DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Greg Healy
v
Wage Inspectorate Victoria
(C2024/1266)

DEPUTY PRESIDENT MILLHOUSE
COMMISSIONER LEE
COMMISSIONER PERICA

MELBOURNE, 16 MAY 2024

Appeal against decision [2024] FWC 344 of Deputy President Colman at Melbourne on 8 February 2024 in matter number U2023/9623

[1] Mr Greg Healy has lodged an appeal pursuant to s 604 of the *Fair Work Act 2009* (Cth) (Act) for which permission to appeal is required against a decision[1] of Deputy President Colman issued on 8 February 2024. The decision dealt with an application made by Mr Healy against Wage Inspectorate Victoria (WIV) pursuant to s 394 of the Act for an unfair dismissal remedy.

[2] Mr Healy was employed by WIV until 13 September 2023. Mr Healy's employment was terminated after WIV concluded that he did not have capacity to perform the inherent requirements of his role. In the decision, the Deputy President concluded that Mr Healy's dismissal was not harsh, unjust or unreasonable and dismissed the application.

[3] Mr Healy's application was listed for permission to appeal only. For the reasons that follow, permission is refused.

The decision

[4] In the decision, the Deputy President summarised the evidence given by Mr Healy, Mr Robert Hortle, who is now the Commissioner of WIV and by WIV's human resources manager, Lauren Romans van Schaik, which included the following:

(1) The events that led to Mr Healy sustaining three workplace injuries between November 2019 and March 2022 and Mr Healy's concerns that his complaints regarding these matters had been ignored.

(2) The allegations of misconduct made against Mr Healy concerning: (a) statements Mr Healy had posted on Twitter expressing personal views on political and government matters in contravention of the *Code of Conduct of Victorian Public Sector Employees* (Code), and (b) Mr Healy's conduct at a meeting on 28 January 2022 in which the

personal health information of a former WIV employee was divulged, and Mr Healy's subsequent conduct in harassing another employee who had expressed concern about Mr Healy's behaviour.

(3) Mr Healy's 18-month absence from the workplace from 16 March 2022, before an investigation had commenced in relation to the above allegations.

(4) The medical reports produced by Mr Healy's psychiatrist and following an independent medical examination which recommended participation in a mediation process, the latter also stating that Mr Healy was unable to return to the current management structure, headed by Mr Hortle.

(5) WIV's reasons for concluding that it would not implement the recommendations that it engage in mediation or alter the structure.

(6) Mr Hortle's decision, based on a recommendation made to him by Ms Romans van Schaik and endorsed by WIV's chief operating officer, to terminate Mr Healy's employment on the basis that he was unable to meet the inherent requirements of his role, noting Mr Healy had been continuously unfit and the medical advice stating that he could not return to work within the current management structure.

[5] Before the Deputy President, Mr Healy contended that he had been subjected to adverse treatment and exposed to safety hazards, leading to him sustaining workplace injuries which rendered him unfit for work. Mr Healy said that his complaints were not adequately investigated and that it was not safe for him to return to work until WIV followed medical advice that the parties engage in mediation. Mr Healy said that WIV had refused to engage in mediation and had unfairly dismissed him.

[6] WIV's position was that Mr Healy was dismissed after it concluded that he did not have capacity to do his job and had been unfit for work for an 18-month period. WIV did not consider it to be reasonable to engage in mediation with Mr Healy about his workplace complaints, which it had considered and found to be unsubstantiated. WIV also relied upon the statements made by Mr Healy in a public forum, of a political nature, which it said contravened its Code, and was a further reason for Mr Healy's dismissal.

[7] The Deputy President found that WIV had a valid reason to dismiss Mr Healy. The medical evidence opined that Mr Healy did not have any current capacity for work and there was no reasonable or imminent prospect of a return to capacity. Considerations of past and future incapacity, either as relevant to the validity of the dismissal or as factors under s 387(h), supported a conclusion that the reason for dismissal was valid and was not unfair in all the circumstances. The Deputy President was satisfied that WIV acted reasonably in declining to engage in mediation or make structural or managerial changes to accommodate Mr Healy's return to work.

[8] The Deputy President concluded that WIV had a second valid reason to dismiss Mr Healy, due to the public statements Mr Healy admitted that he had made on Twitter. The Deputy President found that Mr Healy's tweets, and particularly a tweet dealing with alleged wage theft

(a core business for WIV) and "naming and shaming" the employer, contravened the Code and amounted to misconduct.

[9] The Deputy President was satisfied of the matters in ss 387(b) and (c) having regard to the show cause process that had occurred prior to Mr Healy's dismissal for incapacity. Little weight was attributed to the fact that Mr Healy was not notified of the second reason given its gravity, and noting that it was based on facts in existence at the time of dismissal but not then relied upon by WIV.

[10] As to the other considerations in s 387 of the Act, the Deputy President was satisfied that there was no unreasonable refusal of a support person (s 387(d)); Mr Healy was not dismissed for unsatisfactory performance and did not need to be warned (s 387(e)), and ss 387(f) and (g) carried no weight in the circumstances.

[11] In the context of s 387(h), the Deputy President considered and rejected various matters advanced by Mr Healy, or was not otherwise satisfied that they rendered Mr Healy's dismissal unfair. This conclusion was said to have been reinforced by the Deputy President's view that Mr Healy had mistreated an employee of WIV, Ms Okulicz, by sending her messages that the Deputy President regarded to be persistent, insistent and plainly unwelcome – a matter that led the Deputy President to conclude, at paragraph [67] that Mr Healy lacks insight into the effect of his behaviour on others.

[12] Being satisfied that Mr Healy's dismissal was not harsh, unjust or unreasonable, the Deputy President dismissed the application for an unfair dismissal remedy.

Permission to appeal – principles

[13] There is no right to appeal and an appeal may only be made with the permission of the Commission. This appeal is from a decision made under Part 3-2 of the Act and therefore s 400 of the Act applies. By s 400(1), the Commission must not grant permission to appeal unless it is in the public interest to do so. Section 400(2) provides that an appeal on a question of fact can only be on the ground that the decision involved a significant error of fact. The test under s 400 is "a stringent one."[2]

[14] The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[3] The public interest is not satisfied simply by the identification of error or a preference for a different result.[4] Considerations that may attract the public interest include that the matter raises issues of importance and general application, that the decision manifests an injustice or that the result is counterintuitive.[5]

[15] It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated. However, that the Member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.

[16] An application for permission to appeal is not a preliminary hearing of the appeal. In determining whether to grant permission to appeal, it is unnecessary and inappropriate to conduct a detailed examination of the appeal grounds.[6] However, it is necessary to engage with the grounds to consider whether they raise an arguable case of appealable error.

Appeal grounds

[17] Having regard to the submissions contained in the attachments to Mr Healy's Notice of Appeal, we discern that Mr Healy raises four grounds of appeal:

(1) By declining to make an order compelling the attendance of Mr Healy's only witness, the Deputy President made errors of fact and law, and denied Mr Healy procedural fairness.

(2) The Deputy President made errors of fact when he determined that Mr Healy's tweets breached the Code, and did not act impartially.

(3) The Deputy President erred by concluding that there was no guarantee that mediation would be successful and that Mr Healy's return to work required a rearrangement of WIV reporting lines or appointments.

(4) Despite WIV's allegations of misconduct against Mr Healy not being tested, the Deputy President determined that they could be considered, which took Mr Healy by surprise as he was unexpectedly required to engage with them and defend them during the hearing.

[18] Mr Healy submits that it is in the public interest to grant permission to appeal because the rejection of mediation protects the interests of alleged bullies and creates an unsafe precedent, noting that the outcome of the decision has been reported in media publications.

Consideration

[19] In connection with ground (1) Mr Healy made a Form F51 application to the Deputy President for an order requiring the attendance of a WIV employee to give evidence in his case. The Deputy President declined to make the order, not being persuaded of the reasons given by Mr Healy in support of the application. The Deputy President was not satisfied that the attendance of the employee would assist in determining the substantive application.

[20] In the appeal, Mr Healy sought to rely upon an email from the employee the subject of the Form F51 as fresh evidence. Mr Healy submitted that the email was relevant to demonstrate that the Deputy President's decision not to order the employee's attendance was erroneous.

[21] By s 607(2) of the Act, the Full Bench can admit and take into account further evidence on appeal. The admission of further evidence is discretionary and may be refused, particularly where such evidence could have been admitted at first instance. It is not in dispute that the email was not in evidence below, but had been in existence at that time and provided *ex parte* to the Deputy President's chambers. The Deputy President declined to have regard to the email because it had not been served upon WIV at the employee's request.[7]

[22] The well settled principles governing the discretion to admit new evidence or to consider further material on appeal are set down in *Akins v National Australia Bank (Akins)*.[8] Three conditions need to be met before fresh evidence can be admitted. It must be established that the

evidence could not have been obtained or adduced with reasonable diligence for use at first instance; it must be evidence which is of such a high degree of probative value that there is a probability that there would have been a different result at first instance; and the evidence must be credible. It will be rare for fresh evidence to be admitted on appeal where the conditions in *Akins* are not met.

[23] We declined to exercise our discretion to admit the employee's email as fresh evidence. The email, while not served upon WIV by Mr Healy, was available to Mr Healy at the time of the first instance hearing and there is no probability in our view that its content would have led to a different result. Specifically, we are not persuaded that the email demonstrates that the Deputy President erred in the manner contended by appeal ground (1).

[24] The contention that the Deputy President "denied" the attendance of the employee as a witness for Mr Healy is based on an erroneous assertion of fact. The Deputy President did not deny the employee's attendance. Rather, the Deputy President exercised his discretion on the material before him to decline to issue an order which *compelled* the attendance of a WIV employee who had elected not to voluntarily participate as a witness on Mr Healy's behalf. Having considered the Deputy President's reasons for so deciding,[9] no arguable case of error is apparent.

[25] Nor is there any arguable basis to conclude that Mr Healy was denied procedural fairness, as contended. The decision not to issue the attendance order could not have had any meaningful consequence for the outcome of the proceedings. Any contention that the evidence of the employee may have displaced the Deputy President's finding that there were two valid reasons justifying Mr Healy's dismissal appears to be devoid of merit, as these matters are not addressed in the employee's email.

[26] By grounds (2) and (3), Mr Healy contends that the Deputy President made erroneous factual findings. Mr Healy must demonstrate that there is an arguable basis for concluding that the findings were either not reasonably open on the evidence, glaringly improbable or contrary to incontrovertible facts.[10] Further, where an error of fact is alleged, s 400(2) of the Act requires that it must be a *significant* error of fact. We have considered Mr Healy's contentions, noting the competing evidence before the Deputy President on these issues. In our view, an arguable contention has not been advanced that the Deputy President's findings were not reasonably open on the evidence. The matters addressed in Mr Healy's submissions variously contend that the Deputy President should have made different findings, reached different conclusions or attributed weight to other matters. However, Mr Healy's contentions do not speak to error in the decision or demonstrate that the findings are arguably improbable or contrary to incontrovertible facts. They simply seek a different result. The weight to be assigned to the evidence was a matter for the Deputy President. These grounds have no arguable prospect of success.

[27] We regard Mr Healy's contention, by ground (2), that the Deputy President did not act impartially or that there was a conflict interest to be spurious. There is no indication that Mr Healy addressed his concerns with the Deputy President, or that a recusal application was made. These contentions were not further developed orally before us and are not considered further.

[28] As to ground (4), the Deputy President correctly applied the well settled principle that a valid reason need not be the one that was relied upon by the employer at the time of dismissal.[11] While Mr Healy contends that he was unexpectedly required to engage with WIV's misconduct allegations at the hearing, the alleged error on the part of the Deputy President is not apparent. To the extent that Mr Healy's complaint is that he was unprepared to address these matters, the transcript does not record Mr Healy seeking an adjournment or time to prepare. We otherwise note that the misconduct allegations formed part of WIV's written submissions, filed ahead of the hearing. No arguable case of appealable error arises from the Deputy President proceeding to determine the application before him.

[29] Finally, we record that in oral submissions before us, Mr Healy expressed his disagreement with paragraph [67] of the decision and submitted that it called the Commission into disrepute. We reject this submission. The decision records the Deputy President's analysis as to Mr Healy's interaction with Ms Okulicz, which provides evidentiary foundation for the finding at [67] that Mr Healy lacks insight into the effect of his behaviour on others. Regardless, despite being given the opportunity, Mr Healy did not connect this finding to any contention of appealable error. Nor is any error apparent.

Conclusion and disposition

[30] For the reasons given, we do not consider that a reasonably arguable case has been advanced that the decision was attended by appealable error. Nor are we satisfied, for the purposes of s 400(1) of the Act, that the appeal attracts the public interest. The appeal does not raise any genuine issue of law, principle or wider application. It follows that we must refuse permission to appeal.

[31] Permission to appeal is refused.

DEPUTY PRESIDENT

Appearances:

Mr G Healy, on his own behalf.
Mr A Denton of counsel, for the respondent.

Hearing details:

2024.
Melbourne (by video):
May 8.

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[1] [2024] FWC 344

[2] *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54; 192 FCR 78; 207 IR 177 at [34] and [43]

[3] *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216-217 per Mason CJ, Brennan, Dawson and Gaudron JJ: applied in *Hogan v Hinch* (2011) 243 CLR 506 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]

[4] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343; 197 IR 266 at [24]-[27]; *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/ Warkworth* [2010] FWAFB 10089 at [28], affirmed on judicial review; *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 178; *NSW Bar Association v Brett McAuliffe*; *Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663; 241 IR 177 at [28]

[5] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343, 197 IR 266 at [24]-[27]

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

[7] Transcript of proceedings on 24 January 2024 (Transcript) PN16

[8] [1994] 34 NSWLR 155 at 160

[9] Transcript PN13-PN16

[10] *Edwards v Noble* [1971] HCA 54, 125 CLR 296; *Fox v Percy* [2003] HCA 22, 214 CLR 118 at [28]-[29]

[11] See *Shepherd v Felt & Textiles of Australia Ltd* [1931] HCA 21, per Starke J