DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Leeanne McMahon
v
L C Dyson's Bus Service Pty Ltd T/A Dysons
(C2018/7169)

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT SAMS
COMMISSIONER MCKENNA

SYDNEY, 31 JANUARY 2019

Appeal against decision [2018] FWC 7285 and order PR702721 of Commissioner Harper-Greenwell at Melbourne on 28 November 2018 in matter number U2018/5292.

Introduction

[1] On 14 May 2018, Leeanne McMahon (**the Appellant**) was dismissed from her employment with L C Dyson's Bus Service Pty Ltd T/A Dysons (**the Respondent**), following an incident which occurred on 4 May 2018. Prior to this, the Appellant had been employed by the Respondent as a school bus supervisor from April 2001.

[2] In a decision[1] given on 28 November 2018 (**the Decision)**, Commissioner Harper-Greenwell found that the Appellant's dismissal was not harsh, unjust or unreasonable under s.387 of the *Fair Work Act 2009* (Cth) (**the Act**). The Appellant now seeks permission to appeal and appeal this Decision.

[3] On 10 January 2019, the matter was listed for permission to appeal. Mr G Dircks, paid agent, appeared for the Appellant and Mr A Denton, of Counsel, appeared for the Respondent. Both parties were granted permission to be represented pursuant to s.596(2)(a) of the Act.

Appellant's submissions

[4] The Appellant seeks permission to appeal on the basis that the Commissioner erred in making certain findings, did not give adequate reasons for a finding that the Appellant's conduct constituted a valid reason for her dismissal, did not give proper weight to, among other matters, the Appellant's lack of workplace training, and that the Decision manifests an injustice or the result is counter-intuitive.

[5] The Appellant submits that there were obligations on the Commissioner to provide an intelligible explanation of the reasoning process, to identify which evidence she accepted and

[1] [2018] FWC 7285.

rejected in order to reach the conclusions in the Decision. The failure to give adequate reasons, contended by the Appellant to have occurred in the Decision, is asserted to be a failure to exercise jurisdiction. The Appellant's written submissions noted, among other matters:

- the evidence demonstrated that the action of lifting a reluctant child onto a bus had been done many times before and the parents of the child involved had given approval for the child to be treated firmly; and

- there was no evidence contrary to the above practice and no explanation why the claim that the Appellant over-stepped her authority outweighed the "common enough" practice; and

- the findings about the Appellant's state of mind was insufficient to explain why the action amounted to conduct justifying dismissal; and

- the Commissioner failed to explain the "pattern of escalating behaviour"[2] as one of the reasons why the dismissal was not unfair.

[6] The Appellant submits that it appears the Commissioner accepted the validity of a warning given to the Appellant in 2017 (**the 2017 warning**) despite the absence of any evidence to the contrary. Further, to rely on the 2017 warning and claimed counselling in 2018 (**the 2018 counselling)** to determine that the dismissal was not unfair is a manifest injustice, as there were no findings made as to their validity.

[7] The Appellant submits, as to alleged inadequacy of reasons in the Decision, that the Commissioner failed to address "other relevant matters." These matters include her length of service, the effect of losing her job on her and her family, and the disproportionality between the events on 4 May 2018 and the dismissal.

Appeal principles

[8] An appeal under s.604 of the Act is an appeal by way of rehearing and the Commission's powers on appeal are only exercisable if there is error on the part of the primary decision maker.[3] There is no right to appeal and an appeal may only be made with the permission of the Commission.

[9] This appeal is one to which s.400 of the Act applies. Section 400 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

[2] Decision at [68].

[3] 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.

> question of fact, be made on the ground that the decision involved a significant error of fact."

[10] 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 as "a stringent one".[4] The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment[5]. In *GlaxoSmithKline Australia Pty Ltd v Makin* a Full Bench of the Commission identified some of the considerations that may attract the public interest:

> "... the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters."[6]

[11] It will rarely be appropriate to grant 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.[7] 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.[8]

[12] An application for permission to appeal is not a *de facto* or preliminary hearing of the appeal. In determining whether permission to appeal should be granted, it is unnecessary and inappropriate for the Full Bench to conduct a detailed examination of the grounds of appeal.[9]

Consideration

[13] We have considered the Appellant's submissions and all the materials filed on appeal. We are not satisfied that there is an arguable case of error or other basis relied upon warranting the grant of permission to appeal. The Decision discloses an orthodox approach to the determination of an unfair dismissal application based on the alleged misconduct of an employee.

[14] While the Commissioner made a finding as to the 2018 counselling,[10] it is apparent that she did not consider the 2018 counselling or the 2017 warning to be relevant matters in

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[4] (2011) 192 FCR 78 at [43].

[5] *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].

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

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

[8] *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].

[9] *Trustee for The MTGI Trust v Johnston* [2016] FCAFC 140 at [82].

[10] Decision at [48].

determining whether there was a valid reason for dismissal under s.387(a) of the Act.[11] It is also not apparent that the 2017 warning formed part of the Commissioner's consideration under s.387(h) of the Act.[12]

[15] In considering whether this appeal attracts the public interest, we are not satisfied that:

- there is a diversity of decisions at first instance for which guidance from a Full Bench is required;
- the appeal raises issues of importance and/or general application to the Commission's unfair dismissal jurisdiction;
- the Decision manifests an injustice, or the result is counter-intuitive; or
- the legal principles applied by the Commissioner were disharmonious when compared with other Commission decisions dealing with similar matters.

Conclusion

[16] For the reasons set out above, we are not satisfied, for the purpose of s.400(1) of the Act, that it would be in the public interest to grant permission to appeal.

[17] Permission to appeal is refused and the appeal is dismissed.

VICE PRESIDENT

Appearances:

Mr G Dircks, paid agent (Just Relations), for the Appellant

Mr A Denton, of Counsel, instructed by *Ms N Horvat* (Gadens) for the Respondent

Hearing details:
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[11] Decision at [47]-[48].

[12] Decision at [67]-[69].