



# DECISION

*Fair Work Act 2009*  
s.394—Unfair dismissal

**Emma Valenzuela**

v

**Spectrum Community Focus Limited t/as Spectrum Community Focus**  
(U2017/1378)

SENIOR DEPUTY PRESIDENT HAMBERGER

SYDNEY, 4 OCTOBER 2017

*Application for an unfair dismissal remedy; valid reason for dismissal but not serious misconduct; no order for compensation.*

[1] Ms Emma Valenzuela (the applicant) applied under s.394 of the *Fair Work Act 2009* (FW Act) on 9 February 2017 for an unfair dismissal remedy in relation to the termination of her employment as Finance Manager by Spectrum Community Focus Limited (the respondent) on 14 December 2016.

[2] The respondent initially objected to the application on the grounds that it had been made outside the 21 day time limit provided for in the FW Act. However, following a hearing on 5 June 2017, the objection was withdrawn.

[3] The application was eventually referred to me and hearings were conducted on 4 and 25 September 2017.

[4] The applicant was represented by C Owens and the respondent by J Welch.

## **The reasons for termination**

[5] No formal notice was provided to the applicant giving the reasons for her dismissal. However, she was provided with a letter on 30 November 2016, signed by the respondent's Managing Director, Larissa Robertson, setting out a series of allegations. That letter includes the following:

‘It has come to my attention that your recent performance has been well below what is expected of you in your position. This is subsequent to numerous verbal and written warnings and requests concerning your performance. If the allegations described below are made out against you:

1. They would constitute serious contraventions of your employment obligations, and the business' Serious and Wilful Misconduct Policy, (“**the SWMP**”, including:
  - a. Performing your duties with skill, care and diligence; and

- b. Failing to follow and abide by lawful directions.
2. They would constitute a lack of knowledge or expertise, and/or a clear failure to exercise reasonable care;
3. They would have caused, (and will likely continue to cause,) significant harm to the business;
4. They would have undermined the essential requirement of mutual trust and confidence that must exist between an employer and an employee.

I direct you to consider the below allegations of serious issues and prepare a response. We will meet tomorrow morning at 9:00 AM in my office to consider your response prior to making a final decision concerning what disciplinary action (if any) may be taken. Please note that we consider the above issues to be very serious, and the outcome of the meeting, or any subsequent investigation, may be suspension, and/or the termination of your employment.

## **Issues**

### **1. 2015 Financial Accounts**

The 2015 Financial Accounts and Tax Returns were your responsibility. They were lodged and approved by you, and showed a loss of over \$600,000 for Spectrum Community Outcomes Pty Ltd. The last reports I had received from you and that are still currently in MYOB show a loss of approximately \$86,000. The correct position for this entity was a profit of \$322,908. Not only were the accounts and tax return incorrect, you did not bring the loss of \$600,000 to my attention until I asked you for a summary of net profit for all entities on 14/11/16 to be summarised in a spreadsheet. Even at that point, there was (*sic*) no notes or comments regarding the substantial recorded loss. If these incorrect accounts had been sent to any external party it would have had a very detrimental impact on the business.

### **2. ACNC Return**

We were late to send our returns into the ACNC. This is an essential duty of yours, and the failure to comply caused significant disruption to the business. I was able to negotiate an extension till the 28<sup>th</sup> May 2016. I contacted our accountants immediately and had them start finalising the audit. I spoke with you and emailed you to notify you the last day for lodgement was the 28<sup>th</sup> May 2016. You did not send the required information into the ACNC until the 30<sup>th</sup> May 2016 nor did you contact them or advise me that you would be late. As a consequence, our PBI status is still under review and has cost thousands of dollars in legal and accountants' fees, and in my personal time, to try to rectify. If we lose our PBI status we will be in significant trouble. At the time I was lead to believe I had given you the incorrect lodgement date, since then I have found the email confirmation that it was due on the 28<sup>th</sup> May 2016.

### **3. General Meeting on 18<sup>th</sup> November 2016**

As a consequence of the late lodgement of the ACNC returns we had to appoint an independent Board for Spectrum Community Focus Ltd. I had asked all the managers to prepare a brief 5 minute summary of their role and what's happening so the new Directors would have a better understanding of the business. Unfortunately I crushed my fingers and was rushed to hospital that morning. In the meeting, you presented incorrect and confidential financial information about SCO Group Pty Ltd and its subsidiaries. You told the Directors our cash flow was negative and would remain negative for a number of weeks from the week beginning of 22/11/16. Not only was

this completely incorrect and our cash flow balance at the end of that week was over \$100,000, you also printed and showed incorrect cash flows from a spreadsheet that you do not know how to update. As a consequence Lina Bavaro resigned immediately, and Tom Ellicott is considering resigning unless I can prove your figures were incorrect. Tom also stated that from your presentation he believed Spectrum Community Focus Pty Ltd had an ATO liability of \$1.6 million instead of less than \$200,000 which is why he is very concerned. This has further put the ability for us to rectify the removal of our PBI status in doubt.

#### **4. Win/Win Agreement 2/8/16**

In this agreement we both agreed that;

“Agree that Emma feels confident that she can complete these tasks and will ask for guidance when necessary, however if the end result is Emma cannot complete the work because of lack of skill or knowledge then this role is not right for her.”

“Agree-if Emma is able to master this and the company is profitable by the end of September, Emma will receive a pay rise up to \$30,000 if it financially viable (*sic*).”

The agreement required you to;

- Main Result – ability to make management decisions by understanding our true financial position and exposure
- Work out profitability of SPS
- Work out breakeven of SCO Recruitment
- Work out cash flow survival plan
- Work out targets in sales, cost and profit needed
- Budget
- Resign if you couldn't perform the role.

As of 30/11/16 I have not been able to determine the true financial position of the entities from any reports, information or work you have completed.’

#### **The evidence**

[6] During her cross-examination the applicant agreed that she had provided the respondent with a professional profile when applying in 2014 for the position of accountant that indicated that her qualifications included ‘ASA – CPA Australia’ and ‘Master in Business Administration – Ateneo Graduate School of Business’.<sup>1</sup> She also agreed that in including this in her resume she wanted people to believe that she had a master’s degree in business administration.<sup>2</sup>

[7] The applicant agreed that she did not have a master’s degree.<sup>3</sup>

[8] The applicant was asked whether she was a ‘CPA ASA’.<sup>4</sup> She did not respond to this question directly, instead (after being pressed) saying:

‘Okay. CPA ASA is like when you are going to enter to the CPA program you will be – you will have to submit qualifications like your tertiary education and your experience. They will assess whether you are qualified to undergo this – you are qualified to undertake all the subjects leading to the CPA. And so I was assessed and I got that’.<sup>5</sup>

[9] The applicant agreed that she had six years to move from ASA status (i.e. associate status) to pass the relevant subjects to achieve CPA status, and that she first ‘got her ASA’ in

2008.<sup>6</sup> When asked whether she had undertaken the program to achieve CPA status she obfuscated:

‘Did you do the course? ---Yes. I did one and then I did stuff – I also had an ICAA and I did not continue. So is the same (*sic*)’.<sup>7</sup>

[10] The applicant finally conceded that she did not finish the course and was not an associate member of the CPA.<sup>8</sup>

[11] In fact it is clear that the applicant’s associate membership of the CPA lapsed in 2010<sup>9</sup> – that is, she was not an ‘ASA – CPA’ at the time she applied to work for the respondent, despite her representation to the contrary.

[12] It is also noteworthy that when asked earlier this year, during the Commission hearing into the respondent’s jurisdictional objection, whether she was a CPA accountant the applicant replied:

‘I’m a CPA back in the Philippines. I’m an ASA in Australia’.<sup>10</sup>

[13] I find that the applicant deliberately deceived the respondent about her qualifications when she originally applied to work for them. Moreover, she gave what can charitably be described as misleading evidence to the Commission about this matter in the proceedings concerning the respondent’s jurisdictional objection. This casts serious doubt on the applicant’s credibility.

[14] I consider it appropriate to treat all the evidence of the applicant with considerable scepticism. I found the respondent’s sole witness, Ms Robertson, by contrast to be a plausible witness. While some of her answers were rambling, I have no reason to doubt her general truthfulness. Accordingly where there is a conflict in the evidence of the applicant and Ms Robertson, I prefer that of Ms Robertson.

[15] The respondent is related to Spectrum Community Outcomes (SCO) which is the shareholder of a group of 12 companies. The respondent generated revenue of approximately \$22 million in 2014 and 2015.<sup>11</sup>

[16] At the time of her dismissal the applicant was employed as Finance Manager. Her duties included the preparation of financial reports (including for taxation purposes) for all of the entities in the group as well as for the group as a whole. She reported directly to the CEO and the Board of Directors.

[17] The 2014-15 accounts prepared initially by the applicant on 3 November 2016 reported a \$600,000 loss. This reported loss was not brought to the attention of Ms Robertson by the applicant<sup>12</sup> who first learned about it from her home loan manager. I am satisfied, based on the audit conducted by the respondent’s external accountants and auditors, that this figure was incorrect.

[18] I am also satisfied that the applicant caused the respondent very considerable damage by failing to file the respondent’s return to the Australian Charities and Not-for-profits Commission (ACNC) within the required time frame. Ms Robertson had negotiated with the ACNC a delayed lodgement date of 28 May 2016.<sup>13</sup> (The original lodgement date had been

the previous November). The applicant was told by Ms Robertson of this revised date.<sup>14</sup> However the applicant, whose responsibility it was to lodge the return, failed to do so until 30 May 2016. The applicant claimed that the extension had been granted until 30 May 2016 – indeed it even appears that she subsequently persuaded Ms Robertson of this – at least for a while.<sup>15</sup> However after the ACNC advised Ms Robertson that the respondent had lost its Public Benevolent Institution (PBI) status because it had failed to lodge its return by the due date, she eventually went through the relevant records and found the *‘paperwork and the email saying that it was definitely the 28<sup>th</sup>’*.<sup>16</sup> It appears this did not occur until November 2016, around the time she realised there were problems with the 2015 accounts.<sup>17</sup>

[19] As previously noted, the respondent provided the applicant with a letter on 30 November 2016 expressing its concerns with her conduct. On 14 December 2016 Ms Robertson met with the applicant, together with the applicant’s husband and Paul Reed. The meeting lasted approximately two and a half hours. During the meeting the applicant blamed Ms Robertson and other people for the issues raised in the letter of 30 November 2016.<sup>18</sup>

[20] Due to the serious nature of the issues, and the applicant’s attitude, Ms Robertson decided to terminate the applicant immediately. The applicant was advised of this and there followed some discussion about the applicant’s entitlements.<sup>19</sup>

### **Consideration**

[21] In considering whether I am satisfied that a dismissal is harsh unjust or unreasonable I must take into account the criteria set out in s.387 of the FW Act. These 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.

I will consider each of these criteria in turn.

**[22]** I am satisfied that the respondent had a valid reason to dismiss the applicant. In particular her failure to lodge the ACNC report on time or to prepare satisfactory financial reports for 2015 caused serious damage to the respondent's business. Aggravating these concerns was the applicant's failure to accept any responsibility or even acknowledge her errors.

**[23]** The applicant was notified of the respondent's concerns in the letter she received on 30 November 2016.

**[24]** The applicant was given the opportunity to respond to those concerns at the meeting on 14 December 2016. The applicant contended that she was prevented from responding effectively to the issues raised in the letter because her access to all financial records were cut off from 30 November 2016. I am satisfied that the applicant was well aware of the relevant financial data prior to 30 November 2016.

**[25]** The applicant had a support person at the 14 December 2016 meeting.

**[26]** While the applicant was dismissed for serious misconduct I consider that the reasons for her dismissal are more properly categorised as poor performance. There is no satisfactory evidence that she had received any warnings about her poor performance before November 2016. The weight to be attached to this finding is diminished by the applicant's complete unwillingness to accept any personal responsibility for her mistakes, which means that any attempt to get her to improve her performance would probably have been unsuccessful.

**[27]** The respondent is not a small business. However it seems to have limited access to any human resources expertise.

**[28]** The applicant's dishonesty in relation to her qualifications only came to light after her dismissal. This is most appropriately dealt with under 'remedy'.

**[29]** While I note the applicant's age (she was 62 years old at the time of her dismissal), I also note that she obtained alternative employment in June of this year.

**[30]** On balance, despite the lack of prior warnings, I am not satisfied that the applicant's dismissal was unfair, except in one limited respect. Her poor performance caused serious damage to the respondent's business. This was compounded by her unwillingness to accept any responsibility for her mistakes. The exception is that the applicant was dismissed summarily and was neither given notice nor paid in lieu of notice. The applicant was guilty of poor performance rather than serious misconduct. This would normally justify notice of termination. I find that the dismissal was unfair – but only to the extent that the applicant should have been afforded notice of her dismissal.

**[31]** Under s.390 of the FW Act the Commission must not order the payment of compensation to a person who has been unfairly dismissed unless it is satisfied that reinstatement of the person is inappropriate and it considers an order for payment of compensation is appropriate in all the circumstances.

[32] Given my findings about the applicant's performance reinstatement would be inappropriate. Moreover, while I have found that the applicant should have been dismissed with notice, thereby rendering the dismissal unfair, I do not consider that it would be appropriate in all the circumstances to make an order for payment of compensation. This is because of the applicant's dishonesty concerning her qualifications. It would be reasonable to infer that at least part of the applicant's poor performance was due to the fact that she was 'out of her depth' in performing the Finance Manager's role. If she had been honest with the respondent about her qualifications she might never have been appointed to the position. Payment of compensation in these circumstances would be inappropriate.



SENIOR DEPUTY PRESIDENT

*Appearances:*

*Mr C Owens* appeared for the Applicant

*Mr J Welch* appeared for the Respondent

*Hearing details:*

Sydney

2017

4 September

25 September

Printed by authority of the Commonwealth Government Printer

<Price code C, PR596382>

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<sup>1</sup> PN149, Exhibit S13, appendix LR1 page 3

<sup>2</sup> PN153-154

<sup>3</sup> PN140

<sup>4</sup> PN273

<sup>5</sup> PN280

<sup>6</sup> PN281-284

<sup>7</sup> PN288

<sup>8</sup> PN289-290

<sup>9</sup> Exhibit S10

<sup>10</sup> PN85, transcript of proceedings on 5 June 2017

<sup>11</sup> Exhibit S13, paragraphs 19 - 22

<sup>12</sup> Exhibit S13, paragraph 40

<sup>13</sup> PN1791

<sup>14</sup> PN1806

<sup>15</sup> PN2092-2098

<sup>16</sup> PN2099

<sup>17</sup> PN2127

<sup>18</sup> Exhibit S11, paragraphs 6-9

<sup>19</sup> Exhibit S11, paragraphs 10-12