TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT SAUNDERS
COMMISSIONER RYAN

C2022/6669

s.604 - Appeal of decisions

Mr Brendan Darsie Clarke
and
Central Queensland Services Pty Ltd
(C2022/6669)

Sydney

11.00 AM, FRIDAY, 18 NOVEMBER 2022

PN1

THE ASSOCIATE: This Commission is now in session. C2022/6669, section 605 appeal by Brendan Darsie Clarke v Central Queensland Services Pty Ltd, for hearing.

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VICE PRESIDENT CATANZARITI: Yes, good morning. I have on the Bench this morning Saunders DP and Ryan C. This matter is listed for permission to appeal only. I'll take the appearances. Mr Clarke, you're appearing for yourself?

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MR B CLARKE: I am, with my wife, Debbie.

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VICE PRESIDENT CATANZARITI: Yes, she's present in the room, I understand that.

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MR CLARKE: Yes.

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VICE PRESIDENT CATANZARITI: And the respondent, Ms Larsen, who is a specialist in employee relations.

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MS E LARSEN: Yes, that's correct. Good morning.

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VICE PRESIDENT CATANZARITI: Thank you. As I said, this matter is for permission to appeal only. The Full Bench has had the opportunity to look at the written material and, Mr Clarke, we now invite you, if you wish to do so, to provide any supplementary oral material. You do not need to do so, but if you wish to say something in addition to what is already filed, then please go ahead.

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MR CLARKE: I have got a little bit here to read out but I'm not a very good reader so I'll start with it, but is it okay if my wife takes over if a get a bit haggard or stuck on words and that.

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VICE PRESIDENT CATANZARITI: If you want her to read it, she can read it.

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MR CLARKE: All right, I'll had it over. It will be much better understood coming from her than me.

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VICE PRESIDENT CATANZARITI: Go ahead, Ms Clarke.

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MS CLARKE: I'll just read it as if I'm Brendan.

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My name is Brendan Clarke, I'm 59 years old and left school in Grade 9 to work as a ringer for a few years, until I went into coal mining for the next 40 years, 25 with BHP and the last nine with Daunia.

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My work and safety history over this time has been without blemish. I had settled into the position that I expected to retire in. I have a mortgage and personal loan and typical household expenses and I was the sole income earner for my family until I was stood down, without pay, for 36 days, in February 2022, and terminated on 8 March by refusing an invasive medical procedure.

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Now, this was not required under a public health order, nor did BHP have any legislative obligations. It was not industry standard, in fact it goes against industry standard as BHP owns about 10 per cent of the coal mines in Queensland and we're the only company that mandated the jabs.

PN17

So to put it into perspective, if I had worked in a coal mine in any other number of the other 90 per cent of coal mines in Queensland I would not be here today. I would not have been sacked for choosing my own medical treatments. I would not have been stood down and I would not be wasting my time fighting for justice over the past 10 months.

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Note that this is a significant error of fact that the Commissioner failed to consider in his decision, despite my argument of its unreasonableness and its unfairness.

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Before an appeal will be granted I'm required to show that it is in the public interest. I have gathered a small percentage of relevant decisions that are referred to in the Fair Work Commission Practice Note, Appeal Proceedings, that supports that this appeal is in the public interest to be heard, including the High Court decision of *House v King* where it's stated that:

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> *If a judge acts upon a wrong principle if he allows extraneous or irrelevant matters to guide or affect him, if he misstates the facts, if he does not take into account some material consideration then his determination should be reviewed.*

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From my evidence this is clearly present in the current circumstances and articulated further in my submissions.

PN22

Case 2, the Fair Work of Australia appeal decision of *GlaxoSmithKline v Makin,* in which the Full Bench of the tribunal indicated some key considerations, at paragraph 27, that may attract public interest, including:

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If a decision, at first instance, manifests an injustice -

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Which is clearly present in the current circumstances and articulated in my submissions:

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if the matters raises issues of importance and general application this decision that raises issues of utmost importance, including determination that there is a presence of Commissioner bias, overwhelming public pressure to adhere to predetermined decisions, errors of law and fact and a failure to meet the required evidentiary burdens.

PN26

Case 3, the Fair Work of Australia appeal decision, Aperio Group(?) in which the Full Bench of the tribunal stated that:

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The preservation of public confidence in the administration of justice is a matter of public interest and tends to be undermined by decisions that are manifestly unjust.

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This is a decision (indistinct) our submissions offers submissions of extreme bias, errors of law and fact and a failure to adhere to the required evidentiary burdens and finalises with the Commission, providing an inadequate decision, favouring a legally represented billion dollar company over a self-represented person.

PN29

The cumulative effect of this process offers the possibility to severely erode the public's confidence in the Commission and it's ability to administer fair, impartial justice that is sufficiently separated from the legislative and executive arms. It's an overview of the public interest.

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It is expected, and the general public are entitled to expect decisions to be decided consistent with all relevant governing laws being considered and not merely by handpicking favourable cases or sections of cases to help justify a predetermined decision. All decisions must be based on a prima facie facts of the case as they stand and which guide the decision in the first place. It is essential that the facts considered as relevant, accurate, legal and correct and that the law and reasonableness is applied with fairness and impartiality, irrespective of the personal or political agenda of the hearing Commissioner.

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Additionally, it is a critical expectation from the general public, particularly at this moment in time, that separation of powers between the judicial systems, at all levels, remains strong, individual, impartial and lawful and it is not unduly influenced by the agendas of the government of the day or, indeed, the agenda of major globalist corporations.

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Therefore, it is in the public interest for the Commission to grant an appeal as this application raises wider issues of importance, substantive and multiple issues involving significant errors of fact, major errors of law and breaches of the most fundamental requirements for fairness, justness and impartiality expected of a residing Commissioner.

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Failure to intervene by an appellant court in such situations and to allow a single Commissioner to stand, unscrutinised by other decision makers, undermines the established principles of law and fairness and fails to ensure the preservation of public confidence and justice.

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Alongside the need for public interest is the requirement for the decision to have been made due to a significant error of fact and/or error of law. This decision by Simpson C is almost, in its entirety, inaccurate, immaterial, irrelevant. It's wrong in law, in fact, in fairness and justice. It is wrong in reasonableness and it lacks procedural fairness.

PN35

This document is his decision and it has over 100 clauses in it. I would estimate that 80 per cent of them are misunderstood, irrelevant, incorrect or immaterial. Because of the time limit I can't go into too many of them, but I will briefly touch on a couple of them. They have all been covered in written submissions already.

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VICE PRESIDENT CATANZARITI: (Indistinct) but if your drawing attention that's not already in the written submissions. If it's already there you don't have to repeat it.

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MS CLARKE: Okay. Well, I still with briefly touch on clause 4, he has completely misunderstood and misinterpreted what Brendan's case was even about. He says that it's about:

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> *The respondent failed to undertake a consultation process when implementing a vaccination requirement and directions for employees to be fully vaccinated.*

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That's not even mentioned in Brendan's submissions. So it's so fundamentally inaccurate that it shouldn't even have gone any further because nothing has been addressed in what Brendan's submissions actually were.

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What it says in his Form 2, and which was never mentioned in the decision, 'A vaccination requirement', he never said that. What he said was that, 'The employer failed', in clause 1 and 2 of his submission:

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The employer failed to adequately assess and provide genuine consultation at each change of adverse events taken by the employer against him, with two such major changes being stood down without pay for 36 days and terminated.

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Yet, none of that has even been brought up in the decision at all.

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This is critical because I mean there was 40 other reasons why Brendan felt he was unfairly dismissed and none of them have been addressed. What's been addressed has been something that has just been put forward as a defence by BHP, which was never even part of our argument and the Commissioner has run with that, instead of addressing anything else.

PN44

The indication by the Commissioner, also by the response from BHP, is that consultation was satisfied, valid risk assessments were provided, which is absolutely untrue, by the general manager's own testimony. She stated she didn't need to require - she wasn't required to do a valid risk assessment so she didn't have to abide by the Coal Mine Safety and Health Act, major error of law. She failed to provide any evidence, the Commissioner failed to require any evidence about the mines inspectors that gave her carte blanch to dismiss - - -

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MR CLARKE: (Indistinct)

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MS CLARKE: Neither she, nor the Commissioner, nor mines inspectors have the right not to abide by the Coal Mine Safety Act, in Queensland, when you're the general manager of a coal mine. It is the holy grail of how a coal mine operates and yet - - -

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MR CLARKE: (Indistinct) weight on that.

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MS CLARKE: Yes, and yet no valid risk assessment happened. Then he uses the Mt Arthur case to justify his decision and that consultation had occurred and it clearly states, in the Mt Arthur case, that:

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For consultation to have occurred you have to have received the valid - the employees had to have received a valid risk assessment prior to the implementation of the mandate.

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Which clearly couldn't have been done if there was no risk assessment.

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The Commissioner has placed huge weight on just hearsay by the general manager. I don't know if you want to call it lying, but she changed her testimony, under oath, multiple times. Multiple times the evidence presented in her written testimony, that was sworn as being true and correct, she changed her mind when she got to cross-examination, being that the consultation dates that the Commissioner has relied on, being 24 and 29 December, and which there are minutes within the sworn testimony, written testimony, that says these were the consultation meetings that satisfied the need for consultation and yet, under cross-examination, the witness herself said, 'No, there's no way they were - either of them were -' (indistinct) dragged to the transcript, and yet weight's been placed on it. She said that there was a vaccination clinic on site to use, that you could walk to during your break, to make it easier. When she was questioned on that she changed her mind and said no, it was off lease.

PN52

It's very difficult to cross-examine someone who changes their evidence constantly. When I would ask a question the Commissioner would often step in to stop the witness from answering.

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There's an example in there where I asked a question, he said to me, 'What's the relevance of that?', I answered it to him and then he said, 'You can't ask that because you're making submissions'. I wasn't making submissions to the witness, I answered his question, it was a simple question. That's all in the transcript.

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So far as that goes, (indistinct) there was significant errors of fact in this, failure to reference the arguments. Now, this case was about Brendan, it was about him being stood down for 36 days, unlawfully, without pay, it was about him being terminated unfairly. Yet, in the five to six to 700 pages of submission documents that the general manager provided, Brendan isn't mentioned once. In her 100 clauses Brendan's mentioned four times. Two to say she doesn't know him, one to say, 'Well, he could have found out what was going on, on site, whether he was there or not', so this case is about Brendan being - and yet, the main witness, all her evidence doesn't even mention him.

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The JSA, the Commissioner said she considered it. Well, there is no evidence she considered it. It wasn't in her written evidence, so she didn't mention it till we brought it up. She had no written notes about considering it. She hadn't responded to the people who had sent it in. She didn't bring it up at any meetings and the critical thing the Commissioner has missed here is that this is a breach of law.

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When 10 per cent, cross-section, of your workforce take you a job safety analysis sheet, with over 800 years combined mining experience, you don't just - the general manager does not just get to consider it, it is a requirement, it is a law, it is standard practice. It must be acted on and that policy that she wants to bring in cannot be brought in until that risk has been reduced to a level that minimises the risk. Minimises the risk to an acceptable level.

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MR CLARKE: If it can't be reduced to an acceptable level then it can't be introduced. The so-called partial risk assessment that she said she'd done was done at a global level, nothing at a site level at all.

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MS CLARKE: Another one of the issues where the Commissioner has failed to - - -

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VICE PRESIDENT CATANZARITI: (Indistinct) underlying merits of the argument, you're entitled to do that in a brief way, but we are dealing with permission to appeal today.

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MS CLARKE: Yes, yes, but my understanding is it's to show where the Commissioner has - - -

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VICE PRESIDENT CATANZARITI: (Indistinct) those facts are so significant they would change the outcome, but is there anything more you need to say that's not already in the written material?

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MS CLARKE: Well, I don't know. Based on the fact that our written material presented to Simpson C, who refused to allow us to do anymore than cross-examine during the hearing, was never mentioned during any of his decisions. It just happens to make us a bit sceptical about things being considered that we're not saying.

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Anyway, yes, I guess if that's all you feel that you need, so we relied on - - -

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VICE PRESIDENT CATANZARITI: I've read the entire appeal book, which includes the transcript, the evidence and the submissions of the parties, so that's what the Bench considers.

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MS CLARKE: Okay. Yes, so the Daunia Enterprise Agreement wasn't even considered or mentioned, despite it being a Fair Work Commission overview. They signed off on it - - -

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MR CLARKE: They signed off on it.

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MS CLARKE: Yet he hasn't looked at any of the considerations in it. There's multiple, multiple breaches in there, no - - -

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MR CLARKE: Never consented Fair Work Ombudsman (indistinct).

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MS CLARKE: Yes, not at all, despite them - - -

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MR CLARKE: They were pretty out there and seemed to deal with this sort of stuff and he never considered any of that.

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MS CLARKE: Even when we ring the Fair Work Commission, their message, when you first ring, says, 'If this is about COVID workplace, go to the Fair Work Ombudsman', yet the Commissioner never even considered it, despite us providing evidence that Brendan sat at tier 4, that even with a public health order you were not able to stand somebody down for refusing the vaccination.

PN72

I mean, as you say, you've got most of this. There is so much more which is in the written submissions, the bias of the Commissioner, as I said, stopping questions for no reason, answering for the witness. Placing all this weight on what the witness said, without any evidence, and placing no weight at all on evidence showing that what she was saying was incorrect. Still to this day, there has not been one consultation meeting, actual consultation meeting minutes be provided. There has not been one valid risk assessment being provided.

PN73

The bottom line to this, I guess, to some extent, is we are arguing what BHP and the Commissioner allowed us to argue, which was about a matter that we barely even called in. There's still nothing about why - and Jason Gardner(?), Brendan's supervisor, very clearly says that Brendan was rung up, said, 'I've got a letter to read. This is not open for discussion, you're terminated effective immediately. You're stood down without pay, effective immediately'. That covers no - no employee rights, in any federal, state legislation about fairness, procedural fairness, natural justice, not - you know, no - another thing is the thing, Brendan's termination letter say that he was terminated due to a decision made on - in October '21, and yet the general manager says that she made the decision in January.

PN74

Now, the Commissioner erred by not - not establishing when the decision was made. Brendan couldn't possibly have been terminated under a decision by a decision maker that never existed, yet that's what his letters say. You know, the Commissioner erred in that. He should have established who the decision maker was, when it was made, what the decision was.

PN75

The Commissioner also erred in referring to the BHP case, with the CFMMEU. It related exclusively to the Privacy Act and to bodily integrity. We never argued that, for the very reason that that existed and we'd seen other's, don't bother. We don't believe they're valid, and the new case, Sydney Trains, Cross DP has come out and said, 'It affects bodily integrity and it is not just and it is disproportionate to terminate somebody for refusing that and that it was basically coercion'. So that's it.

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So if you have all the other information and you don't want me to repeat it anymore, we can leave it at that.

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VICE PRESIDENT CATANZARITI: Thank you.

PN78

Ms Larsen, we've obviously got the submissions of the respondent on permission, amongst other things, is there anything you want to say, in terms of reply?

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MS LARSEN: Yes, sure.

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Firstly, this is not something I normally do, so please forgive me if I forgo any sort of formalities with this. Yes, we largely rely on our written submissions that we've provided but perhaps I do just want to reiterate one key point, that being that Mr Clarke's appeal is, we believe, because he dislikes the decision, not because it involves any appealable error and he hasn't been able to articulate that, nor has he been able to articulate why it is in the public interest to grant leave.

PN81

For the most part, we do rely on our submissions. I'm inclined to reiterate just a few things, just for Mr Clarke's clarification I suppose, but I'm also cautious that I don't want to be wasting the Commission's time in doing so.

PN82

Just in regards to the risk assessment, this was discussed during the hearing, it is a risk assessment not for the Coal Mining Health and Safety Act, it was a risk assessment for the business, reflecting the Queensland public health guidelines.

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VICE PRESIDENT CATANZARITI: Sorry, can you just repeat that, I've had a communication problem.

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MS LARSEN: Sorry, sure. Can you hear me okay now?

PN85

VICE PRESIDENT CATANZARITI: I can hear you now, yes.

PN86

MS LARSEN: Beautiful, yes.

PN87

So it's a risk assessment for - it wasn't a risk assessment for the Coal Mining Health and Safety Act, it was a risk assessment for a business decision, referencing Queensland public health guidelines.

PN88

In relation to the confusion with the dates, so 7 October was when the site access requirement was introduced, and that was publicised by Edgar Bastow(?), who is our president for Minerals Australia, however it was for Ms Smith, the general manager of Daunia, to then implement that decision. She chose to implement that decision on 9 January.

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Other than that, I think we rely, largely, on our written submissions and I don't think there's anything really further that we need to add.

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VICE PRESIDENT CATANZARITI: All right, thank you.

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Is there anything further that needs to be said, Ms Clarke, or Mr Clarke?

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MS CLARKE: Just that they - this is the point that we've made about the general manager BHP, Daunia Mine, whoever they want, deciding that they can bypass the Queensland Coal Safety and Health Act, when introducing a health and safety policy onto a mine site in Queensland. That is ludicrous.

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VICE PRESIDENT CATANZARITI: All right, thank you.

PN94

The decision is reserved, the Commission is adjourned. Thank you for your attendance today.

ADJOURNED INDEFINITELY **[11.31 AM]**