Federal Court of Australia

Lee v Fair Work Commission [2021] FCA 1188

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| Appeal from: | | Application for extension of time: *Lee v Superior Wood Pty Ltd* [2021] FCA 515 | |
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| File number: | QUD 161 of 2021 | |
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| Judgment of: | **RANGIAH J** | |
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| Date of judgment: | 6 October 2021 | |
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| Catchwords: | **PRACTICE AND PROCEDURE –** application for extension of time to seek leave to appeal against interlocutory judgment of a single judge of the Federal Court – primary judge dismissed the proceeding on the basis of procedural deficiencies in the applicant’s originating application – application for leave to appeal filed nine days out of time – whether satisfactory explanation for delay – whether proposed application for leave to appeal and appeal have merit – application for extension of time refused | |
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| Legislation: | *Fair Work Act 2009* (Cth) s 570  *Federal Court Rules 2011* (Cth) rr 1.40, 2.16, 4.01, 5.04, 5.23, 12.01, 35.13, 35.14  *Federal Court of Australia Act 1976* (Cth) ss 24(1A) and 24(1AA) | |
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| Cases cited: | *Décor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397  *Lee v Superior Wood Pty Ltd* [2020] FWCFB 6011  *Lee v Superior Wood Pty Ltd* [2021] FCA 515  *Lee v Superior Wood Pty Ltd* *t/a Superior Wood* [2019] FWC 5095  *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980)144 CLR 13  *State of New South Wales v Canellis* (1994) 181 CLR 309  *Wilson v Alexander* (2003) 135 FCR 273 | |
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| Division: | | General Division | |
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| Registry: | | Queensland | |
|  | |  | |
| National Practice Area: | | Employment and Industrial Relations | |
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| Number of paragraphs: | 34 | |
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| Date of hearing: | 16 September 2021 | |
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| Counsel for the Applicant: | The Applicant appeared in person | |
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| Counsel for First to Fourth Respondents: | The First to Fourth Respondents filed submitting notices save as to costs | |
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| Solicitor for the Fifth Respondent: | Mr M Curran of Gilchrist Connell | |

ORDERS

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|  | | QUD 161 of 2021 |
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| BETWEEN: | JEREMY LEE  Applicant | |
| AND: | FAIR WORK COMMISSION  First Respondent  VICE PRESIDENT ADAM HATCHER  Second Respondent  DEPUTY PRESIDENT AMBER MILLHOUSE (and others named in the Schedule)  Third Respondent | |

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| order made by: | RANGIAH J |
| DATE OF ORDER: | 6 OCTOBER 2021 |

THE COURT ORDERS THAT:

1. The application for an extension of time to seek leave to appeal is dismissed.
2. There be no order as to costs.

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

REASONS FOR JUDGMENT

RANGIAH J:

1. This is an application for an extension of time to seek leave to appeal against the judgment of a judge of this Court in *Lee v Superior Wood Pty Ltd* [2021] FCA 515.
2. The judgment of the primary judge was interlocutory. Accordingly, s 24(1A) of the *Federal Court of Australia Act 1976* (Cth) (the **FCA Act**) requires the applicant to obtain leave to appeal. Rule 35.13 of the *Federal Court Rules 2011* (Cth) (the **Rules**) provides that an application for leave to appeal must be filed within 14 days after the date of judgment. Rule 35.14 of the Rules allows an application to be made for an extension of time to seek leave to appeal.
3. The application for an extension of time was filed about nine days outside the time for filing an application for leave to appeal. The factors relevant to the grant of an extension of time include whether the applicant has provided a satisfactory explanation for the delay and whether the proposed application for leave to appeal has prospects of success: *Wilson v Alexander* (2003) 135 FCR 273 at [24]-[25].
4. The factors relevant to the prospects of success of an application for leave to appeal include:
5. whether, in all the circumstances, the judgment of the primary judge is attended by sufficient doubt to warrant it being reconsidered by a Full Court; and
6. whether substantial injustice would result if leave were refused, supposing the decision were wrong.

(*Décor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 398–9).

1. The applicant’s explanation for his delay is that he was unaware of the time limit to seek leave to appeal. The delay was fairly short. The default of the applicant as a self-represented litigant is understandable. The main issue is whether there is sufficient merit in the proposed application for leave to appeal, which in turn depends upon whether there is sufficient merit in the proposed appeal.
2. The proceeding before the primary judge sought review of a decision of the Full Bench of the Fair Work Commission (the **Commission**) made on 10 November 2020: see *Lee v Superior Wood Pty Ltd* [2020] FWCFB 6011. The Full Bench’s decision rejected an appeal by the applicant against a decision of a single Commissioner made on 22 July 2019: see *Lee v Superior Wood Pty Ltd* *t/a Superior Wood* [2019] FWC 5095.
3. The application for review of the Full Bench’s decision came on for a case management hearing before the primary judge on 19 April 2021. His Honour made the following Orders:

1. Superior Wood Pty Ltd trading as Superior Wood be joined as the first respondent.

2. The Fair Work Commission become the second respondent.

3. The presently named second, third and fourth respondents, namely Vice President Adam Hatcher, Deputy President Amber Millhouse, and Commissioner Peter Hampton be removed as respondent parties.

4. The need for the service of the originating application on the new first respondent be dispensed with.

5. The applicant provide forthwith to the Court his telephone number as required by rule 2.16 of the *Federal Court Rules 2011* (Cth).

6. The proceeding be dismissed for want of compliance with order number 6 (sic 5).

7. No order as to costs.

1. The most significant of the Orders was to dismiss the proceeding for want of compliance by the applicant with the order to provide his telephone number as required by rule 2.16(1)(d) of the Rules.
2. The primary judge provided reasons for making the Orders of 19 April 2021. His Honour observed that the applicant’s originating application was deficient in two ways. First, it failed to provide a contact telephone number as required by r 2.16(1)(d) of theRules. Second, it named unnecessary parties, namely the members constituting the Full Bench of the Commission (instead of the Commission itself), and failed to name a necessary party, namely the applicant’s former employer, Superior Wood Pty Ltd (the **employer**).
3. The primary judge’s reasons noted that at the commencement of the case management hearing, the proceeding had been regularised in the second respect, such that the individual members of the Full Bench had been removed as parties and replaced by the Commission, and the employer had been joined as a party. Accordingly, his Honour had made Orders 1 to 3 of the Orders of 19 April 2021.
4. The primary judge’s reasons continued as follows:

4 The case then proceeded further with case management. In the course of that, and noting the absence of a telephone number, as well as a residential address, I asked Mr Lee to provide each of them. He provided a residential address. That residential address, as handwritten by him, I direct be marked as Exhibit 1 and placed on the Court file with the annotation, not to be opened without the leave of the Court or a judge.

5 Mr Lee declined to provide a telephone number. I directed him so to do. I also adjourned the Court so that he might have the benefit of reflecting upon what may be the consequence of noncompliance with the direction to provide a telephone number. Upon resumption, I ascertained from the employer that it had no particular interest in knowing the telephone number; that had been a concern on the part of Mr Lee. I informed Mr Lee that it was my settled view that it remained the case that the administration of justice in this case required that the registry be able to contact him as required by telephone in addition to other means of communication. I also expressly directed his attention to r 2.16(1)(d) of the Rules and provided him with a copy of that for him to read in conjunction with his brother. I warned him that a consequence of a failure to comply with a direction to provide the telephone number may be that his proceeding may be dismissed for want of compliance with a case management direction.

6 I offered Mr Lee a further opportunity, on brief adjournment, to reflect on the course that he had earlier indicated. He voiced an apprehension on his part to me as to some particular adverse impact or disadvantage that might attend the provision of a telephone number to the Court. I assured him that there would be no such disadvantage, but rather, if anything, every advantage in terms of the administration of his proceeding in the facility offered by the ability to contact him as if and when required by telephone. He persisted nonetheless in a settled view that he would not provide a contact telephone number. That being so, in my view, the proceeding should be dismissed for want of compliance with a case management direction. I so order.

1. The matters referred to by the primary judge in these paragraphs were reflected in Orders 5 and 6 of the Orders of 19 April 2021.
2. The proposed grounds of appeal in the applicant’s draft notice of appeal are as follows:

1. Judge Logan refused to allow the unrepresented Applicant to be represented by his brother, then ignored the Applicant’s Appeal of that Decision.

2. This is grossly unfair as the Respondent is a state legal tribunal and has unlimited resources and government solicitors for representation.

3. There was no Joinder Application for Superior Wood to be listed as a Respondent.

4. Judge Logan Ordered the alteration of an Originating Application without any application to do so, and without the consent of the Applicant.

5. Judge Logan acted to strike the matter out by Summary Dismissal, independently of parties. There was no application for Summary Dismissal.

6. Judge Logan Summarily Dismissed an historic appeal for want of the Applicants phone number. The Dismissal was entirely at the discretion of Judge Logan and was petty, redundant, and an attempt to deny the Applicant due legal process.

7. Judge Logan has misrepresented the Applicant in his *Reasons For Judgement*. The Court claims that the Applicant was concerned that his phone number would be misused by Superior Wood. This is wrong. The Applicant was refusing to provide his personal telephone number to the Court because the Court had previously abused it. The Court was again attempting to use the Applicants phone contact to divert the matter to an informal process, instead of progressing it to substantive appeal hearing.

8. Judge Logan has attempted to deny the Applicant a proper appeal hearing, by demanding the Applicant’s phone number for informal, secret communications and negotiations.

9. Judge Logan used the Case Management Hearing to introduce and legitimize a non-party to the matter (Superior Wood).

10. Judge Logan then provided detailed legal strategy advice to Superior Wood, about how it might best extinguish the Applicant’s case in the Federal Court. This could well constitute Unconscionable Conduct.

11. Judge Logan failed to order the Fair Work Commission to make a Submitting Notice.

12. The Fair Work Commission failed to make a Submitting Notice.

13. The Fair Work Commission made submissions to the Court in breach of it’s obligation to provide a Submitting Notice.

14. Judge Logan asked the Fair Work Commission for submissions. He then heard those submissions, in conflict with his obligation to impartiality, and immediately ordered the suggested alterations.

15. The Fair Work Commission has secretly contacted and threatened the unrepresented Applicant.

16. The Federal Court has a profound, undeclared conflict of interest in the matter which has overtaken its’ obligations to treat this precedent matter impartially.

17. Art.14 of The Australian Human Rights Commission Act 1986 (also Art.14 of the International Covenant on Civil and Political Rights (ICCPR).

*All persons shall be equal before the courts and tribunals. In the determination of a ...* [person’s] *rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.*

18. The Federal Court is the only avenue of appeal from the Fair Work Commission. The Applicant has sought to have the Federal Court hear this Appeal and has been denied by the Court as a result of its own conflict of interest.

19. The Court’s requirement of impartiality means that proceedings must be free from bias, and the objective perception of bias. The Court has continuously displayed bias against the Appellant.

20. I appeal the Court’s Order to dismiss this matter.

1. Proposed ground 1 alleges that the primary judge refused to allow the applicant to be represented by his brother. Proposed ground 2 argues that this was unfair in light of the disparity of resources between the Commission and the applicant.
2. Rule 4.01(1) of the Rules provides that a person may be represented in the Court by a lawyer or may be unrepresented. There is no suggestion that the applicant’s brother is a lawyer. The applicant had no *right* to representation by his brother. There is no requirement that legal representation be provided for a party to a civil proceeding: *State of New South Wales v Canellis* (1994) 181 CLR 309 at 328. This principle recognises that there may well be disparity between the resources of the parties. However, that disparity does not require that a party must be permitted to be represented by a person who is not a lawyer. The applicant’s brother was permitted to act as a McKenzie friend. The applicant has not demonstrated any arguable ground of error on the basis of his Honour’s refusal to allow the applicant to be represented by his brother.
3. Proposed grounds 3, 4 and 9 purport to challenge the joinder of the employer as a respondent, or the substitution of the Commission as a respondent in place of the individually named members of the Full Bench. However, s 24(1AA)(b)(i) of the FCA Act provides that no appeal may be brought from a decision to join or remove a party. Accordingly, those grounds cannot succeed.
4. Proposed grounds 5, 6, 7 and 8 challenge the dismissal of the proceeding on the basis of the applicant’s failure to comply with an order that he provide to the Court his telephone number as required by r 2.16(1)(d) of the Rules.
5. Rule 2.16 of the Rules provides, relevantly:

**2.16 Details at foot of each document**

(1) A document filed in a proceeding must contain the following information under a horizontal line at the foot of the front page of the document:

(a) the name and role of the party on whose behalf the document is filed;

(b) the name of the person or lawyer responsible for preparation of the document;

(c) if the party is represented by a lawyer—the telephone number, fax number and email address of the lawyer;

(d) if the party is not represented by a lawyer—the telephone number, fax number and email address, if any, of the party;

(e) the address for service of the party.

…

1. The applicant submits that the words “if any” in r 2.16(1)(d) of the Rules indicate that provision of a telephone number is at the discretion of the party filing a document. However, that submission misconstrues the provision.
2. Rule 2.16(1) provides that a document filed in a proceeding “must contain the following information”. The rule then sets out, from subparagraphs (a)-(e), five categories of information that must be contained in the document.
3. Subparagraphs (a), (b), (c), and (e) are drawn upon the assumption that all parties have and can provide the information required by those subparagraphs. Subparagraph (d), which applies to a party not represented by a lawyer, is different. The words “if any” qualify the words, “the telephone number, fax number and email address”. Subparagraph (d) envisages that not all unrepresented parties will necessarily have a telephone number, fax number or email address. Subparagraph (d) requires that if a party who is not represented by a lawyer has a telephone number, fax number and email address, the party *must* provide that information in a document filed in a proceeding.
4. The applicant does not suggest that he does not have a telephone number. In fact, he asserts that he did not want to provide his telephone number to the Court because he had received a telephone call from the associate of another judge in an earlier proceeding which he regarded as being inappropriate.
5. The applicant submits that it was unjust and unfair that his proceeding was summarily dismissed on the basis of a matter as trivial as a failure to provide his telephone number in his originating application. However, that submission mistakes the basis upon which the proceeding was dismissed. The primary judge’s orders and reasons make it clear that the proceeding was not dismissed because of the applicant’s failure to provide his telephone number *per se*, but because of the applicant’s refusal to comply with the order that he provide the telephone number. The applicant was provided with repeated opportunities to comply with the order, but he refused to do so.
6. The primary judge had the power pursuant to r 5.04(1) of the Rules to make directions for the management, conduct and hearing of the proceeding. It was within his Honour’s power to make the order requiring the applicant to provide his telephone number. The reasons make it clear that his Honour considered that provision of the applicant’s telephone number would be of benefit in the administration of the proceeding.
7. Rule 5.23(1) provides that if an applicant is in default of an order of the Court, a respondent may apply to the Court for an order, relevantly, to dismiss the whole or any part of the relief claimed by the applicant. As the applicant points out, there was no application by the respondent for summary dismissal of the proceeding, but r 1.40(a) of the Rules provides that the Court may exercise a power mentioned in the Rules on its own initiative. That is the course that his Honour took. The applicant was expressly warned that if he failed to comply with the Order to provide his telephone number, the consequence may be that the proceeding be dismissed for want of compliance with the order. Despite that warning, the applicant refused to provide his telephone number.
8. It was within the power of the primary judge to make an order requiring that the applicant provide his telephone number and, when the applicant refused to comply with that order, to exercise the discretion under r 5.23(1) to order that the proceeding be dismissed. The applicant has not demonstrated any arguable error in the exercise of the primary judge’s discretion.
9. Further, there is no arguable case of denial of procedural fairness in circumstances where the applicant was expressly warned of the consequences of non-compliance with the order, but wilfully persisted in that non-compliance. I am unable to discern any arguable case of error in respect of the dismissal of the proceeding by the primary judge.
10. Proposed grounds 10, 14 and 19 make allegations of bias and apprehended bias against the primary judge. It is apparent that the proceeding had been commenced in an irregular manner, as a necessary respondent had not been named and the members of the Full Bench of the Commission had been named individually. The discussion between the primary judge and the legal representatives of the respondents was aimed at regularising the proceeding. The course taken by his Honour of joining the employer and substituting the Commission as a respondent in place of the individually named members of the Full Bench was proper and appropriate. There is simply no basis on the material for the allegations of bias and apprehended bias.
11. Proposed grounds 11, 12 and 13 concern the failure of the primary judge to order the Commission to file a submitting notice. The applicant’s argument seems to be that the Commission was required to comply with the principle in *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980)144 CLR 13 at 35–36, and that the Court was required to ensure that compliance by ordering the Commission to file a submitting notice. The *Hardiman* principle is a convention that generally a tribunal will not actively defend a proceeding but will submit to such order as the court may make. It is not a prohibition upon the participation of a tribunal in a proceeding. The role taken by a tribunal is a matter for the tribunal itself, informed by the risk that the tribunal may endanger its impartiality. It is for the tribunal to determine whether to file a submitting notice pursuant to r 12.01(1) of the Rules. There was no error in his Honour’s failure to order the Commission to file a submitting notice.
12. Proposed grounds 16, 17 and 18 allege that the Federal Court itself has a conflict of interest. The applicant submits that as the President of the Commission is a Federal Court judge, other Federal Court judges who consider the validity of a decision of the Commission have a conflict of interest. It was not explained by the applicant how or why such a conflict of interest arises. It was pointed out to the applicant that if his submission were correct, his proposed appeal could not be heard and determined. The applicant’s submission cannot be accepted.
13. Proposed grounds 15 and 20 do not advance any grounds of appeal against the judgment of the primary judge. They need not be considered further.
14. The applicant has failed to demonstrate that an application for leave to appeal against the judgment of the primary judge would have sufficient merit to warrant an extension of time to apply for leave to appeal.
15. Accordingly, the application for an extension of time to apply for leave to appeal must be dismissed.
16. The parties did not make submissions as to costs, presumably on the basis that this is a proceeding to which s 570 of the *Fair Work Act 2009* (Cth) applies. I will make no order as to costs.

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| I certify that the preceding thirty-four (34) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rangiah. |

Associate:

Dated: 6 October 2021

SCHEDULE OF PARTIES

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|  | QUD 161 of 2021 |
| Respondents |  |
| Fourth Respondent: | COMMISSIONER PETER HAMPTON |
| Fifth Respondent: | SUPERIOR WOOD PTY LTD |