DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Pushpinder Gautam
v
Costco Wholesale Australia Pty Ltd
(C2020/8955)

DEPUTY PRESIDENT MASSON
DEPUTY PRESIDENT MILLHOUSE
COMMISSIONER MCKINNON

MELBOURNE, 2 MARCH 2021

Appeal against decision [2020] FWC 6433 and order [PR725009] of Commissioner Yilmaz at Melbourne on 30 November 2020 in matter number U2020/7728 – permission to appeal granted – appeal dismissed.

[1] Mr Pushpinder Gautam was employed as a tyre fitter by Costco Wholesale Australia Pty Ltd at its Ringwood warehouse in Victoria. He has applied for permission to appeal and if permission is granted, appeals a decision[1] (the Decision) and order[2] of Commissioner Yilmaz on 30 November 2020 dismissing his application for an unfair dismissal remedy on the basis that the dismissal was not harsh, unjust or unreasonable.

[2] The appeal raises a question about reliance on medical evidence in connection with a dismissal due to an inability to perform the inherent requirements of a role. We grant permission to appeal on that limited basis. However, we have decided to dismiss the appeal.

[3] These are our reasons.

Relevant history

[4] Mr Gautam commenced employment on 17 July 2016. In November 2017 he suffered an elbow injury. This led to a period of approximately 2.5 years during which Mr Gautam was largely unable to carry out the full range of duties of his role. The period from late 2017 until his dismissal on 18 May 2020 was punctuated with periods off work and periods of restricted duties. In that time, Mr Gautam was certified as fit to perform normal duties from October 2018 and April 2019.

[5] In January 2020, Costco arranged for Mr Gautam to undertake an independent medical evaluation. Dr Rahgozar, a Consultant Occupational Physician, conducted the evaluation on

[1] *Gautam v Costco Wholesale Australia Pty Ltd* [2020] FWC 6433

[2] PR725009

23 March 2020 and provided his report on 24 March 2020[3]. In Dr Rahgozar's opinion, Mr Gautam was likely to have "left biceps and right common extensor origin tendinitis" and was not fit to perform the inherent requirements of his role.[4] Dr Rahgozar recommended an MRI examination.

[6] On 24 April 2020[5], following receipt of the MRI examination, Dr Rahgozar gave a second medical report to the effect that Mr Gautam was, because of his medical condition, "not fit for the full inherent requirements of his role".[6]

[7] On 30 April 2020 Costco sent a "show cause" letter[7] to Mr Gautam notifying its preliminary view that his employment should be terminated due to an inability to perform the inherent requirements of his role. Mr Gautam responded on 2 May 2020 to the effect that Costco's position was not fair and not based on valid medical evidence.[8]

[8] On 5 May 2020, Costco sought advice from Dr Rahgozar about whether reasonable adjustments could be made to Mr Gautam's role to accommodate his medical condition.[9] Dr Rahgozar replied to the effect that a permanent change to rotation between tyre fitting and clerical work would reduce the risk of injury[10].

[9] Costco separately wrote to Mr Gautam on 5 May 2020,[11] inviting him to suggest any reasonable adjustments that could be made to his duties having regard to the medical reports from Dr Rahgozar. Mr Gautam responded to the effect that he was able to undertake normal duties in full and that another option would be a clerical role or further training.[12]

[10] Mr Gautam was dismissed on 18 May 2020.

The Decision

Whether to allow medical evidence

[11] The Commissioner dealt with whether to allow medical evidence filed by Mr Gautam at the start of the hearing of his unfair dismissal application on 17 September 2020.

[12] The transcript at PN57 and PN58 records the Commissioner's decision to exclude certain medical evidence:

> "THE COMMISSIONER: It doesn't matter. It has been prepared for the purposes of a workers compensation matter subject to that Act, all right - the legislation that deals

[3] Medical Report of Dr Rahgozar dated 24 March 2020, Appeal Book at pg.47

[4] Ibid at pg.51

[5] Medical Report from Dr Rahgozar dated 24 April 2020, Appeal Book at pg. 57

[6] Ibid at pg.58

[7] Costco letter to Appellant, dated 30 April 2020, Appeal Book at pg. 59

[8] Appellant email to Costco, dated 2 May 2020, Appeal Book at pg. 61

[9] Costco letter to Dr Rahgozar dated 5 May 2020, Appeal Book at pg.66

[10] Medical Report from Dr Rahgozar dated 8 May 2020, Appeal Book at pg.69

[11] Costco letter to Appellant dated 5 May 2020, Appeal Book at pg. 65

[12] Email from Mr Gautam to Costco dated 6 May 2020, Appeal Book at pg.68

> with workers compensation and that's what it actually relates to. What I will do to be fair and, well, to protect you, I'm not going to allow these documents.
>
> However, I'm happy for you to - during the course of today if there is material that you think is relevant you can raise it because you're not sure at this point and we can determine its relevance, but this morning those documents that have been identified as having an objection under section 588 - and I have been through these documents - I think it would be best for you if we don't allow them."

[13] The effect of excluding this evidence on Mr Gautam's right to a fair hearing raises a question of jurisdiction. For reasons explained later in this decision, we admit the medical evidence identified by Mr Gautam in his notice of appeal and written submissions in support of the appeal, for the purpose of dealing with the application for permission to appeal and the appeal. This medical evidence comprises the medical report from Dr Gautam's doctor, Dr Hammond (dated 14 November 2019),[13] Dr Hammond's ultrasound report (dated 1 June 2020),[14] Dr Hammond's x-ray report (dated 3 June 2020)[15] and Dr Hammond's medical certificates (dated 15 January 2020[16] and 2 September 2020).[17]

Findings about whether the dismissal was unfair

[14] After dealing with preliminary matters, summarising the facts and respective submissions of the parties, the Commissioner considered (from paragraphs [45] to [74] of the Decision) whether the dismissal was unfair having regard to each of the section 387 criteria.

[15] On whether there was a valid reason for dismissal, the Commissioner said:

> **[45]** I find that Costco's reason for termination of employment is sound and defensible. The reason for the termination of employment relates to Mr Gautam's capacity to perform the inherent requirements of the job of tyre fitter and I find the reason is valid. Further, Costco in its process relied on independent medical advice to ascertain Mr Gautam's capacity to perform the inherent requirements of the role and whether reasonable adjustments could be made.
>
> **[46]** The injuries sustained by Mr Gautam to his arms date back to 2017, prior to his WorkCover claims. In evidence, Mr Gautam tendered emails of 26 October 2017 and 3 November 2017 where he reports to his manager at the time, that he had a sore right arm which was like what he had previously experienced in his left. The emails note Mr Gautam's limitations to perform his tasks because of soreness in both arms. In the email of 3 November 2017, he describes the injury as tennis elbow and based on his doctor's advice, he intends to rest up for 2-4 weeks and continue his physio. The same email states that his left arm "feels a lot better except the upper part" He further states "work cover is never my pathway and never needed it in the past 10 years". It is following this email, that Costco responds with statements to the effect that he is to

[13] Medical Report of Dr Hammond dated 14 November 2019 (Annexure K), Appeal Book at pg.123; see also Notice of Appeal, 2.1 at [1] and [3]

[14] Annexure U, Appeal Book at pg.146; see also Notice of Appeal, 2.1 at [1] and [3]

[15] Annexure T, Appeal Book at pg.145; see also Notice of Appeal, 2.1 at [1] and [3]

[16] Appeal Book at pg.179; see also Notice of Appeal, 2.1 at [1]

[17] Appeal Book at pg.178; see also Notice of Appeal, 2.1 at [1]

provide his medical certificates, is to complete an incident report and that he will need to complete two WorkCover claims, one for each arm. It appears that Costco had paid for physio treatments but made it clear that further treatment is to be managed through WorkCover.

[47] The approach by Costco to insist on the filing of an incident report and lodging of WorkCover claims is understandable given Mr Gautam was a young man still in his 20s and only worked for his employer since 2015. It is reasonable that the employer found concern with the pattern of recurring injury requiring excessive time off work.

[48] Mr Gautam submits he could perform his job of tyre fitter and that Costco did not have a definitive prognosis to substantiate termination of his employment.

[49] The independent medical evidence of Dr Rahgozar concerning Mr Gautam's capacity to perform the inherent requirements of the job was not in Mr Gautam's favour. This medical assessment was undertaken at the time of Mr Gautam's employment and immediately prior to his termination of employment. In that sense Costco relied on contemporary advice and evidence before the decision to terminate his employment. There is no reason to question the credibility of Dr Rahgozar's evidence. While Mr Gautam challenged Dr Rahgozar's credentials and his findings, these challenges did not hold weight. Further, while I accept the medical certificate of Dr Hammond, the certificate was unfortunately brief, leaving me no option but to rely on the written and oral evidence of Dr Rahgozar in its entirety.

[50] Mr Gautam took excessive periods off work due to his elbow injuries both on sick leave and on workers compensation. Mr Rimington gave evidence that while performing "light duties" Mr Gautam complained and attended work for only 41 of the 75 days while alternative duties were found for him in the period from February 2019.

[51] The evidence of Mr Rimington concerning his attendance record was not challenged by Mr Gautam. Further Dr Rahgozar's evidence was credible and persuasive regarding the physical risks for Mr Gautam to perform the duties of a tyre fitter both at the time of assessment and in consideration of the likelihood of ongoing risk of injury.

[52] Mr Gautam contends that Costco could have or should have modified his duties to accommodate his injuries. It is not relevant to consider whether Mr Gautam could perform an alternative role, the assessment in such matters is against his role. Despite this, Mr Gautam gave evidence that repetitive tasks even while performing alternative and less physical tasks caused him pain. Consequently, it is reasonable that Costco had conducted a thorough assessment of Mr Gautam's physical constraints. I also accept the evidence that Costco also considered whether reasonable adjustments could be accommodated and of further relevance was the steps that were taken to provide Mr Gautam with alternative duties which he had expressed difficulty with.

[53] I am satisfied that Costco had a sound, defensible and well-founded reason to dismiss Mr Gautam. I find this consideration does not weigh in Mr Gautam's favour.[18]

[16] The Commissioner separately found that:

[18] Ibid at [45] – [53]

1. Mr Gautam was informed of and understood the reasons for his termination through provisions of the 'show cause' letter that was provided to him prior to the decision to terminate his employment being made by Costco (s 387(b)) (at paragraph [57]);

2. The decision to terminate Mr Gautam's employment did not occur prior to his being afforded an opportunity to respond to the reasons relied on by Costco (s 387(c)) (at paragraph [61]);

3. Mr Gautam was not denied the opportunity to be accompanied by a support person (s 387(d)) (at paragraph [62]);

4. Mr Gautam was not dismissed for performance related reasons (s 387(e)) (at paragraph [63]);

5. Costco is not a small employer, had access to relevant resources, and the size of the enterprise "enhanced the process afforded to Mr Gautam" (s 387(f) & (g)) (at paragraph [69]; and

6. No other matters raised, including Mr Gautam's attendance record and medical evidence, and the fact that Mr Gautam was not without pay during his extended absences, disclosed that Mr Gautam had been treated unfairly (s 387(h)) (at paragraphs [70] to [74]).

[17] The Commissioner concluded that Mr Gautam's employment with Costco ended because of his incapacity to perform the inherent requirements of the job. The Commissioner observed that this followed an extensive process by Costco to ascertain Mr Gautam's risk of injury. The Commissioner determined at paragraph [78] that the dismissal was not harsh, unjust or unreasonable.

Grounds of appeal

[18] There are five grounds of appeal:

Ground 1: The Commissioner erred in finding that there was no option but to rely on the evidence of Dr Rahgozar in its entirety, when there was a medical report from Mr Gautam's doctor, Dr Hammond (dated 14 November 2019),[19] further medical evidence from Dr Hammond (dated 1 and 3 June 2020)[20] and medical certificates from Dr Hammond (dated 15 January 2020[21] and 2 September 2020).[22]

Ground 2: The preliminary view formed by Costco about Mr Gautam's ability to perform the inherent requirements of the role lacked a valid conclusion based on medical opinion.

[19] Medical Report of Dr Hammond dated 14 November 2019 (Annexure K), Appeal Book at pg.123

[20] Electronically signed by Dr J. Makhijani, Annexure U and Annexure T, Appeal Book at pg.146 and 145

[21] Appeal Book at pg.179

[22] Appeal Book at pg.178

Ground 3: A detailed medical report from Dr Hammond dated 14 November 2019 stated that Mr Gautam would recover eventually if treatment continued. Subsequent scans have contradicted findings by Dr Rahgozar of degenerative changes in Mr Gautam's elbow.

Ground 4: The medical reports from Dr Hammond on 1 and 3 June 2020 confirmed no degenerative changes in elbows or abnormalities.

Ground 5: The Commissioner made a factual error in finding that while performing light duties Mr Gautam complained and attended work for only 41 of the 75 days while alternative duties were found for him in the period from February 2019. Payslips show that Mr Gautam was on full duties during that period.

Permission to appeal

[19] An appeal under section 604 of the *Fair Work Act 2009* (FW Act) is an appeal by way of rehearing.[23] An appeal may only be made with the permission of the Commission.

[20] This appeal is one to which section 400 of the FW Act also applies. Under section 400, the Commission must not grant permission to appeal from a decision made by the Commission in relation to unfair dismissal unless it considers it in the public interest to do so. An appeal of an unfair dismissal decision involving a question of fact can only be made on the ground that the decision involved a significant error of fact.

[21] The test under section 400 is "a stringent one."[24] The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[25] In *GlaxoSmithKline Australia Pty Ltd v Makin*[26] 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."

[22] 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.[27]

---

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

[24] *Coal & Allied Mining Services Pty Ltd v Lawler and others* (Buchanan, Marshall and Cowdroy JJ) (2011) 192 FCR 78 at [43]

[25] *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; (2011) 192 FCR 78 at [44] -[46]

[26] [2010] FWAFB 5343, 197 IR 266 at [27]

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

[23] 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.[28] However, it is necessary to engage with the appeal grounds to consider whether they raise an arguable case of appealable error.

[24] In this case, the potential for injustice to flow from the exclusion of relevant medical evidence persuades us that it is in the public interest to grant permission to appeal. We grant permission to appeal on that limited basis. Permission to appeal is otherwise refused.

Consideration

[25] As earlier noted, a decision was made at the commencement of the proceedings before the Commissioner to exclude certain medical evidence relied upon by Mr Gautam. The decision to exclude this medical evidence was based on section 588 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) (Workplace Injury Act), which provides as follows:

> "**588 Unauthorised use of information**
>
> A person must not use information obtained under or pursuant to this Act, the Accident Compensation Act 1985 or the Workers Compensation Act 1958 except as authorised by or in respect of a matter or for a purpose arising under this Act, the Accident Compensation Act 1985 or the Workers Compensation Act 1958.
>
> Penalty: 60 penalty units"

[26] Mr Gautam says that the Commissioner should have considered the medical evidence that he sought to rely upon. So far as medical certificates go, the Workplace Injury Act requires that a claim for worker's compensation or accident compensation be "accompanied" or "supplemented at a later date" by "a medical certificate in accordance with section 25" (section 20). Section 25 sets out the required form and content of a medical certificate that can be relied upon for the purpose of making such claims.

[27] Section 269 of the Workplace Injury Act permits the use of documents relating to a worker's claim for the purposes of any claim, proceeding or payment under that Act or related State legislation dealing with accident and worker's compensation.

[28] In our view, section 588 does not prohibit the tender of relevant medical certificates to the Commission simply because the certificates may also have a connection to a worker's compensation claim. The Workplace Injury Act does not require that a medical certificate be obtained by the person to whom it relates. Nor does it set out a process that must be followed in order to obtain or provide a medical certificate. All it does is make a claim for worker's compensation conditional on the supply of a medical certificate in the approved form, and with certain prescribed content. For this reason, we do not accept that medical certificates given to an employee by their treating doctor meet the description of information "obtained under or pursuant to" the relevant statutory scheme.

---

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

[29] In *Fletcher v Metropolitan Fire and Emergency Services Board*[29], the Federal Court considered the concept of "use" of information within the meaning of a predecessor provision to section 588 of the Workplace Injury Act and held that it does not contemplate production as a result of an order of the Court. The Court's view was that to find that the legislature intended to exclude the Court's power in this regard, where no such express intention is manifest, would be to prejudice the interests of justice by denying relevant and probative material to one party to the litigation.[30]

[30] The same can be said in relation to orders of the Commission which operate under a federal statutory scheme that, subject to express limitations in Part 1-3 of the FW Act, prevails over inconsistent state laws.

[31] Section 590 of the FW Act confers wide powers on the Commission to "inform itself in relation to any matter before it in such manner as it considers appropriate". This includes requiring a person to provide copies of documents or records or any other information to the Commission. The power under section 590 can be exercised to ensure that relevant medical evidence is available to the Commission where the interests of justice require. To the extent that section 588 of the Workplace Injury Act might impede reliance on medical evidence in Commission proceedings, the difficulty can be overcome by orders under section 590 where appropriate.

[32] The exclusion of relevant medical evidence provided by Mr Gautam was said by the Commissioner to be what was necessary to be "fair and to protect" Mr Gautam. At paragraph [7] of the Decision, the Commissioner stated that removal of the documents did not disadvantage Mr Gautam, as alternative material relating to his capacity to perform his position at the time of the decision to terminate his employment was available."[31]

[33] Respectfully, we take a different view. The excluded medical evidence was the main evidence from Mr Gautam's own treating doctors with detailed information about his medical condition. The decision to exclude this medical evidence, and then rely on the evidence led by Costco in the absence of same, denied Mr Gautam procedural fairness. This is because it limited the evidence upon which Mr Gautam could rely in support of his application. This was no trifling matter. Medical evidence was central to the consideration of whether Costco had a valid reason for dismissal, and so whether the dismissal was unfair.

[34] In the circumstances, we consider that this had the effect of denying Mr Gautam the possibility of a successful outcome.[32] The denial of procedural fairness was an appealable error that warrants the grant of permission to appeal.

[35] We now turn to consider the grounds of appeal.

Ground 5

---

[29] [2012] FCA 1513

[30] Ibid at [11]

[31] Decision at [6]-[7]

[32] *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at p.147; *Singh v MSS Security Pty Ltd* [2015] FWCFB 393 at [16]

[36] Ground 5 may be disposed of quickly. It deals with an error of fact at paragraph [50] of the Decision, which refers to a period from February "2019" instead of "2018". As the parties conceded, the error is typographical in nature. It is not an error of significance to the findings reached by the Commissioner at first instance and does not give rise to an arguable case of appealable error.

Grounds 1 - 4

[37] It is convenient to deal with grounds 1-4 together because they each deal with the Commissioner's acceptance of medical evidence led by Costco and Mr Gautam's ability to perform the inherent requirements of the role. Costco submits that ground 3 was not pressed by the time of the appeal hearing, but this is not a fair characterisation of Mr Gautam's position. Submissions filed by Mr Gautam on 8 January 2021 simply acknowledge that Dr Hammond's medical report of 14 November 2019 had been excluded under section 588 of the Workplace Injury Act and Mr Gautam instead sought to rely upon his own sworn evidence about the contents of Dr Hammond's 14 November 2019 report.

[38] We understand Mr Gautam's position to be that the Commissioner erred by preferring Dr Rahgozar's evidence over the evidence in Dr Hammond's 14 November 2019 report, Dr Hammond's ultrasound report dated 1 June 2020, Dr Hammond's x-ray report dated 3 June 2020 and Dr Hammond's medical certificates dated 15 January 2020 and 2 September 2020.

[39] A review of the materials establishes that there was a degree of ambiguity in the medical record about the nature of the medical condition affecting Mr Gautam. The ambiguity was largely resolved by Dr Rahgozar's unchallenged oral evidence in the proceedings before the Commissioner about the meaning of certain terms used in the medical evidence. This evidence confirmed (at PN666) the existence of arthritis or a degenerative process in Mr Gautam's elbow. It was open to the Commissioner to accept this evidence. No arguable case of appealable error is disclosed in the Commissioner doing so.

[40] Dr Hammond did not give evidence at the hearing. Excluded evidence from Dr Hammond, including the report of 14 November 2019 and a medical certificate of 15 January 2020, does not contradict Dr Rahgozar's evidence directly.

[41] In his 14 November 2019 report, Dr Hammond expressed the opinion that Mr Gautam was "currently not suitable for pre-employment or current employment", that "repetitive movement" had contributed to his condition, and that while "he should eventually recover" he should in the future "avoid repetitive tasks including lifting".[33] Significantly, the evidence confirmed that repetitive lifting was an inherent requirement of Mr Gautam's tyre fitting role. Further, while a medical certificate provided to Mr Gautam by Dr Hammond on 15 January 2020 stated briefly that Mr Gautam had the capacity to perform his pre-injury duties from 20 January 2020, the medical certificate was furnished several months prior to Mr Gautam's dismissal.

[42] Medical reports from Dr Rahgozer's on 24 April 2020[34] and 8 May 2020[35] confirmed degenerative changes in each of Mr Gautam's elbows. Consistent with Dr Hammond's earlier

[33] Annexure K, Appeal book at pg.123-124

[34] Annexure O, Appeal book at pg.137

[35] Annexure S, Appeal book at pg.143

report, Dr Rahgozar expressed the opinion that Mr Gautam should avoid activities including tyre fitting, recycling tyres, mopping, and brooming and pushing heavy wheelie bins or trolleys. These activities were inherent requirements of Mr Gautam's role.

[43] Dr Rahgozar's evidence was the contemporaneous medical evidence available to Costco at the time of dismissal. On the need for work restrictions, it was consistent with the earlier, detailed report from Dr Hammond. It was this medical evidence that informed Costco's decision to terminate Mr Gautam's employment on the basis of an inability to perform the inherent requirements of the role.

[44] As to Dr Hammond's ultrasound report dated 1 June 2020, x-ray report of 3 June 2020 and medical certificate of 2 September 2020, this material post-dated Mr Gautam's 18 May 2020 dismissal date. Consistent with the observations of a Full Bench in *Hyde v Serco Australia Pty Ltd,*[36] *(Hyde)* evidence obtained by Mr Gautam after the dismissal is not relevant. This is because the question for the Commissioner was whether there was a valid reason for Mr Gautam's dismissal at the time the dismissal occurred. As a Full Bench stated in *Hyde*:[37]

> **[64]** As noted in *Jetstar,* 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. Applying this principle to the matter before us, Dr White's evidence was correctly excluded from the assessment of whether there was a valid reason for Mr Hyde's dismissal because it was clearly founded upon a factual situation which came into existence well after the date of Mr Hyde's dismissal. Dr White examined Mr Hyde on 10 November 2017, some two months after his dismissal, and his evidence concerned Mr Hyde's capacity as at 10 November 2017; not his capacity as at the date of his dismissal. The validity of that part of Serco's reason for dismissal which concerned Mr Hyde's future capacity to perform his duties must be assessed by reference to his state of health, and the expert opinions expressed as to his state of health, as they were at the time of his dismissal.
>
> **[65]** Dr White's evidence did not address the Appellant's capacity at the time of dismissal and on that basis was not relevant to the determination of valid reason.
>
> **[66]** Our conclusion is consistent with the approach taken in *Jetstar*, in which the Full Bench excluded expert medical evidence which was based on an assessment of the Respondent's health some three to four months after her dismissal. We reject the Appellant's submission that *Jetstar* was distinguishable on the basis that it concerned psychological injury as opposed to the present matter which concerns physical capacity. In our view the principle remains the same – the relevant evidence must be directed at the applicant's state of health at the time of dismissal.

[45] Having reviewed the medical evidence ourselves, we are satisfied that it was open to the Commissioner to conclude that there was a valid reason for Mr Gautam's dismissal. No arguable case of appealable error in this conclusion is disclosed. We reject appeal grounds 1 – 4.

---

[36] [2018] FWCFB 3989

[37] [2018] FWCFB 3989 at [64] – [66]

Conclusion and disposition

[46] As this matter raises an important question about the approach to medical evidence in Commission proceedings, we grant permission to appeal on that basis only.

[47] To the extent that it is necessary to clarify the intersection between section 588 of the Workplace Injury Act and the FW Act, we have done so above. The appeal does not otherwise raise issues of general importance or application. The matter turns on its own facts and circumstances. On the totality of evidence, there is no arguable case that the Commissioner's conclusion was unreasonable, unjust or counter-intuitive.

[48] The appeal is dismissed.

DEPUTY PRESIDENT

Appearances

Mr P Gautam on his own behalf

Mr L Howard for Costco Wholesale Australia Pty Ltd

Hearing details

2021
Melbourne
February 8

Printed by authority of the Commonwealth Government Printer

<727382>