DECISION

Fair Work Act 2009
s.604—Appeal of decision

Syed Rizvi
v
Salini Australia Pty Ltd T/A Webuild
(C2023/1671)

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT BINET
DEPUTY PRESIDENT WRIGHT

SYDNEY, 26 MAY 2023

Appeal against decision [2023] FWC 562 of Commissioner Bissett at Melbourne on 7 March 2023 in matter number U2023/1251 – permission to appeal granted – appeal upheld.

Background

[1] Mr Syed Rizvi (the Appellant) has lodged an appeal under s.604 of the *Fair Work Act 2009* (the Act), for which permission to appeal is required, against a decision of Commissioner Bissett (the Commissioner) issued on 7 March 2023 (the Decision).[1] The Decision concerned a dismissal of the Appellant's application for an unfair dismissal remedy due to the Appellant failing to pay the required fee or file a completed waiver form.

[2] In the Decision, the Commissioner found that since the Appellant's application was not accompanied by the fee prescribed by the Act, it was not made in accordance with the Act pursuant to s.395. As such, the Commissioner dismissed it at her own initiative pursuant to s.587(1)(a) on 7 March 2023.

[3] This matter was listed for permission to appeal and the merits of the appeal. On 5 April 2023, directions were set for the filing of material by the Appellant and Respondent. The Appellant filed written submissions on 19 April 2023, and the Respondent filed written submissions on 3 May 2023. At the appeal hearing on 10 May 2023, we did not grant permission for the Respondent to be legally represented, and both the Appellant and Respondent made oral submissions.

[4] For the reasons that follow, permission to appeal is granted and the appeal is upheld.

The decision under appeal

[5] The Decision below comprises, in most part, a chronology set out by the Commissioner of the various instances of correspondence between the Commission and the Appellant prior to

the dismissal of his application on 7 March 2023. As will become apparent, we consider it important to summarise this chronology in detail.

[6] The sequence of events recounted by the Commissioner in the Decision are as follows:

- On 17 February 2023, the Appellant made an application to the Commission for an unfair dismissal remedy. His application was incomplete as he had not paid the required fee or filed a completed waiver form.
- On 17 February 2023, the Commission emailed the Appellant asking him to pay the filing fee or submit a completed waiver form within 7 days.
- On 20 February 2023, the Commission emailed a reminder to the Appellant about the fee or waiver.
- On 22 February 2023, the Appellant emailed the Commission informing it that he was overseas, could not call the Commission via telephone, and that his attempt to pay the fee by credit card had not been successful.
- On 23 February 2023, the Commission attempted to contact the Appellant via telephone but was unsuccessful. The Commission left the Appellant a voicemail containing the Commission contact number with the international Australian dialling code attached.
- On 24 February 2023, the Commission emailed the Appellant informing him that payment could be made over the phone.
- On 28 February 2023, the Commission attempted to contact the Appellant by telephone but was again unsuccessful. The Commission left the Appellant a voicemail.

[7] By 7 March 2023, the date of the Decision below, the fee was still yet to be paid by the Appellant. The Commissioner dismissed the application pursuant to s 587(1)(a) of the Act, as she was satisfied that the application had not been made in accordance with the Act.

Grounds of appeal and submissions

Appellant's submissions

[8] In his Notice of Appeal, the Appellant submits that on 20 February 2023, he did attempt to pay via the Commission's online portal, but his payment was declined due to an unknown error. He submits that he had sufficient funds in his account to make the payment. The Appellant also claims in his written outline of submissions that he subsequently made multiple attempts to pay through the website, all of which were unsuccessful.

[9] We note that for the purposes of this first submission, the Appellant has tendered new evidence which was not before the Commissioner at first instance, which are extracts from his bank statement issued on 04 April 2023 that show that he had sufficient funds in his account on 21 Feb 2023 to make the payment for the application fee. We determined at the appeal hearing on 10 May 2023 to allow these screenshots into evidence, pursuant to s.607(2) of the Act.

[10] The Appellant further submits that the attempts by the Commission to contact him were unsuccessful as his Australian phone number was deactivated whilst he was overseas. As such,

the Appellant never received the phone calls or was able to access the voicemails until his return to Australia on 5 March 2023.

[11] Additionally, the Appellant submits that whilst the Commission provided him with two different phone numbers for contact, including an 1800 number, he tried but failed to connect with the 1800 number and did not immediately receive the email of 24 February advising the second number as he was travelling through remote areas and had limited access to emails, internet and international calls. The Appellant also submits that he was experiencing family issues during his travels, which compounded with his limited communications access.

[12] The Appellant further submits that although he returned to Australia on 5 March 2023, he was tired and stressed from the journey back and thus did not check his email or Australian phone until 7 March 2023, at which point he discovered that his application had been dismissed.

[13] Finally, the Appellant submits that it is the public interest for the Commission to grant permission to appeal due to the circumstances of the dismissal of his application, considering he had repeatedly attempted to make the payment of fees but was unable to due to barriers imposed by his travelling conditions.

Respondent's submissions

[14] In its outline of submissions, the Respondent submits that permission to appeal should not be granted as the circumstances of the Appellant's filing does not raise issues of general importance or application which might attract the public interest. The Respondent contends that the Commissioner's approach to dismissing the application was orthodox and in harmony with previous similar cases.

[15] In the alternative, if permission to appeal were to be granted, the Respondent submits that the Appellant has not identified any appealable error in the Decision below and that the Appellant's application nevertheless cannot be made as it was not accompanied by the prescribed fee. The Respondent argues that the Appellant is merely seeking that the Full Bench arrive at a different conclusion to that of the Commissioner at first instance.

Principles on appeal

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

[17] This appeal is one to which s 400 of the Act applies. Section 400 provides:

> (1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under this Part unless the FWC considers that it is in the public interest to do so.
>
> (2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under this Part can only, to the extent that it is an appeal on

> a question of fact, be made on the ground that the decision involved a significant error of fact.

[18] In the Federal Court Full Court decision in *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78 at [43], Buchanan J (with whom Marshall and Cowdroy JJ agreed) characterised the test under s 400 as "a stringent one". The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[3] A Full Bench of the Commission, in *GlaxoSmithKline Australia Pty Ltd v Makin*, identified some of the considerations that may attract the public interest:

> "… the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters."

[19] It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated. This is so because an appeal cannot succeed in the absence of appealable error.[4] However, the fact that the Member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.[5]

Consideration

[20] We have considered both the Appellant's grounds of appeal and submissions and the Respondent's submissions. We are satisfied that, in the circumstances that the Appellant faced, it would be in the public interest to grant permission to appeal.

[21] Decisions dismissing applications due to the prescribed fee being unpaid are commonly issued by the Commission. In such matters, the applicants are typically unresponsive to correspondence sent to them by the Commission or make no attempts to contact the Commission to follow up the payment of the prescribed fee.[6] The facts in the matter before us are unique and can be distinguished from this above-mentioned category of cases.

[22] Relevantly, we consider that the following circumstances when compounded together set this matter apart:

- That the Appellant was overseas for the vast majority of time between the filing of his application and its dismissal by the Decision, and provided evidence of his departure and return flight passes.
- That the Appellant had, upon lodging his application on 17 February 2023, informed the Commission in his initial email that he would be out of the country with "limited access to emails and especially phone calls" until the second week of March.
- That the Appellant made a continual effort to contact the Commission throughout his period overseas, though his options for communication were limited by virtue of his being overseas in remote areas.

- That the Appellant had tried to, at least on one occasion, pay the prescribed fee through the Commission web portal but his payment was declined for an unknown error.
- That, in his email to the Commission on 22 February 2023, he requested an extension for the payment until his return to Australia in the second week of March, and that the Commission did not respond to his request in those terms but rather only provided an alternative phone number for the Appellant to dial.
- That the Appellant had sufficient funds in his bank account at the time of attempting to make the payment, of which he has provided new evidence allowed in this appeal.
- That the Appellant did not have access to his Australian phone number whilst overseas as it was deactivated, meaning he was not notified of the phone calls from the Commission nor hear any of the voicemails left for him until after his return to Australia on 5 March 2023.

[23] We note that the Appellant could have submitted a fee waiver form in this period. However, we do not consider that the fact he did not do so as detrimental to his case. The Appellant was ready, willing and able to pay the prescribed fee, but could not do so due to an unknown error with the payment system and his being overseas. We also consider that the fact that the Appellant was dismissed two days prior to his departure from Australia on 29 January 2023 meant that the Appellant could not settle all the steps for making an application in accordance with the Act whilst he was in Australia, and could not wait until he returned to Australia to make his application lest it be outside the 21-day timeframe for unfair dismissal applications.

[24] We also note that, at the time the Decision was issued, the Commissioner did not have access to evidence containing the Appellant's bank records. We consider that this new evidence allowed on appeal is important in demonstrating that the Appellant was ready, willing and able to pay the prescribed fee.

[25] We make no criticisms of the Commissioner's conclusion based on the evidence before her at the time the Decision was issued. However, we consider that in light of the clarificatory submissions we have received on appeal and the new evidence allowed, an injustice will occur if we do not grant permission to appeal.

[26] As for the merits of the appeal, we consider that the Appellant was barred from making his application in accordance with the Act due to a systems error that was the result of the combination of factors as set out above at [22]. Having undertaken a provisional review of the substantive materials filed by the Appellant in relation to his application for an unfair dismissal remedy, we do not consider that such an error should prevent the Appellant from progressing his application for determination on its merits.

Conclusion

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

1. Permission to appeal is granted.

2. The appeal is upheld.

3. The decision of Commissioner Bissett in [2023] FWC 562 is quashed.

4. An opportunity will be given to the Appellant to pay the prescribed fee or submit a fee waiver form in relation to his application for an unfair dismissal remedy, after which the matter will be allocated for determination.

VICE PRESIDENT

Appearances:

Mr S Rizvi, on his own behalf.
Mr K Ritchie, for the Respondent.

Hearing details:

2023.
Microsoft Teams (Video).
10 May.

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<PR761810>

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[1] [2023] FWC 47 ('the Decision').

[2] This is so because on appeal FWC has the power to receive further evidence, pursuant to s.607(2); see *Coal and Allied v AIRC* (2000) 203 CLR 194 at [17] per Gleeson CJ, Gaudron and Hayne JJ.

[3] *O'Sullivan v Farrer* [1989] HCA 61, 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* [2011] HCA 4, 243 CLR 506, 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] FCAFC 54, 192 FCR 78, 207 IR 177 at [44]-[46]

[4] *Wan v AIRC* [2001] FCA 1803, 116 FCR 481 at [30].

[5] *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089, 202 IR 388 at [28], affirmed on judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54, 192 FCR 78, 207 IR 177; *NSW Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663, 241 IR 177 at [28].

[6] See e.g., *Jensen v Coronation BurwoodClub/Coro88 Club Burwood (t/as Coro 88)* [2022] FWCFB 157; Mellersh *v MACA Mining Pty Ltd* [2020] FWC 676; *Herrigan v Finco Solutions (t/as Mining Equipment)* [2020] FWC 1178; *Kaur v Ravi Dutt Pty Ltd* [2019] FWC 7492.