



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**DEPUTY PRESIDENT MASSON
DEPUTY PRESIDENT O'NEILL
COMMISSIONER BISSETT**

C2023/2257

s.604 - Appeal of decisions

**Appeal by Finch
(C2023/2257)**

Melbourne

10.20 AM, FRIDAY, 9 JUNE 2023

PN1

DEPUTY PRESIDENT MASSON: I will start by taking appearances, please. Firstly, for the appellant.

PN2

MR H ROBERTS: Deputy Presidents Masson and O'Neill, and Commissioner Bissett, if it pleases I appear on behalf of the appellant. I offer my sincere apologies for my embarrassing ineptitude in not realising I was required to be present at the hearing today. I do apologise and if any adverse consequences should arise as a result of that, I accept responsibility.

PN3

DEPUTY PRESIDENT MASSON: Well, it's regrettable that you failed to read the notice of listing, Mr Roberts, but there will be no adverse consequences in relation to the conduct of the appeal, so of that you can be assured. Now, Mr Roberts, I take it you have no objection to the respondent being legally represented.

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MR ROBERTS: No, no, none whatsoever, Deputy President.

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DEPUTY PRESIDENT MASSON: Thank you.

PN6

MR M RITCHIE: If it please the Commission, Ritchie, initial M, on behalf of the respondent and seeking leave to appear. I'm happy to address the Commission should you so please.

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DEPUTY PRESIDENT MASSON: Do you have any objection to permission to appear being granted for the applicant?

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MR RITCHIE: No, Deputy President.

PN9

DEPUTY PRESIDENT MASSON: All right. We have read the submissions that have been filed in relation to permission to appear. Given that appeals of this nature have a degree of complexity and given that both parties are legally represented today, we believe it would be appropriate to grant permission to appear pursuant to section 596(2)(a) to both parties. Thank you.

PN10

MR RITCHIE: Thank you, Deputy President. I have with me here today under that same – seeking leave is my instructor from the same office, Mr Cavanagh. He is currently in Adelaide, so he is dialling in via Teams.

PN11

DEPUTY PRESIDENT MASSON: Yes.

PN12

MR RITCHIE: Mr Cavanagh is communicating with me through my mobile phone, which is on silent but I may be checking that as contributions - - -

PN13

DEPUTY PRESIDENT MASSON: That's fine.

PN14

MR RITCHIE: I just wanted to alert that for the Commission in case you thought I was on my phone.

PN15

DEPUTY PRESIDENT MASSON: Yes. No, just for your information myself and Deputy President O'Neill have laptops here and documents, and at times if we are not focused - - -

PN16

MR RITCHIE: Certainly.

PN17

DEPUTY PRESIDENT MASSON: - - - on the advocates, it might be because we're reviewing our notes or looking at material. Thank you. All right. Mr Roberts, we have received your submissions in relation to the appeal; permission to appeal and merits of the appeal. We will now afford you an opportunity to, if you wish, supplement those submissions or highlight any particular aspects of the submissions. It is not necessary to read those submissions verbatim.

PN18

MR ROBERTS: No.

PN19

DEPUTY PRESIDENT MASSON: The members of the Bench have already read those submissions. The members of the Bench might have questions for you, as well, but you are now free to supplement those if you wish.

PN20

MR ROBERTS: Thank you, Deputy President. Just at the outset I wish to confirm that in fact the appellant, Ms Finch, has determined not to participate in the proceedings in case you're concerned about the lack of her participation in the hearing. I did endeavour to address her concerns with regard to her anxiety (indistinct) but ultimately she determined that she was unable to participate and for that reason I (audio malfunction).

PN21

DEPUTY PRESIDENT MASSON: No, that's understood, Mr Roberts. This is an appeal of a decision issued by Johns C, so we're just addressing whether there was error in that decision. Ms Finch is not required to attend and make submissions or give evidence, so that's fine. Thank you.

PN22

MR ROBERTS: Thank you, Deputy President. So with regard to – obviously the critical issue with regard to whether leave to appeal should be granted and in reference to my written submissions, in effect (audio malfunction) there was a denial of procedure fairness when Johns C (indistinct) some submissions to be made or considerations to be taken into account. I have elaborated on those in this regard in the written submissions. I don't think I need to address that any further other than just to make (audio malfunction).

PN23

Johns C, in the discussion about the matter, made reference to not being able to take into account matters for which there was no evidence. Now, it's certainly the case in this matter that there is a paucity of evidence to assist the Commission in determination and it's conceded that that is a significant impediment to the appellant's case. Much of that relates to how particular conditions (indistinct) addressed from a medical point (indistinct) with (indistinct) in my experience where there is a situation where some background information might be provided, such as in this case, the contact I had with the appellant's case and further to that which - - -

PN24

DEPUTY PRESIDENT MASSON: But, Mr Roberts, my reading of the transcript and the Commissioner's decision is that that background information which you sought to put was not in evidence, after the opportunity was afforded to the appellant and obviously also to yourself when the directions were issued to put on evidence that was relevant to the extension of time application. I understand that the Commissioner declined to hear evidence from the bar table going to matters that could and should have perhaps been put on as evidence.

PN25

MR ROBERTS: Indeed, Deputy President, and that is conceded. However, at the time the directions were given it not apparent to me that such matters that are often raised in hearings and taken into this background material – I was not aware that they were such matters that we were expected to adduce evidence. Indeed, the difficulty with that in terms of addressing such matters was that either it required an affidavit from the appellant - - -

PN26

DEPUTY PRESIDENT MASSON: That's the normal course of action.

PN27

MR ROBERTS: Yes, and in that case I apologise for not having turned my mind to that, but I also had not necessarily anticipated the questions that – or the matters raised by the Commissioner that could have been the subject of affidavit material. In particular we would have raised some of the matters that he raised that I would have - - -

PN28

DEPUTY PRESIDENT MASSON: Well, that might disclose a lack of familiarity with the Commission process, Mr Roberts, and I'm not being critical, but I note from the transcript that the Commissioner also was at pains to establish from the day of the hearing – notwithstanding the appellant had not filed a witness

statement, was at pains to confirm whether the appellant would appear and give evidence on the day of the hearing and you advised the Commissioner that she would not.

PN29

So I'm just curious as to how there was a denial of procedural fairness in circumstances where directions were issued which set out the requirements for the filing of material and at the hearing the Commissioner also sought to confirm whether the appellant would give evidence. I'm just trying to understand where is the error from a procedural fairness perspective when opportunities have been afforded to the appellant to put evidence on.

PN30

MR ROBERTS: Well, yes, and I thank you, Deputy President, for the observation if that reflects on my part a lack of familiarity with the procedures in the Fair Work Commission, but that is no excuse. I hadn't specifically anticipated the questions or matters raised by Johns C such that I would have had – in a manner that I would have foreshadowed and determined by way of witness statement.

PN31

It was precisely because of a consciousness of the difficulty of the appellant articulating on her own behalf, which is why I encouraged her to include as much detail as possible in the application itself. I had not anticipated those matters being raised by Johns C with regard to the background, with regard to - - -

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DEPUTY PRESIDENT MASSON: Mr Roberts, that might explain why evidence wasn't put on in advance of the hearing - - -

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MR ROBERTS: Yes.

PN34

DEPUTY PRESIDENT MASSON: - - - and that might explain why the appellant wasn't called to give evidence at the day of the hearing, but in those circumstances regardless of the background how can there be error on the part of the Commissioner if there was no evidence before him other than a medical certificate dated 8 August 2022 and a photograph of a prescription I think dated 25 October? That was the evidence that was before him, along with the content of the F8. That was the evidence.

PN35

MR ROBERTS: Indeed, Deputy President, and in fact this perhaps brings into focus one of the central issues. My assessment all along that was likely to be a significant impediment to the application of the appellant was specifically with regard to material provided with respect to her medical condition. As pointed out in the findings or the determination by Johns C, as referred to in my submissions, Johns C indicated that after the time that the medical certificate was provided, it was potential that the circumstances up until then amounted to exceptional circumstances, but not beyond that time.

PN36

The problem from an evidentiary point of view is in terms of establishing a persuasive or definitive link between the conduct of a person who is affected by mental health issues such as is relevant in this case and the capacity to complete a task, and in this case more specific tasks such as making such an application. Mental health issues are dealt with a lot in state courts where I practise and I'm well aware of - - -

PN37

DEPUTY PRESIDENT MASSON: Mr Roberts, the Bench is well aware of the background of mental health issues in the community. If I can bring you back to the point, the only evidence was the certificate dated 8 August. It doesn't speak to the mental health or the condition or the capacity of the appellant to file material between 8 August and 25 January.

PN38

MR ROBERTS: Yes.

PN39

DEPUTY PRESIDENT MASSON: That is the issue that the Commissioner highlighted. He did not have any evidence before him for that 150 days. Now, you might say that's illogical because it assumes that the appellant's mental health immediately improved after 8 August and that might be said to be unrealistic, but the Commissioner can't assume, surely, the state of her mental health for 150 days on which there is no evidence.

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MR ROBERTS: Indeed, Deputy President. I am conscious of that and recognise that very factor itself.

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DEPUTY PRESIDENT MASSON: Yes.

PN42

MR ROBERTS: It could be a factor that is (indistinct) to the appellant. All I can say in response to that is that with regard to such conditions, they can't be – or the symptoms are not - - -

PN43

DEPUTY PRESIDENT MASSON: You're falling into the trap again of opining about mental health issues. That's not what we're dealing with. We're dealing with whether there is error in the Commissioner's decision based on the material that was before him, not what your subjective opinion may be about the state of the appellant's mental health.

PN44

MR ROBERTS: Well, I agree, Deputy President, and (indistinct) the nature of diagnosis and assessment (indistinct) is very precise and even if a report had been obtained, all that would have done – all that such a report would have done is (indistinct) what is said by, in this case Ms Finch - what she describes with regard to her symptoms, but no report (indistinct) would make it because if - - -

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DEPUTY PRESIDENT MASSON: That may be accepted, Mr Roberts, but it would be more compelling than a complete lack of evidence.

PN46

MR ROBERTS: Indeed, Deputy President. In response all I can say with regard to (indistinct) that conditions such as anxiety and depression are generally of an ongoing nature and that can particularly impact upon that person. It's conceded, yes, in the absence of an updated medical report that the Commission is in a difficult position where there is an absence of evidence with regard to that particular period.

PN47

I have formed a view that because of the background material that is included in that application, including from before her dismissal and subsequent, that it was indeed of an ongoing condition, so it's necessary – would require inferences to be drawn about that subsequent period. I don't believe any medical evidence would have assisted, but given the difficult position of the Commission with regard to – as Deputy President Masson has identified – that subsequent period after the diagnosis and it is conceded the absence of material, it's very difficult for the Commission to make or to draw inferences that might be considered to be of an evidentiary nature with regard to the ongoing condition of Ms Finch.

PN48

DEPUTY PRESIDENT MASSON: You may be aware of one of the authorities that has been filed by the respondent and I'm sure the respondent will draw attention to it. It's a Full Bench authority dealing with a case – the citation escapes me, but the circumstances where a member of the Commission drew conclusions in the absence of compelling medical evidence and he was overturned because he did so.

PN49

MR ROBERTS: Yes.

PN50

MR RITCHIE: Zhang.

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DEPUTY PRESIDENT MASSON: Yes, Zhang. Thank you.

PN52

MR ROBERTS: Deputy President, the name of that case - - -

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DEPUTY PRESIDENT MASSON: It's in the list of authorities filed by the respondent. Shorthand, it's Zhang.

PN54

MR ROBERTS: Thank you. Yes, I've read most of the authorities referred to by the learned representative for the respondent and it's conceded there are persuasive submissions that have been prepared and are quite detailed. I did just

have a few points to make about those, but in light of the points you have raised, Deputy President, that may not (indistinct) those matters.

PN55

DEPUTY PRESIDENT MASSON: I'm just highlighting you're inviting the Bench to overturn a decision which was made on the basis of an absence of medical evidence, whereas a past Full Bench has overturned a decision of a member to grant an extension of time in the absence of compelling evidence.

PN56

MR ROBERTS: Deputy President, yes, that's conceded. All I can say furthermore is that once a diagnosis is made of conditions that are known to be ongoing and, in effect, if Ms Finch had gone to see her GP again, that GP would be at best confirming the diagnosis - - -

PN57

DEPUTY PRESIDENT MASSON: But a diagnosis – I'm sorry, Mr Roberts, I might be seeming a little bit combative here, but a diagnosis doesn't speak to capacity.

PN58

MR ROBERTS: Yes.

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DEPUTY PRESIDENT MASSON: There is no evidence as to capacity after 8 August to 25 January. The whole purpose of being treated is to assist a patient deal with their diagnosis and perhaps address the health issues such that they have a capacity to undertake daily tasks. There's no evidence, and there was no evidence before the Commissioner, going to capacity.

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MR ROBERTS: Yes, indeed, Deputy President, but in my submission it's unlikely (indistinct) that across - - -

PN61

DEPUTY PRESIDENT MASSON: All right. I understand the submission. You are inviting the Full Bench to draw an inference - based on the background circumstances as set out in the F2 and the diagnosis as of 8 August, we should draw an inference that from 8 August to 25 January the appellant was incapable of filing her application at an earlier date. Is that the submission? We are frozen. Sorry, you froze there for a minute, Mr Roberts. Did you hear what I had to say? I was trying to summarise the submission.

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MR ROBERTS: Not all of it, Deputy President.

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DEPUTY PRESIDENT MASSON: All right. I will repeat it and then perhaps we can - - -

PN64

MR ROBERTS: Yes, perhaps if - - -

PN65

DEPUTY PRESIDENT MASSON: I'll repeat it and then perhaps we can move on. What I was saying is you're inviting the Full Bench to draw an inference based on the background circumstances and the diagnosis as identified in the 8 August 2022 medical certificate that the appellant's medical condition was such that she was incapable of filing her application prior to 25 January '23. Is that the submission, in essence?

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MR ROBERTS: Yes.

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DEPUTY PRESIDENT MASSON: Okay.

PN68

MR ROBERTS: Yes, Deputy President, and it is conceded that the requirement of the Commission (indistinct) is a very difficult one to make, certainly from the evidentiary point of view, but it's submitted that it's a difficult exercise in any event because of the impreciseness of any expert report by a mental health practitioner with regard to drawing a link between mental health issues and capacity (indistinct) having said that, that support is necessarily problematic.

PN69

The inference has been drawn, but in the submissions I drew attention to the chronology that was prepared by the Commission which in my view – particularly when one takes into account the factor of the first application being made (indistinct) the Commission does have a chronology that might assist in considering whether such an inference can be drawn, but, yes, ultimately it's conceded that the lack of evidence that might assist – that it's a problematic exercise, but in my submission that is a problematic exercise with regard to anyone with mental health issues such as anxiety and depression. For example, with regard to anxiety - - -

PN70

DEPUTY PRESIDENT MASSON: Mr Roberts, I don't want to hear your opinions on anxiety and depression. I want to hear about where there is error in the Commissioner's decision.

PN71

MR ROBERTS: Yes, to that effect – yes, I accept that, Deputy President, so I can't really say any more other than to point to the submissions made about the public awareness about such issues. Perhaps the Commission might consider whether or not it's appropriate to take a more broad view of such issues, but I concede that from the perspective of this application and the task of the Commission that that's a very difficult exercise to undertake from the perspective of a determination.

PN72

It is conceded that if that is a consideration - a significant (indistinct) the appellant, there's nothing further to submit. I was (indistinct) with regard to such public concern. Yes, in light of the observations made by yourself, Deputy President, I don't think there is anything further I can add.

PN73

DEPUTY PRESIDENT MASSON: All right. So just to be clear on the grounds of appeal, Mr Roberts, I understand you to be aggrieved at the Commissioner's failure to allow you to provide additional information at the hearing. We understand that submission. The Bench also understands the second ground of appeal to be that the member failed to have regard to the medical condition of the appellant and should have had and accorded greater weight to the medical condition of the appellant in reaching a conclusion about whether exceptional circumstances were present. Is that a fair summation?

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MR ROBERTS: Yes.

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DEPUTY PRESIDENT MASSON: Thank you.

PN76

MR ROBERTS: That's a fair summation. I don't know that I can add anything more.

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DEPUTY PRESIDENT MASSON: All right.

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MR ROBERTS: But we will just be repeating what I said before.

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DEPUTY PRESIDENT MASSON: All right.

PN80

MR ROBERTS: I think the Deputy President has understood my submissions and
- - -

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DEPUTY PRESIDENT MASSON: Thank you.

PN82

MR ROBERTS: - - - the appropriate considerations. I don't think I can - - -

PN83

DEPUTY PRESIDENT MASSON: Thank you, Mr Roberts. The respondent?

PN84

MR RITCHIE: Thank you, Deputy President. I will be brief. This matter has already taken up quite a bit of the Commission's time already. I think you have summed up exactly what seems to be the sole ground of appeal. It was asking Johns C in the decision at first instance to join dots and to make inferences, to

surmise as to what the ongoing condition of the applicant may have been, in the absence of any evidence which was tendered to provide the Commissioner with the details of exactly what that condition was.

PN85

Before the matter made its way to hearing at first instance there was a number of delays to this matter. The Commissioner provided Mr Roberts, as the legal representative of the appellant, extra time to present the matter.

PN86

DEPUTY PRESIDENT MASSON: There was one delay at the request of the respondent, as well, because - - -

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MR RITCHIE: There may have been one.

PN88

DEPUTY PRESIDENT MASSON: Yes.

PN89

MR RITCHIE: I certainly have a list of - - -

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DEPUTY PRESIDENT MASSON: Yes, there was a request from the respondent for the adjournment of one proceeding, but be that as it may.

PN91

MR RITCHIE: Yes, and why I put that is it was not like the Commissioner was rushing the parties when they weren't ready for the matter. He bent over backwards, to use that expression, to provide extra time for the appellant to get all the material and all the evidence that the appellant felt she needed for the matter.

PN92

Now, the tactical decisions were made throughout the presenting of this matter not to obtain extra medical information and there is a reference in the transcript there as to, well, it's expensive to do that, to get a report from a medical doctor, so that was a tactical decision not taken. The second tactical decision was not to call the appellant on the day. As you pointed out, Deputy President, the Commissioner was quite clearly saying, 'Well, you've got one witness and the expectation is that - - -'

PN93

DEPUTY PRESIDENT MASSON: That might speak to the appellant's fragile mental state.

PN94

MR RITCHIE: Absolutely. As is common in those situations, as you all well know, you would choose then to let the witness statement do the majority of the work there and you would prepare that, and have those annexures of that medical information or something - as *Zhang v Australia Post* requires - for the entirety of

the duration of the delay. So these tactical decisions were taken to present the case in the manner in which it was - - -

PN95

DEPUTY PRESIDENT MASSON: But it's rare for a recently dismissed person to have the financial resources to equip themselves with a battery of medical reports.

PN96

MR RITCHIE: I am certainly, on behalf of the respondent, aren't suggesting a battery is required, but it is likely in such a situation that you have a relationship with the treating practitioner - and, again, the authorities don't provide any high bar of the type of evidence. It can simply be something from a GP which says, 'Look, I've treated this person from date X to date Y and in my medical opinion A, B, C, D and E.' Rather than the submission from Mr Roberts from the bar table saying, 'Look, I know the appellant. We've got a lot of text messages - - -'

PN97

DEPUTY PRESIDENT MASSON: I have dealt with that, as did Johns C.

PN98

MR RITCHIE: Certainly.

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DEPUTY PRESIDENT MASSON: I think it's fairly clear and I've made it pretty clear to Mr Roberts that there was no medical evidence after 8 August, so I'm not sure that point needs to be laboured for the benefit of the Bench.

PN100

MR RITCHIE: If the Commission pleases. What we then see is what was the Commissioner to do? So Mr Roberts's proposition as to Johns C's decision contains appellable errors because he did not join those dots, he did not make those inferences, he did not fill in the blanks of these periods for which there was no evidence, as the Deputy President has correctly pointed out, *Australian Postal Corporation v Zhang* – it's a relatively recent Full Bench decision - it's exactly on point and it gives guidance to the Commissioners in the first instance as – or the members as to exactly how these matters should be treated.

PN101

You can't make those inferences. I think it was an American medical journal, a DSM. You can't just go off piste and find your own information, and make those inferences. Just stick to the evidence which is before you.

PN102

DEPUTY PRESIDENT MASSON: That was P-I-S-T-E, was it?

PN103

MR RITCHIE: It was P-I-S-T-E. Being winter in Melbourne I thought a skiing expression might be suitable. Let's see how the transcript – lucky you caught that, Deputy President, or the transcript - - -

PN104

DEPUTY PRESIDENT MASSON: That was for the transcript.

PN105

MR RITCHIE: So we see the guidance that is given to the members at first instance is to stick to the evidence and test that evidence, and that's all you can and should go off. That's exactly what the Commissioner did. As he quite rightly pointed out, 'I don't have a lot of evidence that I can test here from the appellant as to what was put before the hearing after those delays and all of that preparation time.'

PN106

As our submissions outline – and I certainly won't repeat them here – is there any appealable error when we look to how the Commissioner handled that evidence and conducted that hearing at first instance? Our submission is there are not. He did exactly what was appropriate for a Commission member not taking submissions from the bar table, not allowing texts between a lawyer and a client just to be read out without any notice of the respondent, without anything being tendered into evidence. The way in which the matter was dealt with was absolutely appropriate from the Commissioner.

PN107

There is no appealable error which we can identify and which the Commissioner would have expected to have handled the evidence before him in a different way. That decision should be supported as not containing any errors and certainly we would contend there's nothing specific that the appellant's legal representative has been able to point the Bench to today which shows that that appealable error exists.

PN108

There is no case law relied on by the appellant in its appeal as to any supporting authority which says this is how the Commissioner was expected to exercise those discretionary decisions and run that decision at first instance. There are detailed reasons provided, extempore, at the end of the transcript which are then confirmed via a decision. As per our submissions, as to the appealable error we say it does not exist and there is not a sufficient ground of appeal there.

PN109

Then when we turn to whether permission to appeal should be granted, it appears my learned friend seems to make the inference that, well, there is a lot of public or community interest in mental health and, therefore, this appeal is in the public interest. Our submission is that the tests – the very well settled tests - around whether a matter contains public interest are not met and we outline those in our submissions. There is nothing outside of the discrete circumstances of this case that has any industry or wider interest or application.

PN110

There are good and settled tests we would say again with *Australian Postal Corporation v Zhang*, a Full Bench decision, which outlines exactly what is required for an applicant seeking to make out the exceptional circumstances test alleging mental health reasons for the delay. Unless I can assist the Full Bench

any further, in conclusion there is no appealable error which has been zeroed in on, sufficiently identified by the appellant. There is nothing in the way in which the Commissioner handled that decision at first instance which should attract any criticism or be considered in error.

PN111

He did a proper and procedurally fair job overall and, secondly, it is not in the public interest for the appellant to be granted leave to appeal the original decision, if the Commission pleases.

PN112

DEPUTY PRESIDENT MASSON: Thank you. Mr Roberts, would you like to say anything in reply?

PN113

MR ROBERTS: Deputy President, yes. I didn't hear, unfortunately much of (indistinct) cut out or it dropped in and dropped out. I think insofar as the submissions are concerned - - -

PN114

DEPUTY PRESIDENT MASSON: Sorry, just before you go on, I'm a bit concerned that you may not have heard the submissions of the respondent but what I can say is those submissions were essentially consistent with the material that was filed by the respondent's representative, so there was nothing new put in their oral submissions.

PN115

MR ROBERTS: Yes. Thank you, Deputy President. That is the impression I got with the parts I was able to listen to. It appeared that the submissions were essentially referencing back to the submissions. One point I would make in response is that with regard to the issue of time, in my submission it's problematic if the passage of time from after the expiry of the 21 days is assessed in a matter where effectively the whole period needs to be accounted for. In my submission, that's a very difficult exercise for someone with mental health issues.

PN116

Nevertheless, it's difficult in respect of what the Commission (indistinct) it appears that certain cases of the authorities - that as the effluxion of time continues there is an issue arising as to the need to explain that whole period of time, understanding the factual circumstances. It's problematic in this matter in terms of being able to provide conclusive and quite persuasive evidence of a person being - - -

PN117

DEPUTY PRESIDENT MASSON: Mr Roberts, we're not talking about forensic exercises sought to pin down the explanation for one day, two days, three days. The issue was really a lengthy period that was not explained. Now, if we were only talking about one or two days, then it might be a different exercise, but we're talking about a significant period of time for which there was no evidence. That was the issue.

PN118

MR ROBERTS: Yes, Deputy President, and there is medical - I would certainly (indistinct) before the Commission on that issue. That's conceded, but all I can say in response to that is it's almost impossible to get a report that could actually make such an assessment. This is one of the difficulties for the Commission that inferences would be required to be drawn for which there is the problem of having the necessary expertise or evidence and it's conceded that it's potentially fatal to the appellant's application.

PN119

It's (indistinct) acknowledge the difficulty (indistinct) in my submission, mental health issues can explain that, but lacking the decision that might be provided for other types of injuries, whether of physical or mental nature, for which more conclusive opinion can be drawn based on evidence that can be obtained. In the case of mental health issues there is a greater (indistinct) in taking such evidence, but that doesn't explain or address the task from the perspective of the Commission in terms of explaining that.

PN120

I think I will just again be repeating myself. I think I've understood from you, Deputy President, the central issues and hopefully I've addressed those.

PN121

DEPUTY PRESIDENT MASSON: Yes, the Bench understands the submissions that are made on both grounds of appeal.

PN122

MR ROBERTS: Yes.

PN123

DEPUTY PRESIDENT MASSON: All right. Is that all, Mr Roberts?

PN124

MR ROBERTS: Yes. I think I would just be labouring the point. I'm grateful that the Deputy President has identified what would certainly be the central issue and I recognise the limitations for the appellant's case, and that that may (indistinct) but I'm grateful for your consideration, Deputy President, and helpful articulation of the central submission and the issues, so thank you.

PN125

DEPUTY PRESIDENT MASSON: Thank you. All right, that concludes these proceedings. The Full Bench will reserve its decision and issue it in due course. I would like to thank the parties for filing material in advance. It has been of assistance to the Bench. We will render that decision as soon as we are able to.

ADJOURNED INDEFINITELY

[11.02 AM]