Federal Court of Australia

Atieh v ⇦ Civil Aviation Safety ⇨ Authority [2013] FCA 20 (23 January 2013)

[AustLII] Federal Court of Australia

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FEDERAL COURT OF AUSTRALIA

Atieh v ⇦ Civil Aviation Safety ⇨ Authority [2013] FCA 20

Citation:	Atieh v ⇦ **Civil Aviation Safety** ⇨ Authority [2013] FCA 20
Appeal from:	Application for leave to appeal: Atieh v ⇦ **Civil Aviation Safety** ⇨ Authority [2012] FCA 1027
Parties:	**MUSTAFA M ATIEH v ⇦ CIVIL AVIATION SAFETY ⇨ AUTHORITY**
File number:	WAD 272 of 2012
Judge:	**MCKERRACHER J**
Date of judgment:	23 January 2013

Catchwords:	**APPEAL AND NEW TRIAL** – application for extension of time and application for leave to appeal from an interlocutory judgment granting summary judgment – applicable principles – whether primary judgment attended by sufficient doubt to warrant its reconsideration – whether explanation for delay – relevance of applicant's status as a self-represented litigant
Legislation:	*Federal Court of Australia Act 1976* (Cth) ss 24(1)(a), 24(1A), 24(1D), 31A *Federal Court Rules 2011* (Cth) r 35.13
Cases cited:	*Decor Corporation Pty Ltd v Dart Industries Inc* [1991] FCA 655; (1991) 33 FCR 397 *Ex parte Bucknell* [1936] HCA 67; (1936) 56 CLR 221 *Glew v Frank Jasper Pty Ltd* [2010] WASCA 87 *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2000] FCA 1572; (2000) 104 FCR 564 *Kuljic v Secretary, Department of Social Security* (1994) 33 ALD 121 *Re Luck* [2003] HCA 70; (2003) 203 ALR 1 *Repacholi Aviation Pty Ltd v* ***Civil Aviation Safety*** *Authority (No 2)* [2012] FCA 1297 *Samsung Electronics Co Ltd v Apple Inc* [2011] FCAFC 156; (2011) 286 ALR 257 *Singh v Super City Nome Loans Pty Ltd* [2012] FCA 83 *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534
Date of hearing:	13 December 2012
Place:	Perth
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	30
Counsel for the Applicant:	The Applicant appeared in person
Counsel for the Respondent:	PA Walker
Solicitor for the Respondent:	Ashurst Australia

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION **WAD 272 of 2012**

BETWEEN: **MUSTAFA M ATIEH**
Applicant

AND: **CIVIL AVIATION SAFETY AUTHORITY**
Respondent

JUDGE: **MCKERRACHER J**
DATE OF ORDER: **23 JANUARY 2013**
WHERE MADE: **PERTH**

THE COURT ORDERS THAT:

1. The applicant's application for an extension of time to seek leave to appeal is refused.
2. The applicant's application for leave to appeal is refused.
3. The applicant's notice of appeal filed 9 October 2012 is declared incompetent and is struck out.
4. The applicant is to pay the costs of the respondent, to be taxed if not agreed.

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

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION **WAD 272 of 2012**

BETWEEN: **MUSTAFA M ATIEH**
Applicant

AND: **CIVIL AVIATION SAFETY AUTHORITY**
Respondent

JUDGE: **MCKERRACHER J**
DATE: **23 JANUARY 2013**
PLACE: **PERTH**

REASONS FOR JUDGMENT

INTRODUCTION

1. On 20 September 2012, the primary judge made orders under s 31A(2) of the *Federal Court of Australia Act 1976* (Cth) (**FCA**) summarily dismissing the applicant's (**Mr Atieh**) originating application against the respondent (**CASA**). On 9 October 2012, Mr Atieh filed a notice of appeal from the judgment of the primary judge. Mr Atieh had not sought or obtained leave to appeal from the interlocutory judgment at that time. On that basis, CASA filed a notice of objection to the competency of the appeal on 17 October 2012. On 9 November 2012 Mr Atieh filed an interlocutory application and accompanying affidavit. I directed at a directions hearing on 15 November 2012 that Mr Atieh file any further materials in support of his application for an extension of time for leave to appeal and application for leave to appeal within a week, thereafter, that CASA file any responsive material within two weeks, and that Mr Atieh's applications be heard together.
2. It did not appear that Mr Atieh understood that he should be addressing the application for extension of time, although he did make some remarks at the hearing of his applications about

some documents being rejected by the Registry. Generally speaking, Mr Atieh appeared to be confused by the process and took the occasion to be one in which he was advancing grounds of appeal. The grounds of appeal, however, were not particularly identified or articulated.

3. Mr Atieh is aggrieved as a consequence of the decision of the primary judge in *Atieh v* ***Civil Aviation Safety*** *Authority* [2012] FCA 1027. By that decision, Mr Atieh's originating application for unlawful discrimination by CASA, brought under the *Australian Human Rights Commission Act 1986* (Cth) (**the AHRC Act**), was summarily dismissed.
4. Mr Atieh made a variety of submissions touching upon alleged discrimination which he has experienced in several facets of his life including in relation to his dealings with CASA.
5. For the reasons given by the primary judge, his complaints were entirely without legal foundation and his prospects of success in any application for leave to appeal were below negligible. Indeed, at the hearing of the leave application he pointed out that he knew he was 'going to lose'.
6. Mr Atieh ventilated several complaints about the government but to the extent he focused on CASA, he paid no regard at all to the principles which had been correctly articulated and drawn to his attention in some detail in the written submissions of CASA. I was informed without objection from him that those submissions had been filed and served on him. Those submissions are in substance reflected below and lead to the inevitable conclusion that both the application for an extension for time and the application for leave to appeal must be refused.

THE ESSENCE OF MR ATIEH'S COMPLAINT

7. Mr Atieh's originating application was based on allegations of unlawful discrimination. The alleged discrimination was related to the fact that CASA required Mr Atieh, in 2010, to submit for particular medical assessments as part of CASA's determination of whether he would be issued with a medical certificate to enable him to lawfully pilot an aircraft. Mr Atieh did not contend at first instance (and does not contend now) that he was unable to comply with CASA's requirements; he simply refused to do so because he did not believe they were necessary.
8. At first instance, the primary judge summarily dismissed the originating application on the basis that the uncontentious evidence was incapable of supporting any finding that CASA engaged in any unlawful discrimination.
9. There is nothing in the materials filed by Mr Atieh in support of his application for leave to appeal to suggest that the primary judge made any errors of law or fact in connection with reaching this conclusion. There are no indications that his Honour erred in any respect in identifying the correct legal principles and applying them to the facts of the case properly in determining that summary dismissal under s 31A(2) FCA was appropriate.
10. As I have refused Mr Atieh's application for leave to appeal, it would, of course, be futile to grant Mr Atieh an extension of time within which to apply for leave to appeal. I accept that Mr Atieh's earlier notice of appeal remains incompetent and must also be dismissed.

NATURE OF JURISDICTION

11. The Court's jurisdiction to hear and determine appeals from judgments of the Court constituted by a single judge exercising original jurisdiction is conferred by s 24(1)(a) FCA. Section 24(1A) provides that the jurisdiction is not to be exercised in respect of an interlocutory judgment of the Court unless leave to appeal is given. By s 24(1D)(b) FCA, a decision granting summary judgment under s 31A FCA is interlocutory for the purposes of s 24(1A). It follows that the judgment of the primary judge was interlocutory and Mr Atieh therefore requires leave to appeal from it.

EXTENSION OF TIME

12. Rule 35.13 of the *Federal Court Rules 2011* (Cth) provides that an application for leave to appeal must be filed within 14 days after the date on which the relevant judgment was pronounced. The application for leave to appeal was filed on 9 November 2012. This was 50

days after the judgment of the primary judge. That length of delay was entirely unexplained.

NO EXTENSION OF TIME WILL BE GRANTED

13. In *Kuljic v Secretary, Department of Social Security* (1994) 33 ALD 121 (at 122) von Doussa J noted as follows:

> One of the principal considerations to be addressed in deciding whether it is fair and equitable in all the circumstances to extend time is whether the merits of the proposed appeal are such that if an extension of time is granted there is some prospect of success on the appeal. If a consideration of the merits indicates that there is no question to be agitated on the appeal, and there is no prospect of success, it would be futile to grant an extension of time...

14. Mr Atieh will not be granted an extension of time within which to apply for leave to appeal in this case because to do so would be futile. Mr Atieh does not have sufficient prospects of success to justify the grant of leave to appeal at all.
15. In any event, as noted, the very substantial delay is quite unexplained. There may have been some confused attempt to explain from the bar table a very short portion of that delay but to the extent that rejection of some documents contributed to a small part of the delay, that does not explain the balance of the considerable period.

LEAVE TO APPEAL IS REFUSED

16. I accept CASA's submission that the following principles are well recognised as being relevant to the question of whether leave to appeal will be granted:
    - The test for whether leave to appeal from an interlocutory judgment will be granted (the so-called 'litmus test') comprises the following two integers. First, whether in all the circumstances of the case the decision is attended by sufficient doubt to warrant its being reconsidered by the Full Court. Second, whether substantial injustice would result if leave were refused, supposing the decision to be wrong.
    - The litmus test is appropriate for the general run of cases. The test should not, however, be applied as if it were some hard and fast rule. Each case must be considered on its merits.
    - Interlocutory orders cover a spectrum from those concerned solely with the mechanics of case management and pre-trial preparation to those which may, for one reason or another, have a significant impact upon the scope and outcome of the proceedings. If the order the subject of the application for leave to appeal is concerned with the mechanics of the pre-trial process, then the scales are likely to be weighted against the grant of leave. However, if while interlocutory in legal effect the order has the practical operation of finally determining the rights of the parties 'a prima facie case exists for granting leave to appeal'.
    - Leave will not be granted if, as here, the Court forms a clear opinion adverse to the success of the proposed appeal.

(See *Samsung Electronics Co Ltd v Apple Inc* [2011] FCAFC 156; (2011) 286 ALR 257 (at [26]-[37]); *Decor Corporation Pty Ltd v Dart Industries Inc* [1991] FCA 655; (1991) 33 FCR 397 (at 398-400); *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2000] FCA 1572; (2000) 104 FCR 564 (at [43]-[44]) and *Ex parte Bucknell* [1936] HCA 67; (1936) 56 CLR 221 (at 225)).

17. In the case of a summary dismissal under s 31A FCA, due to the de facto final nature of the order, leave to appeal will usually be granted if there is any doubt about the decision at first instance: *Singh v Super City Nome Loans Pty Ltd* [2012] FCA 83 (at [74]).
18. Further, due to Mr Atieh's status as a self-represented litigant, it is necessary to be alert to ensure that there may be no arguable error of law which, with appropriate amendment or

permissible assistance, could be put into proper form. Mr Atieh's unrepresented status should not deprive him of the opportunity to have his claim, if any, determined according to law: *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 (at 536) and *Glew v Frank Jasper Pty Ltd* [2010] WASCA 87 (at [10]).

19. Despite these considerations, leave to appeal must be refused because there is no arguable doubt about the correctness of the decision of the primary judge for the reasons which follow.
20. Mr Atieh's originating application at first instance was brought under the AHRC Act claiming $700,000 compensation as sole relief (primary judge's reasons at [10]). The primary judge recorded the following matters surrounding Mr Atieh's allegations of discrimination against CASA. Mr Atieh has not suggested that any of them were incorrect.
    - On 28 March 2008, Mr Atieh applied for a flight crew licence with CASA. At that time, Mr Atieh submitted to a number of medical assessments and tests, and completed a Medical Questionnaire and Examination Form which provided information that his right forearm had been injured in 1998 but that he had made a full recovery (primary judge's reasons (at [13]-[14])).
    - Mr Atieh's application for a licence was approved in 2008. He was also issued with a medical certificate that was certified by CASA. The medical certificate was expressed to be valid until 22 September 2010 (primary judge's reasons (at [13])).
    - He applied for renewal of the medical certificate in May 2010. Around that time, he provided CASA with a handwritten doctor's note which was considered by a panel of doctors. This recorded that Mr Atieh had previously been prescribed medication called Luvox (primary judge's reasons (at [14]-[15])).
    - CASA wrote to Mr Atieh on 9 December 2010 requesting further reports from him about his medical conditions (primary judge's reasons (at [16])).
    - Mr Atieh refused to comply with CASA's requests for further reports (primary judge's reasons at [17]). This was because Mr Atieh regarded these requirements as unnecessary or unreasonable in light of his previous dealings with CASA (primary judge's reasons (at [41])).
21. Mr Atieh's originating application claimed that CASA had unlawfully discriminated against him within the meaning of the *Disability Discrimination Act 1992* (Cth) (**DD Act**) (primary judge's reasons (at [11])). Mr Atieh asserted that by requiring him to submit to medical reports in 2010 as part of CASA's assessment of whether to grant a further medical certificate, when it had not required those same reports in 2008, CASA had not performed its duties towards him with 'fairness and decency' and had demonstrated a 'careless contradicting sense of judgment' (primary judge's reasons (at [19], [42])).
22. As the primary judge observed, Mr Atieh's allegations concerned the DD Act which divides discrimination into direct and indirect disability discrimination and prohibits it by reference to particular situations in which discrimination is made unlawful (primary judge's reasons (at [32])). The relevant prohibition was provided for under s 26 of the DD Act and required Mr Atieh to demonstrate that CASA had engaged in direct or indirect disability discrimination (primary judge's reasons (at [32]-[33])).
23. Direct disability discrimination requires proof that, because of a disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different (primary judge's reasons (at [34])). Meanwhile indirect disability discrimination requires proof that, because of a disability, the aggrieved person did not or would not comply, or was not able or would not be able (primary judge's reasons (at [35]-[36])).
24. Whichever form of discrimination is considered, the uncontentious evidence before the primary judge was quite incapable of supporting a finding that CASA engaged in any unlawful discrimination in requiring Mr Atieh to submit to the relevant medical assessments in 2010 (primary judge's reasons (at [39])). In particular, there was no evidence to suggest that CASA treated, or proposed to treat, Mr Atieh less favourably than any other person (primary judge's reasons (at (40])). There was no evidence or even a submission by Mr Atieh that he was unable to comply with CASA's requests that he submit himself for the relevant medical assessments in

2010 in order for CASA to determine whether to grant him a medical certificate (primary judge's reasons (at [41])). In fact, as his Honour found, Mr Atieh had no inability to comply with CASA's requests; simply an unwillingness to do so (primary judge's reasons (at [41])).

25. As a result, the primary judge found that Mr Atieh had no reasonable prospect of successfully prosecuting the proceeding because, even accepting Mr Atieh's version of the facts, there was no evidence capable of sustaining his claim of discrimination (primary judge's reasons (at [45])). Consequently, the primary judge considered that dismissal of the proceeding under s 31A FCA was appropriate and proceeded to make the necessary orders (primary judge's reasons (at [45], [47])).
26. CASA has simply required a medical assessment to be undertaken on one occasion when it had not been required on a previous occasion. To do so was entirely within the proper discharge of its duties and can in no way be discriminatory as suggested. As many cases have emphasised, a fundamental charter of CASA under its governing legislation is to impose requirements and take other actions directed to the objective of achieving air safety not just for pilots but for the broader community. (See for example the discussion in *Repacholi Aviation Pty Ltd v* ***Civil Aviation Safety*** *Authority (No 2)* [2012] FCA 1297 (at [10] to [22])).
27. The primary judge made no errors of law or fact. There was no real issue of fact or law raised by the originating application and it was entirely appropriate for the matter to be dismissed summarily to save the parties further time and expense.

CONCLUSION

28. Leave to appeal is refused. There is no doubt about the correctness of the decision at first instance. It is obvious that the proposed appeal will fail if it goes any further.
29. It follows that the notice of appeal is incompetent. It will also be struck out (see *Re Luck* [2003] HCA 70; (2003) 203 ALR 1 at [3], [11])).
30. For the reasons stated:
    1. The applicant's application for an extension of time to seek leave to appeal is refused.
    2. The applicant's application for leave to appeal is refused.
    3. The applicant's notice of appeal filed 9 October 2012 is declared incompetent and is struck out.
    4. The applicant is to pay the costs of the respondent, to be taxed if not agreed.

I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice McKerracher.

Associate:

Dated: 23 January 2013
