DECISION

Fair Work Act 2009
s.604—Appeal of decision

Hammam Hijazi
v
Calvary Health Care ACT Ltd T/A Calvary Public Hospital Bruce
(C2021/386)

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT HAMILTON
DEPUTY PRESIDENT YOUNG

SYDNEY, 9 APRIL 2021

Appeal against decision [2021] FWC 13 of Deputy President Dean at Sydney on 6 January 2021 in matter number U2020/1873 – permission to appeal refused.

[1] Mr Hammam Hijazi (the Appellant) has lodged an appeal under s 604 of the *Fair Work Act 2009* (Cth) (the Act), for which permission to appeal is required, against a decision[1] (the Decision) of Deputy President Dean issued on 6 January 2021. The Decision dealt with an application for an unfair dismissal remedy made by the Appellant under s 394 of the Act.

[2] The Appellant alleged that he had been unfairly dismissed from his employment with Calvary Health Care ACT Ltd (the Respondent). In her Decision, the Deputy President found that the Appellant's dismissal was not unfair[2] and dismissed his application.

[3] The matter on appeal was subject to a telephone hearing on 11 March 2021. The parties sought permission to be legally represented. The Full Bench granted the parties' application for permission to be represented pursuant to s 596(2)(a) of the Act, following there being no objection from either side.

[4] The Full Bench has heard the parties on permission to appeal and the substantive appeal. For the reasons that follow, permission to appeal is refused.

The Decision under appeal

[5] The Appellant commenced employment with the Respondent at Calvary Public Hospital (the Hospital) in April 2009. He held the role of Director Medical Imaging. On 10 February 2020, the Appellant was dismissed from his employment following a lengthy investigation into allegations that the Appellant had engaged in bullying and harassing behaviour.

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[1] *Hammam Hijazi v Calvary Health Care ACT Limited* [2021] FWC 13.

[2] Ibid [107].

[6] The investigation was conducted by Mr Ken Grime of Katemaru Legal and Investigations (the Grime Investigation). The Grime Investigation found that the Appellant had engaged in bullying and harassment of staff arising from a Riskman[3] entry on or about 3 March 2019 (Allegation 1). It was further found that the Appellant engaged in bullying and harassment of staff arising from a Riskman entry about his conduct on or about 18 April 2019 (Allegation 2).

[7] Allegation 1 related to a Riskman report made concerning the treatment of a patient in the Medical Imaging Department. The Appellant had failed to check the patient ID prior to beginning a scanning procedure. The patient was only saved from being scanned when another employee, Mr Cuong Trinh, took over from the Appellant and carried out the correct patient ID procedures. Mr Trinh lodged a Riskman report which named the Appellant and Mr Malcolm Bull as being involved in the incident. It was alleged that following this Riskman report, the Appellant repeatedly blamed Mr Bull for the incident and publicly berated and belittled him to the point of bullying. The Grime Investigation found that the Appellant had bullied and harassed Mr Bull from March 2019 until 18 April 2019 by:

> "a. Staring at Mr Bull rather than engaging in their usual method of greeting (ie isolating him);
> b. Repeated, unwarranted questioning about whether Mr Bull had identified the right patient in a heated and stern tone; and
> c. Intimidating Mr Bull by the mocking 'cries and hugs' comment."

[8] Allegation 2 related to another Riskman entry made on 18 April 2019. This Riskman entry was lodged by Mr Bull's supervisor, Ms June Mo, in respect of the Appellant's conduct toward Mr Bull. Ms D'Arx, a witness to the Appellant's conduct was also referred to in the Riskman report. The Grime Investigation found that the Appellant bullied Mr Bull and Ms D'Arx by staring at them rather than engaging in their usual form of greeting, and intimidating Mr Bull and Ms D'Arx by contacting them and questioning them about the lodgement of the Riskman entry.

[9] Much of the Appellant's submissions at first instance centred around the admissibility of the Grime Investigation. The Appellant contended that the Commission should either exclude the Grime Investigation or give it little to no weight in determining whether a valid reason for dismissal existed. It was contended that the Grime Investigation was first-hand hearsay and further, that it was substantially and procedurally flawed. Accordingly, the Appellant contended that the Commission could not rely upon the Grime Investigation to find that the Appellant's alleged misconduct occurred.

[10] The Deputy President dealt first with what, if any, reliance the Commission should have on the Grime Investigation. Regarding the Appellant's submission that the Grime Investigation was fatally flawed, the Deputy President found that this submission had no merit.[4] She then turned to the issue of whether the Grime Investigation should be accepted as evidence. After considering previous cases relevant to the issue,[5] the Deputy President concluded:

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[3] Riskman is the name of the Respondent's system of recording incidents, near misses and the like.

[4] *Hammam Hijazi v Calvary Health Care ACT Limited* [2021] FWC 13 at [69].

[5] Ibid [73] – [74]

"[75] I do not accept the proposition put on behalf of Mr Hijazi that in order for the Commission to make a determination as to whether misconduct occurred, it must only accept evidence through first-hand witnesses of the alleged misconduct. This proposition cannot be supported particularly in light of the cases referred to above."

[11] Regarding what weight was to be accorded to the Grime Investigation, the Deputy president found:

"[78] The Grime Investigation is in my view relevant to the Commission's determination of the issues which needed to be decided. I am satisfied in this regard that the Grime Investigation constituted a full and extensive investigation, that Mr Hijazi was given a reasonable opportunity to respond, and that the findings were based upon reasonable grounds. It is, however, appropriate to place less weight on the Grime Investigation than might otherwise be the case because it is hearsay, which I have done. This is particularly so given Mr Hijazi was unable to test the evidence by way of cross examining those who complained about his conduct."

[12] The Deputy President then considered the legislative principles relevant to determining whether the Appellant's dismissal was unfair[6] and found that his dismissal was not unfair.[7] Accordingly, the Appellant's application was dismissed.[8]

Principles of appeal

[13] 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.[9] There is no right to appeal and an appeal may only be made with the permission of the Commission.

[14] Section 400 of the Act applies to this appeal. It 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."

[15] 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".[10] The task of assessing whether the public interest test is met is a discretionary

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[6] Ibid [79] – [106].

[7] Ibid [107].

[8] PR725950.

[9] *Coal and Allied Operations Pty Ltd v AIRC* (2000) 203 CLR 194 [17] per Gleeson CJ, Gaudron and Hayne JJ (*Coal and Allied Operations Pty Ltd*)

[10] (2011) 192 FCR 78; (2011) 207 IR 177 [43].

one involving a broad value judgment.[11] The public interest is not satisfied simply by the identification of error, or a preference for a different result.[12] In *GlaxoSmithKline*, 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."[13]

[16] 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.[14] However, that the Member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.

Consideration

Appeal Grounds 1 and 2

[17] Ground 1 of the appeal contends that the Deputy President erred in placing reliance on the Grime Investigation. It contends that the Grime Investigation significantly guided the Deputy President's findings about the existence of a valid reason for dismissal. Ground 2 of the appeal contends that the Appellant has been denied procedural fairness because none of the complainants or first-hand witnesses interviewed in the course of the Grime Investigation were called to give evidence. The Appellant contends that he was denied procedural fairness because he did not have the opportunity to challenge the evidence against him and cross-examine the complainants and witnesses.

[18] In essence, grounds 1 and 2 of the appeal take umbrage with the Deputy President's reliance on the Grime Investigation. Accordingly, we will deal with them together.

[19] The Appellant submits that the Deputy President misapplied the principles found in *Pearse v Viva Energy Refining Pty Ltd*[15] (*Pearse*) *and Department of Social Security v Uink*[16](*Uink*). The Appellant contends that in misapplying these principles, the Deputy President failed to fulfil the Commission's fact-finding functions, instead relying impermissibly on the Grime Investigation to find that a valid reason for dismissal existed.

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[11] *O'Sullivan v Farrer and another* (1989) 168 CLR 210 [216] – [217] per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* (2011) 243 CLR 506 [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78; (2011) 207 IR 177 [44]-[46].

[12] see: *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 at [26]-[27], 197 IR 266 ('*GlaxoSmithKline*'); *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].

[13] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 [27]; (2010) 197 IR 266.

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

[15] [2017] FWCFB 4701.

[16] (1997) 77 IR 244.

[20] We do not accept this contention. The Deputy President correctly applied the principles found in *Uink* to conclude that the Grimes Investigation could be accepted as evidence in the matter before her.[17] Furthermore, due to its nature as hearsay evidence, the Deputy President correctly placed limited weight upon it in her finding of a valid reason for dismissal.[18]

[21] Simply put, the Appellant is attempting to elevate the weight accorded by the Deputy President to the Grimes Investigation so as to make it the deciding factor in her finding that a valid reason for dismissal existed. A fair reading of the Decision does not support this contention. As aforementioned, at paragraph [78] of the Decision, the Deputy President indicated that she placed less weight on the Grime Investigation than she otherwise would have due to its nature as hearsay and because the Appellant was unable to test the evidence by way of cross examining those who complained about his conduct. The Deputy President was clearly alive to issues of procedural fairness in circumstances where the Appellant was unable to cross examine individuals who complained of his conduct and, correctly, gave less weight to the Grime Investigation as a result.

[22] Further, at paragraph [92] she concluded:

> "I am satisfied that the matters which are not disputed or are conceded by Mr Hijazi, combined with **limited reliance on the Grime Investigation**, is sufficient to ground a finding that there was a valid reason for his dismissal."
>
> (emphasis added)

[23] Subsequently, at paragraph [93], the Deputy President identified nine matters arising from the non-contentious facts and the Appellant's own evidence that supported a finding that his dismissal was made for a valid reason. Plainly, the Grime Investigation did not form as significant a part in the Deputy President's decision-making as the Appellant contends. In exchanges with the Full Bench, this was repeatedly pointed out to the Appellant.

[24] We would also note that the Appellant himself annexed a copy of the Grime Investigation report (the Report) to his own witness statement.[19] It is extraordinary for the Appellant who was represented to assert in this appeal that the Report is inadmissible or that the Deputy President placed too much reliance upon it in circumstances where he himself relied upon the Report and made no objection to it being received into evidence in the matter at first instance.

[25] For the above reasons, we reject appeal grounds 1 and 2.

Ground 3

[26] Ground 3 of the appeal contends that the Deputy President made a significant error of fact in finding at paragraph [93] of the Decision:

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[17] Decision at [75]

[18] Ibid at [78] and [92].

[19] Appeal Book 455 – 489.

> "g. Mr Hijazi did not dispute he contacted Mr Bull and Ms D'Arx about the Riskman entry (Allegation 2). It was highly inappropriate to do so in circumstances where Mr Hijazi was aware that Mr Bull felt bullied by him, having already made a complaint to that effect the previous month."

[27] The Appellant contends that the above finding is erroneous because Mr Bull had not made a complaint about the Appellant in the previous month. It is contended that this is a significant error because particular weight was attached to this finding and the allegation is not one which hinges on the hearsay evidence.

[28] The Respondent submits that prior to the second Riskman entry, the Appellant's supervisor, Dr Bowden, had informed him that a complaint of bullying and harassment had been made against him. The Respondent concedes that Dr Bowden did not specifically name Mr Bull as the maker of the complaint but contends that in any case, having been made aware that a complaint of bullying and harassment had been made against him, that it was extraordinary for the Appellant to approach and question Mr Bull and Ms D'Arx.

[29] The Respondent further submits that even if the Appellant had not been made aware of a complaint against him prior to the second Riskman entry, it was nonetheless highly inappropriate for him to approach and question Mr Bull and Ms D'Arx as they are, respectively, the individual making the complaint and a witness to the conduct complained of.

[30] In our view, even if the Appellant is correct in his assertion that the Deputy President made an erroneous finding, it is not a significant error of fact. The Appellant himself has acknowledged that contacting Mr Bull and Ms D'Arx was an error of judgment on his part[20] and was conduct that was intimidating for a witness. Therefore, even if the Appellant did not know that a complaint against him had been made prior to the second Riskman entry, it was highly inappropriate for him to approach Mr Bull and Ms D'Arx. If the Deputy President erroneously found that he did have prior knowledge of the complaint, given the above, this is not an error that rises to the level of a significant error of fact.

[31] For the above reasons, we reject appeal ground 3.

Permission to Appeal

[32] Having considered the Appellant's submissions and all the materials filed on appeal, we are not satisfied that there is an arguable case of error. It is clear that the basis on which the Deputy President reached her Decision discloses an orthodox approach to the determination of the Appellant's unfair dismissal application. The Deputy President applied the correct legal principles, considered, and dealt with the evidence that was before her, and made findings of fact based on the evidence before her. Further, we have considered whether this appeal attracts the public interest, and we are not satisfied, for the purposes of s 400(1) that:

- There is a diversity of decisions at first instance so that guidance from an appellate body is required of this kind;
- The appeal raises issues of importance and/or general application;

[20] Appeal Book 69-70.

- The Decision at first instance manifests an injustice, or the result is counter intuitive; or

- The legal principles applied by the Deputy President were disharmonious when compared with other decisions dealing with similar matters.

Conclusion

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

[34] Permission to appeal is refused.

VICE PRESIDENT

Appearances:

Mr *J Macken* of Counsel for the Appellant

Ms *P Bindon* of Counsel for the Respondent

Hearing details:

2021.

Telephone hearing.

11 March.

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