DECISION

Fair Work Act 2009
s.604—Appeal of decision

Julian Strangio

v

Sydney Trains
(C2023/2254)

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT MASSON
DEPUTY PRESIDENT O'NEILL

BRISBANE, 7 JULY 2023

Appeal against decision [2023] FWC 730 of Commissioner McKenna at Sydney on 5 April 2023 in matter number U2022/11462 – permission to appeal refused.

[1] Mr Julian Strangio (the Appellant) worked for Sydney Trains (the Respondent) and its predecessors for 37 years until 1 December 2022, when he was dismissed.

[2] The Appellant was dismissed for a breach of the Respondent's code of conduct by not immediately reporting that on 10 May 2021 he had been charged with certain criminal offences. The Respondent first became aware of the charges through an anonymous tip-off almost one year later, in April 2022. The Appellant had been advised by his criminal defence lawyer to delay advising the Respondent until the charges and agreed facts had been settled with the Police Prosecutor. The settling of the charges did not occur until shortly before the court hearing regarding the finalised criminal charges in May 2022.

[3] The Appellant applied to the Fair Work Commission for an unfair dismissal remedy under s.394 of the *Fair Work Act 2009* (Cth) (the Act). Commissioner McKenna determined that the Appellant's dismissal was not unfair (the Decision).[1] The Appellant now seeks to appeal the Decision.

[4] The appeal was heard on 6 June 2023 and both parties were granted permission to be legally represented.

[5] Under s.400 and s.604 of the Act, the Appellant can only appeal the decision with the permission of the Full Bench. Under s.400, permission to appeal can only be granted if we are satisfied that it is in the public interest to do so.

[6] For the following reasons, we have decided not to grant permission to appeal.

The Commissioner's decision

[7] The Commissioner commenced her Decision recording her satisfaction with the initial matters required to be considered under s.396 of the Act. The Commissioner then set out details of the Appellant's extensive employment with the Respondent, the obligation on its employees under its code of conduct to immediately report if they have been charged with relevant criminal charges, the Appellant's failure to notify his manager following being charged with 13 criminal offences, the anonymous tip off which led to the commencement of an investigation and the show cause process. The Commissioner then set out the contents of the Respondent's letter advising the Appellant of its decision to dismiss him. The Respondent's reasons for the dismissal set out in the letter were the failure to notify the Respondent of the charges and that the Appellant pleaded guilty and was convicted of 12 serious criminal offences. The Respondent also took into account that the Appellant had previous criminal convictions. [2]

[8] The Commissioner then set out the details of the charges initially laid against the Appellant, his subsequent conviction of some amended charges and that no conviction was recorded for some charges.

[9] The Commissioner then set out the Appellant's submissions relating to the outcome of the charges and his submissions concerning the failure to report the initial charges as follows:

> "[11] The applicant's submissions concerning the failure to report the May 2021 Charges were as follows:
>
> > 4. On seeking legal advice from his solicitor the Applicant was advised to delay informing Sydney Trains of the charges until his solicitor had the opportunity to settle the charges and agreed facts with the Police Prosecutor.
> >
> > 5. This process, for reasons that remain unclear, save for speculation arising from the impact of COVID-19 in the period May 2021-May 2022, resulted in this task not being finalized until just immediately prior to the court hearing before Magistrate Follent Parramatta Local Court on 21 May 2022.
> >
> > 6. The Applicant advances by way of mitigation, that acting on legal advice, he fully intended to inform his employer of the pending charges, but was denied this opportunity when an unknown informant sent an anonymous email to Transport NSW in April 2022, incorrectly asserting that Mr Strangio had been convicted of a series of criminal offences.
>
> [12] Among other matters, the applicant submitted that the non-reporting conduct constituted, at worst, a serious error of judgment – but that it was a one-off incident, it was not reckless, and it was guided by legal advice; and did not justify dismissal. The applicant's case relied on a number of matters in support of the contention that the dismissal was harsh, including:
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> - that dismissal was a disproportionate sanction to the conduct engaged in;
> - that the respondent's policies do not require dismissal of an employee for such conduct;
> - that the respondent's policy in respect of potential alternative sanctions could have been invoked;

- that the applicant was remorseful for his conduct and demonstrated insight into his conduct; and
- the applicant's age, length of service and the adverse impact of dismissal on both him and his family."[3]

[10] After summarising the Respondent's submissions, the Commissioner set out her consideration of each of the matters in s.387 of the Act that must be taken into account in considering whether a dismissal was harsh, unjust or unreasonable.

[11] In relation to s.387(a), the Commissioner was satisfied that the Appellant's failure to make the report required under the code of conduct was a valid reason for the dismissal and made findings in relation to s.387(b)-(g), none of which are challenged on appeal.

[12] In relation to s.387(h), the Commissioner noted at paragraph 26 of the Decision that a "*central feature*" of the Appellant's case was that his failure to report the charges arose in circumstances where he was acting on legal advice from Mr Van Houten, his criminal lawyer. Further that "*the applicant advanced, by way of mitigation, that acting on legal advice, he fully intended to inform the respondent of the pending charges, but was denied this opportunity due to the intervening anonymous tip-off."*[4]

[13] The Commissioner considered that '*regardless of the advice given by Mr Van Houten"* and the reasons for it, the only appropriate course was for the Appellant to adhere to his reporting obligations under the code of conduct which were unambiguous and mandatory.[5]

[14] The Commissioner also considered the Appellant's '*atypically lengthy'* and '*largely untarnished'* 37-year service with the Respondent, comments made by the sentencing magistrate regarding the effect of stability in employment on his rehabilitation prospects. The Commissioner then concluded:

> "[33] Both parties' cases advanced matters around the question of proportionality of the disciplinary outcome of dismissal. Even accepting the matters relied on in the applicant's case at their highest in such respects (including, for example, the financial impact and the availability of alternatives short of dismissal), I am not satisfied that the dismissal was disproportionate to the applicant's conduct in him failing to adhere to the reporting obligations imposed by the Code of Conduct."

[15] The Commissioner concluded that the Appellant's dismissal was not harsh, unjust or unreasonable and dismissed the application.

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.[6] There is no right to appeal. An appeal may only be made with the permission of the Commission.

[17] This appeal is one to which s.400 of the Act applies. Under s.400, the Commission must not grant permission to appeal from a decision made by the Commission in relation to unfair dismissal matters unless it considers it is 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.

[18] The test under s.400 has been characterised as '*a stringent one'*.[7] The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[8] The public interest is not satisfied simply by the identification of error,[9] or a preference for a different result.[10] In *GlaxoSmithKline Australia Pty Ltd v Makin*[11] 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."[12]

Grounds of Appeal

[19] In the Notice of Appeal, the Appellant raises four grounds of appeal set out below. At the hearing Ground 3 was not pressed:

1. That the Commissioner misunderstood and therefore failed to properly consider a substantial and clearly articulated argument advanced by the Appellant that bore on the weighing of the gravity of his conduct in failing to report the laying of serious criminal charges against him, namely, that in so doing he was acting in accordance with the advice and instructions of his experienced and specialist criminal solicitor to not inform the Respondent of the charges until they had been settled.

2. In the alternative to Ground 1, the Commissioner failed to take into account a relevant consideration, namely, that the conduct constituting a valid reason for dismissal was the result of the Appellant acting in accordance with the advice and instructions of his experienced and specialist criminal solicitor until the charges had been settled.

3. The Commissioner failed to take into account the following relevant considerations in relation to harshness, namely:

    (a) the adverse consequences of dismissal for the Appellant arising from the difficulties the Appellant would have in obtaining alternate employment; and/or
    (b) the adverse impact of dismissal on the Appellant's mental health; and/or
    (c) that the Appellant was remorseful for his conduct and had insight into it; and/or
    (d) that dismissal was not mandated under the Respondent's policy which the Appellant was found to have breached.

4. The Commissioner's decision that the Appellant's dismissal was not harsh in the circumstances was unreasonable or plainly unjust.

[20] In relation to whether permission to appeal should be granted, the Appellant contends:

1. That the appeal raises the following matters of general importance and application for the Commission's jurisdiction under Part 3-1 of the Act:

    (a) the impact and significance concerning the effect of adverse mental health consequences of a dismissal in the assessment of harshness;
    (b) the impact and significance of a breach of policy where the policy does not mandate dismissal of the employee for such a breach.

2. The Commissioner's decision manifests an injustice to the Appellant as the Commissioner failed to take into consideration or otherwise properly understand and engage with the Appellant's case on harshness.

3. The Commissioner's decision was manifestly unreasonable and unjust in the circumstances.

Consideration

[21] We have carefully reviewed all the material that was before the Commissioner, the Appellant's Notice of Appeal and the written and oral submissions of the parties.

[22] The central alleged error raised in the appeal is that the Commissioner failed in the approach taken to and conclusions reached concerning s.387(h) of the Act. In particular, the alleged errors relate to the treatment of evidence and submissions concerning the Appellant's reliance on his criminal lawyer's advice that he delayed informing the Respondent of the criminal offences he had been charged with in May 2021 until they had been settled. Grounds 1, 2 and 4, whilst characterised in different ways, each arise from the same issue. Ground 1 alleges that the Commissioner failed to properly consider the argument advanced that a substantial and clearly articulated aspect of the Appellant's case in assessing the gravity of his failure to report that he had been charged, was that he was acting in accordance with legal advice. Ground 2 is cast as an alternative to Ground 1, that the Appellant's reliance on advice was a material consideration in assessing whether the dismissal was harsh. The remaining ground, described by counsel for the Respondent as an 'ambitious one' is an alternative in the event the first two grounds are rejected and relies on the second limb of *House v The King.*[13]

[23] The Appellant submits that the Commissioner failed to consider the Appellant's contention that he always intended to inform the Respondent of the charges, but delayed doing so on the advice of Mr Van Houten, that it was not unreasonable to follow the advice, and that this contention bore directly on the gravity of the Appellant's failure to report. It was submitted that this contention went to the issue of whether the dismissal was a proportionate and fair response to the misconduct and that the Commissioner failed to properly consider it.

[24] We do not agree that the Commissioner failed to engage with or properly consider the contention in question. As the Respondent points out, the Decision must be read fairly, as a whole, and not with an eye attuned to detect error.[14] At paragraph 26 of the Decision, the Commissioner clearly identified that a central feature of the case was the Appellant's reliance on the legal advice that he delayed informing the Respondent until the charges had been settled, and that the Appellant relied upon this "*by way of mitigation*" of his conduct.

[25] The Commissioner weighed up the evidence of the Appellant and Mr Van Houten about the legal advice given and relied upon that evidence, along with the other factors she considered relevant under s.387(h). As the Commissioner makes clear at paragraph 33 of the Decision, in relation to the matters raised by both parties concerning the proportionality or otherwise of the decision to dismiss the Appellant, even accepting the matters raised by him at their highest, she was not satisfied that the dismissal was disproportionate to his conduct in failing to comply with the obligation to report that he had been charged.

[26] The Commissioner had a broad discretion to consider the matters which she considered relevant under s.387(h). No particular approach is required to be followed, "*nor is there any basis for an appellate Full Bench to impose a "decision rule" requiring the discretionary decision-making process to be undertaken in a particular way*."[15]

[27] The Appellant's submissions before the Commissioner were that there were nine relevant considerations for the purposes of s.387(h). Two considerations were said to demonstrate that the Appellant's dismissal was disproportionate to his conduct: firstly, because it would lead to a distortion between the lower-end sanction imposed by the criminal justice system and the ultimately more oppressive and punitive sanction of dismissal; and secondly, because of his lengthy career with the Respondent. In relation to the Appellant's reliance on his legal advice, the Appellant's outline of submissions said "… *we submit in considering factors raised in mitigation, Mr Strangio presses his reliance on advice given to him by his legal representative in respect of reporting the criminal charges. We submit, in respect of s387(h) that Mr Strangio's intention to comply with the Respondent's policy has been advanced throughout the investigation prior to his dismissal."*[16]

[28] Whilst the Appellant was pressed in cross-examination about why he chose to rely on the advice of his lawyer at the hearing before the Commissioner, the focus of the submissions before the Commissioner was that the Appellant always intended to comply with the reporting obligation but was denied the opportunity to do so because of an anonymous tip-off.

[29] We discern no error in the Commissioner's approach to dealing with the limited way the issue was raised before her and not making an explicit finding regarding the Appellant's claimed intention to report the charges until they were settled or whether reliance on his legal advice was reasonable. Further, we do not consider that the absence of any such finding would have a material impact in circumstances where the Appellant's opportunity to make good his intention to report the charges persisted for around 12 months, and there was no evidence before the Commissioner of when the Appellant would have disclosed the charges or any attempts by him to revisit the issue given the effluxion of time. In this context, it may have been open to the Commissioner to conclude that the Appellant would not ever have disclosed that he had been charged, but for the anonymous tip-off.

[30] In this regard we respectfully agree with the Full Bench in *King v Catholic Education Office Diocese of Parramatta*[17] in rejecting a submission that the Vice President at first instance did not take into account a number of identified mitigating factors in considering s.387(h):

> "[38] We reject Mr Sharp's submission that the Vice President did not, in his consideration of whether the dismissal was harsh, take into account a number of identified mitigating factors. At paragraphs [15]-[23] of the Decision, the Vice President summarised in detail Mr Sharp's case, which included at paragraph [15] a list all the mitigating factors upon which he relied to demonstrate that his dismissal was harsh, and

> at paragraph [23] reference to Mr Sharp's length and quality of service. We consider that in paragraph [59]-[61] of the Decision the Vice President dealt with these aspects of Mr Sharp's case. That he did not make a specific finding about each of the matters raised by Mr Sharp does not mean that he did not take them into account, given that the consideration of whether the dismissal was harsh involved making a finding of a global nature based on the weighing of a range of competing considerations."

[31] We consider that the Commissioner appropriately considered the Appellant's submissions and was entitled to have regard to each of the factors she considered relevant under s.387(h) and the weight to be assigned to them. No appealable error is disclosed in the first two grounds of appeal.

[32] In relation to the third ground of appeal that the Commissioner's conclusion was plainly unreasonable or unjust and that this is a rare case involving the outcome of the decision being wholly outside the range of outcomes reasonably available to her, we agree that this is an ambitious submission, and find that it is not substantiated.

[33] The appeal is no more than a disagreement with the Commissioner's overall assessment, and we discern no appealable error.

[34] We find no error in the Commissioner's conclusion that the dismissal was not harsh, unjust, or unreasonable and which was clearly open to her on the evidence.

Public Interest

[35] We are not satisfied that granting permission to appeal is in the public interest. The Appellant's clear dissatisfaction with the Decision does not mean, and we do not consider, that the Decision manifests an injustice, or that the result is counter intuitive having regard to the circumstances. The Decision is the result of the orthodox application of legal principles to the facts and there is no diversity of decisions in similar cases that would make it in the public interest to provide appellate guidance.

Conclusion

[36] For the above reasons, we are not satisfied that it is in the public interest to grant permission to appeal. Accordingly, permission to appeal is refused.

VICE PRESIDENT

Appearances:

Mr P Boncardo of Counsel for the Appellant.
Mr J Darams of Counsel instructed by Kingston Reid for the Respondent.

Hearing details:

2023.
Melbourne (By Microsoft Teams):
June 6.

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[1] [2023] FWC 730.

[2] Decision at [5].

[3] Decision at [9]-[12].

[4] Decision at [26].

[5] Decision at [29]-[30].

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

[7] *Coal & Allied Mining Services Pty Ltd v Lawler and others* [2011] FCAFC 54, 192 FCR 78, 207 IR 177 [43] (Buchanan, Marshall and Cowdroy JJ).

[8] *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216-217 per Mason CJ, Brennan, Dawson and Gaudron JJ: applied in *Hogan v Hinch* (2011) 243 CLR 506 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].

[9] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343, 197 IR 266 at [24]-[27].

[10] Ibid at [26]-[27], *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/ Warkworth* [2010] FWAFB 10089 at [28], affirmed on judicial review; *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 178; *NSW Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663, 241 IR 177 at [28].

[11] [2010] FWAFB 5343.

[12] Ibid at [27].

[13] Appeal Transcript PN60.

[14] Respondent's Outline of Submissions at [7], referring to *Tenterfield Care Centre Limited v Wait* [2018] FWCFB 3844 at [29] and *Ng v Skystar Airport Services Pty Ltd t/a Menzies Aviation* [2021] FWCFB 6040 at [12].

[15] *Mt Arthur Coal Pty Ltd v Goodall* [2016] FWCFB 5492 at [66].

[16] Appellant's Outline of Submissions dated 9 February 2023 at [52]. Appeal Book p. 332.

[17] [2014] FWCFB 2194 at [38].