Federal Court of Australia

Merhi v Commonwealth of Australia [2021] FCA 181

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| Review of: | Application for Judicial Review: *Linda Merhi v Commonwealth of Australia, represented by Services Australia (formerly the Department of Human Services)* [2020] FWCFB 3523 |
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| File number: | NSD 946 of 2020 |
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| Judgment of: | **KATZMANN J** |
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| Date of judgment: | 5 March 2021 |
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| Catchwords: | **ADMINISTRATIVE LAW —**application for judicial review of decision of Full Bench of Fair Work Commission under s 39B of the *Judiciary Act 1903* (Cth) **—** where relief only available for jurisdictional error or error of law on the face of the record **—** whether, in refusing application for permission to appeal from decision of Commission to refuse to extend time to apply for an order granting a remedy for unfair dismissal under s 394 of the *Fair Work Act 2009* (Cth), Full Bench committed reviewable error  |
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| Legislation: | *Fair Work Act 2009* (Cth) ss 394, 400, 562, 604, 613(1)*Federal Court of Australia Act 1976* (Cth) s 23*Judiciary Act 1903* (Cth) s 39B  |
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| Cases cited: | *Australian Postal Corporation v D’Rozario* (2014) 222 FCR 303*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 and 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*Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission and Another* (2007) 157 FCR 260*EnergyAustralia Yallourn Pty Ltd v Construction, Forestry, Mining and Energy Union and Another*: (2014) 218 FCR 316*Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416*House v King* (1936) 55 CLR 499*Kirk v Industrial Court (NSW)* (2010) 239 CLR 531*Menzies v Fair Work Commission* [2020] FCA 36; 293 IR 301*O’Sullivan v Farrer* (1989) 168 CLR 210*Toms v Harbour City Ferries Pty Ltd* (2015) 229 FCR 537*Wan v Australian Industrial Relations Commission* (2001) 116 FCR 481*WZASS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 19 |
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| Division: | Fair Work Division |
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| Registry: | New South Wales |
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| National Practice Area: | Employment and Industrial Relations |
|  |  |
| Number of paragraphs: | 55 |
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| Date of hearing: | 3 March 2021 |
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| Solicitor for the Applicant: | Mr M Ayache of OneGroup Legal  |
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| Counsel for the Respondents: | Ms P Bindon |
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| Solicitor for the Respondents: | King & Wood Mallesons |

ORDERS

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|  | NSD 946 of 2020 |
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| BETWEEN: | LINDA MERHIApplicant |
| AND: | COMMONWEALTH OF AUSTRALIA, REPRESENTED BY SERVICES AUSTRALIAFirst RespondentFAIR WORK COMMISSIONSecond Respondent |

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| order made by: | KATZMANN J |
| DATE OF ORDER: | 5 march 2021 |

THE COURT ORDERS THAT:

1. The application be dismissed.

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

REASONS FOR JUDGMENT

KATZMANN J:

## Introduction

1. Linda Mehri was an employee of Services Australia, an agency of the Commonwealth. On 23 January 2018 she was taken into custody. She was held on remand in a maximum security prison until 23 November 2019 when all charges against her were dropped and she was released. In the meantime, on 26 July 2019, Services Australia terminated her employment on the ground that she was incapable of performing her duties. A notice of termination was sent to Ms Mehri’s lawyers but not to her directly and, by this time, the solicitor who had been acting for her had himself been arrested.
2. Ms Mehri filed an unfair dismissal application with the Fair Work Commission on 13 February 2020, well outside the 21 day period prescribed by s 394(2) of the *Fair Work Act 2009* (Cth) (**FW Act**), and the Commission, constituted by a Deputy President, declined to extend the period. Ms Mehri applied to the Full Bench of the Commission for permission to appeal but her application was dismissed.
3. In this Court Ms Mehri filed an originating application under s 39B of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) in which she applied for the orders of the Full Bench to be set aside and “the matter” remitted to the Commission to be determined according to law. Despite this, Ms Merhi’s lawyers conducted the case as though it were an appeal.

## The legislative framework

1. Before going any further it is convenient to refer to the terms of s 394 and the provisions of the FW Act that governed the determination of the unfair dismissal application and the appeal.
2. Omitting the notes, which are not relevant, s 394 provides as follows:
3. A person who has been dismissed may apply to the FWC for an order under Division 4 granting a remedy.

…

1. The application must be made:

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

(b) within such period as the FWC allows under subsection (3).

1. The FWC may allow a further period for the application to be made by a person under subsection (1) if the FWC is satisfied that there are exceptional circumstances, taking into account:

(a) the reason for the delay; and

(b) whether the person first became aware of the dismissal after it had taken effect:

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

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

(e) the merits of the application; and

(f) fairness as between the person and other persons in a similar position.

1. A person who is aggrieved by a decision of the Commission may appeal, but only with the permission of a Full Bench: FW Act, s 604(1) read with s 613(1). Generally speaking, there are no express limitations to the exercise of the discretion to grant permission and the Commission must grant permission if the Commission is satisfied that it is in the public interest to do so: s 604(2). In the case of a decision relating to an unfair dismissal application, however, the rules are different. In such a case, the Commission must not grant permission unless the Commission considers that it is in the public interest to do so: s 400(1). Furthermore, despite s 604(1), to the extent that the appeal is on a question of fact, an appeal from a decision made by the Commission can only be made on the ground that the decision involved a significant error of fact: s 400(2).

## The original decision

1. The Deputy President dealt with each of the matters listed in s 394(3).
2. On the subject of her awareness of the dismissal (para (b)), he found that Ms Merhi did not become aware of her termination until her release from prison on 23 November 2019.
3. With respect to the reason for delay (para (a)), he considered that even if she had been informed of the termination while she was in prison it would have been “extremely hard, if not completely impossible” for her to have made an application and said he would have had “no difficulty” in granting her an extension of 21 days from the time of her release (that is until 15 December 2019).
4. But the Deputy President found there was “no good reason” for the subsequent delay and “no acceptable reason” to extend the time beyond 15 December 2019. He had regard to evidence about her mental state and accepted that after her release from custody she had difficulty adjusting to life in the community, was poorly motivated, and had withdrawn from day-to-day activities. He discussed the opinion of a psychologist whom Ms Mehri was referred. Nevertheless, the Deputy President concluded that Ms Mehri was not incapacitated from making an application, referring to correspondence with her employer, and noted that she had a lawyer acting for her. He felt that the delay following Ms Mehri’s release from custody weighed heavily against her.
5. On the question of action taken to dispute the dismissal (para (c)), the Deputy President acknowledged that Ms Mehri had contacted her employer in early December 2019 but observed that she did not thereby put the Commonwealth on notice of her intention to make a claim. He said that this circumstance therefore weighed only slightly in her favour.
6. The Deputy President noted that the merits of the application (para (e)) were contested and said that he was therefore unable to find that the application had “significant merit”. For this reason he said that the question of merits was a neutral consideration. He also said that the prejudice to the Commonwealth (para (d)) was a neutral consideration.
7. The Deputy President gave no weight to the final consideration — fairness as between her and others in a similar position (para (f)) — since neither party had made “a material submission on the issue” or referred him to any relevant decision of the Commission where the facts were similar.
8. The Deputy President then stated:

In conclusion, the application was filed 181 days late. Though I accept the absence of notice to the applicant due to her incarceration results in the period of lateness being somewhat less, as previously described in these reasons; however, when that delay, and the six factors to be considered under 394(3) are considered, the applicant has not established that when viewed holistically, the circumstances are out of the ordinary, unusual, special or uncommon.

The appropriate weight assigned particularly to the absence of reasons for the bulk of the delay points to the absence of exceptional circumstances. Therefore I am not satisfied that the Commission has jurisdiction to hear the claim, and I order that the application be dismissed.

## The appeal to the Full Bench

1. A notice of appeal was filed on 5 May 2020 and an amended notice of appeal on 28 May 2020. The amended notice of appeal was completed by a solicitor acting for Ms Mehri. Three grounds were identified. They were not particularly illuminating. They read (without alteration):
2. The Deputy Commissioner erred in his assessment of the consideration set out in s 394(3)(a) of the Act, which affected the ultimate finding of whether exceptional circumstances existed when the matter was weighed up against the other five matters to be considered under s 394(3).
3. Deputy Commissioner erred in his assessment of the consideration set out in s 394(3)(e) of the Act, which affected the ultimate finding of whether exceptional circumstances existed when the matter was weighed up against the other five matters to be considered under s 394(3).
4. The Deputy Commissioner erred in reaching the conclusion that the Applicant had not established exceptional circumstances existed for the purposes of s 394(3).
5. It will be recalled that s 394(3)(a) is concerned with the reason for the delay and s 394(3)(e) is concerned with the merits of the application.
6. No “significant errors of fact” were separately identified, despite the exhortation in the Commission’s form to do so under a separate heading or attachment.
7. It was said to be in the public interest to grant permission to appeal because:
8. The Respondent is a large organisation and a Commonwealth entity which has an obligation to act and behave as a model litigant.
9. It is in the public interest that where a Commonwealth entity had not acted in accordance with a law of Australia, such matter should be heard and determined on its merits for the benefit of the public and the perception that justice is done and seen to be done.
10. Both parties were legally represented at the hearing before the Full Bench. The submissions made on Ms Mehri’s behalf, as summarised by the Full Bench in its decision, were these.
11. As to ground 1, the Deputy President must have erred because he referred to the absence of reasons for the bulk of the delay, when he had accepted that the bulk of the delay had been explained, and that this consideration was afforded inordinate weight. But for that error, the decision could or might have been different.
12. As to ground 2, there was an inconsistency between the Deputy President’s statement that “most of the evidence in the matter is contained in the correspondence and generally agreed between the parties” and his later statement that, since the merits were contested, he was unable to determine whether the case lacks merit or has significant merit. The Deputy President erred in finding that the merits were contested, that he was unable to determine whether or not the case lacked merit, and that the question of merit was a neutral consideration.
13. As to ground 3, having found unusual circumstances surrounding the dismissal, the Deputy President erred by not concluding that Ms Mehri had established exceptional circumstances.

## The decision of the Full Bench

1. The Full Bench observed that the appeal was an appeal by way of rehearing in which error on the part of the primary decision-maker must be shown before the Commission’s powers on appeal can be exercised (at [28]). It also observed that the exceptional circumstances test in s 394(3) establishes a “high hurdle” for an applicant and the decision on whether to grant an extension involves the exercise of a broad discretion (at [32]). The Full Bench noted the terms of s 400 of the FW Act and stated that it will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated, of the type demonstrated in *House v King* (1936) 55 CLR 499 (at [31], [32]).
2. In relation to ground 1, the Full Bench considered that the delay was significant, whether it was 60 days or 181 days; the Deputy President properly exercised his discretion in balancing this factor with the other factors in s 394(3); and the Full Bench could discern no arguable case of error (at [34]).
3. In relation to ground 2, the Full Bench found that there was no error, let alone a significant error, in the Deputy President’s conclusion that he could make no finding on the merits of Ms Merhi’s case. The alleged inconsistency was found to be of no consequence on the basis that it was open to conclude that the reference to the evidence being generally agreed between the parties was a reference to the correspondence and not to the contested issues or the merits or otherwise of the dismissal (at [35]). The Full Bench rejected Ms Mehri’s submission that the significance of a person being arrested and then dismissed was not afforded sufficient weight by the Deputy President in the balancing exercise (at [36]). The Full Bench observed that the circumstances surrounding Ms Mehri’s dismissal were “not dissimilar” to those of a person who is unable to perform the inherent requirements of their job because of a medical condition. It said that such circumstances are not unusual or out of the ordinary and the Deputy President was alive to them.
4. Additionally, the Full Bench accepted “the Deputy President’s finding that [Ms Mehri’s] mental state did not prevent her capacity to engage in day to day activities in the period shortly after her release from prison”, and “certainly” did not explain the delay between her release from prison and the date the application was filed (at [39]).
5. The Full Bench considered that there was no substance to ground 3, observing that Ms Mehri had incorrectly conflated the “unusual circumstances” of the dismissal with the question of whether the circumstances in the period after the dismissal were unusual so as to justify a finding of “exceptional circumstances” for that period (at [40]).
6. The Deputy President’s approach to the requirements of s 394(3) appeared to the Full Bench to be “entirely conventional and unremarkable” and held that no arguable case of appealable error was disclosed (at [41]).
7. In any case, for the following reasons the Full Bench was not satisfied that it was in the public interest to grant permission to appeal:

[42] We are not satisfied that this appeal raises any issues of general importance and/or general application beyond the direct interest of the parties, or that there is not a diversity of Commission decisions about this subject matter. There have been numerous decisions of the Commission, at Full Bench and single Member level, as to the relevance of whether the reasons for delay based on mental incapacity provide an explanation or reason for delay, when the medical condition does not prevent a dismissed employee engaging in normal day to day activities. The legal principles are well-settled and appear to have been applied by the Deputy President, albeit in a shorthand *ex tempore* decision. There is no basis to revisit these principles in this appeal.

[43] We reject the submission that there is a public benefit in this Full Bench giving guidance as to the general legal principles applying to extension of time applications to the Commission's exercise of discretion under s 394 of the FW Act. This Commission, and its predecessors, has a well-developed and settled jurisprudence under this section of the FW Act. We do not accept that the general legal principles applying under other statutory regimes, where those principles do not require a test of “exceptional circumstances” are necessarily relevant to the express requirement for “exceptional circumstances” to be established for an extension of time being granted under the FW Act.

[44] Lastly, we do not consider that it is arguable that the Deputy President's decision manifests an injustice or that it is counterintuitive.

## The present proceeding

1. The application in this Court is supported by two affidavits of Jamie Antonopoulos, a solicitor sworn on 26 August 2020 and 1 October 2020. Only the second was read.
2. The first annexed relevant documents, described the applicant as the “appellant” and recited “grounds of appeal”. The second removed the reference to “appeal” and substituted “applicant” for “appellant”. Despite this, no amendment was made to the grounds, and notwithstanding the orders of the Court for the filing of a “court book”, Ms Mehri’s lawyers filed a three-volume “appeal book”.
3. The grounds of the application, formerly referred to as grounds of appeal, were as follows (without alteration):

1. The Full Bench erred in finding at [34] that “little turns on whether the delay was 60 days or 181 days when the Deputy President considered the matters set out in s394(3)(e) of the Act”, and the effect that finding has in determining whether “exceptional circumstances” exist for the purpose of s394(3) of the Fair Work Act 2009 (the Act).

2. The Full Bench erred in finding at [36] that an employee prevented from attending work because of due process is not dissimilar to the circumstances of a person who is unable to perform the inherent requirements of their job because of a medical condition, and the effect of that finding has in determining whether exceptional circumstances exist for the purposes of s394(3) of the Act.

3. The Full Bench at [37] made an error of the face of the record in finding that the medical evidence expressed an opinion that is consistent with the applicant’s capacity to engage with her lawyers and the Respondent shortly after her release from custody.

4. The Full Bench at [40] erred in finding that the Deputy President’s observation that there were “unusual circumstances surrounding the dismissal” was not such as to justify a finding of exceptional circumstances for the purposes of s394(3) of the Act.

5. The Full Bench at [43] erred in the legal principle it applied when considering s394 of the Act and rejecting general legal principles, including but not limited to those set out at [13] of the decision.

## The scope of the Court’s powers

1. Section 39B of the Judiciary Act relevantly provides that the Court’s original jurisdiction includes any matter in which a writ of mandamus or prohibition or an injunction is sought against the Commonwealth (s 39B(1)) and any non-criminal matters arising under any laws made by the Parliament (s 39B(1A)(c)). Section 562 of the FW Act provides that jurisdiction is conferred on the Court in relation to any matter arising under that Act.
2. The effect of the application is that Ms Mehri seeks an order in the nature of certiorari to quash the decision of the Full Bench and a writ of mandamus to compel the Commission to determine her matter according to law*.*
3. Certiorari may be granted as a stand-alone remedy since s 23 of the *Federal Court of Australia Act 1976* (Cth) gives the Court power to issue “writs of such kinds, as the Court thinks appropriate” in matters in which it has jurisdiction. See, for example, *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission and Another* (2007) 157 FCR 260 at [6], [58]–[60], [66], [79]–[80] (Spender, French, Cowdroy JJ) and *EnergyAustralia Yallourn Pty Ltd v Construction, Forestry, Mining and Energy Union and Another*: (2014) 218 FCR 316 at [53]–[55], [69] (Dowsett J, with whom North and Bromberg JJ agreed at [22]). It follows that the Court has the power to issue a writ of certiorari in a matter arising under the FW Act.

## The applicant’s submissions

1. With respect to the grounds of the application Ms Merhi made the following submissions.
2. First, the Full Bench erred in its conclusion at [34] that the delay was significant regardless of whether it was 181 days, as the Deputy President found, or 60 days, as Ms Mehri contended, because it stands to reason that the greater the delay the more weight would be attached to it.
3. Second, the Full Bench erred in law in finding (at [36]) that the circumstances of an employee prevented from performing the inherent requirements of a job due to a medical condition are not dissimilar to the circumstances of a person “prevented from attending work because of due process”. She contended that imprisonment does not create an inability to perform duties but an inability to attend the place of employment in order to do so. As a result, she claimed that the Full Bench placed insufficient weight on the merits of her application.
4. Third, the statement by the Full Bench that the Deputy President’s opinion of her capacity to submit an application after she was released from custody was consistent with her capacity to engage with her lawyers and the Commonwealth’s representative was “an error of law on the face of the record” because a proper reading of the evidence of the psychologist warranted a different conclusion.
5. Fourth, the Full Bench erred by ignoring the “unusual circumstances” surrounding Ms Mehri’s dismissal, thereby failing to evaluate that matter and give it due weight. Rather, it was noted and erroneously discarded as irrelevant.
6. Fifth, Ms Mehri submitted that the Full Bench erred in its construction of s 394, contending that the test of “exceptional circumstances” does not establish a high hurdle. She submitted that the section did not limit the decision-maker to the six criteria in subs (3) or prevent the decision-maker from having regard to other circumstances or general law principles governing applications for extensions of time.
7. The applicant’s submissions must be rejected.

## The flaws in the applicant’s case

1. The case she brings is fundamentally flawed.
2. First, this is not an appeal from the decision of the Full Bench. It is an application for judicial review. Ms Mehri has no right to appeal. The relief she seeks is to require the Full Bench consider her application for permission to appeal afresh. To secure that opportunity she needs to establish that the decision of the Full Bench to refuse permission to appeal is affected either by jurisdictional error or error of law on the face of the record. Regardless of what the Court may think of the decision under review, it cannot inquire into the merits of the grounds of appeal. See, for example, *Menzies v Fair Work Commission* [2020] FCA 36; 293 IR 301 at [27]. The mere change in nomenclature from “appeal” to “application” and “appellant” to “applicant” did not convert an appeal into an application for judicial review and an appeal ground into an available ground of review. As Buchanan J explained in *Toms v Harbour City Ferries Pty Ltd* (2015) 229 FCR 537 at [59] (Allsop CJ and Siopis J agreeing at [1] and [2] respectively):

The task on judicial review is not simply to assess whether an administrative tribunal was right or wrong in its conclusions, or whether it made errors in its analysis. The task is not to correct perceived errors made within jurisdiction. The task is to examine whether the tribunal misconceived its role or otherwise failed to exercise its jurisdiction so that its decision should not be seen as a true exercise of the power committed to it at all.

1. Second, the FW Act precluded the Full Bench from granting permission to appeal if it was not satisfied that it is in the public interest to do so. Contrary to what was suggested by the written submissions made on Ms Mehri’s behalf, the existence of the public interest is not a jurisdictional fact to be determined to the satisfaction of the Court: *Australian Postal Corporation v D’Rozario* (2014) 222 FCR 303 at [8] (Besanko J); [47] (Jessup J) and at [95]-[104] (Bromberg J). It was for the Commission, constituted by the Full Bench, to determine whether it was in the public interest to grant permission to appeal. The FW Act does not prescribe the considerations which are to inform the satisfaction of the Full Bench and the discretion conferred by s 400(1) is extremely broad: *Baker v Patrick Projects Pty Ltd* (2014) 226 FCR 302 at [36] (Katzmann J, Dowsett and Tracey JJ agreeing at [1] and [2]). The expression “in the public interest” as used in a statute “classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only ‘in so far as the subject matter and the scope and purpose of the statutory enactments’ …”: *O’Sullivan v Farrer* (1989) 168 CLR 210 at 216 (Mason CJ, Brennan, Dawson and Gaudron JJ).
2. The Full Bench was not satisfied that it was in the public interest to grant permission to appeal. Ms Mehri did not allege that that decision was affected by jurisdictional error or error of law on the face of the record. For that reason alone, the application must be dismissed.
3. In oral argument Mr Ayache, who appeared for Ms Mehri, submitted that grounds 1 and 2 raised questions of public interest. That may or may not be so. But it is beside the point. A similar submission was apparently made to the Full Bench. The mere fact that the Full Bench was not persuaded by it does not give rise to reviewable error. Mr Ayache accepted that that would not amount to jurisdictional error but submitted that it was an error of law on the face of the record. That submission was untenable since the alleged error only appears in the reasons of the Full Bench and the reasons of the Full Bench are not part of the record: *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd* (2015) 235 FCR 305 at [97] (Dowsett, Tracey and Katzmann JJ). Moreover, the basis for the proposition that the error was one of law was obscure.
4. Third, none of the grounds purport to raise a jurisdictional error and none discloses error of law on the face of the record. In substance, they all seek to persuade this Court that the view the Full Bench reached about the merits of the grounds of appeal was wrong.
5. Dealing first with the last matter, which concerns ground 3, while the Full Bench may have misunderstood the psychologist’s evidence, it is not an error of law to misunderstand or misinterpret evidence. If the Full Bench did err in this respect, the error was one of fact. It is trite that certiorari does not lie for an error of fact. In any case, for the reasons given earlier, the alleged error does not appear on the face of the record.
6. Neither the other grounds nor the submissions made in support of them grappled with the necessity to establish jurisdictional error. The submissions make no reference to any of the authorities on this question.
7. Grounds 1 to 4 are concerned with the consideration by the Full Bench of the question whether the prospective appeal raised an arguable case of appealable error. It was not suggested that this was a wrong question to ask. Nor could such a suggestion sensibly have been made. That is because the prospective appeal was in the nature of a rehearing and, absent a decision to admit further evidence or a relevant change in the law, neither a court nor a tribunal hearing an appeal of this nature can exercise its appellate powers unless it is satisfied that the primary decision-maker fell into appealable error: ***Coal and Allied*** *Operations Pty Limited v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [14]. Consequently, it will rarely, if ever, be appropriate to grant permission to appeal in the absence of an arguable case of appealable error: *Wan v Australian Industrial Relations Commission* (2001) 116 FCR 481 at [30] (Spencer, Kiefel and Dowsett JJ).
8. As the Full Court recently observed in *WZASS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 19 at [38], while “the metes and bounds” of jurisdictional error are not closed and may be impossible to delineate (*Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [71], [73]), there are limits. A mere failure to detect error is insufficient to establish jurisdictional error. In the circumstances of the present case, the Full Bench would only have fallen into jurisdictional error if it had misconceived its role, misunderstood the nature of its jurisdiction, misconceived its duty, failed to apply itself to the question it was charged with answering, or misunderstood the nature of the opinion it was to form: *Coal and Allied* at [31] (Gleeson CJ, Gaudron and Hayne JJ). In the present case, as in that case, the Full Bench did none of those things.
9. Ground 1 quibbles with the observation by the Full Bench that there is little difference between a delay of 60 days or 181 days and therefore the weight it gave to the delay. Ground 2 quarrels with the weight the Full Bench placed on the merits of the appeal. Grounds 4 and 5 raise an issue of statutory interpretation, relying on authorities concerned with different statutory schemes. Even if there were an arguable case that the Deputy President had erred in his construction of s 394 or the Full Bench was wrong to conclude otherwise, without more that would not result in jurisdictional error: see *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420 (Jordan CJ), cited in *Toms* at [53]. It is worth repeating what Buchanan J said in *Toms* at [55]:

It must therefore be understood that no attack, in proceedings of the present kind, is available against the Full Bench merely upon the ground of a dispute or quibble with the quality of the Full Bench reasons or the weight which it gave to particular aspects of the matter before it unless some error is demonstrated which may be said to have the result that the Full Bench has not really exercised the jurisdiction given to it, leaving the jurisdiction “in law constructively unexercised” and thereby exposing the Full Bench to an order that it perform the task it had failed to carry out (*Hebburn*; *Coal and Allied*) or, alternatively, that the Full Bench has purported to determine some matter outside its jurisdiction altogether ([*Public Service Association of South Australia v Federated Clerks’ Union of Australia, South Australian Branch* (1991) 173 CLR 132]).

1. Thus, if the Full Bench erred in any of the respects alleged in the amended originating application, the error would have been within jurisdiction: see *Coal and Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78 at [54]–[57] (Buchanan J, Marshall J and Cowdroy J agreeing at [1] and [2] respectively).

## Conclusion

1. It follows that the application must be dismissed. The Commonwealth did not seek or foreshadow an application for costs so, having regard to s 570 of the FW Act, there will be no order as to costs.

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| I certify that the preceding fifty-five (55) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Katzmann. |

Associate:

Dated: 5 March 2021