FAIR WORK COMMISSION

Zornada v St John Ambulance Australia (WA) Inc

[2013] FWCFB 8255

Catanzariti VP, Cloghan and Hampton CC

4 September, 22 October 2013

Costs — Security for costs order — Application for unfair dismissal remedy — Whether application filed one day out of time — Where respondent argued application had no reasonable prospects of success — Whether security for costs order justified — Whether appellant afforded procedural fairness — No proper notification — Where application to dismiss unfair dismissal application determined on papers — Permission to appeal granted — Merits of application — Failure to take into account material consideration — No entitlement to recover costs — Failure to properly exercise discretion — Appeal upheld — Order quashed — Fair Work Act 2009 (Cth), s 399A.

Appeal — Appeal filed out of time — Extension of time granted — Representative error as reason for delay — Fair Work Act 2009 (Cth), ss 400, 604.

The appellant sought to appeal two orders and a decision of Deputy President McCarthy made in relation to the appellant's application for unfair dismissal remedy made under s 394 of the *Fair Work Act 2009* (Cth) (the Act). The appellant's employment with the respondent was terminated by letter dated 22 August 2012, following an investigation which found that the appellant had engaged in bullying and harassing behaviour. The respondent contended that it had verbally terminated the appellant's employment on 21 August. The appellant filed an application for an unfair dismissal remedy with the Fair Work Commission (the Commission) on 5 September 2012. At that time, applications under s 394 of the Act were required to be filed within 14 days of the date the dismissal took effect or within such further period as the Commission allowed. The respondent sought a security for costs order on the basis that the application was filed one day out of time and did not have reasonable prospects of success. His Honour published a decision on 8 February 2013 (the first decision) and granted the order sought on 15 February 2013 (the first order). On 29 May 2013, as the security for costs had not been satisfied by the appellant, the respondent filed an application with the Commission seeking to have the application dismissed pursuant to s 399A of the Act. His Honour issued an order dismissing the application on 25 June 2013 (the second order).

Held (granting permission to appeal and upholding the appeal) (by the Commission): (1) The second order discloses an appealable error. The appellant was not afforded the level of procedural fairness required to constitute a "fair

hearing". An application to dismiss under s 399A may be determined on the papers. However in order to ensure procedural fairness in those circumstances the parties should be notified that such an approach is to be taken. In circumstances where there was no proper notification that the dismissal application would be determined on the papers, and without warning that failure to file material by the designated date may lead to the matter being determined without a further opportunity being provided to the parties, it cannot be said that the appellant was afforded procedural fairness. The appellant is granted permission to appeal the second order on the basis that the order manifests an injustice, and the appeal should be upheld on the basis that the appellant was not afforded procedural fairness.

(2) Representative error is a sufficient explanation for the delay in filing the appeal against the first decision and the first order. The representative provided erroneous information to the appellant that there was some sort of an agreement between it and the respondent that the payment of the security would not be pursued. The appellant presumably instructed the representative to withdraw its first appeal against the security of costs, which was filed in time, on the basis of that erroneous information.

Cruz v Australia Post Corp (2008) 173 IR 78, applied.

(3) The appeal against the first decision and first order are not an illegitimate use of the Commission's procedures, particularly in light of the extraordinary circumstances of the case, the injustice and prejudice caused to the appellant if the first decision and first order were to stand unchallenged, and the public interest in hearing the appeal. Accordingly, an extension of time is granted to the appellant to appeal the first decision and the first order.

Wellington v Express Publications Pty Ltd (2009) 187 IR 248, applied.

(4) The Commission should award security for costs only in the rarest of circumstances, once it has balanced the merits of the application, the financial position of the parties, and what is just in the circumstances. Simply because an applicant is able to satisfy a security for costs order does not mean that an order is justified.

Harris v Home Theatre Group Pty Ltd [2011] FWA 2910, applied.

(5) It was inappropriate for his Honour not to consider the merits of the unfair dismissal application in determining whether or not to grant the security for costs order. In failing to do so he failed to take into account some material consideration which was an error of the type contemplated in *House v The King* (1936) 55 CLR 499. A respondent only has an "entitlement" to recover its costs if the respondent is successful and is able to establish, on the merits of the case, that the proceedings were commenced vexatiously, without reasonable cause, or in circumstances where it should have been reasonably apparent that the application had no reasonable prospect of success.

(6) Further, the result embodied in the first order is plainly unjust, and accordingly we infer that there has been a failure by his Honour to properly exercise his discretion.

Cases Cited

Brodie-Hanns v MTV Publishing Ltd (1995) 67 IR 298.

Clark v Ringwood Private Hospital (1997) 74 IR 413.

Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194; 99 IR 309.

Comalco Aluminium (Bell Bay) Ltd v O'Connor (No 2) (1995) 61 IR 455.

Cruz v Australia Post Corp (2008) 173 IR 78.

Davidson v Aboriginal and Islander Child Care Agency (1998) 105 IR 1.

GlaxoSmithKline Australia Pty Ltd v Makin (2010) 197 IR 266.

Harris v Home Theatre Group Pty Ltd [2011] FWA 2910.

House v The King (1936) 55 CLR 499.

Hunter v Chief Constable of West Midlands Police [1982] AC 529.

Kanan v Australian Postal and Telecommunications Union (1992) 43 IR 257.

Merribee Pastoral v ANZ Banking Group Ltd (1998) 193 CLR 502.

O'Sullivan v Farrer (1989) 168 CLR 210.

R v Moore; Ex parte Federated Miscellaneous Workers Union of Australia (1978) 140 CLR 470.

Walton v Gardiner (1993) 177 CLR 378.

Wellington v Express Publications Pty Ltd (2009) 187 IR 248.

Zornada v St John Ambulance Australia (WA) Inc [2013] FWC 867.

Application for permission to appeal and appeal

Appellant in person.

K Reid, solicitor, for the respondent.

Cur adv vult

Fair Work Commission

1 This is an appeal by Riccardo Zornada (the Appellant) against two orders and a decision of Deputy President McCarthy in relation to an application made under s 394 of the *Fair Work Act 2009* (Cth) (the Act).

2 The Appellant's employment with St John Ambulance Australia (WA) Inc (the Respondent) was terminated by letter dated 22 August 2012 (although the Respondent contends that the Appellant was terminated verbally on 21 August 2012), following an investigation which found that the Appellant had engaged in bullying and harassing behaviour. The Appellant, who was represented by United Voice at the time, filed an application for an unfair dismissal remedy with the Fair Work Commission (the Commission) on 5 September 2012 (the Application).

3 At the time of the Appellant's termination, applications under s 394 of the Act were required to be filed within 14 days of the date the dismissal took effect or within such further period as the Commission may allow. The Respondent objected to the Application on the basis that the Appellant was terminated on 21 August 2012, meaning that the Application was filed one day out of time, and that the Applicant had not reasonable prospect of success. Based on those objections, the Respondent sought a security for costs order.

4 His Honour published a decision[1] on 8 February 2013 (the First Decision) and granted the order sought[2] on 15 February 2013 (the First Order).

5 United Voice, on behalf of the Appellant, filed an appeal[3] against the First Decision and the First Order (the First Appeal), although that appeal was subsequently discontinued,[4] seemingly without explanation.

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1 *Zornada v St John Ambulance Australia (WA) Inc* [2013] FWC 867.

2 PR533986.

3 C2013/3402.

4 Form F50 — Notice of Discontinuance filed on 14 May 2013.

6 As the security for costs had not been satisfied by the Appellant, on 29 May 2013, the Respondent filed an application with the Commission seeking to have the Application dismissed pursuant to s 399A of the Act (the Dismissal Application).

7 His Honour issued on order[5] dismissing the Application on 25 June 2013 (the Second Order).

8 Although it was not entirely clear from the Notice of Appeal, following the mention held by Vice President Catanzariti on 6 August 2013, and the receipt of the submissions filed by the Appellant on 9 August 2013, it became evident that the Appellant, who is no longer represented by United Voice, was seeking an extension of time to file an appeal against the First Decision and First Order and permission to appeal the same, as well as permission to appeal the Second Order. To the extent required, permission to amend the Notice of Appeal is granted.

9 At the hearing of the appeal on 4 September 2013, Mrs Reid, solicitor, sought permission to appear on behalf of the Respondent. The Appellant opposed the granting of permission on the basis that the Respondent is a large organisation with a dedicated human resources team. Having carefully considered the submissions made by both parties, the Full Bench was of the view that the matter was complex and that legal representation would enable the matter to be dealt with more efficiently. To that end, permission to appear was granted to Mrs Reid pursuant to s 596(2)(a) of the Act.

Background

10 Given the complex nature of the factual background to this appeal, briefly summarised above, it is worthwhile summarising the key events as follows:

Date	Event
5 September 2012	The Appellant lodges an application for unfair dismissal remedy (Application).
9 November 2012	The Respondent objects to the Application on jurisdictional grounds andlodges an application for security for costs.
14 December 2012	Hearing held in the security for costs application.
8 February 2013	McCarthy DP issues a decision ([2013] FWC 867) (First Decision) and subsequently, on 15 February 2013, an order (PR533986) (First Order) for security of costs against the Appellant in the amount of $25,000.
1 March 2013	The Appellant lodges a Notice of Appeal against the First Decision and First Order (First Appeal). The Notice of Appeal expressly seeks a stay of the First Order.
12 March 2013	The Respondent, through its solicitors, indicates that it will pursue a costs order in relation to the stay application sought in the First Appeal as it is of the view that the stay application was made without reasonable cause.

5 PR538211.

Date	Event
9 April 2013	Respondent indicates to United Voice that it does not intend to pursue acontempt order in relation to the non-payment of security.
17 April 2013	United Voice informs the chambers of Drake SDP that it wishes to withdraw its request for a stay, but to keep the First Appeal on foot.
14 May 2013	First Appeal formally withdrawn by United Voice on behalf of the Appellant.
29 May 2013	Respondent makes an application to McCarthy DP to dismiss the Application on the basis that the appellant had yet to provide security for costs (Dismissal Application).
14 June 2013	McCarthy DP's Associate writes to the Appellant's representative seeking submissions on the Respondent's Dismissal Application. A copy of the Dismissal Application is attached. The Appellant's representative was informed that submissions were to be filed by no later than Friday 21 June 2013 at 5 pm.
21 June 2013	No submissions on behalf of the Appellant received by the chambers of McCarthy DP.
25 June 2013	McCarthy DP issues an order (PR538211) dismissing the Application on the basis of the Respondent's Dismissal Application (Second Order).
27 June 2013	Representative of United Voice telephones the chambers of McCarthy DP to make enquiries about the Second Order. These conversations are file noted by the Associate to McCarthy DP.
27 June 2013	United Voice sends an email to the chambers of McCarthy DP stating that the Appellant was not aware of the 14 June 2013 correspondence from the Commission, and that it was not the Appellant's fault that no submission had been made.
10 July 2013	The solicitors acting for the Respondent forward an email to both United Voice and chambers of McCarthy DP indicating that the Dismissal Application was served on United Voice. They also indicate they may seek costs if the matter goes further.
12 July 2013	Appellant makes his own enquiries to chambers in relation to the transcript.
16 July 2013	Appellant lodges a Notice of Appeal (Second Appeal).

Appeal rights

11 An appeal under s 604 of the Act in a matter of this nature is determined by reference to the provisions of s 400 of the Act. Section 400 provides:

> 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 FWC in relation to a matter arising under this Part can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact.

12 A Full Bench in *GlaxoSmithKline Australia Pty Ltd v Makin*[6] considered the impact of s 400(1) on the approach to granting permission to appeal. It said:

> [26] Appeals have lain on the ground that it is in the public interest that leave should be granted in the predecessors to the Act for decades. It has not been considered useful or appropriate to define the concept in other than the most general terms and we do not intend to do so. The expression "in the public interest", when used in a statute, classically imports a discretionary value judgment to be made to be made by reference to undefined factual matters, confined only by the objects of the legislation in question. [*Comalco v O'Connor* (1995) 131 AR 657 at p 681 per Wilcox CJ & Keely J, citing *O'Sullivan v Farrer* (1989) 168 CLR 210]
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> [27] Although the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters, it seems to us that none of those elements is present in this case.

13 Furthermore, as the Notice of Appeal was filed well after the 21 day time limit imposed by the *Fair Work Australia Rules 2010* (Cth) expired with respect to the First Order and the First Decision, in addition to establishing that it is in the public interest to grant permission to appeal, the Appellant is also required to establish that time should be extended to file the appeal against the First Order and the First Decision.

Second Order

14 The grounds on which the Appellant challenges the Second Order were set out in the outline of submissions filed by the Appellant, and expanded on during oral evidence and submissions at the hearing of the appeal.

15 The Appellant submitted that certain errors and omissions may have taken place without his knowledge and that he should not be prejudiced by the errors made by his former representative. The Appellant provided sworn oral evidence that he was not notified by the Commission, or by his representative that the Dismissal Application had been filed by the Respondent, or that submissions were to be filed by 21 June 2013. The first time he was made aware of the Dismissal Application was on 27 June 2013, when the Secord Order was sent to his address by ordinary mail and subsequently read out to him whilst he was away on a remote site.

16 The Appellant's version of events is certainly supported by a review of the file and by the correspondent sent and received by the Commission. It is clear that there is no evidence that the Dismissal Application was served on the Appellant personally, or that the email correspondence from the Commission seeking submissions to be filed by 21 June 2013 was copied to the Appellant. The Appellant's version of events is also supported by the correspondence sent

6 *GlaxoSmithKline Australia Pty Ltd v Makin* (2010) 197 IR 266.

to the Commission by United Voice, which appeared to accept that an error had been made on its part, without any knowledge or instructions from the Appellant.

17 In response, it was submitted by the Respondent that the Second Order was a discretionary decision, and the decision made was reasonably available to his Honour based on the information before him. Accordingly, it was submitted, the Second Order was a reasonable decision and was not attended by errors of the type described in *House v The King* (1936) 55 CLR 499.

18 The Full Bench agrees with the Respondent that the Second Order can be properly viewed as a discretionary decision and the approach to be taken by the Full Bench is outlined by the High Court in *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission*.[7] Although the High Court decision concerned s 45 of the *Workplace Relations Act 1996* (Cth), it is equally applicable to s 400 of the Act.

19 However, in addition to assessing the decision below in accordance with the principles outlined in *House v The King*, we must also be satisfied that the Appellant was afforded procedural fairness by his Honour at first instance. The provision of a fair hearing is at the very heart of the Commission's obligations to the parties who appear before it. A fair hearing involves the opportunity for all parties to put their case and to have that case determined impartially and according to law.

20 Following the receipt of the Dismissal Application, his Honour's chambers sent an email to the Appellant's then representative in the following terms:

> Please find attached the F1 received on 29 May. Deputy President McCarthy has requested if you have any submissions in response to this F1 that they should be made by 5 pm on Friday 21 June 2013.

21 As previously stated, that email was not copied to the Appellant. Furthermore, the email did not state that the decision would be made "on the papers", or indeed that failure to file written submissions may result in his Honour dismissing the Application.

22 Having not received any submissions from the Appellant's representative, and without following up with the parties, on 25 June 2013 his Honour issued the Secord Order, which stated:

> [2] On 29 May 2013 St John Ambulance made application to the application to be dismissed. The grounds for that application included:
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> 1. On 1 March 2013 Mr Zornada lodged a notice of appeal against the order and the decision.
> 2. On 2 May 2013 St Johns Ambulance and the representative for Mr Zornada, United Voice, received notice from the Commission that the Appeal was listed for Hearing on 29 May 2013. The appeal directions required United Voice to provide for written submissions to the Commission by 14 May 2013. On 14 May 2013 United Voice lodged a notice of discontinuance of the appeal.
> 3. Mr Zornada has not yet provided as security for costs as required by the Order. As a result of substantive unfair dismissal proceedings are currently stayed until security is provided.
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> [3] St Johns seeks the application by Mr Zornada to be dismissed.

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7 *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194; 99 IR 309.

> [4] On 14 June 2013 I wrote to the representative United Voice, advising them of the application for dismissal by St Johns. I requested any submissions to be provided to my chambers by 5 PM on Friday, 21 June 2013. *No submissions were received. As a consequence I conclude that Mr Zornada does not contest the grounds St Johns rely upon*.
>
> [5] I find that the grounds St Johns rely upon are reasons to dismiss the application and decide accordingly.

(Emphasis added)

23 We are of the view that the Second Order does disclose an appealable error. We consider that his Honour did not afford the Appellant with the level of procedural fairness required to constitute a "fair hearing". Although there is nothing in the Act which prevents members of the Commission from determining s 399A applications "on the papers", we consider that it can be expected that the parties would be notified that such an approach would be taken to ensure that procedural fairness has been afforded. In circumstances where an email was sent to the Appellant's representative seeking written submission to be filed by a certain date, without proper notification that the Dismissal Application will be determined on the papers, and without warning that failure to file material by the designated date may lead to the matter being determined without a further opportunity being provided to the parties, it cannot be said that the Appellant was afforded procedural fairness. This is particularly so in circumstances where the Appellant was not told of the Dismissal Application or of the need to file submissions by the Commission or by his representative, albeit that this information was not available to his Honour at the time the Secord Order was issued.

24 Accordingly, we consider that it is in the public interest to grant the Appellant permission to appeal the Secord Order on the basis that the order manifests an injustice, and that the appeal should be upheld on the basis that the Appellant was not afforded procedural fairness.

Extension of time to appeal the First Decision and First Order

25 The grounds on which the Appellant challenges the First Decision and the First Order are in much the same terms as the First Appeal. The Notice of Appeal outlined the following grounds of appeal:

- That his Honour erred in law by failing to properly apply the principles relevant to applications for security of costs as established in *Harris v Home Theatre Group Pty Ltd* [2011] FWA 2910:

  Particulars

  The learned Deputy President erred by:

  (a) Failing to consider whether or not the Applicant had brought the application for an unfair dismissal remedy vexatiously or without reasonable cause, or whether it should have been reasonably apparent to the Applicant that he had no reasonable prospect of success;
  (b) Failing to give sufficient weight to the needs of the Applicant;
  (c) Misapplying the statement regarding the Applicant's financial position to pay costs;
  (d) Failing to make a decision that was fair and just in the circumstances.

  (Ground 1)

- That his Honour made significant errors of fact:

Particulars

The learned Deputy President erred by:

(a) Concluding that granting security for costs would deter the member from pursuing the matter;

(b) Concluding that not granting security for costs would deter the employer from defending against the matter when this was not at Issue.

(Ground 2)

26 Through the Appellant's oral evidence and submissions, it emerged that the Appellant's financial situation has significantly changed following his termination by the Respondent and that he is not, and was not, ever in the position to pay the $25,000 as ordered by his Honour. Although the Appellant's representative had filed the First Appeal against that decision, and subsequently withdrew the appeal, based on the advice received by United Voice, the Appellant was of the understanding that the substantive merits of his Application would be heard regardless of the First Order.[8] This understanding was reached, it appears, due to the misapprehension that the Respondent was not pursuing the payment of the security.[9] There is of course nothing to suggest that the Respondent had made any such representations to the Appellant's representative. Accordingly, as best as could be understood, the Appellant is seeking an extension of time to file an appeal against the First Decision and the First Order because of the manifest injustice caused by the First Order and the representative error which caused the Appellant to mistakenly withdraw the First Appeal.

27 In response, the Respondent submitted that an appeal should not be granted against the First Decision and the First Order as the appeal has been brought out of time and it would be an abuse of process to allow the Appellant to re-enliven the discontinued First Appeal. It was submitted that to allow the appeal would be an illegitimate use of the Commission's procedures, it would be oppressive and unfair to the Respondent, and to allow an appeal of the First Decision and the First Order would bring the procedures and fairness of the Commission into disrepute amongst "right-thinking people": *Walton v Gardiner* (1993) 177 CLR 378 at 393 approving Lord Diplock in *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 at 536.

28 The principles relevant to an application to extend time for instituting an appeal were elucidated by a Full Bench in *Wellington v Express Publications Pty Ltd*[10] as follows:

> [8] The principles enunciated in *Brodie-Hanns*, upon which Express relies, were distilled from a number of Federal Court decisions dealing with applications for an extension of time in first instance cases. In our view the principles applicable in determining an application for an extension of time in which to appeal vary slightly from the *Brodie-Hanns* principles in first instance matters. Fundamentally, it is a question of whether granting an extension of time for leave to appeal out of time, is necessary to enable the Commission to do justice between the parties. In that regard we consider the following principles most apt:
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> • there should be adequate reasons which explain the delay;

8 Transcript, PN48.

9 Transcript, PNS 49-50.

10 *Wellington v Express Publications Pty Ltd* (2009) 187 IR 248.

- it is relevant to consider the prospects of success of the appeal. If it is clear that the appeal will fail in the sense that it is not "arguable" or not "fairly arguable", that may militate against granting an extension of time;
- there should not be hardship or prejudice or injustice to the respondent.

(Original references omitted)

29 The Full Bench in *Cruz v Australia Post Corp*[11] summarised the principles relevant to considerations of representative error:

> For the sake of completeness, the giving of wrong advice by a union is a species of representative error. Representative error as an acceptable explanation for delay in filing an application for relief against termination of employment was considered at length by the Full Bench in *Clark v Ringwood Private Hospital*. A Full Bench in *Davidson v Aboriginal & Islander Child Care Agency* usefully summarised the propositions emerging from *Clark* as follows:
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> (i) Depending on the particular circumstances, representative error may be a sufficient reason to extend the time within which an application for relief is to be lodged.
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> (ii) A distinction should be drawn between delay properly apportioned to an applicant's representative where the applicant is blameless and delay occasioned by the conduct of the applicant.
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> (iii) The conduct of the applicant is a central consideration in deciding whether representative error provides an acceptable explanation for the delay in filing the application. For example it would generally not be unfair to refuse to accept an application which is some months out of time in circumstances where the applicant left the matter in the hands of their representative and took no steps to inquire as to the status of their claim. A different situation exists where an applicant gives clear instructions to their representative to lodge an application and the representative fails to carryout those instructions, through no fault of the applicant and despite the applicant's efforts to ensure that the claim is lodged.
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> (iv) Error by an applicant's representatives is only one of a number of factors to be considered in deciding whether or not an out of time application should be accepted.

(Original references omitted)

30 We consider that in this instance representative error is a sufficient explanation for the delay in filing the appeal against the First Decision and the First Order. The Appellant had acted on instruction from his then representative, United Voice, that the Respondent was not pursuing the payment of the security and that the substantive merits of the Application would be heard. This was the advice received as late as mid-May 2013. The next event, as far as the Appellant was aware, was the Second Order, issued on 25 June 2013, which dismissed the Application in its entirety. It cannot be said that the Appellant sat idle and made no inquiries with his representative. Rather, the representative provided erroneous information to the Appellant that there was some sort of an agreement between it and the Respondent that the payment of the security would not be pursued. We can assume that the Appellant instructed the representative to withdraw the First Appeal, which was filed in time, on the basis of that erroneous information.

31 We are also of the view that the appeal against the First Decision and the

11 *Cruz v Australia Post Corp* (2008) 173 IR 78 at [35].

First Order is certainly arguable on the basis of Ground 1 of the Notice of Appeal. Furthermore, although we are mindful of the prejudice to the Respondent caused by extending the time to appeal the First Decision and the First Order, we consider that the other factors outweigh any such prejudice given that the Appellant had previously challenged the First Decision and the First Order, the grounds for challenging the decision have not altered, and the First Appeal was discontinued before any material was filed by the Respondent, and as such, there should not have been significant costs expended.

32 The Full Bench does not consider the appeal against the First Decision and the First Order an illegitimate use of the Commission's procedures, particularly in light of the extraordinary circumstances of the case, the injustice and prejudice cause to the Appellant if the First Decision and the First Order were to stand unchallenged, and the public interest in hearing the appeal. Accordingly, we exercise our discretion to extend the time to the Appellant to appeal the First Decision and the First Order.

Permission to appeal the First Decision and the First Order

33 We consider that permission to appeal the First Decision and First Order should be granted as it is in the public interest for the appeal to be heard. This is in light of our view that the First Decision and First Order manifests an injustice, or the result is counter intuitive. Furthermore, we consider that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.

Security for costs

34 Commissioner Asbury, as she then was, outlined the principles to be considered in assessing whether to grant an order for security for costs in *Harris v Home Theatre Group Pty Ltd*:[12]

> [7] Principles relevant to the making of orders for security of costs can be summarised as follows. There is no absolute rule to control the exercise of the discretion to order security for costs, and what should be done in each case depends on the circumstances of the case with the governing consideration being what is required by the justice of the matter. The making of an order for security for costs should not be oppressive in that it would stifle a reasonably arguable claim.
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> [8] The financial position of the party against whom the order is sought, will be relevant in a number of circumstances. There is no absolute rule that impecuniosity of a party will entitle its opponent to an order for security for costs. There is also a general rule that poverty should not be a bar to a person prosecuting a claim at first instance. On appeal, the question of security is to be determined differently on the basis that the appellant has had his or her day in court, and should not be given a "free hit", particularly in circumstances where the costs of a proceeding below had not been paid by the appellant.
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> [9] In cases where the impecuniosity of the party against whom the order for security for costs is sought, it is relevant that the impecuniosity is itself a matter which the litigation may help to cure or arises from the conduct the party is complaining of. In such circumstances the party against whom the order is sought should not be shut out of litigation.
>
> [10] The prospects of success and the strength of the case of the party resisting the order is relevant. In *Merribee* (Supra) Kirby J said (citations omitted):

12 *Harris v Home Theatre Group Pty Ltd* [2011] FWA 2910.

> Another consideration that has sometimes been judged to be relevant is the strength of the case of the party resisting an order that it provide security for costs and evaluation (necessarily tentative) of its prospects of success. Thus, the fact that a party has secured special leave to argue its case on appeal has been thought a relevant consideration in some circumstances. Similarly, if a proceeding appeared hopeless and such as was bound to fail, the lack of apparent merit in a party's case might be a reason for ordering it to provide security for the costs to which, it appears, it is needlessly putting its opponent. Such a consideration would need to be exercised with care, given that the real merits of a case might not emerge until the final hearing or might not sufficiently emerge in the necessarily brief proceedings typically involved in an application for security of costs. Furthermore, if a party asserts that its opponent's proceedings are manifestly lacking in legal merit, other remedies are available to it to protect it from needless vexation.
>
> [11] In relation to costs, it is relevant that the nature of a proceeding is such that, even if successful, an order for costs might not be made or might be limited. The inability of a party to meet the costs of an unsuccessful proceeding, or the risk that a cost order will not be satisfied is also relevant to the exercise of the discretion. Other related considerations are that a party is, or is likely to be absent from the jurisdiction when a decision is made and has no, or few assets within the jurisdiction.
>
> [12] There may also be aspects of public interest which are relevant to the exercise of the discretion to make an order for security for costs, such as an application raising matters of general public importance, quite apart from the interests of the parties. Other matters that have been considered relevant are that a hearing of the proceedings is close at hand, or the party seeking the order has delayed its application for such an order. It may also be relevant that the parties, or some of them, are legally aided.
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> (Original references omitted)

35 We agree with the summary provided by her Honour. We further note that costs orders in this jurisdiction are extraordinary, and security for costs orders even more so. This is because the Act reflects the longstanding principle that costs will not be awarded against parties in industrial proceedings, other than in exceptional circumstances. Costs are limited to circumstances where the proceedings have been commenced vexatiously, without reasonable cause, or in circumstances where it should have been reasonably apparent that the application had no reasonable prospect of success.[13] It should be noted that a proceeding is not to be classed as being instituted without reasonable cause simply because it fails,[14] but rather in circumstances where the applicant's own version of the facts, it is clear that the proceeding must fail.[15]

36 Accordingly, the Commission should award security for costs only in the rarest of circumstances, once the Commission has balanced the merits of the application, the financial position of the parties, and what is just in the circumstances.

37 The First Decision provided the following:

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13 *Fair Work Act 2009* (Cth), s 611(2).

14 *R v Moore; Ex parte Federated Miscellaneous Workers' Union of Australia* (1978) 140 CLR 470 at 473 per Gibbs J.

15 *Kanan v Australian Postal and Telecommunications Union* (1992) 43 IR 257 at 265.

[5] The FW Act provides no requirements or limitations on the considerations for any Order for the security for costs. Clearly a decision to order or not order security for payment of costs is a discretionary judgment.

[6] Any guidance for the exercising of that discretion is provided by the objects of Part 3-2 which requires that the discretion is applied within a framework that is intended to balance the needs of business in a manner that is quick and informal and the needs of the Applicant and through ensuring a "fair go all round" is accorded to both the employer and the employee concerned [s 381].

[7] I am also required to perform the function in a manner that "a) is fair and just; and (b) is quick, informal and avoids unnecessary technicalities; and (c) is open and transparent; and (d) promotes harmonious and cooperative workplace relations [s 577(a)]." I must also take into account equity, good conscience and the merits of the matter in performing my functions and exercising any powers.

[8] It seems to me that the needs of the employee are primarily whether they can pursue their application. If an Order that would likely cause the application to be discontinued because of a lack of means to comply an Order would not properly recognise an employee's needs. On the other hand if the refusal to issue an Order had the effect of causing an employer to not defend an application they believed to be vexatious, or made without reasonable cause, or because they believed it had no reasonable prospect of success because of the costs involved, this would not properly recognise the needs of the employer.

[9] Much of the time in these proceedings involved submissions about whether or not the application had a reasonable prospect of success. In this matter I consider it was premature for much consideration of that issue. Whether the application has a reasonable prospect of success requires a consideration of the evidence likely to be able to be presented. I do not regard those considerations to be consistent with the object of quickness and informality for matters of this nature.

[10] Here the Applicant is not impecunious and it did not appear to me that any Order would have any effect on him pursuing his application. The Applicant is represented by United Voice.

[11] The exposure by the Respondent to costs is likely to be incurred in defending the application are substantial. The Respondent was represented by legal practitioners. The Respondent is entitled to minimise the exposure to costs and to safeguard their right to seek to recover costs.

[12] In balancing the needs of the Applicant and the needs of the Respondent I am satisfied that the balance weighs in favour of the Respondent in obtaining some security. I also consider an Order would be consistent with the requirement for there to be "a fair go all round". An Order for the security of costs will issue as requested with a requirement for security to the amount of $25,000 to be provided.

38 From the above, it is clear that the basis upon which the order was granted was, simply put, because his Honour concluded that the Appellant was not impecunious and the costs to be incurred by the Respondent in the conduct of the hearing could be significant. The first proposition was most likely based on the following exchange during the hearing:

> MS COLLINS: … The second relevant principle which us outlined at paragraph 8 is the financial position of the party against whom the order is sought. In this case I have taken limited instructions from the applicant in terms of his financial position on the basis that we didn't have a copy of the schedule of costs or the

> amount that the respondent employer was seeking security to be provided for up until this point. If your Honour would like, I can take further instructions from the applicant at this juncture.
>
> THE DEPUTY PRESIDENT: Would you like a brief adjournment to have some discussions?
>
> …
>
> MS COLLINS: Thank you. Having taken instructions I can advise the tribunal that the applicant is in a financial position to satisfy an order for costs, at least in terms of the interlocutory proceedings and the estimated costs following the interlocutory proceedings. If it was to proceed to hearing, that may be a different story. My submission would be that the applicant is not impecunious, and at this juncture a security for ---
>
> THE DEPUTY PRESIDENT: Are you saying you do not oppose a security of costs order?
>
> MS COLLINS: No. We do. We do oppose a security for costs order.
>
> THE DEPUTY PRESIDENT: All right. It's just that order, all right. I just want to be clear about that.
>
> MS COLLINS: Absolutely. However, it's not necessary at this stage as the applicant is in a position to satisfy an order for costs if that were to be made, although there is no guarantee. Having said that, however, an order for security for costs would be a great imposition on the applicant's finances and would be such significant deterrent that it's likely to stifle his claim …

39 It was the Appellant's evidence at the hearing of the appeal that he is indeed not in a position to satisfy the First Order without going to extreme lengths, such as selling his house.[16] However, regardless of whether it was correct to classify the Appellant as "not impecunious", simply because an applicant is able to satisfy a security for costs order does not mean that an order is justified, and certainly not in this jurisdiction.

40 We consider that in this instance, as would be the case with most instances, it was inappropriate for his Honour not to consider the merits of the Application in determining whether or not to grant the security for costs order. We consider this error to be the type contemplated in *House v The King*, namely an error where the decision maker failed to take into account some material consideration. The error is most clearly illustrated in his Honour's finding, at [11], that "The Respondent is entitled to … safeguard their right to seek to recover costs". In this jurisdiction, the Respondent does not have an entitlement to recover costs. Such an "entitlement" only arises if the Respondent is successful and is able to establish, on the merits of the case, that the proceedings were commenced vexatiously, without reasonable cause, or in circumstances where it should have been reasonably apparent that the application had no reasonable prospect of success.

41 Furthermore, and in the alternative, we consider that the result embodied in the First Order is plainly unjust, and accordingly infer that in some way there has been a failure by his Honour to properly exercise his discretion.

42 In light of the above, having granted the extension of time and permission to appeal the First Decision and the First Order, we uphold the appeal and quash the decision of his Honour.

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16 Transcript, PN56.

Conclusion

43 We grant permission to appeal, uphold the appeal and quash the order (PR538211) of Deputy President McCarthy.

44 Furthermore, we extend time to appeal decision ([2013] FWC 867) and order (PR533986), we grant permission to appeal, uphold the appeal and quash decision ([2013] FWC 867) and order (PR533986) of Deputy President McCarthy.

45 As the Respondent's representative indicated at the hearing of the appeal that the Respondent would not agitate the jurisdictional objections raised earlier against the Application,[17] the Application will be remitted to Commissioner Cloghan for the purpose of conducting a hearing pursuant to s 394 of the Act on the substantive application. If the Respondent wishes to pursue a security for costs order, they may file a fresh application to be determined by Commissioner Cloghan.

Orders

46 We determine and order as follows:

1. Extension of time to appeal decision ([2013] FWC 867) and order (PR533986) of Deputy President McCarthy is granted.
2. Permission to appeal decision ([2013] FWC 867), order (PR533986) and order (PR538211) of Deputy President McCarthy is granted.
3. The appeal is upheld.
4. The orders made by Deputy President McCarthy in matter U2012/12994 (PR533986 and PR538211) are quashed.
5. The matter is remitted to Commissioner Cloghan to conduct a hearing pursuant to s 394 of the Act in matter U2012/12994.

Permission to appeal granted; appeal upheld

STEPHANIE MENEAR

17 Transcript, PNS 346-347.