



# DECISION

*Fair Work Act 2009*  
s.604—Appeal of decision

**Vathana Pen**

v

**Octopus Fishing No.2 Pty Ltd**  
(C2023/6614)

DEPUTY PRESIDENT BEAUMONT  
DEPUTY PRESIDENT O'KEEFFE  
COMMISSIONER LIM

PERTH, 14 DECEMBER 2023

*Appeal against decision [\[\[2023\] FWC 2610\]](#) of Commissioner Schneider at Perth on 10 October 2023 in matter number U2022/6436 – permission to appeal granted – appeal upheld.*

## 1 Introduction and factual background

[1] Mr Vathana Pen (the **Appellant**) has applied under s 604 of the *Fair Work Act 2009* (Cth) (the **Act**) for permission to appeal against a decision of Commissioner Schneider issued on 10 October 2023 (the **Decision**)<sup>1</sup> and a subsequent order issued (the **Order**).<sup>2</sup>

[2] The following outlines the context to the appeal presently before us.

[3] On 18 June 2022, the Appellant applied to the Commission for an unfair dismissal remedy pursuant to s 394 of the Act. He had worked in the business of Octopus Fishing No.2 Pty Ltd (the **Respondent**) since April 2021 as a deckhand.

[4] On 30 June 2022, the Respondent filed a Form F3 – Employer response to unfair dismissal application, with the Commission. In its response, the Respondent raised a jurisdictional objection that the Appellant was not dismissed from his employment. In its materials filed on 28 October 2022, it maintained that objection and, in addition, pressed that the Appellant had not completed the minimum employment period.

[5] Directions were issued at first instance on 14 October 2022 and 19 October 2022. Both sets of directions referred to the filing of materials in respect of the jurisdictional objection concerning the minimum employment period. Further, the Notices of Listing issued on 14 October 2022 and 19 October 2022 stated that the hearing was listed to determine the objection that the Appellant (applicant) had not met the minimum employment period in accordance with s 383 of the Act.

[6] On 21 November 2022, a further Notice of Listing was issued for a hearing on 25 November 2022. It stated that the matter was listed for a hearing of the evidence by video using Microsoft Teams before the Commissioner and closing submissions would be made in writing.

[7] At the commencement of the hearing on 25 November 2022, the Commissioner expressed that the issue to be addressed was the minimum employment period.<sup>3</sup> In that first part of the hearing, the Respondent's legal representative submitted that the Respondent considered the primary jurisdictional issue was that there had not been a dismissal and that it was intending on providing a closing submission in relation to that point.<sup>4</sup> The Respondent's representative contended that it seemed to him that on the material available to the Commissioner, the Commissioner would be 'able to determine that issue',<sup>5</sup> noting that if the Commissioner was to find there was regular and systematic employment with a reasonable expectation, it might be unnecessary to hold a hearing on valid reason and procedural fairness, where there was a discrete issue around the dismissal.<sup>6</sup>

[8] The Commissioner responded to the Respondent's submission observing it would depend on where the parties advanced in relation to the issue (presumably the minimum employment period) and that there was substantial material already filed that did address the 'no dismissal' point.<sup>7</sup> The Commissioner informed the parties that he would potentially be open to looking at that separately (presumably the dismissal issue) before going to a full hearing, but he would see where the matter got to before him on that day (the day of the hearing).<sup>8</sup>

[9] On 10 October 2023, the Commissioner issued the Decision, which addressed the issue of whether the Appellant had been dismissed. This is notwithstanding that the directions issued, the Notices of Listing and the introductory remarks at the commencement of the hearing, informed that parties that the issue to be determined was whether the Appellant had met the minimum employment period.

[10] In his Decision, the Commissioner found that the Appellant's termination was not at the initiative of the Respondent and dismissed the Appellant's application for an unfair dismissal remedy.

[11] By a Notice of Appeal dated 30 October 2023 (the **Notice**), the Appellant made an application to appeal the Decision and the related Order.

[12] On 7 December 2023, prior to the hearing, the Full Bench informed the parties that the matter would be listed for a hearing regarding permission to appeal and merits. The parties were further advised that the provisional view of the Full Bench was that the Decision disclosed an arguable case of appealable error in relation to a denial of procedural fairness. The parties were referred to the procedural aspects of the matter, as traversed at paragraphs [5] to [7] of this decision.

[13] On 12 December 2023, the legal representative for the Respondent wrote to the Full Bench, copying in the Appellant, and conceded that there was an appealable error arising from

the lack of procedural fairness as identified by the Full Bench, and proposed that the Full Bench utilise the hearing listed to determine the jurisdictional objection of the minimum employment period.

[14] At the hearing on permission to appeal and the merits, the Appellant was represented by a family member, Ms Elizabeth Kent (**Ms Kent**). Under s 596 of the Act, Ms Kent did not need to seek permission to appear on behalf of the Appellant. The Respondent sought to be represented under s 596(2) by Ms Samantha Masters of Edge Legal. The Full Bench determined that s 596(2)(a) of the Act had been met and, in the circumstances, it was reasonable to exercise discretion to permit the Respondent to be represented. Fulsome reasons for granting permission were provided on transcript.

[15] At hearing, the parties advised that they were content for the Full Bench to determine permission to appeal, and the merits, based on the materials filed and did not seek to proffer further submissions.

[16] In respect of the Respondent's proposition that the Full Bench determine the minimum employment period, parties were informed that the Full Bench considered that in circumstances where permission to appeal was granted, the appeal upheld and the Decision quashed, the appropriate course would be to remit the matter back to a member to determine the jurisdictional objections. In this respect, the issue that confronted the Full Bench was that at no stage of the proceedings – at first instance or in the lead up to the permission to appeal hearing – had the parties been directed to address the jurisdictional objection regarding the dismissal issue. Whilst the Appellant may have considered he was dismissed on 3 June 2022, the Respondent contended that the Appellant was not dismissed and to this extent did not proffer a dismissal date. To determine the minimum employment period in the absence of a finding in respect of the date of dismissal, would, in the circumstances of this matter and in the view of the Full Bench, potentially lead to error.

[17] Returning to the matter of permission to appeal, given the denial of procedural fairness we are satisfied the Decision manifests an injustice which enlivens the public interest. We are therefore satisfied it is in the public interest to grant permission to appeal and, accordingly, we grant such permission.

[18] Further, having considered the material before us, we uphold the appeal and quash the Commissioner's Decision and Order. The matter will be remitted to Deputy President O'Keeffe for redetermination. Our detailed reasons follow.

## **2 The nature of unfair dismissal applications**

[19] An appeal under s 604 of the Act is an appeal by way of rehearing and the Commission's powers on appeal are only exercisable if there is error on the part of the primary decision maker.<sup>9</sup> There is no right to appeal and an appeal may only be made with the permission of the Commission.

[20] This appeal is one to which s 400 of the Act also applies. Under s 400, the Commission must not grant permission to appeal from a decision made by the Commission in relation to

unfair dismissal matters unless it considers it in the public interest to do so. An appeal of an unfair dismissal decision involving a question of fact can only be made on the ground that the decision involved a significant error of fact.

[21] The test under s 400 has been characterised as ‘a stringent one’.<sup>10</sup> The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.<sup>11</sup> 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...<sup>12</sup>

[22] It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated. This is because an appeal cannot succeed in the absence of appealable error.<sup>13</sup>

[23] An application for permission to appeal is not a de facto or preliminary hearing of the appeal. In determining whether permission to appeal should be granted, it is unnecessary and inappropriate for the Full Bench to conduct a detailed examination of the grounds of appeal. However, it is necessary to engage with the appeal grounds to consider whether they raise an arguable case of appealable error. The relevant grounds follow.

### **3 Appeal grounds and submissions**

[24] It is evident from the Appellant’s Notice that he has used it as a vehicle to express evidence in support of his argument that he was dismissed. To this end, we accept the Respondent’s submission that the Appellant has not identified an appealable error or significant error of fact in the Decision. However, we consider this unremarkable and level no criticism toward the Appellant in this regard for the following reasons.

[25] Firstly, and as previously stated, leading up to the hearing on 25 November 2022, the parties were directed on two occasions (14 October 2022 and 19 October 2022) that the minimum employment period was to be addressed. The Notices of Listing similarly provided that the purpose of the hearing was to determine whether the Appellant had completed the minimum employment period and in his introductory remarks at the commencement of the hearing, the Commissioner informed the parties that the issue to be addressed was the minimum employment period. At this juncture, it warrants observing that the materials filed by the Appellant at first instance complied with the directions issued on 14 October 2022 and 19 October 2022, and as such focused on that very issue.

[26] Secondly, the Appellant was not represented by a paid agent or legal representative. Whilst the Appellant appears to have been represented by a family member, Ms Kent, it is not apparent that Ms Kent or for that matter, the Appellant, were adept in completing the Notice. Having discerned that the Decision addressed the jurisdictional objection of whether the Appellant had been dismissed, the Appellant has clearly utilised the Notice, as is evident by the

content of the Notice itself, as an opportunity to provide his account of his purported dismissal, whilst identifying shortcomings of the findings of fact made at first instance.

[27] To the extent that a ground of appeal can be distilled from the Notice, it is that a significant error of fact afflicts the Decision. However, the ‘error’ or ‘errors’ of ‘fact’ that the Appellant presses are, as already observed, essentially his account of what occurred leading up to his purported dismissal.

[28] Whilst the Respondent initially submitted it was reasonably open to the Commissioner to make the Decision on the facts and evidence before him at the hearing, we consider that contention cannot be sustained.

#### **4 Decision**

[29] It is accepted that procedural unfairness afforded to a party or parties is an error that warrants correction on appeal and enlivens the public interest.

[30] Members of the Commission are obliged to observe procedural fairness in carrying out their functions under the Act.<sup>14</sup> Procedural fairness is a component of natural justice. It requires that the Commission ensure that each party is given a reasonable opportunity to present its case.<sup>15</sup> In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Abigroup Contractors Pty Ltd*, Katzmann and Rangiah JJ explained what is meant by a reasonable opportunity to present a case:

What will constitute a reasonable opportunity for a party to present his or her case in a given situation depends upon the whole of the circumstances, including the nature of the jurisdiction exercised and the statutory provisions governing its exercise. Procedural fairness requires that the statutory power be exercised fairly: that is, in accordance with procedures that are fair to each party in light of the statutory requirements, the interests of the parties and the interests and purposes, whether public or private, which the statute seeks to advance or permits to be taken into account as legitimate considerations.<sup>16</sup>

[31] A Full Bench of the Commission in *City of Stirling v Emery* considered the consequences of a failure to afford procedural fairness, stating:

In *Stead v State Government Insurance Commission* the High Court stated that “not every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial.” The Court noted that it is relevant to consider whether further information that might have come before the Court if natural justice had been afforded would have made any difference. The Court went on to state:

“Where, however, the denial of natural justice affects the entitlement of a party to make submissions on an issue of fact, especially when the issue is whether the evidence of a particular witness should be accepted, it is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference. ... It is no easy task for a court of appeal 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 of the trial of an issue of fact.”

In our view, these observations are relevant to the approach of a Full Bench of the Commission in considering a contention on appeal that a party has been denied procedural fairness, this being a component of natural justice.<sup>17</sup>

[32] The Commissioner's decision dealt squarely with the jurisdictional objection that the Appellant was not dismissed. This is despite the parties having been directed and notified on several occasions that the issue to be determined was whether the minimum employment period had been met. Because of those directions and notifications, the Appellant filed evidence and submissions directed at an issue that was not the subject matter of the Decision. In doing so, he was denied the opportunity to engage with the issue that was ultimately determined by the Commissioner. By proceeding to hear and determine the dismissal question at the hearing on 25 November 2022, before the Appellant had an opportunity to develop his case and file evidence and submissions relevant to that issue, we consider that the Appellant was denied a reasonable opportunity to present his case in support of his argument that he had been dismissed and was therefore protected by the provisions of Part 3-2 of the Act. In this respect, the Appellant was denied natural justice.

[33] In the Decision, the Commissioner made findings of fact in respect of whether the Appellant had been dismissed, which were plainly relevant to whether the Respondent's jurisdictional objection succeeded. Procedural fairness required that the Appellant be given a reasonable opportunity to address those issues by way of submissions and evidence at a hearing on the dismissal question.

[34] There is, in our view, at least some prospect that the Appellant may have been able to present an arguable case that he had been dismissed, if he had been given the opportunity to file material addressing the dismissal issue. Accordingly, we are not satisfied that the denial of natural justice could have made no difference to the outcome of the question of whether the Appellant was dismissed.

[35] A denial of natural justice is a jurisdictional error.<sup>18</sup> The Decision disclosed jurisdictional error in that the Appellant was denied procedural fairness. Given the nature of the error which has been established, we are satisfied that to the extent that it is necessary to do so, we would amend the Appellant's Notice under s 586 of the Act to include this matter as a ground of appeal. We note that neither party took objection to this course when asked.

## **5 Conclusion and disposition**

[36] For the reasons set out above, we order as follows:

- a) Permission to appeal is granted.
- b) The appeal is upheld.
- c) The Decision and Order of Commissioner Schneider in *Pen v Octopus Fishing No.2 Pty Ltd* [\[2023\] FWC 2610](#) and [PR767025](#) are quashed.
- d) The application for an unfair dismissal remedy is remitted to Deputy President O'Keeffe for redetermination.

[37] We also direct the parties to let the Associate to Deputy President O’Keeffe know within three days of this decision being published, whether they consent to participating in conciliation before Commission Lim. If both parties consent, Commissioner Lim will conduct a conciliation conference prior to the rehearing before Deputy President O’Keeffe.



DEPUTY PRESIDENT

*Appearances:*

*E Kent* for the Appellant  
*S Masters* for the Respondent

*Hearing details:*

2023.  
Perth (by video):  
13 December.

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<sup>1</sup> *Pen v Octopus Fishing No.2 Pty Ltd* [2023] FWC 2610.

<sup>2</sup> [PR767025](#).

<sup>3</sup> Transcript of Proceedings, *Pen v Octopus Fishing No.2 Pty Ltd* (Fair Work Commission, U2022/6436, Commissioner Schneider, 25 November 2022) [PN3].

<sup>4</sup> *Ibid* [PN7].

<sup>5</sup> *Ibid*.

<sup>6</sup> *Ibid*.

<sup>7</sup> *Ibid* [PN8].

<sup>8</sup> *Ibid*.

<sup>9</sup> This is so because on appeal the Commission has power to receive further evidence, pursuant to s 607(2): see *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194, 204 [17] (Gleeson CJ, Gaudron and Hayne JJ).

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<sup>10</sup> *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78, 90 [43] (Buchanan J, Marshall J agreeing at 79 [1], Cowdroy J agreeing at 80 [2]) (**Lawler**).

<sup>11</sup> *O'Sullivan v Farrer* (1989) 168 CLR 210, 216–17 (Mason CJ, Brennan, Dawson and Gaudron JJ); applied in *Hogan v Hinch* (2011) 243 CLR 506, 548 [69] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Lawler* (n 10) 90 [44]–[46] (Buchanan J, Marshall J agreeing at 79 [1], Cowdroy J agreeing at 80 [2]).

<sup>12</sup> (2010) 197 IR 266, 274 [27].

<sup>13</sup> *Wan v Australian Industrial Relations Commission* (2001) 116 FCR 481, 489 [30].

<sup>14</sup> *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Abigroup Contractors Pty Ltd* [2013] FCAFC 148, [118] (Katzmann and Rangiah JJ).

<sup>15</sup> *Ibid* [119].

<sup>16</sup> *Ibid* [125] (citations omitted).

<sup>17</sup> [\[2018\] FWCFB 2279](#), [37]–[38] (citations omitted).

<sup>18</sup> *Allen v Fluor Construction Services Pty Ltd* (2014) 240 IR 254, 275 [56].