



DECISION

Fair Work Act 2009
s.604—Appeal of decision

Niccolo Pty Ltd

v

Sandro Drummond
(C2023/7690)

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT COLMAN
DEPUTY PRESIDENT MILLHOUSE

BRISBANE, 26 FEBRUARY 2024

Appeal against decision of Commissioner Wilson ([\[2023\] FWC 3036](#)) at Melbourne on 20 November 2023 in matter number U2023/8252.

[1] Niccolo Pty Ltd (Niccolo) has lodged an appeal, for which permission is required, against a decision¹ dated 20 November 2023 in which Commissioner Wilson concluded that an unfair dismissal application made by Sandro Drummond was made within the 21-day period required by s. 394(2) of the *Fair Work Act 2009* (the Act), and that he therefore did not require an extension of time under s. 394(3).

[2] Before the Commissioner, the central issue in contest between the parties was the date of dismissal. Mr Drummond was a company director of Niccolo, and was also employed in an executive position as the managing director. Niccolo contended that Mr Drummond was dismissed on 5 August 2023, when Nicholas Bolton, acting on the instruction of the general manager, Danny Agocs, sent Mr Drummond a message stating: “*Niccolo needs to immediately terminate your employment and involvement in the company*”. Mr Bolton did not hold any position in the company, but was the founder of the company and assisted the general manager with various company matters. Mr Drummond submitted to the Commissioner that Mr Bolton had no authority to dismiss him because he had no formal role in the company, and that the purported dismissal on 5 August 2023 was ineffective. Mr Drummond said that the dismissal did not occur until 11 August 2023, when he was notified that a general meeting of the company had that day passed a resolution to “*remove [Mr Drummond] as a director of the Company, together with any other offices held by him in the Company, with effect from the date of passing the resolution*”. Mr Drummond considered that the resolution’s reference to “*other offices*” included his employment as managing director.

[3] The Commissioner did not accept Mr Bolton’s evidence that Mr Agocs had instructed him to dismiss Mr Drummond. He found that there was no evidence to corroborate this, and that Mr Agocs could have given evidence to the Commission but did not do so (at [31]). The Commissioner stated that the totality of the evidence led him not to accept that Mr Bolton had the requisite authority to dismiss Mr Drummond, as there was no documentary evidence of such

authority being given, and the failure of Mr Agocs to give evidence gave rise to an inference that his evidence would not have assisted Niccolo (at [32]). The Commissioner said that the notion that an assistant of a small company had authority to dismiss the managing director was dubious and, in the absence of cogent evidence, implausible (at [32]).

[4] The Commissioner further found that there was no evidence that Niccolo had acted on the purported dismissal on 5 August 2023 by doing such things as locking Mr Drummond out of its IT systems and bank accounts or advising others that he was no longer employed. Instead, the evidence was that Mr Drummond had challenged his purported termination on the grounds that it was ineffective, and that on 10 August 2023 Niccolo had circulated a Notice of General Meeting for the following day, foreshadowing resolutions to remove Mr Drummond as a director and any other offices held by him in the company. The Commissioner found that these steps together suggested that Niccolo had accepted Mr Drummond's objection that the purported dismissal of 5 August 2023 had been ineffective; if the company wanted to dismiss Mr Drummond, it needed to do so formally (at [35]). The Commissioner considered that, if Niccolo had really believed that the dismissal had occurred on 5 August 2023, there would have been "*no need for a resolution that Mr Drummond be terminated from any other offices held by him in the Company*" (at [36]).

[5] The Commissioner concluded that the combination of these factors led him to find that Niccolo accepted Mr Drummond's objection that the purported dismissal on 5 August 2023 was ineffective because Mr Bolton had no authority to effectuate it and had then taken steps to correct this and terminate him properly (at [37]). He therefore found that Mr Drummond's dismissal occurred on 11 August 2023, and that his application of 31 August 2023 had been made within 21 days of his dismissal, such that he did not require an extension of time.

[6] Niccolo's appeal contended that the Commissioner had made various factual and legal errors that caused him to reach the wrong conclusion about the date on which the dismissal occurred. It submitted that the Full Bench should grant permission to appeal in the public interest, uphold the appeal on the basis of these errors, quash the Commissioner's decision, and redetermine the application on rehearing by concluding that the application was lodged out of time, that there were no exceptional circumstances, and that the application should be dismissed.

[7] An appeal under s. 604 of the Act is an appeal by way of rehearing however the Commission's powers on appeal are only exercisable if there is error on the part of the primary decision-maker (*Coal and Allied v AIRC* [2000] HCA 47 at [17]). Generally, an appellant must obtain the Commission's permission in order to appeal. The present matter is an appeal from a decision made under Part 3-2 of the Act, which concerns unfair dismissals, and is therefore subject to s. 400 of the Act. Section 400(1) states that the Commission "*must not*" grant permission to appeal unless it considers that it is in the public interest to do so. Section 400(2) provides that an appeal on a question of fact can only be made on the ground that the decision involved a "*significant*" error of fact. The Federal Court has described the requirements in s. 400 as "*stringent*" (see *Coal & Allied Mining Services Pty Ltd v Lawler and others* [2011] FCAFC 54 (Lawler) at [43]).

[8] A decision as to whether the public interest test is met is a discretionary one involving a broad value judgment (see *Lawler* at [44]-[46]). Considerations that may attract the public

interest include that the matter raises issues of importance and general application, that the decision manifests an injustice or that the result is counterintuitive. The fact that a member has made an error is not necessarily a sufficient basis to grant permission to appeal.

[9] Niccolo's application for permission to appeal and the substantive appeal were heard together before us on 15 February 2024. Niccolo's first ground of appeal contended that the Commissioner had erred in finding that Mr Agocs did not have authority to dismiss Mr Drummond. This ground is based on a misreading of the Commissioner's decision and we reject it. The Commissioner did not find that Mr Agocs had no authority to dismiss Mr Drummond, but rather that Mr Bolton had no authority of his own to dismiss Mr Drummond, and that Mr Agocs had not authorised Mr Bolton to do so.

[10] Niccolo's second and third grounds of appeal submitted that the Commissioner had denied it procedural fairness by not allowing it to lead evidence from Mr Agocs to rebut Mr Drummond's contention that the purported dismissal of 5 August 2023 was unauthorised. We reject these grounds because they are based on an erroneous assertion of fact. The Commissioner did not deny Niccolo an opportunity to lead evidence. First, the Commissioner's directions provided for Niccolo to file an outline of argument and statements of evidence. Niccolo could have filed a statement from Mr Agocs. It chose not to do so. Secondly, in answer to a question from the Commissioner at the hearing, Mr Bolton said that Mr Agocs would be available to give evidence "*if required*", to which the Commissioner responded to the effect that it was up to the company to bring forward its case. Mr Bolton then said that Mr Agocs had not been called because the company believed that the communication of 5 August 2023 "*stands on the face of it*" (see transcript of hearing on 2 November 2023 at PN160-PN163). This was a deliberate forensic choice. Even at this late stage Niccolo could have asked the Commissioner for an adjournment while it arranged for Mr Agocs to attend and give evidence. It chose not to do so. There was no denial of procedural fairness.

[11] The fourth ground of appeal stated that the Commissioner erred in reaching the conclusion that Mr Drummond was dismissed on 11 August 2023 instead of on 5 August 2023. This is not an independent ground of appeal, but one that depends on an acceptance that some other error has occurred. On its own, it is simply an assertion.

[12] Niccolo advanced several other contentions of error. It was submitted that the company had not understood that the hearing would be confined to the question of extension of time, and that it was reasonable for it to assume that the Commissioner would also determine its contention that Mr Drummond was not protected from unfair dismissal because he exceeded the high income threshold of \$167,500 and was not covered by an award or enterprise agreement. We reject this contention. The Commissioner made it perfectly clear in his listing and directions that the hearing would be for the purposes of dealing with the extension of time matter only.

[13] However, Niccolo also contended that the Commissioner had made a significant error by concluding that the resolution of 11 August 2023 had terminated Mr Drummond's employment, when in fact the resolution had only removed him from offices that he held in the company and said nothing about his employment. We agree.

[14] In his decision, the Commissioner said that if the company had already dismissed Mr Drummond, there would have been no need for a resolution removing him from *any other offices* he held in the company, as well as removing him as a director. Evidently, the Commissioner considered that the reference to “*any other offices*” could only be to Mr Drummond’s position as an employee. In our opinion, this conclusion was in error.

[15] First, the resolution of shareholders that was passed on 11 August 2023 was to “*remove [Mr Drummond] as a director of the Company, together with any other offices held by him in the Company*”. Both at law and as a matter of ordinary business language, there is a clear distinction between an officer and an employee of a company. Section 9AD of the *Corporations Act 2001* defines who is an “*officer*” of a corporation. It does not include an employee. Officers and employees have different statutory responsibilities. Of course, it is very common for officers of a corporation also to be employed by the corporation. That was the case here. Mr Drummond held office as a company director. He was also employed in an executive position as managing director. Depending on the context in which the expression is used, to remove a person from an office might perhaps connote a dismissal. But in the context of a resolution of a general meeting of members, the removal of a person from offices held in the company does not include the termination of the person’s employment. Rather, the term “*offices*” has a legal and business meaning which does not extend to employment.

[16] Secondly, we see no basis for the Commissioner’s inference that, if Niccolo had already dismissed Mr Drummond on 5 August 2023, there would have been no need to remove him from “*any other offices*”. The termination of a person’s employment does not affect the offices they may hold in a corporation. If the members wish to remove the person from offices in the company, they must take the necessary legal steps to do so. The company was not reacting to Mr Drummond’s objection that his dismissal was ineffective. It was attending to a separate matter that was necessary in order to end its relationship with Mr Drummond, namely removing him from offices in the company. Why did the resolution refer to “*any other offices*”, when aside from his office as director, there was no evidence that Mr Drummond held other offices? Probably for the avoidance of any doubt: in the event Mr Drummond did hold any other offices in the company, the resolution of members removed him from those offices. This is a perfectly sensible approach. But even if the resolution had said that Mr Drummond was removed from “*the other office that he holds*”, that would still not be a reason to conclude that, because there was no other office, the resolution must be referring to his employment. It would be a reason to believe that the resolution might contain an error or that the members believed he held another office when this was not in fact the case.

[17] Thirdly, in our view, the fact that Niccolo did not take immediate action after 5 August 2023 to lock Mr Drummond out of bank accounts and IT systems or to make announcements about his termination is not surprising in light of the fact that he remained a director of the company until 11 August 2023. And in any event, it is not a reason to infer that the company did not believe that his employment had ended, or that it had not in fact ended.

[18] The resolution of 11 August 2023 did not terminate Mr Drummond’s employment. It meant what it said, which was that Mr Drummond was *removed* (not terminated) as a director and from any other offices he held in the company. The Commissioner’s conclusion that the resolution ended Mr Drummond’s employment was an error of fact. It was a significant one, because it determined the outcome of the jurisdictional hearing. As a consequence of the error,

Mr Drummond's application was found to have been made within time. The appeal meets the condition in s. 400(2) of the Act.

[19] We also consider that the appeal is in the public interest because it raises a serious question about whether the Commission has jurisdiction to deal with Mr Drummond's unfair dismissal application. If his application was in fact made outside the 21-day period, the Commission has no power to determine the merits unless it first grants an extension of time under s. 394(3). It is in the public interest that the Commission not exceed its jurisdiction. The appeal therefore meets the condition in s. 400(1).

[20] Accordingly, we grant permission to appeal in the public interest and quash the decision on the basis of the significant error of fact that we have identified. In doing so, we note that Niccolo's case at first instance was not put with great clarity, which may have affected the Commissioner's conclusions. It is appropriate in the circumstances to rehear and determine ourselves the questions of whether the application was made in time and if not whether to grant an extension of time under s. 394(3).

[21] The conclusion that the resolution of 11 August 2023 did not terminate Mr Drummond's employment does not necessarily mean that the message sent by Mr Bolton on 5 August 2023 did so. It is necessary to reexamine this question.

[22] Niccolo sought to adduce new evidence pursuant to s. 607(2)(b), in the form of two affidavits from Mr Agocs and an affidavit of Dylan Alexander, Niccolo's financial controller. We declined to accept the second affidavit of Mr Agocs or the affidavit of Mr Alexander on grounds of relevance. We also declined to admit much of Mr Agocs's first affidavit, including evidence to the effect that Mr Bolton had ultimate authority at the company, and that he did not really need to seek the permission of Mr Agocs to terminate Mr Drummond's employment. This was contrary to the case put by the company at first instance. Mr Bolton's own evidence before the Commissioner was that although he was the founder of the company, he took instructions from the general manager and had an advisory role. He did not say that he had ultimate authority.

[23] However, Mr Agocs also stated in his first affidavit that his role of general manager of Niccolo included the day to day running of the company, including staffing and employment matters, and that in early August 2023 Mr Bolton had consulted him about Mr Drummond's employment, and as general manager he gave approval to Mr Bolton to terminate Mr Drummond's employment. He also stated that he considered Mr Drummond's employment to have been terminated on 5 August 2023. This evidence would corroborate Mr Bolton's statement to the Commissioner that he was indeed authorised by the general manager to dismiss Mr Drummond on 5 August 2023. Having regard to the principles that are generally relevant to the question of whether new evidence should be allowed in an appeal (see *Akins v National Australia Bank* (1994) 34 NSWLR 155 at 160), we considered that in all the circumstances it was appropriate to receive it.

[24] Mr Drummond contended that the date of his dismissal was indeed 11 August 2023 because prior to this date he had not received any formal confirmation of his dismissal. However, as we have said above, the resolution did not mention a dismissal and was not concerned with the termination of his employment, but dealt instead with his removal from

offices in the company. Mr Drummond suggested that the email of 5 August 2023 could not have effectuated his dismissal because it was informal, but no formality was required. A valid dismissal needed only to be authorised and clear. We have considered whether the email from Mr Bolton to Mr Drummond was clear and find that it was. It stated that the company needed to terminate his employment *immediately*. It did not suggest that termination might take place at some later time.

[25] The evidence given to the Commissioner at first instance remains before us on rehearing. We have concluded that there is no reason not to accept the evidence of Mr Bolton that he was given authority by Mr Agocs to dismiss Mr Drummond. This evidence is now fortified by the corroborative evidence of Mr Agocs. We find that Mr Agocs, as the company's general manager, gave authority to Mr Bolton to dismiss Mr Drummond. At the hearing, Mr Drummond belatedly sought to argue that Mr Agocs did not have authority to dismiss him, however this contention had not been raised before and we do not accept it. Mr Bolton gave sworn evidence to the Commissioner that the position of general manager was senior to the executive position held by Mr Drummond and we accept it, as the Commissioner appeared to do. We find that Mr Bolton was authorised by Mr Agocs to dismiss Mr Drummond on 5 August 2023. The consequence of this is that the employment of Mr Drummond ended on this day, and that his unfair dismissal application of 31 August 2023 was lodged outside of the 21-day period prescribed by s. 394(2) of the Act. In order for the application to proceed, Mr Drummond requires an extension of time.

[26] In considering whether there are exceptional circumstances for the purposes of s. 394(3), we take into account the submissions of the parties before the Commissioner and before us on appeal. We provided an opportunity at the hearing of the appeal for Mr Drummond to address us in relation to the matters in s. 394(3) including the reason for the delay in lodging his application, in the event that we decided that his dismissal took effect on 5 August 2023. We have had regard to Mr Drummond's submissions and his responses to questions from the Full Bench about these matters. In relation to the matters that the Commission is required to take into account (see ss. 394(3)(a) to (f)), we note firstly that the reason for the delay (s. 394(3)(a)) was evidently that Mr Drummond believed that he had lodged his application within time. However, Mr Drummond also informed the Full Bench that he could have selected either 5 or 11 August as the date his dismissal took effect and selected 11 August because the resolution appeared to be a more formal document than the email he received from Mr Bolton on 5 August 2023. Secondly, Mr Drummond became aware of the dismissal on the same day that it occurred (s. 394(3)(b)), even though he did not accept that the dismissal of 5 August 2023 was effective. (He did not become aware of the dismissal on 11 August 2023, because what occurred on that date was not a dismissal but his removal from offices he held in the company). Thirdly, Mr Drummond took action to dispute his dismissal (s. 394(3)(c)); he told the company that he did not believe that Mr Bolton was authorised to dismiss him. We also note that by disputing the dismissal on 5 August 2023, Mr Drummond indicated his awareness that Mr Bolton had purported to dismiss him on that date. Fourthly and fifthly, there is no relevant prejudice to the employer (s. 394(3)(d)), nor are there any circumstances relevant to the question of fairness between Mr Drummond and other persons in a similar position (s. 394(3)(f)). Finally, as to the merits of the application (s. 394(3)(e)), this would depend on factual findings that would need to be made at a final hearing of the matter. In our view, the merits should presently be regarded as a neutral consideration.

[27] We do not consider the above matters to involve exceptional circumstances. Mr Drummond said that there were exceptional circumstances in his case because he moved overseas for Niccolo and because he had worked very hard for the company. However we do not regard these or the other matters he has referred to before the Commission as exceptional. Further, we do not regard as an exceptional circumstance the fact that there was a dispute between the parties about the date on which the dismissal occurred. Such disagreements are commonplace.

[28] Taking into account the matters in s. 394(3), we are not satisfied that there are exceptional circumstances in this case, and therefore the Commission has no power to grant Mr Drummond an extension of time. His unfair dismissal application must therefore be dismissed.

Orders

[29] We order as follows:

- (1) Permission to appeal is granted.
- (2) The appeal is upheld.
- (3) The decision of Commissioner Wilson ([\[2023\] FWC 3036](#)) is quashed.
- (4) On rehearing, application U2023/8252 is dismissed.



VICE PRESIDENT

Appearances:

N Bolton, Appellant.

S Drummond, Respondent.

Hearing details:

2024.

Melbourne (via Microsoft Teams):

February 15.

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¹ [\[2023\] FWC 3036](#).