FairWork Commission

DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Tasmanian Ports Corporation Pty Ltd t/a Tasports
v
Mr Warwick Gee
(C2017/458)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT DEAN
COMMISSIONER SAUNDERS

SYDNEY, 18 MAY 2017

Appeal against decision [[2017] FWC 31] of Deputy President Wells at Hobart on 4 January 2017 in matter number U2015/11920.

Introduction and background

[1] Tasmanian Ports Corporation Pty Ltd trading as "Tasports" has lodged an appeal, for which permission to appeal is required, against a decision of Deputy President Wells issued on 4 January 2017[1] (Decision). The Decision concerned an application made by Mr Warwick Gee for an unfair dismissal remedy with respect to the termination of his employment with Tasports, which was communicated to him on 28 August 2015 and took effect on 24 September 2015. The Deputy President determined that Mr Gee's dismissal was unfair, and then invited further submissions and evidence on the remedy to be ordered. No further decision as to remedy has yet been made.

[2] A brief recount of the nature of Mr Gee's employment and the circumstances of his dismissal is necessary. Tasports is a state-owned company which owns and operates a number of ports in the State of Tasmania, and also engages in other commercial activities including operating or supplying labour to privately-owned ports. Grange Resources Limited is a mining business which processes and ships for export iron pellets at Port Latta in northern Tasmania. It has engaged Tasports to provide the personnel for its loading and shipping work at Port Latta. Mr Gee was an employee of Tasports, and was assigned to work at Port Latta pursuant to Tasports' commercial arrangement with Grange Resources from 2009 until the date of his dismissal.

[3] An issue arose in relation to Mr Gee's conduct at work on 13 August 2015, and this caused Grange Resources to conduct an investigation which initially was concerned with this incident but widened to include other matters that were earlier in time. Tasports was made

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aware of this investigation, but Mr Gee was not advised of its existence or given any opportunity to respond to the matters that were considered as part of the investigation.

[4] On 17 August 2015 Mr Paul Sturzaker, then Senior Processing Manager at Grange Resources, sent an email to Mr Ashley Ralston, Tasports' Marine Supervisor at Port Latta (and copied to a number of other Grange Resources and Tasports managerial and supervisory staff) advising him that Grange Resources would be revoking Mr Gee's access to all Grange Resources sites, effective immediately. The reasons given were that Mr Gee had allegedly:

- failed to follow a reasonable work and deployment directive to operate a reclaimer during ship loading by the Grange Resources Supervisor (on 13 August 2015); and
- taken, and posted to social media, unauthorised photos of Grange Resources' assets and work sites; and
- circumvented reporting protocols between Grange Resources' shift supervisors and Tasports' pilots (on 7 August 2015); and
- been in possession of a mobile phone without prior authorisation of the site manager.

[5] About 40 minutes after receiving this email, Mr Ralston replied in an email as follows (omitting formal parts):

> "Please accept my apologies on behalf of Tasports for any inconvenience or issues that Warwick's conduct has caused.
>
> We fully support your decision and will put the appropriate processes in place immediately to ensure our service to Grange Resources is not compromised."

[6] Mr Gee was advised later that day by Mr Ralston that his access to Grange Resources' premises at Port Latta had been revoked. Mr Gee then responded to the matters which Grange Resources had raised against him, but there was no evidence that Mr Gee's responses were ever communicated to Grange Resources. On 25 August 2015 Mr Barry Holden, then Tasports' General Manager Marine Services, sent an email to Mr Ralston referring to the four matters which had caused Grange Resources to revoke Mr Gee's site access and a fifth matter ("*total disregard for basic site policy and procedure*"), and making the following request:

> "Please provide specific details in relation to each of these matters, including any documentation, procedures, training, signage, etc. that support the action taken e.g. is there a sign at the entrance advising by word or pictogram that no photos are to be taken and mobile phones are not to be used on site without authorisation. Photos showing such signs would be appreciated. Further details about the circumstances of 'total disregard' are also important to understand."

[7] Mr Ralston responded by sending Mr Holden, by email dated 28 August 2015, a summary of information he had obtained from the investigation conducted by Grange Resources in support of the conclusions which had been reached by Grange Resources. Again, no attempt was made to obtain Mr Gee's response to any of these matters. The same day Tasports sent Mr Gee the letter informing him of his dismissal. The letter relevantly stated:

"**Reasons for revocation of Grange Resources site access**

Grange Resources has advised TasPorts that your access to all Grange Resources sites has been revoked for the following reasons:

(a) You failed to follow a reasonable work and deployment directive to operate a reclaimer during ship loading by Grange Resources Shift Supervisor on Thursday, 13 August during the loading of the MV *Transpacific*.

(b) You took, and posted to social media, unauthorised photos of Grange Resources assets and work sites – this is a breach of Grange Resources' Information Technology Communications Social Media Policy, as per information provided to you by Grange in April 2013.

(c) You attempted to circumvent reporting protocols between Grange Shift Supervisors and TasPorts pilots on Friday 7 August during the loading of the MV *Cemtex Pioneer*.

TasPorts Marine Supervisor, Ashley Ralston has made inquiries with Grange Resources Downstream Processing Manager Paul Sturzaker in relation to the revocation of your site access. Mr Sturzaker advised that he supported the decision to revoke your access to all Grange Resources sites and that your total disregard for basic site policy and procedure did not require any further response from Grange. Based on the information provided by Grange Resources, TasPorts considers that the decision by Grange Resources to revoke your site access was a decision reasonably open to Grange Resources in the circumstances.

Notice of removal from employment roster

As you are aware, the duties of your position as 'Shiploader/Reclaimer Operator – Port Latta' involve carrying out work exclusively on Grange Resources sites. Given your access to all Grange Resources sites has been revoked, you are not able to perform the inherent requirements of your position and there are no alternative available positions/duties you could perform at TasPorts."

[8] Tasports did not speak to Mr Gee about the possibilities of alternative work prior to sending the above dismissal letter.

The Decision

[9] In the Decision the Deputy President analysed the evidence and made findings concerning the allegations of misconduct advanced by Grange Resources. It is not necessary for the purpose of this appeal to traverse those specific findings except to say that the Deputy President accepted the evidence of Mr Gee about those matters and found that he had not in fact failed to follow a reasonable work direction on 13 August 2015, that he had not been informed of the policy which prohibited the taking of photos, and that it was not clear that he had contravened any reporting policy on 7 August 2015 and, even if he did, no action had been taken about it at the time that it occurred. The Deputy President then stated the following conclusions (footnotes omitted):

> "[39] I am of the view that whilst TasPorts relies on an incapacity for Mr Gee to carry out his duties, the decision to terminate Mr Gee's employment was inextricably linked to the decision of the host employer (Grange), to revoke his site access due to his alleged conduct. I am satisfied that the investigation carried out by Grange was procedurally flawed and the outcomes of that investigation, in so much as they seek to establish that Mr Gee refused a lawful and reasonable direction, are unsound.
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> …
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> [41] I accept the evidence of Mr Gee and am satisfied that whilst he described the actions he undertook on 13 August 2015, he did not admit to having refused a direction either during his discussion with Mr Ralston on 13 August 2015 or at a meeting held on 17 August 2015 with TasPorts, (which had been previously scheduled to discuss workplace entitlements for the line crews).
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> [42] As to the actions of TasPorts during the Grange investigation, TasPorts should have acted to protect its own interests and those of Mr Gee. Mr Ralston knew of the investigation being carried out by Mr Duncombe. He advised Ms Beltz[2] of that fact. Neither Mr Ralston nor Ms Beltz advised Mr Gee that an investigation into the circumstances surrounding the events of 13 August 2015 was underway and that it might affect his interests. TasPorts failed to make representations to Grange in relation to their employee or a procedurally fair investigation. Further, Mr Ralston's evidence was that even though he carried out his own investigation into the events of 13 August 2015, he never spoke directly to Mr Dillon[3] about those matters."

[10] The Deputy President then referred to two decisions - first, the decision of Asbury DP in *Kool v Adecco Industrial Pty Ltd T/A Adecco*[4] and then the Full Bench decision in *Pettifer v MODEC Management Services Pty Ltd*[5]. In relation to the latter decision, the Deputy President said:

> "[46] TasPorts contended that the recent Full Bench decision in *Pettifer v MODEC Management Services Pty Ltd* per O'Callaghan SDP, Binet DP and Hampton C, (*Pettifer*) supports its submission that there was a valid reason for Mr Gee's dismissal relating to his capacity, as Mr Gee was solely employed for the purpose of performing work at Grange's Port Latta site; and that TasPorts was not able to redeploy him.
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> [47] *Pettifer* involved an employee who was employed by MODEC and placed with a host employer, pursuant to a contract for the provision of labour for a floating production vessel. Following a safety near miss, the host employer exercised its right under its contract with MODEC and directed MODEC to remove Mr Pettifer from the host employer's site."

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[2] Tasports' Human Resources Manager

[3] Mr Gee's Shift Supervisor

[4] [2016] FWC 925

[5] [2016] FWCFB 5243

[11] The Deputy President then quoted the relevant passages from *Pettifer*, and stated (footnotes omitted):

> "[49] It is a well-established legal principle that members should follow a Full Bench decision as it relates to matters to be determined, unless the decision is inconsistent or wrong in law. In other words, a Full Bench decision should be followed unless there are sound reasons for not doing so. TasPorts rely on the authority in *Nguyen v Nguyen* [(1990)169 CLR 245 at 269] where the High Court held:
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> > "When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the decision is wrong. The occasions upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law."
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> [50] I am mindful of the principle established in *Pettifer* and that respect is to be accorded to that Full Bench decision. However, there are a number of significant differences as to the circumstances requiring decision in this case and those prevailing in *Pettifer.* These differences include:
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> > • There was no contractual arrangement between TasPorts and Grange that was before the Commission that allowed Grange to direct TasPorts to remove an employee from the Port Latta site. The circumstances in this case are that Grange, following a procedurally unfair investigation, removed Mr Gee from the Port Latta site
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> > • A lack of notification to Mr Gee that he may be terminated due to incapacity and that TasPorts were investigating his redeployment
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> > • A lack of a proper review by TasPorts as to Mr Gee's redeployment.
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> [51] An employer's review of alternate opportunities for an employee's employment does not have to be a forensic review, but it does have to be real, otherwise there is no safeguarding of the employee's interests."

[12] The Deputy President proceeded to make findings concerning the efforts undertaken by Tasports prior to deciding to dismiss Mr Gee to ascertain whether there was any alternative employment available for him (footnotes omitted):

> "[52] Ms Beltz conducted a review of TasPorts' worksites and concluded that there were no other positions to which Mr Gee could be deployed. There is no dispute that this review was undertaken without reference to Mr Gee and without Ms Beltz having an understanding of Mr Gee's full work history, qualifications or skills. Had Ms Beltz spoken to Mr Gee, she would have established a full work history, together with his skills set and formal qualifications.
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> [53] Mr Gee has established skills from working in a line crew, albeit not the Master Class 5 qualification which Ms Beltz stated was required for deckhand positions within TasPorts. However, Mr Gee has the capacity to be successful in training that is

> reasonably within his vocational reach, as is evidenced by his trade qualifications and up-skilling whilst working for TasPorts. TasPorts were required to undertake a vocationally and geographically robust review of its business. Their failure to do so neglected the proper duty they owed to Mr Gee.
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> [54] In the same way, and to the same degree, as Mr Gee had a duty to safeguard the interests of his employer, so too was TasPorts, in my view, obliged to safeguard Mr Gee's interests. Such mutuality is fundamental to modern employment. TasPorts, as a minimum, had a duty to safeguard the interests of Mr Gee. Ms Beltz was required to have a full understanding of Mr Gee's total skillset and then conduct the review with that information in mind. Not only was the review not comprehensive, it was not sought to be done comprehensively.

[13] The Deputy President then concluded, in relation to s.387(a), that there was no valid reason for dismissal as follows (footnotes omitted):

> "[56] The evidence before the Commission in this case reflects that the reason for Mr Gee's removal from the site was due to his conduct. It is also clear from the evidence of Mr Ralston, when he replied to Mr Sturzaker's email on 17 August 2015, that he supported the removal of Mr Gee from the site in circumstances where he was not aware of the content of Grange's completed investigation report and had not put any allegations to Mr Gee. While Mr Ralston was aware of the Grange investigation and the likelihood of Mr Gee being removed from site, neither he nor any other person at TasPorts sought at any time to establish whether there was a 'valid reason' for Mr Gee's removal from site. This finding is supported by TasPorts' final written submissions which stated "The Respondent did not make its own findings about any wrongdoing of the Applicant. In accordance with the Respondent's submissions, the Respondent took steps to satisfy itself that Grange had a reasonable basis for revoking [Mr Gee's] site access. This does not equate to a finding that [Mr Gee] was dismissed because of the conduct that led to his site access being revoked." TasPorts was required to do more than "satisfy itself that there was a reasonable basis for Grange's decision to revoke the… site access…" in that this action was to end in Mr Gee's dismissal.
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> [57] Further, in establishing the existence or otherwise of an alternate position in which Mr Gee could be redeployed, I am not satisfied, for the reasons stated above, that TasPorts undertook an adequate process in the circumstances.
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> [58] On the basis of my findings above I have determined that the conclusions reached by both Grange and TasPorts were not sound, defensible or well founded. I am satisfied that there was no valid reason for Mr Gee's dismissal related to his capacity or conduct in all the circumstances."

[14] The Deputy President went on to consider the other matters required to be taken into account by s.387. Relevantly, the Deputy President made findings under s.387(b) that Mr Gee was not notified of the reasons for the dismissal, under s.387(c) that he was not given an opportunity to respond to the reasons, and under s.387(h) that Mr Gee had a previously unblemished record of service and would have difficulty in finding alternative secure employment. The Deputy President's ultimate conclusion was that the dismissal was harsh because of the matters she had considered under s.387(h) and was also unjust and

unreasonable because there was no valid reasons for Mr Gee's dismissal and he was not afforded an opportunity to respond to the reason for his dismissal. The Deputy President also said:

> "[83] I reject the submissions made by TasPorts that any response provided by Mr Gee could not have changed the decision to terminate his employment ... A robust review of redeployment opportunities within TasPorts, and discussions with Mr Gee about such redeployment, was likely to have resulted in a different outcome, given his proven ability to obtain new skills and his employment record."

Appeal grounds and submissions

[15] Tasports' appeal grounds were as follows:

> "1. The Deputy President made an error of law by applying the wrong principles in determining (at paragraph [56]) that Grange Resources was required to have a 'valid reason' for revoking the Applicant's site access.
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> 2. The Deputy President made an error of law by applying the wrong principles in determining (at paragraph [56]) that the Respondent did not have a valid reason for the Applicant's dismissal because the Respondent was required to *'do more than 'satisfy itself that there was a reasonable basis for Grange's decision to revoke the…access…' in that this was to end in Mr Gee's dismissal.'*
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> 3. The Deputy President made an error of law by failing to apply the principle that there is a valid reason related to an employee's capacity where an employee cannot perform inherent requirements as a result an employee being removed from the site of a third party on which they are employed to perform their work.
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> 4. The Deputy President made an error of law by applying the incorrect principles in determining (at paragraph [54]) that the Respondent did not have a valid reason for the Applicant's dismissal because there is 'mutual obligation' to safeguard the interests of an employee/employer and the Respondent failed to comply with this obligation.
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> 5. The Deputy President made an error of law as there is no evidence to support the finding (at paragraph [83]) that a 'robust review of redeployment opportunities within TasPorts, and discussion with Mr Gee about such redeployment, was likely to have resulted in a different outcome…' and this finding was a basis for determining there was no valid reason for the Applicant's dismissal.
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> 6. The Deputy President made a significant error of fact as it was not reasonably open on the evidence for Deputy President Wells to determine (at paragraph [83]) that a 'robust review of redeployment opportunities within TasPorts, and discussion with Mr Gee about such redeployment, was likely to have resulted in a different outcome…' and this finding was a basis for determining there was no valid reason for the Applicant's dismissal.

7. The Deputy President wrongly exercised her discretion in finding (at paragraph [82]) that the Applicant's dismissal was harsh due to the matters relied on under s.387(h).

8. The Deputy President applied undue weight (at paragraph [82]) to the matters relied on under s.387(h) (i.e. length of service, the Applicant's age and personal circumstances) in finding that the Applicant's dismissal was harsh and on balance could not be satisfied that the conclusion of harshness could be reached when balanced against the Applicant's removal from site and the fact that there were no redeployment opportunities for the Applicant.

9. The Deputy President erred by making a significant error of fact by determining (at paragraph [86]) that the evidence at the hearing relating to the Applicant's capacity is incomplete.

10. The Deputy President made an error of law in requiring (at paragraph [88]) further evidence relating to the Applicant's capacity in that the direction is flawed as it fails to afford procedural fairness/natural justice to the Respondent in meeting the Applicant's case as put by the Applicant at the time of hearing."

[16] Tasports' written and oral submissions dealt with the first four appeal grounds conjointly. It submitted in relation to those grounds that the Full Bench decision in *Pettifer*[6] had established that, in cases where an employee is unable to perform work as a result of the actions of a third party, the employer will have a valid reason for dismissal related to the employee's incapacity to perform the inherent requirements of their job, and that it was not the role of the Commission to determine whether the decision of that third party was correct or fair but to consider whether the dismissal was unfair. In circumstances where Mr Gee's substantive position was to perform work at Grange Resources' Port Latta site, where Grange Resources owned and had exclusive control over access to the site, and where it had a right under its labour hire arrangement with Tasports not to utilise Mr Gee's services, Tasports submitted that it necessarily had a valid reason for Mr Gee's dismissal. Any issues as to redeployment might arise for consideration under s.387(h), but they did not arise under s.397(a) because incapacity for work was to be assessed by reference to Mr Gee's substantive position, not a modified, temporary or alternative position. Therefore, it submitted, the Deputy President erred by assessing the question of "valid reason" by reference to Grange Resources' conduct, by not applying the principle established in *Pettifer*, by taking into account the potential for redeployment under s.387(a), and by finding that Tasports had a duty to safeguard the interests of Mr Gee.

[17] Tasports also submitted that the Deputy President erred by finding that there were factual circumstances distinguishing this matter from *Pettifer*. The contractual arrangement between Tasports and Grange Resources was not relevant because the latter's control over access to the site was not in dispute; it was not possible to conclude that any response from Mr Gee to the allegations could have changed the decision to dismiss him, and the lack of any proper consideration of redeployment was relevant to overall fairness but not to the question of whether there was a valid reason for dismissal.

[6] [2016] FWCFB 5243

[18] In relation to grounds 5 and 6 of the appeal, Tasports submitted that there was no evidence to support the conclusion that a proper consideration of redeployment opportunities would likely have led to a different outcome, since the evidence was that there was no suitable alternative employment at the time of dismissal. In relation to grounds 7 and 8, the submission was that the adverse consequences of the dismissal for Mr Gee were not profound or extraordinary and could not weigh in favour of a finding that the dismissal was harsh having regard to Mr Gee's inability to perform his substantive role and the lack of redeployment opportunities. In relation to grounds 9 and 10, Tasports submitted that Mr Gee had the opportunity to call any medical evidence concerning his capacity to work at the hearing, and it should not be disadvantaged by further expense and delay because of the failure of Mr Gee to call such evidence. Further, it was procedurally unfair for Mr Gee to be subject to a direction to, in effect, re-open his case and provide "better" evidence to achieve a more favourable outcome.

[19] Mr Gee submitted that:

- there was no challenge in the appeal to the Deputy President's factual findings concerning the misconduct allegations which caused Mr Gee to be excluded from the Port Latta site;

- the finding that Mr Gee had not been given an opportunity to respond to the allegations made against him was likewise not challenged;

- Tasports' decision to dismiss Mr Gee on capacity grounds was inextricably linked to the conduct grounds for the exclusion of Mr Gee from the Port Latta site, and under s.387(a) the Deputy President was therefore required to consider whether such conduct had in fact occurred;

- because Tasports acted on Grange Resources' findings and found that the decision to exclude Mr Gee was reasonably open, Grange Resources' reasons became Tasports' reasons, and they therefore properly arose for consideration under s.387(a);

- *Pettifer* did not stand for any general principle that there is a valid reason related to capacity where an employee is removed from a work site by a third party, but turned on its own facts;

- alternatively, if *Pettifer* did stand for such a principle, it was wrongly decided, since it would defeat the protections of employees against unfair dismissals;

- the provisions of Pt.3-2 of the FW Act should be read as imposing on a labour hire employer an obligation to take reasonable steps to avoid the unfair dismissal of its employees, even at the instance of a third party;

- "*capacity*" in s.387(a) went to the employee's qualifications or physical ability to perform the inherent requirements of the job, not the circumstances of Mr Gee's case;

- an employer is obliged under the FW Act to make a thorough, assiduous and genuine search for suitable redeployment opportunities, taking into account the interests of the employee, and the Deputy President's finding that Tasports had failed to undertake this was reasonably open on the evidence;

- as to the finding of harshness, the Deputy President was entitled to take into account the personal and economic consequences of dismissal for the employee, and any contention of "*undue weight*" being placed on these factors was not a tenable ground of appeal under s.400; and

- the Deputy President's request for further medical evidence was consistent with the approach contended for by Tasports prior to the Decision being issued, and was consistent with the Commission's power under s.590 to inform itself in such manner as it considered appropriate.

Consideration

Permission to appeal

[20] An appeal under s.604 of the FW Act is an appeal by way of rehearing and the Commission's powers on appeal are only exercisable if there is error on the part of the primary decision maker.[7] There is no right to appeal and an appeal may only be made with the permission of the Commission.

[21] This appeal is one to which s.400 of the FW Act applies. Section 400 provides:

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

[22] In the Federal Court Full Court decision in *Coal & Allied Mining Services Pty Ltd v Lawler and others*, Buchanan J (with whom Marshall and Cowdroy JJ agreed) characterised the test under s.400 as "a stringent one".[8] The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[9] In *GlaxoSmithKline Australia Pty Ltd v Makin* a Full Bench of the Commission identified some of the considerations that may attract the public interest:

> "... 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

[7] This is so because on appeal the Commission has power to receive further evidence, pursuant to s.607(2); see *Coal and Allied v AIRC* (2000) 203 CLR 194 at [17] per Gleeson CJ, Gaudron and Hayne JJ

[8] (2011) 192 FCR 78 at [43]

[9] *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* (2011) 85 ALJR 398 at [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78 at [44] -[46]

applied appear disharmonious when compared with other recent decisions dealing with similar matters."[10]

[23] It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated. This is so because an appeal cannot succeed in the absence of appealable error.[11] However, the fact that the Member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.[12]

[24] An application for permission to appeal is not a de facto or preliminary hearing of the appeal. In determining whether permission to appeal should be granted, it is unnecessary and inappropriate for the Full Bench to conduct a detailed examination of the grounds of appeal.[13]

[25] We consider that it would be in the public interest to grant permission to appeal in relation to grounds 1-4 of the appeal insofar as those grounds raise an significant issue concerning the import and application of the Full Bench decision in *Pettifer v MODEC Management Services Pty Ltd*.[14] Those grounds raise an issue which is of general importance and in relation to which some further appellate guidance would seem to be desirable.

[26] We do not consider that the other grounds of appeal are of a nature which attracts the public interest. In relation to grounds 5-6, the Deputy President's conclusion in paragraph [56] of the Decision that a "robust review of redeployment opportunities within Tasports, and discussions with Mr Gee about such redeployment, was likely to have resulted in a different outcome, given his proven ability to obtain new skills and his employment record" was an inference drawn from primary findings of fact set out in paragraphs [52]-[54] of the Decision. Those findings of fact were not challenged in the appeal. The Deputy President's conclusion appears to us on its face to have been reasonably open on the basis of those factual findings, and raises no issue beyond the particular facts of this case which warrants further appellate examination in the public interest. Grounds 7-8 are patently without merit, since it is well-established from the High Court decision in *Byrne v Australian Airlines Limited*[15] that a dismissal may be found to be harsh by reason of the personal and economic circumstances of the dismissed employee. Appealable error cannot be demonstrated on the basis of a contention that the maker of a discretionary decision should have given more or less weight to a particular consideration that is of relevance.[16] Grounds 9 and 10 are likewise not arguable. The Commission has the power under s.590 of the FW Act to "*inform itself in relation to any matter before it in such manner as it considers appropriate*". Requiring further evidence and submissions about Mr Gee's medical condition, where the existing evidence was unsatisfactory and where circumstances might have changed during the period from the hearing to the date of the Decision, was clearly appropriate. No procedural fairness

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[10] [2010] FWAFB 5343, 197 IR 266 at [27]

[11] *Wan v AIRC* (2001) 116 FCR 481 at [30]

[12] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343, 197 IR 266 at [26]-[27]; *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089, 202 IR 388 at [28], affirmed on judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78; *NSW Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663, 241 IR 177 at [28]

[13] *Trustee for The MTGI Trust v Johnston* [2016] FCAFC 140 at [82]

[14] [2016] FWCFB 5243

[15] (1995) 185 CLR 410 at 465

[16] *Mt Arthur Coal Pty Ltd t/a Mt Arthur Coal v Jodie Goodall* [2016] FWCFB 5492, (2016) 260 IR 391 at [43]; *Restaurant and Catering Association of Victoria* [2014] FWCFB 1996, (2014) 243 IR 132 at [58]

considerations arise since there was no question that Tasports would have the opportunity to adduce its own evidence and make submissions about this issue.

The Full Bench decision in Pettifer

[27] It is critical to the determination of grounds 1-4 of Tasports' appeal to identify the *ratio decidendi* of the Full Bench decision in *Pettifer*.[17] The facts of that matter were that Mr Pettifer was employed by a labour hire company, Modec Management Services Pty Ltd, and had been assigned to work for BHP Billiton Petroleum Inc. (BHPB) to perform work upon a floating production, storage and offloading vessel. After a "near miss" incident, BHPB directed Modec to remove Mr Pettifer from the vessel. This direction was made pursuant to a right possessed by BHPB under a term of the labour supply contract between it and Modec. That right was expressed in the following terms (the "*Company*" being BHPB and the "*Contractor*" being Modec):

> "The Company Representative may direct the Contractor to have removed from the Site or from any activity connected with the work under the Contract, within such time as a Company Representative reasonably directs, any subcontractor or person employed in connection with the work under the contract, whose involvement the company representative considers not to be in the best interests of the project.
>
> The costs associated with removing such persons shall be borne by the Contractor. The person shall not be employed elsewhere on the Site or on activities connected with the work under the Contract without the prior written approval of the Company. Within a reasonable period of time those person who have been removed from the work under the Contract shall be replaced at the expense of the Contractor if the Company so requires by other suitable qualified persons Approved by the Company." [18]

[28] Modec did not agree that Mr Pettifer's conduct justified his removal from the vessel, but was nonetheless obliged to comply with BHPB's direction in accordance with the above contractual provision. Modec endeavoured to find alternative work for Mr Pettifer, which included consideration of local and international employment opportunities and discussions with Mr Pettifer's union to explore alternative roles, and Mr Pettifer was retained in employment while this occurred. It was ultimately concluded that there was no suitable alternative role for him. Mr Pettifer was given an opportunity to respond to this conclusion. He was ultimately dismissed on the basis that Modec had no suitable role for him to perform. Modec did not seek to justify the dismissal by reference to any aspect of Mr Pettifer's conduct.

[29] Mr Pettifer applied to the Commission for an unfair dismissal remedy. In the decision at first instance[19], it was concluded that s.387(a) did not arise for consideration because Modec did not rely on any matter related to the applicant's capacity or conduct as a reason for the dismissal. Notwithstanding this, the dismissal was found not to be unfair, essentially on the basis that there was no practical alternative by which Mr Pettifer could have been retained in employment.

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[17] [2016] FWCFB 5243

[18] Ibid at [36]

[19] [2016] FWC 3194

[30] Mr Pettifer appealed on the basis that the conclusion that s.387(a) did not arise for consideration was in error, and contended in the appeal that his dismissal occurred because of the allegation of misconduct levelled against him by BHBP. The Full Bench rejected the proposition that Modec dismissed Mr Pettifer on the basis of any consideration as to his conduct. However, the Full Bench determined that his dismissal was capacity-related, and that the Commissioner erred by not considering this under s.387(a). The Full Bench said:

> "[32] We have concluded that the BHPB instruction that Mr Pettifer was not permitted to work on the BHPB Site represented a matter which went to Mr Pettifer's capacity to work. Consequently, it was a matter that required consideration pursuant to subsection 387(a) to determine whether or not it was a valid reason for the termination of his employment. It has long been established that the Commission is required to consider and reach conclusions about each of the factors specified in section 387...
>
> [33] Consequently we have concluded that the Commissioner was in error in her conclusion that the circumstances of the termination of Mr Pettifer's employment did not give rise to valid reason considerations. Mr Pettifer's incapacity to work on the BHPB Site arose directly from the BHPB prohibition on his returning to work on that site, as distinct from any dispute over his conduct. As a consequence, Mr Pettifer was incapable of working on the BHPB Site in a manner which was akin to a bar or the loss of a form of licence, essential to his capacity to work. Hence Mr Pettifer's capacity was a factor which required a conclusion in terms of whether it represented a valid reason for the termination of his employment."

[31] Having found error in the respect identified, the Full Bench proceeded to re-determine Mr Pettifer's unfair dismissal remedy application. In relation to s.387(a), the Full Bench referred to the contractual provision earlier quoted, and said (footnotes omitted):

> "[37] MODEC was therefore contractually obliged to remove Mr Pettifer from the BHPB Site if instructed to do so. This was the role which Mr Pettifer was employed to perform. No longer capable of performing the inherent functions of this role, MODEC sought to find alternative employment for Mr Pettifer. Only after exhausting these inquiries did MODEC rely on this reason to terminate Mr Pettifer's employment. In these circumstances the Full Bench is satisfied that MODEC had a valid reason relating to Mr Pettifer's capacity to terminate his employment and only exercised this reason because it genuinely was unable to find suitable alternative employment for him.
>
> [38] We have considered Mr Pettifer's position in the context of the conclusions reached by Deputy President Asbury in Adecco.
>
> [39] In that matter the Deputy President observed that:
>
> > *'[71] I accept that the Adecco, by virtue of its contract with Nestlé for the supply of labour, may have been required to remove Ms Kool from the Nestlé site when it was requested to do so. I was not assisted by the failure of Adecco to call any direct evidence about the terms of its contract with Nestlé for the supply of labour and the rights of Nestlé to seek to remove labour hire employees from its site.'*

> [40] The factual situation before the Deputy President was somewhat different to Mr Pettifer's circumstances. In that case, the Deputy President did not have the terms of the contractual relationship between the labour hire company and the host employer in evidence before her. Some of her comments in that context might well be considered to be, at their highest, a general statement of principle. That principle is that, in the context of labour hire arrangements, the actions of an employer who dismisses an employee following the exercise of a host employer's contractual right to have the employee removed from the host site cannot rely exclusively on the actions of that third party as their defence to a claim of unfair dismissal. A discretion remains with the FWC to decide whether a particular dismissal is unfair in all the circumstances.
>
> [41] In the Adecco case, Deputy President Asbury found that a failure on behalf of the applicant's employer to explore redeployment opportunities for the applicant constituted an element of unfairness in the circumstances of the applicant's dismissal. In this case, there is no contest that MODEC did explore redeployment opportunities for Mr Pettifer both prior to his termination and afterwards, including liaising with his union to explore the opportunity of substitution. In this respect, we would also observe that there is absolutely nothing to suggest that MODEC colluded with its client to remove Mr Pettifer from the work site.
>
> [42] Having determined that there was a valid reason for Mr Pettifer's dismissal related to his capacity it is necessary to make findings in relation to sub-sections 387(b)-(h) as part of our re-determination of the matter."

[32] The Full Bench went on to deal with paragraphs (b)-(h) of s.387 and ultimately came to the same conclusion as that at first instance, namely that the dismissal was not unfair.

[33] Importantly the Full Bench did not conclude that the decision of Asbury DP in *Kool v Adecco Industrial Pty Ltd T/A Adecco*[20], to which reference was made in the above passage, was in error, and indeed endorsed that decision to the extent that it contained a general statement of principle. That principle was enunciated in the following passage in *Adecco*, the second paragraph of which was quoted by the Full Bench in *Pettifer*[21] in the course of its recital of the appellant's submissions:

> "[48] Where managers of a host employer inform a labour hire employee that he or she is to be removed from site on the basis of conduct, capacity or work performance, the actions of the host employer may be tantamount to dismissal. This is particularly so where managers or supervisors of the host employer have also been involved in disciplining the labour hire employee. A labour hire employee seeking to contest such action by making an application for an unfair dismissal remedy, faces considerable difficulty, principally because the host employer is not the employer of the labour hire employee. It is also the case that a labour hire company may face considerable difficulty preventing a host employer from taking disciplinary action against an employee of the labour hire company.

[20] [2016] FWC 925

[21] [2016] FWCFB 5243 at [18]

> [49] However, the contractual relationship between a labour hire company and a host employer cannot be used to defeat the rights of a dismissed employee seeking a remedy for unfair dismissal. Labour hire companies cannot use such relationships to abrogate their responsibilities to treat employees fairly. If actions and their consequences for an employee would be found to be unfair if carried out by the labour hire company directly, they do not automatically cease to be unfair because they are carried out by a third party to the employment relationship. If the Commission considers that a dismissal is unfair in all of the circumstances, it can be no defence that the employer was complying with the direction of another entity in effecting the dismissal. To hold otherwise would effectively allow labour hire employers to contract out of legislative provisions dealing with unfair dismissal."

[34] Tasports went so far as to submit that *Pettifer* stood for the principle that a decision by a host employer in the context of a labour hire arrangement to have a worker supplied by a labour hire employer removed from its worksite meant that there was necessarily a valid reason for the worker's dismissal by the labour hire employer based on the worker's capacity for the purpose of s.387(a). That submission cannot be accepted. It is inconsistent with the statement of principle in *Adecco* which, like the Full Bench in *Pettifer*, we endorse. Even in the context of a labour hire arrangement, whether there is a valid reason for dismissal will depend upon all the circumstances of the case. *Pettifer* exemplifies that proposition because of the way in which its different facts resulted in a different outcome to that in *Adecco*, where the Deputy President found that there was no valid reason for the employee's dismissal related to her capacity or conduct and that the dismissal was unfair. That may be illustrated in three ways.

[35] First, as the Full Bench pointed out, in *Adecco* the terms of the contract between the labour hire employer and the host employer were not disclosed, so that it was not clear what precise right the host employer had to remove the worker from the worksite. In *Pettifer* the Full Bench had before it the relevant provision of the contract, which made it abundantly clear that the host employer had the absolute right to remove the worker where it subjectively formed the view that the "*involvement*" of the workers was not "*in the best interests of the project*". There is no reason to assume that a provision of that precise nature is universal in labour hire contracts. If, for example, the labour hire contract permitted the host employer to request the removal of a worker only in the case of proven misconduct or non-performance of duties, entirely different considerations would arise. In that case the labour hire employer would have the contractual right to resist the removal of a worker by the host employer where substantiation of any allegation of misconduct or non-performance was not forthcoming. If, notwithstanding this, the labour hire employer simply acquiesced in the removal of the worker and proceeded to dismiss him or her, it is difficult to imagine that such a dismissal could be justified on the basis of the worker's incapacity, since the inability of the worker to continue working for the host employer would be the result of the labour hire employer's failure to insist upon compliance with its contract with the host employer rather than any incapacity on the part of the worker.

[36] Second, in *Adecco* the labour hire employer simply acquiesced in the host employer's contention that the worker had engaged in misconduct without forming any independent view about whether this allegation was substantiated, in circumstances where the Deputy President found, on the evidence before her, that it was not.[22] By contrast, in *Pettifer* Modec formed the

[22] [2016] FWC 925 at [69]-[72]

independent conclusion that the worker had not done anything which warranted dismissal, as earlier stated. This distinction is significant because it demonstrates that where a labour hire employer dismisses a worker based on an endorsement of an allegation of misconduct by the host employer, it may be the case that the dismissal is better characterised as conduct-based rather than capacity-based, and its validity under s.387(a) is to be assessed on that basis.

[37] Third, in *Adecco* the Deputy President did not, in connection with s.387(a), accept that the labour hire employer had established that there was a lack of alternative work placements for the employee in question, and pointed to evidence which suggested that in fact there may have been alternative work available.[23] The Full Bench in *Pettifer* at paragraph [41] identified this as a further point of factual distinction, in that Modec had made exhaustive efforts to find alternative work for Mr Pettifer.

[38] Tasports submitted that while the issue of the availability of alternative work might properly arise for consideration under s.387(h), it was not relevant to the question of whether there was a valid reason for dismissal based on capacity under s.387(a). It relied in that connection upon the Full Bench decision in *J Boag & Son Brewing Pty Ltd v Allan John Button*[24], where the Full Bench said:

> "[22] When an employer relies upon an employee's incapacity to perform the inherent requirements of his position or role, it is the substantive position or role of the employee that must be considered and not some modified, restricted duties or temporary alternative position that must be considered."

[39] We doubt whether *Boag v Button* is really on point, since it was concerned with physical incapacity due to illness or injury to perform the inherent requirements of the employee's substantive role, not the circumstances of a labour hire arrangement. Even if *Boag v Button* is applicable, it may not be a simple matter to identify what the substantive role of a labour hire employee is. The conventional position is that labour hire employees are engaged to perform work in such positions as may be assigned to them from time to time. *Pettifer* represented a departure from that conventional position in that Mr Pettifer was engaged to perform work specifically for BHPB. What the precise position is in any given case will depend upon an analysis of the employee's contract of employment.

[40] We therefore regard *Pettifer* as the application of the principle stated in *Adecco* to a particular factual scenario. It does not stand for the broader proposition contended for by Tasports. That conclusion makes it unnecessary for us to consider Mr Gee's alternative submission that *Pettifer* was incorrectly decided.

The Deputy President's consideration under s.387(a)

[41] Having regard to our conclusion about the *ratio decidendi* of the Full Bench decision in *Pettifer*, we do not consider that *Pettifer* compelled the Deputy President to conclude that there was a valid reason for Mr Gee's dismissal related to his capacity merely because Grange Resources acted to remove him from its Port Latta site. It is apparent, as the Deputy President found, that there were a number of factual matters which distinguished Mr Gee's matter from *Pettifer*:

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[23] Ibid at [68], [72]

[24] [2010] FWAFB 4022

(1) Tasports, apparently as the result of a deliberate forensic decision on its part, did not provide the Commission with a copy of the contract between it and Grange Resources, and thus did not establish that Grange Resources in fact had a legal right to require Mr Gee's removal from the worksite or that Tasports had no recourse to preserve Mr Gee's employment at the site once that step had been taken. The demonstration of the existence of that legal right was, as earlier explained, critical to the Full Bench's conclusion in *Pettifer* that the employee was incapable of performing his substantive role.

(2) Tasports did not form its own independent conclusion as to whether Mr Gee had committed misconduct but instead essentially adopted the outcome of Grange Resources' procedurally unfair investigation. That it did so is demonstrable in two ways: first, Mr Ralston's email of 17 August 2015 indicated Tasports' immediate support for the decision to remove Mr Gee from the site based on his alleged misconduct, without taking any steps whatsoever to investigate the matter itself including by asking Mr Gee about it; and, second, the dismissal letter of 28 August 2015 stated that the decision to revoke Mr Gee's site access was "*reasonably open*" to Grange Resources based upon its findings of misconduct, a conclusion reached without any response to those findings having been obtained from Mr Gee. That is to be contrasted with *Pettifer*, where the labour hire employer formed the independent conclusion that removal from the worksite and dismissal was not justifiable on the basis of any conduct on the part of the employee. That meant that Mr Gee's dismissal was capable of being characterised as substantially related to his conduct, with its validity to be assessed on that basis. This was not, as Tasports submitted, a case of assessing whether Grange Resources had a valid reason, but whether Tasports' reasons for dismissal as stated in its own dismissal letter were valid.

(3) As the Deputy President found, and unlike the case in *Pettifer*, Tasports failed adequately to investigate options for Mr Gee's redeployment. This had greater significance given that Tasports is not actually a labour hire business as such, but runs ports and other businesses in its own right and employs persons for that purpose. Although Mr Gee's position description, which concerned his position as Port Latta, was put into evidence, what the actual terms of his employment contract were was left unclear. Insofar as the Deputy President referred in paragraph [54] of the Decision to Tasports having an obligation to "safeguard Mr Gee's interests" in respect of its review of alternative work opportunities, we consider this is to be understood as reference to the contractual duty to do what is reasonably necessary to facilitate the performance of the employment contract, including to do such things as is required to enable the other party to have the benefit of the contract.[25] The implied duty to co-operate in employment contracts is recognised in Australian law.[26]

[25] See *Macken's Law of Employment*, 8th edition at [5.190]

[26] *Commonwealth Bank v Barker* (2014) 243 CLR 169 at [29], [37] per French CJ, Bell and Keane JJ

[42] The Deputy President, in assessing whether there was a valid reason for dismissal under s.387(a), adopted the approach taken in *Adecco* which, as earlier explained, was the correct approach and consistent with *Pettifer*. There was no error of principle on her part. The actual conclusions she reached concerning the validity of the reasons for dismissal were, we consider, reasonably open to her. Consideration of whether there is a valid reason for dismissal under s.387(a) involves the making of an evaluative assessment which is in the nature of the exercise of a discretion. It is therefore not sufficient in an appeal to invite the Full Bench simply to form a different view as to whether there was a valid reason for dismissal; appealable error of the kind identified in *House v The King*[27] must be identified. We do not consider that any appealable error has been demonstrated in the Deputy President's consideration concerning s.387(a). The appeal must therefore be dismissed.

Orders

[43] We order as follows:

(1) Permission to appeal is granted with respect to grounds 1-4 of the appeal. Permission to appeal is otherwise refused.

(2) The appeal is dismissed.

VICE PRESIDENT

Appearances:
R. Collinson and *S. Masters* for Tasmanian Ports Corporation Pty Ltd.
H. Borenstein QC with *T. Slevin* of Counsel for Warwick Gee.

Hearing details:
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[27] (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ