



TRANSCRIPT OF PROCEEDINGS

Fair Work Act 2009

**VICE PRESIDENT ASBURY
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT CLANCY**

C2023/2763

s.604 - Appeal of decisions

**Appeal by Clarke
(C2023/2763)**

Melbourne

10.00 AM, WEDNESDAY, 19 JULY 2023

PN1

VICE PRESIDENT ASBURY: Good morning. Could I just start by confirming the appearances. Mr Clarke, you're representing yourself today?

PN2

MR S CLARKE: Yes.

PN3

VICE PRESIDENT ASBURY: Thank you. And for the respondent?

PN4

MR A HAMBAS: Yes. Good morning. Mr Hambas, initial A, seeking leave to appear for the respondent.

PN5

VICE PRESIDENT ASBURY: Thank you, Mr Hambas. Mr Clarke, you object to the respondent being legally represented as I understand it.

PN6

MR CLARKE: Yes, as I did in the first instance as well.

PN7

VICE PRESIDENT ASBURY: Okay. Thank you. For reasons that will be apparent we consider that this is an appropriate matter for the respondent to be granted permission to be represented legally on the basis that there are some issues of complexity and Mr Hambas was involved in the proceedings at first instance. So we will grant permission for the respondent to be legally represented. Mr Hambas, before we start the appeal hearing proper and hear from the appellant, for my part, Mr Hambas, at least, your submission in relation to the letter, the termination letter, that it's not subject to any ambiguity and the date the appellant's employment terminated is made clear by the letter stating that 10 November 2022 will be his last day. Could I just take you to the letter which is on page 38 of the appeal book.

PN8

MR HAMBAS: Yes, I have it in front of me.

PN9

VICE PRESIDENT ASBURY: Mr Hambas, I am just making sure you are pressing the submission that this letter makes it clear that the employment ended on 10 November.

PN10

MR HAMBAS: Yes, we are, your Honour. In particular paragraph 2 obviously commences with the wording:

PN11

The company confirms that we have decided not to continue your probationary period. As a result your employment with Uniti Group will end on 16 November 2022, which includes one week's notice.

PN12

It is the subsequent parts of that letter though that go to clarifying the meaning of the letter and the intention to terminate the employment on 10 November. It says
- - -

PN13

DEPUTY PRESIDENT GOSTENCNIK: Mr Hambas, we can read what it says, but what do we do, do we ignore the words 'will end on 16 November'?

PN14

MR HAMBAS: We would submit that the only proper interpretation of the words in their entirety is that the last day of the employment will be 10 November, and any notice entitlement will be paid in lieu.

PN15

DEPUTY PRESIDENT GOSTENCNIK: The last day in the last sentence, the reference to the last day, is a reference to the last day on which the appellant would be required to work, because that's what the introductory words say. 'However you will not be required to work your notice period. Your last day is today of work.'

PN16

MR HAMBAS: Yes. However, we also find in the third paragraph, as you would have of course seen, 'You will receive payment in lieu of notice.'

PN17

DEPUTY PRESIDENT GOSTENCNIK: Yes. That's an interesting point that you've made, Mr Hambas. If I take you to section 117 of the Act, specifically subsection (2), 'An employer must not terminate an employee's employment unless' - relevantly paragraph (b) deals with payment in lieu of notice, and in order for there to be a payment in lieu of notice which would allow an employer to terminate without notice the employer must have paid; that is the employer has paid, not is going to in the future pay.

PN18

MR HAMBAS: Yes, I have the wording in section 117 in front of me, and I accept that that is a requirement imposed by the section. What I would say is that it is accepted also that payment of notice, of pay in lieu of notice did not occur on 10 November. However, if there was a breach of subsection 117(2)(b) it would not automatically and retrospectively render the termination to have occurred on the date that payment of the pay in lieu of notice actually occurred.

PN19

DEPUTY PRESIDENT GOSTENCNIK: That much is a given, but the fact that there has been some unlawful action in terminating the employment does not mean the employment relationship hasn't ended. That's to be accepted. But for the purposes of construing the letter as a whole isn't it relevant to note that the employer was intending not to act unlawfully, and in the context of the second sentence in the second paragraph the employer intended to communicate to the applicant, or the appellant, that the employment will end on the 16th, but that from the 10th he is not required to attend for work?

PN20

MR HAMBAS: Well, I again would say that going to the wording of section 117(2)(b) it cannot have retrospective effect so as to, as you have obviously accepted, to retrospectively confirm the date of termination to be something other than it is. In terms of its constructed effect, or when looking at the wording of the letter as a whole, I don't see that section 117(2)(b) has any material work to do. What matters principally must be the wording of the letter.

PN21

If we take the letter in isolation we find that there is reference to the ending of the employment saying to be on the 16th, but then two subsequent statements that would tend to indicate that the ending of the employment must have been on 10 November. On balance having regard to the three statements, two of which weigh in favour of a finding that the employment was to end on 10 November I would submit that the most appropriate interpretation to be given to the letter is that the employment was to end and did end on 10 November. This is a fact - - -

PN22

VICE PRESIDENT ASBURY: Mr Hambas, that submission is contrary to the well-established principle. As far back as 1994 the *Siagian v Sanel*, which is generally the case about whether employment ends at the expiration of the notice period or at the point that payment of the lump sum on termination is made, and Wilcox CJ clearly identifies two kinds of interpretations. Firstly being that someone is told that, 'You are being paid a lump sum. We're summarily dismissing you. You're getting a lump sum for the wages or salary you would have received if you had been given the notice.' And the second one is that, 'We are excusing you from performing any duty that you might have to perform under your employment contract, and your employment will end at the expiration of the notice period.'

PN23

And again for my part I think it is unarguable that this letter is the second kind of termination, and frankly an employee being dismissed should not have to engage in an interpretation exercise of the termination letter. And even if I am wrong on my assessment of what this letter says then alternatively it is so ambiguous that it would weigh in favour of an extension of time being granted if it was necessary. But my provisional view, Mr Hambas, is this application was not filed outside the 21 day period, it was filed within it, and the fact the appellant conceded at the hearing is neither here nor there. This letter should have been considered and it wasn't.

PN24

MR HAMBAS: The applicant conceded at the hearing that the termination occurred on 10 November. He also submitted in written form in his application that the employment ended on 10 November. There is a payslip, a final - - -

PN25

DEPUTY PRESIDENT GOSTENCNIK: Mr Hambas, that submission might get you somewhere if Mr Spenser(sic) were legally represented and his lawyer made that submission, or that - sorry, that Mr Clarke was not suffering under a mental disability. But in the circumstances where he's unrepresented and there's a finding

that he suffers from a mental disability and has ongoing mental illness issues, reliance on some concession that he made either in the application or in (audio malfunction) from the Commissioner very early on in the hearing is not to be given a lot of weight, in the circumstances where the letter itself is at the very least ambiguous and not clear about the date on which the employment ended.

PN26

MR HAMBAS: I hear that, Commissioner. I was going to suggest that perhaps the reason why the applicant at the time was off the mind to confirm the date of termination as being 10 November is because - and I know this is not in evidence at the moment, but there was a final payslip issued to the applicant, and the final payslip identified the termination date as being 10 November.

PN27

VICE PRESIDENT ASBURY: But that was after the event, Mr Hambas. Sorry, Mr Clarke, did you want to - we will come to you shortly.

PN28

MR CLARKE: I just want to sort of make a quick note whilst it's in my head. With regards to the payslip that Mr Hambas has just brought up I never did get that and that's been submitted in evidence with my correspondence based on 22 November and 12 December to Mr Jesse Welsh, neither of which I got a response back. And I still haven't got a payslip, and I've only got the information from the ATO submissions. Excuse me, sorry, that sort of response doesn't hold weight, that's irrelevant in my situation, sorry. Sorry, I just (indistinct), sorry.

PN29

VICE PRESIDENT ASBURY: That's all right, Mr Clarke, no problem. Mr Hambas, the fact that a payslip given after the event might say something it is again in my view neither here nor there. The appellant made a concession right at the beginning of the hearing and wasn't even taken to the letter and given the option - you can agree or disagree with this - if you listen to the recording, which I have done, the appellant didn't make a concession in the full light of this letter. If the letter was considered in the decision I can't see where that has occurred. It strikes me we're putting the appellant through an appeal in circumstances where arguably he didn't file his application out of time in the first place.

PN30

It's equally well established that termination has to be clearly - the termination date has to be clearly advised to the employee, and I am just struggling with the proposition that this letter doesn't clearly say, "The last day you have to work is 10 November, but your employment will end on the 16th. And the fact the appellant wasn't alive to that again is neither here nor there. It's a factual finding that has to be made as to when the employment ended based on the evidence before the Commission.

PN31

DEPUTY PRESIDENT GOSTENCNIK: To put matters further in context to reinforce the ambiguous nature of the termination letter the appellant was entitled to a week's notice. The note in the letter about the date ending is six days, it's not seven, and so what follows about pay in lieu of notice might very well be a

reference to the additional day. He's entitled to a week. It just reinforces the ambiguous nature of - - -

PN32

MR HAMBAS: It may be useful to separate our two issues that could arise, and which having regard to the observations from the Bench I am willing here to accept, but there is the question of what was the true date of termination. And then there is the question of whether or not Commissioner Schneider erred with respect to the finding of whether or not there were exceptional circumstances to warrant an extension.

PN33

On the first of those two questions if there is ambiguity in the wording of the letter as the Full Bench may be minded to find, I would again simply submit that the wording of the letter taken as a whole tends more to indicate that the termination date was 10 November. By reason of the fact that if we take into account the three statements which could give rise to conflicting interpretations of the date of termination, two out of the three tend towards a finding that 10 November was the actual date of termination.

PN34

DEPUTY PRESIDENT GOSTENCNIK: Mr Hambas, the second statement could just as equally be a reference to the requirement to work, not an ending of the employment date. And the third statement could be a reference to the additional day's notice that the applicant was entitled to, because he is entitled to a week, not six days. Those things are ambiguous, they don't speak to your side of the argument. The only clear statement of when the employment will end is the second sentence of the second paragraph. It says the employment will end on 16 November.

PN35

MR HAMBAS: Well, I simply rely upon the submissions already made on those points. If we then look to the question of whether Commissioner Schneider erred in not finding exceptional circumstances arose as a result of any ambiguity in the letter it is, I would suggest, not an immaterial point. Notwithstanding that the applicant was unrepresented during the proceeding that he relied upon 10 November as being the date of termination, both in his application and at the hearing, notwithstanding the observations made about how the hearing was conducted.

PN36

DEPUTY PRESIDENT CLANCY: Mr Hambas, for my part I am not sure that greater reliance can be put on what was disclosed in the application form as the date of termination when one reads the accompanying email from Mr Clarke of 7 December (audio malfunction) at page 2 of the appeal book, because he stated in that:

PN37

Please find enclosed my - in inverted commas - 'late application'. However, I have just noticed that they got the date wrong for the dismissal, which adds one day, and the official date of the termination is dated 17 November 2022,

which includes the week paid in lieu, so I don't know if it actually means I'm within time or not.

PN38

For my part I don't think you can rely on what was outlined in the application form on page 8 of the appeal book as to answer the question at 1.3, 'What date did the dismissal take effect?' It seems to me on the face of it that email that accompanied the application form indicates a level of confusion, or at least on any event the assertion that the date of the termination was the 17th.

PN39

VICE PRESIDENT ASBURY: And, sorry, Mr Hambas, before you respond to that I might add that the Commission has set that email out at paragraph 35 of the decision, and you raised it as a basis for saying that the applicant had made an error and that that was not a reason that time should be extended, that he'd misunderstood his termination date, and there doesn't seem to have been any consideration of the letter itself in the decision.

PN40

So you used that email as an indication the applicant was confused, and the other side of the coin was that he had every reason arguably to be confused given that letter, and if the letter had of been considered at the same time as the email the outcome of this proceeding may have been entirely different. It probably would have been entirely different from my perspective.

PN41

MR HAMBAS: I accept that and I withdraw my last submission, save to say that the discretion that is afforded and was afforded to Commissioner Schneider with respect to the finding of exceptional circumstances is of course a very broad one and involved the taking into consideration of various factors in order to reach his ultimate finding that there were no exceptional circumstances to warrant the extension of time. These were - - -

PN42

DEPUTY PRESIDENT GOSTENCNIK: Mr Hambas, do you accept that the first thing that the Commissioner had to do was to determine the date of termination?

PN43

MR HAMBAS: Yes, and it was open to him. Yes.

PN44

DEPUTY PRESIDENT GOSTENCNIK: And if he's wrong about that then the appeal must succeed. Because if he's wrong about that and the date of termination was in fact 16 November no extension of time was necessary. Do you accept that?

PN45

MR HAMBAS: Correct. However, on the available evidence that he had before him it was a finding that he was open to arrive at.

PN46

VICE PRESIDENT ASBURY: It's not a discretionary finding, Mr Hambas. The date a person is terminated is a date a termination of employment takes effect. It's not a discretionary finding, it's a required finding. There's no discretion about it, you have to determine the date and it's either correct or it's not, and if the date that is determined is not correct there's no discretion involved. A discretion only arises if there is an application filed outside the required time.

PN47

MR HAMBAS: I accept that.

PN48

VICE PRESIDENT ASBURY: Is there anything else you want to say?

PN49

MR HAMBAS: No. No, thank you.

PN50

VICE PRESIDENT ASBURY: Thank you. Mr Clarke, we have considered the material that you have filed in the appeal. If you would like to speak to it you're welcome to do that, but it's up to you, because we have read and considered your material.

PN51

MR CLARKE: Yes. Well, from what's been sort of obviously discussed (indistinct) in respect of the issues with it, because obviously with confusion with the dates and things with the original F8 application you will note that I actually sort of put in the notification dates and the termination dates would be the 9th and 10th, wherein actually in reality it was actually the 10th when I was like notified verbally. And then the 11th was when the email was sent out, although the termination letter was dated. So I find there's a bit of a breach there because the termination should happen the day after you get notified.

PN52

But with regard to reference to the dates, which you will notice in the unsuccessful probation, details which is actually in the subsequent page attached to the aforementioned termination letter, it actually sort of - where I actually got the dates wrong - page 39 of the appeal book, sorry - it actually sort of shows that - which I've sort of raised it in previous submissions, that the adverse action actually began on the 9th, which was the day before I was actually notified verbally of my termination.

PN53

And when I actually, as per the records of the text messages, I tried to return to work, but I was told to stay home and get a call from HR, and then I was terminated that day. So that adverse action also I would say actually confirms merits of my case of this being a false - unlawful dismissal. And certainly the assertion by the respondent with their original submission that I was terminated on the 10th also sort of confirms on their part it was actually a summary dismissal with no reasons stated.

PN54

And this evidence submitted, which is this document, pages 38 and 39, it's all the evidence that refers to my dismissal, because there was no procedural fairness, no warnings, no nothing. That's all the evidence that it was, which again forms additional merit for my - the valid (indistinct) of my complaint should have been taken into consideration with the (indistinct) complaint, as well as the fact that - sorry, if I'm rambling - I've forgotten which section it was, but the criteria with regards to not making attempt to contact the employer to deal with the matter beforehand, was basically state that in all circumstances, like all circumstances I made no attempt.

PN55

As the email to the respondent sort of shows I may not have actually sort of specifically stated, you know, word perfect request to say, 'Please, I beg you, can you look into this matter', or whatever, but I did outline all the issues that I had and I did ask for a response. And I still can't remember whether I meant to put seven days or two days or whatever because my brain doesn't work and I might have been running out of time, so I replied quickly. In either case there was still no response, so there was obviously no attempt by the respondent to make any attempt to contact me, not even in regards to the payslips, which is what I tried to bring up in the hearing, but the Commissioner shot me down on that one because he said it wasn't part of the question.

PN56

Neither on 12 December when I also followed up with Mr Welsh asking for my payslips again and saying I'd actually made the complaint, still neither did I get a response. So basically saying I made no attempt I found was disingenuous.

PN57

VICE PRESIDENT ASBURY: Thank you, Mr Clarke.

PN58

MR CLARKE: I think there was some other thing I was meant to say, but I can't remember. I think they're the sort of the key points there, sorry. And as well I mean if there's additional information you sort of need as I've said in submissions I've only recently been getting access to psychology assessments, which I've been waiting for since September 21.

PN59

And I've also recently been sort of diagnosed as well as the other stuff I already had, bipolar, ADHD and autism spectrum disorder, which explains why I'm having a lot of issues with sort of getting fixated on things and also when I get stressed I basically just have - well, (indistinct) dysfunction or something, my brain just stopped working, and probably why my tic is going mad as well. So obviously a lot of things are sort of going downhill because I've just not been able to explain why I've gone downhill so quickly.

PN60

But it's been a series of things, like a lack of trust as well, the manner in which I was actually terminated in such a non-handed way with not even being given a reason as to why, not a chance to respond or whatever. As I said in the hearing it was a trigger response with what happened when I was employed by SAPOL

where they did go through a process, but they still basically messed me about and pretty much took me to the point of suicide. And so that's where this has - I've sort of kind of gone back to that stage again by what's happened here.

PN61

So that's why I put in my submissions that the issues with my mental health denigrated to a particular point, and as Mr Hambas has said in the recording as well that with earlier documentation that wasn't before 18 December 2022, 'It was curious' - I quote - 'that there wasn't this other information provided.' And so when I did provide the medical certificate which referred to September, which (indistinct) to employment with the respondent, which did confirm those issues, he then rejected it.

PN62

And I've also just recently come across the letter with regards to my difficulties responding to documentation, which was dated in early 2021. So I've had this difficulty with responding to stuff before then, and then things obviously just get worse with each knockback. Sorry, I'll stop there because I'm rambling, sorry.

PN63

VICE PRESIDENT ASBURY: That's okay, Mr Clarke. Thank you for your submission. Mr Hambas, did you have anything you wanted to say in reply?

PN64

MR HAMBAS: (No audible reply)

PN65

VICE PRESIDENT ASBURY: Okay. Well, thank you, parties, for your time today. We will indicate that we will reserve our decision and we will issue it as soon as we can. Thank you for your time, and I will adjourn. Good morning.

PN66

MR CLARKE: Okay. Thank you, your Honours.

ADJOURNED INDEFINITELY

[10.31 AM]