

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Pacific National (NSW) Ltd v Bell

[2008] AIRCFB 555

Harrison and Cartwright SDPP, Larkin C

18 June, 20 August 2008

Termination of Employment — Appeal — Unfair dismissal — Resignation — Oral resignation confirmed in writing — Whether resignation at initiative of employer — Workplace Relations Act 1996 [Post Work Choices] (Cth), s 643.

The respondent had been employed by the appellant as a train driver for approximately 30 years. In October 2007 he contacted another train driver and advised him not to come to work, but that he would write on that employee's timesheet that he had worked the shift.

Following an investigation the respondent tendered his resignation at a meeting on 15 October 2007, relying on advice from the union secretary. The resignation was later confirmed in writing on a document entitled "Termination of Employment and Confidentiality Form" which showed "resignation" as the reason for termination.

The respondent brought an application for relief on the basis that his dismissal was harsh, unjust and unreasonable. The appellant brought a notice of motion to dismiss the application on jurisdictional grounds, namely, that the respondent had voluntarily resigned. Commissioner Spencer dismissed the notice of motion, holding that the resignation was forced and could be construed as a termination at the initiative of the employer.

The appellant appealed.

Held (granting leave to appeal and allowing the appeal): (1) The respondent's resignation was voluntary. It was made after discussion with his union delegate and with the advice of the union secretary. It was not withdrawn. It was confirmed in writing.

(2) The words on the resignation letter "Due to circumstances beyond my control" do not change the unambiguous nature of the resignation.

(3) No one from the company told the respondent that his employment would be terminated. The respondent knew that his actions in falsely signing a time sheet put his employment in jeopardy.

Cases Cited

Bell v Pacific National [2008] AIRC 305.

Wan v Australian Industrial Relations Commission (2001) 116 FCR 481.

Appeal

Y Shariff, for the appellant.

J Merrell, for the respondent.

Cur adv vult

The Commission

1 Pacific National (NSW) Limited (Pacific National) sought leave to appeal under s 120 of the *Workplace Relations Act 1996* (Cth) (the Act) against the decision and order of Commissioner Spencer on 14 April 2008 to dismiss its Notice of Motion to Dismiss Mr Ashley Bell’s application for relief under s 643(1) of the Act.¹ Pacific National had contended that Mr Bell voluntarily resigned from his employment and therefore the termination of his employment was not at the initiative of the employer in accordance with the definition of “termination” at s 642(1) of the Act. It had sought an order dismissing the application for want of jurisdiction.

2 On 9 May 2008, the President of the Commission ordered that the operation of the Decision be stayed until the determination of the appeal. The appeal was heard on 18 June 2008.

3 An appeal to the Full Bench lies only by leave of a Full Bench. The Full Bench must grant leave to appeal if, in its opinion, the matter is of such importance that, in the public interest, leave should be granted. Otherwise, a grant of leave is governed by the conventional considerations for the grant of leave to appeal by an appellate court which include whether the decision is attended with sufficient doubt to warrant its reconsideration or whether substantial injustice may result if leave is refused. However, a Full Court of the Federal Court of Australia when referring to the then appeal power in s 45 of the Act said:²

These “grounds” should not be seen as fetters upon the broad discretion conferred by s 45, but as examples of circumstances which will usually be treated as justifying the grant of leave. It will rarely, if ever, be appropriate to grant leave unless an arguable case of appealable error is demonstrated. This is so simply because an appeal cannot succeed in the absence of appealable error.

4 Appeals such as this against an order made under Subdiv B of Div 4 of Pt 12 of the Act are also subject to s 685(2) of the Act which is in the following terms:

For the avoidance of doubt, an appeal to a Full Bench under section 120 in relation to an order made by the Commission under Subdivision B of Division 4 may be made only on the grounds that the Commission was in error in deciding to make the order.

5 This appeal primarily concerns the Commissioner’s consideration of whether there had been a termination of employment at the initiative of the employer. The Act defines “termination of employment” to mean “termination of employment at the initiative of the employer” (s 642(1)). Section 642(4) further provides:

For the purposes of this Division, the resignation of an employee is taken to constitute the termination of the employment of that employee at the initiative of the employer if the employee can prove, on the balance of probabilities, that the

1 *Bell v Pacific National* [2008] AIRC 305 PR981410

2 *Wan v Australian Industrial Relations Commission* (2001) 116 FCR 481 at [30].

employee did not resign voluntarily but was forced to do so because of conduct, or a course of conduct, engaged in by the employer.

6 The grounds of appeal raise a challenge to a finding of a jurisdictional fact. In those circumstances the question for this Full Bench is whether the Commissioner reached the right conclusion as to the existence or otherwise of that jurisdictional fact. We have been persuaded that the grounds of appeal raise matters which warrant the grant of leave to appeal.

7 Understanding the grounds of appeal is aided by a brief chronology as follows.

8 Mr Bell had been employed by Pacific National (and its predecessors) as a train driver for approximately 30 years. In October 2007 he contacted another train driver, Mr Presland, and advised him not to come into work and that he would write on Mr Presland's timesheet that Mr Presland had worked the shift.³

9 Subsequently Pacific National commenced an investigation. Mr Bell attended a meeting with Mr McConville, Regional Operations Manager, on 10 October. On Friday 12 October he met with Mr Spicer, Operations Manager, to whom Mr McConville reported, and with Mr Parsons, Driver Trainer. The following Monday, 15 October 2007, Mr Spicer convened two meetings, the first with Mr Presland and the second with Mr Bell. Mr McKinnon, Driver Specialist — Operations, was present at both meetings at Mr Spicer's request that morning. Mr Hendy also attended both meetings on 15 October in his role as a union delegate.

10 Mr Bell was scheduled to meet Mr Spicer at 1.30 pm. He arrived at 1.25 pm at Pacific National's office, accompanied by a friend, Mr Smith, and had a discussion with Mr Hendy, during which both he and Mr Hendy spoke by phone to Mr Claassens, the union Secretary. Mr Bell went from this discussion into the meeting with Mr Spicer and, shortly after it started, told Mr Spicer he wished to tender his resignation.

11 The Commissioner found that Mr Bell's "resignation was forced and can be construed as a termination at the initiative of the Employer. The actions of the employer were the principal contributing factors that lead to the termination of the employment relationship."⁴

12 The Commissioner's finding that Pacific National's course of conduct forced Mr Bell to resign arises from two main findings of fact:

- that Mr Spicer delayed a decision on whether to terminate Mr Bell's employment beyond the meeting on 12 October as a device to place pressure on Mr Bell; and
- that Mr McKinnon told Mr Hendy, before his discussion with Mr Bell on 15 October, that Pacific National intended to terminate Mr Bell's employment, knowing that Mr Hendy would pass this on to Mr Bell.

13 The grounds of the appeal challenge the evidentiary basis for these findings. Pacific National submitted that the grounds of appeal "raise two primary errors engaged in by the learned Commissioner, specifically that":

3 *Bell v Pacific National* [2008] AIRC 305 PR981410, at [7].

4 PR981510, at [62].

- (a) the learned Commissioner misapplied s 642(4) of the Act by imputing to Pacific National the conduct of the union delegate, Mr Hendy, and Mr [Bell]'s⁵ subjective views and beliefs; and
- (b) the learned Commissioner erred in making findings of fact that were unreasonable or plainly unjust, including the findings that Mr Spicer had exerted pressure upon Mr Bell by making an early determination of the matter but then delaying his decision to terminate.

14 Accordingly, we turn to review the evidence before the Commissioner.

Evidence

15 Mr Bell gave undisputed evidence that, prior to his discussion with Mr Hendy at 1.25 pm on 15 October, he had no intention of resigning his employment. His affidavit said: "Prior to this I had no intention of resigning my employment with the company, and had intended to keep working for the company until my retirement."⁶

16 At that point, he knew for himself that his conduct was serious and might lead to termination of employment. Transcript records the following:⁷

Now can you tell the court exactly what it is that happened with this timesheet? What is it that you exactly did?---I filled it out, submitted it and scribbled a signature on it.

And what was the effect of doing that?---The effect of doing that was the time sheet was submitted and Mr Presland would have been paid for work that he wasn't there to perform.

And you knew that, didn't you?---Yes I knew that.

Was that honest, you doing that?---No, it was not honest.

It was dishonest, wasn't it?---Yes.

You'd agree with me that in effect what you were doing is defrauding the company?---I believe so, if that's the way you want to put it, yes.

Yes. And it was pretty obvious to you at the time that you did that, that you knew exactly what you were doing? That is that you were being less than honest, in fact quite dishonest about that?---About that, yes.

Correct. So you'd agree with me also that it wouldn't be fanciful for me to suggest that a reasonable person in your position would have clearly understood at the time that you falsified that time sheet that you could be in serious trouble? You'd agree with me on that, wouldn't you?---Yes, that's right.

Yes. So at the moment that you put pen to paper you knew that if you got caught you'd be in deep trouble, correct?---Correct.

Correct. And given that fact, because you're a reasonable person and an intelligent person you would know that one of the consequences of signing that timesheet in the fashion you did could possibly lead to your termination, correct?---Correct.

Correct. So the moment you signed that time sheet, sir - I just want to make this clear - you were well aware if you got caught it could lead to your termination, possibly, correct?---Possibly.

So when you then had the meeting with Mr McConville and he says to you this is a very serious offence, you wouldn't be surprised at all, would you?---No.

5 The grounds of appeal refer to Mr Bell's subjective views and beliefs. Accordingly we have corrected the misquote contained in the written submission.

6 Exhibit 8, para 14.

7 Transcript PN1048-1066. See also Transcript PN1365-1367 and 1377-1378.

No. And when he says to you well we all know what the outcome could be, again that's not a surprise, is it?---No.

Because why? Because you've been dishonest. You falsified a time sheet, correct?---That's right.

So right at the beginning you knew that if you got caught one of the possible outcomes could be that you would be terminated? Correct?---That's correct, yes.

You didn't need anybody to tell you that, did you?---No.

No. Because you're an intelligent person and you know that falsifying a time sheet is a no-no? Correct? You'd agree with that?---Yes.

So you agree with me then that irrespective of what the company would have done or said you knew if you got caught your job was in jeopardy?---That's right.

Correct?---I have never denied any of that.

17 Consequently, Mr Bell was apprehensive about his meeting with Mr Spicer scheduled for 1.30 pm on 15 October and arranged for Mr Hendy to attend with him in his role as union delegate.⁸

18 Before his resignation, no-one from the Company told Mr Bell that Pacific National intended to terminate his employment.⁹

19 After meeting with Mr Hendy for approximately 15 minutes and speaking by phone with Mr Claassens, the union secretary, Mr Bell acted on their advice and resigned. He gave evidence as follows:

What did you ask Mr Claassens?---I asked him what his advice was.

About what?---About what Mr Hendy had told him and what his reaction was to what Mr Hendy had told him.

What did Mr Hendy tell him?---Mr Hendy told him that things weren't looking good and they wanted to sack me and that it would be in my best interest to put my resignation in because of entitlements and future job prospects.¹⁰

Mr Claassens' advice was "... to put the resignation in and see how it goes."¹¹

20 On Mr Bell's evidence, soon after the start of his meeting with Mr Spicer at 1.50 pm, he interrupted Mr Spicer and said "I wish to tender my resignation."¹² He confirmed this in writing shortly after, signing a letter drafted by Mr Hendy, and left the premises.

21 The resignation was not withdrawn. Eight days later, on 23 October, Mr Bell attended an exit meeting with his supervisor, Mr McKinnon, where he returned Company property and signed a "Termination of Employment & Confidentiality Form" in which the reason for termination of employment is twice shown as "Resignation". He did not indicate to Mr McKinnon that the resignation was not voluntary.¹³

22 Turning to the meeting between Mr Bell, Mr Smith and Mr Hendy at 1.25 pm on 15 October, Mr Bell gave evidence that Mr Hendy began by saying "... he had been in discussions with *Nathan Spicer* and 'things are not looking good for you'. Russ said they wanted to sack me ...".¹⁴ [our italics] Mr Hendy

8 Exhibit 8, para 5; also Transcript PN 1360-1367.

9 See Transcript PN 1163-1174, 1182-1184, 1203, 1246-1248, 1282-1283, 1296-1299 and 1365.

10 Transcript PN1470-1472.

11 Transcript PN1497.

12 Exhibit, para 18.

13 Transcript PN1574.

14 Exhibit 8, para 9.

unequivocally denied telling Mr Bell that Pacific National wanted to sack him¹⁵ and gave evidence that he formed the view that “things are not looking good” on the basis of participating in the earlier scheduled meeting (at 12.30 pm) between Mr Spicer, Mr McKinnon and Mr Presland.

And that you drew that from advice that you had received from the company or from what had been said in the meeting with Mr Presland?---What had been said in the meeting with Mr Presland.

What had been said in the meeting with Mr Presland that would have caused you to say to Mr Bell, a completely different person, things are not looking good? ---From the way Nathan Spicer explained to John Presland that the company was taking the matter very seriously and I think that summed it up, that it was a very serious matter and there was no indication of which way it was going to go for either party at that stage. Nathan made it clear that it was a very serious matter.¹⁶

He denied that Mr Spicer or Mr McKinnon had told him that the Company intended to terminate Mr Bell’s employment.

- 23 While Mr Bell’s evidence of what Mr Hendy said in their meeting nominates “discussions with Nathan Spicer” as Mr Hendy’s source, the Commissioner makes several findings to the effect that Mr Hendy and Mr McKinnon met and that Mr McKinnon told Mr Hendy the Company intended to terminate Mr Bell’s employment, in the knowledge this would be passed on to Mr Bell. At paragraph 46 of the Decision the Commissioner finds:

[46] Whilst this discussion was denied by Mr McKinnon, it is determined that, on the balance of probabilities, having observed the evidence and demeanour of the witnesses, that Mr McKinnon undertook a further discussion with Mr Hendy regarding the Respondent’s intention to terminate the Applicant’s employment.

She goes on to find:

It is determined, based on assessment of the evidence, that the discussion between Mr McKinnon and Mr Hendy did occur prior to meeting with the applicant and Mr Smith and that the threat of the termination of the Applicant’s Employment was communicated to him by Mr McKinnon.¹⁷

Further,

The discussion between Mr Hendy and Mr McKinnon is integral to the indirect conduct of “the Employer”, given that it would have been recognised that the information would have been conveyed by the Applicant’s union official to the applicant.¹⁸

- 24 The finding that Mr Hendy and Mr McKinnon had a discussion prior to Mr Bell’s meeting at 1.25 pm with Mr Hendy rests on a single statement by Mr Bell, on which he was not cross examined. Paragraph 7 of his Affidavit reads:¹⁹

On 15 October Roy and I arrived at the Pacific National Gay Street office at 1.25

15 Transcript PN 1783-85; 1928-9.

16 Transcript PN 1808-1809.

17 *Bell v Pacific National* [2008] AIRC 305 [PR981410], at [48], 14 April 2008, Spencer C

18 *Wan v Australian Industrial Relations Commission* (2001) 116 FCR 481 at [56].

19 Exhibit 8.

pm. On arrival at the reception I saw Russ Hendy in conversation with David McKinnon (Locomotive Driver Specialist) in the office Mr McKinnon shared with Terry McConville.

25 While there was an opportunity for the two to meet in the break that followed the meeting with Mr Presland, Mr Hendy's evidence was that "I believe I was outside in the common area, in the office of Gay Street ..." ²⁰ when Mr Bell arrived. Mr McKinnon says he went back to his office after the Presland meeting and "I was in my room" when Mr Bell arrived. The only evidence on whether it is possible to see into Mr McKinnon's office from the reception area was ambiguous, allowing inferences either way. ²¹ Neither Mr Hendy nor Mr McKinnon thought or could recall they had a separate discussion that day; but neither could each deny it might have happened.

26 Accordingly, the Commissioner's finding that a discussion occurred between Mr Hendy and Mr McKinnon was possible on the evidence.

27 What was not possible was a finding on the content of any discussion. There is no evidence in the proceedings as to what was said, if such a discussion took place. Both witnesses unequivocally denied the content the Commissioner attributed to them. There was no other source of evidence on what was said. Further, Mr Bell's evidence that Mr Hendy told him "they wanted to sack me" ²² was admitted on the basis that his Counsel conceded, "I don't rely on it for the purposes of establishing the truth of the statement, but merely the fact that the statement was made ..." ²³ Even that evidence referred to Mr Hendy's "discussions with Nathan Spicer", rather than to discussion with Mr McKinnon.

28 The Commissioner's findings above depended on her findings on the credit of each of the witnesses. But findings as to credit do not cure the absence of evidence. More than speculation was required, however plausible that speculation may appear.

29 All the more caution was required here because the finding implied an agreement between the witnesses not to disclose the truth. That was unjustified in our view, given that Mr Hendy explained his state of knowledge of the Company's views (on which the finding depended) in a way consistent with Mr Bell's own statement and with the rest of the evidence - that he formed his view on the basis of Mr Spicer's comments at the earlier meeting with Mr Presland. The submission cited by the Commissioner at paragraph 47 of the decision "that the only logical way to view the evidence is that Mr Hendy was told by Mr McKinnon that Pacific National was going to terminate his employment" had to be rejected.

30 We are satisfied that the Commissioner's factual finding on the content of the alleged discussion between Mr Hendy and Mr McKinnon was in error. The finding that "... it is this cumulative conduct of the Employer's management; that of Mr Spicer when viewed together with Mr McKinnon's conduct of advising Mr Hendy of the Applicant's pending dismissal that contributed to the situation of the Applicant being forced to resign" cannot stand.

31 We have earlier granted leave to appeal. For the foregoing reasons we are

20 Transcript, PN1746.

21 Transcript, Pn700-705.

22 Exhibit 8, para 9.

23 Transcript PN896.

persuaded that the Commissioner's decision reflects appealable error warranting us granting this appeal and quashing the Commissioner's decision and order.

Consideration

32 With the benefit of all the material, we are in a position to decide the question for ourselves.

33 It will be apparent on the basis of the discussion above that we have concluded Mr Bell's resignation on 15 October 2007 was voluntary. He made his decision after discussion with his union delegate and seeking the advice of the union Secretary. He confirmed it in writing, did not withdraw it and a week later signed the "Termination of Employment & Confidentiality Form" showing "Resignation" as the reason for termination.

34 The opening words of Mr Bell's resignation letter — "Due to circumstances beyond my control" — do not change the unambiguous nature of the resignation. Nor does evidence on how those words came to be used in the letter advance Mr Bell's case one way or the other. All sorts of reasons might be given in a resignation letter, with varying levels of clarity, without casting doubt on an unambiguous resignation.

35 No-one from the Company, either directly or indirectly, told Mr Bell that the Company intended to terminate his employment. We do not need to make findings on what Mr Hendy told Mr Bell, since his is not the conduct of the employer.

36 Mr Bell understood from the outset that his action in falsely signing the timesheet potentially put his employment in jeopardy.²⁴

37 We are not satisfied that Mr Spicer either delayed making a decision on what disciplinary action he should take, or did so to place pressure on Mr Bell. Mr Spicer's evidence was that he had been in his job 6 months and that he had previously been involved in only one decision where an employee had been terminated. His evidence in that context, that he wanted to consult Company policies after the meeting on 12 October and reflect on what had been said before deciding Mr Bell's fate, was in our view unexceptional.

38 The evidence on his communications with Mr McKinnon on 15 October is equally unexceptional and does not suggest to us Mr Spicer had made his decision. Mr Spicer acknowledged that, in asking Mr McKinnon to attend the meetings with Mr Presland and Mr Bell as a witness, he would have told Mr McKinnon "it's serious business and [Mr Bell's] employment may be terminated."²⁵ This was no more than the fact, acknowledged by Mr Bell on his own appreciation of the position. Mr McKinnon's evidence is not consistent with Mr Spicer telling him that Mr Bell's employment would be terminated.²⁶

39 Nor do we see anything untoward in Mr Spicer's communications with Mr McConville, who was his direct report and who carried out the first phase of the investigation of Mr Bell's conduct on 10 October.

40 Mr Spicer denied that he had decided on 12 October to terminate Mr Bell's employment. Nor did Mr Bell conclude that he had. Mr Bell's evidence was that "It was an investigative meeting. It wasn't a meeting that was to conclude with

24 See [16] above.

25 Transcript PN 374.

26 See PN650-666 and 685-687.

an outcome.”²⁷ Prior to meeting with Mr Hendy at 1.25 pm on 15 October, Mr Bell “had no intention of resigning my employment with the company.” Mr Bell resigned at the start of the “disciplinary meeting” with Mr Spicer on 15 October. We cannot see that any conduct of Pacific National’s officers forced Mr Bell to resign.

41 There are two issues we need to deal with subsequent to Mr Bell’s oral resignation. Firstly, we are not persuaded that Mr Spicer’s letter, provided on 19 October at Mr Bell’s request,²⁸ in any way changes the voluntary nature of his resignation on 15 October. By the time Mr Bell received it, four days had already passed in which Mr Bell had given no indication to the Company that his resignation was forced. Nor can it found a view that Pacific National had made a decision on or before 15 October to terminate Mr Bell’s employment. But it is consistent with Mr Bell’s appreciation of his serious position on 15 October, on which he made his own decision to jump before he was pushed.

42 Secondly, Mr Bell gave evidence that, prior to submitting the resignation letter, Mr Hendy asked Mr McKinnon to confirm “that they were going to sack him”.²⁹ Mr Hendy did not recall that happening, but was clear that Mr McKinnon did not reply “They don’t muck round these days”, as Mr Bell alleged. Mr Hendy’s evidence was, “He said nothing of the sort, no.” Mr McKinnon was categorical on both propositions.³⁰

Mr Hendy said, “Dave, can you confirm to Ashley that they were going to sack him”?--No, that did not happen.

Okay. You can’t recall it or didn’t?--It didn’t.

You see, I suggest to you that Mr Hendy did ask you that question?--No, he did not ask me that question.

And you said words to this effect, “Yes, they were, they don’t muck around these days”, isn’t that right?--I did not say that.

43 Although Mr Bell maintained his evidence in cross examination,³¹ it is difficult for us to find that this occurred as stated by Mr Bell. Mr McKinnon’s denial was consistent with Mr Spicer’s evidence of his intentions in the meeting of 15 October, with his own evidence that Mr Spicer never mentioned “termination” in asking him to attend the meeting as a witness,³² and with Mr Spicer’s evidence of how he handled the disciplinary process with Mr Presland.³³ It was clear that Mr McKinnon did not have authority to make a decision on termination of employment and that Mr Spicer, the decision maker, had not indicated any decision prior to that point.

Conclusion

44 We are satisfied that Mr Bell has not proved on the balance of probabilities that he did not resign voluntarily but was forced to do so because of conduct, or a course of conduct, engaged in by Pacific National. In our view, Mr Bell resigned voluntarily on 15 October 2007. His employment was not terminated at the initiative of the employer.

27 Transcript PN1184.

28 Transcript PN457

29 Exhibit 8, paragraph 23.

30 Transcript PN 810-813.

31 Transcript, PN1427-1431.

32 Transcript PN653.

33 Transcript PN479.

45 Accordingly, there is no jurisdiction to entertain an application under s 643(1) of the Act and it must be dismissed.

*Appeal allowed; application pursuant to s 643(1) of the
Workplace Relations Act 1996 (Cth) dismissed*

Solicitor for the appellant: *K Heraghty*.

Solicitor for the respondent: *P Copeland*.

ALEX LAZAREVICH