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CASENOTE: *Commonwealth of Australia v Shamir* [2016] FWCFB 4185

(19 July 2016)

Mr Shamir (also '**Applicant**') (who was respondent on appeal) was employed by the Australian Taxation Office (also **'ATO'** and '**Appellant**') as a Senior Case Profiling Officer.

In 2013 the ATO restructured and made the positions of Senior Case Profiling Officer redundant. Mr Shamir and other case profiling officers were transferred to other employment within the ATO at the same classification level. Mr Shamir performed duties in an auditing division of the ATO, answering to another employee at the same level as him.

A dispute emerged as to whether Mr Shamir had the expertise to perform parts of his new audit duties, including 'client contact'. On 7 April 2015, the Community and Public Sector Union, on behalf of Mr Shamir notified a dispute under the prevailing *ATO Enterprise Agreement 2011* ('**ATO EBA**'). A senior employee gave directions to Mr Shamir to perform certain specific duties, including client contact. Mr Shamir refused to perform the duties and was sent a show cause letter on 10 June 2015. Mr Shamir relied on the notification of the dispute under the ATO EBA and the status quo provisions of the ATO EA as providing a basis for his refusal to perform duties. With effect from 24 July 2015, the ATO terminated Mr Shamir's employment and the Applicant sought relief under Part 3-2 of the *Fair Work Act* 2009 (Cth) ('**FW Act**').

- Allegations at first instance-

Commissioner Ryan heard the application for the Fair Work Commission and gave written reasons published at [2016] FWC 1844. In relation to the question of a valid reason, the Commissioner found (at [26]):

> *In the present matter the decision to dismiss Mr Shamir is indefensible in the circumstances where there was a live and ongoing dispute both as to the ATO's entitlement to require Mr Shamir to perform the duties he was directed to perform and as to Mr Shamir's entitlement to refuse to perform those duties.*

The Commissioner appeared to place great weight on the 'industrial dispute' arising from the ATO EBA. The Commissioner found further that the termination was 'unsound' and for this reason, no valid reason existed for the termination. Ryan C went on to find that the termination was unfair, and exercised his discretion to reinstate the Applicant.

- Appeal -

The ATO appealed.

Ground 1 of the ATO's appeal grounds was to the effect that, on the basis that there was a valid reason for terminating the Applicant's employment, the Commissioner's decision and order should be quashed pursuant to section 607(3)(a) of the FW Act.

Several further grounds for appeal touched upon what the Commissioner found were relevant factors pursuant to section 387(h) of the FW Act. The Appellant submitted that these included the extent to which the Respondent failed to perform his audit duties (including client contact); the level of training in the Applicant's altered role and his level of competency to perform the duties assigned to him by ATO.

A further ground for appeal saw the ATO submitting that:

(a) the conclusion that the dismissal was harsh was a conclusion that was not open to the Commissioner based on the evidence or the findings made;
(b) in support of this conclusion, the ATO posited that; there was a valid reason for the dismissal, the Respondent was fully notified of the reasons, there was no finding as to the extent to which the Respondent did not perform his duties as this was overlooked by the Commissioner.

The full bench (constituted by Catanzariti VP, Dean DP and Riordan C) heard the appeal. The full bench considered the Commissioner's consideration of the ATO EBA to be significant. Clause 145.5 provided relevantly:

> ***145.5*** *Continuation of work – conduct during dispute*
>
> *If there is no imminent risk to their health or safety, employees will continue to work in accordance with the provisions of their contract of employment or, where this is not inconsistent, established custom and practice at the workplace while any matter in dispute is resolved.*

The full bench found that cl 145.5 of the ATO EBA required that the Applicant was obliged to continue to work, unless there was 'an imminent risk to his health and safety'. Therefore, by not taking this obligation under cl 145.5 of the ATO EBA into account, the Commissioner failed to consider a relevant consideration and the full bench found this was an error in accordance with House v The King.

The full bench set aside the Commissioner's findings and elected to rehear (rather than remit) the Commissioner's decision. In uplifting and deciding for itself, the full bench found no unfairness and dismissed the Applicant's application.

Significance of the decision

As with many termination cases, this one turns particularly on its facts. However, this decision remains a curiosity as:

- it is relatively seldom that an appeal against a Part 3-2 decision succeeds. That is the point of section 400(1), which requires that there be public interest in any appeal against an unfair dismissal; and
- it is even more rare that an appeal *which has ordered reinstatement at first instance* so thoroughly revises the terms of a first instance unfair dismissal decision as this one does.

The biggest challenge for an applicant in these circumstances was the Applicant's refusal to perform duties assigned to him; and the treatment of that refusal by the ATO EBA. Whilst these facts don't put a 'fair' termination beyond doubt, they do create a hurdle for seeking relief.

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21 July 2016