FEDERAL COURT OF AUSTRALIA

Menzies v Fair Work Commission [2020] FCA 36

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| File number: | NSD 1780 of 2018 |
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| Judge: | **KATZMANN J** |
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| Date of judgment: | 4 February 2020 |
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| Catchwords: | **INDUSTRIAL LAW** — judicial review of decision of Full Bench of Fair Work Commission to refuse permission to appeal — whether decision affected by jurisdictional error — alleged errors relating to weight to be attached to factors in s 366(2) of *Fair Work Act 2009* (Cth), legal representation for employer in preparation of submissions; alleged failure of Commission to comply with Code of Conduct — apprehended bias — circumstances in which parties may be legally represented in matters before Fair Work Commission —whether employment backgrounds of members of Fair Work Commission before appointments to Commission gives rise to apprehended bias — whether alleged failure to comply with Code of Conduct constitutes jurisdictional error |
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| Legislation: | *Fair Work Act 2009* (Cth) ss 44(1), 125, 365, 366, 400, 562, 563, 569, 569A, 570, 577(a), 581B, 596, 604(1), 609, 613(1), 626(1), 627, 789, Pts 2-3, 2-6, 3-1, 5-1 div 5*Fair Work Commission Rules* *2013* (Cth) r 12*Federal Court of Australia Act 1976* (Cth) ss 37N, 37M, 53A*Judiciary Act 1903* (Cth) s 39B*Migration Act 1958* (Cth) ss 420(1), 353(1) |
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| Cases cited: | *Abebe v The Commonwealth of Australia* (1999) 197 CLR 510*Attorney-General (NSW) v Quin* (1990) 170 CLR 1*Australasian Meat Industry Employees’ Union v Fair Work Australia* *(No 2)* (2012) 203 FCR 430*Australian Workers Union v Leighton Contractors Pty Limited (No 2)* (2013) 232 FCR 428*Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial* *Australia Pty Ltd* (2015) 235 FCR 305*Baker v Patrick Projects Pty Ltd* (2014) 226 FCR 302*Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78*Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* (2000) 203 CLR 194*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337*Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416; 64 WN (NSW) 107*Fair Work Building Industry Inspectorate v Foxville Projects Group Pty Ltd* [2015] FCA 492*Fitzgerald v Woolworths* [2017] FWCFB 2797*George v Fletcher (a trustee)* [2012] FCAFC 148*Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70*Livesey v New South Wales Bar Association* (1983) 151 CLR 288*Menzies v Lindsay Australia Limited t/a Lindsay Brothers Management* [2018] FWC 1850*Menzies v Lindsay Australia Limited t/a Lindsay* *Brothers Management* [2018] FWCFB 1037*Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24*Minister for Immigration and Border Protection v Li* (2013) 249 CLR 332*Minister for Immigration v Jia Legeng* (2001) 205 CLR 507*Mwango v Fair Work Commission* [2019] FCA 1274*Nulty v Blue Star Group Pty Ltd* (2011) 203 IR 1*Periklis Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd t/as Richmond Oysters* [2018] FWCFB 901*Re Commonwealth of Australia; Ex parte Marks* (2000) 75 ALJR 470*Re Finance Sector Union of Australia; Ex parte Illaton Pty Ltd* (1992) 66 ALJR 583*Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78*Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82*ResMed Limited v Australian Manufacturing Workers’ Union* (2015) 232 FCR 152*Spotless Services Australia Ltd v The Honourable Senior Deputy President Jeanette Marsh* [2004] FCAFC 155*Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees’ Union* (2015) 234 FCR 405*Trustee for The MTGI Trust v Johnston* [2016] FCAFC 140*Warrell v Walton* [2013] FCA 291; (2013) 233 IR 335 |
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| Date of hearing: | 2 September 2019 |
|  |  |
| Date of last submissions: | 6 September 2019 |
|  |  |
| Registry: | New South Wales |
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| Division: | Fair Work |
|  |  |
| National Practice Area: | Employment & Industrial Relations |
|  |  |
| Category: | Catchwords |
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| Number of paragraphs: | 88 |
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| Counsel for the Applicant: | The applicant appeared in person |
|  |  |
| Counsel for the First Respondent: | The first respondent filed a submitting notice |
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| Counsel for the Second Respondent: | Mr N D Read |
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| Solicitor for the Second Respondent: | Henry William Lawyers |

ORDERS

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|  | NSD 1780 of 2018 |
|   |
| BETWEEN: | IAN DAVID MENZIESApplicant |
| AND: | FAIR WORK COMMISSIONFirst RespondentLINDSAY AUSTRALIA LIMITEDSecond Respondent |

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| JUDGE: | KATZMANN J |
| DATE OF ORDER: | 4 february 2020 |

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The applicant pay the second respondent’s costs.

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

REASONS FOR JUDGMENT

## Introduction

1. Ian David Menzies is aggrieved by a series of decisions of the Fair Work **Commission**. Mr Menzies is a former employee of **Lindsay** Australia Limited t/a Lindsay Brothers Management Pty Ltd. He was employed by Lindsay as a line haul driver from 20 August 2017 until 24 October 2017, when he was dismissed. The dismissal was effective immediately. Mr Menzies contends that his dismissal was unfair. On 22 November 2017 he applied to the Commission for it to deal with the dispute. Lindsay filed a response in which it objected to his application on the ground that it was out of time.
2. Section 365 of the *Fair Work Act 2009* (Cth) (**FW Act**) entitles a person who has been dismissed and who alleges that the dismissal was in contravention of Pt 3-1 of the FW Act to apply to the Commission for it to deal with the dispute. Section 366 requires that the application be made within 21 days after the dismissal takes effect or within such further period as the Commission allows but only empowers the Commission to allow a further period if it is satisfied that there are exceptional circumstances, taking into account certain matters set out in the section. Mr Menzies’ unfair dismissal application was eight days out of time. Lindsay filed a response in which it objected to the application on that basis, contending that there were no exceptional circumstances which would entitle the Commission to extend the period. Consequently, before the Commission could consider the merits of the application, it was necessary for Mr Menzies to satisfy the Commission that there were exceptional circumstances to warrant the time being extended and that the time should be extended.
3. The application was ultimately allocated to Commissioner Johns who declined to extend the time and therefore dismissed the application. Mr Menzies lodged an appeal but a Full Bench of the Commission refused to grant him permission to appeal.
4. By an amended originating application filed on 16 July 2019, Mr Menzies challenges the decision of the Full Bench on a number of grounds.

## Background

1. The application to the Commission was initially allocated to Commissioner Riordan and the parties were informed that the matter would be listed on 19 December 2017 for “an Extension of Time Conference/Hearing via telephone”. The parties were directed to file their outlines of argument by 13 December 2017. That day, Russ Baldwin of BBW Lawyers submitted Lindsay’s outline of argument and, in a covering email copied to Mr Menzies, sought leave to appear on its behalf. Mr Menzies, who had no legal representation, emailed the chambers of Commissioner Riordan the same day. He did not mention Mr Baldwin’s application, merely noting that Lindsay was “represented by special Counsel”. He asked to be able to present his case in person, saying that he was “completely opposed to telephone hearings unless contentions are resolved by prior consent which [was] not the case in this matter”. His request was conveyed to Mr Baldwin, who opposed it because Lindsay’s representative was based in Brisbane and it would be inconvenient for her to travel to Sydney for the hearing.
2. On 15 December 2017 Commissioner Riordan informed the parties that the matter would proceed by telephone and that this was the standard method for conducting hearings on applications for extensions of time. On 18 December 2017 he notified the parties that he had granted permission for Lindsay to be legally represented at that hearing. At the same time he advised Mr Menzies that, if he wished to attend in person, he was free to do so. Mr Menzies asked to be allowed to appear in person at the hearing and, in the light of Mr Menzies’ request, the Commission vacated the hearing, scheduled to take place the following day. On 22 December 2017 Commissioner Riordan published his reasons for granting permission for Lindsay to be legally represented. In short, he formed the view, based on the contents of Mr Menzies’ email, that he did not oppose Lindsay’s application.
3. On 18 December 2017, Mr Menzies filed a notice of appeal. Two grounds were given, which were later supplemented by a third. In substance they were that:
4. granting the request for legal representation was contrary to s 596 of the FW Act, apparently on the basis that the Commissioner had allegedly ignored the fact that Lindsay had been legally represented for two weeks beforehand;
5. Mr Menzies had not been allowed to appear in person; and
6. the Commissioner made his decision without giving Mr Menzies the opportunity to be heard on Lindsay’s application for leave to be represented by a lawyer (**leave application**).
7. Mr Menzies claimed that it would be in the public interest for the Commission to grant permission to appeal for two reasons: first, that it would be unjust and unfair for a large corporation like Lindsay to be represented by a large law firm; and second, that it was his “unalienable right” to appear in person.
8. The Full Bench (Gooley DP, Beaumont DP and Johns C) (**the First Full Bench**) dismissed Mr Menzies’ arguments with respect to grounds 1 and 2, but determined that Mr Menzies had made out a case of appealable error with respect to ground 3 and that it was in the public interest to grant permission to appeal on that basis. The Full Bench proceeded to grant permission to appeal, to uphold the appeal, to quash Commissioner Riordan’s decision, and to refer the matter to Commissioner Johns to determine Lindsay’s leave application and to decide whether to grant Mr Menzies an extension of time: *Menzies v Lindsay Australia Limited t/a Lindsay* *Brothers Management* [2018] FWCFB 1037 (**the First Full Bench decision**).
9. On 16 February 2018 Commissioner Johns issued directions for the conduct of the matter, including directions relating to the filing and service of outlines of argument, statements of evidence, and other documents upon which the parties sought to rely.
10. Written submissions were filed by both parties. Lindsay’s submissions, dated 23 February 2018, were signed by Kate Southworth and Broderick Jones, who I gather were employees and/or officers of Lindsay. In his response dated 28 February 2018, Mr Menzies noted that the submissions did not address the question of representation and contended that the submissions were written by Lindsay’s lawyers. At the hearing, Lindsay was represented by Mr Jones. He is described in the Commissioner’s decision as Lindsay’s company secretary and legal counsel, which I take to mean in-house counsel.
11. Mr Menzies asserted that, although he asked Lindsay for a copy of his employment documents and pay slips in early September 2017, it was not until 25 November 2017, three days after his application was filed in the Commission, that he received those documents. He said that amongst them was a copy of the Fair Work Information Statement which advised of the 21‑day limit to lodge an unfair dismissal claim. I interpolate that subs 125(1) of the FW Act requires that an employer give each employee the Fair Work Information Statement before, or as soon as practicable after, the employee starts employment. Section 125 is a provision of the National Employment Standards which, if contravened, exposes an employer to the risk of a civil penalty: FW Act, subs 44(1). Mr Menzies argued that he was unaware of the prescribed time to lodge his application, that he was in a state of turmoil as a result of his dismissal, and that Lindsay’s failure to provide him with employment documents, including the Fair Work Information Statement, was exceptional.
12. In its submissions Lindsay contended that Mr Menzies received a starter pack, which included the Fair Work Information Statement and other documents that he returned to Lindsay at its request and which were only returned to him after he was terminated in accordance with his request. As the Commissioner pointed out, however, Lindsay adduced no evidence to support this contention.
13. Consequently, the Commissioner accepted Mr Menzies’ explanation and that he was unaware of the time limit. After considering the factors listed in s 366, however, Commissioner Johns was not satisfied that there were exceptional circumstances. Consequently, he declined to extend time and dismissed Mr Menzies’ application: *Menzies v Lindsay Australia Limited t/a Lindsay Brothers Management* [2018] FWC 1850. It seems that Lindsay’s application for leave to be represented by a lawyer at the hearing was not pressed.
14. Mr Menzies filed a notice of appeal from Commissioner Johns’ decision. That appeal was heard by a second Full Bench comprised of Catanzariti V-P, Bissett C and Hunt C (**the** **Second Full Bench**). It is that decision which is the subject of the present application. Mr Menzies had also filed an application challenging the First Full Bench decision, but on 25 June 2019 he successfully applied for leave to withdraw that application and the application was dismissed. At no time, however, did he file an application in this Court challenging the decision of Commissioner Johns.

## The proceeding before the Second Full Bench

1. The notice of appeal to the Second Full Bench was not before the Court. The grounds of appeal, as summarised by the Full Bench, were as follows:
* The Commissioner ought not to have heard the matter as he was a member of the Full Bench that ruled against the Appellant on grounds 1 and 2 of the appeal.
* The Decision is contrary to the facts and against the evidence with the usual art of lawyer sophistry in convoluting the facts.
* The Commissioner’s discretion has miscarried and has not been exercised judicially in accordance with the rules of reason and justice. The Commissioner’s Decision is arbitrary and capricious. It was made in accordance with the Commissioner’s private opinion as to s.366(2)(a) of the Act, as well as the meaning of ‘exceptional’ in *Nulty v Blue Star* [*Nulty v Blue Star Group Pty Ltd* (2011) 203 IR 1]. Further, the Decision was unjust given that s.366(2)(b)(c)(d) and (e) were found in the Appellant’s favour or otherwise given neutral weight.
* Employers ought not to be allowed to misuse s.596 of the Act by using lawyers to represent them without permission in the lead up to the hearing.
1. The gravamen of the fourth ground was that Lindsay had been represented by lawyers since 4 December 2017, that Lindsay’s submissions were written by lawyers, who only ceased to act the day before the hearing before Commissioner Johns, and that Lindsay had not been granted permission for legal representation at any time except by the First Full Bench in relation to the question of procedural fairness before Commissioner Riordan. In his submissions to the Second Full Bench Mr Menzies noted that he had strongly objected to Lindsay’s representation by lawyers, including “shadow lawyers”, as he contended BBW Lawyers were. He pointed out that, at the hearing, he reiterated his objection and that, although Commissioner Johns said he would deal with the matter, he never did.
2. Mr Menzies argued that it was in the public interest for permission to appeal to be granted because, as he put it:
* He had been dismissed without a lawful reason and he ought not to be denied the overriding intentions of the Act to deliver justice by at least hearing the case.
* The Respondent ought not to be allowed to “get away” with not supplying employment documents to their employees as has been [accepted] by Commissioner Johns at paragraph [19] of the Decision.
* Contrary to s.596 and the intention of the Act, the Respondent enjoyed the benefit of legal representation and having its written submissions prepared by lawyers. It was only 1 day prior to the hearing that its lawyers ceased to act. These circumstances are “far more than” what is described as “shadow lawyers” in *Fitzgerald v Woolworths*.
1. The hearing concluded on 2 May 2018 and the Second Full Bench reserved its decision. Four days later, Mr Menzies filed further submissions alleging apprehended bias on the part of members of the Full Bench based on the positions they held before they were appointed to the Commission. But no application was made for the Full Bench to recuse itself.

## The decision of the Second Full Bench

1. The Second Full Bench held that the matters raised by Mr Menzies in his supplementary submissions did not provide a basis for an apprehension of bias. It considered that it was not in the public interest to grant permission to appeal and refused permission to appeal because Mr Menzies had not established that there was an arguable case of error in relation to any aspect of the decision or that the Commissioner’s conclusion was attended by sufficient doubt to warrant its reconsideration.
2. On the question of the public interest, the Full Bench said that it was not persuaded that the public interest was “enlivened”, explaining “more specifically”, that it was not satisfied that there was “a diversity” of first instance decisions requiring guidance from an appellate body; that the appeal raised issues of importance and/or of general application; that the Commissioner’s decision manifested an injustice or that the result was counter-intuitive; or that the legal principles applied by the Commissioner were disharmonious when compared with other decisions dealing with similar matters.
3. On the question of the Commissioner’s decision, the Full Bench held that there was no error of approach. The Full Bench stated (at [27]) that Commissioner Johns had “due regard” to each of the requirements in subs 366(2), dealt with them “in an orthodox way”, had regard to the evidence about the reasons for delay, determined that there were no exceptional circumstances, and weighed up that finding against the various factors in para 366(2)(b)–(e). It also considered that no significant error of fact was disclosed.

## The proceeding in this Court

1. By an amended originating application filed on 16 July 2019 Mr Menzies sought the following relief:
2. a declaration that the decision of the Full Bench was made in jurisdictional error;
3. an order quashing the decision;
4. an order remitting the decision to the Commission for determination according to law; and
5. an order for costs.
6. The relief was sought on the following three grounds:
7. in considering his application for an extension of time, the Commission failed to give weight to subs 366(2) and its “intentions” and “misused s 366 to deny [his] claim for pedantic reasons”, that is, Mr Menzies’ “well founded continued criticism” of the Commission;
8. the Commission erroneously allowed Lindsay to be legally represented without permission; and
9. the Commission failed to abide by its own code of conduct.
10. Mr Menzies filed a number of documents, each of which was entitled “affidavit/submissions”. To the extent that these documents contained evidence that was before the Commission, they were received as evidence. To the extent that they contained submissions, they were received as submissions. The submissions canvassed a variety of matters, many of which were irrelevant to the present application or raised errors of no consequence. The submissions strayed beyond the grounds of the application and took issue with the merits of the various decisions made in connection with his unfair dismissal application, including the decisions of Commissioner Riordan and the First Full Bench. They were also inflammatory and replete with political and personal invective against Lindsay’s lawyers, the Commission and its members, and the barrister who had agreed to accept a referral from the Court to represent him.

## The statutory scheme and the relevant legal principles

1. A person who is aggrieved by a decision of a Commissioner may appeal the decision to a Full Bench of the Commission, but only with the permission of the Commission: FW Act, subs 604(1) read with subs 613(1). In the present case, the Second Full Bench said that it was “open to the commission to grant permission to appeal where the public interest is not enlivened”. In this respect the Full Bench was mistaken. In appeals in unfair dismissal matters, the Full Bench *must* not grant permission to appeal unless it considers that it is in the public interest to do so: FW Act, subs 400(1). Moreover, to the extent that the appeal is on a question of fact, it may only do so where the decision involves “a significant error of fact”: FW Act, subs 400(2). As the Full Bench recognised, the determination of whether it is in the public interest to grant permission to appeal involves a broad value judgment: *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78 at [44] (Buchanan J).
2. Mr Menzies, who at all relevant times has represented himself, styled his amended originating application as an “Amended Originating application And Writ of Certiorari & Mandamus And Appeal/Merits Review”. Each ground of review was entitled “An Appeal/Merits Review”. Both in his written submissions and in oral argument, Mr Menzies tried to persuade the Court that he should have succeeded before the Full Bench and also before Commissioner Johns. But this is not an appeal. The case comes before the Court in its original jurisdiction. A person who is aggrieved by a decision of the Commission has no right of appeal to this Court. Nor is it a merits review. Rather, it is a judicial review. In such a review, no matter what the Court may think of the decision under review, it cannot inquire into the merits. The jurisdiction of the Court is a limited one, conferred by s 562, read with s 563, of the FW Act and also by s 39B of the *Judiciary Act 1903* (Cth). In the absence of error of law on the face of the record, the Court may only grant relief for jurisdictional error, and the onus is on the applicant to establish that the decision under challenge is affected by jurisdictional error. Even if the Second Full Bench made an error of law, certiorari for error of law on the face of the record is not available, since the record does not include the reasons of the Second Full Bench: see *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial* *Australia Pty Ltd* (2015) 235 FCR 305 at [88]–[97]. Consequently, Mr Menzies can only succeed if he can satisfy the Court that the decision of the Second Full Bench was affected by jurisdictional error. This proceeding is not a vehicle for reviewing the decision of Commissioner Johns or any of the antecedent decisions.
3. A failure to accord procedural fairness will vitiate an administrative decision: *Re Refugee Review Tribunal; Ex parte* ***Aala*** (2000) 204 CLR 82. Thus, a decision may be quashed for actual or apprehended bias: see, for example, *Minister for Immigration v Jia Legeng* (2001) 205 CLR 507. Jurisdictional error will also arise if the Full Bench misunderstood the nature of its jurisdiction, misconceived its duty, failed to apply itself to the question it was required to answer, or misunderstood the nature of the opinion it was to form: *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [31] (Gleeson CJ, Gaudron and Hayne JJ). A mistake of law, however, even as to the proper construction of a statute, does not necessarily give rise to jurisdictional error: *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416; 64 WN (NSW) 107 (Jordan CJ); *Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees’ Union* (2015) 234 FCR 405 at [58]–[69]. Thus, as Buchanan J put it in *Coal & Allied Mining Services Pty Ltd v Lawler* at [43]:

Provided the Full Bench did not misunderstand its powers and functions in some [relevant] respect …, the evaluation of the matters relevant to whether permission to appeal should be given was an issue committed to the Full Bench by the Act. It is not a matter for this Court, whose role in a case such as the present is limited to examining whether jurisdictional error was committed.

## Consideration

### Ground 1: Alleged failure to give “full weight” to s 366(2)(a)–(e)

1. Section 366 of the FW Act governs the time for making an application under s 365 for the Commission to deal with a dismissal dispute. It provides as follows:

(1) An application under section 365 must be made:

(a) within 21 days after the dismissal took effect; or

(b) within such further period as the FWC allows under subsection (2).

(2) The FWC may allow a further period if the FWC is satisfied that there are exceptional circumstances, taking into account:

(a) the reason for the delay; and

(b) any action taken by the person to dispute the dismissal; and

(c) prejudice to the employer (including prejudice caused by the delay); and

(d) the merits of the application; and

(e) fairness as between the person and other persons in a like position.

1. In his submissions, Mr Menzies argued that it is not good enough to take these factors into account but then afford them no weight. He submitted that Commissioner Johns found that para (2)(a) favoured Lindsay and the other paragraphs were either neutral or favoured his own case. He then submitted that, without taking into account the neutral factors, since two of the remaining factors favoured his case and only one Lindsay’s, he should have been given an extension of time and that the Commissioner’s only reason for dismissing his claim was “because ignorance of the time limit is not a good enough excuse, despite [his, that is Mr Menzies’] valid reasons”. He claimed that both Commissioner Johns and the Second Full Bench failed to take into account the decision in *Periklis* ***Stogiannidis*** *v Victorian Frozen Foods Distributors Pty Ltd t/as Richmond Oysters* [2018] FWCFB 901, although he had relied upon it in his submissions to the Second Full Bench.
2. Mr Menzies also argued that Lindsay’s failure to supply him with a Fair Work Information Statement was indeed “exceptional” and that the Commissioner was “not entitled” to conclude otherwise.
3. There are a number of problems with these submissions.
4. First and foremost, this is not an appeal from Commissioner Johns’ decision. Only the Full Bench can hear such an appeal and it refused permission to appeal. As I indicated earlier, to succeed on the present application, Mr Menzies has to establish that the decision of the Second Full Bench to refuse permission to appeal was affected by jurisdictional error: it is beyond the power of the Court to inquire into the merits of the Commissioner’s decision. As Brennan J put it in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35–36:

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

1. Secondly, unless the subject-matter scope and purpose of the relevant legislation indicates otherwise, the weight to be given to a relevant consideration is generally a matter for the administrative decision‑maker (here the Commission) alone: *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 41 (Mason CJ); ***Abebe*** *v The Commonwealth of Australia* (1999) 197 CLR 510 at [197] (Gummow and Hayne JJ).
2. Thirdly, Mr Menzies’ approach wrongly assumes that each of the factors in s 366(2) is entitled to be given equal weight in every case, so that the balancing exercise necessarily requires subtracting the negative factors from the positive. It also ignores the fact that the statutory condition for granting an extension is that the Commission be satisfied that there are exceptional circumstances and that the Commissioner was not so satisfied.
3. The provision of a Fair Work Information Statement is certainly an important means of ensuring that employees are informed of their rights: *Fair Work Building Industry Inspectorate v Foxville Projects Group Pty Ltd* [2015] FCA 492 (Flick J)at [43]. Moreover, some people might well consider that this circumstance was sufficient to distinguish Mr Menzies’ circumstances from the ordinary. But the question of whether, taking into account the matters listed in s 366(2), there were exceptional circumstances to enliven the Commission’s discretion to extend the limitation period was a matter for the Commission and the Commission alone.
4. Fourthly, because the Full Bench was not hearing the appeal but determining whether it was in the public interest to grant permission to appeal, it did not need to decide whether the Commissioner had given appropriate weight to the various factors in s 366(2) or whether he was wrong to conclude that Lindsay’s failure to supply him with a Fair Work Information Statement did not make his circumstances exceptional. Nor was the Full Bench obliged to refer in its decision to all of Mr Menzies’ arguments or to all the authorities upon which he relied. An application for permission to appeal is not a de facto appeal; it was neither necessary nor appropriate for the Full Bench to conduct a detailed examination of the grounds of appeal: *Trustee for The MTGI Trust v Johnston* [2016] FCAFC 140 at [82].
5. *Stogiannidis* was a very different case. In that case, the Commissioner was found to have erred because he treated the absence of a credible explanation for the entire period of delay as determinative, when the reason for the delay is only one factor to be taken into account before a finding of exceptional circumstances could be made. In the present case, there is nothing in the reasons of Commissioner Johns to suggest that he made a similar error. Nor is it to the point, as Mr Menzies’ submissions appear to suggest, that one decision-maker or group of decision-makers might be disposed to grant permission to appeal or to allow an appeal on a similar set of facts.
6. Fifthly, even if the Full Bench were wrong to conclude that the Commissioner did not fall into error or that there was no significant error of fact or that the Commissioner’s approach was not flawed or that there was “a diversity” of first instance decisions calling for appellate review, it would not have fallen into jurisdictional error. Rather, it would have committed an error within jurisdiction which is not amenable to review. As Hayne J explained in *Aala* at [163]:

There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly.). The former kind of error concerns departures from limits upon the exercise of power. The latter does not.

1. In *Re Commonwealth of Australia; Ex parte Marks* (2000) 75 ALJR 470 McHugh J made the same point with respect to the Full Bench of the Australian Industrial Relations Commission (**AIRC**), the predecessor of the Fair Work Commission. In dismissing an application for an extension of time to apply for constitutional writs directed to the AIRC, his Honour observed at [23] that the role of the Full Bench was to ascertain whether a commissioner had made an error in dismissing an application for relief arising out of the termination of the applicant’s employment. At [24] his Honour said:

In my view, there can be no doubt that the Full Bench understood that its function was to ascertain whether or not Jones C had made a relevant error. The Full Bench considered the applicant’s grounds of appeal, and concluded that, in respect of each of them, Jones C did not relevantly err. If the Full Bench was wrong to reach this conclusion, then that was an error within jurisdiction …

(Footnotes omitted.)

1. Finally, Mr Menzies submitted that the Full Bench erred in its summary of Commissioner Johns’ decision when it observed at [19] that the Commissioner determined with respect to para 366(2)(d) that his case was not without merit or lacking in substance and this was a neutral factor in considering whether to grant an extension of time.
2. This was indeed an error. While it is true that Commissioner Johns considered that Mr Menzies’ case was not without merit or lacking in substance, the Commissioner did not treat this as a neutral factor. Rather, he said at [39] of his reasons that this factor weighed in Mr Menzies’ favour. Nevertheless, the error does not go to jurisdiction.
3. For all these reasons, the first ground of appeal must be dismissed.

### Ground 2: The question of representation

1. Neither party was represented by a lawyer at the hearings before Commissioner Johns or the Full Bench. But Mr Menzies argued that Lindsay was represented by a lawyer for the purposes of preparing and lodging “written material” and that the Full Bench was wrong to determine otherwise. He also argued that the only exception to the requirement to obtain the permission of the Commission for an external legal practitioner to prepare written material in connection with a matter before the Commission is provided for in s 596(3) of the FW Act, which deals with modern awards and minimum wages.
2. The Full Bench observed at [29], that:

As per rule 12(1)(a)-(b) of the Fair Work Commission Rules 2013 a party can be represented by an external legal practitioner, without permission, for the purposes of preparing and lodging written materials in connection with proceedings.

1. The Full Bench went on to cite the following passage from the decision in ***Fitzgerald*** *v Woolworths* [2017] FWCFB 2797 at [45]:

[N]otwithstanding that representation has commenced in relation to the application, permission under s.596(2) for any representational activities undertaken prior to or outside of a conciliation conference, determinative conference, or interlocutory or final hearing will generally not be required because **rule 12(1) exempts, subject to any contrary direction made under rule 12(2)**, the making of written applications and written submissions, the lodgment of documents with the Commission and correspondence with the Commission from the general prohibition in s.596(1). If a party considers themselves to be prejudiced by such representational activity on behalf of the opposing party, the remedy is to apply for a direction under rule 12(2) which, if granted, would require the opposing party to seek permission for representation to the necessary extent under s.596(2).”

(Emphasis added).

1. The Full Bench observed that no contrary direction was made in the proceeding before Commissioner Johns and consequently rejected Mr Menzies’ submission that s 596 had been “misused”. Mr Menzies argued that the observation of the Full Bench was wrong because he did not fail to object to Lindsay’s representation. But that is not the point the Full Bench was making.
2. Mr Menzies did not seek to distinguish *Fitzgerald.* Rather, he argued it was wrongly decided.
3. Mr Menzies’ argument is based on a misreading of the legislation.
4. Section 596 of the FW Act relevantly provides that:
5. Except as provided by subsection (3) or the procedural rules, a person may be represented in a matter before the FWC (including by making an application or submission to the FWC on behalf of the person) by a lawyer or paid agent only with the permission of the FWC.
6. The FWC may grant permission for a person to be represented by a lawyer or paid agent in a matter before the FWC only if:

(a) it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or

(b) it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or

(c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.

…

1. The FWC’s permission is not required for a person to be represented by a lawyer or paid agent in making a written submission under Part 2-3 or 2-6 (which deal with modern awards and minimum wages).
2. For the purposes of this section, a person is taken not to be represented by a lawyer or paid agent if the lawyer or paid agent:

(a) is an employee or officer of the person[.]

…

1. I respectfully agree with the Full Bench in *Fitzgerald* at [34] and [44] that representation for the purposes of s 596 is not limited to representation through oral advocacy. As the opening words of subs 596(1) make clear, however, the requirement for leave to obtain legal representation, including for the purpose of making an application or a submission, is subject to two exceptions, not one. One is the exception provided for in subs 596(3). The other is any exception provided by the procedural rules.
2. Section 609 of the FW Act confers power on the President of the Commission to make procedural rules about a number of matters including the circumstances in which a lawyer or paid agent may make an application or submission to the Commission on behalf of a person who is entitled to make the application or submission. If no exception were provided for in the rules, Mr Menzies would be correct. But the rules include an exception, so he is wrong. Rule 12 of the *Fair Work Commission Rules 2013* (Cth) provides that:
3. For subsection 596(1) of the Act, a person may be represented in a matter before the Commission by a lawyer or paid agent for the following purposes:

(a) preparing a written application or written submission for the person in relation to the matter;

(b) lodging with the Commission a written application, written submission or other document, on behalf of the person in relation to the matter;

(c) corresponding with the Commission on behalf of the person in relation to the matter;

(d) participating in a conciliation or mediation process conducted by a member of the staff of the Commission, whether or not under delegation, in relation to an application for an order to stop bullying made under section 789FC of the Act.

Note 1: Section 596 of the Act sets out other circumstances in which a person may be represented in a matter before the Commission by a lawyer or paid representative.

Note 2: Subrule 12(3) deals with representation of parties in a conference or hearing before a Commission Member.

1. However, subrule (1) is subject to a direction by the Commission to the contrary in relation to the matter.
2. To remove doubt, nothing in this rule is to be taken as permitting a lawyer or paid agent to represent a party in a conference or hearing before a Commission Member.

Note: Section 596 of the Act sets out when the Commission may grant permission for a person to be represented by a paid agent or lawyer, including at a conference or hearing.

1. Mr Menzies submitted that the Full Bench “ignored” subss 596(1) and (2). It did not. Indeed, the passage it extracted from *Fitzgerald* at [45] expressly referred to them.
2. The effect of s 596, read with r 12, is twofold. First, for some purposes, including for the purpose of preparing a submission, legal representation can be provided without the Commission’s permission. Second, the Commission can make a direction to the contrary. In other words, it may direct that a lawyer or paid agent not prepare or be involved in the preparation of a submission. In the present case, however, as the Full Bench observed, no such direction was made, and, while it is apparent that Mr Menzies complained about the role BBW Lawyers allegedly played in the preparation of the submissions, there is no evidence before the Court to indicate that he ever applied for such a direction.
3. In the course of his submissions Mr Menzies referred to the catchwords in ***Warrell*** *v Walton*[2013] FCA 291; (2013) 233 IR 335 and to various passages of the judgment, submitting that he was in an analogous position to the dismissed employee in that case. *Warrell*, however, is of no assistance.
4. In *Warrell*,Flick J held that a Full Bench had erred in concluding that the hearing of Mr Warrell’s unfair dismissal case was fair and just in circumstances in which his erstwhile employer had impliedly been granted permission to appear by a lawyer when he was unrepresented. Flick J found that the Full Bench failed to take into account the fact that Mr Warrell was functionally illiterate and brain damaged; the failure of the Commission at first instance to make findings of fact “relevant to her apparent conclusion” that the requirements of s 596(2) had been satisfied; and the manifest forensic advantages to the employer and corresponding disadvantages to Mr Warrell. His Honour held at [27] that:

A decision which fails to properly address whether permission should be granted or refused in the present proceeding had the consequence that the hearing was not “fair and just” as required by s 577(a). The Full Bench … erred in not so concluding.

I interpolate that para 577(a) of the Fair Work Act provides that the Commission “must perform its functions and exercise its powers in a manner that is fair and just”. The section as a whole reads as follows:

The FWC must perform its functions and exercise its powers in a manner that:

(a) is fair and just; and

(b) is quick, informal and avoids unnecessary technicalities; and

(c) is open and transparent; and

(d) promotes harmonious and cooperative workplace relations.

1. I respectfully agree with the remark made by the Full Bench in *Fitzgerald* at [31] that the basis of the order made by Flick J in *Warrell* is not readily apparent. In particular, it is not clear whether his Honour quashed the decision of the Full Bench because the error his Honour identified was jurisdictional or was an error of law on the face of the record or for some other reason. His Honour did not mention jurisdictional error or find in terms that there was a denial of procedural fairness. Without more, it is difficult to see how a failure to comply with para 577(a) would amount to a jurisdictional error. In *Minister for Immigration and Border Protection v Li* (2013) 249 CLR 332 at [12] French CJ said of a similarly worded provision of the *Migration Act 1958* (Cth) (s 353(1)) (“The Tribunal shall, in carrying out its functions under this Act, pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick”):

The direction in sub-s (1) of [both s 420 and s 353 of the Migration Act] is, as was said in *SZGUR*, a “requirement imposed on the Tribunal, in the discharge of its core function”. That requirement is formulated in terms of broad legislative objectives which are, to some degree, “inconsistent as between themselves”. They are not expressed in terms or in a context which would support a claim of jurisdictional error based on the non-observance of any of them …

1. Be that as it may, reliance on *Warrell* is misplaced. *Warrell* was not concerned with the use of a lawyer to prepare submissions but with the employer appearing at the hearing by a lawyer. That question did not ultimately arise before Commissioner Johns because Lindsay did not appear by a lawyer at the hearing. Moreover, Mr Warrell was found to be functionally illiterate and brain-damaged. No such finding was made in the present case. Mr Menzies is clearly not functionally illiterate and, although he told the Court he had “a slight brain injury” when he was a child, there is no evidence to indicate that he suffers, or has ever suffered, from brain damage.

### Ground 3: Alleged failure to comply with the Code of Conduct

1. This ground was not particularised in the amended originating application. And the Code of Conduct was not identified in the submissions. Presumably it is a reference to the document published pursuant to s 581B of the FW Act, subs (1) of which permits the President of the Commission to determine a Code of Conduct for members. The Code was not in evidence. Importantly, however, subs 581B(2) provides that the determination of a Code of Conduct is not a legislative instrument. In these circumstances, and in the absence of any submission directed to that part of the Code with which the Full Bench allegedly failed to comply, ground 3 is meaningless. I shall nonetheless address the substance of Mr Menzies’ submissions.
2. In oral argument Mr Menzies submitted that the Commission did not act fairly and Lindsay was able to rely on submissions written by its lawyers although it had not obtained permission from the Commission to do so. He also submitted, in effect, that the Commission was stacked with political appointees. The written submissions raised a question of apprehended bias on that account. Mr Menzies further submitted that it was unfair to hold the first Full Bench hearing in Melbourne and to hear applications for extensions of time over the telephone.
3. The first submission rests on the notion that Lindsay needed the permission of the Commission before it could rely on submissions prepared by its lawyers. For the reasons given above, the Commission’s permission was not required.
4. The conduct of the first Full Bench hearing is beyond the scope of the present application.
5. That leaves the question of apprehended bias.
6. The test of apprehended bias in proceedings before a court is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the matters in dispute: *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 293–4; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6]. The same test applies in a tribunal like the Fair Work Commission: ***Re Polites****; Ex parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78; ***Laws*** *v Australian Broadcasting Tribunal* (1990) 170 CLR 70. The hypothetical observer is assumed to know the issues to be decided and the circumstances in which they came to be decided: *George v Fletcher (a trustee)* [2012] FCAFC 148at [72], citing *Laws* at 87.
7. In his submissions Mr Menzies argued that:
8. Commissioner Johns ought not to have heard his application for an extension of time because (as a member of the First Full Bench) he had ruled against him on grounds 1 and 2 of his proposed appeal;
9. Vice-President Catanzariti is a former senior partner of Clayton Utz and former President of the Law Council and Clayton Utz, and the Law Council have advocated for reform of s 596 “especially in regard to representation”; and
10. Commissioner Hunt is a former “HR Lawyer” for various businesses, “champions the protection of business”, and is “a trusted adviser” to multi-national businesses.
11. Mr Menzies also made allegations about Commissioner Riordan and two of the three members of the First Full Bench but they have no bearing on the present application.
12. I am unable to discern any error in the way the Full Bench disposed of Mr Menzies’ complaint about Commissioner Johns, let alone any jurisdictional error. As Wigney J observed in *ResMed Limited v Australian Manufacturing Workers’ Union* (2015) 232 FCR 152 at [44], in considering whether a fair-minded observer might reasonably apprehend that a member of the Commission might not bring an impartial mind to the resolution of the issues he was called upon to determine, “it is necessary to appreciate that an ordinary fair-minded observer would understand that, like a judge, a member of the [Commission] would, from time to time, be required to reconsider matters which might have been previously pronounced upon by the member, and would be capable of departing from an earlier expressed opinion if there was reason to do so”. Besides, by failing to object to the Commissioner hearing his application until after the decision had been published, Mr Menzies should be taken to have waived his right to object: see *George v Fletcher* at [94]–[97] and the authorities referred to there.
13. I now turn to the allegations made about Vice-President Catanzariti and Commissioner Hunt.
14. The Full Bench noted (at [25]) that Mr Menzies made no formal request that the members recuse themselves but dealt with his submission on its merits. The Full Bench observed that “the employment background of members of the Commission prior to their appointment … does not constitute grounds for a claim of apprehended bias absent any other relevant matters”, citing *Re Polites* at 87‒88. The Full Bench was correct. Although in his submissions to this Court, Mr Menzies argued that both Vice-President Catanzariti and Commissioner Hunt “openly support big business and like most lawyers hate self-represented people”, he pointed to no evidence to support either proposition.
15. In *Re Polites* a Deputy President of the AIRC accepted a submission made by a trade union that, because of advice he had given to the Hoyts Corporation while he was in practice as a solicitor, a fair‑minded observer might reasonably apprehend that he could not come to an impartial decision. The High Court (Brennan, Gaudron and McHugh JJ) held that he was wrong to do so and granted an order nisi for a writ of mandamus directing him to hear and determine the matter as a member of a Full Bench. Their Honours stated, at 87, that qualification for membership cannot disqualify a member from sitting. Their Honours observed that one of the statutory criteria for appointment of a Deputy President of the AIRC, a predecessor of the Fair Work Commission, was that the person had had experience at a high level in industry or commerce or in the service of an association representing the interests of employers or employees or a government or an authority of a government. In these circumstances, their Honours remarked:

The prior involvement of a Deputy President with associations or with governments who are frequently parties to proceedings before the Commission cannot be sufficient by itself to amount to a disqualification from sitting in a particular case; nor can the prior acquisition of “skills and experience” amount to such a disqualification. Deputy Presidents who are appointed on account of their industrial background are not disqualified merely because persons with that background have a measure of knowledge or are likely to have a particular attitude to the exercise of the Commission's powers. To adopt the words of the Privy Council in *Labour Relations Board of Saskatchewan v. John East Iron Works, Ltd* [(1949) AC 134 at p 151], their background will not necessarily lead them “to act otherwise than judicially, so far as that word connotes a standard of conduct”, even though the background which carries experience and knowledge acquired extra-judicially “assuredly means that the subject-matter is such as profoundly to distinguish such a tribunal from the courts ...”

A prior relationship of legal adviser and client does not generally disqualify the former adviser, on becoming a member of a tribunal (or of a court, for that matter), from sitting in proceedings before that tribunal (or court) to which the former client is a party. Of course, if the correctness or appropriateness of advice given to the client is a live issue for determination by the tribunal (or court), the erstwhile legal adviser should not sit. A fortiori, if the advice has gone beyond an exposition of the law and advises the adoption of a course of conduct to advance the client's interests, the erstwhile legal adviser should not sit in a proceeding in which it is necessary to decide whether the course of conduct taken by the client was legally effective or was wise, reasonable or appropriate. If the erstwhile legal adviser were to sit in a proceeding in which the quality of his or her advice is in issue, there would be reasonable grounds for apprehending that he or she might not bring an impartial and unprejudiced mind to the resolution of the issue. Much depends on the nature of his or her relationship with the client, the ambit of the advice given and the issues falling for determination.

1. Similar observations were made by Deane, Toohey and Gaudron JJ in *Re Finance Sector Union of Australia; Ex parte Illaton Pty Ltd* (1992) 66 ALJR 583 at 584; 107 ALR 581 at 583.
2. The legislation governing the appointment of members of the AIRC was the *Industrial Relations Act 1988* (Cth), not the FW Act, but the relevant provisions are not materially different. The mechanism for the appointment of members of the Fair Work Commission is set out in Pt 5-1 Div 5 of the FW Act. All members are appointed by the Governor‑General by written instrument (subs 626(1)). Before the Governor‑General may appoint a person as a Vice President, the Minister must be satisfied that the person meets one of two criteria. One of those criteria is that the person is qualified for appointment because the person has knowledge of, or experience in, workplace relations; law; and/or business, industry or commerce (subs 627(1)). Before the Governor-General may appoint a person as a Commissioner, the Minister must be satisfied that the person is qualified for appointment because the person has knowledge of, or experience in, workplace relations, law, and/or business, industry or commerce (s 627(3)). It is plain, then, that the legislation contemplates that members of the Commission may have extensive experience working and/or advocating for employers or representing them.
3. The allegations of apprehended bias are without foundation.

## Conclusion

1. None of the grounds of review has been made out. Mr Menzies was not denied procedural fairness. Nor did the Second Full Bench misunderstand the nature of its jurisdiction, misconceive its duty, fail to apply itself to the question it was required to answer, or misunderstand the nature of the opinion it was required to form. Although Mr Menzies is understandably disappointed by its decision, the decision of the Second Full Bench is not affected by any jurisdictional error.
2. Mr Menzies maintained that it was in the public interest to grant permission to appeal and that he was the victim of a grave injustice. He argued that the appeal raised issues of importance and/or of general application, that the decision of the Commissioner was manifestly unjust, and that the legal principle applied by the Commissioner was disharmonious with other decisions on similar matters. All these arguments go to the merits, not the legality, of the decision. It is not for this Court to decide whether it is in fact in the public interest to grant permission to appeal: *Baker v Patrick Projects Pty Ltd* (2014) 226 FCR 302 at [33]–[36] (Katzmann J, Dowsett and Tracey JJ agreeing); *Mwango v Fair Work Commission* [2019] FCA 1274 (Thawley J) at [44].
3. It follows that the application must be dismissed.

## Costs

1. Lindsay sought costs in the event it was successful.
2. Subsection 570(1) of the FW Act provides that a party to proceedings in a court in relation to a matter arising under the Act may only be ordered by a court to pay costs incurred by another party to the proceedings in accordance with subs (2) or s 569 or 569A. Sections 569 and 569A are irrelevant. Subsection 570(2) provides that:

A party may be ordered to pay the costs only if:

(a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or

(b) the court is satisfied that the party’s unreasonable act or omission caused the other party to incur the costs; or

(c) the court is satisfied of both of the following:

(i) the party unreasonably refused to participate in a matter before the FWC;

(ii) the matter arose from the same facts as the proceedings.

1. Lindsay submitted that costs in this case are not constrained by s 570. In the alternative, it submitted that the application was instituted without reasonable cause and it is therefore entitled to its costs in defending the application. Neither submission was supported by argument.
2. Lindsay’s primary submission cannot be accepted. This is a proceeding in a court in relation to a matter arising under the Act because the right or duty sought to be enforced owes its existence to provisions of the FW Act; it does not matter that the Court also has jurisdiction under s 39B of the Judiciary Act: *Australasian Meat Industry Employees’ Union v Fair Work Australia* *(No 2)* (2012) 203 FCR 430 at [16] (Jessup and Tracey JJ); [35] (Flick J). This Court has jurisdiction under s 562 of the FW Act, as I mentioned earlier, *because* it relates to a matter arising under the Act.
3. The question, then, is whether the Court is satisfied that Mr Menzies instituted the proceeding without reasonable cause. The question is to be determined “as a matter of objective fact” (*Spotless Services Australia Ltd v The Honourable Senior Deputy President Jeanette Marsh* [2004] FCAFC 155 at [13]).
4. The relevant principles were summarised by the Full Court in *Australian Workers Union v Leighton Contractors Pty Limited (No 2)* (2013) 232 FCR 428 (at [7]):
5. The purpose or policy of the section is to free parties from the risk of having to pay their opponents’ costs in matters arising under the Act, while at the same time protecting those parties who are forced to defend proceedings that have been instituted vexatiously or without reasonable cause.
6. It follows from the protection offered by s 570(2) that a person will rarely be ordered to pay the costs of a proceeding. But it is not necessary to prove that there are exceptional circumstances warranting the making of an order …
7. The relevant question is whether the proceeding had reasonable prospects of success at the time it was instituted, not whether it ultimately failed: *R v Moore; Ex parte Federated Miscellaneous Workers’ Union of Australia* (1978) 140 CLR 470 at 473 per Gibbs J; *Kangan* [*Council of Kangan Batman Institute of Technology and Further Education v Australian Industrial Relations Commission* (2006) 156 FCR 275 at [60]. In *Kanan v Australian Postal and Telecommunications Union* (1992) 43 IR 257 at 264–5 (approved in *Kangan*) Wilcox J said

If success depends on the resolution in the applicant’s favour of one or more arguable points of law, it is inappropriate to stigmatise the proceeding, as being “without reasonable cause”. But where, on the applicant’s own version of the facts, it is clear that the proceeding must fail, it may properly be said that the proceeding lacks a reasonable cause.

1. The success of Mr Menzies’ application did not depend on the determination of disputed facts or the resolution of one or more arguable points of law. It depended on the identification of a jurisdictional error. Since none of the grounds of the application raised an arguable case of jurisdictional error, the proceeding had no reasonable prospects of success at the time it was instituted. It follows that I am satisfied that the proceeding was commenced without reasonable cause and that the Court has the power to order that Mr Menzies pay Lindsay’s costs.
2. The next question is whether the power should be exercised in Lindsay’s favour.
3. Mr Menzies submitted that, not only should an order of this kind not be made but that Lindsay should pay his costs because it refused to engage in a mediation in this Court or a conciliation in the Commission. Besides, he asked rhetorically: “what is a few legal costs to a Company that turns over a billion dollars a year as opposed to me existing on a welfare payment of $250.00 per week because of them and the [Commission]?”
4. The relative capacity of the parties to pay costs is beside the point. So, too, is Lindsay’s alleged refusal to engage in conciliation in the Commission. Its alleged refusal to engage in a mediation in this Court, however, is arguably not. Parties to a civil proceeding before the Court have a duty to conduct the proceeding, including negotiations for settlement of the dispute to which the proceeding relates, in a way that is consistent with the overarching purpose of the civil procedure provisions of the Act and Rules: *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), subs 37N(1). That purpose is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible: FCA Act, subs 37M(1). A party’s lawyer is obliged to take that duty into account and assist the party to comply with the duty: FCA Act, subs 37N(2). In exercising the discretion to award costs in a civil proceeding, the Court is required to take into account any failure to comply with the duties imposed by subs 37N(1) or (2): FCA Act, subs 37N(4). In theory, costs might have been contained if Lindsay had been prepared to engage in mediation.
5. Lee J, to whom this matter was previously docketed, contemplated making an order under s 53A of the FCA Act referring the whole of the proceeding to mediation. Lindsay’s solicitor, Mr Baldwin, opposed the making of such an order on the basis that it would be futile and, after hearing from both Mr Baldwin and Mr Menzies, his Honour decided not to do so. He expressed the view that mediation was likely to be futile unless both parties were legally represented and left it open to Mr Menzies to make an application for such an order after he had conferred with senior counsel. But no such application was made and senior counsel, who had accepted a referral from the Court for legal assistance, withdrew from the proceeding. Besides, having considered all the evidence and submissions, I am of the opinion that there was no realistic prospect of settlement, whether at mediation or otherwise. As Lee J observed, it was plain that the relationship between the parties had completely and irretrievably broken down. Moreover, despite indicating a willingness to participate in a mediation, Mr Menzies made it quite clear that he wanted to have his positions on the matters raised by his application vindicated by a decision of the Court. Indeed, had an order for mediation been made, it would only have added to the parties’ costs. In these circumstances, an order that Lindsay pay Mr Menzies’ costs would be inappropriate and there is no good reason why I should not order Mr Menzies to pay Lindsay’s costs.

## Orders

1. The orders of the Court will therefore be that the application be dismissed and that Mr Menzies pay Lindsay’s costs.

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| I certify that the preceding eighty-eight (88) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Katzmann. |

Associate:

Dated: 4 February 2020