

DECISION

Fair Work Act 2009 s.603 - Application to vary or revoke a FWC decision

Prateek Patial

V

Kailash Lawyers Pty Ltd T/A Kailash Lawyers and Consultants (C2024/8266)

DEPUTY PRESIDENT EASTON

SYDNEY, 5 DECEMBER 2024

Application to vary or revoke a FWC decision – application is prima facie hopeless – dismissal under s.587(1)(c) at the Commission's initiative – procedural fairness – repeated improper applications – application has no reasonable prospects of success – application dismissed without the need for a protracted hearing.

- [1] In 2021 Mr Patial claimed that he had been an employee of Kailash Lawyers Pty Ltd and had been unfairly dismissed from his employment. Eight different members of the Fair Work Commission have rejected arguments and dismissed applications made by Mr Patial in six published decisions relating to the alleged dismissal. Many observations have been made about the unprofessional way in which Mr Patial conducted those earlier proceedings despite him having legal qualification, including observations that he had made claims and appeals that he was not entitled to make and that he had improperly attempted to use Fair Work Commission proceedings to prosecute gripes and complaints that the Commission has no jurisdiction to deal with.
- [2] The lengthy history of Mr Patial's challenges to his alleged dismissal in the Fair Work Commission are recorded in the following decisions:
 - (a) 6 August 2021 Commissioner McKenna found that Mr Patial was not an employee of the Respondent and therefore was not a person who was dismissed: *Patial v Kailash Lawyers Pty Ltd* [2021] FWC 4167;
 - (b) 24 November 2021 a Full Bench (Vice President Catanzariti, Deputy President Bull and Commissioner Ryan) refused permission to appeal Commissioner McKenna's first decision: *Patial v Kailas Lawyers Pty Ltd* [2021] FWCFB 6055;
 - (c) 18 July 2022 Commissioner McKenna found that Mr Patial was required to pay the Respondent's costs subject to quantification: *Patial v Kailash Lawyers Pty Ltd* [2022] FWC 1449;
 - (d) 28 October 2022 Commissioner McKenna determined the amount of costs Mr Patial was required to pay and made an order accordingly: *Patial v Kailash Lawyers Pty Ltd* [2022] FWC 2721;
 - (e) 6 December 2022 Deputy President O'Neill dismissed Mr Patial's application for a stay order over the Commissioner's costs decision; and

- (f) 19 April 2023 a Full Bench (Deputy President Clancy, Deputy President Millhouse, Commissioner Harper-Greenwell) refused permission to appeal the earlier appeal decision, refused an extension of time to file Mr Patial's appeal of the costs liability decision and refused permission to appeal the Commissioner's costs quantification decision: *Patial v Kailash Lawyers Pty Ltd* [2023] FWCFB 73;
- [3] Mr Patial has also challenged the alleged dismissal in the Federal Court of Australia and even the High Court of Australia. On 26 July 2023 the Chief Justice of the High Court refused Mr Patial's application for leave to issue or file a proposed application for a constitutional or other writ (see [2023] HCATrans 95). Her Honour's reasons for dismissing the application included the following:

"The applicant has made numerous unsuccessful attempts to have the [challenges to the decisions of the Commission] considered by the Federal Court of Australia. An application seeking the issue of prerogative writs in relation to the substantive and costs decisions was refused under r 2.26 of the *Federal Court Rules 2011* (Cth) as frivolous or vexatious; an application for an appeal against the substantive and costs decisions was refused under r 2.26; and a second application was also refused. An earlier application for judicial review of the substantive decisions had been refused.

The document [filed by the Applicant in the High Court] seeks orders quashing the decisions of the Commission and an order for mandamus compelling the Commission to remake the decisions according to law. An order is also sought that the Federal Court hear the matter de novo and that the conduct of the first defendant be reviewed.

The applicant alleges that the Commission had no jurisdiction in the matter; that he was denied procedural fairness; and that the finding as to the relationship of employer and employee was incorrect. The allegations are not supported by any substantial evidence and are largely unexplained.

The applicant also makes scandalous allegations, unsupported by any evidence of substance. He alleges that the Commissioner at first instance was biased, discriminated against him on the basis of his race or age, and had communications with the first defendant to which he was not party. He alleges that the first defendant was involved in illegal activities, committed perjury and tampered with evidence.

There is no basis for an order for remitter to the Federal Court of Australia. No application for special leave to appeal its decisions has been sought. No basis for the exercise of this Court's original jurisdiction is shown. The claim for relief by way of mandamus is untenable and is made after the applicant invoked the jurisdiction of the Federal Court. Further and in any event, the claims rely to a significant extent on unsupported, scandalous assertions.

For those reasons the document for which the applicant seeks leave to issue or file is frivolous, vexatious and an abuse of the Court's process."

Mr Patial's latest application

- [4] On 20 November 2024 Mr Patial has made yet another application to the Commission in relation to his alleged dismissal in 2021 this time an application purportedly under sections 603 and 607 of the *Fair Work Act* 2009 (Cth) (**the Act**).
- [5] For the following reasons I have decided to utilise the facility available under s.587 of the Act and dismiss Mr Patial's application on my own initiative because the application has no reasonable prospects of success.

Application under s.607

- [6] Mr Patial's reliance on s.607 is wrong and can be quickly dispatched. Section 607 describes the process for dealing with appeals properly made under s.604 or applications for review properly made by the Minister under s.605. None of the powers available to the Commission under s.607 are engaged by Mr Patial's latest application because he has not, this time, filed an appeal under s.604 and he has no standing to ask for a review under s.605.
- [7] The opening words of s.605 are "The Minister may apply ..." Mr Patial submitted:
 - "... there is no explicit statutory provision within the Fair Work Act 2009, the Fair Work Regulations 2009, or the Fair Work Commission Rules 2024 that restricts review applications exclusively to the Minister. As a member of the public, I believe that my application under section 603 is appropriately made in the public interest and aligns with the Commission's objectives of fairness and justice.

If the Commission is relying on specific legislative or regulatory provisions to assert that the review mechanism under section 607 is restricted to the Minister, I respectfully request that those provisions be identified and cited for clarity. The absence of such explicit restrictions supports my submission that the Commission has jurisdiction to consider my applications under section 603 and, where relevant, section 607 in the public interest."

[8] This submission is nonsense. Section 605 gives the Minister, and only the Minister, standing to apply to the Commission for a review. No more needs to be said about Mr Patial's application purportedly under s.607.

Application under s.603

[9] Section 603 is in the following terms:

"Varying and revoking the FWC's decisions

(1) The FWC may vary or revoke a decision of the FWC that is made under this Act (other than a decision referred to in subsection (3)).

Note: If the FWC makes a decision to make an instrument, the FWC may vary or revoke the instrument under this subsection (see subsection 598(2)).

- (2) The FWC may vary or revoke a decision under this section:
 - (a) on its own initiative; or
 - (b) on application by:
 - (i) a person who is affected by the decision; or

- (ii) if the kind of decision is prescribed by the regulations—a person prescribed by the regulations in relation to that kind of decision.
- (3) The FWC must not vary or revoke any of the following decisions of the FWC under this section:

. . .

Note: The FWC can vary or revoke decisions, and instruments made by decisions, under other provisions of this Act (see, for example, sections 447 and 448)."

[10] In *Grabovsky v United Protestant Association of NSW Ltd T/A UPA* [2015] FWC 5161 at [37]-[39] (**Grabovsky**) President Ross described the powers available under s.603:

"It is apparent from its terms and the legislative context that s.603 is intended to be broader than a statutory form of the slip rule. So much is clear from s.602, which is directed at slip rule problems. The question is how broad the power is and in what circumstances should it be exercised?

The power to vary or revoke a decision has generally only been exercised where there has been a change in circumstances such as to warrant the variation or revocation of the original decision or, where the initial decision was based on incomplete or false information, fraudulently procured or otherwise.

As a general proposition applications to vary or revoke a decision should not be used to re-litigate the original case. After a case has been decided against a party, that party should not be permitted to raise a new argument which, deliberately or by inadvertence, it failed to put during the original hearing when it had the opportunity to do so."

[Footnotes omitted]

- [11] Mr Patial used the general Form F1 to make his application and sought the following orders:
 - "1. That the decision in the Proceedings (U2020/11942) made on 6 August 2021 varied on 24 August 2021 by the FWC Commissioner be revoked.
 - 2. That the decision in the Proceedings (U2020/11942) made on 18 July 2022 by the FWC Commissioner be revoked.
 - 3. That the decision in the Proceedings (U2020/11942) made on 28 October 2022 by the FWC Commissioner be revoked.
 - 4. In the alternative, the matter be heard on a denovo basis by a different FWA Member.
 - 5. Any further orders the Commission considers appropriate."
- [12] The grounds for seeking relief included alleged "errors on the face of the record", errors in the decision quantifying the costs order, that misleading information was provided by the Respondent in the earlier proceedings, that procedural fairness was not provided and that Commissioner McKenna was biased.

[13] On 21 November 2024 the following self-explanatory email was sent to Mr Patial:

"The above matter has been referred to Deputy President Easton as the Regional Coordinator. One of the Deputy President's roles as a Regional Coordinator is to marshal matters in their preliminary stages.

Each of the proceedings you have referred to in your most recent application have concluded and each file have been closed:

- Patial, Prateek v Kailash Lawyers Pty Ltd T/A Kailash Lawyers and Consultants [2021] FWC 4167 (U2024/11942 unfair dismissal application
- Patial, Prateek v Kailash Lawyers Pty Ltd T/A Kailash Lawyers and Consultants [2022] FWC 1449 (U2020/11942 costs application
- Patial, Prateek v Kailash Lawyers Pty Ltd T/A Kailash Lawyers and Consultants [2022] FWC 2721 (U2020/11942 costs application amount of costs

The above decisions (except *Patial*, *Prateek v Kailash Lawyers Pty Ltd T/A Kailash Lawyers and Consultants* [2022] FWC 1449) have also been appealed by you and each of your appeals have been dismissed:

- Patial, Prateek v Kailash Lawyers Pty Ltd T/A Kailash Lawyers and Consultants
 [2021] FWCFB 6055 (C2021/5106 appeal against Commissioner McKenna's decision [2021] FWC 4167)
- Mr Prateek Patial v Kailash Lawyers Pty Ltd T/A Kailash Lawyers and Consultants [2022] FWC 3199 (C2022/7586 stay application against Commissioner McKenna's decision [2022] FWC 2721)
- Mr Prateek Patial v Kailash Lawyers Pty Ltd T/A Kailash Lawyers and Consultants [2023] FWCFB 73 (C2022/7586) appeal against Commissioner McKenna's decision [2022] FWC 2721)

Your most recent application purports to rely on s.603 of the *Fair Work Act 2009*. At least some of the matters raised in your most recent application appear to have already been raised in earlier proceedings, such as your claim that invoices were missing or repetitive and your claim that Commissioner McKenna erred in finding that you were not an employee of the Respondent.

Please note that in *Grabovsky v United Protestant Association of NSW Ltd T/A UPA* [2015] FWC 5161 President Ross observed that the power under s.603 should not be used to relitigate a previous case and cannot be used to usurp the appeal process.

Your application for orders under s.603 does not appear to have any reasonable prospects of success. Section 587 of the *Fair Work Act 2009* allows the Commission to dismiss an application on the Commission's own initiative in the early stages – subject to affording procedural fairness. Protracted proceedings can be avoided when there is no reasonable prospect of an outcome other than the dismissal of the application.

The Deputy President is considering dismissing your application under 587(1)(c) of the Fair Work Act 2009 (Cth).

The Deputy President invites you to either (1) discontinue your application or (2) provide a submission explaining how you say the power under s.603 of the Act is available by no later than 4:00pm on 29 November 2024. "

- [14] In the material filed by Mr Patial he included submissions and materials that he described as "separate applications" with four amended Form F1s relating to the six Commission decisions listed in [7] above. Mr Patial demanded that new Commission files be opened for each amended Form F1 because "these distinct applications cannot be adjudicated appropriately under a single file due to their separate procedural histories and substantive issues".
- [15] There is no need to draw on additional administrative resources to create and maintain four separate files. Quite obviously the six decisions are interrelated and any application under s.603 must be considered in the context of the span of litigation. Quite frankly each amended Form F1 is as hopeless as the others.
- [16] If Mr Patial could show that his application under s.603 had a reasonable prospect of success in relation to any of the six decisions then s.587 would not apply.
- [17] Each amended Form F1 contained vastly expanded grounds. None of these amendments improve Mr Patial's case. Question 1.1 of the Form F1 requires an applicant to "set out the provisions of the Fair Work Act 2009 (or any other relevant legislation) under which you are making this application". In each amended application Mr Patial has listed provisions from the Fair Work Act 2009, the Fair Work Commission Rules 2024, the Fair Work Regulations 2009, Legal Profession Uniform Law, Independent Contractors Act 2006 and more. None of the provisions listed in any of the amended Form F1s give Mr Patial standing to make an application to revoke the earlier Commission decisions.

Section 587

[18] The relevant provisions in s.587 of the Act are as follows:

"587 Dismissing applications

- (1) Without limiting when the FWC may dismiss an application, the FWC may dismiss an application if:
 - (a) the application is not made in accordance with this Act; or
 - (b) the application is frivolous or vexatious; or
 - (c) the application has no reasonable prospects of success.

. . .

- (3) The FWC may dismiss an application:
 - (a) on its own initiative; or
 - (b) on application."

- [19] Section 587(1)(c) of the Act is in similar terms to s.31A of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**). The decisions of the Full Court of the Federal Court in *Upaid Systems Ltd v Telstra Corporation Limited* [2016] FCAFC 158 at [46]-[49] and *Nichol v Discovery Africa Ltd* [2016] FCAFC 182 at [138]-[142] provide helpful summaries of the application of s.31A of the FCA Act. The Court's decisions in *Boston Commercial Services Pty Ltd v GE Capital Finance Australasia* [2006] FCA 1352 at [41]-[48] and *White Industries Aust Ltd v Federal Commissioner of Taxation* [2007] FCA 511 at [51]-[59], (2007) 160 FCR 298 at 310-312 are also regularly cited.
- [20] Earlier Full Bench decisions have considered the operation of s.587: see *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498 at [19], *Bibawi v Stepping Stone Clubhouse Inc* [2019] FWCFB 1314 at [17], (2019) 285 IR 190 at 196, *Chopra v Al Siraat College Inc & Ors* [2023] FWCFB 266 at [56] and *Elecnor Australia Pty Ltd* [2024] FWCFB 245 at [20]-[23] and [29].
- [21] The following general principles can be derived from these cases:
 - (a) section 587 allows the Commission to dismiss an application on the Commission's own initiative or on application by a party (per s.587(3));
 - (b) the purpose of s.587(1)(c) is to enable the Commission to deal with matters that should not be litigated because there is no reasonable prospect of an outcome other than the dismissal of the application;
 - (c) section 587 is a provision that is available to use at the early stages of a proceeding before a full hearing is conducted;
 - (d) it could not have been the intention of the Parliament in introducing s.587 to require the Commission to engage in lengthy and elaborate hearings on an interlocutory basis for the purpose of determining whether or not a proceeding has reasonable prospects of success;
 - (e) as a general proposition it is inappropriate that the resources of the Commission and the parties are unnecessarily diverted towards protracted proceedings if an application has no reasonable prospects of success;
 - (f) the 'no reasonable prospects of success' test in s.587(1)(c) sets a lower bar than the common law test for obtaining summary judgement. It is not necessary to establish that an application is hopeless or bound to fail (per General Steel principles) in order to establish that an application has no reasonable prospects of success;
 - (g) the exercise of power under s.587 should be used with caution, particularly if the matter involves complex questions of fact or law;
 - (h) an application has reasonable prospects of success if there are live facts in issue that could affect the outcome of the proceedings; and
- [22] The power under s.587(1)(c) is subject to the Commission acting judiciously and affording applicants procedural fairness, noting again that the power is available without the need for a hearing:
 - (a) an applicant must be able to put his or her case to the decision-maker for consideration on all matters material to the making of the decision (per *Hempenstall v Minister for Home Affairs* [2020] FCAFC 216 at [39]);
 - (b) where there are specific aspects of an applicant's application that the Commission considers *may* be important to the decision and may be open to doubt, the Commission must at least ask the applicant to expand upon those aspects of the application (per

- SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 63 at [47], (2006) 231 ALR 592 at 602;
- (c) when dealing with unrepresented parties it may be appropriate in certain circumstances for the Commission to direct the parties' attention to the relevant terms of the legislation and to invite submissions on the various statutory criteria (*James Jones v Ciuzelis* [2015] FWCFB 84 at [44]); and
- (d) the expression procedural fairness conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case (*Galloway v Molina and Zhai* [2021] FWCFB 5419 at [22]-[29], (2021) 310 IR 151 at 157-8).
- [23] Section 587 should also be understood in conjunction with the cost provisions in s.611 and s.400A. These provisions read together indicate that Parliament intended to discourage the making of, *and the continuation of*, applications that are made vexatiously or without reasonable cause, or that have no reasonable prospect of success.
- [24] In the long history of litigation there are many references to Mr Patial attempting to improperly or impermissibly try to reagitate his earlier failed appeals. For example in April 2023 the Full Bench said in [2023] FWCFB 73 at [5]:
 - "As s.604 makes clear, the Act does not provide for appeal of a decision of a Full Bench of the Commission to another Full Bench. Instead, a person aggrieved by a decision of a Full Bench of the Commission may seek judicial review of the decision in the Federal Court of Australia, pursuant to s.39B of the *Judiciary Act 1903* (Cth) and ss.562 and 563 of the Act. Accordingly, to the extent the Appellant seeks permission to appeal the Appeal Decision we refuse to grant permission to appeal."
- [25] As the email sent to Mr Patial explained, the power under s.603 cannot be used to usurp the appeal process. In *Grabovsky* Justice Ross concluded at [45]-[46]:
 - "Acceding to the Applicant's applications would undermine the statutory appeal process and would be inconsistent with the public interest that there be finality in litigation. In my view the apparent scope of the power in s.603(1) must be construed such that it does not permit a single Member to vary or revoke an appeal decision by a Full Bench. Absent such a limitation a Member whose decision was overturned on appeal could act on their own motion (pursuant to s.603(2)(a)), or on the application of the respondent to the appeal (pursuant to s.603(2)(b)(i)), and vary or revoke the appeal decision. Such an outcome cannot have been intended by the legislature.

In the event that I am wrong about the scope of the power in s.603(1) and that it is in fact broad enough to encompass a variation of the type sought, I would decline to exercise the discretion to vary the relevant decisions for the reasons expressed in paragraph [45] above."

[26] On its face, Mr Patial's application under s.603 appeared entirely hopeless and appeared to be an attempt to re-appeal decisions that Mr Patial is no longer entitled to appeal – hence the email calling on him to state a basis upon which his claim could be made under s.603.

- [27] In this context, unless Mr Patial can establish that there is a clear prima facie cause of action available to him under s.603, I am not prepared to entertain the possibility that further resources will be wasted by conducting a full hearing on this new application that otherwise appears legally hopeless.
- [28] Of course procedural fairness is paramount. Mr Patial submitted that:
 - "I respectfully submit that dismissing my application under section 587(1)(c) of the Act, without a thorough examination of the substantive evidence and relevant legislative provisions, would be procedurally unfair and contrary to the principles of natural justice."
- [29] I do not agree. Mr Patial was specifically invited to "provide a submission explaining how you say the power under s.603 of the Act is available." In other words, if Mr Patial can show that his application is the kind of application that can be made under s.603 then the power under s.587 is not engaged (subject to a member finding that on the merits there is no reasonable prospect of an outcome other than the dismissal of the application).
- [30] In response to the directions issued, Mr Patial's submissions included the following construction of s.603:
 - "Section 603(2)(b) permits the Commission to revoke or vary its decision where it is necessary to:
 - i. Address significant procedural irregularities or breaches of fairness.
 - ii. Correct errors in fact, law, or reasoning that have materially affected the outcome.
 - iii. Respond to public interest considerations, including ensuring confidence in the Commission's processes.

The Applicant submits that the Commission's power is engaged in this case due to procedural flaws, factual errors, and significant public interest concerns.

- ...This discretionary power is pivotal in ensuring procedural fairness, correcting jurisdictional errors, and addressing decisions impacted by material new evidence or inconsistencies. The Applicant respectfully submits that the circumstances in this matter warrant the Commission's exercise of this power to rectify substantive errors in the original decision."
- [31] This submission and construction of s.603 is wrong. The functions Mr Patial describes are available on appeal. There is no general right to appeal a decision of the Commission. An interested person may appeal a decision to the Commission (per s.604(3)), but may only do so with the permission of the Commission. Section 603 does not allow a party to apply to relitigate their case or launch an appeal by a different route.
- [32] Mr Patial provided written submissions and "evidence bundles" that he said support his submissions. I have carefully read each submission to see if Mr Patial has raised any argument at all that could indicate that s.603 is engaged and that this application is not just another attempt to relitigate or appeal the earlier decisions.

- [33] None of the submissions received from Mr Patial give any indication that s.603 is engaged. To be clear, Mr Patial's submissions criticise the Respondent, the Respondent's legal representative, and the Commission. Some but not all of these matters could be relevant in an appeal proceeding. However the present application is not an appeal of any of the Commissioner's decisions. None of the matters raised in the current application are relevant to the powers under s.603. Mr Patial has not identified any change of circumstances described by Justice Ross in *Grabovsky* (see [10] above), or any other matter that engages s.603.
- [34] I have not reviewed the bundles of material filed by Mr Patial in any detail. Mr Patial has not identified in his submissions how any of the filed material engage with s.603.
- [35] Noting again that it could not have been the intention of the Parliament in introducing s.587 to require the Commission to engage in lengthy and elaborate hearings on an interlocutory basis for the purpose of determining whether a proceeding has reasonable prospects of success, it is not necessary for me to chronical at length all of Mr Patial's irrelevant and flawed submissions in this decision.
- [36] I am satisfied that Mr Patial has had the opportunity to put his case for consideration on all matters material to the making of the decision to dismiss his application under s.587.
- [37] I am satisfied that Mr Patial's application under s.603 and/or s.607 of the Act has no reasonable prospect of success within the meaning of s.587(1)(c), and that it is appropriate in the circumstances to dismiss his application on the Commission's own initiative by the facility available in s.587(3)(a).
- [38] I have separately made an order dismissing Mr Patial application (PR782070).



DEPUTY PRESIDENT

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