FEDERAL COURT OF AUSTRALIA

Bronze Hospitality Pty Ltd v Hansson (No 2) [2019] FCA 1680

|  |  |
| --- | --- |
| Review of: | *Bronze Hospitality Pty Ltd v Hansson* [2019] FWCFB 1099 |
|  |  |
| File number: | WAD 162 of 2019 |
|  |  |
| Judge: | **JACKSON J** |
|  |  |
| Date of judgment: | 16 October 2019 |
|  |  |
| Catchwords: | **INDUSTRIAL LAW** - application for judicial review of decision of Full Bench of Fair Work Commission - claim for unfair dismissal under Pt 3-2 Div 2 of *Fair Work Act 2009* (Cth) - whether casual employment met criteria in s 384(2)(a)(i) and s 384(2)(a)(ii) of *Fair Work Act* - point in time employee has objectively reasonable grounds for expectation of continuing employment on regular and systematic basis - no jurisdictional error by Full Bench - application dismissed |
|  |  |
| Legislation: | *Fair Work Act 2009* (Cth) ss 382, 383, 384, 385, 390, 394, 396, 590, 591, 604, Part 3-2, Division 2*Judiciary Act 1903* (Cth) s 39B |
|  |  |
| Cases cited: | *Adams v Bracknell Forest Borough Council* [2004] UKHL 29; [2005] 1 AC 76*ALDI Foods Pty Ltd v Shop, Distributive & Allied Employees Association* [2017] HCA 53; (2017) 262 CLR 593*Australian Postal Corporation v D'Rozario* [2014] FCAFC 89; (2014) 222 FCR 303*Baker v Patrick Projects Pty Ltd* [2014] FCAFC 165; (2014) 226 FCR 302*Bronze Hospitality Pty Ltd v Hansson* [2019] FCA 1236*Coal and* *Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194*Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135*Craig v State of South Australia* (1995) 184 CLR 163*D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187; (2013) 303 ALR 242*Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416*Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225; (2018) 364 ALR 423*Khalil v Minister for Home Affairs* [2019] FCAFC 151*L & B Linings Pty Ltd v WorkCover Authority of New South Wales* [2012] NSWCA 15*SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 231; (2003) 77 ALD 402*WorkPac Pty Ltd v Skene* [2018] FCAFC 131; (2018) 362 ALR 311 |
|  |  |
| Date of hearing: | 5 September 2019 |
|  |  |
| Registry: |  |
|  |  |
| Division: |  |
|  |  |
| National Practice Area: | Employment & Industrial Relations |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 67 |
|  |  |
| Counsel for the Applicant: | Mr GJ Douglas |
|  |  |
| Solicitor for the Applicant: | Douglas Cheveralls Lawyers |
|  |  |
| Counsel for the First Respondent: | Mr M Rynne with Mr F Robertson (Pro Bono) |
|  |  |
| Counsel for the Second Respondent: | The second respondent filed a submitting notice save as to costs |

ORDERS

|  |  |
| --- | --- |
|  | WAD 162 of 2019 |
|   |
| BETWEEN: | BRONZE HOSPITALITY PTY LTDApplicant |
| AND: | JANELL HANSSONFirst RespondentFAIR WORK COMMISSIONSecond Respondent |

|  |  |
| --- | --- |
| JUDGE: | JACKSON J |
| DATE OF ORDER: | 16 OCTOBER 2019 |

THE COURT ORDERS THAT:

1. The application is dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

JACKSON J:

1. The first respondent, Janell Hansson, claims that Bronze Hospitality Pty Ltd (**Bronze**) unfairly dismissed her from her employment, within the meaning of s 385 of the *Fair Work Act 2009* (Cth) (**FWA**). Her claim is before the Fair Work Commission. In the present application, Bronze seeks judicial review of a decision of the Full Bench of the Commission.
2. Ms Hansson opposes the application. She appeared by counsel acting on a pro bono basis. The court is grateful to counsel for the assistance thus provided.
3. Bronze makes its application under s 39B of the *Judiciary Act 1903* (Cth). The orders it seeks are that the decision of the Full Bench be 'set aside and remitted to the Fair Work Commission for review'. The court has jurisdiction to decide an application for orders of that nature: *Baker v Patrick Projects Pty Ltd* [2014] FCAFC 165; (2014) 226 FCR 302 at [29] (and see also at [3]).

## How the issues arise

1. Some background appears in the court's reasons in *Bronze Hospitality Pty Ltd v Hansson* [2019] FCA 1236, but it is convenient to set it out again here.
2. Bronze is in the business of supplying labour to the Harbour Terrace Bar and Grill in Hillarys, Western Australia. It employed Ms Hansson to work there, in the position of Food and Beverage Attendant. She was employed continuously between 28 November 2017 and 7 June 2018. From 28 November 2017 until 21 January 2018 she was a casual employee. For the rest of the period of her employment she was employed full‑time (her full‑time employment may have started on 24 January 2018, but Bronze does not claim that this makes the total period of her employment discontinuous).
3. On 7 June 2018, Bronze dismissed Ms Hansson from her employment with it. She then applied to the Fair Work Commission under s 394 of the FWA for remedies for what she claims was unfair dismissal.
4. The questions that the Commission has determined so far, and which have led to this application, concern whether Ms Hansson was a person who was protected from unfair dismissal according to the provisions of Pt 3‑2 Div 2 of the FWA. Under s 390(1)(a) of the FWA, the Commission's power to order remedies for the unfair dismissal of a person depends on it being satisfied that the person was protected from unfair dismissal at the time of being dismissed. Hence Pt 3‑2 Div 2 is engaged.
5. With the omission of s 384(2)(b), which is presently immaterial, the division can be set out in full:

**382 When a person is protected from unfair dismissal**

A person is ***protected from unfair dismissal*** at a time if, at that time:

(a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and

(b) one or more of the following apply:

(i) a modern award covers the person;

(ii) an enterprise agreement applies to the person in relation to the employment;

(iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

**383 Meaning of minimum employment period**

The ***minimum employment period*** is:

(a) if the employer is not a small business employer - 6 months ending at the earlier of the following times:

(i) the time when the person is given notice of the dismissal;

(ii) immediately before the dismissal; or

(b) if the employer is a small business employer - one year ending at that time.

**384 Period of employment**

(1) An employee's ***period of employment*** with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee.

(2) However:

(a) a period of service as a casual employee does not count towards the employee's period of employment unless:

(i) the employment as a casual employee was on a regular and systematic basis; and

(ii) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis …

1. It appears to have been common ground before the Commission that Ms Hansson was an employee of Bronze at the time of her dismissal, and that at least one of the necessary criteria in s 382(b) were satisfied. But whether she had completed a period of employment with Bronze of at least the minimum employment period for the purposes of s 382(a) was in issue.
2. That meant it was necessary to determine whether Bronze was a small business employer, as that would affect whether the minimum employment period to be determined under s 383 was six months or one year. The Commission ultimately determined that Bronze was not a small business employer. That determination is not in issue in these proceedings.
3. So the minimum employment period for the purposes of s 382(a) was six months. Ms Hansson's total period of employment was six months and 10 days. Bronze initially put it as six months and nine days. On the evidence here, nothing turns on the difference of one day. But as it will be seen, what is open to be concluded on the evidence about what happened within the first 10 (or nine) days is important.
4. The outcome turns on the qualified exclusion of casual employees in s 384(2)(a). Ms Hansson's period of casual employment at the commencement of her time with Bronze was 54 days; a little over 7½ weeks. Whether she was a person who was protected from unfair dismissal under Pt 3‑2 Div 2 therefore depended on how many of those 54 days (if any) could be counted towards her total period of employment as defined in s 384. If as few as 11 days could not be counted, her claim would fail.

## The Commission's decision at first instance

1. Bronze contended in the Commission that Ms Hansson's employment as a casual was not on a regular and systematic basis and that she did not have a reasonable expectation of continuing employment by Bronze.
2. The evidence showed that during her period as a casual employee, Ms Hansson's start and finish times varied from day to day. Bronze relied on the variation in the duration of shifts worked, and in the start and finish times, to say that Ms Hanson did not have an expectation of regular and systematic work. Her payslips did, however, show that she worked between 65.28 and 94.26 hours a fortnight during her time as a casual. She was first employed during the pre‑Christmas period when the restaurant was very busy. Time sheets showed that during the period of her casual employment she worked five or six days a week; on three days for the lunch shift only, on every other day the dinner shift, and on several days both shifts.
3. Bronze also submitted to the Commission that Ms Hansson's casual employment did not go on for long enough for any view to be formed that it was regular and systematic. Bronze pointed to high rates of turnover in employment that are common in the hospitality industry.
4. The Commission at first instance rejected Bronze's arguments. It referred to authority in the Commission to the effect that it was the employment that had to be regular and systematic, not the hours worked. The authorities also indicated that employment can be regular and systematic even when the times or days of work are irregular or not rostered.
5. The Commission did not accept that a period of seven weeks was incapable of being a period of regular and systematic employment, and found that Ms Hansson's employment 'within that period' was regular and systematic. It found that she was engaged to work as a casual with the prospect of being converted into full time employment if the relationship progressed positively. It accepted her time sheets as evidence that the actual work she performed was part of a continuing relationship between the parties. The Commission concluded that her minimum employment period was between 28 November 2017 and 7 June 2018, 'a period of slightly more than 6 months and 1 week'. That, together with the Commission's finding that Bronze was not a small business employer, meant that Ms Hansson was a person protected from unfair dismissal.

## The appeal to the Full Bench

1. Bronze appealed to the Full Bench of the Commission. A Full Bench granted the necessary permission to do so on 19 November 2018, and a differently constituted Full Bench gave its decision on the appeal on 20 February 2019: *Bronze Hospitality Pty Ltd v Hansson* [2019] FWCFB 1099. That is the decision of which Bronze now seeks judicial review.
2. In relation to the period of employment for Ms Hansson, Bronze again argued that it was not possible for a casual employee to work on a regular and systematic basis, or to have or develop a reasonable expectation of continuing employment, after some eight weeks of casual work. The Full Bench rejected that argument. It held that there was no minimum period of time for a casual employment to assume a regular and systematic character, nor any minimum period for an employee to develop a reasonable expectation of continuing employment. A casual employee could be told, for example, at the outset that her casual employment would be ongoing, as well as regular and structured, and then be rostered accordingly.
3. Then the Full Bench said (at [33]):

Where nothing is said about the regularity or system of engagement, or its possible duration, all of the circumstances are to be considered in order to ascertain whether s.384(2) is engaged. Clearly upon a person's first engagement, without more, one could not speak of regularity or system, and in the very early phase of a casual employment relationship it may be difficult to substantiate that it is either regular or systematic, or that any reasonable expectation exists as to ongoing employment. However, a short period might well be sufficient, depending on the circumstances. The question in the present matter is whether it was reasonably open on the evidence for the Commissioner to conclude that Ms Hansson's circumstances fell within s.384(2).

1. After summarising the approach taken to the evidence at first instance, the Full Bench held that while the Commissioner's reasons did not identify the precise basis on which he concluded that Ms Hansson's employment as a casual was regular and systematic, that conclusion was plainly open to him on the evidence. After giving its own summary of the time sheets, the Full Bench held (at [37]):

In our opinion, there was an ample basis in the evidence for the Commissioner to conclude that Ms Hansson's period of employment was on a regular and systematic basis over this period. In our view, he reached the correct conclusion.

1. The Full Bench then turned to the question of whether Ms Hansson had a reasonable expectation of continuing employment by Bronze on a regular and systematic basis. It reviewed Bronze's arguments that the evidence did not support that conclusion. The Full Bench agreed with Bronze that there was no evidence to support the Commissioner's findings that the possibility of ongoing permanent employment was raised at the beginning of the period of casual employment, and that Ms Hansson was engaged to work as a casual with the prospect of being converted to full time employment if the relationship progressed positively. The Full Bench found that it was only in late December 2017 that she was told she would be offered permanent employment.
2. Nevertheless, the Full Bench went on to find as follows (at [42]‑[43], footnotes omitted):

However, Ms Hansson also gave evidence that from the commencement of her casual employment, she was told that it was going to be busy over the Christmas period and school holidays and that she should expect a lot of hours. She gave evidence that she in fact expected that she was going to receive regular work because Bronze had told her that it was their busiest period. In late December, she was offered the prospect of permanent employment and on 22 January 2018 she received this offer and accepted it.

In our view, this evidence, which was not contradicted by Bronze, is sufficient to found a conclusion that Ms Hansson had a reasonable expectation of ongoing employment as a casual employee. She was told that she would receive regular work, she expected to receive it, and she did in fact receive it. Although the precise date on which she was told that she should expect a lot of work is not indicated, it was evidently at the commencement of her employment ('from the moment I was there').

1. The reference to 'the Christmas period and school holidays' extended into January 2018, and in late December 2017 Bronze told Ms Hansson to expect a permanent contract. The Full Bench held (at [43]) that 'the Commissioner was correct to conclude that Ms Hansson had a reasonable expectation of ongoing employment for the purposes of s.384(2)(a)(ii)'. It then concluded (at [44]):

As we have said, the period of regular and systematic employment must coincide with the reasonable expectation of ongoing employment, in order for the relevant period to count towards the period of employment. In light of what she was told to expect when she joined, and the days and hours she actually worked, we consider that all of Ms Hansson's casual employment was regular and systematic, and that she had a reasonable expectation of continuing employment throughout this period. Although there were errors in his reasoning, the Commissioner's conclusion that all of Ms Hansson's casual service counts towards her period of employment was correct.

## First ground - whether the whole period of casual employment counted

1. By its first ground of review, Bronze claims that the Full Bench directed itself to the wrong questions when seeking to determine whether the whole period of Ms Hansson's casual employment was on a regular and systematic basis with a reasonable expectation of continuing employment.
2. Bronze submits that in the case of both the question of whether Ms Hansson's employment as a casual employee was on a regular and systematic basis, and the question of whether she had a reasonable expectation of continuing employment on a regular and systematic basis, what the Full Bench did was to answer both of those questions in the affirmative, and thus conclude that the whole period of casual employment could be counted towards her period of employment. Bronze claims that the Full Bench failed to have regard to the question of the point in time at which her employment met both of those two criteria. Only that date, if any, would be the start of the period of employment for the purposes of s 384(1).
3. I do not accept that the Full Bench made that error. It is clear from its reasons that the Full Bench did not overlook the importance of determining the point in time at which both of the criteria in s 384(2)(a)(i) and s 384(2)(a)(ii) were met. Before considering Bronze's arguments, the Full Bench made the following observations about the phrase 'during the period of service' in s 384(2)(a)(ii) (at [29], emphasis in original, footnotes omitted):

First, 'during' can mean either 'throughout the course of' or 'at a point in the course of'. In our view, the first of these meanings is intended. The sub-provision is an exception to an exception; a period of casual service does not count, unless two requirements are met. Both of these requirements concern states of affairs that can develop over time. This context points to the word 'during' connoting a continuous period, rather than a point in time. Further, the alternative construction would mean that a casual employee need only have a reasonable expectation of continuing employment for any fleeting period in the course of the casual employment. There is no apparent rationale that would support this being the intended meaning. Finally, we note that the explanatory memorandum to the Fair Work Bill states simply that 'service as a casual employee does not count towards the period of employment unless it was on a regular and systematic basis and the employee had a reasonable expectation of continuing engagement on a regular and systematic basis.' This wording is consistent with the interpretation we favour, and inconsistent with a 'point in time' meaning. The effect of this is that a paiticular [sic] period of service as a casual employee only 'counts' in respect of periods when the casual employment was regular and systematic *and* the employee had a reasonable expectation of continuing employment.

1. That is inconsistent with Bronze's submission that the Full Bench overlooked the question of when the relevant criteria were first fulfilled. The Full Bench said expressly that a finding that, at a particular point in time, the employee had a reasonable expectation of continuing employment on a regular and systematic basis, would not be enough. The expectation had to subsist for a period, and it was that period that was capable of being counted towards the period of employment. While these observations were made about the requirement in s 384(2)(a)(ii), the Full Bench mentioned that both that requirement, and the one in s 384(2)(a)(i), 'concern states of affairs that can develop over time'. The rest of the passage confirms that the Full Bench considered that what had to be found was a period during which both of the requirements were fulfilled. The last sentence of the passage quoted says as much.
2. The Full Bench's approach to the evidence, as summarised above, is consistent with that view of how s 384(2)(a) should be applied. Paragraph 33 of the reasons, which I have quoted, shows that the Full Bench was conscious that the period during which the two requirements were met may not start until some time after the casual employment commenced. When the Full Bench turned to the question of whether Ms Hansson's employment as a casual was regular and systematic, it referred (at [36]) to what the time sheets showed about the frequency and regularity of her work 'over the period of her casual employment' and held (at [37]) that 'there was an ample basis in the evidence for the Commissioner to conclude that Ms Hansson's period of employment was on a regular and systematic basis over this period'. So the conclusion was that the regular and systematic basis of her casual employment held for the entire period.
3. Similarly, when it came to the question of whether Ms Hansson had a reasonable expectation of continuing employment on a regular and systematic basis, the Full Bench focussed on when that expectation arose. It found that the possibility of ongoing permanent employment only arose towards the end of December 2017. But it relied on other evidence which indicated that Ms Hansson did have the necessary expectation from the beginning of her employment. Paragraphs 42‑43 of the Full Bench's reasons, which I have also quoted, shows that it paid close attention to exactly when the expectation arose. It found that 'it was evidently at the commencement of her employment ("from the moment I was there")'.
4. The Full Bench's reasons show that it was aware that it had to make a finding as to the period, if any, during which both of the requirements in s 384(2)(a)(i) and s 384(2)(a)(ii) were satisfied, and that it went on to make that finding (at [44]). There is no basis for Bronze's submission in this court that the Full Bench failed to direct itself to the question of the point in time at which Ms Hansson's employment became regular and systematic, and the point in time at which she had a reasonable expectation of continued employment.
5. Bronze's submissions raised other questions as to the proper construction of s 384(2)(a).
6. One of those questions may be put this way: if the Commission finds that there was a pattern of work indicating for the purposes of the requirement in s 384(2)(a)(i) that the employment was on a regular and systematic basis then, accepting that the pattern could not have emerged until some time after the commencement of the employment, is that requirement fulfilled over the entire period over which the pattern can be observed, or is it only fulfilled from the time when the pattern first emerges?
7. The question may be illustrated with a hypothetical example. Suppose that a person is employed as a casual employee by a small business employer for six months leading up to their dismissal. Suppose it turns out that they work the morning shift, every third day, consistently throughout that period. That may be regular and systematic employment. But without more, it would not be possible at the commencement of the period to say that was so. There would have to be some repetition of the pattern of morning shifts every three days before one could conclude from that pattern that the employment was regular and systematic.
8. If, say, three shifts were enough, the pattern would not emerge until seven days into the period of employment (assuming the first shift was on the first day). Is that day seven the start of the period of regular and systematic employment, meaning, on this example, that the employee does not have the necessary six months of employment? Or are the first three shifts all part of the period of employment on a regular and systematic basis?
9. In my view, illustrating the question this way points to the correct answer, which is that the entire period is to be counted, not just the period commencing at the first time at which it can be observed that the employment is on a regular and systematic basis. It is inherently contradictory to say that the first three shifts are evidence establishing that the employment was on a regular and systematic basis, but they cannot be part of the period during which the person was employed on that basis.
10. Section 384(2)(a)(i) calls for an evaluation of whether the employment as a casual employee was on a regular and systematic basis. So it is the relationship of employment that must be characterised, one way or the other. It is true that the basis of the relationship can change over time, so it is necessary to determine when it became employment on a regular and systematic basis. But if, looking back after the end of the relationship (as is of course inevitable in an unfair dismissal case) the evidence as a whole supports a characterisation of its basis as regular and systematic from the beginning, it does not matter that looking forward from the beginning, one would not have yet seen all that evidence. The basis of the employment was, in fact, regular and systematic from the start, even if sufficient evidence of that fact did not accumulate until later.
11. Another question about the proper construction of s 384(2)(a) arises from a submission by Bronze that if Ms Hansson 'objectively formed' the necessary reasonable expectation only after nine days, then the requirement that there be employment of the necessary character for the minimum six months would not be met. Bronze submitted that working the majority of days for the first week and a half, without more, would not be an objective basis to conclude that the work will continue on a regular and systematic basis.
12. The first of these points is correct. If the employee's expectation was based, not on anything the employer said, but solely on her own observation of the regularity of her work shifts, it would be wrong to look back and say that, as it turned out, there was a reasonable expectation from the very beginning. An expectation could not be reasonable until the time at which the pattern necessary to make it so has emerged.
13. But I do not accept that as a matter of construction of s 384(2)(a)(ii), a week and a half of regular employment cannot establish that pattern. The ordinary meaning of the words of s 384(2)(a)(ii) requires that the employee has subjectively formed an expectation of continuing employment by the employer on a regular and systematic basis. If that expectation has been formed, it is necessary to assess whether it is a reasonable one. It is true that the word 'reasonable' is generally used in the law to import an objective standard: *Adams v Bracknell Forest Borough Council* [2004] UKHL 29; [2005] 1 AC 76 at [33] (Lord Hoffmann). But the FWA does not limit the matters that may be taken into account in determining whether the expectation is reasonable. Certainly, the shorter the period of employment, generally the harder it will be for the employee to establish that he or she reasonably relied on a pattern of work, if that is the basis of his or her reasonable expectation. But the reasonableness of the expectation depends on all the circumstances, and there is no minimum period in the legislation that makes a week and half insufficient in every case.
14. It may be that, as Bronze submitted, the context of Ms Hansson's employment in the hospitality industry was relevant. That context may mean that frequent work does not point to a regular and systematic basis of employment as clearly as it might in other industries. But if the Commission did not give adequate weight to that context, that was an error within jurisdiction.
15. In any event, the submission that a week and half of regular employment was not enough to found a reasonable expectation does not take account of the evidence about what Bronze said to Ms Hansson at the beginning of her employment. In *WorkPac Pty Ltd v Skene* [2018] FCAFC 131; (2018) 362 ALR 311 at [178] the Full Court observed that what is agreed to at the commencement of the employment is relevant to the characterisation process. While their Honours were referring to the objective characterisation of whether employment was casual, part‑time or full‑time, the same must go for the question of whether an employee has objectively reasonable grounds for an expectation of continuing employment on a regular and systematic basis.
16. What the employer tells the employee must be relevant. Counsel for Bronze accepted this. If the employee in fact has the necessary expectation, and if what the employer said at the beginning of the employment was sufficient to make the expectation reasonable, and nothing in the circumstances indicated that what the employer said was unreliable, implausible or was otherwise to be disbelieved, then the criterion may be satisfied from that time. If nothing happens subsequently to show that the expectation will not be fulfilled, then it may subsist, as a reasonable expectation, throughout the entire period of service as a casual employee. There is nothing in the legislation which indicates that the employee's expectation cannot be reasonable until a pattern of regular and systematic employment, such as regular shifts, has in fact emerged.
17. Bronze sought to illustrate its point with a hypothetical example in which, at the start of the employment relationship, an employee only receives a few sporadic shifts, and at some later time the employer starts to engage the employee more regularly. The assessment, looking back, would be that during the period of sporadic engagements the employment was not on a regular and systematic basis, but from the start of the period when the engagements become more regular, it was.
18. But this example does not shed much light on the present case, because it does not factor in any discussions that the employer and employee may have had. It is also inapt because the hypothetical employee only receives sporadic shifts at the beginning, while the time sheets show that Ms Hansson received work frequently and regularly throughout the first 10 (or nine) days.
19. Here, the Full Bench did not rely solely on the time sheets. In the passages quoted above, the Full Bench based its findings on what Ms Hansson was told at the start of her employment, as well as on the subsequent course of events. There is a ground of review challenging the Full Bench's findings based on that evidence, which I address below. But those findings do not demonstrate any misunderstanding of s 384(2)(a)(ii) on the part of the Full Bench.
20. I find that the Full Bench did not commit any error of the kind alleged in the first ground of review.
21. In case I am wrong about that, I should briefly express my conclusion on whether that error would have been a jurisdictional error. That depends on the proper construction of the legislation as a whole, in order to determine whether the legislature intended that a decision affected by an error of that kind lacks the characteristics necessary for it to be given force and effect by the statute: *Khalil v Minister for Home Affairs* [2019] FCAFC 151 at [43].
22. In my view, that intention can be discerned here. The Full Bench was considering an appeal from the Commission under s 604 of the FWA. The statutory power under which the decision appealed from was made was conferred by s 390(1) of the FWA. It is an express precondition of the exercise of that power that the Commission be satisfied that the person was protected from unfair dismissal at the time of being dismissed: s 390(1)(a). That this is so is emphasised by s 396, which provides that the Commission must decide whether the person was protected from unfair dismissal (among other things) 'before considering the merits of the application': see s 396(b). This distinction between the question of whether the person was protected from unfair dismissal, and 'the merits', is a strong indication that an error in answering the first question, based on a misunderstanding of the question, would be a jurisdictional error. Likewise, that distinction indicates why it does not necessarily follow that an error made in determining the other precondition in s 390(1), that 'the person has been unfairly dismissed' (s 390(1)(b)) is a jurisdictional error.
23. The nature of the jurisdiction granted to the Full Bench was to conduct an appeal by way of rehearing where it could determine whether the decision the subject of appeal was an incorrect decision: *ALDI Foods Pty Ltd v Shop, Distributive & Allied Employees Association* [2017] HCA 53; (2017) 262 CLR 593 at [100]. If a misunderstanding of s 384(2)(a) leading to a misunderstanding of the test in s 390(1)(a) on the part of the Commission would be a jurisdictional error, the same misunderstanding would equally be a jurisdictional error on appeal.
24. While it was decided under different legislation, that view tends to be confirmed by *Coal and* *Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194 at [31], where Gleeson CJ, Gaudron and Hayne JJ (applying Jordan CJ in in *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420) indicated (among other things) that it would be a jurisdictional error for the Full Bench of the Australian Industrial Relations Commission to misunderstand the nature of the opinion which it was to form.

## Second ground - whether the decision was not based on evidence

1. Bronze's second ground of review was that the Full Bench fell into jurisdictional error by reaching a decision with regard to Ms Hansson's expectation of ongoing employment that was not based on evidence and was unreasonable. This concerns the Full Bench's finding that from the commencement of her employment Ms Hansson had a reasonable expectation of ongoing employment on a regular and systematic basis.
2. I have just described the relevance of the finding within the statutory framework, namely that it bears upon whether the Commission is satisfied that Ms Hansson was protected from unfair dismissal, being a matter that the Commission needs to decide before considering the merits of her application. The requirement for the existence of that state of satisfaction may have entailed a requirement that it be formed reasonably upon the material before the Commission: *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135 at [34] (Gleeson CJ, Gummow, Kirby and Hayne JJ). However Bronze did not articulate the case that way in its written or oral submissions. Nor did Bronze submit that the question concerned what is sometimes called a jurisdictional fact, in the sense of a limit on power to be established to the satisfaction of the reviewing court: see *D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187; (2013) 303 ALR 242 at [241] (Basten JA).
3. Rather, Bronze put the point in terms of an absence of any evidence that Ms Hansson expected that the work she was to be given would be regular, or evidence as to when she expected that she would be given such regular work. Counsel for Bronze confirmed that the reference to unreasonableness in the ground of appeal was a way of describing illogicality in the finding, resulting from an absence of evidence to support it. In other words, the complaint is that the finding was unsupported by evidence.
4. In *Australian Postal Corporation v D'Rozario* [2014] FCAFC 89; (2014) 222 FCR 303 the Full Court (Besanko, Jessup and Bromberg JJ, in separate judgments) examined the authorities as to when an absence of evidence to support a finding by an administrative decision‑maker demonstrates jurisdictional error. Jessup and Bromberg JJ each proceeded on the basis that the following proposition from an earlier Full Court decision, *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 231; (2003) 77 ALD 402 at [19] was correct: 'If the tribunal makes a finding and that finding is a critical step in its ultimate conclusion and there is no evidence to support that finding then this may well constitute a jurisdictional error'. Allsop CJ (Markovic and Steward JJ agreeing) recently took the same approach in *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225; (2018) 364 ALR 423 at [32]. In light of the status of the Commission's satisfaction about Ms Hansson's reasonable expectation, as a precondition to the Commission's power to grant remedies for unfair dismissal, I will take the same approach here. If the error that Bronze alleges is made out, then it will be a jurisdictional error.
5. However the test is a stringent one. Bromberg J referred to the authorities in *Australian Postal Corporation v D'Rozario* at [118]. It is, of course, not enough that the court would have come to a different conclusion based on the same evidence. Nor is a mere insufficiency of evidence enough. The ground is not made out unless it is established that there was no evidence or other material to justify the finding made.
6. It is also important to bear in mind the following points made by Basten JA in *L & B Linings Pty Ltd v WorkCover Authority of New South Wales* [2012] NSWCA 15 at [34]:

Four points of caution should be made. First, this passage indicates that the 'no evidence' ground of judicial review depends not on the reasoning of the decision‑maker, but on a comparison between the material available to the decision‑maker and the conclusion reached. Secondly, care must be taken with the term 'no evidence', as an administrative decision-maker is usually entitled to take into account material which would not count as 'evidence' in a judicial context. In what is essentially an inquisitorial inquiry, that material is not necessarily limited to the material placed before the decision-maker by the applicant for review. Thirdly, it is important to bear in mind that the decision-maker may be entitled to seek support for a particular inference from the absence of material supportive of a contrary view. Fourthly, where an evaluative judgment is to be formed on the basis of conflicting indicators, it will be difficult if not impossible to establish a 'no evidence' ground of review.

1. In relation to the second of these points, it is relevant to note that the Commission was able to inform itself in relation to the matter in such manner as it considered appropriate (FWAs 590) and that it was not bound by the rules of evidence (s 591).
2. In the present case, the issue resolved to what could be made of the following passage from Ms Hansson's evidence before the Commission at first instance:

THE COMMISSIONER: What I need you to do is just tell me how that employment came about, how you think it was regular and systemic and then how it changed into ongoing employment after the end of January 2018.

MS HANSSON: Okay. So when I applied for the job via Seek, I recall that pretty much the very next day I went in for a trial and received a casual position that night. The reason I believe it was regular and systematic was just due to the fact I was doing more hours sometimes as a casual than I even did as a full-timer; up to sometimes 70 hours a week and no less than sort of eight fortnights at 65 hours per fortnight. That is when after about a month I got offered a full-time position that ours a didn't take effect until 22 January, so a month after I was already offered the position.

THE COMMISSIONER: Who came to offer you the full-time position?

MS HANSSON: At the time it was actually the original venue manager, Jarrod, but he was dismissed at the time and then I guess the next senior manager, Hamish Laird, then continued to give me the position.

THE COMMISSIONER: All right. Does that mean Jarrod said to you, 'We want you now to work on a permanent basis?' Was he the first one to say that?

MS HANSSON: I was basically asked from the moment I set foot in The Harbour Terrace to basically be the reliable one. I would say, yes, from the moment I was there I was asked - it was going to be busy, it was Christmas period, school holidays, and to expect I would have a lot of hours. I think on one, even, fortnight I did something like 80 hours.

THE COMMISSIONER: All right. Are you saying then that when you started in November, you believed - well, let me tum [sic] this around. What did you believe about what would be occurring with your future employment?

MS HANSSON: Well, I would assume after staiting [sic] at the beginning of the holiday period that I was going to expect regular work due to the fact that they told me it was their busiest period.

THE COMMISSIONER: All right. Am I correct in saying that you were told initially it was a trial period of employment?

MS HANSSON: No, just for the actual two hours I did originally.

THE COMMISSIONER: I see. That's what you meant. All right.

MS HANSSON: Yes.

THE COMMISSIONER: The period as a casual, was it held out to you that if things went well you would be a permanent employee?

MS HANSSON: I got basically offered the full-time job after four weeks of being there. It was just trying to get through the red tape and get it all organised, because it's a smooth running system - as it should be. Yes, it took about a month to finally get the contract together and get it signed.

THE COMMISSIONER: All right. Who gave that contract to you?

MS HANSSON: Hamish Laird.

THE COMMISSIONER: That was about after four weeks, was it?

MS HANSSON: No, the contract didn't come until 22 January, but I was offered the job a month prior to that.

THE COMMISSIONER: All right. Let's just focus on that job offer. When was that?

MS HANSSON: That would have been actually about Christmas time. Like, I'd worked exceptionally hard from the moment I had walked in there, so they more or less kind of offered me the position because I guess of how hard I worked.

1. Bronze submitted that it was open to the Full Bench to make findings that Ms Hansson was told that the Christmas period or the holiday period was the busiest one, that she should expect a lot of hours during that period, and that she would be expected to be reliable. But, it was said, she did not give evidence that she expected that the work would be regular, or give evidence of when she expected that she would start to be engaged to perform 'a lot of work'.
2. In my view there are several reasons why the above passage, when taken as a whole, contained evidence capable of supporting the Full Bench's findings. *First*, Ms Hansson refers to the fact that she went in for a trial 'pretty much the very next day' after applying for the job on Seek and that she received a casual position that night. That suggests that she perceived that there would be demand for her to work frequent shifts right from the start of her employment. *Second*, she does say, expressly, that she believed the employment was regular and systematic. It is true that she does so by way of repetition of a leading question from the Commissioner, but that is a matter of weight that cannot found a finding of jurisdictional error here. *Third*, she says why she formed the expectation: she was doing more hours as a casual than as a full timer. The time sheets were evidence that this was the case from the start, and in conjunction with the other evidence emphasising that the impressions she formed were formed immediately, it was open to the Full Bench to conclude that she formed that opinion within the crucial 10 days at the beginning of her employment. *Fourth*, she said that she was 'basically asked from the moment I set foot in The Harbour Terrace to basically be the reliable one'. That was in response to a question as to when she was first asked to work on a permanent basis. In that context, the reference to reliability in her evidence is capable of being construed as meaning that she understood she would need to come in to work on a regular and systematic basis, as if she were a permanent employee. *Fifth*, she says 'I would assume after staiting [sic starting] at the beginning of the holiday period that I was going to expect regular work due to the fact that they told me it was their busiest period'. It was open to the Full Bench to read this as a statement that she expected regular work right from the beginning of her employment. And the time sheets showed that this expectation was quickly borne out, so it was open to the Full Bench to conclude that it was a reasonable expectation, and became so during the crucial nine or 10 days. It is true that Ms Hansson couched this in terms of an assumption, as Bronze's submissions emphasised. But it was oral evidence given by a lay witness. It should not be read with an eye to such precision of language as to exclude the possibility that she was referring to an expectation she had formed.
3. In my view there was evidence capable of supporting the Full Bench's conclusion that at the beginning of her employment with Bronze, Ms Hansson formed a reasonable expectation of continuing employment on a regular and systematic basis. Whether that conclusion was factually correct on the balance of probabilities is, of course, not relevant to this application.
4. Bronze submitted that the Full Bench fell into a jurisdictional error of the sort identified by the High Court in *Craig v State of South Australia* (1995) 184 CLR 163 at 179, where the court referred to an error of law which causes an administrative tribunal 'to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected'. However the court said that would be a jurisdictional error 'at least in some circumstances', suggesting (as must be the case) that not every erroneous finding or mistaken conclusion will be a jurisdictional error. In *Australian Postal Corporation v D'Rozario* at [109]‑[113], Bromberg J explained that the requirement that the tribunal's exercise or purported exercise of power be affected by the factual error can be satisfied where the error displays a misconception of the statutory task. For the reasons I have given, the Full Bench did not misconceive its task here.
5. I do not uphold ground 2.

## Discretionary grounds

1. Ms Hansson submitted that even if there was jurisdictional error, the application should be refused on discretionary grounds. She claimed that Bronze had failed to apply for a stay of the proceedings in the Commission, and in allowing those to run their course while seeking judicial review in this court, Bronze was having 'a bet each way'. Bronze adduced evidence to the effect that it had sought a stay.
2. Ms Hansson also submitted that since the Commission at first instance has determined the matter a second time, after the Full Bench decision that is challenged here, and the Full Bench had refused permission to appeal from that second decision, quashing the first Full Bench decision would be futile. In view of my conclusion that there was no jurisdictional error, there is no need to determine whether those submissions are correct.

## Conclusion

1. The application is dismissed. Since this matter concerns the FWA, which is generally a no costs jurisdiction, and since Ms Hansson was represented pro bono, counsel indicated that she would not pursue costs. So no order for costs will be made.

|  |
| --- |
| I certify that the preceding sixty-seven (67) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jackson. |

Associate:

Dated: 16 October 2019