



# DECISION

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

**Kelvin Njau**

v

**Superior Food Group Pty Ltd**  
(U2018/7740)

COMMISSIONER MCKINNON

MELBOURNE, 17 DECEMBER 2018

*Application for an unfair dismissal remedy.*

[1] Kelvin Njau was employed by Superior Food Group Pty Ltd as a Storeworker from 4 April 2017 until 11 July 2018, when his employment was terminated on the grounds of failing to successfully pass a National Police Check without conviction.

[2] On 26 July 2018, Njau applied to the Commission for an order granting a remedy for unfair dismissal under section 394 of the *Fair Work Act 2009* (the Act). He says the dismissal was unfair because Superior Food Group had full knowledge of his criminal record for more than one year before his dismissal and it was not a requirement of his employment that he have a clean criminal record.<sup>1</sup>

[3] On 3 August 2018, Superior Food Group filed a response to the unfair dismissal application. It says the dismissal was not unfair, because Njau had a criminal conviction and was not honest in his disclosures to Superior Food Group for the purposes of the National Police Check. It says it was a condition of employment that Njau successfully pass a National Police Check.<sup>2</sup>

[4] After attempts at conciliation failed, the matter was heard in Melbourne on 8 and 9 November 2018. Njau was represented with permission.

## **Preliminary matters**

[5] There is no dispute that the application was filed within 21 days. Njau was employed on a full time basis for more than twelve months. The *SFS Food Services Enterprise Agreement 2015*<sup>3</sup> applied to his employment. He is protected from unfair dismissal.

[6] There is no dispute that Njau was dismissed from his employment. At the time of dismissal, Superior Food Group was not a small business employer. For that reason, I am

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<sup>1</sup> Form F2 – Unfair Dismissal Application filed on 26 July 2018

<sup>2</sup> Form F3 – Employer Response to Unfair Dismissal Application filed on 3 August 2018

<sup>3</sup> AE417060

satisfied that the dismissal could not have been consistent with the Small Business Fair Dismissal Code. No issue of redundancy arose and I am also satisfied that the dismissal was not a case of genuine redundancy.

**Was the dismissal harsh, unjust or unreasonable?**

[7] The phrase ‘harsh, unjust or unreasonable’ was explained in *Byrne v Australian Airlines Ltd*<sup>4</sup> 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.”

[8] In determining whether a dismissal was harsh, unjust or unreasonable, the Commission must take into account the criteria in section 387 of the Act. Those are considered in turn.

*Was there a valid reason for the dismissal related to the Applicant’s capacity or conduct?*

[9] It is established that Njau had a criminal record prior to seeking employment with Superior Food Group and that he did not disclose all of his prior convictions to Superior Food Group in connection with his application for employment.<sup>5</sup> I do not accept that his failure in this regard was inadvertent or that he ‘ran out of room’ on the relevant form. There is space in the section on the document seeking information about past convictions. The disclosures made by Njau are also not the more recent, or more serious, convictions. While Njau says he only declared those convictions he remembered and thought were relevant to his application for employment,<sup>6</sup> more recent driving related convictions in the same category of apparent ‘relevance’ were not disclosed. It is hard to reconcile his purported lapse of memory with the fact that the disclosed convictions occurred some years earlier than those which were more recent, and also relevant. The most recent (and most serious) conviction was not disclosed at all.

[10] Njau’s failure to declare his criminal history to Superior Food Group occurred in circumstances where he had simultaneously consented to the Police Check. In providing his consent, Njau says he understood that his full history of convictions would be disclosed to Superior Food Group. That is what occurred. Superior Food Group obtained the information it required, in full, on 19 April 2017.<sup>7</sup> It took no action, once it had that information, to deal with either any concern it may have had about the existence of his criminal record, or any

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<sup>4</sup> [1995] HCA 24; (1995) 185 CLR 410 at 465

<sup>5</sup> Exhibit 1, Statement of Kelvin Njau; Exhibit 16, Police Check Consent Form; Exhibit 17, National Criminal History Record Check

<sup>6</sup> Exhibit 1, [34]-[36]

<sup>7</sup> Email from Pro Active Strategies to Superior Foods on 19 April 2017 at 11.30am

allegation of dishonesty or lack of disclosure about it. It was not until an audit more than one year later, in mid-2018, that it sought to extricate him from the workforce. Given the passage of time and Superior Food Group's failure to act promptly on the information it had available, I do not consider that it can now rely on Njau's failure to disclose prior criminal convictions as a valid reason for dismissal.

**[11]** Superior Food Group have also not established that it was a condition of employment for Njau to 'successfully pass' a National Police Check, in the sense that he was required not to have any criminal convictions as a condition of employment. Nor, in my view, could it impose such a requirement without any relevant connection to the inherent requirements of Njau's role. None of the documentary material tendered in the proceeding states that it is a condition of employment that Njau have a clear criminal record. At its highest, Njau was required to consent to a police check in connection with his application for employment. He provided his consent as required. What happened after that was a matter for Superior Food Group to deal with in consultation with Njau, having regard to the inherent requirements of the role. On my reading of his terms and conditions of employment, Superior Food Group had no automatic right to rely on the existence of Njau's prior criminal record to justify his dismissal. It was not a valid reason for dismissal.

**[12]** There is, however, another matter which I am satisfied was a valid reason for dismissal. By his own admission, Njau gave false information to Superior Food Group in his resume, in support of his application for employment. He gave the impression that he was employed by two businesses, Grays Online and Solar Lord, without disclosing that his work for those entities was through an employment agency. More seriously, however, he knowingly and falsely stated that he had worked at "Continental Biscuits Manufacturers" for more than five years. He provided a 'referee' from Continental Biscuits Manufacturers, Bertha Mhundwa, who had also never worked at that business and was actually his wife.<sup>8</sup> The period of employment said to have occurred with Continental Biscuits Manufacturers was his only period of employment, on paper, of more than one year. It created the wholly wrong impression that he had a history of stable, long term, relevant and recent employment.

**[13]** In my view, this dishonesty, which only became apparent after the dismissal, was such that Superior Food Group could not reasonably rely on Njau to be honest in his dealings with the business. It was valid reason for dismissal.

*Was the Applicant notified of the valid reason for dismissal?*

**[14]** Superior Food Group was not aware of the dishonesty on Njau's resume until its participation in this proceeding. It was accordingly not in a position to notify him of any concerns it may have had in relation to the matter prior to the dismissal taking effect.

*Was the Applicant given an opportunity to respond?*

**[15]** Njau's first opportunity to respond to the matter arose only in connection with this proceeding, because the dishonesty only became apparent at that late stage and was first admitted while he was giving evidence in the hearing. The result is that Superior Food Group did not give him an opportunity to respond to the matter before he was dismissed. In the circumstances, it cannot be held responsible for that.

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<sup>8</sup> Exhibit 8, Statement of Bambi Scholes-Miller filed on 1 November 2018

*Any unreasonable refusal of a support person to assist with discussions relating to the dismissal?*

[16] I am satisfied that Njau was offered a support person to assist him in discussions relating to his dismissal and that he initially resisted the offer. At the prompting of Superior Food Group, he ultimately accepted the participation of his union representative in those discussions.<sup>9</sup>

[17] I am satisfied that there was no unreasonable refusal to allow Njau a support person for the purpose of assisting in discussions relating to the dismissal.

*Was the Applicant warned about unsatisfactory performance?*

[18] The dismissal was not related to unsatisfactory performance. This matter is not relevant to the facts and circumstances of this case.

*The size of the employer's business*

[19] At the time of dismissal, Superior Food Group says it employed 106 employees at its Oakleigh site.<sup>10</sup> Njau says that was not its only workplace, although there is no evidence before me about the overall size of the business. Even with 106 employees, it is a business of reasonable size. That should have positioned it well to apply its established processes and procedures in a way that ensured a 'fair go all round'.

[20] Unfortunately, that does not seem to have been the case. The pre-employment and contractual documents relied on by Superior Food Group point to, but do not make clear, Superior Food Group's expectations when dealing with the existence of a criminal record. Having sought information about prior convictions from Njau, presumably for the purpose of determining his suitability for employment, no relevant action was taken until more than one year later. Superior Food Group then sought to 'retrofit' a condition of employment to Njau's contract of employment and to rely on that 'condition' as a reason for his dismissal. That was an entirely unjust approach.

*Access to dedicated human resources management specialists or expertise*

[21] As I have indicated, Superior Food Group is a business of reasonable size. It employs human resources professionals, including Bambi Scholes-Miller and Catherine Sutherland, who appear to be tasked with managing the entire workplace relations function. In my observation, it would have been prudent for Superior Food Group to at least obtain external advice before embarking on the course that it did in relation to Njau, given the nature of the allegations and the intersection of employment and discrimination law principles. There is no evidence that it did and the result was a process that was flawed in the manner described above.

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<sup>9</sup> Exhibit 1; Exhibit 7, Statement of Bambi Scholes-Miller

<sup>10</sup> Form F3 - Employer Response to Unfair Dismissal Application filed on 3 August 2018

*Other relevant matters*

[22] Njau relies on section 31(b) of the *Human Rights Commission Act 1986* (Cth) and regulation 4 of the *Australian Human Rights Regulation 1989* which deals with discrimination on the grounds of criminal conviction. On my reading of the legislative regime to which Njau refers, it is a facilitative mechanism through which the Australian Human Rights Commission can exercise certain functions in relation to conduct that may be discriminatory, in furtherance of its objective to promote equality of opportunity and treatment in employment and occupation. It does not, of itself, make discrimination on the basis of a criminal record unlawful.

[23] That is not to say that employers can simply refuse to employ persons with a criminal record. Denying a person the opportunity for employment must be carefully considered in light of the inherent requirements of the particular role as well as the individual facts and circumstances of the case. A blanket rule that no person with a criminal record can obtain, or maintain, employment, is prone to difficulty. Superior Food Group should carefully consider its requirement for employees to successfully pass a National Police Check so that in the future, any requirement of that kind is fairly applied and reasonably targeted to the mischief it seeks to address.

**Conclusion**

[24] Having considered each of the matters in section 387, on balance I am satisfied that Njau's dismissal was unjust because it proceeded on a basis that was not legitimate, notwithstanding that it later became apparent that there was a valid reason for dismissal. I find that the dismissal was unfair.

[25] However, because of Njau's dishonesty in his application for employment and my finding that Superior Food Group could not reasonably rely on Njau to be honest in his dealings with the business, I am satisfied that reinstatement is inappropriate in this case.

[26] I am also not satisfied that an order of compensation is appropriate in all the circumstances of this case. Njau's dishonesty was material to his application for employment in the manner described above. Had it known of the dishonesty prior to dismissal, Superior Food Group would have had both a reasonable basis to commence disciplinary proceedings against Njau and a valid reason for dismissal. It is no mitigating factor that ultimately Njau's conduct in relation to his resume was admitted. Had it not arisen in this proceeding, I am not persuaded the admission would ever have been made.

[27] The application is determined accordingly.



COMMISSIONER

[2018] FWC 7626

*Appearances:*

*J Findley* for the Applicant

*B Scholes-Miller* for Superior Food Group Pty Ltd

*Hearing details:*

2018.

Melbourne:

November 8, 9.

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