DECISION

Fair Work Act 2009
s.604—Appeal of decision

Michael Rosser
v
Toll Transport PTY LTD
(C2021/2582)

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT BULL
COMMISSIONER O'NEILL

SYDNEY, 19 JULY 2021

Appeal against decision [2021] FWC 1881 of Commissioner Cambridge at Sydney on 16 April 2021 in matter number U2020/11287 - permission to appeal refused.

[1] Mr Michael Rosser (the Appellant) has lodged an appeal under s 604 of the *Fair Work Act 2009* (the Act), for which permission to appeal is required, against a decision[1] (the Decision) of Commissioner Cambridge (the Commissioner) issued on 16 April 2021. The Decision dealt with an application for an unfair dismissal remedy made by the Appellant under s 394 of the Act.

[2] This decision deals only with whether permission to appeal should be granted.

[3] The Appellant alleged that he had been unfairly dismissed from his employment with Toll Transport Pty Ltd (the Respondent). The Commissioner found that the Appellant was dismissed for a valid reason and that his dismissal was not otherwise harsh, unjust or unreasonable.

[4] The matter on appeal was subject to a telephone hearing on 9 June 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.

[5] For the reasons that follow, permission to appeal is refused.

The Decision under appeal

[6] The Appellant was employed by the Respondent for a period of 3 years and 8 months as a casual truck driver. He was engaged on a regular and systematic basis. In April 2019, the Appellant was elected as a Health and Safety Representative (HSR). As a HSR, the Appellant was involved in raising issues and representing workers' safety concerns. The Appellant was

[1] *Michael Rosser v Toll Transport Pty Ltd* [2021] FWC 1881.

also a member of a Healthy and Safety Committee that comprised other HSRs including Mr John Erak, another delivery driver.

[7] In June 2020, Mr Erak became the subject of a disciplinary investigation arising from allegations that he had failed to take the most direct route to and from various Woolworths' stores, that he had taken longer, unauthorised breaks which had not been accurately recorded and that in effect, he had made fraudulent claims for payment in respect of time which had not been worked.

[8] On 19 June 2020 Mr Erak attended a disciplinary meeting held at the Woolworths Regional Distribution Centre (the site). He was accompanied to this meeting by the Appellant. The meeting commenced at around 1pm and lasted for more than one hour and 10 minutes. Following the conclusion of this meeting, the Appellant inquired as to whether there was any driving work for him to undertake at that time, as he was due to commence work later that afternoon in any case. The Appellant was advised that there was no work for him to complete and to return to the site at his scheduled commencement time later that day (either at 3pm or 5pm).

[9] On 23 June 2020, the Appellant attended a second disciplinary meeting regarding the allegations against Mr Erak. This meeting was scheduled to commence at 1pm but the Appellant and Mr Erak arrived at 12:50pm. The meeting concluded within 10 minutes. On that day, the Appellant was scheduled to commence a rostered engagement at 5pm. After the conclusion of the meeting, the Appellant asked Mr Dean Southern, the Respondent's senior site manager, whether he would receive payment for the time spent at the site prior to his scheduled 5pm engagement. He was advised by Mr Southern that he would only be paid from the commencement of his rostered engagement at 5pm.

[10] On 26 June 2020, the Appellant attended a third disciplinary meeting regarding the allegations against Mr Erak. Upon their arrival to the site, they were informed by Mr Southern that the meeting would be rescheduled. Later that day, Mr Southern sent an email to Mr Steve Innes, the Respondent's General Manager – Grocery, in which he raised concerns that on 23 June, the Appellant had claimed paid time for the period from the commencement of the disciplinary meeting, which had only lasted ten minutes, and the time thereafter, as contiguous with the subsequent start of his rostered engagement.

[11] Subsequently, Mr Innes commenced an investigation into the conduct of the Appellant in respect to the claims that he made for payment regarding his attendance at the site on 23 and 26 June. As a result, on 30 June 2020, the Appellant was provided with a written document setting out allegations that he had falsified his timesheet records such that he made claim for payment for time including and following his attendance at the disciplinary meetings, and for which he had been advised that he was not entitled to receive payment.

[12] The Appellant provided a written response to these allegations on 10 July 2020. In summary, he advised that his attendance at the site and at other off-site locations on 23 and 26 June 2020. involved activities associated with his role as a HSR, and not in the capacity of a support person for Mr Erak. The Appellant asserted that he was justified in making the claim for payment in respect of his attendance at the site and for activities undertaken off-site because this conduct involved the performance of his role as a HSR.

[13] Following further correspondence between the Appellant and the Respondent, the Appellant was provided with a notice of termination on 3 August 2020. As a result, his employment was immediately terminated for serious misconduct, being the substantiated allegations that he had falsely claimed payment for wages on 23 and 26 June 2020.

[14] In the proceedings at first instance, the Appellant broadly submitted that he was entitled to make claims for payments on 23 and 26 June 2020. Further, even if he was not entitled to make those claims, any misunderstanding on his part was not unreasonable, and further, even if the Appellant's belief was unreasonable it was asserted that he had not been dishonest, and therefore there was not a valid reason for his dismissal.

[15] After considering the evidence, the Commissioner found that the Appellant had been dismissed for a valid reason because the Appellant had engaged in serious misconduct by deliberately falsifying his timesheets.[2] Further, after considering all the matters specified in s 387 of the Act,[3] the Commissioner was satisfied that the dismissal of the Appellant was not harsh, unjust or unreasonable.[4]

Principles of Appeal

[16] 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.[5] There is no right to appeal and an appeal may only be made with the permission of the Commission.

[17] As this appeal involves an unfair dismissal claim s. 400 of the Act applies. 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."

[18] 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".[6] The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[7] The public interest is not satisfied simply by the

---

[2] Ibid [50].

[3] Ibid [52] – [60].

[4] Ibid [63].

[5] *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*)

[6] (2011) 192 FCR 78; (2011) 207 IR 177 [43].

[7] *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].

identification of error, or a preference for a different result.[8] 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."[9]

[19] 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.[10] 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. [11]

[20] 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.[12] However, it is necessary to engage with the appeal grounds to consider whether they raise an arguable case of appealable error.

Grounds of Appeal

[21] The Appellant advances 8 grounds of appeal which have been numbered 3 – 8 as grounds 1 and 2 as they appear in his F7 – Notice of appeal are simply introductory remarks and not substantive grounds of appeal.

[22] The Appellant has conveniently grouped the grounds of appeal in the following way:

> "The grounds of appeal identified in the Appellant (sic) Notice of Appeal can be broadly characterised as falling under three types of error:
>
> a. that the Commissioner erred by failing to have regard to matters that he was statutorily required to have regard to (grounds 3, 6 and 7) (**Statutory Requirement Errors**);

---

[8] 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].

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

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

[11] *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089, 202 IR 388 at [28], affirmed on judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54, 192 FCR 78, 207 IR 177; *NSW Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663, 241 IR 177 at [28]

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

b. that the Commissioner erred by failing to apply the Briginshaw principles (grounds 4 and 5) or otherwise by erroneous characterisation (ground 8) (**Characterisation Errors**)

c. that the Commissioner made significant errors of fact (grounds 9 and 10) (**Significant Errors of Fact**)."[13]

(original emphasis)

[23] Regarding the public interest, the Appellant's appeal rests principally on two grounds. The first is that the Commissioner erred by not considering whether the Appellant was entitled to be paid for attending the disciplinary meetings in accordance with the *Work Health and Safety Act 2011* (NSW) (WHS Act). The second is that the Commissioner erred in failing to apply the Briginshaw principles when he found that the Appellant engaged in serious misconduct by deliberately falsifying his timesheets.

Consideration

[24] We will deal first with the Appellant's public interest submissions.

[25] We do not accept that the Commissioner failed to consider whether the Appellant was entitled to be paid for attending the meetings on 23 and 26 June. A fair reading of the Decision shows that the Commissioner did make a finding that the Appellant was not entitled to payment under the WHS Act. This is evident in paragraph [49] of the Decision where the Commissioner found that the Appellant did not have an entitlement to be paid and was aware that he did not have that entitlement. We note that appeal ground 3 that the Commissioner erred in not considering whether there was an entitlement under the WHS Act, is contrary to the Appellant's, submissions to the Commissioner that he should not make such a finding.[14] In any case, the Commissioner did make such a finding in holding that his attendance at the disciplinary meetings was not on the basis of his role as a HSR.[15]

[26] Regarding the Appellant's submission that the Commissioner failed to apply the Briginshaw principles, we do not accept that it arises in this matter. The Appellant has conflated the Commissioner's finding that he deliberately falsified his timesheets with a finding of fraud. These are two different conclusions and should not be conflated. Furthermore, even if the Briginshaw principles did arise in the matter below, it was not demonstrated to our satisfaction that there is an arguable case that it was misapplied with the Commissioner having found that the Appellant did not have a genuine belief that his attendance at the disciplinary meetings involved legitimate HSR activities.

[27] We have had regard to the Appellant's grounds of appeal and we are not satisfied that they disclose an arguable case of appealable error. We are further not satisfied that the Commissioner acted upon a wrong principle, allowed extraneous or irrelevant matters to guide or affect his decision, mistook certain facts or failed to take into account material considerations.

---

[13] Appellant's written submissions dated 2 June 2021.

[14] Decision at [23], see also

[15] Decision at [46] and [49]

Conclusion

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

[29] Permission to appeal is refused.

VICE PRESIDENT

Appearances:

Mr *T Häkkinen* for the Appellant.

Mr *J Wells* and Ms *C Fenton* for the Respondent.

Hearing details:

2021.

Telephone hearing.

9 June.

Printed by authority of the Commonwealth Government Printer

<PR731839>