DECISION

Fair Work Act 2009
s.604–Appeal of decisions

Rick Adaszko

v

Mitford Investments Pty Ltd ATF The JJG Trust t/as Integro Private Wealth
(C2020/9213)

PRESIDENT JUSTICE ROSS
DEPUTY PRESIDENT BEAUMONT
COMMISSIONER MCKINNON MELBOURNE, 12 FEBRUARY 2021

Appeal against decision [2020] FWC 5497 of Deputy President Binet at Perth on 11 December 2020 in matter number U2020/11708 – permission to appeal refused

[1] Mr Rick Adaszko has filed a notice of appeal in which he seeks permission to appeal and appeals a decision[1] of Deputy President Binet issued on 11 December 2020 (Decision) in which the Deputy President dismissed Mr Adaszko's application for an unfair dismissal remedy. This matter was listed for hearing in respect of both permission to appeal and the merits of the appeal.

[2] In the Decision the Deputy President concluded that Mr Adaszko had not been 'dismissed', within the meaning of s.386 of the *Fair Work Act 2009* (Cth) (FW Act). The Decision also provides an alternate basis for the dismissal of Mr Adaszko's application, namely that it was filed outside the period prescribed in s.394(2)(a) and the Deputy President was not satisfied that there were exceptional circumstances such as to warrant the provision of a further period for the application to be made. For reasons which will become apparent we need not dwell on that part of the Decision in which the Deputy President refused to grant an extension of time.

[3] We propose to briefly summarise the relevant background before turning to the submissions advanced on appeal.

[4] In the proceedings at first instance, one of the issues in dispute was whether Mr Adaszko had been dismissed. Mr Adaszko submitted that he was notified of his dismissal on 20 November 2019 and that his dismissal took effect on 16 December 2019. The Respondent, Mitford Investments Pty Ltd ATF The JJG Trust t/a Integro Private Wealth (Integro) contended that Mr Adaszko had resigned from his employment effective 13 December 2019.

[1] [2020] FWC 5497.

[5] Section 394(1) of the FW Act provides that 'a person who has been dismissed' may apply to the Commission for an unfair dismissal remedy.

[6] The term 'dismissed' is defined in s. 386, as follows:

> **386 Meaning of *dismissed***
>
> (1) A person has been dismissed if:
>
> (a) the person's employment with his or her employer has been terminated on the employer's initiative; or
>
> (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.

[7] Section 386(2) contains some exceptions which were not relevant to Mr Adaszko's application.

[8] In the proceedings at first instance it was common ground that Mr Adaszko had resigned from his employment; the issue was whether he was 'forced to do so because of conduct, or a course of conduct engaged in by his… employer.' Mr Adaszko and Mr Justin Gilmour, the Managing Director of Integro, both gave evidence.

[9] The Deputy President found (at [13] of the Decision) that on 15 October 2019 Mr Gilmour held a meeting with Mr Adaszko in relation to reports of negative feedback from clients about Mr Adaszko's performance. At that meeting they discussed whether Mr Adaszko preferred to resign or undergo performance counselling. Mr Gilmour's evidence was that Mr Adaszko informed him that he would be resigning from his position but required time to secure alternative employment.[2]

[10] The gravamen of the Deputy President's consideration of this issue is at [30] - [35] of the Decision, as follows:

> '**[30]** The FWC has held in a number of comparable cases that a resignation tendered to avoid disciplinary action or performance management does not constitute a dismissal for the purposes of the FW Act because it lacks the necessary conduct on the part of the employer of removing choice from the employee.
>
> **[31]** In this case, Mr Adaszko did have a real choice. He could remain with the organisation and undergo performance management or he could chose to leave the organisation. If, as he says, his performance was without fault then he had nothing to fear from the performance management process. If his employer acted without basis and terminated his employment for poor performance he could seek a remedy for unfair dismissal.
>
> **[32]** The Separation Arrangements Email, which Mr Adaszko tendered as evidence of conduct forcing him to resign makes no reference to performance counselling or to a requirement that he resign. What it does evidence is the offer of an arrangement that, if he were to resign, he would be released from the Loan Agreement and that he would be extended another loan of $5000 to cover his study expenses and provide him with cashflow over the Christmas period.

[2] Mr Gilmour's witness statement at [5], Digital Court Book (DCB) at pp 34 – 35; also see Transcript 16 October 2020 at [223], [230], [232] and [234].

> **[33]** In the Separation Arrangements Email Mr Adaszko confirms his consent to the arrangements with the words "*okay, that would be great. Thank you.*"
>
> **[34]** The language of the email does not convey any animosity or compulsion, rather there appears to be a mutually agreeable commercial arrangement reached.
>
> **[35]** I am not satisfied that Mr Adaszko was forced to resign from his employment because of conduct, or a course of conduct, engaged in by his employer. To the contrary it appears that the parties parted ways on what were, at the time, mutually agreeable terms.'

[11] The 'Separation Arrangements Email' to which the Deputy President refers is set out below (the bold text signifies Mr Adaszko's response to the terms proposed by Mr Gilmour):

> 'Hi RA,
>
> Mate below is what we are intending to send out as a comms to the staff. Do you have any feedback on this as we would like to send this by COB today. If you can provide the letter of resignation and we will at the same time give you the release document of the loan for the $40K. **– email to staff is fine, Yes I will prepare a resignation letter today**
>
> In relation to your request for an additional two weeks pay beyond the notice period of December. Given the time of the year with clients wrapping up before Christmas I am happy to support you with a loan of $5K as a means of assisting you to manage your cash flow. There is also the study support that needs to be sorted which I understand is $3630 over the past two years which we can add to the loan instead of deducting from the final payroll. This would need to be repaid by 31st March 2020.- **okay, that would be great. Thankyou**
>
> If you would like to go ahead with this loan agreement proposal I will have Phil update the waiver today. – **ok, yes please proceed**'[3]

[12] In accordance with these arrangements, Mr Adaszko forwarded a signed letter of resignation to Mr Gilmour on 22 November 2019 in the following terms:

> 'As discussed, I have decided to resign from Integro to pursue other opportunities where I can spend more time in the southwest, my last date at Integro will be 13 December 2019.
>
> Thanks for all your support, I have enjoyed my time at Integro.'[4]

[13] We now turn to the appeal.

[14] An appeal under s.604 of the FW 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.

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[3] DCB at p 107.

[4] DCB at p 38.

[5] 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.

[15] This appeal is one to which s.400 of the FW Act applies, s.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 question of fact, be made on the ground that the decision involved a significant error of fact.

[16] The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[6] A Full Bench of the Commission, in *GlaxoSmithKline Australia Pty Ltd v Makin,* 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.'[7]

[17] In *Coal & Allied Mining Services Pty Ltd v Lawler and others*[8] Buchanan J (with whom Marshall and Cowdroy JJ agreed) characterised the test under s.400 as "a stringent one".

[18] 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.[9] 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.[10]

[19] In support of his appeal in respect of the Deputy President's decision that he was not dismissed within the meaning of s.386, Mr Adaszko submits:

> 'I did not voluntarily resign and was forced to resign otherwise Mitford Investments (Integro) would not be a satisfactory referee and provide a satisfactory exit audit where a referee and satisfactory exist audit are required by any new and prospective employee. Mitford Investments (Integro) left Ricki Adaszko (the applicant and former employee) no effective or real choice but to resign from being an employee.

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[6] *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].

[7] [2010] FWAFB 5343, 197 IR 266 at [24] – [27].

[8] (2011) 192 FCR 78 at [43].

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

[10] *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089 at [28], 202 IR 288, affirmed on judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78; *NSW Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663, 241 IR 177 at [28].

> …
>
> I did not have a real choice and could not remain the Mitford Investments (Integro). Mitford Investments (Integro) acted without basis and terminated employment for Ricki Adaszko (the Applicant) on the basis that he upset a referral partner who was a business partner and also a personal friend of Justin Gilmour the principal of Mitford Investments (Integro). If the applicant Ricki Adaszko did not resign Justin Gilmour the principal of Mitford Investments (Integro) would not be a satisfactory referee and assist with a satisfactory exit audit for the applicant Ricki Adaszko which is required for any future prospective employer to employee the applicant Ricki Adaszko under their license.
>
> The applicant wishes to appeal that he was dismissed via forced resignation and did not voluntarily resign. The applicant would not resign and be left without an income when he has a family and four children to support. The applicant was not given a choice by Mitford Investments (Integro) and was forced to resign.
>
> …
>
> Justin Gilmour principal and Mitford Investments forced me to resign on the 20th November 2019 where his explanation was that I upset a referral partner at Hartleys which was also a personal friend of Justin Gilmour's. I did not have any recent dealing with Hartley's and I feel Mitford Investments (Integro) forced me to resign after my raised concerns around non-compliance by Mitford Investments (Integro) where in October 2019 Mitford Investments (Integro) had to self-report to ASIC for 154 breaches of misconduct and non-compliance. I also raised concerns with Mitford Investments (Integro) around collection and non-disclosure of conflicted remuneration which I discovered in September 2019 when Justin Gilmour asked me to assist with the dial-down of brokerage commission for a client John Rogers.'[11]

[20] In brief, Mr Adaszko submits that contrary to the Deputy President's decision, he was forced to resign. Mr Adaszko advances three arguments in support of this contention:

1. He was asked to resign at the meeting on 15 October 2019 and agreed to do so, in part, because Integro agreed to forgive a loan facility which Integro had provided to Mr Adaszko in February 2017. Integro subsequently forwarded a document purporting to reflect that agreement, but that document contained conditions which Mr Adaszko could not accept. In short Mr Adaszko submits that Integro did not honour its side of the bargain and he 'felt deceived'.

2. If he had not resigned Integro would not have acted as a 'satisfactory referee' which would have impaired his ability to obtain future employment.

3. The forced resignation occurred after he had raised concerns around Integro's non-compliance and misconduct in respect of its obligations as a financial adviser.

[21] The first point amounts to little more than a complaint that Integro did not honour its side of the agreement reached at the 15 October 2019 meeting. Any failure by Integro to honour that agreement is a contractual matter between the parties; it is not relevant to the issue of whether Mr Adaszko was 'dismissed' within the meaning of s.386.

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[11] *Appellants Outline of Submissions* at [1.2(a)], [1.2(c)], [1.2(d)] and [2(3)].

[22] The other two points seek to advance arguments which were not put at first instance and in respect of which no evidentiary foundation is proffered. As to Mr Adaszko's complaints to ASIC, it may be accepted that such complaints were made but there is no evidence to support Mr Adaszko's assertion that after he had raised the concerns Integro 'didn't want me to be part of their organisation'.[12] Nor was anything put about this matter at first instance.

[23] The function of an appeal under s.604 (as modified by s.400) is to correct error. Absent error on the part of the primary decision-maker it is not the function of the appeal process to give unsuccessful parties an opportunity to recast their case in the hope of a different outcome. The arguments advanced by the Appellant in this respect do not speak to any error that the Deputy President may have made; it can hardly be an error to fail to take account of an argument that was not advanced.

[24] We have earlier set out the Deputy President's conclusion in respect of the issue of whether Mr Adaszko had been dismissed (within the meaning of s.386(1)(b)) and the basis for that conclusion. We now turn to consider whether there is an arguable case for Mr Adaszko's assertion that the Deputy President erred in concluding that he had not been dismissed.

[25] The issue in dispute was the application of the second limb of the definition of 'dismissed' in s.386(1)(b), namely whether Mr Adaszko had been forced to resign 'because of conduct, or a course of conduct' engaged in by Integro.

[26] The second limb of the definition in s.386(1)(b) was considered in *Bupa Aged Care Australia Pty Ltd t/a Bupa Aged Care Mosman v Tavassoli*:[13]

> 'A resignation that is "forced" by conduct or a course of conduct on the part of the employer will be a dismissal within the second limb of the definition in s.386(1)(b). The test to be applied here is whether the employer engaged in the conduct with the intention of bringing the employment to an end or whether termination of the employment was the probably result of the employer's conduct such that the employee had no effective or real choice but to resign. Unlike the situation in (1), the requisite employer conduct is the essential element.'[14]

[27] In circumstances where an employee asserts that they were forced to resign it falls to the employee to persuade the Commission that they did not resign voluntarily and to establish that the employer forced the employee's resignation, by identifying action on the part of the employer which brought the relationship to an end or action that had that probable result. In short Mr Adaszko bore the evidentiary onus of establishing that he had been forced to resign.

[28] The extent to which the legal concept of onus or burden of proof applies to matters before an administrative tribunal such as the Commission is somewhat vexed. However, as observed by the Full Bench in *Advanced Health Invest Pty Ltd T/A Mastery Dental Clinic v Mei Chan*:[15]

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[12] Transcript, 9 February 2021 at [20].

[13] [2017] FWCFB 3941 at [47].

[14] Ibid at [47]. Also see *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* [1995] IRCA 645 (29 November 1995), [(1995) 62 IR 200 at p. 206]. Also see *Wilkie v National Storage Operations Pty Ltd* [2013] FCCA 1056 at [99].

[15] [2019] FWCFB 5104.

> **'[43]** As to the issue of onus agitated by the Respondent, it must be said that the extent to which the legal concept of onus or burden of proof arises in relation to matters considered by an administrative tribunal such as the Commission is a difficult one. However, in the context of the question whether a dismissal is unfair, to the extent that there is a legal onus or something analogous to it, the onus rests on the applicant in the sense that it is the applicant who bears the risk of failure if the satisfaction required by s.385 including s.385(c) is not reached. As to evidentiary onus, plainly a party seeking to establish a fact bears onus of adducing evidence necessary to establish that fact. In a practical sense, in most cases the question of where an evidentiary onus resides will be answered by asking: in relation to each matter about which the Commission must be satisfied, which party will fail if no evidence or no further evidence about the matter were given?'

[29] As we have mentioned, in the proceedings at first instance Messrs Adaszko and Gilmour gave evidence. As to the circumstances in which his employment ended Mr Adaszko said:

> "• On 20th November 2019 I was asked to resign from Integro by the Principal Justin Gilmour both verbally and via email on the 20th November 2019 (copy of email attached to this application).
>
> • I was asked to resign or face performance counselling which I was told would be very unpleasant even though I was achieving my targets and job objectives as evidence by the job scorecards and compliance reports attached to this application.
>
> • I was asked to resign and in turn Justin Gilmour would forgive a loan facility he provided in February 2017. The funds from the loan facility were used to purchase clients from my previous employer whereas a result Justin Gilmour has been receiving the ongoing revenue from these clients and is still receiving the ongoing revenue from these clients.
>
> • I resigned from Integro on the 21st November 2019 and Justin did not perform his part of the agreement by forgiving the loan facility. Justin Gilmour lodged a civil procedure claim against me for the loan facility in April 2020.'[16]

[30] Mr Adaszko's oral evidence is set out at [57] to [184] of the Transcript. During the course of his cross examination Mr Adaszko acknowledged that the highlighted text in the Separation Arrangement Email was his response to Mr Gilmour and that, in those responses, he did not put Mr Gilmour on notice that he was aggrieved with his resignation.[17]

[31] We note that on a number of occasions during the course of his cross examination Mr Adaszko provided non-responsive answers to the questions put to him and was directed to answer the questions put.[18] We now turn to the Respondent's evidence.

[32] The Form F3 – Employer response to unfair dismissal application – filed by Integro states:

> 'At a meeting on 15 October 2019 the Applicant verbally informed the Respondent that he would resign from his position but required time in which to transition to alternative work.

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[16] DCB at p 12.

[17] Transcript, 16 October 2020 at [108] – [114] and [116] – [117].

[18] For example, see Transcript, 16 October 2020 at [106], [117], [129], [147] – [149].

On 22 November 2019 the Applicant provided a letter of resignation to the Respondent.

The Applicant's final day of employment with the Respondent was on 13 December 2019.'[19]

[33] Integro advanced two jurisdictional objections:

- The application was out of time; and
- The Applicant was not dismissed.

[34] The Respondent's outline of submissions addresses the second jurisdiction objection in the following terms:

'3. On 15 October 2019, the Applicant informed Mr Justin Gilmour, a Director of the Respondent, that the Applicant would resign from his position with the Respondent but required time to find alternative work.

4. On 22 November 2019, the Applicant produced his letter of resignation to the Respondent (a copy has been filed by the Applicant in these proceedings).

5. Consistent with the Applicant's resignation, the last day of the Applicant's employment with the Respondent was on 13 December 2019.'[20]

[35] In his witness statement Mr Gilmour says:

'5 On 15 October 2019, the Applicant informed me, at the Respondent's office situated at 38 Station Street, Subiaco, that he would be resigning from his position with the Respondent but required time to find alternative employment.

6 The Respondent was prepared to give the Applicant time to source alternate employment.

7 On 22 November 2019, the Applicant produced his letter of resignation to me by email. Attached to this witness statement is a copy of the Applicant's letter of resignation.'[21]

[36] During the course of cross examination Mr Gilmour stated that Mr Adaszko had verbally resigned at the meeting on 15 October 2019[22] which was later formally confirmed on 20 November 2019.[23]

[37] The following exchanges took place during the course of Mr Gilmour's cross examination:[24]

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[19] DCB at p 22.

[20] DCB at p 28.

[21] DCB at p 34 – 35.

[22] Transcript, 16 October 2020 at [217].

[23] Transcript, 16 October 2020 at [218].

> 'MR ADASZKO: So, Mr Gilmour, just to clarify that I resigned from Integro, or I was told to resign, due to poor performance?---So when we spoke about the performance and the feedback from the referral partners, and I asked you, 'What choice do we have', and it's like - well, and you go - you offered to resign. So it's like, well, that's all we could work with.
> …
> MR ADASZKO: So I was - was I asked to resign, due to poor performance?---You - we went through the process of what the referral partners had said then you said, 'So we will go down performance management', that's what we discussed in the meeting and then - then you said, 'Well, I'll resign', which previously you said, 'If we ever went down performance management I would resign'.
>
> But, Mr Gilmour, was I told to resign due to poor performance, or I resigned voluntarily?---The
> feedback - - -
>
> Do you understand me?---The feedback we discussed, from the referral partners, the feedback. So the option was to either go down performance management, then you opted to resign. That's it.'

[38] The following exchange between the Deputy President and Mr Gilmour is also relevant:

> 'THE DEPUTY PRESIDENT: Mr Gilmour, just for my assistance, in the discussion about the feedback from the referral partners, is that the right word, did that happen on 15 October or around 22 November?---No, on 15 October.
>
> Okay?---Yes.
>
> And between 15 October and 22 November there was some discussions about how that departure might occur?---Yes. So there was the offer of assistance, to make it easier for him to transition to find other employment, which we agreed to that we would give some financial assistance, via a loan. Then he said - then we agreed that we would get an agreement done, I would forego the loan that we had already leant him previously, if he signed the agreement to say that he wouldn't solicit clients.'

[39] As is apparent from the Decision, the Deputy President accepted Mr Gilmour's evidence that Mr Adaszko chose to resign rather than go through a performance management process. Such a finding was plainly open on the evidence.

[40] In our view the evidence falls well short of establishing that Mr Adaszko was forced to resign. Indeed on Mr Adaszko's own evidence he was merely asked to resign and was offered an inducement to do so in the form of an offer to forgive a debt. As we have mentioned, Mr Adaszko's real complaint is that he upheld his part of an agreement with Integro by resigning but Integro did not honour its side of the bargain.

[41] The Deputy President did not err in concluding that Mr Adaszko had not been dismissed within the meaning of s.386.

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[24] Transcript, 16 October 2020 at [223], [230] and [232].

[42] Section 394(1) provides that 'a person *who has been dismissed* may apply' for an unfair dismissal remedy. As Mr Adaszko was not dismissed he lacks the requisite standing to make this application. It follows that we need not consider that part of the appeal which is directed at the Deputy President's refusal to grant an extension of time.

[43] As we have mentioned, s.400(1) provides that permission to appeal *must not* be granted unless the Commission considers that it is in the public interest to do so.

[44] During the course of oral argument Mr Adaszko submitted that it was in the public interest that permission to appeal be granted because four other advisors had left Integro in the first six months of 2020 (after he left Integro) and that Integro's conduct, in respect of both employment matters and more generally, warranted examination.[25]

[45] In our view the considerations advanced do not enliven the public interest; they bear no relevant relationship to the decision subject to appeal. Even if we take the assertion made at face value we know nothing of the circumstances in which the employment of these advisors ended and, in any event, the FWC does not have the statutory remit to conduct an inquiry into the employment practices of particular employers. As to Integro's conduct more generally, that is a matter for ASIC not the FWC.

[46] We are not persuaded that the decision subject to appeal discloses any error of principle or any significant error of fact. Nor has Mr Adaszko established an arguable case of error in relation to the Deputy President's conclusion that he was not 'dismissed' within the meaning of s.386.

[47] We are not persuaded that Mr Adaszko has established that it is in the public interest to grant permission to appeal and accordingly we refuse permission to appeal.

PRESIDENT

Appearances:

R Adaszko, Appellant.
D Molony for the Respondent.

Hearing details:

Melbourne and Perth (by video)
9 February 2021

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[25] Transcript, 9 February 2021 at [66].