[2008] AIRCFB 26 PR980376

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AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996
s.120 - Appeal to Full Bench

Victoria Radio Network Pty Ltd

and

Bruce Eva
(C2007/3774)

Broadcasting Industry

VICE PRESIDENT WATSON
SENIOR DEPUTY PRESIDENT CARTWRIGHT
COMMISSIONER FOGGO

MELBOURNE, 31 JANUARY 2008

Appeal against alleged refusal to exercise jurisdiction – whether more than one notice of motion can be lodged on the same jurisdictional ground if previously determined – whether Commission bound to hear second motion on the same ground – Workplace Relations Act 1996 s. 643, 645, 120(1)(f).

DECISION

INTRODUCTION

[1] This is an appeal, for which leave is required, against the alleged refusal by Commissioner Eames to deal with a motion to dismiss Mr Bruce Eva's application for relief in respect of the termination of his employment by Victoria Radio Network Pty Ltd ("VRN").

[2] The matter has a complicated history. The original application for a remedy with respect to the termination of employment was filed by Mr Eva on 1 August 2007. The matter was not resolved at a conciliation conference held on 12 September 2007. The Commissioner heard a motion to dismiss the matter on 20 September 2007. By a decision issued on 25 September 2007 [[2007] AIRC 814 & Order PR978682] the Commissioner dismissed the jurisdictional objection. His conclusions were expressed in the following terms:

> ***"[39]*** *Having looked through those records, which appear to me to be authentic, and contain references, among others, to accountants, managers, announcers, producers, panel operators, reporters, receptionist, journalist and several other names without description, I cannot be certain, on a balance of probabilities as to who are or may be employees, and who may or may not be contractors.*
>
> ***[40]*** *Many of these persons do appear on the Respondents various radio programs for I have listened to many of them myself, but as to their employment status, I am most uncertain.*
>
> ***[41]*** *Mr Failla could have appeared to give evidence in this matter, as could Mr Quick, and they more than likely could have brought with them sufficient documentation, to establish their claim that they employ less than 101 persons and subjected themselves to cross examination. They did not do so, and accordingly I am satisfied that the Respondent has not made out its jurisdictional objection when one applies the criteria contained in the case law references cited in this decision."*

[3] No appeal was brought in relation to the decision or order. However a further notice of motion to dismiss the matter was lodged on 7 November 2007. Shortly after the notice of motion was filed, a 68 paragraph affidavit of Mr Allan Failla, attaching 27 documents, was filed in support of the notice of motion.

[4] The Commissioner sent a letter to the parties dated 13 November 2007 as follows:

> *"I note your Notice of Motion to dismiss Mr Eva's application dated 7 November 2007 pursuant to s. 645 of the Act.*
>
> *Your claim, that by operation of sub.section 643(10) of the Workplace Relations Act 1996 (the Act), Mr Eva's application cannot be brought because at the time of his termination, the Respondent and its related bodies corporate employed 100 employees or fewer has been dealt with and a decision and order was issued on 25 September 2007 [*PR978595 *&* PR978682*].*
>
> *I do not intend to again deal with this matter.*
>
> *Your client has appeal rights under the terms of the Act."*

[5] The appeal is brought against this correspondence which VRN contends is a refusal to exercise jurisdiction to hear and determine the second notice of motion. The appeal was heard on 13 December 2007 in Melbourne. Mr S. Wood, of counsel, represented VRN. Mr M. Rinaldi, of counsel, represented Mr Eva.

[6] The appeal is brought pursuant to section 120 of the *Workplace Relations Act 1996* ("the Act"). Pursuant to section 120(1)(f) of the Act, an appeal lies to a Full Bench in respect of the refusal or failure of a member of the Commission to exercise jurisdiction in a matter arising under the Act. Such an appeal is not an appeal against a discretionary decision. The appellant alleges that the Commissioner made a jurisdictional error in not exercising the jurisdiction invoked by the second notice of motion. The task of the Appeal Bench is to determine whether, in all of the circumstances, leave to appeal should be granted, and if so, to determine whether the refusal of the Commissioner to deal with the second notice of motion represented a jurisdictional error.

RELEVANT LEGISLATION

[7] The jurisdiction sought to be invoked by Mr Eva's original application is that contained in section 643 of the Act. Subsection (10) of that section contains the jurisdictional limitation relied on by VRN in its notices of motion. These provisions are as follows:

> ***"643 Application to Commission to deal with termination under this Subdivision***
>
> *(1) Subject to subsections (5), (6), (8) and (10), an employee whose employment has been terminated by the employer may apply to the Commission for relief in respect of the termination of that employment:*
> *(a) on the ground that the termination was harsh, unjust or unreasonable; or*
> *(b) on the ground of an alleged contravention of section 659, 660 or 661; or*
> *(c) on any combination of grounds in paragraph (b) or on a ground or grounds in paragraph (b) and the ground in paragraph (a).*
>
> . . .
>
> *(10) An application under subsection (1) must not be made on the ground referred to in paragraph (1)(a), or on grounds that include that ground, if, at the relevant time, the employer employed 100 employees or fewer, including:*
>
> *(a) the employee whose employment was terminated; and*
>
> *(b) any casual employee who had been engaged by the employer on a regular and systematic basis for at least 12 months;*
>
> *but not including any other casual employee.*
>
> *(11) For the purposes of calculating the number of employees employed by an employer as mentioned in subsection (10), related bodies corporate (within the meaning of section 50 of the Corporations Act 2001) are taken to be one entity.*

(12) For the purposes of subsection (10):

(a) the relevant time is the time when the employer gave the employee the notice of termination, or the time when the employer terminated the employee's employment, whichever happened first; and

(b) for the purposes of calculating the number of employees employed by the employer, employee has the same meaning as in paragraph (b) of the definition of that term in section 636.

[8] The Act contains a specific provision for initiating the dismissal of section 643 applications on jurisdictional grounds. Section 645 provides:

*"**645 Motions for dismissal of application for want of jurisdiction***

(1) A respondent may move for the dismissal of an application under section 643 on the ground that the application is outside the jurisdiction of the Commission at any time, including a time before the Commission has begun dealing with the application.

(2) If:
(a) the respondent moves for the dismissal of an application on such a ground and has not previously so moved; and
(b) the respondent so moves before the matter is referred for conciliation by the Commission; the Commission must deal with the motion before taking any action, or any further action, on that application, unless the respondent indicates that the matter may be dealt with at a later time.

(3) If the respondent moves for the dismissal of an application on such a ground, having already so moved on a previous occasion, the Commission must deal with the motion but may do so at any time it considers appropriate.

(4) If a respondent has moved for the dismissal of an application made, or purported to have been made, under subsection 643(1):
(a) on the ground referred to in paragraph 643(1)(a); or
(b) on grounds that include that ground;
subsection (5) applies to the application.

(5) If the Commission is satisfied that an application to which this subsection applies cannot be made under subsection 643(1) on the ground referred to in paragraph 643(1)(a):
(a) because the employee is excluded from the operation of Subdivision B by section 638; or
(b) because of the operation of subsection 643(6) (which relates to qualifying periods); or
(c) because of the operation of subsection 643(10) (which relates to employers of 100

employees or fewer);
the Commission must:
(d) if paragraph (4)(a) applies – make an order dismissing the application; or
(e) if paragraph (4)(b) applies – make an order dismissing the application to the extent that it is made on the ground referred to in paragraph 643(1)(a).

(6) If:
(a) a respondent has moved for the dismissal of an application to which subsection (5) applies; and
(b) the Commission is not satisfied as mentioned in paragraph (5)(a), (b) or (c) in relation to the application;
the Commission must make an order refusing the motion for dismissal.

(7) The Commission is not required to hold a hearing in relation to the making of an order under subsection (5) or (6).

GROUNDS OF APPEAL

[9] The ground of appeal in this matter is a single one of narrow compass. VRN submits that the Commissioner was bound to hear the second motion and cannot simply refuse to exercise the jurisdiction created by the notice of motion. It submits that there is no limitation on a party lodging more than one notice of motion, and once validly lodged, the Commission is obliged to deal with it. It concedes that the Commission has a discretion as to how to deal with a matter before it, provided the principles of natural justice are observed.

[10] Mr Eva contested whether there had been a refusal to exercise jurisdiction in circumstances where the Commissioner heard and determined the first notice of motion.

[11] The issues involved in the appeal are therefore whether it was open to VRN to lodge the second notice of motion and if so, whether the Commission had an obligation to deal with the matter in a more substantive manner than it did, given that it had dealt with a notice of motion on the same issue once already. The issues raised have implications for the competency of the appeal, whether leave to appeal should be granted and the merits of the appeal itself.

CAN MORE THAN ONE NOTICE OF MOTION BE LODGED ON THE SAME JURISDICTIONAL GROUND?

[12] Counsel for VRN submitted the following in relation to the right of the employer to make the second notice of motion:

- There is no common law rule against a second application.

- There are various aspects of the relevant statutory provisions which contemplate and authorise the making of a second application on the same jurisdictional ground. These include sections 645(1),(2),(3) and section 683, and references to moving for dismissal of a matter "at any time" and "having already done so on a previous occasion."

- The absence of provisions such as section 673 and section 649(3) precluding a second application.

- There is some case law which contemplates more than one motion to dismiss a matter being made.

- The obligation on the Commission to deal with the matter and the way in which a second application may be dealt with are matters which should be considered separately.

[13] Counsel for Mr Eva submitted that the proper avenues for dealing with the matter are either by way of an appeal against the first decision or an application to revoke the order dismissing the notice of motion under section 683. He submits that attempting to run the same case for a second time is contrary to fundamental principles of certainty and finality in litigation. Because the Commission is entitled to control its own procedure it is entitled to refuse to deal with a matter that has already been heard and determined. He submitted that the employer should not be permitted to run its jurisdictional objection repeatedly and put the employee to unnecessary additional expense. He submitted that the statute does nothing more than contemplate different notices of motion on different jurisdictional grounds – not repeated motions on the same matters.

[14] In our view, the availability of an appeal or an application for revocation does not render it impermissible for a party to lodge a second notice of motion. It appears to us that under the statute these are all options, none of which is exclusive.

[15] It should be noted that the nature of the matter sought to be agitated by VRN concerned the question of whether jurisdiction existed to deal with the application. A notice of motion to dismiss a matter for want of jurisdiction may be made at any time: (s.645(1)). This could be prior to conciliation, after conciliation has occurred, or as part of the arbitration process. The Commission is an administrative tribunal which has a fundamental duty to satisfy itself that it has jurisdiction to exercise the powers requested to be exercised in an application before it. The question of jurisdiction is relevant to the powers of the Commission to conciliate the matter, if objection is taken to conciliation powers being exercised, and with respect to the exercise of arbitration powers. It is generally not open to a party to reopen a case or entertain new merit arguments which had not been run when the first opportunity to do so was given. 1 This is based on the principle that a party is bound by the conduct of its case. However it has been held that different considerations apply where the matters raised are jurisdictional.2

[16] The terminology of section 645 is also particularly significant. It expressly comprehends more than one notice of motion to dismiss a matter because of want of jurisdiction. In our view these

words should be given their full meaning and effect. We see no reason to read these words down so as to restrict their meaning and possible applications to motions on different jurisdictional grounds. We consider that the arguments of the respondent relate more to the nature of the duty reposed on the Commission to deal with a second notice of motion, rather than the right of the employer to make it.

[17] We are therefore of the view that it was open to VRN to lodge the second notice of motion. Seeking to re-run a case when its initial conduct has been deficient may have implications for the nature of the case permitted to be run the second time and the prospects of a costs order against the party involved. The nature of the obligation on the Commission when a second notice of motion is given is a separate matter to which we now turn.

THE OBLIGATION On THE COMMISSION

[18] Counsel for VRN submitted that once the second motion was lodged, the Commission had an obligation to deal with it. He said that the Commission should have given the applicant an opportunity to make an application to adduce further evidence and put further submissions in the matter. He made reference to High Court authority on the duty of AIRC members to perform public duties vested in them. 3 He said that there was a discretion, subject to the obligation to observe the rules of natural justice, as to whether to grant such an application but it could not refuse to deal with the application at all.

[19] Counsel for Mr Eva's arguments are reflected in the notion outlined above that the Commission has a discretion as to its own procedure and can refuse to entertain a second motion on the same matters. He said that the Commission has complied with the obligations to provide natural justice to the employer by hearing and determining the first notice of motion.

[20] The High Court has held that an administrative tribunal has the power and duty to reconsider an earlier decision in circumstances where an earlier decision involves jurisdictional error. 4 In that case Gleeson CJ said:

> *"[8] The requirements of good administration, and the need for people affected directly or indirectly by decisions to know where they stand, mean that finality is a powerful consideration. And the statutory scheme, including the conferring and limitation of rights of review on appeal, may evince an intention inconsistent with a capacity for self-correction. Even so, as the facts of the present case show, circumstances can arise where a rigid approach to the principle of functus officio is inconsistent with good administration and fairness. The question is whether the statute pursuant to which the decision-maker was acting manifests an intention to permit or prohibit reconsideration in the circumstances that have arisen. That requires examination of two questions. Has the tribunal discharged the functions committed to it by statute? What does the statute provide, expressly or by implication, as to whether, and in what circumstances, a failure to discharge its functions means that the tribunal may revisit the exercise of its powers, or to use the language of Lord Reid,*

reconsider the whole matter afresh?" 5

[21] The position in relation to jurisdiction may well be different to a situation where a tribunal changes its mind, or realises it has made an error within jurisdiction, or because there has been a change of circumstances.

[22] In this matter, the Commissioner heard the first motion and concluded that:

- no evidence had been led by the employer to support its contention that the relevant persons were independent contractors rather than employees;
- he was most uncertain as to their employment status; and
- the employer had not made out its jurisdictional objection.

This decision fell short of a conclusion that there was jurisdiction to deal with the matter. In our view it could properly be said that the jurisdiction of the Commission remained an open question which was dependent on evidence of the circumstances.

[23] When the employer sought to have the matter reconsidered by way of the second notice of motion and lead evidence not adduced in support of the first motion, we believe that the Commissioner was bound to provide the employer with at least an opportunity to make application to adduce further evidence and to proceed to deal with the notice of motion in such a way as to provide natural justice to both parties. An application to adduce further evidence would not be granted automatically. It would need to be justified on established principles.

[24] There was no duty to grant the application to adduce further evidence and no duty to rehear the parities without regard to what had occurred in the first proceedings. The Commission had the power to truncate the second proceedings. However, in our view, it did not have the power to decline to deal with the application at all. We are therefore of the view that refusing to deal with any aspect of the second motion constituted a failure to exercise a duty vested in the Commission and thereby a refusal to exercise jurisdiction.

[25] We do not believe that considering the first motion amounted to the exercise of jurisdiction to deal with the second motion when there was no consideration of the application to adduce further evidence, no consideration of the second motion in any substantive sense and the conclusions in the first decision fell short of being positive conclusions that jurisdiction exists.

CONCLUSIONS

[26] In the light of the conclusions we have reached, we are of the view that the Commissioner failed to exercise the jurisdiction vested in him to hear and determine the second motion. Therefore, his

refusal was appeallable under section 120(1)(f) of the Act.

[27] As it is a fundamental duty of the Commission to determine whether it has jurisdiction and it has yet to positively do so, we consider that the matter is of such importance that in the public interest, leave to appeal should be granted.

[28] We consider that because there has been a failure to exercise jurisdiction, the appeal should be granted so as to provide for the jurisdiction arising from the second notice of motion to be exercised under the Act. We will remit the matter to Commissioner Eames to hear and determine the second notice of motion.

BY THE COMMISSION:

VICE PRESIDENT

Appearances:

Mr S. Wood, of counsel, for VRN.
Mr M. Rinaldi, of counsel, for Mr Eva.

Hearing details:

Melbourne.
2007:
13 December.

1 *University of Wollongong v Metwally* (No.2) (1985) 59 ALJR 481.

2 *Goumas v Wattyl Australia* (2005) 145 IR 256; *Nightingale v Little Legends Childcare* (2004) 134 IR 111; *Big W Monarto Warehouse/590 Regional Distribution Centre v Paech* [2007] AIRCFB 1049.

3 *Re Australian Bank Employees Union Ex parte Citicorp Australia Ltd* [1989]167 CLR 513; *Re Media, Entertainment and Arts Alliance and Another; Ex parte Arnel and others* [1993-4] 179 CLR 84.

4 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 187 ALR 117.

5 *Bhardwaj* at p119.

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