FAIR WORK AUSTRALIA

DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Lisa Holland
v
Nude Pty Ltd T/A Nude Delicafe
(C2011/6896)

Tony Holland
v
Nude Pty Ltd T/A Nude Delicafe
(C2011/6897)

SENIOR DEPUTY PRESIDENT HARRISON
SENIOR DEPUTY PRESIDENT RICHARDS
COMMISSIONER BLAIR

SYDNEY, 3 AUGUST 2012

Appeal against decision [2011] FWA 8012 of Commissioner Asbury in matter numbers U2010/6622 and U2010/6623, s.611 costs order, whether applications made vexatiously, collateral purpose, whether need to find malice, appeal upheld.

[1] This decision concerns two appeals against cost orders made by Commissioner Asbury against the appellants, Mr Holland and Ms Holland, in respect of applications they had each made under s.394 of the *Fair Work Act 2009* (the Act). The appeals raise identical issues and were heard together. The respondent, Nude Pty Ltd trading as Nude Delicafe, had previously been the employer of each of the appellants. Before us the appellants were represented by Mr Watson of counsel and the respondent by Ms Coulthard, also of counsel.

[2] The appellants had been employed by the respondent in its cafe business in Cotton Tree in the State of Queensland. After being summarily dismissed they each made an application under s.394. The respondent raised three jurisdictional objections to the applications. It asserted that it was a small business and the Small Business Code had been complied with, that the appellants were casual employees and not served the minimum period of employment and that the dismissals were genuine redundancies. Subsequently, it withdrew two of those jurisdictional objections. By the time the two s.394 applications were listed for

arbitration before the Commissioner the issues to be determined were whether the dismissals were genuine redundancies and whether they were harsh, unjust or unreasonable. Late in the afternoon of the day prior to the arbitration, the appellants' solicitor advised the Commissioner's associate and the respondent's solicitor both applications would be discontinued. A notice of discontinuance was filed by the appellants' solicitor on the morning of the arbitration. A short hearing proceeded on that day when an application was made orally for an order for costs against each of appellants. For reasons it is not necessary to detail, that matter did not proceed further on that day and a written application for a costs order was later filed. Both parties filed affidavits and written submissions in respect of that application and there was a hearing before the Commissioner.

[3] In her decision, Commissioner Asbury said she would exercise her discretion to award costs. She was satisfied that the applications for unfair dismissal remedies were made vexatiously. We refer to this as the s.611(2)(a) finding. The following extract from the Commissioner's decision contains her conclusions about this finding:

> "**[38]** The question of whether an application was made vexatiously is answered with reference to the motive of the applicant, and requires consideration of whether the predominant purpose is to harass or embarrass the other party, or to gain a collateral advantage [*Nilsen v Loyal Orange Trust* IRCA Decision No: 267/97], rather than seeking adjudication on issues to which the application gives rise [*Attorney-General v Wentworth* (1988) 14 NSWLR 481]. An application may also be vexatious where regardless of the motive of the applicant it is so "obviously untenable or manifestly groundless as to be utterly hopeless."[Ibid at 491 and see also *Re Cameron* (1996) 2 Qd R 218 per Fitzgerald P]
>
> **[39]** In my view, the evidence in this case in relation to the conduct of the Applicants and their representative in pursuing the applications, establishes that they were made in circumstances where there was no real intention to prosecute them. I am also of the view that the evidence considered overall, establishes that the applications were made for the collateral purpose of obtaining a payment from Nude Pty Ltd to cover the period between the date the Applicants' dismissals took effect and the date upon which they intended to resign their employment for the purposes of establishing their own business. I have reached these conclusions for the following reasons.
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> ...
>
> **[47]** Mr Holland's evidence that he did not consider that there would need to be a hearing, because he believed that Nude Pty Ltd would "back down", is a further indication that the purpose of the applications was to pressure Nude Pty Ltd to make a payment to the Applicants to tide them over while they implemented a plan formulated before their dismissal, to open a new business. It is also apparent that the Applicants were not seeking the remedy of reinstatement emphasised in the Objects of the unfair

> dismissal provisions, when they made their applications, and this is a relevant factor in the overall consideration of whether the applications were made vexatiously."

[4] The Commissioner was also satisfied that it should have been reasonably apparent to the appellants that their unfair dismissal applications had no reasonable prospect of success. We refer to this as the s.611(2)(b) finding. The Commissioner said the following about this finding.

> **"[49]** In the circumstances of this case, I am satisfied that it should have been reasonably apparent to the Applicants that their unfair dismissal applications had no reasonable prospects of success. This follows from the finding that the applications were made for the collateral reason that the Applicants were seeking a payment from the Respondent to tide them over until they could open their own business, rather than to have FWA determine whether they had been unfairly dismissed. ..."

[5] Although the notices of appeal contain numerous grounds the parties proceeded on the basis there were two principal issues that were raised. The first of these is the appellants' submission that a consideration of whether proceedings are brought vexatiously involves an element of malice being found to exist. Commissioner Asbury did not find any such requisite element on the part of the appellants in bringing their applications. As part of this submission the appellants also submit that the Commissioner was in error in categorising the applications as being made for a collateral purpose and that this supported her finding they were made vexatiously. Accordingly, the appellants submit she was in error in making the s.611(2)(a) finding. The second issue was that in determining whether it should have been reasonably apparent to the appellants that their applications had no reasonable prospect of success, the correct approach is to determine objectively whether the applications were 'manifestly untenable or groundless or so lacking in merit or substance to be not reasonably arguable', and that on the evidence that conclusion could not have been reached. The appellants submit that the Commissioner was in error in making the s.611(2)(b) finding.

[6] To put the appellants' submissions into context we should reproduce s.611 of the Act. It is in these terms:

> "611 Costs
>
> (1) A person must bear the person's own costs in relation to a matter before FWA.

> (2) However, FWA may order a person (the *first person*) to bear some or all of the costs of another person in relation to an application to FWA if:
>
> > (a) FWA is satisfied that the first person made the application, or the first person responded to the application, vexatiously or without reasonable cause; or
> >
> > (b) FWA is satisfied that it should have been reasonably apparent to the first person that the first person's application, or the first person's response to the application, had no reasonable prospect of success.
>
> Note: FWA can also order costs under sections 376, 401 and 780.
>
> (3) A person to whom an order for costs applies must not contravene a term of the order.
>
> Note: This subsection is a civil remedy provision (see Part 4-1)."

[7] We turn to the first issue raised by the appellants' grounds of appeal. The approach generally taken by members of the Tribunal as to the meaning to be ascribed to the word "vexatiously" in s.611(2)(a) is to adopt the comments of Justice North in *Nilsen v Loyal Orange Trust*[1] (*Nilsen*). The Commissioner referenced this case in her reasons for decision. *Nilsen* was decided in 1997 when the then *Workplace Relations Act 1996* applied however the relevant provision considered by His Honour was in terms similar to s.611(2)(a) being whether an applicant "instituted the proceeding vexatiously or without reasonable cause". About this provision His Honour said:

> "The next question is whether the proceeding was instituted vexatiously. This looks to the motive of the applicant in instituting the proceeding. It is an alternative ground to the ground based on a lack of reasonable cause. It therefore may apply where there is a reasonable basis for instituting the proceeding. This context requires the concept to be narrowly construed. A proceeding will be instituted vexatiously where the predominant purpose in instituting the proceeding is to harass or embarrass the other party, or to gain a collateral advantage : see *Attorney General v Wentworth* (1988) 14 NSWLR 481 at 491. The approach of the High Court in an application for a permanent stay of criminal proceedings on the ground of abuse of process constituted by improper purpose is instructive. In *Williams v Spautz* [1992] HCA 34, (1992) 174 CLR 509, at 522, Mason CJ, Dawson, Toohey and McHugh JJ said:
>
> > "Bridge LJ identified one difficulty when he said ([1977] 1 WLR, at p 503; [1977] 2 All ER, at p 586):
> >
> > > 'What if a litigant with a genuine cause of action, *which he would wish to pursue in any event*, can be shown also to have an ulterior purpose in view as a desired byproduct of the litigation? Can he on that ground be debarred from proceeding? I very much doubt it.' (Emphasis added.)

> So would we. But his Lordship, by implication, evidently sees no difficulty with the case in which the plaintiff does not wish to pursue his or her cause of action to a conclusion because he or she intends to use the proceedings for a collateral and improper purpose."

[8] The Commissioner said that in her view the applications by the appellants were made with no real intention to prosecute them. She found that they were made for the collateral purpose of obtaining a payment from the respondent to cover the period from the date their dismissals took effect and the date upon which they intended to resign their employment for the purposes of running their own business. The appellants submit that this is not enough to establish that the applications were made vexatiously. It submits this for two reasons. The first is that it says that there must be established an element of malice for an application to have been made vexatiously. Secondly, it submits that the collateral purpose the Commissioner found motivated the appellants could not properly form the basis of a finding the applications were made vexatiously.

[9] We turn to the first reason. The appellants submit that the word vexatiously, when used in s.611 of the Act, involves an element of malice and to establish this they rely upon the judgment of Wilcox CJ in *Hanrahan v Wesfarmers Dalgety Limited*[2] (*Hanrahan*), where His Honour said "The word "vexatiously" has a connotation of action taken to harass or annoy another party, an element of malice being involved." His Honour was then considering a costs application made in respect of an application for an interim injunction under the then Part VIA of the *Industrial Relations Act 1988* which concerned unlawful termination applications.

[10] The appellants submit that the Commissioner failed to consider whether or not there was malice involved in the appellants bringing their applications and she was in error in not doing so. The respondent submits that the reference to malice in *Hanrahan* does not take the test in *Nilson* any further, or require, as the appellants suggest, a separate finding of malice on their part. We think this is correct. It is also to be noted that the later decision of the court in *Nilsen* did not refer to *Hanrahan* nor did the appellants take us to any other court judgments which adopted the extract from *Hanrahan* which it relied upon. The New Shorter Oxford English dictionary does not mention malice in its definition of vexatious. It defines the word as:

> "**1** Causing or tending to cause vexation, annoyance, or distress; annoying, troublesome. M16. **2** *Spec*. In *Law*. Of an action: instituted without sufficient grounds for winning purely to cause trouble or annoyance to the defendant. L17"

Finally, we note that the appellants' submission was not put to the Commissioner and we are not inclined to deal with it further in this appeal. In any event, it is not necessary that we do so in light of our ruling on the second limb of this argument to which we now turn.

[11] The second limb of the appellants' submission is that the Commissioner was in error in finding the applications were made vexatiously as the purpose for making them was a collateral one to obtain a payment from the respondent to cover the period between the date of the appellants' dismissals and the date upon which they intended to resign from employment. We are persuaded there is merit in this submission. Although we note that the extract from *Nilsen* is the source of the reference to a collateral purpose we doubt it was intended to extend to a desire by an applicant to obtain relief in the nature of that which the Act contemplates. In this respect we note that s.390 refers to both reinstatement or the payment of compensation as being remedies available if a finding that a dismissal was unfair is made. In our opinion, seeking to obtain an amount of compensation for wages lost is not a collateral purpose. And, in our opinion, this is so whether or not the appellants intended to progress their applications to completion (ie to an arbitrated outcome).

[12] It is also relevant to take into account that at the time the appellants made their s.394 applications they had received legal advice that they had a reasonable prospect of showing that their dismissals were harsh, unjust or unreasonable. A desire to obtain a finding that they had been unfairly dismissed in itself may be adequate to avoid any finding that the s.394 applications were made vexatiously. Without reaching a final conclusion on this consideration we do note it seems to have some support in the judgment of Justice North in *Nilsen*.[3]

[13] We are persuaded that the Commissioner was in error in finding that the appellants had each made their s.394 applications vexatiously.

[14] The second issue raised by the grounds of appeal challenges the Commissioner's finding that it should have been reasonably apparent to the appellants that their s.394 applications had no reasonable prospect of success. This is the s.611(2)(b) finding. Each of the parties accepted that the approach to be taken to considering whether such a finding

should be made is summarised in the decision of the Full Bench in *Baker v Salva Resources Pty Ltd*[4] (*Baker*). The relevant extract is as follows:

> "The concepts within s.611(2)(b) "should have been reasonably apparent" and "had no reasonable prospect of success" have been well traversed:
>
> - "should have been reasonably apparent" must be objectively determined. It imports an objective test, directed to a belief formed on an objective basis rather than a subjective test; and
>
> - a conclusion that an application "had no reasonable prospect of success" should only be reached with extreme caution in circumstances where the application is manifestly untenable or groundless or so lacking in merit or substance to be not reasonably arguable."

[15] The appellants submit that on the evidence and submissions before the Commissioner she could not properly have been satisfied, to the requisite degree, that the applications were manifestly untenable or groundless or so lacking in merit or substance as to not be reasonably arguable. In this respect we should note that the Commissioner indicated that the considerations we have earlier set out in the extract from *Baker* are to be determined upon the facts apparent to the appellants at the time they instituted the s.394 applications. Each of the parties accepted this to be consistent with the terms of s.611.

[16] First, when the appellants were dismissed they were not advised it was due to their positions being redundant although that seems to be what was subsequently suggested to them in a telephone conversation after they had been dismissed. The respondent's evidence before the Commissioner was that it had decided to dispense with the work of the appellant Tony Holland as head chef and no longer to employ any person in the position Lisa Holland held.

[17] In our opinion the appellants had, at the very least, an arguable case that their dismissals did not constitute a genuine redundancy as that term is defined in s.389 of the Act. It was arguable their positions or at least one of them was required and would continue to be performed. Also the consultation requirements of the Restaurant Industry Award 2010 did not appear to have been complied with. In these circumstances it could not be suggested that the appellants had an untenable or groundless case that their dismissals were harsh, unjust or unreasonable.

[18] The appellants also had at least an arguable case that their dismissals were unfair in that the day before their dismissal they were called into a meeting with the two directors of

the respondent one of whom we will refer to as Margo. Allegations were then made that there were some discrepancies in the cash register reconciliations. This was denied by the appellants and an explanation was given. On the basis of Margo's statement filed in the substantive proceedings she then said she would discuss the matter with her husband. The next day she sent a text message to the mobile phone used by the appellants that they were no longer needed at the cafe and that she would be managing the cafe from then on. In a telephone conversation later that day Margo did not mention any issue about the cash register reconciliation, serious misconduct (which she later relied upon) nor refer to a redundancy - all she said she was that she was letting the appellants go.

[19] In considering whether she was satisfied that the requirements of s.611(2)(b) were made out the Commissioner again returned to the collateral purpose she had earlier found had motivated the appellants in making the s.394 applications. For the reasons we have earlier given, the fact the appellants were seeking a payment of compensation, and did not intend to seek reinstatement, is not a ground for a finding that their applications had no reasonable prospect of success and this remains so even if the amount of compensation they may reasonably have expected to have obtained was no more than a few weeks wages. In our opinion the Commissioner was in error in making the s.611(2)(b) finding.

[20] Before we turn to the disposition of these appeals we should make it clear we have considered only the narrow issues raised in the appeals and the construction of s.611 of the Act. We should not be taken to have endorsed the manner in which the appellants pursued their applications. We mention two aspects only. The appellants' statements filed in respect of the substantive proceedings were incomplete and failed to mention that they intended to resign from employment with the respondent as they had bought a business which would open in some five weeks or so from the day they were dismissed. We do accept that these issues were addressed by the appellants in their statements filed with respect to the costs application. The appellants also withdrew their s.394 applications at a time that was unacceptably late. They are to be criticised for each of these factors, however, in the circumstances of this appeal, these considerations do not provide a basis for an order for costs being made under s.611.

[21] The parties did not agree whether the appeals, under s.604 of the Act, are subject to s.400. Section 400 reads as follows:

> "400 Appeal rights
>
> (1) Despite subsection 604(2), FWA must not grant permission to appeal from a decision made by FWA under this Part unless FWA considers that it is in the public interest to do so.
>
> (2) Despite subsection 604(1), an appeal from a decision made by FWA 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] The appellants submit that since this is an appeal from a decision made pursuant to s.6l1 of the Act s.400 does not apply. It submits the decision made by Commissioner Asbury was not one made under Part 3-2 of the Act.

[23] The respondent submits that permission to appeal is to be determined by reference to s.400 of the Act and that unless it is in the public interest to do so, permission cannot be granted. It submits that the reference in s.400 to 'under this Part' is to Part 3-2 which part is about unfair dismissals and, whilst the discretion to order costs is contained in s.611, the costs order made by the Commissioner is an order in respect of an application made under Part 3-2.

[24] The question is whether the order for costs in respect of which these appeals are filed is, in terms of s.400(1), "a decision made by FWA under this Part ...". The answer is not readily apparent.

[25] Section 611 is the general source of power to award costs. It is contained in Subdivision F of Division 3 of Part 5-1. This part of the Act deals generally with the subject of the conduct of matters before the Tribunal. Section 401 is a specific power contained in Part 3-2 of the Act and deals with cost orders against lawyers and paid agents. Section 401(3) makes it clear the section does not limit the power to award costs under s.611. It is a power which is to operate in addition to the general power to award costs.

[26] Section 402 modifies the general power (which prescribes no time limit for making an application) to provide for a time within which applications for costs in respect of unfair dismissal applications are to be made. It is in these terms:

> "402 Applications for costs orders

> An application for an order for costs under section 611 in relation to a matter arising under this Part, or for costs under section 401, must be made within 14 days after:
>
> (a) FWA determines the matter; or
>
> (b) the matter is discontinued."

The section is concerned with the time within which an application for costs is to be made. In the case of an application under s.611 "in relation to a matter arising" under Part 3-2 it is to be made within 14 days after "FWA determines the matter". On balance, we think a s.611 costs order does not, by virtue of this section, become, in terms of s.400 "a decision made by FWA" under Part 3-2. A s.611 costs order may well be, as the respondent submits, an order in respect of an application under Part 3-2 but that does not make it a "decision made by FWA" under Part 3-2.

[27] Although it is not a desirable result, the construction we have adopted in the foregoing paragraph means that one type of costs order, that is one made under s.401 is, on appeal, subject to s.400 and otherwise a costs order relating to a s.394 application is not.

[28] Despite our preference for the construction to be placed on s.400 urged upon us by the appellants, this has no practical consequence for these appeals. This is because we are satisfied that it is in the public interest to grant permission to appeal. This finding means that regardless of whether s.400 of the Act applies to the appeals or not, nonetheless, permission to appeal is granted in each. For the reasons we have given we are satisfied that the Commissioner was in error in making the costs order she did. We uphold the appeals and quash the order made by the Commissioner. An order to this effect will issue at the same time as this decision is published.

SENIOR DEPUTY PRESIDENT

Appearances:

Mr K. Watson, of counsel, for the Lisa Holland and Tony Holland.

Ms A.J. Coulthard, of counsel, for Nude Pty Ltd T/A Nude Delicafe.

Hearing details:

2012.
Brisbane:
March 14.

Decision Summary

TERMINATION OF EMPLOYMENT – costs – ss.394, 611 Fair Work Act 2009 –appeal - Full Bench - notice of discontinuance followed by application for costs order – primary finding that applications for unfair dismissal remedies were made vexatiously – purpose of applications was to pressure respondent to make payment – reasonably apparent that applications without reasonable prospect of success –whether Commissioner acted in error – submission that word vexatious requires separate finding in relation to malice – first submission rejected – submission that Commissioner was in error in finding that applications vexatious as they were made with collateral purpose – seeking to obtain compensation for wages lost is not a collateral purpose – Commissioner erred in finding that applications were not reasonably arguable – appeal upheld – decision quashed – order of this effect to issue at the time decision is published.

Appeal by Holland & Anor against decision of Commissioner Asbury of 25 November 2011 [[2011] FWA 8012] – Re: Nude P/L t/a Nude Delicafe

C2011/6896 & Anor [2012] FWAFB 6508
Harrison SDP Sydney 3 August 2012
Richards SDP
Blair C
Citation: *Appeal by Holland & Anor against decision of Commissioner Asbury of 25 November 2011 [[2011] FWA 8012] – Re: Nude P/L t/a Nude Delicafe* [2012] FWAFB 6508 (3 August 2012)

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[1] [1997] 76 IR 180 at page 181

[2] [1995] 68 IR 105 at page 110

[3] Ibid at page 182

[4] [2011]FWAFB 4014 at para 10