DECISION

Fair Work Act 2009
s.604—Appeal of decision

Isaac Howard
v
Falls Creek Ski Lift Pty Ltd T/A Falls Creek Ski Lift Group
(C2023/3737)

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT SAUNDERS
DEPUTY PRESIDENT WRIGHT

BRISBANE, 5 SEPTEMBER 2023

Appeal against decision [2023] FWC 1317 of Deputy President Bell at Melbourne on 7 June 2023 in matter number U2023/3109 – unfair dismissal application – seasonal employment – permission to appeal granted – appeal dismissed.

Introduction

[1] Mr Isaac Howard seeks permission to appeal a decision by Deputy President Bell to dismiss his unfair dismissal application (Decision).[1]

[2] On 23 August 2023, we conducted a hearing, by video conference, in relation to both permission to appeal and the merits of the appeal. At that hearing each party was afforded an opportunity to present oral submissions to supplement their written submissions in relation to the appeal.

Deputy President's Decision

[3] Mr Howard was employed by Falls Creek Ski Lifts Pty Ltd (Falls Creek) as a Snowsports Instructor. Since about 2011, Mr Howard had worked each winter for Falls Creek. He did not work for Falls Creek during the other seasons of the year.

[4] By contract dated 3 March 2022, Mr Howard agreed to work for Falls Creek for the 2022 winter season. His last day of work for Falls Creek in the 2022 winter season was on 28 September 2022. On that day, Mr Howard suffered an injury to his knee and did not work for Falls Creek during the balance of the 2022 winter season, which concluded on 2 October 2022. Mr Howard lodged a WorkCover claim, which was approved.

[5] On about 31 October 2022, Mr Howard received an email from Falls Creek. It relevantly stated:

> "…We are super excited to welcome you back for another great season in 2023 and would love to hear some feedback from your 2022 experience and find out your intentions for 2023.
>
> If needed, you can also request a separation certificate and your final payslip through the feedback form.
>
> …We are planning on having return staff offers sent out before Christmas 2022 and will be in contact closer to when this information will be going out…"[2]

[6] On 15 October 2022, Mr Howard competed in a running race on the Gold Coast known as the 'Trifecta Spartan' race. He did so in the belief that his participation in the race was consistent with his rehabilitation from his knee injury. Falls Creek became aware of Mr Howard's participation in the Trifecta Spartan race in early 2023, as part of discussions with a WorkCover assessor. Falls Creek took a different view of Mr Howard's participation in the race. As a result, on 7 February 2023 Falls Creek wrote to Mr Howard and informed him that he would not be offered an employment contract to work for Falls Creek during the 2023 winter season.

[7] On 12 April 2023, Mr Howard lodged an unfair dismissal application in the Fair Work Commission (Commission).

[8] Falls Creek raised three jurisdictional objections to Mr Howard's unfair dismissal claim. First, it contended that the application was lodged out of time. Secondly, it contended that Mr Howard was not dismissed. Thirdly, Falls Creek contended that it had not employed Mr Howard for the minimum employment period.[3]

[9] The Deputy President determined the first two jurisdictional objections but did not need to decide the third jurisdictional objection in light of his conclusions that Mr Howard was dismissed on 28 September 2022[4] and there were no exceptional circumstances to justify the exercise of discretion to extend time for the application to be lodged in the Commission.[5]

[10] In reaching his conclusion that Mr Howard was dismissed within the meaning of s 386 of the *Fair Work Act 2009* (Cth) (Act), the Deputy President reasoned that Mr Howard was employed pursuant to a "contract of employment … for the duration of a specified season", namely the Winter Season"[6] of 2022, but his employment did not terminate "at the end of the season", with the result that the termination did not fall within s 386(2)(a) of the Act.[7] The Deputy President found that "as at 28 September 2022, while Mr Howard's employment was about to be terminated at the end of the Winter Season, in a somewhat unusual turn of events, his employment ended four days earlier because he was taken off the roster due to being unable to work".[8] This was, so the Deputy President found, a termination "at the initiative of the employer, and it was not because of the Winter Season wind-down".[9] Accordingly, the Deputy President concluded that Mr Howard was dismissed for the purposes of s 386 of the Act.[10]

[11] The Deputy President considered the factors identified in s 394(3) of the Act and concluded that there were no exceptional circumstances.[11] As a result, the Deputy President did not extend time for the unfair dismissal application to be filed and dismissed the application.

Permission to appeal

[12] 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.[12] There is no right to appeal and an appeal may only be made with the permission of the Commission.

[13] This appeal is one to which s 400 of the Act applies. Section 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."

[14] In the decision of the Full Court of the Federal Court 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 as "a stringent one".[13] The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[14] In *GlaxoSmithKline Australia Pty Ltd v Makin* 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."[15]

[15] 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 an appealable error.[16] 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.[17]

Appeal grounds and submissions

[16] We granted leave for Mr Howard to rely on the amended grounds of appeal set out in paragraph [24] of his written submissions dated 21 July 2023.

[17] By amended ground 1, Mr Howard contends that the Deputy President erred in finding that he was dismissed within the meaning of s 386 of the Act on 28 September 2022, because the Deputy President:

(a) incorrectly found that Mr Howard was a 'casual seasonal employee' falling within the definition of seasonal employee in s 386(2)(a) of the Act;

(b) incorrectly found that by being taken off the roster on 28 September 2022, Mr Howard had been dismissed; and

(e) failed to find that Mr Howard's employment was terminated at the employer's initiative by Falls Creek on 7 February 2023.

[18] Mr Howard submits that he was not employed under a contract of employment for the duration of a specified season within the meaning of s 386(2)(a) of the Act because his contract was terminable at any time on one hour's notice.

[19] Mr Howard also submits that the mere act of removing a casual employee from a roster because he has suffered an injury cannot lead to a finding that the employer terminated the employee's employment. Mr Howard contends that the Deputy President erred in finding that he was dismissed from his employment on 28 September 2022. He submits that he remained in an employment relationship with Falls Creek until his employment was terminated, at the initiative of Falls Creek, on 7 February 2023.

[20] Amended ground 2 contends that the Deputy President erred in refusing the application for an extension of time to file an unfair dismissal remedy because the Deputy President:

(c) failed to consider whether Mr Howard had been employed for the minimum employment period under ss 382-384 of the Act; and

(d) failed to conduct a proper analysis of the merits of Mr Howard's unfair dismissal application, pursuant to s 394(3)(e) of the Act.

[21] Falls Creek submits that the Decision does not disclose any arguable appealable errors and permission to appeal should be refused. Falls Creek submits that Mr Howard's employment ended on 28 September 2022 or 2 October 2022 and what Mr Howard is really challenging is the failure to offer him new employment, in February 2023, for the 2023 winter season.

Consideration

[22] Mr Howard was employed by Falls Creek pursuant to a written contract of employment. The terms of that contract are important, particularly in relation to the question of whether Mr Howard was employed under a contract for the duration of a specified season within the meaning of s 386(2)(a) of the Act and the question of whether Mr Howard's employment was terminated on the employer's initiative within the meaning of s 386(1)(a) of the Act.

[23] Mr Howard's contract of employment contains the following relevant provisions:

> "… Falls Creek is pleased to offer you a position for the 2022 Winter Season…
>
> … this offer of employment is conditional on Falls Creek opening for the 2022 Winter Season.

Winter Employment Offer

On behalf of Falls Creek Ski Lifts Pty Ltd ("Falls Creek"), we are pleased to offer you the position of Snowsports Instructor 2 on a Casual basis for the 2022 Winter Season only. As noted in Clause 6, there is no guarantee of minimum or continuing working during this Season.

This contract is offered on the basis that each Winter Season is a discrete employment arrangement and that Falls Creek is under no obligation to re-employ you for any future Season. As such, any future employment will be at the discretion of Falls Creek.

Your position is linked to the Mount Hotham and Falls Creek Enterprise Agreement 2018 ("EA") …

Employment type:	Casual
Anticipated Start Date:	10/06/2022
Anticipated End Date:	02/10/2022…

1. **Employment:** We anticipate your employment will commence on 10/06/2022 and conclude no later than 02/10/2022…

   Your start and finish dates will also be influenced by snow and weather conditions and related business demand.

   If, for any reason, Falls Creek does not open for the 2022 Winter Season, this offer of employment may be immediately withdrawn, without notice or payment in lieu.

   If, for any reason, the 2022 Winter Season is shorter than anticipated, Falls Creek may terminate your employment by giving you notice in accordance with Clause 7 below.

   In the event of adverse climatic or other conditions, we reserve the right to adjust or reduce the anticipated period of Seasonal employment.

   Any decision to adjust or reduce your anticipated period of Seasonal employment will be disclosed to you in writing as soon as practicable…

7. **Notice Period:** Given your employment will be on a Casual basis, either you or Falls Creek is entitled to terminate employment (for any reason, including in case of significant adverse climatic conditions) by providing the other with one (1) hour's notice or, in the case of Falls Creek, payment in lieu of this notice…

21. **Special Conditions:**

   …

   d) You warrant that you have no expectation of ongoing employment beyond the expiry of your Seasonal engagement for the 2022 Winter Season. You further

> warrant that Falls Creek is under no obligation to re-employ you for any future Season, and nor are you obligated to accept any offer of employment for a future Season.
>
> **FORMAL ACCEPTANCE OF OFFER LETTER DECLARATION**
>
> …
>
> I understand that this offer of employment is for a fixed period and does not amount to an offer of continuing employment in the future beyond the period specified in this Employment Offer…"

[24] Clause 30 of the *Mount Hotham and Falls Creek Enterprise Agreement 2018* contemplates that casual employees may be engaged on a seasonal basis, at the end of which their employment will come to an end and they may be re-employed for another season in the future. It provides:

> "**30 REHIRING OF SEASONAL (FULLTIME, PART-TIME & CASUAL) EMPLOYEES**
>
> 30.1 The employer will advise each seasonal fulltime, seasonal part-time or casual employee from the Mount Hotham Resort and from the Falls Creek Resort prior to 10 December, whether he/she will:
>
> 30.1.1 be given preference in hiring for the following season; or
>
> 30.1.2 be asked to reapply for his/her position for the following season; or
>
> 30.1.3 not be required for the following season.
>
> 30.2 If an employee requests, the employer will provide reasons as to why he or she will not be required for the following season.
>
> 30.3 An employee who has been given preference in hiring for the following season pursuant to clause 30.1.1 will be required to advise his or her employer of his or her availability for employment in the following season by no later than 1 February."

[25] It is well established that if a contract of employment for a maximum term contains an unqualified right on the part of either party to terminate the contract at any time on notice, then the contract will not be for a 'specified period of time' within the meaning of s 386(2)(a) of the Act.[18] That is because a 'specified period of time' is a period of time that has certainty about it. A contract of employment will be for a specified period of time if "the time of commencement and the time of completion are unambiguously identified by a term of the contract, either by the contract stating definite dates, or by stating the time or criterion by which one or other end of the period of time is fixed, and by stating the duration of the contract of employment."[19] However, if the "terms of the contract of employment, instead of identifying in this manner the period of time during which it is to run, provides that it is to run until some future event, the timing of the happening of which is uncertain when the contract is made, the contract will be for an indeterminate period of time."[20] In the event that a maximum term contract of

employment contains a right to terminate the contract at any time for any reason, the "cessation date merely records the outer limit of a period beyond which the contract of employment will not run… At any point during the two year period identified by the commencement and cessation dates neither side could know with any certainty when the period of the contract of employment might come to an end."[21]

[26] By parity of reasoning, if a contract of employment for a season contains an unqualified right to terminate the contract, at any time during the season, then it will not be a contract of employment for 'the duration of a specified season' within the meaning of s 386(2)(a) of the Act. At any point during the season neither the employer nor the employee could know with any certainty when the contract of employment might come to an end. The most that could be said is that the employment contract is for the *maximum* duration of a specified season, not for *the* duration of a specified season.

[27] Mr Howard's contract of employment with Falls Creek for the 2022 winter season contained an express term which permitted either party, at any time and for any reason, to terminate Mr Howard's employment on one hour's notice, or in the case of Falls Creek, by a payment in lieu of one hour's notice.[22] It follows that Mr Howard was not employed under a contract of employment for 'the duration of a specified season' within the meaning of s 386(2)(a) of the Act. The maximum duration of his employment with Falls Creek was the end of the 2022 winter season. Accordingly, we agree with the submission advanced on behalf of Mr Howard[23] that the Deputy President erred by finding that Mr Howard's contract of employment was "a contract of employment … for the duration of a specified season', namely the Winter Season as set out in the Contract".[24] However, this finding was not critical to the Deputy President's conclusion on the question of dismissal. The Deputy President found that the exception in s 386(2)(a) of the Act was not engaged because Mr Howard's employment did not terminate at the end of the season.[25]

[28] The Deputy President found that Mr Howard's employment was terminated on 28 September 2022 "because he was taken off the roster due to being unable to work".[26] It is necessary to examine the surrounding circumstances to analyse Mr Howard's contention that this finding was erroneous.

[29] On Wednesday, 28 September 2022, Mr Howard injured his knee while teaching snowboarding. He went to see a medical practitioner, who certified that he had capacity for pre-injury employment from 28 September 2022, but noted that Mr Howard should "avoid skating on leg or other activities that increase pain".[27] The following day, Thursday, 29 September 2022, was Mr Howard's rostered day off.[28] On the evening of 29 September 2022, Mr Howard checked his roster to see what work he was doing on the next day. He discovered that Falls Creek had taken him off the roster as "sick/injured".[29] Mr Howard could not get hold of any Falls Creek human resources employees until Saturday, 1 October 2022, at which time he spoke with Ms Leanne Trudgeon, Human Resources Manager.[30] Ms Trudgeon directed Mr Howard to go back to the doctors to get a backdated certificate of capacity stating that he was not able to work.[31] Mr Howard followed Ms Trudgeon's direction and went to see a doctor, who gave him a certificate dated 1 October 2022, stating that he had no capacity for employment from 28 September 2022 to 4 October 2022.[32] In addition, Ms Amy Hodge, Resort Services Manager, stated that:

> “Due to the restrictions on the WorkCover certificate stating that he [Mr Howard] was to avoid skating on his right leg, Zac was not able to continue taking lessons as it is impossible to not skate on the snowboard when taking the lesson. I stood him down from work and blocked his ski lift pass in order to protect his knee from further injury and aggravation.
>
> After blocking his ski lift pass, Zac was not able to perform his normal duties taking snowboarding lessons…
>
> Zac was not rostered on for all days leading up until the end of the season and I believe in all he lost only one day following the report of his injury…
>
> Zac’s casual employment ceased as of 2 October 2022 when the ski season closed for 2022…”[33]

[30] The question of whether there has been a termination of an employment contract and/or the employment relationship is to be determined objectively. It requires an assessment as to what each party by words and conduct would have led a reasonable person in the position of the other party to believe, in light of the surrounding circumstances.[34]

[31] We accept that removing a casual employee from a work roster is *an* indication which may support a conclusion that the employment contract and/or relationship has been terminated, but other surrounding circumstances must also be considered. In the present case, the evidence does not suggest that there was any communication from or on behalf of Falls Creek to Mr Howard on 28 September 2022, or at any later time, to the effect that his employment contract or relationship had been terminated. On 28 September 2022, Mr Howard was taken off the work roster for the remaining four days of the winter season, but that was because he was injured. His ski lift pass was also blocked to prevent his knee from further injury.[35] Ms Hodge, the relevant manager, characterised these steps as standing Mr Howard down from work until the end of the ski season on 2 October 2022. Further, when Mr Howard communicated with Falls Creek’s human resources manager, Ms Trudgeon, on 1 October 2022, she did not tell him or suggest to him that his employment had been terminated. To the contrary, she issued him with a lawful and reasonable direction to attend upon a medical practitioner and obtain a medical certificate for the period from 28 September to 2 October 2022. Mr Howard complied with this direction. Having regard to all the surrounding circumstances, we do not consider that a reasonable person in the position of Mr Howard would have believed that his employment contract and/or relationship with Falls Creek terminated on 28 September 2022. Accordingly, we agree with the submission advanced on behalf of Mr Howard that the Deputy President erred by concluding that his employment with Falls Creek ended on 28 September 2022.[36]

[32] However, we do not agree with Mr Howard’s contention that the Deputy President erred by failing to find that his employment with Falls Creek terminated at the initiative of Falls Creek on 7 February 2023.[37] In our view, it is clear that Mr Howard’s employment contract and his employment relationship with Falls Creek terminated at the end of the 2022 winter season on 2 October 2022, as was the case with the other remaining ski instructors engaged by Falls Creek until the end of the 2022 winter season. His employment contract and relationship with Falls Creek came to an end on 2 October 2022 in accordance with the terms of the contract he entered into in March 2022. Those terms make pellucidly clear that he was employed for the

2022 winter season only, and his "employment", being both his employment contract and his employment relationship with Falls Creek, would conclude no later than 2 October 2022. Mr Howard's contention that his employment relationship with Falls Creek remained on foot until 7 February 2023 cannot be sustained in light of the express terms of the employment contract, including the provision which informed Mr Howard that the offer of employment contained in the contract did "not amount to an offer of continuing employment in the future beyond the period specified in his Employment Offer".[38] At no time after 2 October 2022 did Mr Howard perform any work for Falls Creek. There is no evidence to suggest that he entered into a new contract of employment with Falls Creek at any time after 2 October 2022.

[33] Mr Howard's employment contract and relationship with Falls Creek concluded on 2 October 2022 by reason of the agreement between the parties, as recorded in the employment contract. There was no termination at the initiative of Falls Creek.[39] Further, in those circumstances the decision by Falls Creek, in February 2023, not to offer any further contract of employment to Mr Howard is not relevant to the question of whether there was a termination of employment at the initiative of the employer. The decision not to offer further employment is separate and distinct from the earlier agreement between the parties to end the employment contract and relationship at the conclusion of the 2022 winter season.[40] It follows that Mr Howard was not dismissed within the meaning of s 386 of the Act and it was correct for the Deputy President to dismiss his unfair dismissal application.

[34] In light of the fact that Mr Howard was not dismissed, there is no need to consider ground two of the amended appeal grounds, which relates to the Deputy President's decision not to grant an extension of time.

Conclusion

[35] We consider that it is in the public interest to grant permission to appeal because this appeal raises issues of general importance concerning the circumstances in which seasonal employment contracts may give rise to a dismissal within the meaning of s 386 of the Act.

[36] Because Mr Howard was not dismissed, we agree with the Deputy President's decision and order to dismiss Mr Howard's unfair dismissal application, albeit for different reasons to those relied on by the Deputy President. It follows that the appeal should be dismissed.

[37] We order that:

1. Permission to appeal is granted.

2. The appeal is dismissed.

VICE PRESIDENT

Appearances:

Mr J. Tierney, Counsel, appeared for Mr Howard
Mr M. Harmer, Solicitor, appeared for Falls Creek Ski Lifts Pty Ltd

Hearing details:

2023.
By Microsoft Teams:
23 August.

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[1] [2023] FWC 1317

[2] Appeal Book (AB) at p 341

[3] AB at pp 362-369

[4] Decision at [30]-[31]

[5] Decision at [79]

[6] Decision at [19]

[7] Decision at [28]

[8] Decision at [29]

[9] Decision at [30]

[10] Decision at [31]

[11] Decision at [56]-[83]

[12] 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

[13] (2011) 192 FCR 78 at [43]

[14] *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]

[15] [2010] FWAFB 5343, 197 IR 266 at [27]

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

[17] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 at [26]-[27], 197 IR 266; *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]

[18] *Khayam v Navitas English Pty Ltd* (2017) 273 IR 44 (*Navitas*) at [81]-[84]

[19] *Andersen v Umbakumba Community Council* (1994) 56 IR 102 at 105-7

[20] Ibid

[21] Ibid

[22] AB at 479 (clause 7)

[23] Ground 1(a) of the amended appeal grounds

[24] Decision at [19]

[25] Decision at [30]

[26] Decision at [29]

[27] AB at 86

[28] AB at p 44 PN291

[29] Ibid

[30] Ibid

[31] AB at p 45 PN291-7

[32] AB at p 84

[33] AB at p 144; see, also, AB at pp 43-44 PN267-277, p 139 [31] & p 337

[34] *Koutalis v Pollett* [2015] FCA 1165 at [43]-[44]; applied in *Canberra Urology Pty Ltd v Lancaster* [2021] FWCFB 1704 at [30]

[35] AB at p 144 [17]

[36] Ground 1(b) of the amended grounds of appeal

[37] Ground 1(e) of the amended grounds of appeal

[38] AB at p 482

[39] *Navitas* as [75(4)]

[40] *Navitas* as [75(4)]