DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Michael Renton
v
Bendigo Health Care Group
(U2016/11206)

COMMISSIONER BISSETT MELBOURNE, 30 DECEMBER 2016

Application for relief from unfair dismissal – Facebook posts – whether serious misconduct – valid reason – dismissal harsh – reinstatement not appropriate – compensation to be further considered.

[1] Mr Michael Renton worked for Bendigo Health Care Group (Bendigo Health) in the Marjorie Phillips Unit which looks after aged psychiatric patients. In August 2016 Mr Renton posted a video to Facebook in which he 'tagged' two work colleagues with the statement 'Frank Christie getting slammed by Jo Keown at work yesterday!' At around the same time, Mr Renton left blobs of white sorbolene cream on Mr Christie's desk at work.

[2] Mr Frank Christie, a Clinical Social Worker at Bendigo Health, complained about the Facebook post and the blobs of sorbolene cream on his desk. Mr Renton was issued with a letter dated 9 August 2016 in which he was asked to provide a response as to his conduct in these two matters. At a meeting on 18 August 2016, Mr Renton admitted to the conduct (that he had tagged his colleagues in the Facebook post and had put the sorbolene cream on Mr Christie's desk). After considering his explanation, Mr Renton was advised that a recommendation would be made to the CEO to terminate his employment. This was confirmed and, on 19 August 2016, Mr Renton's employment was terminated for conduct deemed to be serious misconduct. He was paid four weeks' pay in lieu of notice.

[3] Mr Renton claims that he was unfairly dismissed and now seeks relief from that dismissal pursuant to s.394 of the *Fair Work Act 2009* (FW Act). He seeks reinstatement and associated orders for continuity of employment and payment for the period between his dismissal and any date of reinstatement.

Evidence

[4] Evidence in the matter was given by:

- Mr Michael Renton – Enrolled Nurse, Bendigo Health.
- Ms Debra Cogo – Registered Nurse and Health and Community Services Union delegate, Bendigo Health.
- Mr Frank Christie – Clinical Social Worker, Marjorie Phillips Unit, Bendigo Health.
- Ms Jo Keown – Clinical Social Worker, Marjorie Phillips Unit, Bendigo Health.
- Ms Kerryn (Lee) McNally – Advisor, People and Culture, Bendigo Health.
- Ms Natalie Hutchins – Business Unit Manager, Marjorie Phillips Unit, Bendigo Health.
- Mr Tim Lenten – Director of Nursing (Psychiatric services), Bendigo Health.
- Ms Andrea Noonan – Director, People and Culture, Bendigo Health.

The Facebook post

[5] Mr Renton says that on or about 4 August 2016, he saw a video on Facebook titled 'horrific stuff' with a message to 'Tag a mate who wants to do this'.

[6] The video was of an obese woman in her underwear dropping her stomach on to the back of a man on all fours, also in his underwear. In the video, the woman can be heard to say 'how heavy is that' and 'a little horsey'.

[7] Mr Renton says that when he saw the video, he watched it a couple of times and decided to post it on his Facebook page which he did. He says he then chose to write a comment and, in doing so, 'tagged' Mr Christie and Ms Jo Keown, two work colleagues. He says that he didn't really think about what he was doing and tagged his colleagues with the intention of them having a laugh.

[8] Mr Renton tagged the post with the line 'Frank Christie getting slammed by Jo Keown at work yesterday!'

[9] Mr Renton agreed that the process of tagging a person on Facebook allows friends of the tagged person to see the post. He said that it also allows any Facebook friends of someone who comments on the post to see the post. Mr Renton agreed that friends of Mr Christie and Ms Keown could see the post as could friends of Ms Pauline Hinds, Ms Alisa Klaus and Ms Alisha Renton (Mr Renton's wife, who also works in the Marjorie Phillips Unit at Bendigo Health) who each commented on the post.

[10] Mr Renton agreed that the post was of a sexually explicit nature and that he had tagged two work colleagues. He did not agree that it suggested the activity had occurred at work.

[11] On tagging the post, Mr Renton says that he had a brief thought that he hoped Ms Keown would not be offended but was 100% confident she would not be.[1] Mr Renton said that he did not consider it reasonable that Ms Keown would be offended by the portrayal of her and he didn't see why she might think it was a sexually explicit video.

[12] Mr Renton did not accept that Ms Keown had 'untagged' herself so that her Facebook friends would not see the video and comment.[2]

[13] Mr Renton agreed that there was no history of him and Ms Keown exchanging such 'banter' in the past.

[14] Ms Keown gave evidence that she was disgusted, offended and humiliated by the post. She agreed that she had exchanged a number of Facebook messages with Ms Renton. These messages commenced on 17 August 2016 and ended on 19 August 2016. The messages read, in part:

- (To Ms Renton on 17 August 2016) '…I'd heard today that Michael had been sent a letter from HR regarding the video he posted…I just wanted to make it clear that I certainly didn't say anything…I did block…Michael, only because I have my young children on Facebook and I just don't want them seeing things like that…'

- (From Ms Renton on 17 August 2016) Thanks Jo. Michael is feeling devastated to have upset you. He's well aware of how inappropriate his actions [were]. Unfortunately he has been instructed by HR that he's not to…contact… yourself…

- (From Ms Renton on 18 August 2016) Jo can you please consider speaking to Lee McNally? I understand if not. Has not gone well.

- (From Ms Keown on 18 August 2016 at 11.43am) Oh god. Surely they haven't sacked him?

- (From Ms Keown on 18 August 2016 at 11.46am) Oh god! Surely it would warrant a warning only.

- (From Ms Keown on 18 August 2016 at12.12pm)…You guys seriously haven't caused any grief to me. Yes it was stupid, I saw it, shook my head then seriously forgot it…[3]

[15] In her evidence, Ms Keown says that she initiated the conversation with Ms Renton because of her concern of the effect the matter was having on relationships in the workplace. She said that she didn't like conflict and was in an awkward position following the post. She said she had heard that Mr Renton was angry with her. She said that she felt staff were

'disliking' her for what had happened to Mr Renton and she was just trying to maintain relationships.

[16] Ms Keown said that:

> In hindsight I actually did have a right to put in a complaint, if that's how I felt at that time, but because it's such daunting process and experience that I just wouldn't have done that. I think it warranted a complaint, it was disgusting and I don't think he quite gets the ramifications of how appalling things like that are. So this is purely about me trying to maintain relationships within my place of employment, because I was put in a very awful predicament and situation and I'm here now so, you know, instead of compromising my integrity and ignoring such rot, you know, relationships will be strained because of me speaking how I feel now.[4]

[17] Whilst Ms Keown said she just wanted the matter gone, she wished she had been a stronger person to challenge the conduct. Ms Keown said she had not forgotten about the incident.[5]

[18] Mr Renton said that he had a history of shared posts with Mr Christie and that what he posted was no different to what he and Mr Christie had shared in the past. He agreed that Mr Christie's family and friends could have seen the post he made on 4 August 2016.

[19] Mr Christie agreed that the posts he had made on Facebook[6] where he tagged Mr Renton[7] were 'blokey, crass and immature.' He said however that this does not mean he was not offended by the post made by Mr Renton on 4 August 2016. He said he was personally and professionally embarrassed by the post.

[20] Mr Christie agreed that he has not been subject to any disciplinary action with respect to his posts but said he was not aware that anyone had complained about any of them.

[21] Mr Christie said he became fully aware of the post and video at about 7.00am on 4 August 2016 when he arrived at work. He overheard two staff of Bendigo Health mention the post and video so looked at it closely himself. He said that because he was tagged to the post and video they became visible to all of his Facebook friends (and, because Ms Keown was also tagged, to all of Ms Keown's Facebook friends) and all of Mr Renton's Facebook friends. He said that Facebook friends of people who made comments on the post would also be able to see the post.

[22] At 7.30am Mr Christie says he rang Ms Fiona Hutchins, the Business Unit Manager at Bendigo Health, and left a message for her with respect to the post and the sorbolene cream. He later spoke to Ms Hutchins and told her he found the post and video disgusting and that he was angry. He understood that Ms Hutchins took the matter very seriously.

[23] Mr Christie said he had not complained of any of Mr Renton's Facebook posts in the past as they had not impacted on him professionally at work.

[24] Mr Christie said that he was disappointed that Mr Renton's actions caused him to lose his job.

[25] Mr Renton agreed that, of his approximately 150 Facebook friends, 68 are either colleagues or previous colleagues from Bendigo Health.

[26] Mr Renton said that his Facebook page does not indicate that he works for Bendigo Health.

The sorbolene incident

[27] Mr Christie said that blobs of sorbolene cream and tissues had been left on his desk on 4 August 2016. He says that he took this to suggest that he or someone else had masturbated at his desk.

[28] Mr Renton said that, on 4 August 2016, as a practical joke, he left approximately five blobs of sorbolene cream on Mr Christie's desk.

[29] Sorbolene cream is common in the workplace. Employees have access to disinfectant gel which they then follow with sorbolene cream to moisturise their hands and tissues to wipe of excess cream.

[30] Mr Renton said that the sorbolene cream was not intended to convey that a person had masturbated on the desk, rather it was just a way of playing an annoying practical joke on Mr Christie. He denied there were any sexual overtones in the joke and he was surprised anyone was offended by it. He said that when he left the sorbolene cream on Mr Christie's desk, he had already forgotten about the Facebook post 'so there was no correlation'.

[31] Mr Renton said that he had previously left sorbolene cream, lolly wrappers, potato chips, fried chips and tissues on Mr Christie's desk as a joke.

[32] A photograph of the desk was provided to the Commission.[8]

Post-employment conduct

[33] On 9 August 2016, Mr Renton was provided with a letter that invited him to a meeting to discuss the two incidents. Attached to the letter was a 'still' from the video posted on his Facebook page and a photograph of the desk with sorbolene cream on it.[9]

[34] The letter also said:

> It should be noted that we expect that you will not make any contact with the two staff members involved in relation to this matter and that there will be no negative implications for Bendigo Health or these staff as a result of this action. You are advised that this matter must remain confidential and is not to be discussed with your work colleagues. Should you disregard the instructions contained in this letter you may be subject to disciplinary action.

[35] Mr Renton's employment was terminated on 19 August 2016.

[36] Mr Renton engaged in communication with both Mr Christie and Ms Keown after 9 August 2016. Mr Renton agreed that he did not accept the advice that the matter remains confidential.[10]

[37] In his sworn witness statement, Mr Renton said:

> After I was terminated by Bendigo Health on 19 August 2016 I contacted Frank and Jo to apologise to them personally about the post…[11] [underlining added]

[38] In his oral evidence, under cross examination, Mr Renton said:

> When you say at paragraph 10 of your witness statement, "When I spoke with Jo she was very upset to hear that this incident had resulted in my termination and we spoke for about 45 minutes…You clearly spoke to Jo on the basis of that evidence, Mr Renton…You deny that you called her? -Absolutely - I should have - sorry, I should have rephrased that and said that Jo spoke to me; Jo rang me...[12]

[39] Mr Renton then gave evidence that Ms Keown was speaking to his wife:

> You discussed the matter? -I was outside at the time. I came in. Jo was talking to my wife. I wanted to know who it was and then Jo agreed to talk to me. Then we spoke on the phone for a good 45 minutes. Jo was at pains - I reckon in all honesty probably 30 of the 45 minutes Jo spoke about her fear of other nurses on the ward blaming her for my dismissal.[13]

[40] That is, his evidence changes. Mr Renton contradicts what he said in his written statement and his oral evidence as to the circumstances by which he came to be talking to Ms Keown. First he says he rang Ms Keown, then he says Ms Keown rang him and then he says that Ms Keown was speaking to his wife and then agreed to talk to him.

[41] Ms Keown says that on 18 or 19 August 2016, Mr Renton called her. Her evidence is that they spoke for 20 to 25 minutes and that, while Mr Renton apologised for the post, most of the conversation was taken with him saying how he had been wronged.

[42] I do not accept Mr Renton's evidence with respect to the phone call to be reliable. He contradicts himself and Ms Keown's version of how the conversation came about. I prefer the consistent evidence in Mr Renton's written evidence and Ms Keown's evidence that Mr Renton rang her.

[43] However, even if I am wrong, Mr Renton spoke to Ms Keown about the matter in clear breach of the express prohibition in the letter sent to him on 9 August 2016.

[44] Mr Renton agreed that he made contact with Mr Christie[14] to discuss the matter subject to the letter of 9 August 2016. Mr Renton called Mr Christie, texted him and sent him messages via Facebook.

[45] The Facebook exchanges were not in evidence. However, Mr Renton agreed that the transcript of text exchanges between him and Mr Christie as detailed in Mr Christie's witness statement is correct.[15]

[46] Mr Christie's evidence is that in the week of 7 August 2016, he received a phone call from Mr Renton who said that HR wanted to talk to him and asked Mr Christie if he had complained to HR. Mr Christie said he had not. Mr Christie admits that this was a lie.[16]

[47] The messages exchanged between Mr Renton and Mr Christie occurred in the period 7-11 September 2016.[17] This exchange commenced with a message from Mr Renton to Mr Christie on 7 September 2016 which says, in part:

> Just a heads up tomorrow mate, don't talk to the red headed cunt about what's happened….[18]

[48] Mr Christie took the reference to the red-head to be a reference to Ms Hutchins.

[49] On 11 September 2016, following some more exchanges, Mr Christie texted to Mr Renton a message that said, in part:

> I've decided not to get involved in any Union or fwa (sic) process… I have read emails from work which state that we should not be involved in any discussions about it… I won't be taking texts, emails or phone calls about it from anybody…[19]

[50] The phone call to Mr Christie and the messages exchanged with Mr Christie were in clear breach of the direct instruction that had been given to Mr Renton.

Meeting with Mr Renton on 18 August 2016

[51] The letter of 9 August 2016 invited Mr Renton to a meeting on 16 August 2016 (subsequently held on 18 August 2016) to discuss the Facebook post and the blobs of sorbolene cream on Mr Christie's desk.

[52] Mr Renton attended the meeting with Ms Debra Cogo as his union representative. Ms Lee McNally and Mr Tim Lenten attended for Bendigo Health.

[53] Mr Renton said he apologised at the meeting for any offence caused by the post and it was not his intention to do so. He said that perhaps he had a 'slight lack of judgement' but he and Mr Christie had "posted similar kinds of stuff" over the years without offence. Mr Renton agreed that he told Ms McNally and Mr Lenten that he was surprised that Mr Christie and Ms Keown were offended by the post.[20]

[54] Mr Renton said that Mr Lenten then said that management had two choices, they could recommend termination of employment or he could be given a warning. Mr Renton said that he and Ms Cogo were asked to step out. They waited for 'approximately two and a half minutes' before being called back in where Mr Renton was told that the recommendation would be dismissal. Ms Cogo agreed that they were only out of the room for two minutes.

[55] Mr Lenten rang Mr Renton the next day to confirm that his employment had been terminated.

[56] Ms McNally kept a record of the meeting. That record indicates that Mr Renton agreed to making the post and putting the blobs of sorbolene cream on Mr Christie's desk. It also indicates that Mr Renton was embarrassed and apologetic about the post. The record accords generally with what Mr Renton says occurred in the meeting.

[57] In her evidence, Ms McNally said that when Mr Renton was advised that one of the outcomes could be a recommendation to terminate his employment, he became defensive although agrees that she did not mention this in the notes.

[58] Ms McNally and Mr Lenten both agree that the break they took in considering the matter was 5-10 minutes, not the two and a half minutes suggested by Mr Renton and Ms Cogo, before advising Mr Renton that they would be recommending dismissal to the CEO.

[59] In deciding to recommend dismissal to the CEO, Ms McNally says that she and Mr Lenten took into account:

> 36.1 The Facebook post, consisting of both the video and comment attached to it, was offensive and sexual in nature and clearly implicated two employees in conduct that was stated to have occurred at work. Furthermore, because Bendigo Health employees were 'tagged' to the Facebook post and it referred to those actions occurring at work, the post clearly brought Bendigo Health's reputation into disrepute as well as causing stress to staff in the work unit.
>
> 36.2 The Applicant had admitted the misconduct, and referred only to his view that it was meant as a 'light hearted' joke between friends.
>
> 36.3 Although he was apologetic at first, it was clear from his demeanour during the meeting that he had little insight into the grossly offensive and inappropriate nature of the Facebook post and the harm it had caused.
>
> 36.4 It appeared to me that he was primarily concerned with finding out who had 'dobbed' him in.[21]

[60] Mr Lenten's evidence accords with that of Mr Renton with respect to the meeting except that he says that he and Ms McNally adjourned for 5-10 minutes to consider what their recommendation would be.

[61] Mr Lenten also said that Mr Renton had an 'apparent lack of insight into the nature of his behaviour' and 'seemed unable to accept that offence had been caused by the post as he kept asking to speak to Jo and Frank about it.'

[62] Mr Lenten agreed that the comment placed on the tagged video by Mr Renton did not say that the two colleagues were having sex at work. He agreed that 'slammed' could mean more than sex but disagreed with the proposition that being slammed did not imply sexual activity.

[63] Mr Lenten agreed that he had not specifically detailed to Mr Renton which policies of Bendigo Health he may have breached by his conduct.

[64] Mr Lenten said that he considered issuing Mr Renton with a warning but considered the conduct and its impact were such that a warning would not suffice.

[65] Mr Lenten said that the conduct of Mr Renton fell within serious misconduct as the conduct caused harm to Mr Christie and Ms Keown and others and it reflected badly on the reputation of Bendigo Health.

The recommendation to the CEO

[66] Following the meeting on 18 August 2016 Ms McNally drafted an email for Ms Noonan to send to the CEO.

[67] Ms McNally agreed that she did not mention in the email to Ms Noonan that Mr Renton had apologised as a relevant factor but gave evidence that Ms Noonan was aware of this as, prior to sending the email, she met with Ms Noonan.

[68] Ms McNally is part of Ms Noonan's team. Ms Noonan said that, prior to making a recommendation to the CEO with respect to Mr Renton, she had a number of discussions with Ms McNally although cannot recall the dates of these discussions. Ms Noonan said that she had discussed with Ms McNally that Mr Renton had apologised and acknowledged his lack of judgement. She was also advised of Mr Renton's work history with Bendigo Health.

[69] Ms Noonan said she reviewed the draft email for the CEO sent to her by Ms McNally, made some changes and forwarded this to the then acting CEO.

[70] Ms McNally agreed that a picture posted on Bendigo Health's website[22] encouraging participation in a fun run was offensive but said it was of a different calibre to the video posted by Mr Renton.

Submissions

Mr Renton

[71] Mr Renton submits that, while he agrees that he posted the video and tagged it to Mr Christie and Ms Keown, the post had been done with the intent to generate humour. He had not intended to post anything sexually explicit and, having found that people were offended by it, immediately removed it from his Facebook page.

[72] Mr Renton submits that there is no evidence that he breached Bendigo Health's social media policy or that the action of making the post caused any imminent risk to the health and safety of anyone. He, therefore, says that there was no valid reason for the dismissal.

[73] Mr Renton concedes that he was properly notified of the reason for dismissal in the letter of 9 August 2016.

[74] Mr Renton submits that, if there was a valid reason for dismissal, his response was not properly considered prior to a decision being made to recommend termination of his employment. He says that Ms Noonan relied on the recommendation of Mr Lenten and Ms McNally and that they only considered the matter for two minutes before advising him of the outcome. Such a short period of time suggests that the decision to terminate his employment had been made prior to the meeting of 18 August 2016.

[75] Mr Renton therefore says that he was not given an opportunity to respond.

[76] Mr Renton says that the decision to terminate his employment was harsh, unjust or unreasonable because it was disproportionate to the conduct complained of, the conduct was not serious misconduct and his apology and his intent in making the post (to be humorous) do not support a decision to terminate his employment.

[77] Further, Mr Renton says that the decision to terminate his employment has had severe economic consequences for him. He submits that Bendigo has a relatively small health care sector within which he can work. Further, because he is a not a medically endorsed enrolled nurse, there is a further limitation on his employment prospects.

[78] Mr Renton also complained that other employees who have made inappropriate Facebook posts have not been subject to any disciplinary action.

[79] Mr Renton seeks reinstatement.

Bendigo Health

[80] Bendigo Health submits that Mr Renton's employment was not terminated for breach of policy but for the posting of a sexually explicit video on his Facebook page that tagged two work colleagues and for leaving sorbolene cream on a colleague's desk.

[81] Bendigo Health submits that Mr Renton admitted that he posted the video and agreed that the video was sexually explicit. Bendigo Health says that the words Mr Renton put with the video (being slammed at work) are at least sexually suggestive (if not explicit) and clearly suggest that the incident occurred at work.

[82] Bendigo Health submits that for misconduct to be serious misconduct it does not require a finding that the conduct caused *actual* harm to the health and safety of a person or *actual* harm to the reputation and viability of the employer. Rather, it is conduct that causes serious and imminent *risk* to health and safety or reputation of the employer.

[83] In this case, both Ms Keown and Mr Christie were affected by the conduct of Mr Renton. Ms Keown was appalled and disgusted and now wished she had the strength to make a complaint. Mr Christie has sought counselling to deal with the stress of the incident.

[84] Each of Ms Keown, Mr Christie and Ms Hutchins had taken time off work because of the incident.

[85] The reputation of Bendigo Health was at risk because the post suggested that the conduct occurred at work and many of the people who saw the post (including a substantial number of Mr Renton's Facebook friends) were work colleagues or ex-work colleagues of Bendigo Health so well knew where 'work' was.

[86] Bendigo Health says that Mr Renton's intent in posting the video cannot overcome the actual effect that it had. In any event, it submits that Mr Renton agreed that he did think for a split second that Ms Keown might be offended but continued with the post anyway.

[87] Bendigo Health submits that Mr Renton has shown no insight into the seriousness of the post. He still fails to accept that offence could have been caused by the post, he does not accept that the text with that tag that it occurred 'at work' implies that it occurred 'at work' and he maintains that Ms Keown could not be offended or reasonably offended, even in circumstances where there is no history of similar types of exchanges with Ms Keown.

[88] Bendigo Health says that the sorbolene cream matter was not coincidental, that it was deliberate, that it was intended to suggest someone had masturbated at Mr Christie's desk and that it was offensive, not just to Mr Christie but to others who viewed the photograph.

[89] Bendigo Health says that Mr Renton was advised of the reasons for his dismissal by letter on 9 August 2016.

[90] Bendigo Health says that the decision to dismiss Mr Renton was made at an operational level and the request to approve the decision by the acting CEO was a matter of protocol. In this respect, it submits that the CEO authorised the decision made. That decision to terminate Mr Renton's employment was made after he was given an opportunity to respond to the allegations at a meeting on 18August 2016. His response was properly considered prior to any decision being made.

[91] Mr Renton was not unreasonably denied access to a support person.

[92] Mr Renton's employment was not terminated for poor performance.

[93] Bendigo Health is a large employer and has access to dedicated human resources staff.

[94] Bendigo Health submits that Mr Renton's conduct post the termination of his employment is a relevant consideration. It submits that Mr Renton was given a direction not to talk to others about the matter. He agreed in his evidence that he contravened this direction. In contacting Mr Christie, Bendigo Health submits that Mr Renton tried to pressure Mr Christie to recant his complaint.

[95] In referring to Ms Hutchins as 'that red headed cunt', Mr Renton displayed deliberate and objective contempt for the management of Bendigo Health.

[96] Bendigo Health says that the post made by Mr Renton is not comparable with those made by Mr Christie. Mr Christie's posts were not sexually explicit, did not tag two colleagues and did not suggest that they had engaged in sexual activity at work.

[97] The post on Bendigo Health's website does not equate to Mr Renton's conduct. It stands apart and, in any event, has not been subject to any complaint.

Legislative requirements

[98] I am satisfied (and it was not contested) that Mr Renton is protected from unfair dismissal. (s.382 of the FW Act)

[99] Section 385 of the FW Act states:

> **385 What is an unfair dismissal**
>
> A person has been ***unfairly dismissed*** if the FWC is satisfied that:
>
> (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.

[100] I am satisfied that Mr Renton has been dismissed. The *Small Business Fair Dismissal Code* does not apply and the dismissal was not a case of genuine redundancy.

[101] It falls, therefore, to determine if the dismissal of Mr Renton was harsh, unjust or unreasonable.

[102] Section 387 of the FW Act states:

> **387 Criteria for considering harshness etc.**
>
> In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:
>
> (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.

Section 387(a) – a valid reason for dismissal

[103] For a reason to be valid it must be 'sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced cannot be a valid reason'.[23]

[104] *In Walton v Mermaid Dry Cleaners Pty Ltd*,[24] Moore J said

> In my opinion, the evidence does establish that the employer had a valid reason for terminating the employment of Mr Walton. I should, however, make plain - and this has been made plain in many cases decided by this court - that it is not the court's function to stand in the shoes of the employer and determine whether or not the decision made by the employer was a decision that would be made by the court but rather it is for the court to assess whether the employer had a valid reason connected with the employee's capacity or conduct, and in these proceedings I have concluded it did.[25]

[105] Despite this, it is necessary for the Commission to be satisfied that the conduct did, in fact, occur.[26]

[106] In this case, I am satisfied that on 4 August 2016 Mr Renton did post a video on Facebook of an obese women dropping her stomach onto the back of a man who is on all fours on the floor. Both are only wearing their underwear. The woman can be heard to say 'how heavy is that' and 'a little horsey'.

[107] In posting the video, Mr Renton tagged two of his work colleagues at Bendigo Health – Mr Frank Christie and Ms Jo Keown – with the line 'Frank Christie being slammed by Jo Keown at work yesterday!'

[108] In tagging the video and adding the text, I am satisfied that the video and text could be seen by all of Mr Renton's Facebook friends, all of Mr Christie's Facebook friends and all of Ms Keown's Facebook friends. I am also satisfied that the post could be seen of the Facebook friends of Ms Hinds, Ms Klaus and Ms Renton who all commented on the post.

[109] Mr Renton agreed, and I am satisfied, that 'slamming' has sexual connotations. Even if the term is not sexually explicit, I am satisfied that it has strong sexual overtones, particularly in the context of the video. If the video was of a person slamming a door the context, and therefore meaning, would be quite different.

[110] I am satisfied, despite Mr Renton's views to the contrary, that the text with the post says that the 'slamming' took place at work. There is no other way to read it.

[111] Mr Renton's conduct displayed an appalling lack of judgement and concern for the effect making such a post might have on his two colleagues. To the extent that Mr Renton gave some thought to whether Ms Keown might be offended by the post, he decided to proceed with the post.

[112] By making the post, Mr Renton affected the health and safety of his work colleagues. Mr Christie has sought assistance through the employee assistance program at Bendigo Health and Ms Keown was distressed both by the post and the fear that she may be thought less of at work if she was the one who made the complaint. On this, I should make clear that I accept the explanation given by Ms Keown of her reasons for communicating with Ms Renton – that she disliked conflict and she sought to maintain relationships at work (remembering that Ms Renton is in the same workplace).

[113] By making the post, Mr Renton engaged in conduct which had the potential to adversely affect the reputation of Bendigo Health. The joke was not shared by a few individuals but by a range of people, some of whom work at Bendigo Health and some of whom do not. Many of those people knew Mr Renton worked at Bendigo Health and could conclude the incident took place at work.

[114] I am also satisfied that on 4 August 2016, Mr Renton left four to five blobs of white sorbolene cream on Mr Christie's desk. Whilst he says this was coincidental with the post, I am not satisfied that this is so. Mr Renton made the post while he was at work on 4 August 2016. That same day he left the blobs of sorbolene cream on Mr Christie's desk. Mr Christie discovered this at about 7.00am when he arrived at work. The timing of both incidents strongly suggests they were not coincidental and strongly suggests that the sorbolene cream was intended to suggest that someone had masturbated at Mr Christie's desk.

[115] Whilst offence may well be in the eye of the beholder, in this case Mr Christie was offended. Objectively viewed, I am satisfied that he had grounds for such offence. Further, the conduct of Mr Renton in this case has spilled into the workplace. His reference to the slamming occurring at work adds an additional layer to the inappropriateness of his conduct that cannot be ignored. His actions have had a detrimental effect on two of his colleagues

[116] I have not discounted the evidence of Mr Christie as to his reaction to the incident because of his admission that he lied to Mr Renton when asked around 7 August 2016 if he had complained about the post or sorbolene cream. Mr Christie's response to Mr Renton is understandable but does not raise issues of the credibility of his evidence in these proceedings.

[117] Mr Renton, by his actions, exposed Mr Christie and Ms Keown to humiliation and potential ridicule at work. The professionalism and appropriate standards of conduct of their co-workers must be relied on to ensure this does not occur. His actions were crass, careless and showed an absence of judgement.

[118] It is not necessary that I find the conduct of Mr Renton to be serious misconduct. The matter I must determine is if Mr Renton's conduct, however it might be described, provides a valid reason for his dismissal.[27]

[119] Mr Renton has not displayed an appropriate standard of conduct in his dealings with his colleagues or his employer. I am satisfied that Mr Renton's conduct provides a valid reason for his dismissal.

Section 387 (b) – whether the person was notified of that reason

[120] It is not disputed that Mr Renton was advised of the allegations in relation to the Facebook post and the sorbolene cream matter by letter on 9 August 2016.

Section 387(c) – an opportunity to respond to any reason related to the capacity or conduct

[121] It is well established that an employee must be given an opportunity to respond to any allegations prior to a decision being made to dismiss the employee.

[122] I am satisfied that a decision was not made to dismiss Mr Renton prior to him being heard with respect to the allegations at the meeting of 18 August 2016. I accept the evidence of Mr Lenten and Ms McNally that a decision had not been made prior to the meeting.

[123] It is evident that some thought had been given by Ms McNally and Mr Renton to possible outcomes from the meeting. They advised Mr Renton during the meeting of the two possibilities after they had heard from him but before he was advised of the outcome. The possibilities were a recommendation to the CEO for dismissal or a final warning.

[124] The quality of a decision should not be measured alone by the time taken to reach it. It is measured by the soundness of it given the matters that require consideration. In this case, I accept Ms McNally's evidence of the matters she and Mr Lenten discussed in reaching their decision, that is: the implication of two work colleagues and that the incident impliedly occurred at work; the reputational damage to Bendigo Health; that Mr Renton admitted the conduct but considered it a joke; that Mr Renton was apologetic although had little insight into his conduct; and that Mr Renton was primarily concerned in finding out who dobbed him in.

[125] In the context of the post and of the sorbolene cream matter, I am satisfied that Mr Renton was given an opportunity to respond prior to a decision being taken to dismiss him.

Section 387(d) – unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal

[126] There was no unreasonable refusal to allow Mr Renton to have a support person with him. The meeting originally scheduled for 16 August 2016 was changed to 18 August 2016 to enable his support person to attend.

Section 387(e) – unsatisfactory performance

[127] Mr Renton's employment was not terminated for performance reasons. This is not a relevant factor.

Sections 387(f) & (g) – the size of the employer's business and absence of dedicated human resource management specialists or expertise

[128] Bendigo Health is a large employer and has dedicated human resources staff. In such circumstances the expectation is that the process of effecting the dismissal will be sound and defensible.

Section 387(h) – Any other matters

[129] Mr Christie had engaged in posting matters on his Facebook page which, to my mind are crass and immature. Some of these had Mr Renton tagged. Whilst it was suggested they were also 'blokey' it is difficult to see any humour in them. However, Mr Christie's posts were private; did not suggest sexual activity; certainly did not implicate the workplace in their crassness; and have not been subject to any complaint.

[130] An image was also posted on Bendigo Health's website in support of a charity fun run of a person wearing a fake naked bottom which was being squeezed by another person. Everyone in the picture was wearing a 'traditional' nurse's uniform. This post does not suggest any sexual activity and has not been subject to complaint. It clearly does, however, implicate the workplace in conduct that is unbecoming and Bendigo Health would be well placed to better monitor its Facebook content.

[131] Neither Mr Christie nor the person responsible for the post on the Bendigo Health website have been subject to disciplinary action or had their employment terminated.

[132] In *Sexton v Pacific National (ACT) Pty Ltd*,[28] Vice President Lawler said of claims of unequal treatment:

> **[36]** In my opinion the Commission should approach with caution claims of differential treatment in other cases advanced as a basis for supporting a finding that a termination was harsh, unjust or unreasonable within the meaning of s.170CE(1) or in determining whether there has been a "fair go all round" within the meaning of

> s.170CA(2). In particular, it is important that the Commission be satisfied that cases which are advanced as comparable cases in which there was no termination are in truth properly comparable: the Commission must ensure that it is comparing "apples with apples". There must be sufficient evidence of the circumstances of the allegedly comparable cases to enable a proper comparison to be made. Obviously, where, as in National Jet Systems, there is differential treatment between persons involved in the same incident the Commission can more readily conclude that the cases are properly comparable. However, even then the Commission must approach the matter with caution. Specifically, the Commission must be conscious that there may be considerations subjective to the circumstances of an individual that caused an employer to take a more lenient approach in an allegedly comparable case. For example, a worker guilty of particular misconduct justifying termination might be shown leniency because of extreme need or stress arising from the serious illness of a close dependent. Another worker guilty of the same misconduct could not necessarily rely upon the leniency shown to the first worker as a basis for demonstrating that his or her termination was harsh, unjust or unreasonable. Many other examples could be constructed.

[133] I am not satisfied that the conduct of Mr Christie and the person responsible for the fun run post can be equated to that of Mr Renton for a number of reasons. Firstly, no-one has complained of Mr Christie's posts or the fun run post. Second, Mr Christie's posts and the fun run post, whilst displaying parts of the anatomy and semi naked women, were not suggestive of any sexual activity. Third, they do not suggest sexual activity at work although the fun run post is clearly in the context of Bendigo Health. Mr Christie's posts and the fun run post are not comparable to Mr Renton's conduct and post. The claim of unequal treatment is not sustainable.

[134] Mr Renton's conduct post his termination is also a relevant consideration.

[135] Mr Renton's description of Ms Hutchins (set out above – I do not repeat it) following his dismissal demonstrates a contempt for management of Bendigo Health and is not an acceptable way to talk of a senior manager of his (past) employer. It indicates an on-going lack of judgement on his part.

[136] I appreciate the economic impact Mr Renton's dismissal has had on him and I have considered this in reaching my conclusion.

[137] I have taken into account Mr Renton's long and exemplary employment record. He has worked for Bendigo Health since January 1999.

Conclusion

[138] It is accepted that a dismissal may be:

- unjust because the employee was not guilty of the alleged misconduct,
- unreasonable because the evidence or material before the employer did not support the conclusion,

- harsh on the employee due to the economic and personal consequences resulting from being dismissed, or

- harsh because the outcome is disproportionate to the gravity of the misconduct (the punishment does not fit the crime).[29]

[139] Mr Renton should have listened to the voice in his head that suggested Ms Keown might have been offended by the post and, having done so, not proceeded with the post. Unfortunately, he did not and the consequences for him and others are far reaching.

[140] The post was visible far and wide before Mr Renton took it down. It was not a joke shared by a handful of people and the description given to the Commission of how the Facebook post could be seen suggests that it could have been and was seen by an ever expanding group. This consequence of posting on Facebook is so often overlooked but cannot be ignored.

[141] Mr Renton's conduct extended beyond the private realm into work. He tagged work colleagues and suggested sexual activity had occurred at work between them. It was offensive and those tagged have a right to feel aggrieved at his conduct. He has brought question to the reputation of his employer who has a right to be aggrieved by his actions.

[142] Whilst Mr Renton is apologetic, he has displayed a lack of insight into the effect of his post on his colleagues – even at the hearing of his application he failed to appreciate that it caused real offence. To this extent, I am not sure the basis of his apologies. He compounded his Facebook misdeed by placing blobs of sorbolene cream on Mr Christie's desk. That act was boorish.

[143] Having said this, however, I consider, on fine balance, that the decision to terminate Mr Renton's employment was harsh in that it was disproportionate to the gravity of the misconduct. I have also taken into account the economic and personal consequences of the decision in circumstances where Mr Renton has young children including a child with Attention Deficit Hyperactivity Disorder for whom he shares joint care. Whether Mr Renton's conduct was serious misconduct or not is not relevant to my consideration. The relevant consideration in the determination of whether the dismissal was harsh, unjust and unreasonable is those matters set out in s.387 as I have found above.

[144] Mr Renton has no history of misconduct at work. Whilst it is apparent he and Mr Christie have exchanged 'jokes' in the past, not dissimilar to the sorbolene incident, this has gone unremarked by either of them, their colleagues or management (if it was aware of these 'jokes'). Further, the Facebook posting and its naming of work colleagues and 'work' is a one-off incident. Mr Renton had not drawn such connections in the past. Whilst Mr Renton's insight into the incident may be questioned it can only be hoped he has learnt from his conduct. Further, there was no suggestion that the incident had any adverse effect on any other aspect of Mr Renton's work.

[145] However, it is a serious matter and it warranted a swift and strong response from Bendigo Health. It warranted a sincere and heartfelt apology from Mr Renton to Mr Christie and Ms Keown and recognition of the distress he had caused. Even though the misconduct was serious, because of its one-off nature I am not convinced that it justifies the decision to terminate Mr Renton's employment although I can appreciate why Bendigo Health reached the conclusion it did.

[146] Having found that the dismissal of Mr Renton was harsh, I therefore find that he was unfairly dismissed. I do not need to make a finding as to whether the dismissal was unjust or unreasonable.

Remedy

[147] Mr Renton seeks reinstatement. He says that, based on the evidence of Ms Hutchins that she could work with him, reinstatement is appropriate. Mr Renton says that I should ignore the evidence of Mr Lenten with respect to reinstatement.

[148] Bendigo Health says that reinstatement of Mr Renton is untenable. His conduct has caused harm to co-workers and presented a risk to the reputation of Bendigo Health. Further, it says that Mr Renton's behaviour during the meeting of 18 August 2016 suggested that he would be seeking retribution on those who dobbed him in.

[149] Bendigo Health also submits that Ms Hutchins was upset and hurt by the language used by Mr Renton of her.

[150] Section 390 of the FW Act states:

> **390 When the FWC may order remedy for unfair dismissal**
>
> (1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:
>
> (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
>
> (b) the person has been unfairly dismissed (see Division 3).
>
> (2) The FWC may make the order only if the person has made an application under section 394.
>
> (3) The FWC must not order the payment of compensation to the person unless:
>
> (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
>
> (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.
>
> Note: Division 5 deals with procedural matters such as applications for remedies

[151] In this case, I am not satisfied that reinstatement is appropriate. I reach this conclusion for a number of reasons.

[152] Firstly, when Mr Renton received the letter of 9 August 2016 he was expressly directed to not have contact with the employees involved. He showed a blatant disregard for that direction and contacted both Mr Christie and Ms Keown in circumstances where he was challenging his unfair dismissal and seeking reinstatement. By his actions he has shown an unwillingness to accept a reasonable direction given to him. This has implications for any return to the workplace.

[153] Second, Mr Renton, in correspondence with Mr Christie, used a description of Ms Hutchins which is derogatory, crass and unedifying. Whilst Ms Hutchins displayed a level of professionalism in stating that she would work with Mr Renton if he was reinstated, I am not convinced that Mr Renton has demonstrated respect for Ms Hutchins such that his professionalism must be called into question. And again, he used the language he did whilst he was in the process of making an application for unfair dismissal and, in that process, seeking reinstatement.

[154] Third, Mr Renton agreed to a long history of playing 'pranks' and practical jokes on Mr Christie. He saw this incident as just an extension of those. Bendigo Health has grounds to have lost confidence in Mr Renton that he will not continue with such conduct.

[155] Fourth, I have considered Mr Renton's absence of any insight as to the seriousness and effect of the post he made.

[156] Having found that Mr Renton should not be reinstated, I must consider what compensation should be awarded to him.

[157] At the conclusion of the hearing on this matter I indicated that, if I considered Mr Renton had been unfairly dismissed and was going to consider compensation, I would seek further submissions from the parties with respect to those matters in s.392 of the FW Act. For this reason, separate directions will be issued for the filing of submissions and other materials in relation to compensation.

COMMISSIONER

Appearances:

E. Dickenson for Mr Renton.

A. Forsyth of counsel for Bendigo Health Care Group.

Hearing details:

2016.
Bendigo:
December 6, 7.

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Endnotes:

[1] Transcript, PN280.

[2] Transcript, PN298.

[3] Exhibit A3.

[4] Transcript, PN850.

[5] Transcript, PN851-852.

[6] Mr Renton's Outline of Submissions at Attachment 5.

[7] Ibid, pages 4, 5, 7, 8, 10 and 21

[8] Exhibit R7, attachment TL-2. A coloured copy of the attachment was provided to the Commission during the hearing and Mr Renton agreed that he was provided with a colour copy of the photograph.

[9] Whilst what was filed in the Commission was a black and white copy of the material, Mr Renton agreed that he received coloured copies of the attachments to the letter.

[10] Transcript, PN456.

[11] Exhibit A1, paragraph 9.

[12] Transcript, PN500.

[13] Transcript, PN507.

[14] Transcript, PN457.

[15] Transcript, PN470-PN474.

[16] Exhibit R2, paragraphs 40-41.

[17] Exhibit R2, paragraph 44.

[18] Ibid.

[19] Ibid.

[20] Transcript, PN432.

[21] Exhibit R4.

[22] Exhibit A5.

[23] *Selvachandran v Peteron Plastics Pty Ltd,* (1995) 62 IR 371, 373

[24] (1996) 142 ALR 681.

[25] Ibid, 685.

[26] *King v Freshmore (Vic) Pty Ltd*, Print S4213 at [24]

[27] *Sharp v BCS Infrastructure Support Pty Limited,* [2015] FWCFB 1033 at [33]-[34]; *O'Connell v Wesfarmers Kleenheat Gas Pty Ltd, t/a Kleenheat Gas* [2015] FWCFB 8205 at [22]-[23] as cited in *Titan Plant Hire Pty Ltd v Van Malsen,* [2016] FWCFB 5520 at [27]-[28].

[28] PR931440.

[29] *Byrne v Australian Airlines Limited*, (1995) 185 CLR 410, 465.