FAIR WORK AUSTRALIA

Baker v Salva Resources Pty Ltd

[2011] FWAFB 4014

Watson and Drake SDPP, Harrison C

27 June 2011

Costs — Appeal — Whether reasonably apparent application had no reasonable prospect of success — Relevant factors — Applicant's lack of familiarity with statutory basis for appeal and lack of expertise in industrial law — Proposition that decision of first instance infected by error — Whether proposition arguable — Fair Work Act 2009 (Cth), s 611(2)(b).

An application to extend time to institute proceedings under s 365 of the *Fair Work Act 2009* (Cth) (the Act) was dismissed. The applicant's subsequent request for permission to appeal the decision to refuse to the extension was declined by the Full Bench of Fair Work Australia. The respondent then sought costs, pursuant to s 611(2)(b) of the Act.

That provision empowered Fair Work Australia to order a person to bear some or all of the costs of another person in relation to an application to Fair Work Australia if it was satisfied that it should have been reasonably apparent to the first person that the application or that person's response to the application, had no reasonable prospect of success.

Held (dismissing the application for costs): (1) In assessing whether s 611(2)(b) of the Act was applicable, a relevant factor was the lack of familiarity the applicant had with the statutory basis for an appeal within that Act and the absence of expertise of that person in industrial law.

(2) The proposition that the decision maker at first instance might have erred, by having no or insufficient regard to the medical evidence relied upon to support an applicant's case as to a reasonable explanation for the delay in bringing proceedings under s 365 of the Act, was not necessarily manifestly untenable or so lacking in merit or substance as to not be reasonably arguable so as to allow s 611(2)(b) of that Act to apply.

Cases Cited

Baker v Salva Resources Pty Ltd [2011] FWA 1289.

Baker v Salva Resources Pty Ltd [2011] FWAFB 2625.

Deane v Paper Australia Pty Ltd (unreported, AIRC (FB), PR932454, 6 June 2003).

Smith v Barwon Region Water Authority (2009) 187 IR 276.

Wodonga Rural City Council v Lewis (2005) 142 IR 188.

Application for costs

Cur adv vult

Fair Work Australia

1 This is an application, pursuant to s 611 of the *Fair Work Act 2009* (Cth) (the Act), by Salva Resources Pty Ltd (Salva) in respect of an appeal by Ms A Baker against a decision of Senior Deputy President Hamberger on 28 February 2011.[1] His Honour's decision concerned an application to extend time for the making of an application under s 365 of the Act.

2 We declined to grant permission to appeal and dismissed the appeal in a decision of 6 May 2011.[2]

3 On 26 May 2011 Salva filed in Fair Work Australia an application for costs. On 30 May 2011, the Full Bench directed Salva to file full submissions in support of its costs application. Those submissions were received on 17 June 2011 in accordance with our direction.

4 Salva submitted that Ms Baker failed to establish that there was a significant error of fact, as required by s 400(2) of the Act, and simply reiterated the grounds upon which the original application for an extension of time was based. Salva submitted that Ms Baker's appeal was made, inter alia, "to give clarity and reiterate grounds that (Senior) Deputy President Hamberger may have had an oversight on" and "… the dismissal was due to not enough persuasion of my case …". Salva further submitted that Ms Baker failed to establish that the appeal was in the public interest.

5 Salva submitted, therefore, that upon the facts apparent to Ms Baker at the time of instituting the appeal, it should have been reasonably apparent to her that she had no prospects of sucess and that the appeal was manifestly untenable and groundless. It submitted that where this was apparent, the Full Bench has discretion to determine whether an order for costs is justified.

6 Salva submitted that in circumstances where the Full Bench is persuaded that the appeal is unreasonably brought and caused costs to be incurred by it, the Full Bench should exercise its discretion in favour of Salva.

7 Salva also submitted that an order be made for costs inccurred by Salva in bringing its costs application.

Consideration

8 Section 611 of the Act provides that:

> (1) A person must bear the person's own costs in relation to a matter before FWA.
>
> (2) However, FWA may order a person (the *first person*) to bear some or all of the costs of another person in relation to an application to FWA if:
>
> (a) FWA is satisfied that the first person made the application, or the first person responded to the application, vexatiously or without reasonable cause; or
>
> (b) FWA is satisfied that it should have been reasonably apparent to the first person that the first person's application, or the first person's response to the application, had no reasonable prospect of success.
>
> (3) A person to whom an order for costs applies must not contravene a term of the order.

1 *Baker v Salva Resources Pty Ltd* [2011] FWA 1289.

2 *Baker v Salva Resources Pty Ltd* [2011] FWAFB 2625.

9 Salva has relied upon s 611(2)(b) of the Act to support its application, arguing that it should have been reasonably apparent to Ms Baker that her appeal had no reasonable prospect of success.

10 The concepts within s 611(2)(b) "should have been reasonably apparent" and "had no reasonable prospect of success" have been well traversed:

- "should have been reasonably apparent" must be objectively determined. It imports an objective test, directed to a belief formed on an objective basis, rather than a subjective test;[3] and
- a conclusion that an application "had no reasonable prospect of success" should only be reached with extreme caution in circumstances where the application is manifestly untenable or groundless[4] or so lacking in merit or substance as to be not reasonably arguable.[5]

11 In support of its application Salva relied upon the expression of the grounds for appeal contained in the application of Ms Baker: "to give clarity and reiterate grounds that (Senior) Deputy President Hamberger may have had an oversight on".

12 This expression of the basis of the appeal reflects the lack of familiarity Ms Baker had with the statutory basis for an appeal within the Act and the absence of expertise in industrial law.

13 However, when the basis of Ms Baker's appeal is considered by reference to her submissions, it is clear that her appeal was based primarily on the proposition that Senior Deputy President Hamberger had no or insufficient regard to her medical circumstances in reaching his decision, referencing documentation submitted in that regard. Ms Baker concluded in her written submissions in the appeal that the evidence should have provided enough material to support a reasonable explanation of her delay in making her application and contending that her medical condition "has not been taken into account by Senior Deputy President Hamberger".

14 Whilst we did not accept that contention and dismissed the appeal, the proposition that Senior Deputy President Hamberger erred, by having no or insufficient regard to the medical evidence relied upon to support Ms Baker's case as to a reasonable explanation for the delay, was not manifestly untenable or so lacking in merit or substance as to be not reasonably arguable.

15 Having considered the full written submissions of Salva in support of its costs application, we are not satisfied that it should have been reasonably apparent to Ms Baker that her appeal had no reasonable prospect of success. In those circumstances, it is not necessary to seek submissions from Ms Baker.

16 The application for costs in relation to the appeal and the costs application is dismissed.

Application dismissed

DR RJ DESIATNIK

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3 *Wodonga Rural City Council v Lewis* (2005) 142 IR 188 at [6].

4 *Deane v Paper Australia Pty Ltd* (unreported, AIRC (FB), PR932454, 6 June 2003) at [7] and [8].

5 *Smith v Barwon Region Water Authority* (2009) 187 IR 276 at [48].