DECISION

Fair Work Act 2009
s.604—Appeal of decision

Nicholas Williams

v

KTC Refrigeration & Air Conditioning Pty Ltd
(C2023/2515)

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT MASSON
COMMISSIONER BISSETT

BRISBANE, 25 OCTOBER 2023

Appeal against decision [2023] FWC 881 of Deputy President Boyce at Sydney on 14 April 2023 in matter number U2022/12365.

Overview

[1] Mr Nicholas Williams (Appellant) has lodged an appeal under s. 604 of the *Fair Work Act 2009* (the Act), for which permission is required, against a Decision[1] of Deputy President Boyce issued on 14 April 2023 (the Decision). The Decision concerned an application for an unfair dismissal remedy made by the Appellant. In the Decision, the Deputy President upheld an objection by KTC Refrigeration & Air Conditioning Pty Ltd (Respondent), finding that that the Appellant's dismissal was a case of genuine redundancy within the meaning of s. 389 of the Act and dismissed the application.

[2] The grounds of appeal set out in the Form F7 Notice of appeal are said to be based on significant errors of fact. The Appellant was self-represented in the proceedings before the Deputy President, and in the appeal, which is reflected in the drafting of the appeal grounds. When the grounds of appeal and the submissions filed by the Appellant in support of those grounds are considered, three significant matters can be distilled, which if substantiated, constitute failure to afford the Appellant procedural fairness and a fair hearing and failure by the Deputy President to deal with the Respondent's objection in accordance with the jurisdiction conferred on the Commission. Those matters can be summarised as follows.

[3] *Firstly*, the Deputy President granted permission for the Respondent to be represented by a lawyer in circumstances where the Respondent did not comply with Directions in relation to seeking permission so the Appellant was not on notice that the Respondent would seek permission and the Appellant was not given an opportunity to be heard in opposition. That the Appellant was not heard in relation to the grant of permission for the Respondent to be represented by a lawyer is apparent from the transcript of the hearing before the Deputy President. Having been granted permission, the Respondent's representative, Mr Ash Mola of Brooklyn Lawyers, conducted himself in a manner described by the Appellant as making

"*antagonistic insults and slurs*" including calling the Appellant "*manic depressive*".[2] That Mr Mola did describe the Appellant in this way, is also confirmed by the transcript of the hearing before the Deputy President. As a result of these issues, the Appellant was denied procedural fairness in relation to the Deputy President granting permission for the Respondent to be represented by a lawyer. While not specifically raised in the appeal grounds, a substantial contribution to the denial of procedural fairness appears to be that the Deputy President conducted the hearing entirely by telephone. This is a matter to which we will return.

[4] *Secondly*, it is contended by the Appellant that the Respondent did not comply with an obligation in a modern award that applied to him to consult about the redundancy. A related issue is that the Deputy President decided the question posed by s. 389(1)(b) in relation to the obligation to consult, by applying a construction of the consultation term in the relevant award that was not raised by either party, without putting the parties on notice that the matter would be determined on this basis. *Thirdly*, several grounds of appeal relate to the question posed by s. 389(2) of the Act as to whether the Appellant could have been redeployed within the Respondent's enterprise. The Deputy President appears to have approached this question on the basis that the Appellant bore the evidentiary burden of establishing that it would have been reasonable for him to be redeployed within the Respondent's enterprise. It is also arguable that the Deputy President adopted the same approach to the questions posed by s. 389(1) of the Act, in relation to determining whether the employer no longer required the Appellant's job to be performed by anyone, because of changes in the operational requirements of the Respondent's enterprise.

The Appeal

[5] The Appellant lodged a Notice of Appeal against the Decision on 5 May 2023. In response to Directions for the hearing of the appeal, the Respondent sought permission to be represented by Mr Mola, its legal representative in the proceedings before the Deputy President, on grounds including that:

a. The assistance of a trained legal advocate would enable the matter to be dealt with more efficiently taking into account its complexity;
b. Representation would allow for effective representation where the Respondent is a small business, its Director has no advocacy experience and it does not employ any human resources staff;
c. It would be unfair not to allow the Respondent to be represented as it would otherwise not be able to represent itself effectively; and
d. The complexity includes appeal grounds raising errors of law and serious allegations of fraud made by the Appellant against the Respondent.

[6] The Appellant's submissions in response drew attention to the conduct of Mr Mola in the hearing before the Deputy President, and opposed representation by Mr Mola on the grounds that Mr Mola's presence at the appeal hearing could result in chaos as his antagonistic insults and slurs would not be tolerated. The Appellant also objected to the Respondent being represented by any lawyer, citing fairness on the basis that he was not represented due to lack of funds.

[7] At the hearing of the appeal, the Respondent sought to be represented by Mr Whitbread of Counsel. Mr Whitbread was not involved in the hearing before the Deputy President. In oral submissions in the appeal, Mr Whitbread said that permission should be granted because it would enable the matter to be conducted more efficiently and the Respondent did not have capacity to represent itself effectively. Further, Mr Whitbread reiterated that the case involved legal and procedural complexity associated with the Appellant's allegations of fraud, and whether fresh evidence should be admitted. Mr Whitbread also said that the issues raised by the Appellant about the conduct of the Respondent's lawyer in the proceedings before the Deputy President related to his instructing solicitor Mr Mola, and that he did not intend to engage in such conduct.

[8] The Full Bench granted permission for the Respondent to be represented by a lawyer in the appeal on the grounds that the matter raised issues of complexity including the allegations of fraud and the question of whether fresh evidence should be admitted. We were also of the view that the appeal raised complex questions about the provisions of the Act concerning genuine redundancy and how those provisions related to the consultation term in a modern award. Further, we were satisfied that granting the Respondent permission to be represented by a lawyer would enable the matter to be dealt with more efficiently, taking into account that complexity.

[9] A hearing was conducted before the Full Bench on 7 June 2023. The Appellant represented himself and the Respondent was represented in line with the permission granted.

[10] During the hearing of the appeal, we addressed whether further evidence sought to be adduced by each party on appeal should be admitted. Section 607(2) of the Act confers a discretion on the Full Bench to "*admit further evidence*" and "*take into account any other information*" on appeal. However, it is by no means a matter of course that it will do so. The approach to whether the discretion is exercised to admit new evidence or to consider further material is set out in *Atkins v National Australia Bank*[3] and requires that three conditions are met, although it has also been recognised that in considering whether to exercise the discretion in s. 607(2) it is permissible in an appropriate case to depart from the principles set out in *Akins* and they need not be strictly applied.[4] The conditions are as follows:

- it must be established that the evidence could not have been obtained or adduced with reasonable diligence for use at first instance;
- it must be evidence which is of such a high degree of probative value that there is a probability that there would have been a different result at first instance; and
- the evidence must be credible.[5]

[11] The Appellant sought to provide further evidence to indicate the nature of his apprenticeship on the basis that he was dismissed as a Third Year Apprentice Electrician when he was a Fourth Year Air Conditioning and Refrigeration Apprentice. Counsel for the Respondent accepted there had been an error in the Respondent's Form F3 response, and that this had been adopted by the Deputy President in the Decision. The Respondent did not dispute that at the time of his dismissal, the Appellant was a Fourth Year Air Conditioning and Refrigeration Apprentice. It was therefore unnecessary for this evidence to be admitted.

[12] The Appellant also sought to tender evidence to support allegations of fraud on the part of the Respondent. When asked by the Full Bench why the Appellant did not raise the fraud allegations in the first instance hearing the Appellant submitted that he was not offered the chance to object to any of the Respondent's information except their witness statements. Further, the Appellant submitted that he was not a lawyer and did not know when to bring things up and had been advised to "*wait till the very end and if it comes up bring it up and if it doesn't just use it on appeal*".[6] It was the Appellant's assertion that the Apprentice/Traineeship Training Contract (Training Contract) between himself and the Respondent was fraudulently signed and that if the contract was fraudulent, the other evidence of the Respondent may be fraudulent.

[13] We decided to refuse leave for the Appellant to admit further evidence about the alleged fraud on the basis that the evidence could have been obtained and adduced with reasonable diligence at first instance and, in any event, the evidence is not determinative of the issues we are required to determine in the appeal. Given that the Training Contract was appended to the Respondent's Form F3 Response to the application, the Appellant did not provide a satisfactory explanation for the failure to raise this matter in the hearing before the Deputy President. We also refused leave for the Respondent to admit further evidence on the basis that it largely responds to submissions not the subject of this appeal and the appendices within that evidence, being communications between the legal representative for the Respondent at first instance and the Deputy President, are already on the file.

The Decision under appeal

[14] The Decision records that the Appellant asserted he had been unfairly dismissed and that the Respondent contended that the dismissal was a case of genuine redundancy, within the meaning in s. 389 of the FW Act. It is noted that following receipt of submissions and evidence the Deputy President held a hearing to resolve the genuine redundancy objection. After setting out ss. 385 and 396 of the Act the Deputy President outlined three questions that, in his view, needed to be answered in light of s. 389, which deals with the meaning of genuine redundancy, as follows:

> 1. Was the [Appellant's] job no longer required to be performed by anyone because of changes in the operational requirements of the Respondent's enterprise?
>
> 2. Did the Respondent comply with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy?
>
> 3. Would it have been reasonable in all the circumstances for the Appellant to have been redeployed within the Respondent's enterprise, or an associated entity of the Respondent?

[15] After discussing the approach to deciding the first question, the Deputy President set out some background facts including that the Appellant was employed as a third-year apprentice electrician from 1 December 2020 to 9 December 2022. The Appellant was issued with a termination letter on 5 December 2022, stating that the Appellant's employment had been terminated as the Respondent no longer required his services "*on account of the downsizing procedure*". The Deputy President next summarised the Respondent's submissions including

that the Respondent is a small family-owned business with two arms, performing warranty repair work and mechanical and refrigeration installations. The Appellant performed warranty work only, had represented to the Respondent's Director that he only wanted to perform that work, and did not want to perform installation work. The profit margin for warranty work was said to be 3% and the Respondent had forecast further deterioration in that margin. Installation work was a new arm of the business commenced in the 12 months prior to the hearing and the Respondent had not been paid for project work due to the client to whom the Respondent subcontracted going into administration in December 2022. Prospects of recovering any payment were said to be limited and the Respondent had been unable to secure new project work. The Respondent is recorded as having three clients it performed warranty work for within a 30 km radius of Chipping Norton.

[16] The Deputy President also set out the Respondent's submissions in relation to its financial position, which in summary were that the Respondent owed money to the ATO and two finance companies, about which the Appellant had been "*appraised*". The Appellant had also been informed of the distinct possibility that his employment may end if conditions did not improve. The Respondent submitted that it had serious cashflow problems and was selling company assets (motor vehicles) to make ends meet. The Respondent also submitted that it decided that the Appellant's job of "*third year apprentice*" was no longer required to be performed by any worker and this decision was made because of changes in operational requirements. Further, the Respondent submitted that warranty work was being done by the Respondent's Director.

[17] The Appellant is recorded as having contended that he did not only perform warranty work, that work continued to be performed by the Respondent and warranty work was not only being performed by the Respondent's Director but was also being performed by other employees. The Appellant also disputed the Respondent's assertions of financial difficulties pointing to the purchase of two new vehicles in 2022 and to the fact that the Respondent had not put evidence about its financial problems before the Deputy President and failed to identify any changes to its operations.

[18] In relation to the first question, the Deputy President found that, due to on-going poor cash flow and its decision to limit its warranty repair work, the Respondent had genuine operational reasons to make changes to its business. It was those changes (as determined on a *bona fide* basis by the Respondent) that, in the Deputy President's view, resulted in the Appellant's job being no longer required to be performed by anyone. The Deputy President also found that the Respondent had, via its witness statements tendered in the proceedings, explained the basis upon which it reduced its warranty workload, and rejected the Appellant's submissions that the Respondent should have been required to prove the workload reduction via the tender of work records. In rejecting this submission, the Deputy President observed that if the Appellant sought to challenge the Respondent's contention as to a workload reduction via the tender of records, he had the ability to obtain a notice requiring the production of those records, which he did not.[7]

[19] The Deputy President also rejected the Appellant's submission that his role was still required to be performed because the Director of the Respondent, Mr Kenan Hussein, still performed warranty repair work. The Deputy President noted that it was not uncommon for a Director of a small business to absorb tasks or categories of work in order to reduce staff

numbers (and overall salary liability), but it did not mean the particular role still existed. Further, simply because the Appellant was made redundant on the basis that the Respondent wanted to eliminate or otherwise reduce the warranty repair work it performed did not mean that the Respondent was, in an absolute sense, required to never undertake warranty repair work.

[20] Further, the Deputy President rejected the Appellant's contentions about the Respondent's financial position and the purchase of new vehicles, stating that the new vehicles are subject to an on-going finance arrangement that impacts deleteriously on the Respondent's cashflow, referring to the witness statement of Mr Kenan Hussein of 21 February to support this finding. However, in a footnote in the Decision in relation to that statement, the Deputy President accepted that "…*many of the assertions of the Respondent's financial status contained in the Respondent's submissions are unsupported in the evidence relied on by the Respondent in these proceedings.*"[8] The Deputy President also noted that, in his submissions and in cross-examination, the Appellant raised concerns that he had been selected for redundancy, had performed, and was capable of performing, work other than warranty work, and that other employees with equal or less skills and experience were not made redundant. The Deputy President rejected the Appellant's submissions on the basis that the selection, or the process of selection, of an individual for redundancy is not a relevant consideration in determining whether a dismissal is a case of genuine redundancy under s. 389 of the Act, citing the Full Bench Decision in *UES (Int'l) Pty Ltd v Leevan Harvey.*[9]

[21] In relation to whether it was reasonable in all circumstances for the Appellant to have been redeployed within the Respondent's enterprise or associated entities, the Deputy President quoted the decision of a Full Bench of the Commission in *Ulan Coal Mines Limited v A. Honeysett & Ors*,[10] to the effect that the reasonableness of redeployment for the purposes of s. 389(2) is to be assessed as at the time of the relevant dismissal, and it is necessary to identify the position or other work to which the employee could have been redeployed and determine whether that position or other work is reasonable for both the employer and the employee. The Deputy President also made observations that s. 389(2) does not interfere with the employer's right to require that selection criteria for a vacant position be met; require the employer "*to fit a square peg into a round hole*"; or create an obligation for an employer to redeploy an employee into a role that the employer does not think is suitable because the employee does not hold the requisite skills, qualifications and/or experience.[11]

[22] The Deputy President then considered passages from *Teterin Resource Pacific Pty Ltd t/a Ravensworth Underground Mine*[12] and *Jain v Infosys Ltd*[13] concerning the onus of proof in the context of the question of whether a dismissal is unfair where the question of whether the dismissal was a case of genuine redundancy is also agitated. In relation to *Teterin*, the Deputy President said that the conclusion of the Full Bench with respect to the interaction between ss. 389(2) and 385(d) is worth drawing attention to and set out the following passage from that decision:

> "The manner in which the Deputy President expressed his conclusions may be justified by reference to s.385(d), which requires that for a person to have been unfairly dismissed, the Commission must be satisfied that the dismissal was *not* a case of genuine redundancy. It must follow that the applicant in an unfair dismissal case bears the risk of failure if the state of satisfaction required by s.385(d) cannot be reached. If the Deputy President considered the evidence insufficient to allow him to determine whether redeployment was reasonable under

> s.389(2), then (there being no issue with respect to the s.389(1) matters) he could not be satisfied that the dismissals were not genuine redundancies, meaning that the applications before him had to be dismissed."[14]

[23] The Deputy President also referred to the Full Bench decision in *Jain* which stated that:

> "… in the context of the question whether a dismissal was an unfair dismissal in which there is also agitated whether the dismissal was a case of genuine redundancy, to the extent that there is a legal onus of proof or something analogous thereto, it rests with the applicant in the sense that the applicant bears the risk of failure if the satisfaction required by s.385 including paragraph (d) is not reached."[15]

[24] The Deputy President then set out the Appellant's submission that he should have been redeployed to perform installation work, and went on to conclude that the Appellant's failure to identify any specific role or roles that, at the time of his dismissal, were available for him to be redeployed to, was "*fatal to his contention*" in this regard, posing the following questions at paragraph [34] of the Decision::

> "a) How can the Commission assess whether or not it would have "been reasonable in all the circumstances for [an employee] to be redeployed" into another role at an employer's enterprise (at the time of his/her dismissal) when the employee has not identified exactly what the relevant role (or asserted lost opportunity) was?
>
> and
>
> b) How can an employer be held to a redeployment requirement or standard when the relevant employee pressing for such a requirement or standard to be observed has not identified the specific role or roles to which such requirement or standard applies?"

[25] In answering both questions, the Deputy President concluded that it was not for the Commission to speculate as to redeployment options and, in any event, there was simply no evidence that there was in fact a vacant role available in the Respondent's business (in any of its work divisions) at the time of the Appellant's dismissal, for him to be redeployed into. On the evidence before the Commission, the Deputy President also rejected and found it unnecessary, and perhaps even beyond his jurisdiction, to make findings as to the Appellant's claims about the "*real*" reasons for his dismissal. The substance of these matters was not discussed in the Decision.

[26] At [38] of the Decision, the Deputy President, having regard to the evidence and submissions of the parties, summarised his findings as follows:

> "(a) As at the time that the Respondent made the decision to make the Applicant's role redundant, this role was genuinely no longer required to be performed by anyone at the Respondent's business because of changes in the operational requirements of the Respondent's enterprise (s.389(1)(a) of the Act).
>
> (b) The Respondent has satisfied its obligations as to consultation under the Award in that no Award consultations obligations arise for determination in these proceedings (s.389(1)(b) of the Act).
>
> (c) The Respondent has complied with the requirements of s.389(2) of the Act in that it denies that it would have been reasonable in all of the circumstances to have redeployed the Applicant in its enterprise, and the Applicant has failed to identify (on the evidence) that a role existed that it would have been reasonable to redeploy him into as at the time of his dismissal."

[27] The Deputy President concluded that the Respondent had made good its case as to genuine redundancy and dismissed the Appellant's application, making an Order to that effect.[16]

Appeal Grounds

[28] The grounds of appeal are set out in the form of a submission appended to the Notice of Appeal. The Appellant's primary ground of appeal is that there were significant errors of fact in the Decision. Specifically:

1. The Respondent submitted forged documents (being the Training Contract between the Appellant and the Respondent) against the Appellant and claimed the Appellant breached the Training Contract. As such, the Commission had inaccurate information and could not make a proper finding.

2. During the hearing, the Deputy President had erroneous information before him. Specifically, the signature next to the Appellant's own name in the Training Contract was not written by him, and the Respondent's description of the Appellant's role as "Third Year Apprentice Electrician" was wrong as the Respondent did not have the proper licencing to legally hire that role.

3. The Deputy President erred in finding that the Appellant did not show there was an available position at the company when on the same day of the Appellant's dismissal, another employee of the Respondent quit because of workplace bullying. As that employee had the same role as the Appellant, this created a job he could fill.

4. The Deputy President erred in assuming there was no role available, particularly where (in the Appellant's view) the Respondent never once stated whether another job was available.

5. The Deputy President showed clear bias in allowing the Respondent to be represented by a lawyer at the hearing, despite no form being filled out notifying that the Respondent would be represented. On the day of the hearing, the Deputy President also failed to ask the Appellant if he objected to the Respondent being legally represented.

6. The Deputy President continued to show bias in accepting multiple submissions from the Respondent after the deadline outlined in the Directions.

7. The Deputy President was biased in finding that the Respondent had "*cash flow issues*" despite stating in footnote [23] of the Decision[17]:

> "Although I accept that many of the assertions of the Respondent's financial status contained in the Respondent's submissions are unsupported in the evidence relied upon by the Respondent in these proceedings."

8. The Deputy President failed to apply basic logic in concluding that the Respondent's purchase of new vehicles did not mean the Respondent had money. Further, the Deputy President erred in concluding that the Respondent was having cash flow issues on the basis that the Respondent financed the vehicles; this conclusion fails logically in all

aspects as it indicates that small business owners have the right to buy outside its means then terminate anyone they want because they now have more bills to pay.

9. The Deputy President ignored all evidence submitted by the Appellant and relied on the allegedly forged and perjured documents from the Respondent. The Deputy President failed to mention the multiple alleged contradictions and lies that the Appellant pointed out in the first instance.

Applicable appeal principles

[29] An appeal under s. 604 of the Act is an appeal by way of rehearing and the Commission's powers on appeal are exercisable only if there is error on the part of the primary decision maker.[18] There is no right to appeal and an appeal may only be made with the permission of the Commission. Section 604(2) of the Act states:

> "Without limiting when the FWC may grant permission, the FWC must grant permission if the FWC is satisfied that it is in the public interest to do so."

[30] As an application for unfair dismissal is brought under Part 3-2 of the Act, this appeal is also one to which s. 400 of the Act applies. Under s. 400, the Commission "must not" grant permission to appeal from a decision in relation to unfair dismissal unless it considers it is in the public interest to do so. The test under s. 400 is "a stringent one."[19]

[31] With s. 604(2) of the Act requiring the Commission to grant permission to appeal if satisfied that it is "in the public interest to do so", the task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[20] 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."[21]

[32] Other than granting permission to appeal on a public interest basis, the grounds for granting permission to appeal are not specified. Considerations which have traditionally been treated as justifying the grant of permission to appeal include that the decision is attended with sufficient doubt to warrant its reconsideration and that substantial injustice may result if refused.[22]

Consideration

Appeal grounds

[33] The appeal grounds are discursive and poorly pleaded, and incorrectly characterise the errors asserted by the Appellant as errors of fact. Properly characterised, the grounds of appeal include alleged errors of law or jurisdictional error. It is necessary to read the appeal grounds in conjunction with submissions filed by the Appellant to understand them. However, the

Respondent has, at all relevant times, been represented by a lawyer and has responded to the essential issues raised in the appeal grounds and other material filed by the Appellant in submissions in the appeal. In the written outline of submissions in support of the Respondent being legally represented it was acknowledged that the Appellant had asserted errors of law in his appeal.

[34] It is only necessary that we deal with appeal grounds 3, 4, 5, and 7. It is convenient to commence with ground 5 concerning the grant of permission for the Respondent to be represented by a lawyer.

Grant of permission for Respondent to be represented by a lawyer – ground 5

Submissions of the parties

[35] In ground 5 of his appeal, the Appellant contends that:

> "The Deputy President showed clear bias in allowing the Respondent to be represented by a lawyer at the hearing, despite no form being filled out notifying that the Respondent would be represented. On the day of the hearing, the Deputy President also failed to ask the Appellant if he objected to the Respondent being legally represented."

[36] In his written submissions in the appeal, the Appellant said that the Deputy President did not ask him whether he objected to the Respondent being legally represented and instead, asked his witness, who had no idea what was going on. The Appellant also said that once this was found out, he was not given an opportunity to object. Further, the Appellant said that if he could have obtained representation without prior approval he would have done so.

[37] Ground 5 is properly characterised as the Appellant asserting that the decision to grant permission to the Respondent to be represented by a lawyer was affected by a denial of procedural fairness, and we have dealt with the matters it raises on that basis.

[38] In relation to the Appellant's contention that he was not notified in advance of the hearing before the Deputy President that the Respondent sought to be represented by a lawyer, we note that the Form F3 Response to the application, filed on 16 January 2023, was blank and information was set out in the form of a submission attached to the Response. Relevantly, the section of the Form F3 requesting details of any representative was blank. The form was electronically signed by Mr Mola. Although Mr Mola is a Lawyer and Director of Brooklyn Lawyers, sections of the Form F3 requesting that the signatory indicate capacity/position, were also blank. Further, the submissions attached to the Form F3 do not indicate that Mr Mola is a lawyer or that he is representing the Respondent.

[39] In relation to the assertion that he was not notified that the Respondent would seek permission to be represented by a lawyer, the file indicates that on 31 January 2023 the Deputy President issued Directions stating that: "The matter is listed for **Hearing** in regard to the genuine redundancy jurisdictional objection at 10.30 am AEDT by **Telephone** on **Wednesday 1 March 2023**" (emphasis in original). The Directions required the Respondent to file and serve outlines of submissions, witness statements and any documents in support of its "*genuine redundancy jurisdictional objection*" and the Appellant to file material in opposition to the objection. Relevantly, the Directions also required that any party seeking to be represented by

a lawyer comply with the Commission's *Practice Note: Lawyers and Paid Agents*, and that this should be done at the earliest possible opportunity.[23] The Directions contained a link to the Practice Note which, in summary, states that a person must give notice that a lawyer or paid agent acts for the person in relation to a matter before the Commission if they provide professional services to the person in relation to a matter including giving legal or other advice, preparing or advising on documents including applications, forms, witness statements and submissions, lodging documents with the Commission or preparing to appear as an advocate. Notice is given by identifying the lawyer in the application or other approved form lodged in the matter or by lodging a Form F53. The notice must also be served on the other party. Notwithstanding that Mr Mola signed the Form F3, and (we infer) also prepared the submission attached to it, neither Mr Mola nor the Respondent filed and served a Form F53 Notice that Mr Mola was commencing to act for the Respondent. Nor, as we have previously noted, did the Form F3 indicate that Mr Mola was lawyer and represented the Respondent.

[40] The transcript records that at the commencement of the telephone hearing before the Deputy President, the following exchange occurred between the Deputy President and a person named Mr Ross, who was present with the Applicant.

> "THE DEPUTY PRESIDENT: Okay. So, Mr Ross, you're appearing for the applicant.
>
> MR ROSS: Yes.
>
> THE DEPUTY PRESIDENT: And, Mr Mola, you're seeking permission to appear for the respondent.
>
> MR MOLA: Correct.
>
> THE DEPUTY PRESIDENT: All right. Is permission opposed for the respondent to be legally represented, Mr Ross?
>
> MR ROSS: Pardon?
>
> THE DEPUTY PRESIDENT: Do you oppose permission for the respondent to be legally represented?
>
> MR ROSS: No.
>
> THE DEPUTY PRESIDENT: Okay. And Mr Mola, do you oppose Mr Ross representing the applicant?
>
> MR MOLA: No."[24]

[41] Mr Mola was then asked by the Deputy President why the Respondent should be granted permission to be represented by a lawyer. Mr Mola's submission was as follows:

> "MR MOLA: KTC – I've been involved in these proceedings from the outset. The (indistinct) employer response (indistinct) the submissions, everything has been (indistinct) in accordance with KTC's instructions. There's no – the circumstances where I've been instructing this matter from the outset – there's no prejudice from the other side. The other side has had the opportunity of getting (indistinct). Those are my submissions.
>
> THE DEPUTY PRESIDENT: All right. Well, the criteria is set out under section 596(2) of the Act in relation to granting permission for a lawyer to represent a party in the proceedings. Do you say that Mr Hussein is in a position to represent the respondent today?
>
> MR MOLA: No.

> THE DEPUTY PRESIDENT: And why is that?
>
> MR MOLA: Because he was under the assumption that I would be representing him today. I've referred to the submissions. I've referred to everything. I guess that's attributed to me in circumstances where I guess (indistinct) and I've done all the prep work. I guess that's the reason why.
>
> THE DEPUTY PRESIDENT: Well, does he have any experience in legal matters?
>
> MR MOLA: No.
>
> THE DEPUTY PRESIDENT: Has he ever appeared in a court or tribunal representing himself or the respondent?
>
> MR MOLA: No."[25]

[42] The Deputy President's decision and reasons in relation to legal representation, were given on transcript immediately after Mr Mola's submission above, as follows:

> "THE DEPUTY PRESIDENT: All right. Well, having regard to the criteria under section 596(2), particularly criteria B whereby it would be unfair not to allow the person to be represented because the person's unable to represent him, herself or itself effectively. I note the submissions of Mr Mola concerning Mr Hussein's ability and experience to represent the respondent today.
>
> It's also apparent having regard to Mr Mola's involvement and some of the particular facts of this matter that there is some complexity to the proceedings and that the matter would be conducted more efficiently with the respondent being granted permission to be legally represented. I, therefore, grant permission for the respondent to be legally represented generally in these proceedings…"[26]

[43] After giving his reasons for granting permission to the Respondent to be represented by a lawyer, the Deputy President then asked Mr Ross: "…*what's your status as an advocate today*?". The following exchange between the Deputy President, Mr Ross and the Appellant then ensued:

> "MR ROSS: My status as an advocate is that of a witness before Nicholas Williams.
>
> THE DEPUTY PRESIDENT: Sorry. You've put on a witness statement?
>
> MR ROSS: Yes.
>
> THE DEPUTY PRESIDENT: All right. So, well, a witness is different to a representative. You seek to speak on his behalf. I'm - - -
>
> MR WILLIAMS: I'm – hold on, Ben. I'll be calling Benjamin Ross as a witness.
>
> THE DEPUTY PRESIDENT: Right. So, you're appearing for yourself, Mr Williams.
>
> MR WILLIAMS: Yes. I'm self-representing.
>
> THE DEPUTY PRESIDENT: Right. So - - -
>
> MR WILLIAMS: I wasn't sure if I'd have to call a witness this early or what was the go with that.
>
> THE DEPUTY PRESIDENT: All right. So, the applicant's self-represented today."[27]

[44] We note that in response to the Directions issued by the Deputy President, the Appellant filed a witness statement made by Mr Benjamin Ross. The Deputy President then had an

exchange with Mr Mola in relation to his objections to the witness statement of Mr Ross, before ruling that it would be admitted, and confirmed that the Appellant wanted to cross-examine all witnesses for the Respondent. Mr Mola confirmed that the Respondent's witnesses could be available by telephone if that was possible, and the Deputy President stated that cross-examination of the Respondent's witnesses by the Appellant would be confined to 15 minutes per witness, unless leave was granted to extend beyond that time, given the confined nature of the issues for determination.[28] The Deputy President did not revisit the matter of permission nor hear from the Appellant in relation to whether he objected to permission being granted.

[45] In his submissions in the appeal the Appellant said that the Respondent did not fill out a form notifying that it would be represented, and on the day of the hearing the Deputy President did not ask if the Appellant objected to Respondent being granted permission to be represented by a lawyer. The Appellant said that he believed that to be represented by a lawyer both parties were required to submit a notice to that effect and that, if he could have obtained legal representation without prior approval, he would have done so. The Appellant also said that he was denied an opportunity to properly consider whether to obtain legal representation because he was not aware in advance of the hearing that the Respondent would seek to be represented by a lawyer.

[46] In relation to the Appellant's submission that the Deputy President demonstrated "*clear bias*" by allowing the Respondent to be represented by a lawyer at the hearing (allegedly without giving the Appellant a chance to object), the Respondent relied on the transcript of the hearing. The Respondent pointed out that the transcript records the following:

- The hearing commenced with the Respondent's solicitor, Mr Mola, seeking permission to appear for the Respondent and Mr Ross indicating that he was appearing for the Appellant.[29] The Appellant was also present.

- The Deputy President asked Mr Ross whether the Appellant opposed the Respondent being legally represented to which he said "*no*".

- Mr Mola then made some submissions as to the matters in s. 596 of the Act, following which the Deputy President considered these matters and made a decision to allow the Respondent, a small business, to be legally represented. The hearing continued.

- Shortly thereafter Mr Ross clarified that he was not appearing for the Appellant (as he had earlier indicated) but rather Mr Ross clarified that he was one of the Appellant's witnesses. Thereafter Mr Williams appeared on his own behalf.

[47] In the Respondent's view, there is no actual or apprehended bias demonstrated by this exchange, the Deputy President considered the matters in s. 596 of the Act and decided to grant permission to the Respondent to be legally represented, and that was a discretionary decision which no appealable error arises from (or has been identified).

[48] A further issue raised by the Appellant is the conduct of Mr Mola in the hearing before the Deputy President. In his written response to the submissions of the Respondent seeking permission to be represented by a lawyer in this appeal the Appellant opposed the Respondent being represented by a lawyer generally, and Mr Mola particularly, on grounds including that

Mr Mola had displayed a lack of respect and professionalism in the hearing before the Deputy President including "*throwing slurs towards the Applicant ... calling him MANIC DEPRESSIVE*". In oral submissions in the appeal Mr Whitbread, who sought permission to represent the Respondent, informed the Full Bench that:

> "…the complaints about my instructing solicitor aren't applicable to myself … and I'm certainly not intending to be unnecessarily adversarial or cast slurs upon the appellant, in the course of this hearing."[30]

[49] The specific example of Mr Mola's conduct in the hearing before the Deputy President given by the Appellant is found in the following exchange between the Appellant and Mr Mola, during which Mr Mola appears to take issue with the Appellant referring to himself in the third person:

> "MR MOLA: Sorry, what's the relevance?
>
> MR WILLIAMS: Well, KTC are claiming that Nicholas wasn't qualified, so he couldn't do jobs himself.
>
> MR MOLA: When you say 'Nicholas', you mean you?
>
> MR WILLIAMS: Yes, Nicholas.
>
> MR MOLA: You're saying that this question is relevant to the redeployment issue, is that right?
>
> MR WILLIAMS: Mm-hm.
>
> MR MOLA: Sorry, what did you say – yes or no?
>
> MR WILLIAMS: Yes, I did. You can lose the attitude, Ash.
>
> MR MOLA: There is no attitude in doing this, and don't get manic depressive here. I'm just talking to you like I talk to anyone else.
>
> MR WILLIAMS: No, that's all right.
>
> MR MOLA: So please just, you know, chill, calm down."
>
> MR WILLIAMS: Commissioner Boyce?
>
> THE DEPUTY PRESIDENT: Yes.
>
> MR WILLIAMS: Is that a yes, objection sustained?
>
> THE DEPUTY PRESIDENT: I'll allow the question."[31]

[50] During this exchange, the Appellant was endeavouring to cross-examine one of the Respondent's witnesses. Given the difficulty facing the Appellant as a self-represented applicant it is understandable that he would have difficulty framing questions in cross-examination as indicated by referring to himself in the third person as "*Nicholas*". There was nothing confusing about the question and no indication that the witness being questioned was confused. Mr Mola was not asserting confusion about the question.

[51] There are also examples of Mr Mola addressing questions to the Appellant of the kind that would be asked if Mr Mola was cross-examining the Appellant while the Appellant is attempting to cross-examine the Respondent's witnesses.[32]

[52] Further, there are examples in the transcript of Mr Mola objecting to questions posed by the Appellant, and rather than waiting for a ruling on the objection proceeding to have a debate with the Appellant. At points the objections are directed at the Appellant rather than seeking a ruling from the Deputy President.[33] There are objections advanced by Mr Mola on the grounds of relevance, in circumstances where the questions being posed by the Appellant to a witness in cross-examination are relevant to the proceedings – for example, Mr Mola takes issue with questions about how many apprentices there were when the Applicant's employment was terminated and what tasks those apprentices undertook.[34] Those questions are relevant to a jurisdictional objection on the grounds of genuine redundancy.

[53] At one point of the Appellant's cross-examination of the Respondent's Director, when the Appellant questioned why the Respondent had only obtained three witness statements, and the Deputy President stated that it was a matter for the Respondent as to how many witnesses it called, Mr Mola interjected with a comment as follows, despite the Appellant indicating his acceptance of what the Deputy President had just said:

> "MR MOLA: Can I just clarify this for everyone's sake. The real limitation to having how many statements that we do have is with the time limitation and that was because I, as a practitioner, with a hundred (indistinct) running at any one time, do not have the capacity to gather every single worker, take their statement and sign them up. Essentially, Mr Williams, if you're going to kind of blame anyone for not having a statement from everyone under the sun, that has to do with me and me alone. Please proceed."[35]

[54] There are entire passages of transcript indicating an ongoing debate between the Appellant and Mr Mola during which Mr Mola provides a running commentary expressing his views on the appropriateness of the questions the Appellant is asking, informs the Appellant that his question has been answered and he should "*move on*",[36] and makes submissions about relevance, without seeking that the Deputy President make a ruling on the matter of relevance. Later, Mr Mola tells the Appellant not to raise his voice and to treat Mr Mola with courtesy[37], in circumstances where Mr Mola has effectively run roughshod over the Appellant with little or no intervention from the Deputy President, other than to observe that matters were deteriorating.[38]

Approach to considering failure to accord procedural fairness and its effect

[55] As a Full Bench of the Commission pointed out in *Construction, Forestry, Maritime, Mining and Energy Union v Ditchfield Mining Services Pty Limited*[39], administrative decision makers, including Members of the Commission, must accord procedural fairness to those affected by decisions they make. What is required to achieve this in any given case should be determined by reference to "*what is required in order to ensure that the decision is made fairly in the circumstances having regard to the legal framework within which the decision is to be made*"[40]. It has also been said that while the benefit to a decision maker of seeing a witness advance his or her case should not be exaggerated, it cannot be dismissed as illusory.[41] In this regard an oral hearing will often assist in the resolution of credibility issues by allowing the decision maker to interact directly with a witness by asking the witness questions, considering answers and having regard to the demeanour of the witness.[42]

[56] Similarly, Gageler and Gordon JJ observed in *Minister for Immigration and Border Protection v WZARH*:[43]

> "Where, however, the procedure adopted by an administrator can be shown itself to have failed to afford a fair opportunity to be heard, a denial of procedural fairness is established by nothing more than that failure, and the granting of curial relief is justified unless it can be shown that the failure did not deprive the person of the possibility of a successful outcome. The practical injustice in such a case lies in the denial of an opportunity which in fairness ought to have been given."[44]

[57] Not every breach of the rules of natural justice will affect a decision. As the High Court said in *Re Refugee Review Tribunal: Ex parte Aala*:[45]

> "Not every breach of the rules of natural justice affects the making of a decision. The decision-maker may have entirely upheld the case for the party adversely affected by the breach; or the decision may have turned on an issue different from that which gave rise to the breach of natural justice. Breach of the rules of natural justice, therefore, does not automatically invalidate a decision adverse to the party affected by the breach. This principle was acknowledged by this Court in *Stead v State Government Insurance Commission* ... when it said that 'not every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial.' Nevertheless, once a breach of natural justice is proved, a court should refuse relief only when it is confident that the breach could not have affected the outcome because '[i]t is no easy task for a court ... to satisfy itself that what appears on its face to have been a denial of natural justice could have had no bearing on the outcome'."[46] (citations omitted)

[58] The alleged denial of procedural fairness asserted by the Appellant in the present case relates to permission for the Respondent to be represented by a lawyer. In *Warrell v Walton*[47] the Federal Court observed in relation to the grant of permission for a party to be represented by a lawyer under s. 596, that:

> "[24] A decision to grant or refuse "*permission*" for a party to be represented by "*a lawyer*" pursuant to s 596 cannot be properly characterised as a mere procedural decision. It is a decision which may fundamentally change the dynamics and manner in which a hearing is conducted. It is apparent from the very terms of s 596 that a party "*in a matter before FWA*" must normally appear on his own behalf. That normal position may only be departed from where an application for permission has been made and resolved in accordance with law, namely where only one or other of the requirements imposed by s 596(2) have been taken into account and considered. The constraints imposed by s 596(2) upon the discretionary power to grant permission reinforce the legislative intent that the granting of permission is far from a mere "*formal*" act to be acceded to upon the mere making of a request. Even if a request for representation is made, permission may be granted "*only if*" one or other of the requirements in s 596(2) is satisfied. Even if one or other of those requirements is satisfied, the satisfaction of any requirement is but the condition precedent to the subsequence exercise of the discretion conferred by s 596(2): i.e., "*FWA may grant permission…*". The satisfaction of any of the requirements set forth in s 596(2)(a) to (c) thus need not of itself dictate that the discretion is automatically to be exercised in favour of granting "*permission*"."[48]

Conclusion in relation to ground 5

[59] While we accept that the decision of the Deputy President to grant the Respondent permission to be represented by a lawyer does not indicate bias, when all of the matters we have identified are considered, it is apparent that the manner in which the Deputy President heard and determined the grant of permission to the Respondent to be represented by a lawyer constituted a failure to accord procedural fairness to the Appellant.

[60] Based on the Directions issued by the Deputy President the Appellant could reasonably have expected that he would be notified in advance of the hearing if the Respondent sought legal representation at the hearing and we accept his submission in this regard. The Appellant

was not notified. As a result, the Appellant had no opportunity to prepare to meet an application for permission, even if he had been given an opportunity to be heard in response to that application.

[61] We observe, on this issue, a direction that submissions on the grant of permission be made "at the earliest opportunity", is a direction with no effect and is discordant with the *Practice Note: Lawyers and Paid Agents* which indicates that the Commission will make a decision on permission prior to a hearing or conference, wherever practical. To do this requires that submissions in support of, and opposed to, permission should be sought prior to a hearing or conference date to enable a decision to be made prior to the hearing or conference. This allows parties to prepare should permission not be granted, but of course does not preclude the Commission from considering an application for permission at the hearing or conference itself should such an application be made at that time.

[62] At the hearing the Appellant was not given an opportunity to be heard in relation to his opposition to the Respondent being represented by a lawyer before the Deputy President made an *ex-tempore* decision to grant permission. On becoming aware of his mistake with respect to Mr Ross' involvement in the hearing, and that the Appellant had not been heard in relation to permission, procedural fairness required that the Deputy President revisit his decision and hear from the Appellant. We also observe that the reasons for the grant of permission do not seem to relate to submissions made by Mr Mola in support of permission being granted. Had the Appellant been given an opportunity to be heard in response to Mr Mola's submission he may have persuaded the Deputy President to refuse permission.

[63] It is also the case that for the Deputy President to have granted permission based on the matter involving complexity, was at odds with his subsequently expressed view that the issues in dispute were confined, justifying the 15-minute limitation that the Deputy President placed on the Appellant's cross-examination.

[64] A decision to grant permission to one party to be represented by a lawyer, in proceedings where the other party is not represented, is a significant matter that has real potential to change the dynamics and nature of the hearing. This heightens the imperative for the unrepresented party to be given an opportunity to be heard in relation to this matter. This includes the unrepresented party being informed of the provisions of s. 596 of the Act as the basis upon which he or she can object. In the present case we cannot conclude that the denial of that opportunity did not make a difference to the outcome of the proceeding.[49] This is not a finely balanced conclusion, given the inappropriate manner in which Mr Mola conducted himself in the course of the hearing.

[65] For reasons which are apparent from the transcript extracts we have set out above, the involvement Mr Mola did not result in the proceedings before the Deputy President being conducted more efficiently. While Mr Mola was entitled to object to questions which were not relevant, he was not entitled to do so in a way that was argumentative or derogatory to the Appellant. Any objections Mr Mola had should have been made to the Deputy President and not directed at the Appellant in any form.

[66] Mr Mola also made objections on the grounds of relevance, to questions which were directly relevant to the matters in dispute. It is apparent that the questions the Appellant was

attempting to ask related to the work the Respondent was performing before and after his dismissal; the identity of employees performing that work; and the qualifications of employees who remained in the Respondent's employment, were relevant to the matters in s. 389. We also note that the questions were asked in circumstances where there was a dearth of evidence of the kind that would be expected from an employer endeavouring to make out a jurisdictional objection on the ground of genuine redundancy and where the Deputy President later concluded that the Appellant had not established that there was a position to which he could have been redeployed.

[67] It was entirely inappropriate for Mr Mola to direct a comment to a party in a proceeding before the Commission, stating that party is "*manic depressive*" or behaving in that way, or to tell that party to "*chill, calm down*" after making such a comment. If (as he informed the Appellant) that is the way Mr Mola talks to other people, he should not conduct himself in that way during a hearing before the Commission while representing a client. The fact that the Appellant told Mr Mola to "*drop the attitude*" could and should have been addressed by Mr Mola seeking the intervention of the Deputy President rather than taking it upon himself to chastise the Appellant about his behaviour. Mr Mola continued his inappropriate behaviour, even after being informed by the Deputy President that he would allow the Appellant some liberty to ask his questions, given that he is self-represented.[50] The Deputy President otherwise made minimal attempts to intervene in the altercations between Mr Mola and the Appellant and hence ensure the proceedings were conducted in a fair and respectful manner.

[68] It is also necessary for us to observe that the cause of the events resulting in the Appellant being denied procedural fairness was the Deputy President's decision to conduct the hearing of the Respondent's objection by telephone. As we have noted, the Directions issued by the Deputy President indicate that he had decided the hearing would be conducted by telephone, before the parties had filed their material. Section 397 of the Act requires that the Commission conduct a conference or hearing in relation to a matter arising under Part 3 – 2 of the Act which concerns Unfair dismissal, if, and to the extent that, the matter involves facts, the existence of which are in dispute. It was clear that the matter did involve disputed facts, from the Form F2 Application filed by the Appellant and the Form F3 Response filed by the Respondent. Both the application and the response were filed before the Directions for hearing were issued.

[69] Section 577 of the Act relevantly requires the Commission to perform its functions and exercise its powers in a manner that is: fair and just; quick, informal and avoids unnecessary technicalities; and open and transparent. While s. 589(1) empowers the Commission to make procedural and interim decisions in relation to how, when and where a matter is to be dealt with, those decisions must be consistent with requirements for the Commission to accord fairness and justice to parties in proceedings.

[70] This method of conducting the hearing was not appropriate. As we have noted, there is no indication that either party requested a telephone hearing in accordance with the Commission's *Practice note: Requests to appear remotely*, and, if there was such a request, there was no apparent basis for the request to be granted given the proximity of the parties to the Sydney office of the Commission[51]. Both parties appeared in the appeal by Microsoft Teams without issue so that, if there was a reasonable basis for a remote hearing to be conducted, there is no reason why it could not have been conducted by video.

[71] The Commission has invested considerable time and resources to ensure that it has technology to conduct hearings by video using Microsoft Teams where this is appropriate, and to provide assistance to remote parties or those who have genuine and reasonable grounds for not attending hearings in person, to participate by video. While we accept that it may be necessary in unusual or emergent circumstances for Commission proceedings to be conducted by telephone, this practice should be avoided in cases of contested hearings particularly where there are disputed facts, and the credit of witnesses is in issue. It is difficult to conceive of an unfair dismissal application where one or other of these considerations is not in play.

[72] The consequences of conducting proceedings by telephone are errors such as that made by the Deputy President in the present case in relation to obtaining agreement for the Respondent to be legally represented from a person who was a witness rather than the applicant in the proceedings. There are also parts of the transcript of the hearing at first instance that are inaudible. This is unsatisfactory in an appeal, much less a hearing at first instance where Members of the Commission are required to make findings of fact which are critical to the rights of parties to proceedings who may rely on the transcript as a basis for findings.

[73] On our reading of the transcript the Deputy President failed to intervene in the verbal altercations between the Appellant and Mr Mola to the point where, on occasions, the Appellant felt compelled to ask the Deputy President to make a ruling or intervene. This was unfair to the Appellant, and it is apparent that it made the conduct of his case unnecessarily difficult. It was clear from the transcript that the ability of the Deputy President to intervene in the proceedings to ensure fairness was impacted by audio difficulties associated with the fact that the hearing was conducted by telephone. Generally, it is the case that telephone hearings make it difficult to control the conduct of parties, or the integrity of the hearing process, because parties engaged in verbal altercation by telephone may not appreciate attempts being made by the Member hearing the matter to intervene to stop the altercation. A video hearing provides an immediate means of intervening because the parties have a visual cue that the member is speaking and that they should cease their altercation. Further, a Member conducting a proceeding by telephone is unable to visually check that there are no other persons in the room when a witness is giving evidence or to take steps to minimise the risk of witnesses being coached via electronic means.

[74] We uphold ground 5 of the appeal.

Reasonableness of redeployment – grounds 3 and 4

[75] By grounds 3 and 4 of the appeal, the Appellant asserts that the Deputy President erred in finding that the Appellant did not show there was an available position to which he could have been redeployed and in assuming that there was no role available in the absence of evidence to that effect from the Respondent. While these grounds are put based on alleged errors of fact, properly considered, they involve error in the approach taken by the Deputy President to considering the evidence and the evidentiary onus of establishing the matters in s. 389. This proposition was put to the Respondent's representative by the Full Bench in the appeal.[52]

[76] It is clear from paragraph [34] of the Decision that the Deputy President considered that the Appellant bore the onus of establishing that it would have been reasonable in all the

circumstances for the Respondent to redeploy him within its enterprise, or at least that the Appellant bore the onus of identifying positions that were available and that he could have redeployed to, and applied this approach to answering the question posed by s. 389(2) of the Act. In support of this approach, the Deputy President, at [31] and [32] of the Decision, cited passages from the Full Bench decisions in *Teterin v Resource Pacific Pty Ltd t/a Ravensworth Underground Mine*[53] and *Jain v Infosys Limited*[54] in relation to "*the interaction between s. 389(2) and s. 385(d) of the Act*".

[77] *Teterin* concerned an appeal by 12 employees against a decision by a Deputy President of the Commission to dismiss their unfair dismissal applications on grounds including that the dismissals were cases of genuine redundancy. In the decision at first instance the Deputy President framed the question of whether it was reasonable for the applicants to be redeployed for the purposes of s. 389(2) by stating that: "*The Applicants must establish this for their dismissals to be decided to be not genuine redundancies.*"[55] The grounds of appeal included that the Commission erred by approaching the matter as if the appellants (the dismissed employees) bore the onus of demonstrating that it would have been reasonable for them to be redeployed within the respondent's enterprise.

[78] The Full Bench in *Teterin* carefully distinguished between a legal and an evidentiary onus, observing that the legal onus or burden of persuasion affects the outcome of cases in which the trier of fact thinks the plaintiff's and the defendant's positions equi probable, and is a tie-breaker.[56] This was contrasted with the evidentiary onus, or burden of persuasion, being "*the burden of adducing or pointing to sufficient evidence to raise an issue for determination by the court*".[57]

[79] The Full Bench in *Teterin* went on to state that, in most of the decisions relied upon by the appellants to support the proposition that in the case of jurisdictional objections based on s. 389 it will be the respondent who bears the onus, it is apparent that an evidentiary onus or something analogous thereto was being referred to.[58] The Full Bench did not find that the respondent bore no evidentiary onus, but rather concluded that, to the extent the respondent did bear an evidentiary onus with respect to s. 389(2), it discharged that onus, having called extensive evidence concerning the steps it had taken to explore redeployment opportunities and why the dismissed employees could not be redeployed.[59]

[80] The Full Bench identified that the complaint of the appellants concerning onus turned on a conclusion by the Deputy President to the effect that they had not put forward enough evidence to allow a finding to be made that it would have been reasonable to redeploy them to work being done by contractors. The Full Bench said that those paragraphs cannot be read as relieving the respondent of any evidentiary onus which it bore, since it had discharged that onus.[60] The Full Bench concluded that the authorities referred to by the appellants did not stand for the proposition that the respondent to an unfair dismissal remedy application bears the legal onus with respect to matters in s. 389(2) of the Act. The following passage (cited by the Deputy President) in the present appeal, must be read in the context of the earlier conclusions:

> "The manner in which the Deputy President expressed his conclusions may be justified by reference to s.385(d), which requires that for a person to have been unfairly dismissed, the Commission must be satisfied that the dismissal was *not* a case of genuine redundancy. It must follow that the applicant in an unfair dismissal case bears the risk of failure if the state of satisfaction required by s.385(d) cannot be reached. If the Deputy President considered the evidence insufficient to allow him to determine whether

> redeployment was reasonable under s.389(2), then (there being no issue with respect to the s.389(1) matters) he could not be satisfied that the dismissals were not genuine redundancies, meaning that the applications before him had to be dismissed."[61]

[81] The Full Bench also observed that its review of the evidence led it to conclude that the respondent did in fact establish that redeployment of the appellants to work performed on overtime by contractors would not have been operationally practicable, and therefore would not have been reasonable, notwithstanding the evidence of the appellants that they had the skills and experience to do that work.[62]

[82] The Full Bench decision in *Jain*, also cited by the Deputy President in the decision subject of this appeal, draws the same distinction. Paragraph [37] of *Jain* which was cited by the Deputy President in the present case, must be read in the context of paragraph [36] as follows:

> "[36] If a Respondent relies upon the dismissal as being a case of genuine redundancy, the Respondent would be expected to adduce sufficient evidence concerning the matters which arise for consideration in s. 389. This is because it bears the risk that without evidence the Commission might not be satisfied that the dismissal was a case of genuine redundancy. In that sense the Respondent to an unfair dismissal remedy application involving an allegation of genuine redundancy bears an evidentiary onus or something analogous thereto in respect of the matters in s. 389.
>
> [37] In most cases the question of where an evidentiary onus (or something analogous to it) 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 that matter were given? The evidentiary onus will generally be the party that will fail in that event."

[83] It is necessary to observe that an objection to an unfair dismissal application on the ground that the dismissal is a case of genuine redundancy is not strictly a jurisdictional objection. Although termed an objection, if made out, an objection on the ground of genuine redundancy is a complete defence for an employer against an unfair dismissal application and operates by removing such an application from the scope of the unfair dismissal provisions in the Act. Neither *Teterin* nor *Jain* are authority for the proposition that the applicant in an unfair dismissal application, which also involves the question of whether the dismissal was a case of genuine redundancy, bears an evidentiary onus to establish that the objection should fail. Rather, a Respondent claiming the defence is generally expected to put on evidence that is at least sufficient to raise a genuine redundancy objection for determination by the Commission. To the extent that the concept of onus operates with respect to unfair dismissal application, there is an onus akin to a legal onus borne by every applicant for an unfair dismissal remedy to establish the ultimate conclusion that the dismissal was unfair. In the event that an objection on the ground of genuine redundancy fails, an application may still fail if the Commission is not satisfied that the dismissal was unfair, because it was harsh, unjust or unreasonable.

[84] In the present case, it cannot be said that the Respondent has adduced sufficient evidence concerning the matters which arise for consideration in s. 389(2). In those circumstances, the Deputy President's observations at [34] indicate an erroneous approach to the extent that he has concluded that that the Appellant failed to adduce evidence of the reasonableness of redeployment without considering whether the Respondent's evidence was sufficient to raise the matters in s. 389(2) for consideration. It is also the case that while the Appellant may not have adduced evidence about particular roles he could have been redeployed to, he did give evidence about his skills and the work he could have performed given the resignation of Mr

Ross. That evidence was not properly weighed given the approach adopted by the Deputy President. In this regard we note that the Respondent did not lead evidence of the kind that would be expected of an employer seeking to put in issue that the Appellant's dismissal was a case of genuine redundancy. There was little evidence about matters such as the changed operational requirements that led to the Appellant's dismissal, the numbers and classifications of employees before and after the dismissal, and how work was to be reorganised and the duties performed by the Appellant redistributed or no longer undertaken. Matters such as these should be relatively easy for a small business to identify particularly when it is represented by a lawyer in a hearing. While the Respondent made submissions about these matters, it is arguable that there was not a sufficient basis for the Deputy President to make findings in relation to these matters and the findings do not refer to evidence in the proceedings.

[85] We are also of the view that it is difficult to conclude that it would not have been reasonable in the circumstances for a person dismissed on the ground of redundancy to be redeployed in the employer's enterprise, in circumstances where there is no evidence of any discussion being held with the employee about redeployment. Counsel for the Respondent conceded that there was no evidence of such discussions before the Deputy President.[63]

[86] The finding in relation to redeployment not being reasonable was foundational to the Respondent's jurisdictional objection being upheld, and as a consequence, the Deputy President's Decision is attended with doubt. We uphold appeal grounds 3 and 4 – albeit for different reasons than those pleaded by the Appellant – on the basis that the approach adopted by the Deputy President was inconsistent with Full Bench authority and constitutes a failure to properly exercise jurisdiction as a required by s. 389 of the Act.

Meaning of genuine redundancy – ground 7

[87] While framed as an allegation of bias, ground 7 is another ground of appeal which raises an alleged error in the approach taken by the Deputy President to determining whether the dismissal was a case of genuine redundancy, based on the matters in s. 389(1). It is probable that the Deputy President's erroneous approach to the question of which party carried the evidentiary burden in relation to the matters in s. 389(2) affected his consideration of the matters in s. 389(1). In this regard, we note that the Deputy President appears to have accepted that there was insufficient evidence before him in relation to the matters in s. 389(1), evidenced by his observation in a footnote to paragraph [18](h) – that assertions of the Respondent's financial status in its submissions are unsupported by the evidence it relied on in the hearing. We are of the view that the Deputy President's conclusions in relation to the matters in s. 389(1) are unsound and that ground 7 of the appeal should also be upheld.

Obligation to consult

[88] It was common ground between the parties that the *Electrical, Electronic and Communications Contracting Award 2020* (the Award) applied to the Appellant in relation to his employment with the Respondent. There was a dispute as to whether the Respondent consulted the Appellant in relation to his position being made redundant. In the Decision the Deputy President acknowledged the extensive submissions the Appellant made asserting a failure in this regard. The Deputy President then considered the consultation obligation under the Award noting that clause 27 of the Award requires consultation after an employer "*makes*

a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees". Clause 27.5 of the Award provides that:

> "27.5 In clause 27 significant effects, on employees, includes any of the following:
>
> a) termination of employment; or
> b) major changes in the composition, operation or size of the employer's workforce or in the skills required; or
> c) loss of, or reduction in, job or promotion opportunities; or
> d) loss of, or reduction in, job tenure; or
> e) alteration of hours of work; or
> f) the need for employees to be retrained or transferred to other work or locations; or
> g) job restructuring."

[89] In relation to whether there had been a "*major change*" in the present case, the Deputy President found as follows:

> "[26] It has been said that reference to the plural "employees" rather than "employee" in similarly worded clauses does not capture individual redundancies on the basis that individual redundancies do not constitute a "major change" to the Respondent's operations that impact upon a collective of employees.
>
> [27] In this case, there was only one redundancy (i.e. the Applicant's role) in a small business of less than 10 employees. I do not accept, on the evidence before me, in the circumstances of this case, that s.389(1)(b) of the Act is enlivened for consideration in these proceedings. In this regard, I find that, on the terms of clause 27 of the Award, by reference to the case law set out in this decision:
>
> a) The redundancy of the Applicant's role in the Respondent's business:
>
> - was not a "major change" (i.e. the Respondent's Director picked up work allocated to the warranty repair work division (albeit with assistance from other employees from time to time)); and
>
> - did not have "significant effects" upon the Respondent's remaining employees on an individual or collective basis (i.e. there is no evidence of any effects let alone significant effects flowing to any of the Respondent's employees arising from the redundancy of the Applicant's role with the Respondent).
>
> b) The Respondent has satisfied its Award obligations as to consultation concerning the Applicant's redundancy in that no Award consultations obligations arise for determination in these proceedings."

[90] Although there was no specific ground of appeal concerning the Respondent's obligation to consult as provided in s. 389(1)(b), the Appellant raised an alleged failure by the Respondent to consult in his submissions at first instance and in the appeal. The Appellant also took issue in his submissions in the appeal, with the approach the Deputy President took to answering the question posed by s. 389(1)(b).

[91] Notwithstanding the failure of the Appellant to advance a ground of appeal on this point, it was dealt with in oral submissions in the appeal and Counsel for the Respondent accepted that the approach taken by the Deputy President was not advanced by either party during the hearing and that the Deputy President did not place the parties on notice that it was under contemplation.[64] In our view the approach taken by the Deputy President to s. 389(1)(b)

constitutes a further failure to accord either party procedural fairness. The question of whether the Respondent complied with an obligation to consult with the Appellant about the redundancy was a significant matter in the Deputy President's decision to uphold the Respondent's objection to the Appellant's unfair dismissal application.

[92] We observe, without deciding, that the approach taken by the Deputy President was arguably erroneous, in circumstances where the Respondent did not adduce sufficient evidence to establish the basis for its objection generally, much less an argument that it did not advance.

[93] The "*case law set out in this decision*" to support the conclusion reached by the Deputy President is a footnoted reference to the decision of a Full Bench of the Commission in *Tsiftelidis v Crown Melbourne Limited* (*Tsiftelidis*)[65] and a quote from the judgment of White J in *Port Kembla Coal Terminal v CFMMEU*[66]. Those cases do not establish a decision rule to the effect that in any case where there is a single redundancy, or a proportionately small number of redundancies, the consultation term in a modern award or an enterprise agreement dealing with major change will not apply.

[94] *Tsiftelidis*, concerned an appeal against a decision of a member of the Commission which determined that the dismissal of an employee from his position as Sports Consultant was a case of genuine redundancy. The Full Bench in that case considered whether the employer had complied with its obligation under an enterprise agreement to consult about the redundancy pursuant to s. 389(2)(b) of the FW Act. Clauses 24 and 33 of the relevant enterprise agreement in that case imposed obligations on the Respondent to consult in relation to certain matters and it was noted by the Full Bench that those clauses of the agreement, and the consultation obligations that they imposed on the Respondent, were at the heart of the appeal.

[95] In short compass, clause 33 of the relevant agreement provided for specific consultation obligations with respect to redundancy and required that the Company consult with a relevant union prior to redundancies taking effect. The Full Bench accepted that the consultation pursuant to that clause occurred. Clause 24 dealt with "*Change Consultation*" and required the establishment of a consultative committee to discuss matters of a "*collective nature*" which were defined as matters affecting a group of employees covered by the Agreement. The clause also contained provisions for the introduction of major change, which was defined in similar terms to those contained in the relevant Award in the present case.

[96] The Full Bench applied established principles relevant to the construction of the terms of enterprise agreements and concluded that in the context of the provisions of clause 24 relating to the consultative committee having a purpose of discussing collective matters and the use of the plural "*employees*" throughout the clause, the additional consultation requirements in clause 24 did not apply to individual redundancies on the basis that they "*do not constitute a major change to the Respondent's operations that impact on a collective of employees.*"[67]

[97] In *Port Kembla*, three employees, who were dismissed by Port Kembla Coal Terminal Ltd (Port Kembla) by way of forced redundancies, sought relief in the Federal Court alleging Port Kembla had contravened s. 50 of the FW Act by failing to consult the Union and the affected employees in relation to a major change and redundancies as required by clauses 7 and 13.5 of the *Port Kembla Coal Terminal Limited Enterprise Agreement 2012-2015*. One of the employees further alleged that the Employer had contravened ss. 340 and 346 of the FW Act

on the basis that adverse action was taken because he was an officer or member of a Union and organised and promoted a lawful activity for and on behalf of the Union.

[98] The consultation provision of the enterprise agreement in that case, required consultation with employees where the employer was "*considering introducing a major change in production, program, organisation, structure, technology, shift arrangements, work organisation or the level of outsourcing in relation to its enterprise*" where the change was likely to have a detrimental or significant impact on employees. The relevant clause went on to provide that:

> "7.6. Significant change or effect may include but is not limited to:
>
> a. major changes in the composition, operation or size of the Company's workforce; or
>
> b. the skills required; or
>
> c. the significant restructuring of work organisation; or
>
> d. proposals by the Company to outsource services or contract out services currently provided by Company Employees.
>
> 7.7. The above definition seeks to illustrate that the changes requiring extensive consultation generally need to have broad impacts and be likely to affect a significant part of the Company's operations or affect Employees' working arrangements."

[99] The agreement also required a further consultative process for forced redundancies. It was argued before the Full Court of the Federal Court that the consultation term was not engaged in the circumstances because the "*change*" that involved the abolition of the positions of the 3 employees was not a major change within the meaning of that provision. It was noted by Jessup J that this argument was put at first instance but was rejected. At [182], Jessup J noted that the primary Judge characterised the change as a major one for two reasons:

> "The first (in the first and second reasons) would have it that the "change" was a change in the Company's approach to a situation which required a reduction in manning levels. Here the change could be described as major because of the importance of the change in approach, however many employees may have been involved. The second (in the third, fourth and fifth reasons) would look to the fact that one or more forced redundancies was involved in what the Company did, his Honour taking the view, it seems, that even one forced redundancy was to be regarded as a "major change".

[100] At [186] – [190], Jessup J considered that the primary Judge erred in his reasoning as follows:

> "186 Commencing with the first of the two ways in which his Honour characterised those circumstances, I do not agree that a "change" of this kind would amount to a change to "production, program, organisation, structure, technology, shift arrangements, work organisation or the level of outsourcing". Only by a very strained reading of the words could the change identified by his Honour be so described. On appeal, counsel for the respondents submitted that the change was to 'organisation', but, save to propound the point, they really advanced no focussed argument as to how it was so. The change identified by his Honour was not, in my view, a change in organisation.
>
> 187 As to the second of the two ways in which his Honour characterised the circumstances leading to the termination of the employments of these three employees, again I do not, with respect, agree that the occurrence of a 'forced redundancy' makes the underlying, or corresponding, change a 'major' one. If many employees were to be made redundant, there may well have been a major change with which

> those redundancies were associated, but the size and importance of the change would have to be assessed by reference to facts which went beyond, although they may include, the facts of the redundancies. In the present case, it is enough to reiterate that the forced redundancy of three employees out of a workforce of about 98 did not of itself constitute a major change within the meaning of cl 7.1.
> …
>
> 190 …The primary Judge made no findings of the kind or detail that would be necessary to justify the conclusion that the impact upon other employees of the redistribution of the duties formerly performed by Mr Giddings and Mr Rosewarn, to the extent that there was, or was to be, any such redistribution, amounted to a "major change" within the meaning of clause 7.1 of the Agreement. On appeal, counsel for the respondents undertook no analysis of the evidence at trial sufficient for the Full Court to make its own findings on this subject."
>
> [emphasis added]

[101] White J agreed with the analysis of Jessup J in respect of the construction of clause 7, subject to 2 qualifications as follows:

> "498 The first qualification concerns the meaning of the term 'work organisation' in cl 7.1(a). That is a term of variable meaning. At its widest, it could mean something like "the way in which things are done" in PKCT's terminal operations, including its employee allocations. On that construction, the change implemented by PKCT may have amounted to a change in 'work organisation' because there was some change in the way it would conduct its operations. However, it is not necessary to express a concluded view about this because, even if that be an appropriate construction, it is difficult to characterise the change in the way in which PKCT organised the way things were done in its operations in the present case as 'major'. This is especially so taking into account the elaboration of the term 'significant change' (which seems to be regarded as a synonym for 'major change') in cll 7.6 and 7.7.
>
> 499 The second qualification is that I do not regard a simple comparison between the number of employees to be terminated, and the number of the employees in its workforce overall, for which PKCT contended, as being necessarily conclusive of the question of whether a change is 'major'. Much may depend on the circumstances of a given case including, for example, the seniority and importance of the employees in PKCT's operations, the extent to which PKCT's employees work in an integrated or disconnected manner; the consequences for the continuing employees of the redundancies and consequent terminations, as well as other matters. In the present case, the primary Judge did not rest his conclusion on an analysis of this kind. Nor did the applicants contend, in the manner of a notice of contention and with references to the evidence, that the Judge should have made findings on these matters in relation to their redundancies."
>
> [emphasis added]

[102] In his submissions in the appeal the Appellant said that there was no consultation or discussion with him about redeployment before the decision to terminate his employment was made and no real consideration of options for redeployment. The Appellant also took issue with the Deputy President's conclusion that the consultation term in clause 27 of the Award did not apply to the dismissal of a single employee. It is the Appellant's submission that the Respondent failed to meet the consultation requirement under the Award as there was no notification or meeting conducted by the Respondent when it decided to make his position redundant and restructure the business.

[103] Further, the Appellant submitted that the Deputy President was factually wrong in his analysis as the Award does not state that a major change needs to affect the employer's business but rather it is the effect the change has on employees that matters. The Appellant contends that his termination had a major effect on him and, in his view, affected other employees relying on

the Deputy President's statement that other employees "*assisted*" in the Appellant's duties after his dismissal. The Appellant also contended that this shows that multiple people were required to perform his role and that the Respondent has not stopped doing warranty repair work and as a result, his position was not redundant. Further, the Appellant contended that there was no evidence submitted to the Commission to demonstrate that the Respondent had on-going poor cash flow and made a decision to limit warranty repair work, as was indicated by the footnote in relation to the Respondent's evidence.

[104] In relation to the consultation provision under clause 27 of the Award the Respondent submitted that the Deputy President was correct in identifying that the Appellant's redundancy was not a major change and that it did not have significant effects upon employees. The Respondent noted the Deputy President's factual findings at [27] of the Decision that there was only one position affected by redundancy (i.e. the Appellant's role) and that this was neither a "*major change*" nor had "*significant effects*" upon the Respondent's employees. As such, in the Respondent's view, clause 27 of the Award was not enlivened and there was no consultation obligation to comply with for the purposes of s. 389(1)(b) of the Act.

[105] The Respondent submitted, in line with the Deputy President's finding, that the Respondent's Director, Mr Hussein, decided to reduce the amount of warranty repair work the Respondent performed. This meant that the Appellant's position was no longer required and to the extent the Respondent was going to continue to perform the warranty repair work that the Appellant performed, Mr Hussein would largely absorb this himself. In the Respondent's view that is the "*change*" that it implemented that affected the Appellant's position. The Respondent also submitted that Mr Ross electing to leave is not an effect that is a result of the change in the way warranty repair work is done; it is a change that occurred because of Mr Ross' decision to leave. It is the Respondent's submission that there was no factual error, let alone a significant one, in the Deputy President's approach to determining whether there was a major change with significant effects.

[106] The Respondent also submitted that the Appellant's assertions regarding the meaning of "*employee*" versus "*employees*" are similarly misguided. As in *Tsiftelidis*[68] to which the Deputy President referred to at [26], clause 27 of the Award refers throughout to the effects that major changes may have upon "*employees*"; that is, more than one employee. Clause 27 does not capture the Appellant's individual redundancy as it was not a "*major change*" to the Respondent's organisation, structure or technology likely to have significant effects on employees. The Deputy President's determination of whether there was a major change and whether it had significant effects were questions of fact and degree. The Respondent contended that the Appellant has not demonstrated that there was any significant error in the Deputy President's factual findings at [27] of the Decision.

[107] For present purposes we make the following observations. *Firstly*, both *Tsiftelidis* and *Port Kembla* involved consultation terms that were unique and the agreements in those cases contained other related obligations to consult employees that provided context for the construction of consultation obligations in those terms. *Secondly*, while the terms in those cases bear similarities to the term in the Award in the present case, there is no Full Bench authority in relation to the applicability of the approach or the construction of the relevant consultation terms in *Port Kembla* and *Tsiftelidis* in the context of the consultation term in modern awards or agreements including the model consultation term. *Thirdly*, both cases involved

consideration of the particular facts and circumstances in the enterprises concerned, which went beyond the redundancies.

[108] We note that at [21] the Deputy President acknowledged that the Applicant made extensive submissions asserting a failure by the Respondent to consult with him about the redundancies. In our view, contrary to the Respondent's submissions, it is arguable that there was insufficient evidence for the Deputy President to make the findings in [27] and it appears that the finding is based on a numerical analysis of the number of persons the Respondent employed and the fact that the Appellant's role was the only one made redundant without considering whether there was evidence to establish that any changes in the organisation of work were, or were not, significant. For present purposes it is sufficient to note that the cases cited by the Deputy President do not establish a decision rule to the effect that, where there is a single redundancy or a relatively small number of redundancies, a major change that is the subject of an obligation under a modern award or enterprise agreement will not arise. For example, it may be that a single redundancy in a relatively small business does bring about a significant change in the operation of that business with respect to remaining employees.

[109] We are also of the view that the failure of the Deputy President to place the parties on notice that he was considering answering the question posed by s. 389(1)(b) by reference to the approach in *Port Kembla* and *Tsiftelidis* deprived the Appellant of an opportunity to put his case in opposition to that position, and the Respondent to advance arguments as to why the facts in the case should result in the same finding being made. Given the fact that there is no specific appeal ground in relation to this matter and the lack of properly informed submissions on the point, it is neither necessary nor desirable that we consider this matter further.

Conclusion and disposition of appeal

[110] We have read the Decision a whole and considered the materials and submissions filed by the parties. The failure of the Deputy President to accord the Appellant procedural fairness in relation to the grant of permission for the Respondent to be represented by a lawyer and to accord both parties procedural fairness in relation to his approach to the question posed by s. 389(2) and to deal with the application in terms of the jurisdiction conferred on the Commission, have caused an injustice to the Appellant. We are satisfied that it would be in the public interest to grant permission to appeal.

[111] Given that the denial of natural justice was in relation to a significant matter – permission for the Respondent to be represented by a lawyer – we are not satisfied that this had no bearing on the outcome of the Respondent's objection being upheld and the Appellant's application for an unfair dismissal remedy being dismissed. The denial of procedural fairness is compounded by conduct of the Respondent's lawyer in the proceedings before the Deputy President and the apparent failure of the Deputy President to manage the additional unfairness visited on the Appellant because of that conduct. Further, the approach the Deputy President took to considering the matters in s. 389 is erroneous and this constitutes a failure to exercise jurisdiction in the manner provided for in the Act.

[112] We therefore Order as follows:

1. Permission to appeal is granted;

2. The appeal is upheld in relation to grounds 5, 3, 4 and 7; and
3. The Deputy President's decision in [2023] FWC 881 is quashed.

[113] The matter will be remitted to another Member of the Commission to hear and determine the Respondent's objection to the Appellant's unfair dismissal application. We are also of the view that it is appropriate to afford the parties an opportunity to participate in a Conciliation Conference conducted by a Member of the Commission, to avoid the time and expense of the matter being the subject of a further hearing. The parties will be contacted in relation to this process.

VICE PRESIDENT

Appearances:

Mr N Williams (the Appellant) appeared for himself.
Mr M Whitbread, instructed by Ash Mola of Brooklyn Lawyers, appeared with permission for the Respondent.

Hearing details:

2023.
Melbourne (via Microsoft Teams):
7 June.

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[1] [2023] FWC 881.

[2] Appellant's submission dated 1 June 2023, in response to Respondent seeking to be represented by a lawyer at the hearing of the appeal.

[3] (1994) 34 NSWLR 155.

[4] *JJ Richards & Sons Pty Ltd v Transport Workers' Union of Australia* (2010) 202 IR 180; [2010] FWAFB 9963 at [95]; *Mermaid Marine Vessel Operations Pty Ltd v Maritime Union of Australia* (2014) 241 IR 35; [2014] FWCFB 1317 at [17]; *C Ozsoy v Monstamac Industries Pty Ltd* [2014] FWCFB 2149 at [21] - [25]; *Perry v Rio Tinto Shipping Pty Ltd* [2016] FWCFB 6963 at [11].

[5] Cited in *Perry v Rio Tinto Shipping Pty Ltd* [2016] FWCFB 6936.

[6] Transcript of Proceeding on 7 June 2023 at PN41.

[7] Decision [18] (e).

[8] Decision [18] (h) footnote 22.

[9] [2012] FWAFB 5241.

[10] [2010] FWAFB 4125

[11] Decision at [30].

[12] [2014] FWCFB 4125.

[13] [2014] FWCFB 1495.

[14] Op. cit. at [31(2)].

[15] Op. cit. at [35].

[16] PR761089.

[17] We note that the correct reference is to footnote 22.

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

[19] Coal & Allied Mining Services Pty Ltd v Lawler [2011] FCAFC 54, 192 FCR 78, 207 IR 177.

[20] 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].

[21] [2010] FWAFB 5343, 197 IR 266 at [24] – [27].

[22] Also see CFMEU v AIRC (1998) 89 FCR 200; and Wan v AIRC (2001) 116 FCR 481.

[23] Directions issued by Deputy President Boyce 31/01/23 Appeal Book page 56.

[24] Transcript of proceedings 1 March 2023 PN1 – 10.

[25] Ibid PN12 – 20.

[26] Ibid PN21 – 22.

[27] Transcript of proceedings 1 March 2023 PN27 – PN32.

[28] Ibid at PN49, PN78.

[29] Ibid at PN1 – PN6.

[30] Transcript of appeal PN17.

[31] Ibid PN194 – 208.

[32] Ibid PN227 – 231 when Mr Mola asks the Appellant whether he had a particular license and informs him that he can ask his questions because it is not going to do anything.

[33] Ibid PN137 – 142; PN168 – 182.

[34] Ibid PN168 – 182.

[35] Ibid at PN263.

[36] Ibid at PN303,

[37] Ibid at PN375, 377.

[38] Ibid at PN379.

[39] [2019] FWCFB 4022.

[40] *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 [30] per Kiefel CJ, Bell and Keane JJ.

[41] Ibid at [44] citing *Fox v Percy* (2003) 214 CKR 118 at 125 – 127.

[42] Ibid at [41] citing the judgement of Nicholas J in *WZARH v Minister for Immigration and Border Security* (2014) 230 FCR 130 at 148 [57].

[43] (2015) 256 CLR 326 at [59] – [61].

[44] Ibid at [59] – [61].

[45] (2000) 204 CLR 82.

[46] Per McHugh J at [103].

[47] *Warrell v Walton* (2013) FCA 291; (2013) 233 IR 335.

[48] Ibid at [24].

[49] *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145.

[50] Ibid PN214.

[51] The Respondent is located at Chipping Norton and the Appellant at Macquarie Fields.

[52] Transcript of appeal PN202 – 211.

[53] [2014] FWCFB 4125.

[54] [2014] FWCFB 5595.

[55] Op. cit. at [8].

[56] Ibid at [25] citing *Cross on Evidence* Australian Edition, Service 167 - May 2014 at [7010].

[57] Citing *Sidhu v Van Dyke* [2014] HCA 19 at [63] per French CJ, Kiefel, Bell and Keane JJ.

[58] Ibid at [27] and [29].

[59] Ibid at [30].

[60] Ibid at [31].

[61] Ibid at 32(2).

[62] Ibid at [32](3) and [34].

[63] Transcript of appeal PN196 – 200.

[64] Transcript of appeal PN215.

[65] [2016] FWCFB 4675 at [33].

[66] (2016) 248 FCR 18; (2016) FCAFC 99.

[67] Op. cit. at [33].

[68] [2016] FWCFB 4675.