DECISION

Fair Work Act 2009
s.604—Appeal of decision

Stephen Fitzgerald
v
Woolworths Limited
(C2017/2237)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT DEAN
COMMISSIONER WILSON

SYDNEY, 17 OCTOBER 2017

Appeal against decision [2017] FWC 1730 of Commissioner Cambridge at Sydney on 5 April 2017 in matter number U2016/14484.

Introduction and background

[1] Mr Stephen Fitzgerald has lodged a notice of appeal in which he applies for permission to appeal and appeals under s.604 of the *Fair Work Act 2009* (FW Act) against a decision of Commissioner Cambridge issued on 5 April 2017[1] (Decision). The Decision concerned an application made by Mr Fitzgerald for an unfair dismissal remedy with respect to the termination of his former employment with Woolworths Limited (Woolworths). In response to the application Woolworths contended that, because Mr Fitzgerald voluntarily resigned from his employment, he was not dismissed within the meaning of s.386(1) of the FW Act and the Commission had no jurisdiction to entertain his application. In the Decision, the Commissioner found that Mr Fitzgerald had not been dismissed, upheld Woolworths' jurisdictional objection and dismissed Mr Fitzgerald's application.

[2] Rule 56(2) of the *Fair Work Commission Rules 2013* (FWC Rules) relevantly provides that a notice of appeal under s.604 must be filed within 21 calendar days after the date of the decision the subject of the appeal or within such further time allowed by the Commission on application by the Appellant. Mr Fitzgerald initially sent his notice of appeal by email to the chambers of the Commissioner on 26 April 2017. He was advised by the Commissioner's Associate that day that it was necessary for him to lodge his notice of appeal with the Commission's Registry. He did so the following day, 27 April 2017, which was the 22nd day after the Decision was issued. Under rule 14(1), documents permitted to be lodged with the Commission may be lodged by email sent to an address approved by the General Manager for that purpose. Mr Fitzgerald's lodgment of his notice of appeal with the Commissioner's chambers on 26 April 2017 did not comply with this rule. However we consider the fact that Mr Fitzgerald sent his appeal to the wrong email address within the Commission is a mere irregularity in the manner in which he made his application. It did not cause any prejudice to Woolworths, and Woolworths did not contend otherwise. We waive this irregularity under

[1] [2017] FWC 1730

s.586(b). Therefore Mr Fitzgerald's appeal was filed within the time prescribed by rule 56(2), and no extension of time is necessary.

[3] Mr Fitzgerald's appeal was initially listed for hearing on 29 May 2017 on the question of whether permission to appeal should be granted only. After hearing from the parties that day, we determined that one contention of appealable error in Mr Fitzgerald's appeal was arguable and raised an issue of general importance such that it would be in the public interest to grant permission to appeal in accordance with s.400(1) of the FW Act. The issue was whether, in the hearing before the Commissioner on 3 March 2017, Woolworths was being represented by lawyers for which the permission of the Commission was required pursuant to s.596 of the FW Act. The circumstances in which this issue arose are explained later in this decision.

[4] Mr Fitzgerald advised the Commission that, between the hearing on permission to appeal on 29 May 2017 and the full hearing of the appeal on 28 August 2017, his hearing had declined significantly. Both parties filed written submissions prior to the final hearing in accordance with the Commission's directions. At the hearing on 28 August 2017, Mr Fitzgerald was offered the use of a hearing loop and upon request was permitted to use voice recognition software. Notwithstanding this, Mr Fitzgerald asserted that he was unable to hear the respondent's oral submissions or the questions and comments made by members of the Full Bench. Accordingly the Commission provided him with a copy of the transcript of the hearing, and gave him the opportunity to file a further written submission in reply within seven days. Mr Fitzgerald took advantage of this opportunity and filed such a submission.

Factual background

[5] At the time of the purported dismissal, Mr Fitzgerald was employed by Woolworths as a Team Support member at its supermarket in Avalon, Sydney. In around June 2016 Mr Fitzgerald became aggrieved by various actions taken by his supervisor Mr William Lose, particularly including the opening of a metal lockbox owned by the company but used exclusively by Mr Fitzgerald and the removal of a desk and stool that had been used by Mr Fitzgerald. Following those incidents Mr Fitzgerald took an almost five month period of personal and annual leave. During the periods in which he took personal leave, Mr Fitzgerald provided medical certificates which did not specify the nature of the illness from which he was suffering. Mr Fitzgerald continued to visit the Avalon store over the period of his leave, and had interactions with Woolworths staff, including Mr Lose, in which he indicated among other things that he was not going to return to work. On or about 27 November 2016 Mr Fitzgerald sent the manager of Woolworths' Avalon store a letter of resignation which stated:

> "In view of ongoing and persistent bullying, harassment and intimidation by Will Lose, the 2IC of Woolworths Avalon, and the associated dangers of working in a disruptive environment and also, since my leave entitlements have now expired, I am left no choice but to resign.
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> In view of the above, my employer and employee relationship with Woolworths is extinguished as of 27th November 2016.
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> Forwarded for your information and appropriate action."

[6] Mr Fitzgerald lodged his unfair dismissal application on 5 December 2016. He contended that he was dismissed within the meaning of s.386(1)(b) of the FW Act in that he was forced to resign as a result of the employer's conduct towards him. Woolworths' case was that no harassment, bullying and intimidation as alleged in the letter of resignation had occurred, and that Mr Fitzgerald resigned voluntarily.

The proceedings before the Commissioner

[7] Mr Fitzgerald's unfair dismissal application was (after an unsuccessful conciliation conference) initially the subject of a telephone directions hearing before the Commissioner on 25 January 2017. Mr Fitzgerald represented himself, and Ms Nicole Barclay, who was employed by Woolworths and held the position of Employee Relations Specialist, appeared for Woolworths. During the hearing the Commissioner raised the issue of representation, and the following exchange occurred:

> "THE COMMISSIONER: And that's the whole reason for holding today's proceeding, so that everyone is, as it's sometimes described, on the same page about this; everyone's got the same understanding of what's going to be happening. Ms Barclay, I take it, are you going to be the person that will actually conduct the case on behalf of the respondent?
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> MS BARCLAY: At this point in time my answer to that question will be yes. However, we would like to reserve our right to seek leave of the Commission to be represented, but we're not in a position to make that call as yet.
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> THE COMMISSIONER: Well, if you use a lawyer or paid agent then I'll need to determine whether permission should be granted. Section 596 then is the relevant section of the Act about that, and the leading authority, of course, is a decision made by the Federal Court, and that would need to be carefully considered, particularly the question of any imbalance where one side was self-represented, as it's described, and the other side use a lawyer or paid agent. There may be a difficulty with the respondent being granted permission, but we'll deal with that if that arises.
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> MS BARCLAY: Yes, we understand.
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> THE COMMISSIONER: The decision I'm referring to is the Warrell decision, the judgment of Flick J, and that's the established authority on this question. Anyway, if we get to that point we'll have to address the question of permission, but at this stage we probably don't need to trouble ourselves with that.
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> MS BARCLAY: Yes, I agree. At this stage, we will report on the basis that it will be myself representing Woolworths in the future.
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> THE COMMISSIONER: Yes. Obviously if that changes you need to advise if you're going to be represented, and then we need to deal very quickly with that question of permission."

[8] During the course of the directions hearing, the Commissioner made directions for the filing of evidentiary material and outlines of submission, and the preliminary issue of whether Mr Fitzgerald had been dismissed by Woolworths was set down for hearing on 3 March 2017.

[9] It became apparent not long after the directions hearing that Woolworths was being provided with legal services in relation to Mr Fitzgerald's application by the law firm Sparke Helmore. On 14 February 2017 Mr Ian Bennett, a Senior Associate with Sparke Helmore, sent an email to Mr Fitzgerald which, relevantly, stated "*I confirm we are assisting Woolworths Ltd in relation to the above matter*" and attached a "without prejudice" letter. The "without prejudice" letter was under the letterhead of Sparke Helmore, and commenced by saying "*We confirm we are engaged by and instructed to assist Woolworths ... in preparing for the arbitration hearing listed before the Fair Work Commission ...*". It is not necessary to describe further the contents of the letter except to say that it put Mr Fitzgerald on notice that if he continued with his unfair dismissal application and was unsuccessful, Woolworths might seek a costs order against him. Mr Fitzgerald responded to the email and letter the same day by email. He also copied his response together with the original email and the "without prejudice" letter to the Commissioner's Associate. This, understandably, caused Sparke Helmore to send an email (over the signature block of Mr Bennett) to the Commissioner's chambers the following day protesting at Mr Fitzgerald's behaviour in sending the Commission the "without prejudice" letter. This email also stated "*I confirm we are engaged by Woolworths ... to assist in this matter*", and went on to "*advise that Woolworths intends to file and serve evidence and submissions in this matter on or before 22 February 2017 (as per the directions dated 25 January 2017)*". The email finished by saying "*Should you have any questions, concerns or wish to discuss further, please do not hesitate to contact me*". On 24 February 2017 Sparke Helmore sent a further letter to Mr Fitzgerald which notified him that the makers of two witness statements which Mr Fitzgerald had filed and served as part of his evidentiary case were required to attend the hearing for cross-examination.

[10] Woolworths did not at any time before the hearing apply for permission to be represented by lawyers. When the hearing commenced on 3 March 2017 and the Commissioner asked for the appearances, Ms Barclay announced that she was appearing for Woolworths and that "*...I'm assisted here today by Ian Bennett from Sparke Helmore*".[2] There is no dispute that Mr Bennett was at that time and all times thereafter during the hearing seated next to Ms Barclay at the bar table. Predictably enough, the form of appearance announced by Ms Barclay prompted a protest on the part of Mr Fitzgerald:

> "MR FITZGERALD: Okay, now, on our preliminary hearing I was here. You specifically asked Nicole Barclay if she would have a solicitor or barrister here with her. She said no. That is on the record. We have a gentleman here from Sparke Helmore, the legal firm representing Woolworths and to me, that seems like it's gone against what Nicole Barclay had said at the time and I'm representing myself and she has legal representation with her which she said she wasn't going to bring in the court or the Fair Work Commission. Now, do I have - is there an issue there or do I just have to go along with that?[3]"

[11] This led to the following exchange between the Commissioner and Ms Barclay:

> "THE COMMISSIONER: Well, Ms Barclay, are you actually representing the respondent employer? What is the role of Mr Bennett in all of this?

[2] Transcript 3 March 2017 PN 2

[3] Transcript 3 March 2017 PN 10

MS BARCLAY: That's correct, Commissioner. I'll be representing Woolworths today. We don't have any intention to seek leave to have legal representation. Mr Bennett is just simply here to assist me with my paperwork today.

THE COMMISSIONER: Right, so he's not going to play any active role - - -

MS BARCLAY: No.

THE COMMISSIONER: - - in that I won't be hearing from him at all?

MS BARCLAY: You won't be hearing from him. He understands his obligations.

THE COMMISSIONER: Right."[4]

[12] Mr Fitzgerald continued his protest at Mr Bennett's involvement in the hearing, which led to a further exchange between him and the Commissioner during which Mr Fitzgerald said he could not afford to have a lawyer represent him, being unemployed, and that he would prefer that Mr Bennett not be in the room.[5] Ms Barclay at that point responded, and gave an assurance that Mr Bennett was "*simply here today to assist me with my paperwork and it is my intention that I and myself alone will be representing the matter on behalf of Woolworths*".[6] There was then a further exchange between the Commissioner and Mr Fitzgerald:

"THE COMMISSIONER: Frequently, Mr Fitzgerald, when there is an argument about this question of - it's actually permission for a party to be represented by a lawyer or paid agent - when there is an argument about that and the Commission sometimes decides that one side will not be granted permission so if I was presented with that argument now, which to some extent I am - - -

MR FITZGERALD: Yes.

THE COMMISSIONER: - - I would say that in the circumstances, having regard for section 596 of the Act, permission for Woolworths to be represented by lawyers or paid agents is refused. But that then doesn't mean that I have the capacity to say to Woolworths that they cannot have the assistance of anyone, whoever that might be - - -

MR FITZGERALD: Okay, yes.

THE COMMISSIONER: - - a lawyer, a paid agent - they could get the Prime Minister in here to assist them. I couldn't stop that. All I can do is under section 596 of the Act refuse permission for the person that's standing there and speaking on behalf of Woolworths and conducting the case on behalf of Woolworths to not be a lawyer or paid agent. I cannot do anything sort of behind the scenes to - - -

MR FITZGERALD: No, okay.

[4] Transcript 3 March 2017 PNs 11-17

[5] Transcript 3 March 2017 PN 27

[6] Transcript 3 March 2017 PN 30

THE COMMISSIONER: - - to say, "Well, you can't have this person here or you can't have that person here." How they actually configure their assistance in respect of the matter is something I have absolutely no control over.

MR FITZGERALD: Okay, I just wanted to clarify - - -

THE COMMISSIONER: Very often that does occur, to put it bluntly, that the lawyer just instead of standing there and doing the case moves to one side and acts - assisting and there is nothing that can be done about that.

MR FITZGERALD: Okay.

THE COMMISSIONER: That's just the way it is.

MR FITZGERALD: I just needed to know what the legal aspects were."[7]

[13] After some further comments the Commissioner said:

"THE COMMISSIONER: Okay, so the record will show that, Mr Fitzgerald, you've raised this concern. I've tried to explain it. I just don't think that I have the power - nor would it be appropriate for me to say that this person or that person can't be in the room."[8]

[14] It is plain from these exchanges that, for the purpose of the requirement for permission for legal representation in s.596(1), the Commissioner treated representation as being confined to oral advocacy.

[15] The transcript does not show that Mr Bennett subsequently spoke during the hearing except for two occasions. The first was that, while Mr Fitzgerald was being cross-examined, he (quite inappropriately) addressed some questions to Mr Bennett concerning emails which Sparke Helmore had sent to him and provoked him into responding.[9] The second was when, shortly afterwards and in response to the Commissioner's request for copies of a certain document, Mr Bennett responded that he had a copy of the document in question.[10]

The Decision

[16] In respect of the issue of representation, the Decision simply noted that Mr Fitzgerald represented himself, and Woolworths was represented by Ms Barclay.[11] The Commissioner then made detailed findings of fact in the Decision concerning the circumstances leading up to Mr Fitzgerald's resignation.[12] After summarising the parties' submissions, the Commissioner referred to a number of authorities concerning the circumstances in which a resignation can be

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[7] Transcript 3 March 2017 PNs 31-42

[8] Transcript 3 March 2017 PN 49

[9] Transcript 3 March 2017 PNs 885-888

[10] Transcript 3 March 2017 PN 896. The transcript subsequently has Mr Bennett asking Mr Fitzgerald a question at PN 991, but this is an error and in fact it was Ms Barclay who asked the question.

[11] Decision at [4]

[12] Decision at [5]-[19]

treated as a termination of employment at the initiative of the employer by reason of the employer's conduct.[13] The Commissioner then reviewed the facts of the metal lockbox incident and the desk/stool removal. In relation to the former, the Commissioner said:

> "[54] In any event, although the applicant had legitimate basis for complaint about the conduct of Mr Lose when he accessed the metal lockbox, this was action reflective of a misjudgement on the part of Mr Lose rather than something that could be construed to represent an egregious breach of the employment relationship. The metal lockbox incident should have been a matter that, if properly agitated and following proper and thorough investigation, resulted in firstly, an apology from Mr Lose to the applicant, and secondly, a formal directive to the applicant to remove his personal padlock from the lockbox together with any other personal items that he had stored in it."

[17] Concerning the desk/stool removal, the Commissioner characterised this as a "childish power struggle between a longer serving junior employee who refused to accept a new manager's instruction", but said there was "a legitimate business purpose" for the removal of the furniture and that there "was no evidence to support any inference that the rearrangement of the desk and stool and other changes to the furniture and layout of the Back Dock area, were actions which were taken to deliberately strain the employment relationship with the applicant".[14] The Commissioner went on to conclude:

> "[57] An objective analysis of the specific aspects of the applicant's complaints regarding the conduct of Mr Lose does not permit any finding that the metal lockbox incident and/or the desk/stool removal, either separately or in combination, and having regard for the broader context of the interactions between the applicant and Mr Lose, were actions of the employer that were designed to produce or likely to lead to the resignation of the applicant. In particular, the actions of Mr Lose could not be construed as egregious breaches of the employment relationship which repudiated the employment, so as to permit the applicant to have treated the employment to be at an end.
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> [58] Unfortunately, rather than pursuing the legitimate aspects of complaint about the actions of Mr Lose, the applicant commenced a period of leave which the employer quite understandably did not consider to be connected with the concerns that the applicant had previously raised with Mr Tiller. There is an obligation on both parties to the employment relationship to take reasonable steps to maintain the relationship. The absence of any pressed articulated complaint meant that the employer had no opportunity to rectify the legitimate aspects of complaint about the conduct of Mr Lose. In these circumstances the subsequent resignation of the applicant that coincided with the expiry of his paid leave, cannot be properly connected with any conduct, or a course of conduct engaged in by the employer."
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> **Conclusion**
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> [59] The determination of this matter has involved a contest about whether or not the applicant was a person dismissed from employment. Upon application of the relevant tests and an analysis of the evidence involving the circumstances of the termination of

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[13] Decision at [40]-[45]

[14] Decision at [55]-[56]

> employment, it has been established that the resignation of the applicant was not caused by conduct, or a course of conduct, on the part of the employer.
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> . . .
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> [62] The applicant had a variety of options other than resignation, including elevating his complaints as was suggested to him by another employee. The applicant was clearly not forced to resign.
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> [63] Consequently, a careful analysis of the circumstances in this instance has established that it was not the actions of the employer that operated as the real and effective initiator of the termination of the contract of employment. The applicant was not a person dismissed from employment, and the jurisdictional objection as advanced by the employer must be upheld."

The costs application

[18] After the Decision was issued, on 19 April 2017 Woolworths made an application for an order pursuant to ss.400A and 611 of the FW Act that Mr Fitzgerald pay its costs of the proceedings. The costs sought had two components: Woolworths' internal costs incurred in the proceedings (consisting of the time spent by Ms Barclay on the matter charged at an hourly rate of $57.00), and "*fees incurred and paid ... for Costs to Sparke Helmore Lawyers throughout the course of the Proceedings*". The internal costs were calculated as totalling $6,500, and the costs billed to Woolworths by Sparke Helmore (itemised in two separate tax invoices dated 28 February 2017 and 31 March 2017) were $25,885.75. The invoices contained the heading "*Fitzgerald v Woolworths Limited (FWC Ref: U2016/14484)*". It appears that Sparke Helmore was first instructed in the matter on 31 January 2017. Activities undertaken by Sparke Helmore that were billed included preparation of the "without prejudice" letter of 14 February 2017; drafting of the outline of submissions, drafting of witness statements (including interviews with witnesses); review and settlement of the strategy for the conduct of the arbitration hearing; preparation for the hearing including drafting opening submissions, cross-examination questions, scripts for examination in chief and "*other collateral matters*"; "*Attending FWC Arbitration Hearing before Commissioner Cambridge and to assist N Barclay*"; and drafting and reviewing closing written submissions in the matter.

[19] The Commissioner has deferred hearing and determining Woolworths' costs application pending the outcome of this appeal.

Appeal grounds and submissions

[20] Mr Fitzgerald's grounds of appeal are lengthily expressed, but the propositions they contained may be summarised as follows:

(1) The Commissioner made a significant error of fact in finding that Mr Fitzgerald "left" Woolworths, when the evidence showed that it was the intention of Woolworths to "get rid" of him.

(2) The Commissioner failed to take into account the witness statement of Mr Ray Plater which stated that Mr Fitzgerald's supervisor said that he had got rid of Mr Fitzgerald, and consequently an error of fact was made by the Commissioner in finding that Mr Fitzgerald left his employment voluntarily.

(3) He was misled by the Commission with regard to legal representation of the Respondent, in that at the pre-hearing conference, and again at the hearing the Respondent confirmed that it would not be seeking leave to be represented by a lawyer, however at the hearing the Respondent was assisted by Mr Ian Bennett of Sparke Helmore Lawyers.

(4) He was misled about or not made aware of the ramifications of a jurisdictional objection in that losing on a jurisdictional point may result in a costs application being made against him.

(5) Woolworths engaged in witness tampering by preventing Mr Fitzgerald's witnesses from attending the hearing, in that Woolworths did not alert the witnesses to attend the hearing or release them from work to attend, and in fact allowed one of the witnesses to take annual leave to go on a cruise during the time of the hearing.

(6) The Commissioner should have allowed Mr Fitzgerald to telephone former employees of Woolworths during proceedings to validate his evidence, despite those people not having provided witness statements.

(7) There was misrepresentation and deceit relating to legal representation and the jurisdictional objection which attracted the public interest.

[21] The written and oral submissions advanced by Mr Fitzgerald in support of his appeal grounds were of little assistance in the determination of the appeal. They consisted to a large extent of dissertations about irrelevant matters, political commentary, semi-racist remarks and unsupported allegations made against Woolworths and its personnel. In relation to the issue of legal representation, he submitted that Woolworths had misrepresented the position with respect to legal representation at the 25 January 2017 directions hearing, he was misled by the Commission that legal representation was not required, Woolworths was legally represented at the 3 March 2017 hearing without obtaining permission, and he had been left exposed to a costs order even though Woolworths had not obtained permission for legal representation.

[22] Woolworths submitted in relation to the issue of legal representation that:

- the role of Sparke Helmore was confined to the provision of assistance and advice to Woolworths in the preparation and presentation of its case;

- the role Sparke Helmore was taking in the matter was known to Mr Fitzgerald prior to the hearing as a result of the correspondence sent to him;

- Mr Bennett of Sparke Helmore did not act or appear on behalf of Woolworths at the hearing on 3 March 2017, as is apparent from the transcript;

- his role did not amount to representation of Woolworths for the purpose of s.596 of the FW Act;

- represent, on its ordinary meaning, means "*to stand or act in the place of as a substitute, proxy, or agent*" and "*to speak and act for by delegated authority*";

- there is no reason why this ordinary meaning should not be applied to s.596, and to the extent that rule 12 of the FWC Rules suggests a broader meaning, it cannot exceed its statutory source;

- the common law has recognised the role of the "McKenzie friend", being a person (whether legally qualified or otherwise) present in court to assist a party by prompting, making notes or quietly giving advice on the conduct of a case;

- a "McKenzie friend" is considered to be distinct from a representative in the sense that they do not have a right to appear as an advocate or to address the court on behalf of a party, and do not generally require leave or permission to participate in this role subject to the general powers of a court or tribunal regarding the management and fair conduct of its processes;

- there was no error in the Commissioner's conclusion that Woolworths was not being represented at the hearing by Sparke Helmore;

- in any event, there is nothing in the record of proceedings to suggest that the presence of Mr Bennett at the hearing gave rise to any unfairness, and the Commissioner satisfied himself that there was no relevant unfairness;

- the incurrence of costs by Woolworths in relation to the legal services provided by Sparke Helmore was irrelevant to the issue of representation; and

- even if there was error in the way the Commissioner approached the application of s.596 to the proceedings, there is no basis to conclude that this could have affected the outcome of the proceedings.

[23] In relation to Mr Fitzgerald's other grounds of appeal, Woolworths submitted:

- there was nothing in the record of proceedings to support the propositions that Mr Fitzgerald was subjected to any procedural unfairness, did not understand the nature of the issue that was the subject of the hearing on 3 March 2017, or was not provided by the Commission with the appropriate degree of assistance for a self-represented litigant;

- there was no basis for Mr Fitzgerald's contentions that he was unfairly denied the opportunity of calling witnesses in support of his case or that Woolworths interfered with the capacity of his witnesses to attend the hearing;

- Mr Fitzgerald's assertion that the Commissioner erred in assessing witness credibility could not amount to a demonstration of appealable error, particularly as he had not identified any significant error of fact in the Decision; and

- the Commissioner's factual findings, and his conclusion that Mr Fitzgerald voluntarily resigned, were reasonably open to him on the evidence, and no error has been disclosed.

Consideration

Appeal grounds 1, 2, 4, 5 and 6

[24] Insofar as these appeal grounds do not traverse the issue of representation, we do not consider that any appealable error has been demonstrated in the Decision. Mr Fitzgerald advanced his case on the basis that he was forced to resign by Woolworths, and therefore he was "*dismissed*" within the second limb of the definition of that term in s.386(1)(b) of the FW Act. The well-established test for a forced resignation was restated in the recent Full Bench decision in *Bupa Aged Care Australia Pty Ltd v Tavassoli*.[15] The employer must have engaged in conduct with the intention of bringing the employment to an end, or termination of the employment must have been the probable result of the employer's conduct, such that the employee had no effective or real choice but to resign.[16] In this case, Mr Fitzgerald relied upon two instances of supervisory action occurring in June 2016 which on any view were relatively minor in nature to contend that he had no choice but to resign in November 2016. While Mr Fitzgerald was no doubt, in a wholly subjective sense, aggrieved and offended by Mr Lose's conduct in relation to the two incidents, we do not consider it to have been reasonably arguable that this forced Mr Fitzgerald to resign five months later. As the Commissioner found, Mr Fitzgerald never even formally complained about Mr Lose's conduct. There was no contemporaneous connection made by Mr Fitzgerald between his taking of leave and any conduct on the part of Mr Lose or Woolworths. His resignation coincided with the exhaustion of his leave entitlements. While Mr Fitzgerald, by reason of the incidents which occurred before he took leave, plainly decided he did not want to return to work at Woolworths once his leave expired, there was no objective basis in the evidence which permitted the conclusion that he was compelled to make that decision by reason of any conduct on the part of Woolworths.

[25] In relation to other specific matters raised by Mr Fitzgerald:

(1) We do not consider that the Commissioner made any appealable error by not specifically referring to the statement of Mr Ray Plater in the Decision. Mr Plater made a witness statement in which he asserted that, at some time after Mr Fitzgerald left his employment, "*Will Lose approached me and said he got rid of Stephen Fitzgerald because he wasn't performing*". Woolworths requested of Mr Fitzgerald in writing that Mr Plater attend the hearing for cross-examination. However he did not attend. Mr Lose, who gave sworn evidence, denied that he had said this. The assertion in the statement is inconsistent with the fact, not in dispute, that Mr Fitzgerald resigned. It is also inconsistent with Mr Fitzgerald's own evidence that, prior to the resignation, Mr Lose denied "*getting rid*" of him and asked him to come back to work "*…in a squeaky little mouse voice…*" to which Mr Fitzgerald replied "*Snakes have no empathy and Will bit* [sic] *you worse the second time*". In the circumstances it could not be said that Mr Plater's statement had any probative value.

(2) It is clear from his written submissions, his statement of evidence and the transcript of the hearing that Mr Fitzgerald fully comprehended the nature of

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[15] [2017] FWCFB 3941

[16] Ibid at [47]

Woolworths' jurisdictional objection and that he needed to demonstrate that he had been dismissed by Woolworths. Whether he had an adequate apprehension that he might be subject to a costs application if it was found that he was not dismissed is a matter for consideration when the costs application is determined by the Commissioner. It is not relevant to a consideration of whether the Decision was attended by any error.

(3) The allegation of "witness tampering" was based on the proposition that Woolworths had an obligation to make Mr Fitzgerald's witnesses available for the hearing. It did not. There was no evidence that Woolworths did anything as an employer to obstruct any of its employees giving evidence in support of Mr Fitzgerald. That it approved leave requested by an employee to go on a cruise does not amount to any impropriety in this respect. The allegation is without substance.

(4) The Commissioner was not obliged as a matter of fairness to allow Mr Fitzgerald to telephone during the hearing various persons nominated by him, who had neither made witness statements in accordance with the Commission's directions nor attended the hearing to give evidence, in order to glean support for his case. The Commission's procedures in unfair dismissal matters are designed to ensure that parties are placed on notice as to the evidentiary case they have to meet in advance of hearings by the provision of witness statements. There are often legitimate circumstances in which these procedures may be departed from - for example, if a witness is unavailable to make a witness statement or is hostile and refuses to do so. Evidence may also sometimes be taken from witnesses by telephone if properly arranged in advance. However the extraordinary procedure proposed by Mr Fitzgerald of "cold-calling" various persons during the hearing for the purpose of obtaining evidence from them, without any prior notice of this having been given to Woolworths or the Commission, was extraordinary and verged on the farcical. There are limits to which the circumstances of litigants in person may be accommodated consistent with the obligation to conduct a fair and just hearing, and Mr Fitzgerald's proposed course of action went beyond those limits.

[26] Appeal grounds 1, 2, 4, 5 and 6 are, leaving aside the issue of representation, rejected.

The representation issue

[27] The requirement for permission for legal representation, and the exceptions to that requirement, are contained in s.596 of the FW Act as follows:

596 Representation by lawyers and paid agents

(1) 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.

(2) 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.

Note: Circumstances in which the FWC might grant permission for a person to be represented by a lawyer or paid agent include the following:

(a) where a person is from a non English speaking background or has difficulty reading or writing;

(b) where a small business is a party to a matter and has no specialist human resources staff while the other party is represented by an officer or employee of an industrial association or another person with experience in workplace relations advocacy.

(3) 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).

(4) 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; or

(b) is an employee or officer of:

(i) an organisation; or

(ii) an association of employers that is not registered under the Registered Organisations Act; or

(iii) a peak council; or

(iv) a bargaining representative;

that is representing the person; or

(c) is a bargaining representative."

[28] Section 609 of the FW Act authorises the making of procedural rules, and relevantly provides:

609 Procedural rules

(1) After consulting the other FWC Members, the President may, by legislative instrument, make procedural rules in relation to:

(a) the practice and procedure to be followed by the FWC; or

(b) the conduct of business in relation to matters allowed or required to be dealt with by the FWC.

(2) Without limiting subsection (1), the procedural rules may provide for the following:

. . .

(b) the circumstances in which a lawyer or paid agent may make an application or submission to the FWC on behalf of a person who is entitled to make the application or submission;

. . .

[29] Pursuant to s.609, rules 11 and 12 of the FW Rules have been made. Together these rules constitute Part 3, *Representation*, of the FW Rules. They provide:

11 Notice of representative commencing or ceasing to act

(1) A person who commences to act as a lawyer or paid agent of a party to a matter that is already before the Commission must lodge a notice with the Commission.

Note: The notice must be in the approved form—see subrule 8(2).

(2) Subject to section 596 of the Act, the Commission may permit a person to represent a party in a matter before the Commission despite the person's failure to lodge a notice in accordance with subrule (1).

Note: Section 596 of the Act provides for when a party may be represented by a lawyer or paid agent.

(3) A person who ceases to act as a lawyer or paid agent of a party to a matter before the Commission must lodge a notice with the Commission.

Note: The notice must be in the approved form—see subrule 8(2).

12 Representation by a lawyer or paid agent

(1) 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.

(2) However, subrule (1) is subject to a direction by the Commission to the contrary in relation to the matter.

(3) 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.

[30] There is little authority on the scope or operation of s.596. Only two decisions are of significance. In *Warrell v Fair Work Australia*[17] the Federal Court (Flick J) dealt with a situation where, in an unfair dismissal proceeding before Fair Work Australia (as the Commission was then known), a lawyer was permitted to appear on behalf of the employer in a proceeding without the Senior Deputy President hearing the matter having given consideration to the requirements of s.596. The Court said:

"[24] A decision to grant or refuse "*permission*" for a party to be represented by "*a lawyer*" pursuant to s 596 cannot be properly characterised as a mere procedural decision. It is a decision which may fundamentally change the dynamics and manner in which a hearing is conducted. It is apparent from the very terms of s 596 that a party "*in a matter before FWA*" must normally appear on his own behalf. That normal position may only be departed from where an application for permission has been made and resolved in accordance with law, namely where only one or other of the requirements imposed by s 596(2) have been taken into account and considered. The constraints imposed by s 596(2) upon the discretionary power to grant permission reinforce the legislative intent that the granting of permission is far from a mere "*formal*" act to be acceded to upon the mere making of a request. Even if a request for representation is made, permission may be granted "*only if*" one or other of the requirements in s 596(2) is satisfied. Even if one or other of those requirements is satisfied, the satisfaction of any requirement is but the condition precedent to the subsequence exercise of the discretion conferred by s 596(2): i.e., "*FWA may grant permission...*". The satisfaction of any of the requirements set forth in s 596(2)(a) to (c) thus need not of itself dictate that the discretion is automatically to be exercised in favour of granting "*permission*".

[25] The appearance of lawyers to represent the interests of parties to a hearing runs the very real risk that what was intended by the legislature to be an informal procedure will be burdened by unnecessary formality. The legislative desire for informality and a predisposition to parties not being represented by lawyers emerges, if not from the terms of s 596, from the terms of the *Explanatory Memorandum* to the *Fair Work Bill* 2008 which provided in relevant part as follows:

2291. FWA is intended to operate efficiently and informally and, where appropriate, in a non-adversarial manner. Persons dealing with FWA would

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[17] [2013] FCA 291, 233 IR 335

> generally represent themselves. Individuals and companies can be represented by an officer or employee, or a member, officer or employee or an organisation of which they are a member, or a bargaining representative. Similarly, an organisation can be represented by a member, officer or employee of the organisation. In both cases, a person from a relevant peak body can be a representative.
>
> 2292. However, in many cases, legal or other professional representation should not be necessary for matters before FWA. Accordingly, cl 596 provides that a person may be represented by a lawyer or paid agent only where FWA grants permission.
> ...
> 2296. In granting permission, FWA would have regard to considerations of efficiency and fairness rather than merely the convenience and preference of the parties.

[26] Neither on a review of the reasons for decision of the Senior Deputy President nor the transcript of the proceedings does it appear that any consideration at all was given to the constraints imposed by s 596(2). Nor was there any apparent consideration given to the manner in which the discretion was to be exercised – even if s 596(2)(a), (b) or (c) was satisfied. These matters cannot be regarded as some mere oversight assuming no real importance or exposing Mr Warrell to no real prejudice. Given the nature of the issues to be resolved by the Senior Deputy President and the difficulties confronting Mr Warrell, it is not self evident that Bacto Laboratories could have readily satisfied one or other of those constraints.

[27] It is thus concluded that the Senior Deputy President either erred in granting permission for Mr Butterfield to represent Bacto Laboratories or in failing to consider whether one or other of the constraints imposed by s 596(2) had been satisfied. 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, it is respectfully concluded, erred in not so concluding."

[31] The Court in *Warrell* proceeded to quash the decision of the Full Bench which dismissed an appeal from the Senior Deputy President's decision. It is not clear whether it did so on the basis that the identified error constituted jurisdictional error or an error of law on the face of the record, or on some other basis. It is sufficient to note that *Warrell* at least stands for the proposition that any non-compliance with s.596 in proceedings must be treated as a matter of significance in an appeal before the Commission.

[32] The other authority is the Full Bench decision in *NSW Bar Association v McAuliffe*.[18] That decision is, for relevant purposes, authority for two propositions. The first is that the power to grant or refuse permission for legal representation in s.596(2) does not carry with it the power to select who that legal representative would be either by reference to the individual identity of the lawyer or whether the lawyer is a barrister or solicitor, nor did it empower the Commission to choose which member of a party's legal team might represent the party in proceedings. Section 596(2) was not intended to interfere with a party's right to choose who

[18] [2014] FWCFB 1663, 241 IR 177

its legal representative would be.[19] The second proposition is that an error in the application of s.596 at a hearing does not necessarily require the decision that results from the hearing to be quashed if it does not result in any prejudice to a party.[20]

[33] Neither of these decisions dealt with the scope of the concept of "representation" in s.596. Woolworths attempted to obtain some support for its submission that s.596 was directed to limiting lawyers or paid agents appearing and/or advocating on behalf of a party at a hearing from the statement in *Warrell* (in the passage quoted above) that s.596 required that "a party '*in a matter before FWA*' must normally appear on his own behalf".[21] However we do not consider that much can be gleaned from this sentence given that the issue here did not arise for consideration in *Warrell*. In any event the concept of "appearing" for a party in legal proceedings is not itself unambiguous, since it may encompass the conventional announcement as to who is representing a party at the commencement of a hearing, but it may also refer to the identification of the legal representative of a party at all stages of proceedings before a court or tribunal through the filing of a notice of appearance.

[34] The text of ss.596 and 609 makes it apparent that "representation" in s.596 is concerned with more than just advocacy at a hearing. There are three reasons for this. First, the concept of representation when used in connection with the activities of a lawyer is not normally understood to be confined to such advocacy. A lawyer can be said to "represent" their client when they engage in a wide range of activities connected with litigation, not just advocacy. In the case of barristers, this may be illustrated by rule 15 of the Australian Bar Association's Barristers' Conduct Rules, which describes the work of a barrister in the following way:

> "15. Barristers' work consists of:
>
> (a) appearing as an advocate;
>
> (b) preparing to appear as an advocate;
>
> (c) negotiating for a client with an opponent to compromise a case;
>
> (d) representing a client in a mediation or arbitration or other method of alternative dispute resolution;
>
> (e) giving legal advice;
>
> (f) preparing or advising on documents to be used by a client or by others in relation to the client's case or other affairs;
>
> (g) carrying out work properly incidental to the kinds of work referred to in (a)-(f); and
>
> (h) such other work as is from time to time commonly carried out by barristers."

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[19] Ibid at [24]

[20] Ibid at [28]

[21] [2013] FCA 291, 233 IR 335 at [24]

[35] All the above categories of work involve representation of a client, not just the first category of appearing as an advocate. The position is no different with respect to a solicitor. Outside of the context of legal representation, a paid agent involved in proceedings before the Commission will typically engage in non-legal analogues of most of the above categories of work, and would be regarded as "representing" their principal in doing so. Therefore the use of the word "*represented*" in s.596 would not, on its ordinary meaning, suggest that the operation of the section is confined in the way suggested by Woolworths.

[36] Second, s.596(1) and (2) refer to a person being represented "*in a matter*" before the Commission. The word "matter" is not apt to describe just a hearing, and in a legal context usually describes the whole of a justiciable controversy that is brought before a court or tribunal for adjudication.

[37] Third, s.596(1) expressly provides that representation in a matter includes "*making an application or submission to the FWC on behalf of the person*", and the exclusion in s.596(3) from the permission requirement in s.596(1) in respect of *written* submissions in modern award and minimum wage matters indicates that "*submission*" in s.596(1) includes written submissions (which are necessarily prepared out of court). The making of an *application*, at least in the formal sense, is also necessarily an out of court activity. Section 609(2)(b) likewise authorises the making of procedural rules concerning the circumstances in which lawyers and paid agents may make applications and submission on behalf of persons, and thus is expressed in terms consistent with s.596(1).

[38] Section 596 is drawn in broader terms than requirements for permission for legal representation contained in the predecessor statutes of the FW Act. The very first requirement of this nature appeared in s.27 of the *Conciliation and Arbitration Act 1904* as first enacted. It provided (emphasis added):

> 27. *On the hearing or determination* of any industrial dispute an organization may be represented by a member or officer of any organization, and any party not being an organization may be represented by an employee of that party; but no party shall (except by consent of all the parties or by leave of the President) be represented by counsel or solicitor.

[39] This provision was clearly confined to in-court representational activities. One aspect of the operation of this section, namely its application to a situation where a barrister or solicitor was also a member or officer of an organisation or an employee of any other party, was considered by Higgins J, sitting as President of the Commonwealth Court of Conciliation and Arbitration, in *Waterside Workers Federation v Commonwealth Steamship Owners' Association*[22]. The facts of the matter were that a Mr Schrader of the law firm Sly and Russell had agreed to be employed by the NSW Stevedoring Company (a party to the proceedings) for £1 per week on the basis that he would whenever requested represent the company before any Wages Board or Court of Arbitration and cross-examine witnesses. Higgins J ruled:

> "To fancy that he acts for this client - a valuable client, no doubt - for £52 per year, I think rather absurd. Mr Schrader's experience and qualifications would certainly entitle him to more than £1 per week, and I am convinced that but for his legal skill he

[22] (1914) 8 CAR 53

would not be called 'assistant secretary.' I treat this as an obvious evasion of the section, and I shall have, unwillingly, to decline to hear Mr Schrader."[23]

[40] A similar issue was dealt with by the High Court in *R v Kelly; Ex parte The Commonwealth Public Service Clerical Association*[24]. The statutory provision there under consideration was s.19 of the *Public Service Arbitration Act 1920-1952*, which provided: "*No person or organization shall in any proceeding under this Act be represented by counsel or solicitor*". The factual issue was whether the general secretary of the Association, who was also a barrister, was permitted to appear for the Association under the section. The Court said:

> "We are now called upon to say whether the order nisi should be made absolute, and that involves two questions; first, whether the case is within s. 19 and second, if it is not, whether the remedy of mandamus lies.
>
> The first of these questions depends entirely on the terms of the section. Those terms are appropriate to describe the appearance before a tribunal of counsel or solicitor in his professional capacity on behalf of a client. There is no reason to suppose that it was meant to extend beyond that nor to give the language the provision uses any wider application. Clearly if a natural person who is a party to a proceeding under the Act is a barrister or a solicitor, s. 19 has nothing to say against his being heard. A corporation must proceed by the agency of natural persons and an organization not represented by counsel cannot appear before a tribunal except by some servant or agent. When it appears by its proper officer he acts as its servant, and even if he is a barrister or a solicitor he does not represent the organization in virtue of that status. The organization is not his client and his duties as well as his authorities are of a different description.
>
> Section 19 does not vary materially from s. 12 of the Arbitration (Public Service) Act 1911, the language of which was taken from the last words of s. 27 of the Commonwealth Conciliation and Arbitration Act 1904. That section began by conferring a positive right upon an organization to be represented by a member or officer and upon any other party to be represented by an employee. Then followed the prohibition. In *Waterside Workers Federation v. Commonwealth Steamship Owners' Association* (1914) 8 CAR 53 , Higgins J. as President of the Arbitration Court construed the words of prohibition as not excluding from the operation of the earlier or positive part of the section an officer or employee because he was qualified as a barrister or solicitor. That means that the words of prohibition referred only to representation by counsel or solicitor in his professional capacity. At the same time his Honour made it clear that the relation of the person who is a barrister or solicitor to the party whom he represented before the court as officer or employee must be in truth and reality that of an officer or employee and that a colourable employment or appointment would not do.
>
> Although s. 19 confers no positive right to representation by an officer, employee or other agent and is confined to prohibiting representation by counsel or solicitor there is no reason for giving the words any wider meaning or application. The consequence is

[23] Ibid at 60-61

[24] [1955] HCA 20; 92 CLR 10

> that the learned Chief Judge acted upon a mistaken interpretation of s. 19 in refusing to allow Mr. Smith to represent the association."

[41] Although the provision considered by the Court referred to representation "*in any proceeding*", which expression would generally be taken to refer to any application to a court in its civil jurisdiction for its intervention or action[25], the Court did not apparently regard it as operating more widely than the provision applying to a "*hearing or determination*" considered by Higgins J in *Waterside Workers Federation v. Commonwealth Steamship Owners' Association*, and considered its operation only in the context of an actual appearance before the tribunal by a lawyer. That may be explicable by the fact that in that era, the adduction of evidence and the making of submissions was done almost entirely in court and there was minimum scope for "representation" outside the courtroom setting. Whatever the scope of the operation of the provisions being considered in the two decisions above, it may additionally be noted that both decisions referred to considered that the operation of statutory provisions restricting legal representation could not be avoided by "colourable" activity or contrivances.

[42] Section 42 of the *Industrial Relations Act 1988*, as first enacted, provided in subsection (2) that a "*party to a proceeding before the Commission may be represented only as provided by this section*", and in subsection (3) that "*A party (including an employing authority, may be represented by counsel, solicitor or agent...*" in three specified circumstances all including a requirement for the leave of the Commission. In the provision's final emanation immediately before the enactment of the FW Act as s.100 of the *Workplace Relations Act 1996* the position had not relevantly changed apart from an alteration to the circumstances in which leave could be granted to a lawyer to represent a party. Notwithstanding the potential breadth of the concept of representation of a *party to a proceeding*, we were not taken to and are not aware of any case where the possible application of the provision beyond the scope of courtroom appearances was given any consideration prior to the enactment of the FW Act. The assumption appears to have been that the provision was concerned with who could appear at a hearing on behalf of a party. That assumption appears to be embedded, for example, in differing decisions concerning whether leave under s.42(3) could be granted to an organisation as distinct from a natural person. This issue was discussed in *Re Woolworths Queensland Supermarket Certified Agreement 2004*[26] (in the context of an application for intervention), and the conclusion stated was as follows:

> "[55] Leave to appear under s.42 of the Act is able to be granted only as a consequence of the Commission having initially granted a right for a party to intervene in a matter and to be "*heard*". Section 42 is the means by which the Commission facilitates the hearing of a party. While as a matter of practicality an appearance will be conducted by a natural person, there is no reason to conclude that a registered organisation that is not seeking to appear as a party in its own right cannot appear pursuant to s.42(3)(c) as an "*agent*", in the manner in which the Full Bench in *Formula One* provided."

[43] In a contrasting decision, *Austar Entertainment Pty Ltd Award 1997*[27] the conclusion was stated that s.42(3) envisaged only:

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[25] *Cheney v Spooner* [1929] HCA 12; 41 CLR 532 at 536-537, 538-539; *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43; 258 CLR 31 at [36]

[26] PR951532, [2004] AIRC 858 (31 August 2004)

[27] PR911106, [2001] AIRC 1172 (9 November 2001)

> "...the appearance of a natural person as counsel, solicitor or agent and not an organisation. An organisation, as Mr. Hatcher suggested, has no physical presence. An organisation cannot physically walk and/or talk and therefore cannot represent before the Commission. An organisation is not capable of appearing and presenting submissions and material for the consideration of the Commission."

[44] Be that as it may, for the reasons earlier stated, we consider that s.596 is not confined to permission for courtroom advocacy, and indeed appears to have been drafted in a way that is deliberately distinct from the predecessor provisions and was intended to put beyond doubt that all aspects of representation in connection with a matter were to be encompassed. The only relevant limitation on the scope of representation identifiable in s.596(1) is that it must be in a matter *before the FWC*. That would naturally exclude legal and agency services provided in relation to a justiciable controversy under the FW Act before an application to the Commission is made, and would probably also exclude the provision of legal advice to a party, *inter partes* dealings and other activities which do not involve interaction with the Commission itself even after an application is made to the Commission.

[45] On that basis, s.596 operates in conjunction with rules 11 and 12 in respect of unfair dismissal applications in the following way. Where an applicant engages the services of a lawyer or paid agent, representation begins at the point that the application to the Commission is made on the applicant's behalf. All dealings with Commission undertaken on behalf of either party from that point onwards in connection with the application constitute representation. Rule 11(1) operates to require the lawyer or paid agent to lodge a "*notice of representative commencing to act*" as soon as representation in the sense discussed commences. However, notwithstanding 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).

[46] The Sparke Helmore tax invoice provided in support of Woolworths' costs application, which we have determined to take into account in our consideration of this appeal, demonstrates that Woolworths was being legally represented in relation to Mr Fitzgerald's unfair dismissal application from at least early February 2017. Sparke Helmore was involved in, among other things, corresponding with the Commission on behalf of Woolworths and the making of written submissions by way of their preparation. In the circumstances it should have, but did not, file a "*notice of representative commencing to act*" in accordance with rule 11(1). Notwithstanding that, it was not required to obtain permission for those representational activities undertaken prior to the hearing on 3 March 2017 because they were exempted by rule 12(1).

[47] That brings us to the role of Mr Bennett of Sparke Helmore at the hearing on 3 March 2017. It was conceded by Woolworths in the appeal that his activities at the hearing involved the provision of professional legal services to Woolworths in connection with Mr Fitzgerald's unfair dismissal matter before the Commission. Indeed it could not be otherwise given that

Sparke Helmore charged Woolworths for the attendance in its tax invoice. The question is how Sparke Helmore could be said to be providing professional legal services to its client Woolworths by attending an arbitration hearing without being characterised as representing Woolworths before the Commission for the purpose of s.596.

[48] We have already rejected the proposition that s.596(1) is to be construed as being confined to representation by way of oral advocacy, so the fact that Ms Barclay undertook the advocacy and Mr Bennett provided assistance to her in the conduct of that advocacy is not demonstrative that legal representation was not being provided. His practical role appears to have been, at least, roughly analogous to that taken by an instructing solicitor and/or junior counsel assisting senior counsel in the conduct of a matter on behalf of a client. In that situation it could not seriously be suggested that only the senior counsel is representing the client before the Commission but the other members of the legal team are not.

[49] As earlier noted, Woolworths contended that Mr Bennett's role was that of a "McKenzie friend" providing assistance to a non-professional advocate rather than that of a legal representative. The role of a McKenzie friend was described in a decision of the Family Court (Lindenmayer J) in *Watson & Watson*[28] as follows:

> "2. ... The case of *McKenzie v McKenzie* [1970] 3 All E.R. 1034 was to the effect that a litigant who appears before a Court in person is ordinarily entitled, if he or she so wishes, to have the assistance, in the Court, of a friend or assistant who may sit beside the litigant at the bar table for the purpose of taking notes, handling or cataloguing documents or exhibits, making quiet suggestions to the litigant as to how best to conduct the case, and generally being of assistance to the litigant in presenting his or her case to the Court, provided that that person does not disrupt the proper conduct of the proceedings. However, an important limitation upon the role and functions of a 'McKenzie friend' is that he or she may not (except, perhaps, in the most exceptional cases, and with the express leave of the Court) act as an advocate for the litigant in the proceedings. *Collier v Hicks* (1831) 2 B and ad. 663 at 669 [1831] EngR 686; 109 E.R. 1290at 1292, and *KT v KJ & TH* [2000] FamCA 831; (2000) FLC 93-032 at 87,509 cited."

[50] In the decision of the Administrative Decisions Tribunal of NSW (O'Connor DCJ) in *Vice-Chancellor, University of New South Wales v Curtin and McGuirk*[29], consideration was given to whether the prior permission of a court or tribunal was required for a person to act as a McKenzie friend. After reviewing relevant UK and Australian authorities on the subject, the Tribunal concluded:

> "[55] In my view there is a danger in any class of litigation – not just criminal trials – that the proposed McKenzie friend may be an agitator or promoter of a cause whose interests go beyond the mere giving of assistance to a friend in need on a particular occasion. In the *Bow County Court* case the proposed friend was a man who regularly rendered assistance to fathers in the family law courts, derived remuneration from this activity, and was the president of a fathers' rights group. Lord Woolf MR referred at 758 to the danger that such a person:

[28] [2001] FamCA 1470

[29] [2006] NSWADT 271

> ‘will cease to conduct himself as an assistant and will indirectly run the case, using the litigant in person in the manner in which a puppet master uses a puppet. Such behaviour could provide a firm foundation for a judge not wishing him to be present as a McKenzie friend’.

> [56] In my view, therefore, the proper practice is for a litigant in person in the Tribunal to advise the Tribunal at the outset of the proceedings if he or she wishes to be assisted by a friend in the way contemplated for a McKenzie friend. The other party should be invited to indicate its attitude. The Tribunal should allow such assistance unless it has a well-founded concern that the participation of the friend might interfere with its ability effectively to conduct the proceedings. In that regard the nature of the proceedings will be relevant (different considerations may apply as between, for example, preliminary proceedings in the nature of case conferences or planning meetings and the formal hearing itself).”

[51] It is possible for a McKenzie friend to be a lawyer. Indeed the original friend of Mr McKenzie in *McKenzie v McKenzie*[30] was an Australian barrister not entitled to practice in the UK, and in *Smith v R*[31] the High Court did not appear to regard it as impermissible in all circumstances for a person to have a barrister as a McKenzie friend. However we were not taken to and are not aware of any authority that suggests that a legal practitioner who has been contracted to provide professional legal services to a client in relation to a proceeding before a court or tribunal could legitimately act as a McKenzie friend for that client at a hearing in the matter as part of the provision of such legal services. The UK has in recent years seen the development of a class of fee-charging McKenzie friends, which has been the subject of controversy[32], but they are not legal practitioners. We are not aware of any parallel development having occurred in Australia.

[52] Having regard to these authorities, we reject the proposition that Mr Bennett could be characterised as having acted as a McKenzie friend and not a legal representative at the hearing on 3 March 2017, for the following reasons:

(1) Woolworths did not, at least in terms, attempt to identify Mr Bennett as taking the role of a McKenzie friend at the hearing, let alone seek permission for this to occur. It should be noted that even in circumstances where s.596 does not apply, a party does not have a general right to determine who may attend a hearing on its behalf. The Commission under ss.589-593 of the FW Act is conferred with wide power to control the conduct of proceedings before it. This includes the power, in s.593(3)(b), to make orders as to who may be present at a hearing, whether “*because of the confidential nature of the evidence, <u>or for any other reason</u>*” (underlining added).

(2) Woolworths was not appearing in the matter as a “litigant in person”. It is a major corporation with the resources to engage legal representation if it wishes to do so. There is nothing in the cases which suggests that a corporation of this nature has a right, or would be permitted to, use the facility of a McKenzie

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[30] [1970] 3 All E.R. 1034

[31] [1985] HCA 62; (1985) 159 CLR 532

[32] See *Is access to justice a right or a service?*, a paper presented by the Honourable Stephen Rares at the *Access to Justice – Taking the Next Steps* Symposium held on 26 June 2015 at Monash University, at paragraph 75

friend because it has determined for whatever reason to use a corporate employee to conduct the advocacy at a hearing. The policy reasons for allowing McKenzie friends simply have no relevance to Woolworths.

(3) Once the entirety of Sparke Helmore's role in the matter, as exposed by its tax invoices, is understood, it is clear that Mr Bennett was not in fact taking the limited role envisaged by a McKenzie friend. He and his colleagues at Sparke Helmore had substantially prepared the case that Ms Barclay was to present, including the submissions, the witness statements, the questions for examination in chief and cross-examination, and the forensic strategy for the hearing. With the benefit of this information (which the Commissioner did not have at the time of the hearing), the proper inference to be drawn is that Mr Bennett's presence was to assist in ensuring that Ms Barclay advanced the case in the way planned. While it may be too much to say that Mr Bennett's true role was that of the "puppet master" (as referred to in the UK decision of *Bow County Court* case quoted in the passage from *Vice-Chancellor, University of New South Wales v Curtin and McGuirk* set out above), he certainly had a significant role in the presentation of Woolworths' case.

[53] In taking the role we have just described, we consider that Mr Bennett was legally representing Woolworths at the hearing before the Commissioner. He was part of a team consisting of Sparke Helmore and Ms Barclay which was tasked with presenting to the Commission Woolworths' case that Mr Fitzgerald had not been dismissed. In doing so, he was acting as a legal practitioner on behalf of Woolworths in the matter.

[54] We have earlier referred to the decisions in *Waterside Workers Federation v Commonwealth Steamship Owners' Association*[33] and *R v Kelly; Ex parte The Commonwealth Public Service Clerical Association*[34], which support the proposition that contrivances and colourable activities which seek to evade statutory limitations upon the right of appearance of legal practitioners in industrial tribunals should not be permitted. As explained in *Warrell v Fair Work Australia*[35], the policy considerations underlying s.596 include that Commission proceedings should be conducted efficiently with as little formality as possible and in a manner that is fair and just. Those policy considerations may be vitiated if lawyers are permitted effectively to direct or substantially influence the conduct of proceedings on behalf of a party without permission having first been obtained from the Commission in accordance with s.596. The maxim of statutory interpretation that what is prohibited directly cannot be done indirectly (*quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud*), applied to s.596, would tell against an overly narrow interpretation and application of the provision which permits its statutory purpose to be defeated or circumvented.[36] The practice of parties using "shadow lawyers" which has apparently developed[37], to the extent that it involves lawyers engaged by a party in a matter

[33] (1914) 8 CAR 53

[34] [1955] HCA 20; 92 CLR 10

[35] [2013] FCA 291, 233 IR 335

[36] *Caltex Oil (Aust) Pty Ltd v Best* [1990] HCA 53, 170 CLR 516 at 522-523; applied to the interpretation and application of the FW Act in *CFMEU* v *Queensland Bulk Handling Pty Ltd* [2012] FWAFB 7551 at [51]-[52]

[37] In the article *The restriction on legal representation before the Fair Work Commission: an end without means* by Adam Salter and Dr Kai Luck (Employment Law Bulletin, July 2016, p.214), reference is made to the practice as follows: "In practice, lawyers have tended to remain 'in the shadows' under the Act by preparing submissions, conducting detailed

attending and being involved in the conduct of a hearing without actually engaging in oral advocacy, should not we consider be regarded as falling outside the scope of operation of s.596.

[55] Woolworths was therefore required to seek the Commission's permission for Mr Bennett's participation in the hearing on 3 March 2017. The Commissioner erred in proceeding on the basis that permission was not required under s.596(2) merely because Mr Bennett was not to engage in oral advocacy. Alternatively he erred by formally refusing permission whilst still allowing Mr Bennett to engage in what we have found to be legal representation of Woolworths at the hearing.

[56] In stating these conclusions, we emphasise that we do not intend any personal criticism of Ms Barclay and Mr Bennett on the basis that no application for permission was made pursuant to s.596(2). The point raised and determined in this appeal is novel, and they no doubt believed they were acting in accordance with the established practice as to the operation and application of s.596. And, from the Commissioner's perspective, he did not at the relevant time have the advantage as we do of having the Sparke Helmore tax invoices, which expose the full extent and nature of the firm's role in the proceedings.

Disposition of the appeal

[57] It does not follow, as was made clear in *NSW Bar Association v McAuliffe*, that the error we have identified necessarily requires the Decision to be quashed. Mr Fitzgerald's main complaint about Woolworths' representation was that, having been informed by the Commissioner that permission under s.596(2) was not required for Mr Bennett's attendance at the hearing, he could not reasonably have anticipated that he would subsequently face a costs application that included the fees charged for Mr Bennett's attendance at the hearing. That point has a degree of substance, notwithstanding that Woolworths had in earlier correspondence placed Mr Fitzgerald on notice that he might face a costs application should he proceed with his application. However, that is a matter relevant only to the consideration of Woolworths' costs application, which is not before us for determination. Mr Fitzgerald did not identify any specific prejudice that was caused to him in the conduct of the hearing by Mr Bennett's participation. His complaint that he was "misled" at the directions hearing on 25 January 2017 concerning Woolworths' intentions concerning legal representation does not go anywhere in terms of any prejudicial effect upon the hearing. For the reasons earlier given, Woolworths' jurisdictional objection had overwhelming merit, and we cannot identify any reasonable possibility that a different ruling on the question of representation could have led to a different outcome. Therefore, having granted permission to appeal, we consider the appropriate course is simply to dismiss the appeal.

Order

[58] The appeal is dismissed.

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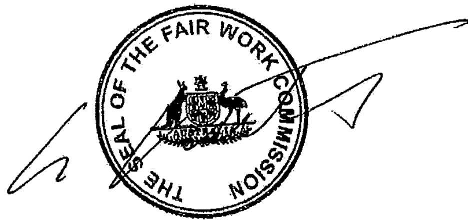
briefings and witness proofs with parties in preparation for the formal hearing and even attending and observing the hearing itself."



VICE PRESIDENT

Appearances:
S. Fitzgerald, Appellant.
Y. Shariff of counsel with N. Barclay for the Respondent.

Hearing details:
2017.
Sydney:
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