Elliott or Ms Jorgensen would have had the authority, let alone any inclination to agree to a future RTW date, given the long history of the matter and the absence of any supportive medical evidence, contrary to the only consistent evidence they had from Dr Wong to that point. I note again that the applicant did not even take any steps to demonstrate he was fit to RTW in January 2018.

[48] There is no doubt that the Appellant mentioned his preferred return to work date of January 2018 on a number of occasions in meetings with the Respondent but there is nothing to suggest that this was consented to or that the Respondent agreed that it would hold a position for him until that date. The Appellant, in his evidence, agreed that Ms Elliot didn't agree to hold his position open but that "she didn't reject" his proposal[23] although he accepted that "she didn't say anything."[24] He took this however as "implied consent" - he had told Ms Elliot of his plans and she had listened to him.[25] The Appellant also suggested that the Respondent did not object to his plan to return to work in January 2018 such that he had its implied consent.[26]

[49] Whilst the Appellant does not agree with the conclusion of the Deputy President this is not indicative of any arguable error of fact by the Deputy President. The Appellant has not identified any evidence the Deputy President should have considered but failed to do so that would have made a material difference to the conclusion he reached. We find no arguable case of error by the Deputy President in this regard.

Premature comments of the Deputy President (appeal ground 3)

[50] The Appellant says that the Deputy President made a comment at the beginning of the second day of hearing on 21 May 2018 that the Appellant considered premature. The Appellant says that the Deputy President said "Well that might make it a bit more difficult yes" when he stated that he still sought reinstatement.

[51] The totality of the exchange between the Deputy President and the Appellant and Respondent as recorded in the transcript is as follows:

> THE DEPUTY PRESIDENT: I know I might be throwing you a curved ball at the moment, but it's always preferable. One party will win and one party will lose. There will be a public decision, and I know that it was probably dealt with by way of an earlier conciliation either by phone and/or in person. But things have moved on and I wonder - circumstances change, people's views change and I wonder if there is any appetite for a settlement.
>
> Mr Rodl, I suppose I should ask you first. You originally sought reinstatement, did you not?
>
> MR RODL: Yes, I would like to be reinstated.

---

[23] Transcript PN111; Appeal Book p.91

[24] Transcript PN113; Appeal Book p.91

[25] Transcript PN112; Appeal Book p.91

[26] Transcript PN254; Appeal Book p.105

> THE DEPUTY PRESIDENT: Yes. Would you maintain that position if we were to have a discussion about settlement of the matter?
>
> MR RODL: Yes.
>
> THE DEPUTY PRESIDENT: Well that might make it a bit difficult. Yes.
>
> MS FARAH: Thank you, Deputy President. I think it's fair to say that there's been a number of occasions in which potential settlement options have been traversed by both parties. I think to cut through it, the applicant has made clear, most recently again on 7 May by email to Riordan C, that, and I'll quote from it:
>
> > *I am not seeking voluntary redundancy, but sanctioned clarification about the legitimacy of my termination. I am asking for reinstatement to my former position, should it be established by the Commissioner with all the evidence available that my termination was illegitimate.*
>
> I believe it's fair to say that that's been the applicant's unwavering position throughout the course of the proceedings.
>
> THE DEPUTY PRESIDENT: That probably leaves little scope for further discussion. Yes, is that - does that remain your positions does it, Mr Rodl?
>
> MR RODL: Yes Commissioner, I'd like this case to be judged if it was unfair or a harsh dismissal.

[52] It is clear that the Deputy President made the comment to which the Appellant has taken exception in the context of exploring with the parties if there was any prospect of finding a settlement to the matter prior to further hearing. There is nothing wrong in such an approach and it is consistent with the objects of the Act in respect to unfair dismissal claims. It as a not an uncommon aspect of hearing such applications in the Commission. Considered properly and in context there was nothing in the comment of the Deputy President that suggests he had reached any predetermined or concluded view as to the merits of the Appellant's case. No arguable case of appealable error is disclosed.

Presence of "shadow lawyer" (appeal ground 1)

[53] The Respondent had sought, and the Commission had refused,[27] permission to be represented by a lawyer in relation to the application.

[54] At the commencement of proceedings on 2 May 2018 Ms Farah of the Respondent announced her appearance. She also said that:

> "in the interest of transparency I've got Amy Linton here with me. She is a full-time employee at Ashurst who is on a full-time secondment at Qantas Airways Limited, and

[27] [2018] FWC 1935; Appeal Book p.23

she is simply to assist with providing me documents and taking notes. I will be running the matter on behalf of Qantas Airways Limited."[28]

[55] The Appellant says that despite the decision of the Commission on this matter Ms Linton continued to accompany representatives of the Respondent to Commission proceedings, passed handwritten notes to Ms Farah during proceedings, was heard whispering to Ms Farah during proceedings, spoke to Ms Farah during breaks in the proceedings and is copied into all correspondence in relation to the matter.

[56] The Appellant says he understood that permission was required to be represented and further that the default prohibition applies to all aspects of representation in and out of hearing rooms.

[57] Whilst one query was raised by Commissioner Riordan during the hearing on 2 May 2018 in relation to the conduct of Ms Linton passing some material to Ms Farah, there is nothing in the transcript of that day indicating any objection of the Appellant to Ms Linton's presence. The presence or otherwise of Ms Linton was not an issue canvassed in the Commissioner's decision to refuse permission to be represented.

[58] On 3 May 2018 the Appellant sent an email to Commissioner Riordan in which he said that he was "surprised to notice, Ms. Farah…accompanied by Ms. Linton, a lawyer employed by Ashurst Australia…Not only were Ms. Farah and Ms. Linton in a position to interact during the hearing breaks, but were also observed by you on at least one occasion, passing written notes…I hope that your order for QANTAS not being allowed representation will be respected and upheld in the forthcoming Arbitration Hearing scheduled for…7 May 2018."[29]

[59] At the commencement of proceedings on 21 May 2018 Ms Farah again announced her appearance and that she was accompanied by Ms Linton who was on secondment to the Respondent from Ashurst. The Appellant did not raise the matter of his correspondence of 3 May 2018 nor did he seek some consideration of the issue by the Deputy President.

[60] Section 596(1) of the Act provides that "except as provided by subsection(3) *or the procedural rules*" a person may be represented by a lawyer or paid agent only with permission of the Commission

[61] The Fair Work Commission Rules 2013 state:

> **12 Representation by a lawyer or paid agent**
>
> (1) For subsection 596(1) of the Act, a person may be represented in a matter before the Commission by a lawyer or paid agent for the following purposes:
>
> (a) preparing a written application or written submission for the person in relation to the matter;

[28] Appeal Book p.80; Transcript PN4

[29] Appeal Book p.322

(b) lodging with the Commission a written application, written submission or other document, on behalf of the person in relation to the matter;

(c) corresponding with the Commission on behalf of the person in relation to the matter;

(d) participating in a conciliation or mediation process conducted by a member of the staff of the Commission, whether or not under delegation, in relation to an application for an order to stop bullying made under section 789FC of the Act.

Note 1: Section 596 of the Act sets out other circumstances in which a person may be represented in a matter before the Commission by a lawyer or paid representative.

Note 2: Subrule 12(3) deals with representation of parties in a conference or hearing before a Commission Member.

(2) However, subrule (1) is subject to a direction by the Commission to the contrary in relation to the matter.

(3) To remove doubt, nothing in this rule is to be taken as permitting a lawyer or paid agent to represent a party in a conference or hearing before a Commission Member.

Note: Section 596 of the Act sets out when the Commission may grant permission for a person to be represented by a paid agent or lawyer, including at a conference or hearing.

[62] The interaction of s.596(2) of the Act with rule 12 was considered by the Full Bench in *Fitzgerald v Woolworths Limited*[30] where it was held that:

> **[45]** On that basis, s.596 operates in conjunction with rules 11 and 12 in respect of unfair dismissal applications in the following way. Where an applicant engages the services of a lawyer or paid agent, representation begins at the point that the application to the Commission is made on the applicant's behalf. All dealings with Commission undertaken on behalf of either party from that point onwards in connection with the application constitute representation. Rule 11(1) operates to require the lawyer or paid agent to lodge a "*notice of representative commencing to act*" as soon as representation in the sense discussed commences. However, notwithstanding that representation has commenced in relation to the application, permission under s.596(2) for any representational activities undertaken prior to or outside of a conciliation conference, determinative conference, or interlocutory or final hearing will generally not be required because rule 12(1) exempts, subject to any contrary direction made under rule 12(2), the making of written applications and written submissions, the lodgment of documents with the Commission and correspondence with the Commission from the general prohibition in s.596(1). If a party considers themselves to be prejudiced by such representational activity on behalf of the opposing party, the remedy is to apply for a direction under rule 12(2) which, if

[30] [2017] FWCFB 2797

granted, would require the opposing party to seek permission for representation to the necessary extent under s.596(2).

[63] The Appellant did not seek any direction from the Commissioner or Deputy President under rule 12(2).

[64] The Full Bench of the Commission in *Kennedy v Qantas Ground Services Pty Ltd*[31] considered whether s.596 placed any limitation on the use of a lawyer outside proceedings for the purpose of providing advice and/or assisting in preparing submissions. In that matter the Respondent was denied permission pursuant to s.596(2) of the Act to be represented. The Full Bench in that matter found:

> **[44]** Although the Deputy President had decided not to grant permission for the respondent to be represented by counsel under s.596(2), he had not made any order under Rule 12(2). Accordingly, there would have been nothing to prevent the respondent's lawyers from preparing a document for QGS to use at the conference on 30 April 2018.
>
> **[45]** In this regard, we should point out that on 4 June 2018, shortly after the notice of appeal was filed, Mr Kennedy wrote to the Deputy President seeking 'advice' from him as to whether the company was able to use its lawyers to prepare written submissions. On 18 June 2018, the Deputy President replied to Mr Kennedy stating that, having regard to the Full Bench decision in *Fitzgerald v Woolworths Limited*, the answer to Mr Kennedy's question was 'no'. With respect, the correct answer to this question was 'yes'. That Mr Kennedy pursued certain arguments based on the answer he received is understandable, but they are not relevant to the determination of his appeal.
>
> **[46]** Finally, we note that, while s.596 places limitations on the right of a person to be represented in a matter before the Commission, it does not affect a person's right to seek legal advice about such a matter. Moreover, if a person does seek such advice, confidential communications between client and lawyer for the dominant purpose of the lawyer providing legal advice will be privileged. Although the Commission is not bound by the rules of evidence, it is well-established that legal professional privilege is not simply a rule of evidence, but a substantive doctrine of the common law. There is no provision in the Act that excludes the doctrine of privilege in relation to proceedings before the Commission.
>
> [footnotes omitted]

[65] We are not convinced that Ms Linton sitting at the bar table with Ms Farah as a note taker, in circumstances where permission was not granted, was contrary to the decision of the Commission. Ms Linton played no role in proceedings beyond taking notes and passing exhibits to Ms Farr. We would also note that this occurred in circumstances where Ms Linton was seconded to Qantas on a full time basis and had been for some seven months such that the secondment was not some artifice designed to try to circumvent the decision of the Full Bench in *Fitzgerald.* At the one point where it might have been thought that Ms Linton did overstep the boundary the Commissioner properly intervened.

---

[31] [2018] FWCFB 4552

[66] As to discussions Ms Farr may have had with Ms Linton outside the courtroom there is no evidence as to the content of these discussions and we take the matter no further.

[67] We see no arguable case of error in the approach of the Commission in allowing Ms Linton to accompany Ms Farah in the proceedings. Further, that the written submissions of the Respondent were in the form common to Ashurst is not evidence that they were prepared by Ashurst but, even if they were, this is not contrary to s.596 of the Act when read in conjunction with the Rules.

[68] To the extent the Appellant suggests that permission to appeal should be granted as it may provide guidance to employees from non-English speaking backgrounds, we see no merit in that argument. In this case neither the Appellant nor the Respondent were represented by lawyers. Whilst this does not necessarily ensure a level playing field in terms of the expertise of either party, the decision of an applicant to seek professional advice is a matter for them and not one on which guidance by a Full Bench is required.

[69] We would note however that the Commission is constantly updating its resources to assist particularly unrepresented parties in matters before the Commission.

Conclusion

[70] In this application for permission we are unable to identify public interest grounds which would justify the grant of permission. The issues raised by the Appellant are not matters of such importance or general application to invoke the public interest nor is there is any demonstration of a diversity of decisions at first instance such that guidance from the Full Bench is required. Finally the Appellant has not shown even on an arguable basis that the Decision manifests an injustice, where the result is counterintuitive or that the Decision is disharmonious when compared with recent decisions such that permission to appeal should be granted.

[71] We are also not persuaded that the Appellant has established an arguable case of appealable error on the part of the Deputy President. Specifically, we are not persuaded that there has been established any arguable case that the Decision is attended by errors in factual findings or that the Deputy President failed to take into account a relevant consideration or took into account any irrelevant considerations in reaching his conclusion.

[72] Permission to appeal is therefore refused and the application is dismissed.

DEPUTY PRESIDENT

Appearances:

R Rodl, Appellant.
J Farah for the Respondent.

Hearing details:

2018.
Melbourne and Sydney (by video):
September 24.

Printed by authority of the Commonwealth Government Printer

<PR701877>