DECISION

Fair Work Act

2009
s.394—Unfair dismissal

Cathy (Yaqin) Chen

v

TIOBE Pty Ltd T/A TIOBE
(U2018/2693)

COMMISSIONER BISSETT MELBOURNE, 19 JULY 2018

Application for an unfair dismissal remedy – dismissal unjust – applicant unfairly dismissed – remedy – compensation ordered.

[1] Ms Cathy (Yaquin) Chen was employed as a Consultant by TIOBE Pty Ltd T/A TIOBE (TIOBE). She provided professional services as a Business Analyst/IBM Unica Solution Specialist to clients of TIOBE.

[2] Ms Chen commenced her employment with TIOBE on or about 12 March 2013. Her employment was terminated with notice on 12 February 2018 and she finished employment on or about 12 March 2018.[1] At the time her employment was terminated Ms Chen had completed a 14 month assignment with API (Priceline).

[3] At the commencement of the hearing I granted permission to Ms Chen to be represented by a paid agent. TIOBE was represented by Mr Keira Czarnota, Managing Director of TIOBE.

[4] Evidence was given in proceedings by Ms Chen –and Mr Alex Malano, Ms Chen's husband, on behalf of Ms Chen and Mr Czarnota gave evidence for TIOBE. Whilst a number of other statements were filed by TIOBE, none of those people were called to give evidence.

Legislation

[5] I am satisfied that Ms Chen is protected from unfair dismissal and her dismissal was not a result of redundancy.

[6] Whilst TIOBE is a small business it does not say that the dismissal of Ms Chen is in accordance with the Small Business Fair Dismissal Code (Code). For this reason, I am satisfied that the Code does not apply.

[7] It is therefore necessary for me to consider if the dismissal of Ms Chen was harsh, unjust or unreasonable.

Evidence

[8] Mr Czarnota is the Managing Director and majority shareholder of TIOBE. He gave evidence that Ms Chen's employment was terminated because the client she was working for at the time (API) did not want her working with them any longer. He said that he needed all of his consultants working for clients and he could not get another engagement for her. Further, he said that he had given her a number of warnings about her work performance in the six months since July 2017.

[9] Mr Czarnota said that in about July 2017 he and Ms Galine McBride of TIOBE met with Ms Chen and Mr Kevin Yang, another employee of TIOBE who was working with Ms Chen at API. This meeting was in response to concerns raised with him by API. Mr Czarnota said that there were complaints that Ms Chen and Mr Yang were not working well together and this was affecting TIOBE's work for API. Mr Czarnota said that he told Ms Chen and Mr Yang that they needed to work out how to get along and that if their relationship did not improve one of them would no longer have a job.

[10] Mr Czarnota said that the relevant staff at API had spoken to him about concerns with Ms Chen's work and that he discussed this with Ms Chen. Mr Czarnota said he had concerns that Ms Chen was working on Sundays in order to complete her work and he did not consider this acceptable. He said he told Ms Chen she was not to work on Sundays but she continued to do so.

[11] Mr Czarnota said that he met with Ms Chen a number of times over the six month period from July 2017 about her work performance, including at the July meeting involving Mr Yang and a meeting in early February 2018. When pressed as to the times and details of other meetings, Mr Czarnota said that these were held to discuss ways in which Ms Chen did her work or managed her workload but could not recall when these meetings were. He suggested Ms Chen would know when they were.

[12] Mr Czarnota gave evidence that Ms Chen was removed from the API project at the request of API. He relied on an email he received from API dated 25 May 2018 to support this evidence.

[13] Mr Czarnota gave evidence that in late January 2018 he visited Ms Chen and her husband at their home and suggested to Ms Chen that she should resign and leave TIOBE in a positive way.

[14] Ms Chen agreed that Mr Czarnota met with her and Mr Yang to discuss conflict between the two of them on the API project in around July 2017. She said that this occurred around the time TIOBE conducted an internal audit into the API project because of a "critical incident" in the project. This internal audit report was completed on 8 August 2017.[2]

[15] Ms Chen said that she does not remember any meeting with Mr Czarnota and API to discuss just her performance. Ms Chen did agree that some strategies were put in place after discussion with API to deal with communication issues. Ms Chen said she did not believe it to be true that she was not performing in her role with API or that API requested that she be removed from the site.

[16] Ms Chen gave evidence that she had a meeting with Mr Czarnota in a park on 9 February 2018 where she was given a "verbal informal message [of her] dismissal" and was told she would finish at the end of her assignment with API which was due to complete at the end of February 2018. Ms Chen says that Mr Czarnota told her at this meeting that he had no other role for her and did not want her "on the bench" (that is, not placed with any other client). She said she was not told the reason she could not be put on the bench was because of the financial situation of the business.

[17] Ms Chen said that, following an all staff training day for TIOBE staff in October 2017, she believed the business was performing well.

[18] Mr Malano is Ms Chen's husband. He said that on 20 December 2017 he posted a message on the TIOBE staff messaging system (Slack) in response to a message posted by Mr Yang. Mr Yang was critical in his post of Ms Chen's working hours, particularly of her leaving work before 5.00pm that day. Mr Yang asked that she come in as early as possible the next day to get some work completed prior to her going on leave on 22 December 2017.[3]

[19] Ms Chen responded to this post within 10 minutes indicating that she did not leave early, that she had been in before 8.00am and had no lunch break and then left at 4.40pm.[4]

[20] Mr Malano said that Ms Chen had told him of what Mr Yang had posted and that she was upset by it. He considered Mr Yang's criticism unfair and, whilst Ms Chen was away from the dinner table and about an hour after the initial post, Mr Malano responded to the apparent criticism. His evidence is that he posted the comment of his own volition and Ms Chen was not aware that he had done it. He said he was upset about how Ms Chen had been treated and the hours she was working. He said that his response was emotional.

[21] In his post Mr Malano made clear that he was responding by starting his message with "This is Alex". He then defended Ms Chen's working hours, criticised Mr Yang and said "Cathy had been too nice to you but I will not be. You are unprofessional…The fact that Keira [Czarnota] is not addressing this issue after this long shows a complete disregard for his employees".[5]

[22] Soon after making this post Mr Malano received a text message from Mr Czarnota requesting the post be removed. Mr Malano replied to the text and said he would not remove the post. He said that Mr Czarnota then telephoned him where they continued to differ. Mr Czarnota said that Mr Malano's post was totally unprofessional and that it attacked him personally. He said that even though it indicated it was from "Alex" he could not know that Ms Chen did not dictate the words to Mr Malano or that she was not with him when he sent the message. In this respect he held Ms Chen responsible for the message. Given that he thought the message was attributable to Ms Chen, Mr Czarnota could not explain why he texted Mr Malano to ask him to remove the message and did not direct this request to Ms Chen.

[23] Mr Malano gave evidence that on 30 January 2018 Mr Czarnota came over to his and Ms Chen's house, had a casual chat asking about their respective holidays, and then left. He said Mr Czarnota then called him on 2 February 2018 and told him that he, Mr Czarnota, wanted Ms Chen to resign from her position with TIOBE. Mr Malano said Mr Czarnota did

not say why he wanted Ms Chen to resign, just that the relationship was over although he may have mentioned the message posted on Slack.

[24] Mr Malano said that, in the conversation on 2 February 2018, Mr Czarnota did mention the conversation he had with Ms Chen and Mr Yang "in about April or May" of 2017 about the need for their relationship to improve.

[25] Mr Malano said he did not tell Ms Chen of the conversation as he considered it Mr Czarnota's responsibility to talk to Ms Chen if he wanted her to resign.

Was the dismissal of Ms Chen harsh, unjust or unreasonable?

[26] Section 387 of the *Fair Work Act 2009* (FW Act) sets out those matters that must be taken into account in determining if 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.

[27] I have considered the relevant evidence in relation to each of these matters in reaching my conclusion.

Section 387(a) - a valid reason for dismissal related to capacity or conduct

[28] Mr Czarnota said that Ms Chen's employment was terminated for poor performance and also for her actions in relation to a message posted on Slack by Mr Malano.

[29] There is no evidence that Ms Chen's work performance was an on-going concern either to TIOBE or API, the client she was working with. It is true that issues in relation to Ms Chen and Mr Yang's working relationship were raised in mid-2017 but there is no evidence that this was an issue after that point in time. Further, there is evidence of a critical incident in mid-2017 but it appears that systems were put in place to mitigate the risk of further similar incidents. The audit report completed by TIOBE in relation to that incident said that "the bulk of the issues are being caused by the complex new…project process and specifically by the performance issues at Vii…" The audit report said that the "campaign team [including Ms Chen] has done a great job to maintain the running of the…campaigns in a tough technical environment…"

[30] Claims by Mr Czarnota of "further meetings" with Ms Chen about her work performance were not supported with any record or detail of such meetings. Mr Czarnota's view that I should ask Ms Chen when the meetings occurred is not evidence that they did occur. In any event, Ms Chen denied any such meetings. Mr Czarnota maintained that Ms Chen's employment was terminated for poor performance. The onus is on TIOBE to provide proof of her poor performance. It failed to do so.

[31] There is no evidence to support a claim that API raised issues with respect to Ms Chen's performance that provided a reason for Ms Chen's dismissal. Those issues that arose whilst Ms Chen was placed with API were addressed and, it appears, satisfactorily rectified.

[32] There is no evidence of any on-going performance issues such that I could find that they provide a valid reason for Ms Chen's dismissal.

[33] Mr Czarnota also said that Ms Chen's employment was terminated because of her conduct in relation to the posts on Slack. There is no evidence that Ms Chen played any part in the posting of the message by Mr Malano. I am satisfied that she did not post the message, encourage Mr Malano to post the message or have any knowledge of the message being posted. Mr Malano said he was angry and that he posted the message himself without the knowledge of Ms Chen. Mr Czarnota responded to the message by texting and phoning Mr Malano, not Ms Chen. Ms Chen cannot be held responsible for the actions of Mr Malano. Mr Malano's conduct was foolish and emotional but does not provide a valid reason for the dismissal of Ms Chen.

[34] For these reasons I find that there is no valid reason for the dismissal of Ms Chen.

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

[35] This criterion asks whether the person has been "notified of that reason". The reference to "that reason" can only be a reference to the valid reason for dismissal.

[36] In this case I have found no valid reason for the dismissal. It stands to reason that Ms Chen therefore cannot have been advised of that valid reason.

[37] Even if my reasoning of this is wrong, in the Form F3 – Employer Response to Unfair Dismissal Application TIOBE said that Ms Chen was advised of her dismissal on 9 February 2018 in a meeting with Mr Czarnota. There is no evidence that she was advised of the reason for her dismissal in advance of that meeting and that at that meeting, Mr Czarnota had apparently already decided to dismiss her from employment with TIOBE.

Section 387(c) – whether the person was given an opportunity to respond

[38] There is no evidence Ms Chen was given an opportunity to respond to the reason for dismissal. As was found in *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport*[6] the Full Bench of the Australian Industrial Relations Commission said of the opportunity to respond:

> **[73]** As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their 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 170CG (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.

[39] It is not clear that Ms Chen was notified of the reason for her dismissal or given an opportunity to respond prior to TIOBE making a decision to dismiss her.

[40] Whilst a further meeting was held with Ms Chen on 12 February 2018, on TIOBE's reckoning this occurred after a decision was taken to dismiss her.

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

[41] There is no indication that Ms Chen sought and was then unreasonably denied access to a support person.

Section 387(e) – warned of unsatisfactory work performance

[42] Ms Chen said that she was never warned with respect to her work performance. She said that the conversation in about July 2017 was with respect to her working relationship with Mr Yang. Mr Czarnota, Ms McBride and Mr Yang were present with her in that meeting. Ms Chen said her work performance was not raised. There is no evidence (save for some indication based on the message from Mr Yang on Slack on 20 December 2017) that the working relationship between Ms Chen and Mr Yang was an on-going issue.

[43] Mr Czarnota said that he had numerous discussions with Ms Chen about her work performance although could not identify any particular date or detail of these discussions. His suggestion that Ms Chen could tell me of such meetings is meaningless and, in any event, she disputes such meetings took place.

[44] I do accept that some processes were put in place at API (for example the quality assurance process) following the critical incident in mid-2017. It is not clear if this failure was Ms Chen's fault alone but, in any event, a system was put in place to ensure the problem did not re-occur. There is no evidence that the problem did re-occur.

[45] It does appear that some procedures were also put in place to assist Ms Chen in her communications with staff from API. Again, these having been put in place there is no evidence that Ms Chen was not working to the required standard.

[46] Mr Czarnota sought to rely on an email from Mr Mark Plaisted of API as evidence of Ms Chen's poor work performance. I do not accept the email as evidence of that at all. The email was sought by Mr Czarnota in an email he sent to Mr Plaisted on 22 May 2018 in which he said, in part:

> ...As you know we let Cathy go when API advised that you wanted her to roll off the account. Because of this Cathy is taking TIOBE to court citing unfair dismissal – and has stated she received no advice that her work was not up to standard…
>
> Any comparisons you may have on skills, process (like the daily stand ups that were introduced) or level of Cathy's expertise compared to other TIOBE team members would be appreciated…

[47] In his reply on 25 May 2018 Mr Plaisted said that:

> In regards to your request below, your decision to terminate Cathy Chen from Tiobe was entirely your decision and had nothing to do with API/Priceline (as Tiobe's client).
>
> As you will recall, Felicity and I requested a new consultant in December 2017. Cathy had been on our account for some time and we believed that a change of consultants would have a positive impact on our business and it was also our usual practice with Tiobe to swap consultants over after a year or so. Further, our understanding was that the discussion between you, Felicity and Cathy was a general catch up initiated by you, rather than an 'exit interview' as you refer to it in your email below…

[48] This email does not suggest that API had raised on-going performance concerns of Ms Chen but rather, in requesting her removal, had sought the regular rotation of consultants as had occurred in the past.

[49] There is no evidence before me that specific performance concerns were raised with Ms Chen or that she was advised that if her performance did not improve in the identified areas her employment with TIOBE was at risk. As was said by the Full Bench in *Fastidia Pty Ltd v Goodwin*[7] mere exhortations to improve are not sufficient. An employee cannot know what is required of them through vague statements or general requests to "improve".

[50] If there are areas of concern with respect to an employee's work performance the obligation is on the employer to identify the performance concerns, to be clear on the level of performance required, to provide training and support as necessary to the employee and to provide regular feedback on how the employee is progressing as required. Without these steps

an employee cannot know what is required of them and whether or not they are progressing as desired by the employer.

[51] None of those elements are evident in respect of Ms Chen. Vague statements without evidence do not satisfy me that Ms Chen was warned that if her performance did not improve her employment was at risk.

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

[52] I accept that TIOBE is a small business. It clearly does not have access to human resource specialists or expertise. This may well have affected the way the dismissal was brought about.

[53] It does not however excuse the lack of any documentation by TIOBE to support the claims it has made with respect to performance issues or meetings with Ms Chen.

Section 387(h) – any other matters

[54] Ms Chen claims that, by dismissing her when it did, TIOBE have avoided payment to her of a $50,000 five year bonus that she claims she was otherwise entitled to. She says that this is a relevant consideration in deciding if her dismissal was harsh. Mr Czarnota disputes that Ms Chen had accrued the entitlement.

[55] I accept that the entitlement to such a bonus or the denial of the bonus would be a relevant consideration in determining if the termination was harsh. I do not intend however, and it is not my role, to decide if Ms Chen had completed five years employment.

[56] This is not a determinative factor in reaching my decision.

Conclusion

[57] I am satisfied, for all of the reasons given above, that the dismissal of Ms Chen was unjust. There was no basis in her conduct or work performance to justify the decision of TIOBE to terminate her employment.

[58] In these circumstances I am satisfied that Ms Chen was unfairly dismissed.

Remedy

[59] Ms Chen does not seek reinstatement and, in such circumstances, I do not consider reinstatement appropriate. I shall therefore consider compensation.

Further material

[60] On 23 June 2018, following the hearing of the application, Mr Czarnota forwarded to me a copy of a Profit and Loss Statement of TIOBE, designed to counter claims he said were made for Ms Chen in submissions as to the profitability of the business. Upon receipt of this information my chambers forwarded it to Mr Dircks (representing Ms Chen) to seek his views

as to whether the Commission should accept the material and, if I decided to do so, any submissions he might wish to make about it.

[61] Mr Dircks responded that the material should not be accepted as it was filed outside the directions issued by the Fair Work Commission (Commission) and it appeared to be a Profit and Loss Statement until 30 June 2018 when the financial year had not yet ended. Mr Dircks also said that, should I decide to admit the information, Ms Chen would seek to make further submissions with respect to that information on it.

[62] I have decided not to take into account the Profit and Loss Statement filed by Mr Czarnota primarily because, on its face, it tells me little of the financial status of the business. Further, to the extent that submissions were made for Ms Chen that the business was profitable, there is no reliable evidence to support such a submission and Mr Czarnota did dispute that this was the case.

[63] Section 392 of the FW Act is relevant to the determination of compensation. It states as follows:

> **392 Remedy—compensation**
>
> *Compensation*
>
> (1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.
>
> *Criteria for deciding amounts*
>
> (2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:
>
> (a) the effect of the order on the viability of the employer's enterprise; and
>
> (b) the length of the person's service with the employer; and
>
> (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
>
> (d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
>
> (e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and
>
> (f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
>
> (g) any other matter that the FWC considers relevant.

Misconduct reduces amount

(3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

(4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

Compensation cap

(5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:

(a) the amount worked out under subsection (6); and

(b) half the amount of the high income threshold immediately before the dismissal.

(6) The amount is the total of the following amounts:

(a) the total amount of remuneration:

(i) received by the person; or

(ii) to which the person was entitled;

(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and

(b) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations.

[64] I have considered each of the provisions of s.392 of the FW Act in reaching my decision.

[65] I am not satisfied that the order I shall make will have an effect on the viability of the business. To the extent it may raise cash flow issues, I have dealt with this below (s.392(2)(a)).

[66] Ms Chen had been employed by TIOBE for about five years and has, over that period, worked for five clients of TIOBE on six separate assignments. Ms Chen apparently enjoyed her work and liked working for the company. She considered Mr Czarnota a good employer (although he did have some faults as a boss) and her conditions of employment, including parental leave, were good. There was nothing in the evidence of Ms Chen to suggest she was considering leaving her employment. I am therefore satisfied that she would have remained employed by TIOBE for a further 12 months had her employment not been terminated. Ms Chen's annual remuneration (including superannuation) at the time of her dismissal was $140,000 per annum. The remuneration she would have received had her employment not been terminated is $140,000 (ss.392(2)(b) and (c)).

[67] Since her dismissal Ms Chen has sought and obtained some contract work. That contract work commenced on 5 May 2018 and will conclude on 29 June 2018. Ms Chen earned $10,770.76 + $1,023.22 superannuation in the period up until 8 June 2018 from this work. On the basis of her evidence she will receive a further three weeks' pay of ($2,248.84 salary + $213.64 superannuation per week) $7,387.44 giving her total remuneration (including anticipated remuneration) of $19,181.42 (including superannuation) (ss.392(2)(e) and (f)).

[68] I am not aware of any other attempts of Ms Chen to find work. I do note that she is currently pregnant and believes that this will disadvantage her in attempts to secure on-going work. Whilst I accept that her pregnancy may impact on her ability to find on-going work at this time, I am not convinced it is a barrier to her seeking work (such as contract work she has undertaken) to mitigate her loss. I have therefore decided to deduct 20% for this reason.

[69] I have also decided to deduct an amount from the compensation I would otherwise determine of 20% for general contingencies. Ms Chen is pregnant. It is reasonable to assume that she will not work for some period around the time of the birth of her child (she took extended parental leave with her first child). I have taken this into account in the amount I have decided to deduct for contingencies.

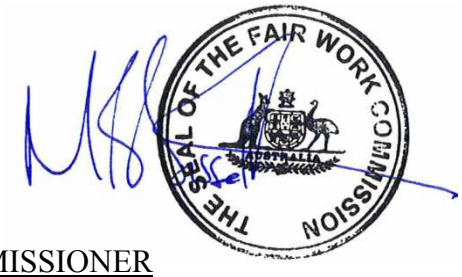
[70] Ms Chen's lost remuneration is therefore ($140,000 - $19,181.42 = 120,818.58 less 20% for mitigation and then a further 20% for contingencies) $77,323.89 including superannuation.

[71] I have not made any deduction for misconduct as none is evident on the material before me. I have not included any amount for the shock, humiliation or distress.

[72] The maximum amount of compensation Ms Chen is entitled to is $70,000 (26 weeks salary, including superannuation) which is less than half of the amount of the high income threshold (ss.392(5) and (6)).

[73] I have therefore decided to award Ms Chen compensation of $70,000.00.

[74] It is my intention to issue an order for the payment of $70,000 to Ms Chen within 21 days of the date of the order. TIOBE may, if it so chooses, make application to have the amount paid in instalments prior to the date for payment. Such an application will be considered as quickly as possible to minimise any disadvantage to Ms Chen or TIOBE. An order[8] to this effect will be issued with this decision.



COMMISSIONER

Appearances:

G. Dircks for Cathy (Yaqin) Chen.

K. Czarnota for TIOBE Pty Ltd T/A TIOBE.

Hearing details:

2018.
Melbourne:
June 20.

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Endnotes:

[1] There is a dispute which is not necessary that I resolve as to the length of Ms Chen's employment. If she was employed for five years she has an entitlement to a bonus.

[2] Exhibit A3.

[3] Exhibit A1, attachment 10.

[4] Exhibit A1, attachment 11.

[5] Exhibits A1, attachment 12; and A5, attachment 2.

[6] Print S5897.

[7] Print S9280.

[8] PR609148.