FAIR WORK AUSTRALIA

# Timmins v Compass Security

[2012] FWAFB 1093

Boulton J, SDP, Richards SDP and Bissett C

2 December 2011, 21 February 2012

*Termination of Employment — Minimum employment period — Appeal — Appeal against dismissal of unfair dismissal application — Applicant did not contest facts but sought to amend application — No basis for appeal — No error in original decision — Permission to appeal refused — Applicant made submissions not relevant to basis of appeal — Applicant made application without reasonable cause — Applicant made application without reasonable prospect of success — Costs order — Fair Work Act 2009 (Cth), ss 382, 383, 390, 400, 604, 611.*

An unfair dismissal remedy application was dismissed on the basis that the applicant was not eligible to be protected under ss 382, 383 and 390 of the *Fair Work Act 2009* (Cth) (the Act) as he was employed by the respondent for less than the required six month period.

These proceedings were conducted entirely through written submissions.

The applicant did not contest that he had been employed for less than six months, but contended that the decision contravened various legislative provisions as well as international obligations. The respondent submitted that a right to appeal was not established under s 400 of the Act, and sought a costs order under s 611 of the Act against the applicant, alleging that the appeal was made without reasonable cause or reasonable prospect of success.

Fair Work Australia considered whether the applicant's submissions constituted an attempt to amend the original application and sought to assess jurisdictional issues which would arise should the appeal be mounted on the amended grounds.

*Held* (refusing permission to appeal; dismissing the appeal) (by Fair Work Australia): (1) There was no basis on which to grant permission to appeal. The original decision turned on the applicant's period of employment and this was not contested in these proceedings. There was no error in relation to facts or application of statutory provisions, thus s 400 of the Act was not made out.

(2) The applicant's submissions were found to constitute an attempt to amend the original application and relate it to provisions in the Act concerning unlawful termination. Even if the amended grounds were prosecuted, significant issues of jurisdiction would arise, specifically that in order for the matter to fall within the operation of the Act, a substantive connection to Australia must be demonstrated.

(3) An order for costs against the applicant should be made as the provisions of s 611(2) of the Act were satisfied. As the applicant's submissions did not contest

the factual or legal basis of the decision at first instance, the applicant made his appeal without reasonable cause and it ought to have been apparent to the applicant that the application had no reasonable prospect of success.

*Baker v Salva Resources Pty Ltd* (2011) 211 IR 374; *Kanan v Australian Postal and Telecommunications Union* (1992) 43 IR 257, applied.

(4) Any application for an order for costs against the applicant pursuant to s 402 of the Act will be considered by Boulton J, SDP following further submissions by the parties.

**Cases Cited**

*Baker v Salva Resources Pty Ltd* (2011) 211 IR 374.

*Comalco Aluminium (Bell Bay) Ltd v O'Connor (No 2)* (1995) 61 IR 455.

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

*GlaxoSmithKline Australia Pty Ltd v Makin* (2010) 197 IR 266.

*Harris v Home Theatre Group Pty Ltd* [2011] FWA 2910.

*Kanan v Australian Postal and Telecommunications Union* (1992) 43 IR 257.

*Legaz v Northern Beaches Community Services Pty Ltd* [2011] FWA 5656.

*O'Sullivan v Farrer* (1989) 168 CLR 210.

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

*Timmins v Compass Security* [2011] FWA 7263.

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

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

*Xing v H & M Ferman Pty Ltd* [2011] FWA 6254.

**Application for permission to appeal and appeal and application for costs order**

*B Timmins*, on his own behalf.

*B Feltham*, for the respondent.

*Cur adv vult*

**Fair Work Australia**

1 In a decision given on 24 October 2011,[1] Senior Deputy President Acton dismissed an unfair dismissal remedy application made by Ben Timmins (the applicant) on the basis that her Honour was not satisfied that the applicant was protected from unfair dismissal at the time of being dismissed as he had not completed at least six months employment with his employer.

2 The relevant provisions of the *Fair Work Act 2009* (Cth) (the Act) are ss 382, 383 and 390. For the purposes of this decision, the relevant parts of those sections are as follows:

> 390 When FWA may order remedy for unfair dismissal
>
> (1) … FWA may order a person's reinstatement, or the payment of compensation to a person, if:
>
> (a) FWA is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
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> (b) the person has been unfairly dismissed (see Division 3).

1 *Timmins v Compass Security* [2011] FWA 7263.

> 382 When a person is protected from unfair dismissal
>
> A person is *protected from unfair dismissal* at a time if, at that time:
>
> (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period …
>
> 383 Meaning of minimum employment period
>
> The minimum employment period is:
>
> (a) if the employer is not a small business employer — 6 months ending at the earlier of the following times:
>
> (i) the time when the person is given notice of the dismissal;
>
> (ii) immediately before the dismissal; or
>
> (b) if the employer is a small business employer — one year ending at that time.

3 The applicant has sought pursuant to s 604 of the Act to appeal against the Senior Deputy President's decision. Section 604 of the Act provides that a person who is aggrieved by a decision such as the one made here may appeal, with the permission of FWA, against the decision. However s 400 of the Act limits that right in unfair dismissal cases. It provides:

> 400 Appeal rights
>
> (1) Despite subsection 604(2), FWA must not grant permission to appeal from a decision made by FWA under this Part unless FWA considers that it is in the public interest to do so.
>
> (2) Despite subsection 604(1), an appeal from a decision made by FWA 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.

4 As was said by a Full Bench of FWA in *GlaxoSmithKline Australia Pty Ltd v Makin*:[2]

> [3] Prior to the introduction of the Act the manner in which an appeal against an unfair dismissal decision proceeded was the same as with appeals from other decisions, but only on the grounds that the Australian Industrial Relations Commission was in error in deciding to make the order.[3] The conventional grounds for granting leave to appeal[4] otherwise applied under the *Workplace Relations Act 1996*, being whether the decision was attended by sufficient doubt to warrant its reconsideration or whether substantial injustice would result if leave were refused. However, even absent the conventional grounds, if the Commission was of the opinion that the matter was of such importance that it was in the public interest that leave should be granted the Commission was required to grant leave. Alternatively, leave could be granted if error could be demonstrated.[5]
>
> [4] It can be seen that a significant change to the granting of permission to appeal was wrought by the introduction of the Act.

5 The Full Bench indicated some of the situations in which the public interest might be attracted:

> [26] Appeals have lain on the ground that it is in the public interest that leave should be granted in the predecessors to the Act for decades. It has not

2 *GlaxoSmithKline Australia Pty Ltd v Makin* (2010) 197 IR 266.

3 *Workplace Relations Act 1996* (Cth), s 685.

4 *Wan v Australian Industrial Relations Commission* (2001) 116 FCR 481 at [26].

5 Section 170JF(2) of the pre-Work Choices *Workplace Relations Act 1996* (Cth).

> been considered useful or appropriate to define the concept in other than the most general terms and we do not intend to do so. The expression "in the public interest", when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only by the objects of the legislation in question.[6]
>
> [27] Although 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, it seems to us that none of those elements is present in this case.

6 The matter was called on for mention before Justice Boulton in Melbourne on 2 December 2011. The mention was conducted by telephone as the applicant resides in New Zealand and the representative of the Company was in Sydney. In the mention proceedings, Mr. Brett Feltham, Special Counsel, Price Waterhouse Coopers, for Compass Security (t/as Compass Integrated Security Solutions) (the Company) sought and was granted leave to appear. The parties were reminded that the appeal was against a decision dismissing an unfair dismissal application on the basis that the applicant did not have the relevant period of service as would entitle him under the Act to make such application. Therefore the appeal would be concerned with a relatively confined point and would not necessarily entail any wide-ranging inquiry into the circumstances of the employment of the applicant or his dismissal.

7 In the mention proceedings, the Company's representative indicated that in the appeal proceedings an order for costs would be sought against the applicant on the basis that the appeal has no reasonable prospect of success (s 611). It was said that the appeal is against a decision which deals solely with the question of whether the applicant was employed for the minimum employment period required to bring an unfair dismissal claim. On the applicant's own documentation, it was said that this was acknowledged. In these circumstances, the Company sought an order for security for the payment of costs (s 404). This was opposed by the applicant. In ruling on this issue and giving directions for the filing of submissions, Justice Boulton said:

> I am not inclined at this stage to make any order in relation to security for costs. I note that the parties have agreed that the matter can be dealt with on the basis of written submissions. I also note that to some extent, just from reading all the material that has already been filed, that there is already quite a wealth of material that is before us so I don't know whether the parties are going to as it were prepare much further or more lengthy materials. But at least I am going to provide an opportunity for that to happen. I do so on the basis of reminding both parties that this matter that is before the Full Bench is an appeal from the decision of Senior Deputy President Acton and it will be determined as an appeal against that decision. It is not necessarily a wide ranging inquiry into anything other than the issues which we would need to look at in determining the appeal which is before us.[7]

8 As the applicant and the Company agreed that the appeal would be conducted

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6 *Comalco Aluminium (Bell Bay) Ltd v O'Connor (No 2)* (1995) 61 IR 455 at 479-480 per Wilcox CJ & Keely J, citing *O'Sullivan v Farrer* (1989) 168 CLR 210.

7 Transcript PNS 48-49.

without a hearing and on the basis of the written submissions (see s 607), directions were issued for the filing of submissions. Pursuant to these directions, the applicant filed submissions on 9 December 2011, the solicitor for the Company filed submissions on 16 December 2011 and the applicant filed submissions in reply on 19 December 2011.

9 We have considered all the submissions in reaching our conclusions in this matter. However we note that much of what is contained in the applicant's submissions is not relevant to the issues necessary to be determined in the appeal. The essential issue in the appeal is whether there is some error in the Senior Deputy President's decision to dismiss the unfair dismissal remedy application.

**Merits of the appeal**

10 The applicant acknowledged in his submissions that the Senior Deputy President's decision "was based solely and primarily on the period of employment prior to the unlawful termination" and submitted that the decision was in error because it "contravened protection provisions in legislation and International employment obligations". In effect, the applicant sought on appeal to correct or amend the unfair dismissal application he had made and for FWA to deal with the matter as if it were an unlawful termination application and to issue a certificate pursuant to s 777 of the Act. The applicant did not contest that he had been employed for less than six months. The applicant's submissions were mainly concerned with the circumstances of and reasons for his termination and with issues relating to the legislative provisions relating to the operation of Pt 6-4 of the Act (which deals with termination of employment), international labour standards, the legal representation of the Company in the appeal and the application by the Company for an order for costs.

11 The Company in its written submissions argued that permission to appeal should not be granted as the requirements of s 400 are not satisfied. In particular it was put that the period of the applicant's employment was not in dispute between the parties. This was the basis for the decision that no unfair dismissal remedy was available to him.

12 In this respect, we agree with the Company's submission. There is nothing in the submissions on appeal to suggest that the Senior Deputy President erred in determining that the applicant had not completed the minimum employment period or in dismissing his application for an unfair dismissal remedy. Whether the applicant might have recourse to other provisions of the Act dealing with general workplace protections (Pt 3-1) or termination of employment (Pt 6-4) were not matters which the Senior Deputy President was called upon to decide.

13 In these circumstances, there is no basis for an appeal bench to grant permission to appeal in this matter. It has not been shown that there is any arguable case as to error in the decision sought to be appealed against. There has been no error in relation to the significant facts nor has there been any misapplication of the relevant legislative provisions. Accordingly, permission to appeal is refused.

14 The appeal is in effect an endeavour by the applicant to have his complaint regarding the termination of his employment dealt with under provisions of the Act other than those relied upon in making the application under s 394. In particular, it would seem that the applicant now seeks that FWA deal with the application under the provisions of the Act dealing with unlawful termination, adverse action, sham contracting or ILO standards. If such matters are sought to

be pursued, appropriate applications should be made and the requirements of the Act in relation to such applications satisfied. However, in this regard, it would seem to us that some of the applicant's submissions in the appeal relating to other possible applications are based upon a misconstruction of relevant provisions of the Act. Furthermore we note that there might be significant jurisdictional issues arising in the pursuit of such applications. The Company's submissions to the Senior Deputy President and on appeal were to the effect that the applicant was an independent contractor and not an employee; that the applicant was domiciled in New Zealand and was engaged to provide services in Afghanistan; that the applicant was not engaged by the Company while present in Australia and did not provide any services to the Company while in Australia; and that the Company is not incorporated in Australia and does not engage in any activities or conduct any operations in Australia. The applicant would need to show that his engagement by the Company had such a sufficient or real connection with Australia as to be within the geographical or valid application of the Act (see Pt 1-3).

**Order for costs**

15 The Company in its submissions sought an order for costs under s 611 of the Act against the applicant. It was submitted that the order should be made on the basis that it would have been reasonably apparent to the applicant that the appeal had "no reasonable prospect of success" (s 611(2)(b)). It was also submitted that the appeal was pursued by the applicant vexatiously and without reasonable cause (s 611(2)(a)).

16 Section 611 provides that generally a person must bear their own costs in relation to a matter before FWA. However FWA is given a discretion to make an order for costs against a person if it is satisfied that the person made an application vexatiously or without reasonable cause or the application had no reasonable prospects of success.

17 Section 611 is in the following terms:

> 611 Costs
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> (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.
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> Note: FWA can also order costs under sections 376, 401 and 780.
>
> (3) A person to whom an order for costs applies must not contravene a term of the order.
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> Note: This subsection is a civil remedy provision (see Part 4-1).

18 Section 402 deals with the making of applications for costs orders in matters arising under Pt 3-2 of the Act. The section provides as follows:

> 402 Applications for costs orders
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> An application for an order for costs under section 611 in relation to a matter arising under this Part, or for costs under section 401, must be made within 14 days after:
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> (a) FWA determines the matter; or
>
> (b) the matter is discontinued.

19 In *Baker v Salva Resources Pty Ltd*,[8] a Full Bench of FWA summarised the approach to be taken in relation to subs 611(2)(b) of the Act as follows:

> [10] The concepts within s 611(2)(b) "should have been reasonably apparent" and "had no reasonable prospect of success" have been well traversed:
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> • 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;[9] 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[10] or so lacking in merit or substance as to be not reasonably arguable.[11] [12]

20 On the question of what constitutes "without reasonable cause", Justice Wilcox in *Kanan v Australian Postal and Telecommunications Union*[13] said that:

> [29] It seems to me that one way of testing whether a proceeding is instituted "without reasonable cause" is to ask whether, upon the facts apparent to the applicant at the time of instituting the proceeding, there was no substantial prospect of success. If success depends upon the resolution in the applicant's favour of one or more arguable points of law, it is inappropriate to stigmatise the proceeding as being "without reasonable cause". But where it appears that, on the applicant's own version of the facts, it is clear that the proceeding must fail, it may properly be said that the proceeding lacks a reasonable cause.

21 This test of what constitutes "without reasonable cause" has been adopted by FWA in several cases.[14]

22 The claim for costs was raised in the mention proceedings and is dealt with in considerable detail in the submissions filed by the applicant and the Company. The Company submitted that it was clear that the appeal would fail due to the minimum employment period not being completed. This was evident from the applicant's own version of the facts which was confirmed by him when given an additional opportunity by the Senior Deputy President. Accordingly it was submitted that it should have been reasonably apparent to the applicant that the

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8 *Baker v Salva Resources Pty Ltd* (2011) 211 IR 374.

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

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

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

12 See also *Legaz v Northern Beaches Community Services Pty Ltd* [2011] FWA 5656 at [59].

13 *Kanan v Australian Postal and Telecommunications Union* (1992) 43 IR 257.

14 See eg. *Harris v Home Theatre Group Pty Ltd* [2011] FWA 2910, *Legaz v Northern Beaches Community Services Pty Ltd* [2011] FWA 5656 at [59], and *Xing v H & M Ferman Pty Ltd* [2011] FWA 6254 at [15] and [16].

appeal had no reasonable prospects of success within the meaning of s 611(2)(b) of the Act. The applicant opposed the making of an order for costs on the basis that the Company had brought the actions upon itself by offering an agreed settlement and then withdrawing it. Further it was put in the reply submissions that the applicant now objected to legal representation by the Company and that the representative was acting illegally without proper notice and/or permission.

23 We have considered the submissions of the parties in relation to the application for costs. In the circumstances of the present matter, we consider that it would be appropriate to make an order pursuant to s 611 that the applicant bear some of the costs of the Company in relation to the appeal.

24 The decision appealed against was reached on the basis of uncontested facts as to the period of the applicant's employment with the Company. The Senior Deputy President decided that the applicant had not completed the minimum employment period specified in s 383 and therefore was not a person protected from unfair dismissal under the Act. Although the applicant's notice of appeal refers to a significant error of fact and his submissions are to the effect that the decision was in error, there is nothing in the voluminous materials put by the applicant in the notice of appeal or in submissions which challenge the factual or legal basis upon which the Senior Deputy President's decision was made. It should have been clear to the applicant that the appeal would be confined to such matter. This would also be evident from the mention proceedings before Justice Boulton. Despite this, the applicant pursued the application to appeal and repeated in his submissions much of what had previously been put by him to the Senior Deputy President regarding various additional and extraneous claims against the Company. Although the applicant might have been proceeding on the basis of some misguided notion of what might be possible outcomes of the unfair dismissal application made or of the appeal, we are satisfied that the requirements in s 611(2) for the making of an order for costs are met.

25 For these reasons, we are satisfied that the applicant made the application to appeal "without reasonable cause" and that the applicant pursued the appeal in circumstances where it should have been reasonably apparent to him that it had no reasonable prospect of success.

26 Accordingly we consider that the grounds have been made out for the making of an order for payment of part of the costs of the Company in the appeal. Any application made pursuant to s 402 of the Act will be dealt with by Justice Boulton having regard to this decision. The order to be made and amount of costs awarded will be determined by Justice Boulton after providing an opportunity for the parties to make further submissions on this issue.

*Leave to appeal refused; appeal dismissed; order for costs to be made subject to further submissions*

JACKSON HARRISON