DECISION

Fair Work Act 2009
s.604—Appeal of decision

Komeyui Management Pty Ltd
v
Guy Goonewardena
(C2024/3839)

DEPUTY PRESIDENT CLANCY
DEPUTY PRESIDENT ANDERSON
DEPUTY PRESIDENT MASSON

MELBOURNE, 8 NOVEMBER 2024

Appeal from decision [2024] FWC 1445 of Commissioner Crawford in Sydney on 5 June 2024 in matter number U2023/10241– application to adduce fresh evidence on appeal rejected – permission to appeal granted – consideration of ss 387 (b),(c) and (e) – appeal dismissed.

[1] The appellant, Komeyui Management Pty Ltd (**Komeyui**), dismissed Guy Goonewardena (**Mr Goonewardena or the respondent**) on 17 October 2024 on performance grounds. The appellant is part of a group of companies that operate Japanese restaurants in Brisbane and Melbourne.

[2] Mr Goonewardena was a floor manager at one of the Brisbane restaurants. He had been employed for approximately ten months.

[3] Mr Goonewardena made an unfair dismissal application under s 394 of the *Fair Work Act 2009* (**FW Act**). It was allocated to Commissioner Crawford who heard the matter by determinative conference (conducted by video) on 7 May 2024. A subsequent determinative conference was also conducted once the Commissioner became aware that a minimum employment period issue (s 383) may arise having regard to the size of the respondent.

[4] The Commissioner found the dismissal to be unfair. He made an order for compensation in the sum of $7,694.98 plus $846.45 superannuation, payable within 14 days.

[5] Komeyui appealed the decision. It challenges both the finding of unfairness and the compensation order. The order was stayed by consent pending the hearing and determination of the appeal.[1]

The Decision

[6] The Commissioner concluded that Mr Goonewardena had served the minimum employment period to be eligible to make the claim. He found that although the appellant employed seven employees at the date of dismissal, it was not a small business by virtue of its associated entities (at [17]).

[7] On unfairness, the Commissioner concluded:

- the alleged performance issues in the termination letter did not provide a valid reason for dismissal either individually or collectively (at [46]);
- whether Mr Goonewardena was notified of the reason for dismissal was not strictly relevant because there was no valid reason, but if it were relevant then he was not notified prior to a final decision being made (at [49], [50]);
- whether Mr Goonewardena was given an opportunity to respond was not strictly relevant because there was no valid reason, but if it were relevant then he was not given such an opportunity (at [53], [54]);
- no request was made for a support person, with this being a neutral factor (at [55]);
- Mr Goonewardena was not warned about unsatisfactory performance (at [57]), but as the appellant had raised concerns about performance prior to dismissal this was a neutral factor (at [58]);
- the reasonably small size of the appellant and the absence of human resource expertise contributed significantly to the procedural defects which occurred (at [59], [60]);
- Mr Goonewardena's age was relevant as it may increase difficulty in locating alternate employment (at [63]);
- the dismissal was unjust and unreasonable because there was no valid reason (at [65]);
- had there been a valid reason, the dismissal was nonetheless harsh because of Mr Goonewardena's age and because "the performance issues were not overly serious" (at [66]); and
- had there been a valid reason, the dismissal was nonetheless unjust and unreasonable because Mr Goonewardena was not notified of the reason for the dismissal and was not provided with an opportunity to respond prior to the final decision being made (at [67]).

[8] On remedy, the Commissioner concluded:

- reinstatement was inappropriate (at [71], [72]);
- compensation was appropriate (at [74]);

- taking into account the performance concerns, Mr Goonewardena would have been likely to have remained in employment for a further two months (at [80], [81]);

- no remuneration had been earned since dismissal (at [96]); and

- the failure to mitigate loss resulted in a 30% deduction to the compensation sum (at [87]).

Submissions

[9] In its grounds of appeal, Komeyui submit that fresh evidence of performance concerns should be admitted. The fresh evidence is in the form of eleven declarations sworn since the Commissioner's decision was made. Eight of those declarations are by current employees, one by a former employee, one by a landlord, and one by a food blogger. All purport to concern the performance or conduct of Mr Goonewardena whilst employed by the appellant.

[10] Komeyui advance two reasons why the additional evidence should be admitted:

- the appellant was unfamiliar with the Commission's processes and did not properly understand what was required of it at the hearing. Accordingly, the appellant was unprepared; and

- the language barrier at the hearing made it difficult for the appellant's position to be communicated and understood.

[11] Komeyui submit that the fresh evidence would establish a valid reason for dismissal and that it had not acted unfairly. The Commissioner's finding that there was no valid reason and his conclusion that the dismissal was unfair was based on incomplete evidence. As this finding would be displaced upon consideration of the additional evidence, the decision is attended with doubt and the compensation order is inappropriate.

[12] Accordingly, Komeyui submit that permission should be granted and the matter redetermined with the application being dismissed.

[13] Mr Goonewardena submits that fresh evidence should not be admitted on appeal, that some of the statutory declarations may lack authenticity, they contain allegations never put to him and cannot be relied upon without being tested.

[14] Mr Goonewardena submits that the Commissioner's decision was made after considering the material before him, was consistent with the evidence and was just.

[15] Mr Goonewardena submits that the appeal should be dismissed, the stay lifted, and the compensation paid.

Consideration

[16] An appeal under s 604 is an appeal by way of rehearing. The Commission's powers on appeal are only exercisable if there is error on the part of the primary decision-maker.[2] There is no right to appeal. Permission is required.

[17] As this is an appeal from a decision made under Part 3-2 of the FW Act, the grant of permission to appeal is conditioned by s 400(1), which provides that, despite s 604(2), the Commission *must not* grant permission to appeal unless the Commission considers that it is in the public interest to do so. Although not an exhaustive indication, the grant of permission may be in the public interest if the appeal raises issues of importance and general application, or if there is a diversity of decisions at first instance for which guidance from an appellate full bench is required, or if the decision at first instance manifests an injustice, or the result is counter-intuitive, or the legal principles applied appear disharmonious.[3] Assessing whether it is in the public interest to grant permission involves a broad value judgment.[4]

[18] Permission to appeal is rarely granted if an arguable case of appealable error is not shown, because appeals cannot succeed in the absence of appealable error.[5] However, that the Member at first instance made an error is not necessarily a sufficient basis for the grant of permission.

[19] An application for permission to appeal is not a *de facto* or preliminary hearing of the appeal. Consequently, it is generally unnecessary to conduct a detailed examination of the grounds of appeal to determine whether permission to appeal should be granted.[6] Notwithstanding, in this appeal we have had the benefit of arguments directed to both permission to appeal and the merits of the appeal.

[20] When an appeal from a decision made under Part 3-2 of the FW Act concerns a question of fact, s 400(2) also narrows the scope of appeal by providing that such an appeal can only be made on the ground that the decision involved a "significant error of fact".

Should additional evidence be admitted?

[21] Appeals exist for the correction of error, not to afford an unsuccessful party a second opportunity to run their case.[7] This principle is axiomatic and underpins the efficient and fair administration of justice.

[22] Whilst a full bench on appeal may admit further evidence (s 607(2)), there are compelling and well-established reasons why this discretion should be exercised in limited circumstances only.

[23] The principles governing the discretion emanate from a decision of the New South Wales Supreme Court in *Akins v National Australia Bank* (***Akins***).[8] These are, firstly, that it must be shown that the evidence could not have been obtained or adduced with reasonable diligence for use at first instance, secondly, the evidence must be 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 thirdly, the evidence must be credible.[9]

[24] It has been recognised by the Commission that, in considering whether to exercise the discretion in s 607(2), it is permissible in an appropriate case to depart from the principles set out in *Akins* and that the principles need not be strictly applied.[10] However it will be rare for fresh evidence to be admitted on appeal where the conditions in *Akins* are not met.[11]

[25] We agree that the nine fresh employee and former employee statutory declarations, together with the remaining two, if credible, would constitute a body of evidence that would have a material probative value, particularly on valid reason (s 387(a)). We agree that a possibility would exist that a different result may ensue. However, we are not satisfied that this is probably so. This is because an assessment of unfairness involves a weighing exercise of all factors in s 387. In the matter before the Commissioner, a substantive finding of procedural unfairness was made. That finding was reasonably open. Nothing in the statutory declarations, if they were to be admitted, would be likely to disturb that finding. That finding would remain capable of sustaining an overall conclusion of unfairness.

[26] Nor is this a case where the fresh evidence could not have been obtained or adduced with reasonable diligence for use at first instance. Indeed, significant aspects of the fresh evidence were included in written material submitted by Komeyui at first instance (including exhibits R7, R8, R9, R10 and R11 identified by the Commissioner at [21]). What largely happened at first instance, as acknowledged by the employer,[12] was that three of the persons who could have given direct evidence on that material (and have now produced statutory declarations) were simply not called to do so.

[27] Komeyui's reasons for not doing so, and for not gathering and submitting the further material it now seeks to rely upon, are not, objectively considered, sufficient to warrant the exercise of a discretion under s 607(2), even recognising that the *Akins* principles need not be strictly applied.

[28] The Commissioner issued directions in an orthodox manner for the conduct of the application. These included that in advance of proceedings, the parties file and serve witness statements and materials on which they intended to rely. In particular, the directions made by the Commissioner on 8 March 2024 outlined, inter alia:

> *"Witness statements are required to outline the evidence of each witness that the party intends to call at the Determinative Conference and are to be provided in the form of a signed statement. All assertions of facts, conversations, and descriptions of events should be given in the form of a witness statement which can be sworn or affirmed by the witness on the day of the hearing, and tested in cross-examination (this involves the other side asking the witness questions). Therefore, any person who provides a witness statement must be available to attend the hearing or determinative conference."*

[29] Komeyui was sent those directions, and (like Mr Goonewardena) had sufficient time to prepare its case. Whilst unfair dismissal proceedings may have been unfamiliar to the employer, this is not uncommon, and unfamiliarity is not an orphan to employer respondents only.

[30] We also observe that Komeyui could have, but did not, ask the Commissioner to clarify its obligations or his directions. Nor did it seek an adjournment of the hearing to prepare or better prepare. Further, it would appear, based on what we were advised during the hearing of

this appeal, that Komeyui decided to dispense with an external representative prior to the hearing and proceeded to be represented by internal officers. That was its forensic decision.

[31] At first instance, Komeyui was represented by a director Mr Kumano, assisted by its internal accountant. As was apparent at the appeal hearing (where an interpreter was sought and provided), Mr Kumano has some capacity to communicate in English, but with material limitation. It is apparent, from a reading of the transcript at first instance, that there were occasions before the Commissioner where Mr Kumano had some difficulty presenting Komeyui's case in English. On at least one occasion the accountant drew to the Commissioner's attention that Mr Kumano was having communication difficulty.[13]

[32] We have taken this into account. However, we are not satisfied that the appellant was denied procedural fairness in the overall conduct of the matter by reference to language barriers. Having examined the conduct of the proceeding as a whole, we are satisfied that the appellant's case was expressed and understood in sufficiently clear English. Its representatives made submissions and asked questions (including in cross examination) with reasonable clarity. The Commissioner engaged in two-way dialogue with both Mr Kumano and the accountant. At no time did Komeyui request an interpreter or indicate that it had not understood what was required of it.

[33] We observe that by conducting the matter by video rather than in person the Commissioner may have unintentionally accentuated the communication difficulties experienced by Mr Kumano. However, Komeyui made no request for an in-person hearing. Upon calling the matter on, the Commissioner, having noted the self-represented status of both parties, acted reasonably in deciding to conduct the proceedings in the more informal manner of a determinative conference.

[34] Accordingly, the failure to adduce the full body of evidence it now seeks to rely upon was a failure by Komeyui, not the Commissioner.

[35] More generally, we observe that it is not the Commission's task to run the case of a party. The Commission's responsibility is to conduct a fair hearing. This includes intervening only to the extent of ensuring that a self-represented party knows what is required of them, is directed to the matters in issue (and only the matters in issue), has a fair opportunity to present their case and test that of the other party, and to have its case understood.[14] On balance, those thresholds were met in this matter.

[36] We also observe that unfair dismissal proceedings, whether conducted by conference or hearing, are adversarial, not inquisitorial. Whilst under s 590(2) the Commission has power to inform itself as it sees fit (including by requiring a person to attend or provide documents) *inter-partes* litigation such as unfair dismissal proceedings are not general inquiries into workplace conduct or culture, or forums to ventilate broader concerns.

[37] It is appropriate, given the large number of unfair dismissal applications before the Commission, and the ever increasing number of matters where at least one if not both parties are self-represented, to recall, at Full Bench level, that Commission members at first instance have a statutory duty to act in a fair, efficient and transparent manner (s 577). So long as parties are given a reasonable opportunity to prepare their respective cases and procedural fairness is

afforded, matters must be determined by reference to relevant evidence properly obtained and presented. Parties, including self-represented parties, should generally be held to forensic choices they make in the conduct of litigation. The Commission publishes a range of resource material aimed particularly at assisting self-represented parties.

[38] We decline to exercise a discretion to admit the fresh evidence advanced by Komeyui in determining this appeal. Nor do we consider it appropriate to have the matter redetermined simply because Komeyui has now compiled a more substantial body of evidence on the merits.

Was the decision attended to by appealable error?

[39] The Commissioner was required to exercise his statutory responsibility by reference to the evidence and submissions before him, and no more.

[40] Komeyui has not pointed to specific error, other than the speculative contention that a finding that no valid reason existed and the conclusion that the dismissal was unfair would not have been reasonably made had more detailed evidence as to performance been before the Commissioner.

[41] It is apparent from the decision that the Commissioner determined the matter by reference to the sworn testimony of Mr Goonewardena and Mr Kumano, and the documentary material admitted into evidence. It is not the case that the Commissioner failed to take relevant material into account. Whilst the material presented by both parties was sparse and much of Komeyui's material hearsay, given that it did not call relevant employees, those were forensic decisions of the parties.

[42] If the Commissioner was suggesting (at [23]) that the events in June 2023 concerning performance or conduct could not reasonably have informed the decision to dismiss Mr Goonewardena in October 2023, simply because they "were well before Mr Goonewardena's dismissal", we respectfully disagree. Only four months passed between these events and Mr Goonewardana being notified of his dismissal and had they formed part of a probative body of evidence going to performance failures, they may well have been relevant to the question of whether there was a valid reason for the dismissal. However, given that the relevant witnesses were not called by Komeyui, the Commissioner was not in error (at [23]) in not affording significant weight to Komeyui's written material referencing their accounts.

[43] We have noted the Commissioner's finding (at [46]) that none of the six alleged performance issues identified in Mr Goonewardena's termination letter provided a valid reason for dismissal, either individually or collectively. We have taken this to mean that the Commissioner's finding was not that these failures, considered collectively, were incapable of constituting a valid reason, but rather, that the Commissioner could not be satisfied that they did, due to the lack of probative evidence before him.

[44] In this context it was reasonably open for the Commissioner to find that no valid reason existed. The evidence of Mr Kumano on Mr Goonewardena's performance, limited as it was, was hearsay and generalisation. It fell short of establishing a sound, defensible or well-founded reason for dismissal.

[45] It was also open for the Commissioner to find that Mr Goonewardena was not afforded procedural fairness because, despite performance concerns having been raised at an earlier time, he was not given an opportunity, prior to dismissal, to respond to the dismissal allegations set out in the termination letter.

[46] Further, we discern no error in the Commissioner's consideration and calculation of the compensation order.

[47] Given this, the decision does not manifest an injustice and nor is it counterintuitive.

[48] However, we observe a number of potential errors of construction on the face of the decision.

[49] We consider that the Commissioner may have been in error in the application of s 387(c). The Commissioner concluded (at [53]) that whether Mr Goonewardena was given an opportunity to respond was not strictly relevant because there was no valid reason.

[50] We do not consider that s 387(c), properly construed, applies only to a reason that is found to be a valid reason under s 387(a). Self-evidently, s 387(c) refers to "any reason". It is logical, by reference to both the plain meaning of the phrase "any reason" as well as the purpose of s 387 (being a global assessment of factors relevant to fairness) that the subsection concerns the reason (if any) advanced at or prior to dismissal by the employer, and not only a reason that is objectively valid. To apply a narrow construction (which the Commissioner appears to have done) is to eliminate from the fairness consideration, where the reason is not valid, whether an opportunity to respond was provided. That the reason may have been invalid is relevant to the fairness equation, but in our view relevant by reference to s 387(a), and not by excluding that consideration from s 387(c).

[51] In this respect, we note that the Commissioner applied the same reasoning to s 387(b) in concluding (at [49]) that whether Mr Goonewardena was notified of the reason for dismissal was not strictly relevant because there was no valid reason. However, this too is an excessively narrow construction because context remains relevant when considering s 387(b). For instance, the Commission may conclude there was no valid reason but consider the fact that an applicant was not notified of a valid reason does not weigh heavily in favour of a finding of unfairness because the applicant was nonetheless notified of the reason the respondent considered was a valid reason for the dismissal. Conversely, not being notified of a valid reason may, in different circumstances, weigh in favour of a finding of unfairness.

[52] We need not take these points of construction further because the ultimate findings of fact by the Commissioner in applying both s 387(b) and (c) were correct. As a matter of fact, Mr Goonewardena was not notified of the reason for dismissal (valid or otherwise) other than at the time of dismissal, and nor was he given an opportunity to respond to the termination letter allegations. To the extent that the Commissioner considered that ss 387(b) and (c) weighed in favour of a finding of unfairness, he was not in error.

[53] We further observe that the Commissioner, at [56] and [57], construes s 387(e) as only concerning prior warnings where the warning contains specific reference to the person's employment being at risk if performance concerns are not addressed. The Commissioner cites

as authority for that proposition an earlier decision of a Full Bench of the Australian Industrial Relations Commission in *Fastidia Pty Ltd v Goodwin* (***Fastidia***),[15] which considered wording in now repealed legislation which was almost identical to that now found in s 387 (e).[16] While we acknowledge that the interpretation outlined in *Fastidia* has generally been followed in subsequent Commission decisions, we disagree that the text of s 387(e) provides that a warning will only be relevant if it makes it clear that an employee's employment is at risk unless the performance issue identified in the warning is addressed. As a matter of construction, we consider that warnings by employers to employees concerning underperformance or to improve performance are relevant considerations under s 387(e) irrespective of whether they are accompanied by a specific statement that dismissal could be a consequence of continuing failure to address the performance concerns. The degree of weight to be attached will depend on the context. As the Full Bench in *Fastidia* acknowledged "*a mere exhortation for the employee to improve his or her performance would not be sufficient. We also note that we accept that these criterion are to be applied in a practical and commonsense way taking into account the employment context.*"[17] As such, we do not consider that the Full Bench in *Fastidia* purported to establish a decision rule in relation to what is now s 387(e).

[54] It follows that not all prior performance warnings will have equal weight in assessing the overall fairness of a performance-based dismissal. Warnings that fail to specify that a consequence of failure may be a disciplinary sanction including dismissal may well be given less weight than warnings that do. Applying different weight to warnings is not novel when assessing fairness in unfair dismissal matters. For example, warnings that are general in nature may carry less weight than those which provide specific notice or guidance of what is required of an underperforming employee. Similarly, a warning that is stale because it was given years earlier may be less relevant (or not relevant at all) compared to a warning with a temporal connection to the dismissal.

[55] It is also relevant to observe that in seeking to manage performance concerns, an employer may apply other less formal approaches than giving disciplinary warnings that misconduct or underperformance could lead to dismissal. Often sound reasons exist for other approaches, given the potential (especially in small to medium sized businesses) for formal warnings to destabilise relationships, demotivate an employee or appear excessively heavy-handed. It is common for coaching, counselling or retraining to be invoked as alternatives. As with warnings, such approaches to address underperformance remain relevant to fairness even though they may not be a "warning" within the meaning of s 387(e). We consider that such alternate approaches to managing underperformance are considerations relevant to overall fairness (including procedural fairness) under s 387(h). Of course, even in those respects there will be varying degrees of weight to be attached to prior coaching, counselling or retraining, depending on the circumstances of each matter.

[56] Finally, whilst it was reasonable for the Commissioner in this matter to consider the absence of a formal warning to be a neutral factor (at [58]) it does not appear that the Commissioner assessed how Komeyui raising prior performance concerns with Mr Goonewardena were to be weighed. Similarly, the Commissioner appears to have had regard to the size of the appellant, its lack of human resource expertise and the respondent's age (at [59], [60] and [63]) but does not specify how each of those matters weighed in his overall fairness assessment. Whilst no appealable error arises because they appear to have been taken into

account, a lack of specificity as to how each relevant s 387 factor weighs unnecessarily exposes the reasoning to potential error.

[57] In summary, whilst aspects of the Commissioner's approach could have potentially led him into error, particularly if there had been a firm evidentiary basis which objectively established underperformance, there is no appealable error on the face of the decision.

Conclusion

[58] We grant permission to appeal because the decision raises some important questions about the construction and application of s 387 to which we have referred.

[59] We do not consider it appropriate to admit fresh evidence. Further, as we have found no appealable error, we do not remit the application to be redetermined based on fresh evidence or otherwise.

[60] The appeal is dismissed.

[61] The effect of this decision is that the stay on the Commissioner's order ceases to operate. The compensation amount ordered by the Commissioner is immediately payable.

DEPUTY PRESIDENT

Appearances:

M. Kumano, *of and on behalf of*, Komeyui Management Pty Ltd, with interpreter assistance.

G. Goonewardena, *on his own behalf*.

Hearing details:

2024.
Melbourne and Brisbane (by video link);
19 September.

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[1] PR776022 - 14 June 2024.

[2] This is so because on appeal the Commission has power to receive further evidence, pursuant to s 607(2) of the Act; see *Coal and Allied Operations Pty Ltd v AIRC* [2000] HCA 47, 203 CLR 194, 74 ALJR 1348, 174 ALR 585, 99 IR 309, [17] per Gleeson CJ, Gaudron and Hayne JJ.

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

[4] *O'Sullivan v Farrer* [1989] HCA 61, 168 CLR 210, [13] per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* [2011] HCA 4, 243 CLR 506, 85 ALJR 398, [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* [2011] FCAFC 54, 192 FCR 78, 207 IR 177, [44]-[46].

[5] *Wan v AIRC* [2001] FCA 1803, (2001) 116 FCR 481, [30].

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

[7] *D'Rozario v The Truste for the Trimatic Management Services Unit Trust* [2024] FWCFB 2577, [3].

[8] (1994) 34 NSWLR 155.

[9] Ibid, [5].

[10] *JJ Richards & Sons Pty Ltd v Transport Workers' Union of Australia* [2010] FWAFB 9963, [95].

[11] *Mermaid Marine Vesel Operations Pty Ltd v Maritime Union of Australia* [2014] FWCFB 1317, [17].

[12] Transcript 7 May 2024 at PN 1333 – PN 135.

[13] Ibid at PN 170.

[14] *John Holland Pty Ltd t/as John Holland Aviation Services Pty Ltd v Ronaldo Salazar* [2014] FWCFB 7813, [24].

[15] *Fastidia Pty Ltd v Goodwin* Print S9280 (AIRCFB, Ross VP, Williams SDP, Blair C, 21 August 2000).

[16] S.170CG(3)(d) of the *Workplace Relations Act 1996.*

[17] *Fastidia Pty Ltd v Goodwin* Print S9280 (AIRCFB, Ross VP, Williams SDP, Blair C, 21 August 2000) at [44].