



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Rosario (Ross) Condello

v

Fresh Cheese Co (Aust) Pty Ltd
(U2017/9655)

COMMISSIONER HARPER-GREENWELL

MELBOURNE, 9 APRIL 2018

Application for an unfair dismissal remedy.

[1] Mr Rosario Condello (**Applicant**) commenced working for Fresh Cheese Co (Aust) Pty Ltd (**Fresh Cheese Co**) (**Respondent**) on 26 February 2001 in their Broadmeadows cheese factory¹ until he was dismissed on 17 August 2017 at the initiative of the employer. The dismissal took effect immediately.

[2] On 5 September 2017, Mr Condello made an application to the Fair Work Commission (**Commission**) pursuant to s.394 of the *Fair Work Act 2009* (Cth) (**the Act**) for a remedy in respect of his dismissal by Fresh Cheese Co.

[3] On Wednesday 16 August 2017, Mr Condello used his mobile phone during his shift.² On Thursday 17 August 2017, Mr Condello met with Mr Roger Dale, Human Resources Manager, and Louis Katsouranis, Operations Manager, regarding his mobile phone use and was summarily dismissed.³ Mr Condello says his dismissal was unfair.

[4] Fresh Cheese Co says the dismissal was not unfair as it has a policy against mobile phone usage in the production facility and Mr Condello knowingly breached that policy.

Procedural Background

[5] This matter was conciliated on 5 October 2017 however remained unresolved. The matter was subsequently listed for arbitration before me on 10 January 2018.

[6] Nicholas Grealy of the “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU) appeared on behalf of Mr Condello and Roger Dale, HR Manager, appeared on behalf of Fresh Cheese Co.

[7] Mr Condello gave evidence on his own behalf.

[8] The following witnesses gave evidence on behalf of Fresh Cheese Co:

- Mr Roger Dale, Human Resources Manager; and
- Mr Louis Katsouranis, Operations Manager.

Preliminary Matters

[9] Mr Condello filed his application nineteen days after he was dismissed, within the time limit prescribed by s.394(2) of the Act.⁴

[10] During his employment with Fresh Cheese Co, Mr Condello was covered by the *Food, Beverage and Tobacco Manufacturing Award 2010* and his annual earnings were well below the high income threshold.⁵ Mr Condello's period of employment with Fresh Cheese Co was longer than the minimum employment period. Mr Condello is protected from unfair dismissal under the Act.

[11] As at 17 August 2017, Fresh Cheese Co had approximately 78 employees, therefore the Small Business Fair Dismissal Code does not apply.

[12] No issue of redundancy arose in the proceeding and I find that the dismissal was not a case of genuine redundancy.

[13] Therefore the issue for me to consider is whether Mr Condello's dismissal was harsh, unjust or unreasonable.

The cases presented

Submissions and Evidence of Mr Condello

[14] Mr Condello was employed at the Broadmeadows factory of Fresh Cheese Co. For the majority of his employment he worked cooking ricotta until around 2011 when he developed carpal tunnel syndrome. He was subsequently moved to a few different areas in the factory until he ended up in the washing area.⁶

[15] Mr Condello's role required him to wash colanders, utensils, tubs and other items in chemicals and water and return them to different areas of the factory.⁷

[16] On Wednesday 16 August 2017 Mr Condello commenced work at 6am performing his usual duties in the washing area. At around 8 or 9am, he submitted that a supervisor told him there was not enough work in the area for two employees and asked him to go and make boxes outside.⁸

[17] Mr Condello had to change into his street clothes as he was not allowed to be in his 'whites' outside of the production area. Whilst he was making boxes he noticed his mobile phone was ringing, and that it was a call from his wife.⁹

[18] Mr Condello's wife was looking after his mother in law, who has dementia, and he was concerned that she may have suffered a sudden deterioration in her condition or an incident like a fall.¹⁰ He walked around to a freezer room for some privacy to call his wife back.¹¹

[19] Mr Condello later submitted that this room was not in fact refrigerated. He submitted that it was intended to be used as a freezer but the refrigeration was never connected, and as such it was a storage room containing only empty boxes.¹²

[20] Mr Condello's oral evidence was that whilst he was aware that mobile phones were not permitted in the work production area, he did not consider the area in which he was using his phone to be a production area. His evidence was that a production area was the area where the cheese was actually being produced, rather than where it was packed and sealed next to the loading bay.¹³

[21] He gave evidence that there were forklifts in the area and trucks reversing into the loading bays creating smoke which often required him to hold his breath. He submitted that there had previously been roller doors that were kept open to allow them to breathe properly, however these had subsequently been closed as there was a production area on the other side of the door. Mr Condello submitted that the storage area should not be considered a production area simply because it is under the roof.¹⁴

[22] Mr Condello further submitted that any contamination could not occur in the area because everything was sealed, and the room was simply full of empty boxes.¹⁵

[23] Mr Condello submitted that he spoke to his wife for about three minutes. After the call ended a colleague, Nick Alvarado, entered the room and queried what Mr Condello was doing. He did not recall what he said to Mr Alvarado or if he said anything at all. Mr Condello resumed his shift as normal and left at 2pm.¹⁶

[24] The following morning, Mr Condello arrived at work at 6am. At around 8.15am, a supervisor asked him to speak to Mr Katsouranis, who in turn advised him to get changed and go to Mr Dale's office.¹⁷

[25] When he arrived at Mr Dale's office, Mr Dale and Mr Katsouranis spoke about his use of his mobile phone. He submitted that Mr Dale stated that he wanted to make an example out of him.¹⁸

[26] When Mr Dale queried why he was on the phone, Mr Condello said he was speaking to his wife. Mr Condello submitted that he provided no further explanation because Mr Dale was already aware of his mother in law's health issues and he believed Mr Dale had already made up his mind about terminating him.¹⁹

[27] Mr Condello submitted that he felt agitated and didn't want to speak too much in case he lost his temper. He did not have an opportunity to bring a witness or a support person.²⁰ Mr Condello was then summarily dismissed.²¹

[28] Mr Condello denied having attended a toolbox meeting about Fresh Cheese Co's mobile phone policy on 9 August 2017, and submitted that he had not received an employee handbook when he commenced his employment in 2001.²² Mr Condello accepted that he had been trained on the issue of hazardous materials and the finding of foreign objects in cheese products during his employment.²³

[29] Mr Condello's oral evidence was that whilst he was aware that it was against the rules to use his phone he was not aware that, if he used the phone, he could be dismissed without notice.²⁴

[30] Mr Condello submitted that during his 16 years of employment he had received one written warning in or around 2015 for an incident in which he pushed a table which swung out and hit some pipes on the floor. He submits other than the warning his performance has been unblemished.²⁵

Submissions and Evidence of Fresh Cheese Co

[31] Fresh Cheese Co submitted that Mr Condello was regularly provided with training surrounding Hazard Analysis and Critical Control Points (**HACCP**), hygiene and foreign matter.²⁶

[32] They submitted that their company policies and employee handbook reinforce the prohibitions from Dairy Food Safety Victoria (**DFSV**) regarding mobile phones in production areas. They submitted that all staff are advised of this prohibition at induction and were subsequently reminded at a toolbox meeting involving all staff on 9 August 2017.²⁷

[33] They also submitted that, due to the 5 forklifts operating in the production and warehouse areas, having staff being distracted by mobile phones is not only against DFSV regulations but also an occupational health and safety risk.²⁸

[34] Fresh Cheese Co submitted that Mr Condello used his mobile phone on 16 August 2017 in the restricted area despite all staff having been reminded of the prohibition only one week earlier. Further, they submitted that at no time did Mr Condello advise them that he needed to be contactable during work hours.²⁹

[35] Consequently, they submitted that Mr Condello was dismissed for gross misconduct and a serious breach of company policy and guidelines.³⁰ They submitted that this was fair and reasonable given Mr Condello's extensive training throughout the course of his employment.³¹

Evidence of Mr Roger Dale

[36] Mr Roger Dale is employed as the Human Resources Manager for Fresh Cheese Co and is the company appointed OH&S representative. He submitted that he is responsible for ensuring safe work practices and that all company policies and procedures are followed and enforced.³²

[37] In support of his argument that Mr Condello was using his phone in the 'production area' Mr Dale relied on the DFSV Code of Practice. He says that DFSV as part of their initial audit determined the production, warehousing and packing areas to be part of the controlled area and all staff were made aware of this during their induction.³³ There were also signs on the front and rear doors advising staff they were entering a production area.³⁴ Mr Dale also drew attention to section 5.2.14 of the DFSV Code of Practice in which he acknowledged "it was the responsibility of Fresh Cheese Co to ensure that every person that's employed at the premises demonstrates competency and skills and knowledge in food safety and hygiene matters in relation to their activities undertaken and the job performed".³⁵

[38] What was defined as ‘the production area’ was the subject of contention. Mr Dale’s submitted that DFSV had designated the area Mr Condello had used his phone in as a food production area. Mr Dale’s evidence in cross-examination was that he did not have any specific evidence to support this and that the QA Manager would have evidence but he was “tied up at the moment, and was not able to provide it for me”.³⁶ I note however that evidence given by Mr Dale throughout the hearing was that the majority of the documents relied on by Fresh Cheese Co were made available to Mr Dale by the QA Manager prior to the hearing.

[39] Mr Dale’s evidence was that DFSV had designated the loading bay as a food production area back in 2009, which he says was made clear to him during his induction.³⁷ Mr Dale went on to say that he had also read it in some audit documents when he had been involved in audits of the whole production facility which he says included the warehouse and packing areas.³⁸

[40] Mr Dale’s evidence was that Fresh Cheese Co had met their obligation by providing Mr Condello with regular training in relation to HACCP, chemical usage, hygiene, sanitisation and foreign matter detection.³⁹ It is not in contention that training records provided as evidence by Mr Dale indicated Mr Condello had not undertaken any HACCP training or refreshers since some time in 2010.⁴⁰

[41] Mr Dale also produced an undated letter from United Training Management Group (UTMG) signed by Mr Tim O’Brien whose position was not identified.⁴¹ Mr Dale’s evidence was that this letter was to confirm that morning and afternoon sessions regarding mobile phone usage were conducted on 9 August 2017. His evidence was that this was not the toolbox meeting that Mr Condello had attended but was instead for those that were currently involved in the training course and on training that day.⁴² The letter also referenced that all new staff employed over the last two years have undertaken a four to five day program in which they received training about the company’s mobile phone policies and procedures. Mr Dale says the letter was produced by UTMG for audit purposes.⁴³ His evidence was that the content of the document relating to new starters was not relevant to Mr Condello.⁴⁴

[42] In their submission Fresh Cheese Co submits that Mr Condello was part of a toolbox meeting that was conducted for all staff on 9 August 2017 reminding them of the company policies and DFSV regulations surrounding the use of mobile phones in restricted areas.⁴⁵ During cross-examination Mr Dale confirmed he had no first-hand knowledge of Mr Condello’s attendance at the toolbox meeting and had instead relied on the statement of Mr Katsouranis.⁴⁶

[43] Mr Dale also gave evidence about and submitted a revised version of an Employee Handbook dated 29 July 2016.⁴⁷ The original was produced in 2014. Mr Dale was not aware if Mr Condello had been provided with a copy and was not aware of any records that would confirm he had obtained and signed for a copy.⁴⁸ The employee handbook contains the following paragraph;

“Production facility is defined as cool rooms, packing rooms, maturing and brine rooms, cheese making areas, storage areas, loading bays, boiler rooms, chemical storage areas and silo room.”⁴⁹

[44] Mr Dale gave evidence that there was training for employees conducted to familiarise themselves with its contents however there were no training records to support this.⁵⁰

[45] Mr Dale commenced with Fresh Cheese Co in September 2015 and wasn't aware of any training being conducted for existing employees to familiarise themselves with the Employee Handbook other than "the QA manager who supposedly conducted it".⁵¹

[46] Mr Dale referred to the Woolworths Code of Practice⁵² which Fresh Cheese Co has to adhere to in order to be able to supply to Woolworths. His evidence was that this document is not given to employees as it forms part of the audit process. The document underpins Fresh Cheese Co's policies and procedures and the employee handbook.⁵³

[47] He also submitted that Mr Condello's work record was far from positive, with him being given several verbal warnings about performance and being regularly moved to differing roles as a result of poor performance.⁵⁴ His oral evidence was that he had no record of the warnings he refers to in his submission and he could not provide evidence or details of the events that Mr Condello had supposedly received verbal warnings for.⁵⁵

[48] Mr Dale's evidence was that Fresh Cheese Co did not possess a disciplinary procedure outlining the process that could or would have been made available to employees.⁵⁶

[49] Mr Dale submitted that on the afternoon of 16 August 2017 it was reported to him that Mr Condello had been using his mobile phone in a restricted area contrary to company policy and DFSV guidelines.⁵⁷

[50] In cross-examination Mr Dale gave evidence that he discussed the breach with the company directors and advised them that he was going to terminate Mr Condello's employment.⁵⁸ He then had the disciplinary meeting with Mr Condello on 17 August 2017.⁵⁹ Mr Katsouranis was also in attendance.⁶⁰

[51] His evidence was that in organising a disciplinary meeting they would generally just contact the employee and call them into the meeting without prior warning as to what the meeting was about and they are always offered a support person.⁶¹ Mr Condello was given around 5 to 10 minutes notice that he had to attend a meeting.⁶²

[52] It was heavily contested that Mr Condello was provided with the opportunity to have a support person present. Mr Dale's submission was that Mr Condello did not request a support person and his oral evidence was that, when asked if he needed anybody else to attend the meeting, Mr Condello said no.⁶³

[53] He submitted that he asked Mr Condello whether the allegations that had been made were true and that Mr Condello replied 'yes'. When questioned as to whether he was aware of the company policy and DFSV guidelines surrounding the use of mobile phones in a prohibited area, he submitted that Mr Condello advised that he was.⁶⁴

[54] Mr Dale submitted that after considering the facts before him, Mr Condello's response and the considerable training that had been provided to Mr Condello he decided to dismiss Mr Condello on the basis that there had been gross misconduct and a major breach of company policy.⁶⁵

Evidence of Mr Louis Katsouranis

[55] Mr Louis Katsouranis is employed as the Operations Manager for Fresh Cheese Co.⁶⁶

[56] Mr Katsouranis supplied the Commission with a witness statement⁶⁷ that was almost identical in content to that of Mr Dale. Mr Katsouranis' evidence was that he had been provided with a copy of Mr Dale's witness statement to use as guidance. He then had Mr Dale type out his witness statement for him.⁶⁸

[57] Mr Dale had previously given evidence under oath that Mr Katsouranis had produced the witness statement on his own and that, whilst Mr Katsouranis was aware of his witness statement and had seen it, he did not create Mr Katsouranis' statement.⁶⁹ This did not accord with the evidence of Mr Katsouranis.

[58] Mr Katsouranis' oral evidence was that staff were made aware that mobile phones were not permissible in the factory production areas at the toolbox meeting on 9 August 2017. Staff were made aware that the toolbox meeting was to occur shortly before it was to take place. He gave evidence that all staff were present during the toolbox meeting and that he knew for a fact that Mr Condello was in attendance.⁷⁰ Mr Katsouranis submitted that the meeting went for approximately 10 minutes.⁷¹

[59] His evidence was that this toolbox meeting took place because mobile phones "were becoming a bit of a problem... so we had to hit it on the head and stop it from happening."⁷²

[60] During cross-examination Mr Katsouranis conceded that whilst the production manager had walked around and spoken to people regarding this toolbox meeting, he could not be sure that everyone had been made aware that it was going to occur. Further, Mr Katsouranis conceded that he did not personally see Mr Condello at the toolbox meeting and that there was no record kept as to who was in attendance.⁷³

[61] He further gave evidence that whilst he had not witnessed Mr Condello undertaking any training in relation to hazards and the mobile phone policy, he was aware of toolbox meetings being conducted where Mr Condello was present. Mr Katsouranis conceded that these meetings were also not documented.⁷⁴

[62] Mr Katsouranis also gave evidence that he was aware of other employees being terminated due to using their mobile phones in the production areas.⁷⁵ However his evidence was that those employees were Mr Condello and another employee who had not in fact been terminated. During cross-examination Mr Katsouranis conceded that there had been other employees observed with their phones in their pockets in production areas who were simply advised that their phones had to be placed in their lockers. He advised that he had not reported the matters to Mr Dale, and that he and the other supervisors handled the matters themselves.⁷⁶ His evidence was that the only issues usually reported to Mr Dale were pay discrepancies, hiring and firing and 'extreme things'.⁷⁷

[63] Mr Katsouranis' evidence was that the area in which Mr Condello was using his phone was an area designated by DFSV to be a food production area as "if you're handling cheese it's classified as a production area".⁷⁸ Mr Katsouranis could not point to any section of the DFSV Code of Practice that designated the area as a production area⁷⁹ and subsequently submitted that the regulatory agency had designated it so when Fresh Cheese Co submitted

their plan for the room. He submitted that there would have to be documents relating to this but confirmed that they had not been produced to the Commission.⁸⁰

[64] On cross-examination, Mr Katsouranis conceded that he had to regularly relay information to supervisors, which he often did via mobile phone. He advised that, if he received an urgent call whilst on the factory floor, he would step outside to take the call, sometimes to the loading bay, outside or to the upstairs offices. His evidence was that he had used his phone in the loading bay and storage areas pretty routinely, as did the other supervisors.⁸¹

[65] Mr Katsouranis gave evidence that he advised Mr Condello, sometime between 6.30 and 8am on the day of his dismissal that Mr Dale wanted to see him and sent him upstairs.⁸² He submitted that Mr Condello was not advised of the purpose of the meeting and was not told that he could have someone else present if he needed to.⁸³

[66] Mr Katsouranis confirmed that Mr Condello did not deny using his mobile phone and gave evidence that Mr Condello did not provide any explanation as to why he had done so.⁸⁴

[67] In relation to the material contained in his witness statement about verbal warnings given to Mr Condello, Mr Katsouranis conceded that he had never either administered those warnings nor observed them occurring.⁸⁵

Consideration

Harsh, Unjust Unreasonable

[68] Section 387 of the Act sets out the criteria for considering whether a dismissal was harsh, unjust or unreasonable:

“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.”

[69] The type of conduct which may fall within the phrase ‘harsh, unjust or unreasonable’ was explained by the High Court of Australia in *Byrne v Australian Airlines Ltd.*⁸⁶ McHugh and Gummow JJ explained as follows:

*“It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.”*⁸⁷

[70] I will now consider each of the matters set out in s.387 of the Act.

Was there a Valid Reason for the dismissal- s.387(a)

[71] Mr Condello has not at any time denied using his mobile phone and was aware that he was prohibited from using his mobile phone in the production area. There is some contention between the parties as to the specific definition of what areas of the plant are deemed to be the production area. Whilst the employee handbook defines a ‘production facility’ and provides that loose objects such as mobile phones are not permitted in the production facility, the evidence of Mr Katsouranis establishes unequivocally that mobile phones have been used in those areas identified outside of the ‘food production’ area and that Fresh Cheese Co have taken a lenient approach to such phone usage. Fresh Cheese Co have not consistently applied the rules of mobile phone usage in a number of the areas defined in the employee handbook.

[72] In any case, whilst the evidence supports a finding that a ‘production area’ is as defined in the employee handbook, there is no evidence that Mr Condello has ever been provided with or trained in the contents of the handbook, therefore it cannot be established that he was aware of its contents, specifically what had been designated as “production areas”.

[73] I am not satisfied that the evidence supports Fresh Cheese Co’s submission that Mr Condello had received extensive training during the course of his employment on mobile phone usage, with the most recent training being one week prior to the incident. The evidence supports a finding that Mr Condello was not in attendance at the August toolbox meeting and was not aware that Fresh Cheese Co was taking a supposedly “no tolerance approach” to mobile phone usage in the workplace.

[74] Even if I were to accept that he had been at the toolbox meeting, which on Mr Katsouranis’ evidence ran for 10 minutes, I would not be satisfied that there was a valid reason for Mr Condello’s termination due to the following concerns.

[75] The evidence suggests the implementation was poorly organised and there was insufficient detail provided to employees. There is no evidence before me to suggest that employees were provided with any written materials outlining the proposed changes to mobile phone usage. There were no policy or procedural documents made available to employees, nor was any documentation provided to explain how Fresh Cheese Co was intending to implement such a stance as ‘zero tolerance’ and what the possible consequences would be if an employee was to breach the policy. There is no evidence before me that suggest the said ‘zero tolerance policy’ was communicated adequately at the toolbox meeting and there is no evidence as to which employees were in attendance as no records of the content of the toolbox meeting or the attendees were produced at this hearing.

[76] It is simply not sufficient for Fresh Cheese Co to rely on the UTMG document, the employee handbook which Mr Condello had not had in his possession nor received any training on, or the tardily organised toolbox meeting to justify the termination of Mr Condello’s employment.

[77] I am satisfied that the incident that occurred was isolated and brief, with Mr Condello having no history of engaging in such conduct, and could readily have been resolved through counselling or another lesser form of corrective action.

[78] It was Mr Dale’s very own evidence that identified that it was Fresh Cheese Co’s responsibility to ensure all employees are aware of DFSV guidelines and prevent the use of mobile phones in restricted areas, and that this position has not been reinforced other than in an employee handbook that was provided to Mr Condello. Therefore Fresh Cheese Co was not fully compliant with their obligation and Mr Condello cannot be held accountable for that.

[79] A company cannot simply produce policies and procedures and expect to rely on them to defend a claim if there is no evidence to support that its employees have been made aware of those documents, trained in the content of the documents, and provided with access to those documents. The onus is on the employer to adequately operationalise their policies and procedures if they seek to rely on them to defend an unfair dismissal application.

[80] I am not satisfied that Fresh Cheese Co has established that they had in place a zero tolerance policy on phone usage and therefore Mr Condello could not have been in breach. I am not satisfied that there was a valid reason for the dismissal of Mr Condello.

Notification of the Valid Reason –s.387(b) and an Opportunity to Respond –s.387(c)

[81] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made⁸⁸, and in explicit⁸⁹ and plain and clear terms.⁹⁰ In *Crozier v Palazzo Corporation Pty Ltd* a Full Bench of the Australian Industrial Relations Commission dealing with a similar provision of the *Workplace Relations Act* 1996 stated the following (at [73]):

“As a matter of logic procedural fairness would require that an employee be notified of a valid reason for the termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170(3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a

decision had been taken to terminate their employment. Much like shutting the stable door after the horse has bolted.”

[82] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. This criterion is to be applied in a common sense way to ensure the employee is treated fairly and should not be burdened with formality.⁹¹

[83] Mr Condello was notified of the reason for his termination, however I am not satisfied that this was before the decision to dismiss him was made. Mr Dale had notified the company directors of his intention to dismiss Mr Condello prior to the disciplinary meeting. Mr Condello was also therefore not provided with a reasonable opportunity to respond prior to the decision to terminate his employment.

Unreasonable Refusal of a Support Person – s.387(d)

[84] In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal.⁹² With respect to this consideration, the Explanatory Memorandum states:

“This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them.⁹³

[85] Mr Condello had no prior warning as to the subject of the meeting he was about to attend. He was not afforded a reasonable opportunity to request or obtain a support person.

Warnings regarding Unsatisfactory Performance – s.387(e)

[86] In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, if the dismissal related to unsatisfactory performance by the person, the Commission must take into account whether the person had been warned about that unsatisfactory performance before the dismissal.⁹⁴ Unsatisfactory performance is more likely to relate to the employee’s capacity to do the job, than their conduct.⁹⁵ The Commission must take into account whether there was a period of time between an employee being warned about unsatisfactory performance, and a subsequent dismissal. This period of time gives the employee the opportunity to understand their employment is at risk and to try and improve their performance.⁹⁶

[87] Although Mr Condello had a prior warning which was not in contention, he was dismissed for reason of his conduct and not dismissed for unsatisfactory performance.

Impact of the Size of the Respondent on Procedures Followed and Absence of dedicated human resources management specialist/expertise on procedures followed – s.387(f)-(g)

[88] In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal.⁹⁷ Further, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account 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.⁹⁸

[89] Fresh Cheese Co has the benefit of a HR manager with significant practical and academic experience, as such I make no allowance for the obvious deficiencies in the processes.⁹⁹

Other Relevant Matters – s.387(h)

[90] Mr Condello submitted that the dismissal was particularly harsh in light of his long and positive work record as well as his advanced age. He submitted that there had been no prior issues regarding the use of a phone at work and that he had not been forewarned that minor issues such as making a brief call during a shift could result in summary dismissal.¹⁰⁰

[91] Mr Condello further submitted that a summary dismissal was disproportionate to the misconduct, as it was not 'serious misconduct'.¹⁰¹

[92] Finally, Mr Condello submitted that the personal and economic effects of the dismissal have been severe, as he has limited education and he is of advanced age, therefore he will struggle to find alternative employment.¹⁰²

[93] Fresh Cheese Co submit that Mr Condello had been previously paid in excess of his sick leave entitlements due to poor payroll recording process, of which Mr Condello was aware and did not report.¹⁰³

[94] The poor record keeping by Fresh Cheese Co is not the responsibility of Mr Condello and Fresh Cheese Co produced no evidence in support of its submission. However if it was the case, it would have been unethical conduct for Mr Condello not to have brought this to the attention of the employer.

[95] I do however take into account Mr Condello's long standing service and the lack of evidence to suggest that he was a poor performing employee.

Conclusion

[96] Having considered each of the matters specified in section 387, I am satisfied that the dismissal of Mr Condello was harsh. Given the extensive experience of Mr Dale the denial of procedural fairness in this matter was significant, accordingly I find the dismissal of Mr Condello to be unfair.

Remedy

[97] Based on the evidence and submissions provided in the proceedings I am unable to come to a concluded view about what remedy is appropriate. Directions on the filing of submissions dealing with remedy will be issued to the parties following this decision.



COMMISSIONER

Appearances:

N. Grealy for the Applicant;
R. Dale for the Respondent

Hearing details:

2018
Melbourne
10 January

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¹ Exhibit JS1, [1]

² Ibid. [2]

³ Ibid. [3] – [4]

⁴ Ibid. [6]

⁵ Ibid. [7]

⁶ Exhibit A2, [10] – [11]

⁷ Ibid. [11]

⁸ Ibid. [12] – [13]

⁹ Ibid. [15] – [16]

¹⁰ Ibid. [16] – [17]

¹¹ Ibid. [18]

¹² Exhibit A3, [1] – [2]

¹³ PN95 - PN99

¹⁴ PN107

¹⁵ PN109 – PN117

¹⁶ Exhibit A2, [20] – [21]

¹⁷ Ibid. [22] – [23]

- ¹⁸ Ibid. [24] – [25]
¹⁹ Ibid. [25]
²⁰ Ibid. [26]
²¹ Ibid. [26] – [27]
²² Ibid. [30] – [31]
²³ PN81 - PN82
²⁴ PN158
²⁵ Exhibit A2, [32]
²⁶ Exhibit R1, ‘Introduction’ [4]
²⁷ Ibid. [5] – [7]
²⁸ Exhibit R1, ‘Introduction’ [8]
²⁹ Ibid. ‘Introduction’ [9] – [10]
³⁰ Ibid. ‘Introduction’ [12]
³¹ Ibid. ‘Gross Misconduct’ [1]
³² Exhibit R2, ‘Background’ [1] – [5]
³³ PN235
³⁴ PN236
³⁵ PN237
³⁶ PN466
³⁷ PN475
³⁸ PN477
³⁹ PN238
⁴⁰ Exhibit R4
⁴¹ Exhibit R5
⁴² PN367
⁴³ PN263
⁴⁴ PN264 - PN270
⁴⁵ Exhibit R2, ‘The Applicant’ [4] – [5]
⁴⁶ PN371
⁴⁷ Exhibit R8
⁴⁸ PN376
⁴⁹ Exhibit R8
⁵⁰ PN325
⁵¹ PN330
⁵² Exhibit R6
⁵³ PN274
⁵⁴ Exhibit R2, ‘The Applicant’ [10]
⁵⁵ PN 383-387
⁵⁶ PN509
⁵⁷ Exhibit R2, ‘The Incident’ [1]
⁵⁸ PN419
⁵⁹ PN419-420
⁶⁰ Exhibit R2, ‘The counselling session / exit interview’ [1] – [2]
⁶¹ PN485 - PN487
⁶² PN506
⁶³ PN488
⁶⁴ Exhibit R2, ‘The counselling session / exit interview’ [4] – [6]

⁶⁵ Ibid. [12] – [14]

⁶⁶ Exhibit R11, ‘Background’ [1]

⁶⁷ Ibid.

⁶⁸ PN566 - PN584

⁶⁹ PN498 – PN503

⁷⁰ PN653 - PN657

⁷¹ PN866

⁷² PN783

⁷³ PN809 - PN819

⁷⁴ PN684 - PN688

⁷⁵ PN659

⁷⁶ PN789 - PN797

⁷⁷ PN800 - PN801

⁷⁸ PN830; PN842

⁷⁹ PN838

⁸⁰ PN842 - PN852

⁸¹ PN734 - PN751

⁸² PN693 - PN695

⁸³ PN696 - PN697

⁸⁴ PN700 - PN703

⁸⁵ PN772 - PN775

⁸⁶ (1995) 185 CLR 410.

⁸⁷ Ibid at 465.

⁸⁸ *Chubb Security Australia Pty Ltd v Thomas* Print S2679 at [41]

⁸⁹ *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137 at 151

⁹⁰ *Previsic v Australian Quarantine Inspection Services* Print Q3730

⁹¹ *RMIT v Asher* (2010) 194 IR 1 at 14-15

⁹² *Fair Work Act 2009* (Cth) s.387(d).

⁹³ Explanatory Memorandum, *Fair Work Bill 2009* (Cth) [1542].

⁹⁴ *Fair Work Act* (Cth) s.387(e).

⁹⁵ *Annetta v Ansett Australia Ltd* (2000) 98 IR 233, 237.

⁹⁶ *Johnston v Woodpile Investments Pty Ltd T/A Hog’s Breath Café – Mindarie* [2012] FWA 2 [58].

⁹⁷ *Fair Work Act* (Cth) s.387(f).

⁹⁸ *Fair Work Act* (Cth) s.387(g).

⁹⁹ Exhibit A1, [13]

¹⁰⁰ Ibid. [15]

¹⁰¹ Ibid. [16]

¹⁰² Ibid. [17]

¹⁰³ Exhibit R1, ‘Gross Misconduct’ [9] – [11]