FAIR WORK AUSTRALIA

Prasad v Alcatel-Lucent Australia Ltd

[2011] FWAFB 1515

Boulton J, SDP, Hamberger SDP and McKenna C

20 December 2010, 14 March 2011

Termination of Employment — Unfair Dismissal — Appeal — Application for permission to appeal — Whether Commissioner erred in refusing to extend the time in which an application for unfair dismissal can be brought — Fair Work Act 2009 (Cth), ss 394, 604.

The appellant sought permission to appeal against a decision of a Commissioner in which the appellant's application for an extension of time to bring an application for an unfair dismissal remedy was refused. The appellant had delayed nearly two months after becoming aware that he had the right to bring an unfair dismissal application before lodging one, which was ultimately lodged four months outside the time for filing. He argued that during that time he was trying to pursue the possibility of redeployment or re-employment rather than taking legal proceedings.

Held (refusing the application for permission to appeal): (1) Although a discretion is given to extend the time for the making of an application, such an extension can be allowed only where Fair Work Australia is satisfied that there are exceptional circumstances.

Cheval Properties Pty Ltd (t/as Penrith Hotel Motel) v Smithers (2010) 197 IR 403, referred to.

(2) The appellant had not demonstrated any appealable error in the exercise of the Commissioner's discretion, nor had any error of law been shown.

Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194; 99 IR 309, applied.

Cases Cited

Cheval Properties Pty Ltd (t/as Penrith Hotel Motel) v Smithers (2010) 197 IR 403.

Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194; 99 IR 309.

House v The King (1936) 55 CLR 499.

Norbis v Norbis (1986) 161 CLR 513.

Application for permission to appeal

The appellant (and *Mr Atul*) appeared in person.

N Street, for the respondent.

Cur adv vult

Fair Work Australia

1 This is an appeal by Mr Rajeev Prasad (the Appellant), pursuant to s 604 of the *Fair Work Act 2009* (Cth) (the Act), against a decision of Commissioner Thatcher dated 7 October 2010. In the decision, the Commissioner refused to extend the time for the making of the Appellant's application for an unfair dismissal remedy. The Appellant was dismissed from his employment as a Software Test Engineer with Alcatel-Lucent Australia Ltd (the Respondent) on 29 January 2010. The unfair dismissal application was filed with Fair Work Australia (FWA) on 11 June 2010, approximately four months outside the standard 14-day period for making such applications.

2 The background to the appeal may be briefly described as follows. The Appellant was employed by the Respondent from 17 March 2008 until 29 January 2010. Prior to this, he had been working for the Alcatel-Lucent group in India since May 2001 and his transfer to Australia was contingent upon the Respondent's sponsorship of a visa under s 457 of the *Migration Act 1958* (Cth).

3 The Appellant was notified in November 2009 that, as a result of a restructure of part of the Respondent's operations, his position was redundant and his employment would cease on 12 January 2010. This was later extended to 29 January 2010. The Appellant was paid redundancy entitlements and the Respondent offered to meet the Appellant's relocation costs back to India.

4 After being advised about his redundancy, the Appellant made application for various positions with the Respondent and with related overseas companies. He continued to make applications for vacancies after the cessation of his employment and believed that he had received encouragement from the Respondent in this regard. However, all the applications were unsuccessful.

5 The evidence before the Commissioner was that in mid-April 2010 the Appellant consulted a Legal Aid Office and private lawyers specialising in the field of employment law and was made aware of his rights to pursue an application with FWA. It would seem that he also received advice regarding possible rights under his contract of employment to relocation to a position with Alcatel-Lucent in India.

6 There were many communications from the Appellant to the Respondent regarding redeployment and re-employment in the period before and after the termination of employment, including efforts by the Appellant to meet with the worldwide CEO of Alcatel-Lucent whilst he was visiting Australia in April 2010. The response was that the Appellant should pursue his concerns with the Australian management of Alcatel-Lucent. The Respondent's position was that it would meet the relocation expenses back to India but it was for the Appellant to pursue any employment opportunities directly with Alcatel-Lucent India.

7 As a result of the expiry of his s 457 visa, the Appellant left Australia on 13 June 2010 and returned to India. The Appellant did not accept payment for the relocation costs as he maintained the claim to redeployment to Alcatel-Lucent India.

8 The unfair dismissal application was filed by the Appellant two days before his departure from Australia. The application was opposed by the Respondent

on the bases that it was made outside the statutory 14 day period and because it was said that the termination of employment was a case of "genuine redundancy".

9 A conciliation conference was held on 6 July 2010 following which the Appellant decided to proceed with his application including the extension of time application. The matter was then referred to the Commissioner to determine whether the period for making the unfair dismissal application should be extended.

10 Subsection 394(2) of the Act requires that an application for an unfair dismissal remedy be made within 14 days after the dismissal took effect or "within such further period as FWA allows." Although a discretion is given to extend the time for the making of an application, such an extension can be allowed only where FWA is satisfied that there are exceptional circumstances. The factors to be taken into account in determining whether there are exceptional circumstances are set out in s 394(3). This subsection provides:

> (3) FWA may allow a further period for the application to be made by a person under subsection (1) if FWA is satisfied that there are exceptional circumstances, taking into account:
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> (a) the reason for the delay; and
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> (b) whether the person first became aware of the dismissal after it had taken effect; and
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> (c) any action taken by the person to dispute the dismissal; and
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> (d) prejudice to the employer (including prejudice caused by the delay); and
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> (e) the merits of the application; and
>
> (f) fairness as between the person and other persons in a similar position.

11 In his decision, the Commissioner considered relevant authorities in relation to what might constitute "exceptional circumstances" within the meaning of s 394(3) of the Act, including the decision of a Full Bench of FWA in *Cheval Properties Pty Ltd (t/as Penrith Hotel Motel) v Smithers* (2010) 197 IR 403. The Commissioner then set out the approach he would adopt in considering the application before him in these terms:

> [13] It should be clear from the case law I have cited that the making of a s 394 application out of time should not be regarded as presenting the applicant with some mere technical problem. Rather s 394(2) is a substantive legislative provision which represents the legislature's judgement that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the period may often result in a good cause of action being defeated. The limitation period in s 394(2) is a relatively short period of 14 days, underlining the legislature's intention that applications under s 394 are dealt with expeditiously.

12 The Commissioner considered the evidence in relation to the termination of the Appellant's employment and the very extensive efforts made by the Appellant to find other positions within Alcatel-Lucent, whether in Australia or other countries.

13 In particular, the Commissioner made a careful examination in relation to each of the factors set out in s 394(3) and decided that there were no

exceptional circumstances as would warrant extending the period for the lodgement of the unfair dismissal application. The Commissioner concluded as follows:

> [60] Whether or not special circumstances exist requires an overall judgement of all of the factors prescribed by s 394(3). I am not satisfied that my findings in respect of the matters in paragraphs 394(3)(a) to (f) constitute exceptional circumstances.
>
> [61] In respect of s 394(3)(a), Mr Prasad's reasons for his delay in making his substantive application cannot be regarded as unusual or extraordinary, particularly given that he did not seek legal advice until approximately 4 months after being advised he was to be retrenched and the lengthy period of approximately 2 months between his being made aware of the unfair dismissal remedy and his making the substantive application.
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> [62] Further there is nothing in my findings in respect of the matters in s 394(3)(b) to (f) that are not routinely or normally encountered so as to contribute to satisfaction of the test of exceptional circumstances, particularly given my findings that his actions were in the main directed to his purported entitlement under his contract of employment to relocation rather than to dispute the unfairness of his dismissal and that he had not acted promptly on the advice of a lawyer that he make an application for an unfair dismissal remedy.

14 In the appeal proceedings, the Appellant maintained that he had a very good *prima facie* case and would suffer irreparable loss and damage if the claim was defeated on technicalities and by reason of delays for which the Respondent was primarily responsible. It was said that the Respondent gave false assurances about redeployment and that these were influential in the Appellant pursuing opportunities for redeployment rather than contesting the dismissal through legal proceedings. It was submitted that the Commissioner failed to take these and other matters into account in reaching the decision not to extend the time for the lodgement of the unfair dismissal application. It was also alleged that the Commissioner made various factual errors in his decision, including in relation to the acceptance of statements of the Respondent regarding the work performed by the Appellant and redundancy. It was further alleged that the failure of the Respondent to produce certain documents in the appeal proceedings had severely prejudiced the Appellant's case.

15 An appeal under s 604 of the Act involves an appeal by way of rehearing, with the powers of the Full Bench being exercisable only if there is error on the part of the primary decision-maker: see *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194; 99 IR 309. The majority of the High Court in that case explained in the following passage (at 205; 315) how error may be identified where a discretionary decision is involved:

> Because a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision-making process (See *Norbis v Norbis* (1986) 161 CLR 513 at 518-519). And unless the relevant statute directs otherwise, it is only if there is error in that process that a discretionary decision can be set aside by an appellate tribunal. The errors that might be made in the decision-making process were identified, in relation to judicial discretions, in *House v The King* in these terms:

> If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so

(55 CLR 499 at 505).

16 An appeal under s 604 of the Act may only be pursued with the permission of FWA. This would normally require an appellant to demonstrate an arguable case of appealable error and refer to other considerations which would justify the granting of permission to appeal. Although s 604(2) requires FWA to grant permission to appeal if it is satisfied that it is in the public interest to do so, there is a note following the subsection to the effect that this does not apply in relation to an application to appeal from an unfair dismissal decision (see s 400). The effect of s 400 of the Act is that the general approach to dealing with appeals is varied in two significant ways in relation to appeals from unfair dismissal decisions. Firstly, in regard to the granting of permission to appeal, this may only be granted where FWA considers it is in the public interest to do so (s 400(1)). Secondly, where an appeal is based on error of fact, the appeal can only be made on the ground that the decision involved a significant error of fact (s 400(2)).

17 The appeal proceedings in this matter involved written outlines of submissions from the parties, a hearing which included submissions by telephone link by the Appellant and his legal advisor in India, sometimes with the assistance of a translator, and submissions on behalf of the Respondent, and allowing the Appellant to provide written submissions in reply. The Appellant was given considerable latitude in the presentation of his case and in raising issues and referring to matters which he considered of relevance in the determination of the appeal.

18 We have carefully considered the submissions and materials presented in the appeal and the evidence and submissions before the Commissioner. However, we are not satisfied that the Appellant has demonstrated that there is an arguable case of appealable error in the decision of the Commissioner. Indeed, in many respects the Appellant has in the appeal proceedings continued to agitate the same issues as were raised before the Commissioner, namely that he should not have been terminated due to redundancy, that he was misled by the Respondent as to the possibility of redeployment and that the Respondent was obliged to arrange for his redeployment to Alcatel-Lucent in India These matters were contested by the Respondent and, in any event, were only part of the circumstances that the Commissioner needed to consider in deciding whether in the exercise of the discretion under s 394(2) the time for the making of the application should be extended.

19 The unfair dismissal application was lodged almost four months outside the standard time period in s 394(2)(a). It would seem that, for some of the period, the Appellant was not aware of the possibility of pursuing an unfair dismissal application. However, even when he became so aware, he did not lodge the application until almost two months had passed. This was because he decided to pursue the possibility of redeployment or re-employment with Alcatel-Lucent rather than commencing unfair dismissal or other legal proceedings. Although the Appellant alleged that he was misled by the Respondent with respect to

redeployment opportunities, there seems little to suggest from the evidence regarding the communications between the parties that this was the case.

20 The Commissioner considered whether in all the circumstances of the matter it was appropriate to extend the period to allow the application to proceed. In so considering, the Commissioner had regard to relevant statutory provisions and the considerations in s 394(3). The Commissioner also referred to relevant decisions of FWA relating to the meaning of "exceptional circumstances" in s 394(3) of the Act and adopted an approach to the determination of the matter before him which was consistent with the authorities. It has not been shown that the Commissioner made any errors in relation to the essential facts of the matter or that he failed to take into account matters of material relevance to the exercise of the discretion.

21 The Commissioner fully considered the circumstances of the application and the submissions and evidence before him, and came to the conclusion that there were not such exceptional circumstances as would warrant granting an extension of time. It has not been shown in the appeal proceedings that the Commissioner erred in law or in fact in the consideration of the matter before him or in the decision that he reached. In these circumstances, we have decided not to grant permission to appeal.

Permission to appeal refused

ALEX LAZAREVICH