DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Nash Wong
v
Taitung Australia Pty Ltd
(U2016/7347)

COMMISSIONER CAMBRIDGE SYDNEY, 10 NOVEMBER 2016

Unfair dismissal - summary dismissal - serious misconduct - primary factual findings proven upon requisite standard - valid reason for dismissal - nature of misconduct not treated as basis for summary dismissal - summary dismissal unjust - compensation reduced to zero.

[1] This matter involves an application for unfair dismissal remedy made pursuant to section 394 of the *Fair Work Act 2009* (the Act). The application was lodged at Sydney on 1 June 2016. The application was made by *Nash Wong* (the applicant) and the respondent employer is *Taitung Australia Pty Ltd T/A Taitung Food Service* (the employer).

[2] The application indicated that the date that the applicant's dismissal took effect was 13 May 2016. Subsequently, it appeared that the Parties accepted that the dismissal of the applicant took effect on 17 May 2016. In any event, the application was made within the 21 day time limit prescribed by subsection 394 (2) of the Act.

[3] The matter was not resolved at conciliation, and it has proceeded to arbitration before the Fair Work Commission (the Commission) in a Hearing conducted at Sydney on 14 September 2016. The Hearing involved the taking of evidence, with the final written submissions in the matter provided on 12 October 2016.

[4] The Commission granted permission under s. 596 of the Act, for the Parties to be represented by lawyers or paid agents. The applicant was represented by Mr S Gorval, solicitor, from the firm of *Gorval Lynch.* Mr Gorval called the applicant as the only witness who provided evidence in support of the unfair dismissal claim.

[5] The employer was represented by Mr R Hassall, solicitor, from the firm of *Sparke Helmore Lawyers.* Mr Hassall called three witnesses who provided evidence on behalf of the employer.

Background

[6] At the outset, it must be regrettably noted that the evidentiary cases presented in this matter revealed the omission of material which, upon any reasonable assessment, was of significant importance. The general paucity of evidence, and the absence of evidence

regarding plainly significant aspects of the circumstances connected with the dismissal of the applicant, may have, in part, been attributable to the very late involvement of the particular legal representatives who appeared on behalf of the respective Parties at the Hearing.

[7] Whatever may have been the cause for these evidentiary deficiencies, the consequence has manifested as a matter where the evidentiary cases that were presented by both sides can only be described as surprisingly inadequate, particularly given that the primary evidentiary material from both Parties was not prepared by an unrepresented litigant and respondent, but by the Parties' previous representatives. Further, the previous representatives of the Parties inadequately prepared evidentiary material in circumstances where there were serious allegations of criminality connected with the reason for the dismissal of the applicant. The inadequately prepared evidentiary cases for both sides have created some difficulties for establishing certain fundamental facts which should ordinarily not be matters of obfuscation. Consequently, there have been some unusual difficulties associated with the identification of elements of the factual framework surrounding the employment and subsequent dismissal of the applicant.

[8] The applicant had worked for the employer for just over nine years. The applicant was initially employed as a store person, and at sometime around 2012, his work was altered to involve the driving of a small, 4.5 tonne delivery truck. The applicant worked at and from the employer's food storage warehouse located in the Sydney suburb of Moorebank.

[9] The employer trades under the name of *Taitung Food Service* and it operates a food supply business which specialises in Asian ingredients and frozen seafood supply to restaurants and other commercial kitchens. The employer's Moorebank warehouse is the principal place of business from which the daily delivery of food supplies is conducted. The warehouse also operates to provide direct sale to the public of various food supplies and associated products.

[10] The number of employees engaged by the employer is an example of one of the matters of evidentiary inadequacy referred to in paragraphs [6] and [7] above. The employer's submissions dated 12 October 2016, suggested that the "*business employs approximately 12 employees*", the employer's response of 29 June 2016, stated that the employer had 16 employees, one of the employer's witnesses said that there were about 15 employees[1], while the General Manager, Mr Bevan Wong, provided evidence that there were "*25ish employees*"[2]. (It should be noted that the applicant and the General Manager both have the surname of Wong. Consequently, because of the two Mr Wongs, the General Manager has been distinguished from the applicant by use of his full title, Mr Bevan Wong.)

[11] The applicant's employment appeared to have involved some history of difficulty associated with complaints that he raised about, in particular, workplace health and safety issues. These complaints involved issues such as allegations that the drivers of forklifts were not appropriately licensed, and that various delivery vehicles were unroadworthy. The applicant also raised various complaints with the employer about other matters regarding alleged incorrect wage payments and other employment related entitlements which had apparently not been provided by the employer.

[12] On around 16 or 17 February 2016, one of the employer's delivery drivers, Mr Chang (aka Peter) was found to have wrongly taken eight cartons of tiger prawns and placed them in his delivery truck. These eight cartons of tiger prawns were not included in the specific items

of produce identified in the relevant picking slip order. The employer asserted that Peter had stolen the eight cartons of tiger prawns, and Peter was suspended from duty pending some further investigation.

[13] At around the same time, February 2016, one of the employer's store persons, Mr Jiang (aka Andy), informed the Warehouse Manager, Mr Le, that he was involved in an arrangement whereby he and other employees would steal stock by adding additional produce items which were not identified in the particular picking slip orders for truck delivery. The additional produce items would then leave in the delivery trucks and be sold by various drivers who obtained direct payment for the stolen produce. The drivers then distributed some of the proceeds from the sale of the additional produce to other employees such as Andy, as reward for their role and participation in the arrangement. This scheme or arrangement has been referred to as the joint criminal enterprise.

[14] The employer's General Manager, Mr Bevan Wong was not in Australia at the time that Andy provided his confession to Mr Le regarding the joint criminal enterprise. Mr Le telephoned Mr Bevan Wong and informed him of the confessions made by Andy about the joint criminal enterprise. Upon his return to Australia, Mr Bevan Wong conducted further investigations into the confessions provided by Andy.

[15] The confessions provided by Andy were consistent with the discovery of the eight additional (unaccounted) cartons of tiger prawns in the truck driven by Peter. Further, Andy showed Mr Bevan Wong a transcript of *WhatsApp* messages that had occurred on 19 and 21 February 2016 between Andy and Peter during which there was repeated mention of aspects of the joint criminal enterprise and the means by which its discovery may be avoided.

[16] On or about 23 February 2016, Mr Bevan Wong reported the matter of the alleged joint criminal enterprise to the police at Liverpool. On 2 March 2016, Andy gave a police statement to Liverpool detectives about the alleged joint criminal enterprise that had been conducted at the employer's business. Mr Bevan Wong said that the police suggested that he not take any immediate action against those employees that Andy had nominated as participants in the joint criminal enterprise, so that further evidence of the conduct of those that were participating in the joint criminal enterprise might be revealed and confirmed.

[17] Mr Bevan Wong said that he agreed with the police request/suggestion to defer any disciplinary action against any of those employees who had been nominated by Andy as participants in the joint criminal enterprise. The applicant was one of those employees nominated in the confession made by Andy, and the applicant was mentioned on various occasions in the transcript of the *WhatsApp* exchanges of 19 and 21 February 2016.

[18] In March 2016, Peter resigned from his employment. In April 2016, Mr Bevan Wong spoke again to the police at Liverpool. During this discussion, Mr Bevan Wong indicated that he thought that particularly following the resignation of Peter, the other employees who were involved in the joint criminal enterprise may have become suspicious and ceased any further conduct of the joint criminal enterprise. Relevantly, the applicant's employment, inter alia, was continued up until events that occurred on 12 May 2016.

[19] On 12 May 2016, the applicant made a complaint that the truck that he was driving was faulty and unroadworthy. The applicant returned the loaded truck to the employer's Moorebank warehouse where the Warehouse Manager, Mr Le, took the truck for a drive to

test out the applicant's allegations that it was unroadworthy. Mr Le said that he found nothing wrong with the truck, and that he believed that the applicant was being unnecessarily difficult. Following a telephone discussion with Mr Bevan Wong, Mr Le then told the applicant that he was suspended from duty for 24 hours.

[20] The applicant then left the employer's premises and made a number of phone calls to the Fair Work Ombudsman, Work Safe, and the NSW Roads and Maritime Service in which he made complaint about various aspects of his workplace environment, including the allegedly unroadworthy delivery truck.

[21] On Friday, 13 May 2016, the applicant telephoned the employer and sought to speak further with Mr Le. Mr Le did not speak directly with the applicant but a message was conveyed from Mr Le which the applicant took to mean that he had been dismissed but that he was required to come back to work on Monday to deal with another issue.

[22] On Monday, 16 May 2016, the applicant attended the employer's Moorebank warehouse and he was provided with a letter which, inter alia, invited him to attend a disciplinary meeting scheduled for the following day 17 May 2016. This letter included allegations that the applicant had participated in the joint criminal enterprise which had been the subject of the confessions made by Andy in February 2016. The applicant was advised that he should bring a lawyer or a support person to the meeting scheduled for the following day.

[23] The applicant unsuccessfully endeavoured to engage a lawyer or support person to assist him during the meeting scheduled for Tuesday, 17 May 2016. Consequently, the applicant attended the meeting on 17 May 2016 alone, and the allegations that were set out in the letter of 16 May 2016 were put to the applicant and his response was invited. The applicant denied the allegations and any involvement in the joint criminal enterprise. The applicant was told that the employer would consider his denials and advise him of the outcome of the disciplinary meeting.

[24] Later on 17 May 2016, the applicant was advised verbally during a telephone conversation that he had been dismissed from his employment. Subsequently, a letter dated 17 May 2016, confirmed that the applicant had been summarily dismissed from his employment on the basis of serious misconduct found by the employer in respect to the joint criminal enterprise.

[25] The applicant was paid up until 17 May, together with any outstanding annual leave entitlements. The applicant has unsuccessfully attempted to find alternative employment.

The Case for the Applicant

[26] The written submissions that were provided on behalf of the applicant by his first representatives asserted that the dismissal occurred on Friday, 13 May 2016. These submissions asserted that there was no valid reason for the applicant's dismissal because the dismissal occurred before the applicant had been made aware of any of the allegations about his capacity or conduct.

[27] Conversely, the written submissions provided by the applicant's second representatives who appeared at the Hearing, asserted that the dismissal occurred on Tuesday,

17 May 2016. These submissions stated that there was no valid reason for the dismissal of the applicant because there was insufficient evidence to substantiate the accusations regarding the applicant's involvement in the joint criminal enterprise.

[28] The written submissions made by both of the applicant's representatives were constructed with reference to the various provisions of s. 387 of the Act. In particular, the question of valid reason for the dismissal of the applicant was challenged, albeit upon different grounds. Notwithstanding these differences, the alleged absence of any valid reason for the dismissal of the applicant, whether that be in respect to Friday, 13 May, or Tuesday, 17 May, involved firm denial of the applicant's participation in the joint criminal enterprise. Instead it was suggested that the employer was improperly motivated by the applicant's complaints about work-related matters including unsafe work practices, specifically the unroadworthy truck that he complained about on Thursday, 12 May 2016.

[29] In addition, submissions made on behalf of the applicant contended that the employer was motivated to implement the summary dismissal of the applicant as a means to avoid the applicant's entitlement to payment in respect of long service leave. The alleged absence of valid reason for the dismissal of the applicant was supported by submissions which challenged evidence about the alleged joint criminal enterprise.

[30] The submissions made on behalf of the applicant focused upon challenge to the evidence provided by Mr Jiang, (aka Andy), who, as a sworn witness at the Hearing, confirmed and repeated his admissions to engagement in criminal activity involving the theft of the employer's products during the operation of the joint criminal enterprise. Particular criticism was made of the evidence regarding Mr Jiang having allegedly provided a police statement. However this alleged police statement was not produced as evidence before the Commission. In addition, submissions were made which suggested that there was some impracticality associated with the physical means by which produce such as multiple boxes of frozen prawns could be covertly conveyed to the delivery trucks. The credibility of Mr Jiang was also challenged in the submissions made on behalf of the applicant and in this regard, it was noted, inter alia, that the employer had not terminated the employment of Mr Jiang despite him being a participant in the alleged joint criminal enterprise.

[31] The further submissions made on behalf of the applicant also criticised the performance of the other witnesses who provided evidence on behalf of the employer namely, Mr Le and Mr Bevan Wong. Alternatively, it was submitted that the applicant had a near perfect employment record in over 9 years of service.

[32] In summary, the submissions made on behalf of the applicant asserted that there was no valid reason for the dismissal of the applicant and therefore the applicant's dismissal was harsh, unjust and unreasonable. In particular, it was stressed that the evidence presented by the employer was insufficient in providing proof of any form of misconduct by the applicant. The applicant submitted that reinstatement was inappropriate, and he sought compensation as remedy for his unfair dismissal. The applicant's submissions also asserted that he should be provided with compensation of an amount equivalent to 26 weeks remuneration and, additionally, a payment of five weeks wages in lieu of notice as required pursuant to s. 117 of the Act.

The Case for the Employer

[33] The written submissions provided on behalf of the employer summarised the factual circumstances as contended for by the employer, and were further constructed by reference to the various factors contained in s. 387 of the Act.

[34] The employer submitted that the applicant was dismissed on Tuesday, 17 May 2016, and there was valid reason for the dismissal of the applicant. The valid reason for the dismissal of the applicant was specified to relate to the conduct of the applicant whereby he stole goods from the employer's business, and sold these goods to other third parties. Further, the valid reason for dismissal involved the applicant's conduct whereby he approached other employees such as Mr Jiang to assist him in the theft of the employer's goods.

[35] The submissions made on behalf of the employer contended that there was sufficient evidence before the Commission to find that the employer had reasonable grounds for holding the belief that the applicant was guilty of misconduct involving theft. It was submitted that the employer's General Manager, Mr Bevan Wong, had conducted certain investigations in parallel with a police investigation which reasonably allowed him to conclude that the applicant had participated in serious misconduct in the form of theft. In this regard it was submitted that the investigation was not required to be of the type or standard that would be undertaken for a criminal conviction.

[36] According to the submissions made on behalf of the employer, the actions of the applicant in respect to his complaint about a truck on 12 May 2016, immediately predated the employer's determination to put the allegations of theft to the applicant. However, this did not mean that the applicant's complaint about the truck formed any part of the reason for the dismissal of the applicant. Instead, the employer submitted that it believed that the applicant had engaged in theft and that belief was established upon reasonable grounds and provided valid reason for the dismissal of the applicant.

[37] The further submissions of the employer asserted that the applicant had been notified of the reason for dismissal by telephone and in a termination letter dated 17 May 2016. Further, it was submitted that the applicant had been afforded the opportunity to respond to the allegations set out in the letter provided to him on Monday, 16 May 2016, and the applicant's denials were considered and evaluated by the employer but ultimately rejected when weighed with all of the available evidence.

[38] In addition, the employer submitted that the applicant had been given an opportunity to have a support person present and that this was acknowledged by the applicant, although he was unable to obtain any assistance in respect to the disciplinary meeting held on 17 May 2016. The employer also submitted that the Commission should have regard for the actions of Mr Bevan Wong who cooperated with recommendations made by the police which involved the continuation of the applicant's employment after the employer had become aware of his participation in the joint criminal enterprise.

[39] In summary, the submissions made by the employer denied that the applicant was entitled to any remedy as his dismissal was not harsh, unjust or unreasonable. In an alternative submission, the employer proposed that if some aspect of the dismissal of the applicant was found to be unfair, as reinstatement was not sought, any amount of compensation should be reduced because of the applicant's misconduct.

Consideration

[40] The unfair dismissal provisions of the Act include s. 385 which stipulates that the Commission must be satisfied that four cumulative elements are met in order to establish an unfair dismissal. These elements are:

> *"(a) the person has been dismissed; and*
> *(b) the dismissal was harsh, unjust or unreasonable; and*
> *(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and*
> *(d) the dismissal was not a case of genuine redundancy."*

[41] In this case, there was no dispute that the matter was confined to a determination of that element contained in subsection 385 (b) of the Act, specifically whether the dismissal of the applicant was harsh, unjust or unreasonable.

[42] Section 387 of the Act contains criteria that the Commission must take into account in any determination of whether a dismissal is harsh, unjust or unreasonable. These criteria are:

> *"(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and*
>
> *(b) whether the person was notified of that reason; and*
>
> *(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and*
>
> *(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and*
>
> *(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and*
>
> *(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and*
>
> *(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and*
>
> *(h) any other matters that the FWC considers relevant."*

S. 387 (a) - Valid reason for the dismissal related to capacity or conduct

[43] In this instance, the reason for the summary dismissal of the applicant involved the employer's findings of serious misconduct in respect to his participation in what has been described as the joint criminal enterprise. Although the applicant submitted that the reason for his dismissal involved other, ulterior motivations such as his complaints regarding employment entitlements, workplace safety, and the impending entitlement to long service

leave, an analysis of the serious allegations of criminal conduct should logically predominate any consideration of whether valid reason existed for the dismissal of the applicant.

[44] If, upon analysis, the more serious allegations of misconduct connected with the alleged joint criminal enterprise were verified to the requisite standard of proof, there would be little cogent reason or practical purpose to further examine any of the other issues which were said to motivate the employer's decision to dismiss the applicant. Confirmation of the employer's belief that the applicant was a participant in the joint criminal enterprise would provide proper, sound, defensible, valid reason for dismissal. That sound, valid reason for dismissal would be unlikely to be altered or disturbed by some element of inappropriate motivation connected with reaction to complaints made about employment entitlements and workplace safety.

[45] As mentioned earlier in this Decision, this matter has suffered from unusual inadequacies in the evidentiary cases that were advanced by the respective Parties. These inadequacies have made the determination of the primary issue as to whether the applicant was guilty of the misconduct as was found by the employer, more difficult than it might otherwise have been. For example, Mr Jiang's witness statement included mention that on 2 March 2016 he gave a police statement to Liverpool detectives about the joint criminal enterprise. However, a copy of that police statement was not attached to his statement, or otherwise included as evidence, despite Mr Jiang having retained the statement, and that police statement was at the time of the Hearing, at his home.[3]

[46] Notwithstanding the various unfortunate evidentiary deficiencies, the question as to whether the applicant was involved in the joint criminal enterprise has required careful examination and evaluation of the directly contested evidence provided on the one hand, with the applicant's denials, and on the other hand, the admissions made by Mr Jiang. Although any inconsistencies in testimony, and the usual observations of the performance of the respective witnesses can form an important part of any analysis of directly contested evidence, in this instance, a most significant piece of corroborative evidence was provided in the form of the *WhatsApp* transcript of the exchanges between Mr Jiang (Andy) and Mr Chang (Peter).[4]

[47] A careful examination and consideration of the detail of the contents of the *WhatsApp* transcript has provided a compelling basis upon which to conclude that on the balance of probabilities, and to the requisite, elevated Briginshaw[5] standard, the applicant was one of a number of employees who participated in the joint criminal enterprise involving the theft of the employer's products, and the direct sale of those products to third parties for the personal monetary gain of the various participants. The *WhatsApp* transcript includes repeated mention of detailed aspects of the joint criminal enterprise, and the means by which any discovery of that enterprise could be concealed from the employer. The contents of the *WhatsApp* transcript further confirmed that the circumstances involving Mr Chang being "caught" with eight additional boxes of tiger prawns in his delivery truck elevated a concern amongst the participants in the joint criminal enterprise that their activities may be discovered by the employer.

[48] Particular contents of the *WhatsApp* transcript at 10:54 PM disclosed what subsequently materialised as the confessions and admissions of Mr Jiang. At this point in the message exchange, Mr Jiang actually described the circumstances which acted as the catalyst for his confessions to the employer when he said; "*So before Nash snitch us*" "*We snitch*

him". These statements reveal that Mr Jiang was clearly nervous about the prospect that the employer would discover the joint criminal enterprise, and he saw some clear benefit in "snitching" before anyone else, particularly the applicant. "Snitching" in this context is to be given that meaning provided by the Macquarie dictionary as; "*to turn informer*".

[49] In addition to the important evidence provided by the *WhatsApp* transcript, a careful evaluation of the witness evidence provided by the applicant and that provided by Mr Jiang, has supported findings to confirm the operation of the joint criminal enterprise and the various participants in that enterprise, including the applicant. In this regard, although there were certain incongruities and inconsistencies that could be identified from the testimony provided by both the applicant and Mr Jiang, the open admissions made by Mr Jiang, which were given without seeking any immunity and in the full knowledge of their self-incrimination, was evidence that was plausible, believable and preferable to the curt, blunt denials of the applicant.

[50] It should be noted that the totality of the evidence presented in this matter including, in particular, the *WhatsApp* transcript, together with the testimony and witness performance of the applicant as compared with Mr Jiang, may be unlikely to provide sufficient foundation for any criminal conviction of the applicant. However, notwithstanding the deficiencies with the evidence presented in this instance, there has been sufficient evidentiary material which, upon careful examination and evaluation, has represented sound basis for the Commission to confirm the employer's belief that the applicant was a participant in the joint criminal enterprise. That confirmation has been made cognisant of the elevated standard of "civil" proof required in circumstances where the conduct under examination may involve alleged criminality.

[51] As earlier mentioned, there would seem to be little practical purpose served in any further examination of other aspects of the alleged reasons for the dismissal of the applicant connected with his complaints about employment entitlements and workplace safety. Nevertheless, the evidence did reveal that the stimulus for the timing of the applicant's dismissal was connected with his complaint about the delivery truck. The applicant's complaint about the delivery truck may have represented the reason for the timing of the dismissal of the applicant but it, and other matters connected with employment entitlements, were insignificant issues when compared with the serious misconduct of the applicant as a participant in the joint criminal enterprise.

[52] In summary therefore, the findings of serious misconduct made by the employer against the applicant have been carefully and objectively analysed, and must be supported as representing valid reason for the dismissal of the applicant. The particular findings of serious misconduct made by the employer in respect to the applicant's participation in the joint criminal enterprise which involved theft of the employer's stock have been verified, and represent valid reason for the dismissal of the applicant.

S. 387 (b) - Notification of reason for dismissal

[53] The employer provided verbal and written notification of the reasons for the applicant's dismissal. The evidence was unclear as to whether the written notification of the reasons for the dismissal was conveyed to the applicant without undue delay. Certainly, criticism must be made of the verbal advice of dismissal provided to the applicant by the

employer. However, in view of the nature of the established valid reason for dismissal, procedural errors of this nature can be given only little weight.

S. 387 (c) - Opportunity to respond to any reason related to capacity or conduct

[54] The applicant was given an opportunity to respond to the allegations concerning his participation in the joint criminal enterprise, and he denied any involvement during the course of the disciplinary meeting held on 17 May 2016.

S. 387 (d) - Unreasonable refusal to allow a support person to assist

[55] The employer did not unreasonably refuse or otherwise avoid the presence of a support person to assist the applicant. Although it was not a matter raised as a complaint by the applicant, the very short timeframe by which he was required to enlist the assistance of a lawyer or other support person was unnecessarily short.

S. 387 (e) - Warning about unsatisfactory performance

[56] This factor is not relevant to the circumstances in this instance as the applicant was not dismissed for unsatisfactory performance but instead, serious misconduct.

S. 387 (f) - Size of enterprise likely to impact on procedures

[57] The employer is a small to medium size business operation and therefore allowance has been made for a degree of informality and some imprecision in respect to employment related matters.

S. 387 (g) - Absence of management specialists or expertise likely to impact on procedures

[58] There was evidence that the employer did not have management specialists or other expertise. However, the employer apparently had regular, direct, employment law advice provided by its first representatives.

S. 387 (h) - Other relevant matters

[59] The procedure adopted by the employer included one unfortunate and important error. The employer consciously permitted the applicant to continue to perform work up until the dismissal on 17 May 2016, in the full knowledge of the nature and extent of the misconduct for which it subsequently invoked a summary dismissal. This circumstance appeared to have arisen as a result of the suggestion/request of the police. Although it may have been understandable that, in the context of any potential criminal prosecution there was clear desirability for further evidence gathering, the continuation of the employment removed the capacity for the employer to subsequently summarily dismiss the employee.

[60] Consequently, the employer applied a level of severity to the misconduct of the applicant which was inconsistent with permitting him to continue to work as part of some potential for obtaining further evidence. This continuation of the applicant in the performance of work meant that the employer could not subsequently summarily dismiss on the basis of the misconduct that the employer was aware of when it permitted the applicant to continue

work.[6] In such circumstances, notwithstanding the severity of the applicant's misconduct, the failure to suspend the applicant from duty meant that the employer was required to implement any dismissal with notice, rather than summarily.

Conclusion

[61] The applicant was summarily dismissed for serious misconduct involving the employer's finding that he was a participant in the joint criminal enterprise. Upon careful analysis, the employer's findings of serious misconduct have been confirmed.

[62] The employer's finding of serious misconduct in respect to the applicant's participation in the joint criminal enterprise has, of itself, established valid reason for the dismissal of the applicant. The valid reason for dismissal has been assessed and evaluated against certain procedural errors which were evident in the manner that the employer eventually dismissed the applicant. The procedural errors are matters of insignificance when evaluated against the nature of the valid reason for dismissal. The reason for dismissal represented an elevated level of serious misconduct that would, ordinarily, justify summary dismissal.

[63] In the unusual circumstances of this case, the employer, somewhat understandably, continued the applicant's employment apparently at the request of the police, and as a potential means to gather further evidence in anticipation of criminal charges being laid. After several months, the further evidence and criminal charges did not materialise, so the employer decided to implement dismissal.

[64] However, the employer invoked a summary dismissal in circumstances where the employee had been continued in duty, and thus it was deprived of the capacity to dismiss without notice. This particular procedural error made by the employer has rendered what would have otherwise been an entirely fair dismissal with notice, to be an unjust summary dismissal.

[65] Therefore, the summary dismissal of the applicant must be held to have been unjust. Significant concern has arisen regarding the question of the remedy that should be provided for the unfair dismissal of the applicant in the particular circumstances of this case.

Remedy

[66] The applicant has not sought reinstatement as remedy for his unfair dismissal. Any remedy of reinstatement would be inappropriate. Further, in the particular circumstances of this case which involved misconduct, the appropriate remedy would logically contemplate potential for reduction of any amount of monetary compensation.

[67] Section 392 of the Act prescribes certain matters that deal with compensation as a remedy for unfair dismissal. I have approached the question of compensation having cognisance of the guidelines that were established in the Full Bench Decision in *Sprigg v Paul's Licensed Festival Supermarket* [7] and as commented upon in the subsequent Full Bench Decision in *Smith and Ors v Moore Paragon Australia Ltd.* [8]

[68] Firstly, I confirm that any Order of payment of compensation to the applicant would, if made, be made against the employer in lieu of reinstatement of the applicant.

[69] Secondly, in determining the amount of compensation that I Order I have taken into account all of the circumstances of the matter, including the factors set out in paragraphs (a) to (g) of subsection 392 (2) of the Act.

[70] In particular, I mention that there was no evidence of any effect that any Order of compensation would have on the viability of the employer's enterprise. The applicant had been employed for a considerable period of over 9 years. However, the employer's knowledge of the applicant's misconduct meant that had he not been summarily dismissed, his employment was likely to have been terminated within a very short period.

[71] I also note that the applicant has made only minimal efforts to mitigate his loss. I further note that any amount of compensation that I may be prepared to provide would not include any component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the applicant by the manner of the dismissal.

[72] In circumstances where a summary dismissal has been found to be unfair, but dismissal with notice would have not been hash, unjust or unreasonable, it is often appropriate to Order an amount of compensation that is commensurate with the notice period that the applicant should have received. However, in this instance, the circumstances are such that subsection 392 (3) of the Act should operate to reduce the amount that would be otherwise Ordered under subsection 392 (1).

[73] Consequently, the severity and nature of the misconduct of the applicant has meant that the amount of compensation that might have otherwise been provided as an amount equivalent to the notice period, has been reduced to zero.

[74] Although the summary dismissal of the applicant has been found to have been unjust, no Order for any amount of compensation shall be issued. The application is determined accordingly.

COMMISSIONER

Appearances:

Mr S Gorval, solicitor of Gorval Lynch appeared for the applicant.

Mr R Hassall, solicitor of Sparke Helmore Lawyers appeared for the employer.

Hearing details:

2016.
Sydney:
September 14.

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[1] Transcript @ PN1213.

[2] Transcript @ PN1455.

[3] Transcript @ PN904.

[4] Exhibit 2 – Attachment YJ-1

[5] Briginshaw v Briginshaw (1938) 60 CLR 336.

[6] See for example: McCasker v Darling Downs Co-operative Bacon Association Ltd, Supreme Court of Queensland, [Ryan J], 25IR 107 @ page 114.

[7] Sprigg v Paul's Licensed Festival Supermarket, (Munro J, Duncan DP and Jones C), (1998) 88IR 21.

[8] Smith and Ors v Moore Paragon Australia Ltd, (Lawler VP, Kaufman SDP and Mansfield C), (2004) PR942856.