



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Nicholas Tondorf

v

Impresa House Pty Ltd
(U2018/10348)

DEPUTY PRESIDENT COLMAN

MELBOURNE, 26 FEBRUARY 2019

Application for an unfair dismissal remedy – whether applicant forced to resign

[1] This decision concerns an application by Mr Nicholas Tondorf for an unfair dismissal remedy under s 394 of the *Fair Work Act 2009* (Act).

[2] Mr Tondorf claims that he was forced to resign from his employment because of conduct engaged in by his former employer, Impresa House Pty Ltd (Impresa). He says that the company’s general manager of production, Mr Andrew Aliev, made a threat to his life and safety, and that because the company did not take appropriate action, he had no choice but to resign. Mr Tondorf contends that this constitutes a dismissal for the purpose of s 386(1)(b), and that the dismissal was unfair. He seeks compensation.

[3] Impresa denies that its conduct or that of Mr Aliev forced Mr Tondorf to resign. It says that Mr Aliev did not make a genuine threat to Mr Tondorf’s life or his safety. Impresa further says that it promptly investigated Mr Tondorf’s complaint about Mr Aliev, found Mr Aliev’s words to be inappropriate, and disciplined him. The company contends that Mr Tondorf chose freely to resign, and objects to the unfair dismissal application on the basis that Mr Tondorf was not dismissed within the meaning of s 386.

[4] Mr Tondorf’s application and the company’s jurisdictional objection were listed before me on 16 January 2019. Mr Tondorf represented himself and gave evidence. Mr Brian Hartwig and Mr Michael O’Gara, former employees of the company, gave evidence for Mr Tondorf. Mr Robert Romano, human resources manager, appeared and gave evidence for the company along with Mr Aliev and Ms Jennifer Davis, the company’s office manager and health and safety coordinator.

Background

[5] I will first address the factual background to this matter. There are several areas of conflicting evidence in respect of which I must make factual findings, including the question of what words Mr Aliev spoke to Mr Tondorf and the significance of those words.

[6] Mr Tondorf commenced employment with the company as a full time carpenter in May 2015. On Friday 21 September 2018, an exchange occurred between Mr Tondorf and Mr Aliev at the company's Parkville site. Mr Tondorf's evidence was that, after he had left the lunchroom, Mr Aliev approached him and said 'I know what you fucking said in the lunchroom, next time I take your liver'.¹ Mr Tondorf said that Mr Aliev spoke the words quietly, but came very close to his face and pointed to his liver. Mr Tondorf said that he was very upset by the incident and feared for his life and safety. He also said that he feared for his family's safety, because Mr Aliev had access to his private address.

[7] Mr Aliev's evidence was that, shortly before he spoke to Mr Tondorf on 21 September 2018, he heard loud laughter coming from the lunchroom and thought that people were laughing at him. Then, as he was walking to his car to leave the site, Mr Tondorf asked him 'what are you doing here?' Mr Aliev said that he was offended by this question and that he said to Mr Tondorf 'if you ask me again, I show where your liver' (sic).² Mr Aliev said that he was several metres from Mr Tondorf when he said this, and that he did not point to Mr Tondorf's liver. I note that Mr Aliev's native language is Russian however he speaks English and participated in the proceedings without the assistance of an interpreter.

[8] Mr Tondorf said that following the exchange, he called Ms Davis to report that he had been threatened by Mr Aliev. Ms Davis said in her evidence that Mr Tondorf demanded in this conversation that the company take immediate disciplinary action against Mr Aliev. She told him that the company could not take any action until it had made proper inquiries, but that his complaint would be taken seriously and she would look into it.³

[9] Ms Davis gave evidence that following this conversation with Mr Tondorf, she contacted the chief executive officer of the company, Mr Sean Morley, and discussed Mr Tondorf's complaint with him. Mr Morley said that he would take over the investigation and that she should ask Mr Denis Botvenev, the chief engineer, to speak with Mr Aliev.

[10] At approximately 11.30 the same morning, Ms Davis called Mr Tondorf back. She told him that Mr Botvenev was speaking to Mr Aliev about the exchange and that the company was looking at disciplining Mr Aliev. Mr Tondorf told Ms Davis that he intended to resign. She replied that this would be his choice. Ms Davis told Mr Tondorf to go home, however he remained at work to help some co-workers finish certain tasks, and then went home at about 12.30.

[11] Mr Tondorf said that he contacted the police to report the exchange which had occurred between him and Mr Aliev that day, but was told that, as there was no physical element to the exchange, the police would not be taking any action.

[12] Later the same day, Mr Morley and Mr Botvenev determined that Mr Aliev had behaved inappropriately towards Mr Tondorf and decided to suspend Mr Aliev without pay for one week.⁴ Ms Davis said that in making this decision, the company did not believe that there was any actual threat to Mr Tondorf's safety.

¹ PN709

² PN728

³ PN360

⁴ PN610; PN594 – PN599

[13] The next working day was Monday 24 September 2018. Mr Tondorf did not come to work. At 4.52 pm he sent Ms Davis a message stating that he had taken the day off as sick leave, and attached a medical certificate for 24 and 25 September 2018. He also stated the following:

‘I am writing to inform you of my resignation as a carpenter at Impresa House. I am unable to continue to work for Impresa House as I believe that Impresa House is not providing me with a safe place of work. I am giving 2 weeks notice and intend to finish on Friday the 5th October. As the General Manager (Mr A. Aliev) has threatened me, for my own safety, may I please ask that Mr Aliev does not come to [the worksite] whilst I am there.’

[14] On Tuesday 25 September 2018 Ms Davis replied to Mr Tondorf’s email from the previous afternoon. She stated:

‘Given the circumstances, we have decided it best that you don’t come to work during your notice period and instead be paid in full in lieu of that notice. Any accrued entitlements will be made in the next pay run on 11th October 2018. The incident involving Andrew Aliev has been taken very seriously and he is currently suspended until further notice. Would you please make arrangements to return all company property prior to 5th October 2018 ...’

[15] Mr Tondorf said that this was the first he learnt of the decision to suspend Mr Aliev. He did not return to work. Mr Tondorf’s final payments were paid on 11 October 2018.

Findings

[16] I make the following factual findings.

[17] First, I find that the words spoken by Mr Aliev to Mr Tondorf were ‘I show where your liver’ (sic). These are the precise words that Mr Aliev recited twice in his evidence, in the same ungrammatical formulation. Mr Aliev was clear about what he had said. This evidence is consistent with Mr Aliev’s brief written statement, in which he said that he had used the words ‘I’ll show where your liver is’. Although worded slightly different, the substance of the written statement is also about showing Mr Tondorf where his liver is, not taking his liver. By contrast Mr Tondorf’s account of the particular words Mr Aliev used was not consistent. Mr Tondorf’s unfair dismissal application stated that the words Mr Aliev used were that he would ‘cut out [his] liver’. Then in his oral evidence, Mr Tondorf said that Mr Aliev used the words ‘I’ll take your liver’ or ‘I take your liver.’⁵ Further, in my view Mr Aliev’s account of the words he used is consistent with Mr Tondorf’s evidence, which I accept, that Mr Aliev pointed to his liver. By this I understand Mr Tondorf to mean that Mr Aliev pointed to his abdomen, or the general region of the body where a layman might expect the liver to be. Such an action could logically accompany a statement about ‘showing’ Mr Tondorf where his liver was. Mr Aliev said that he did not make this gesture, but I do not consider this to count against his credit. A detail such as this might easily be forgotten. Similarly, my preference for Mr Aliev’s account of the precise words used in the exchange

⁵ PN98, PN709, PN714. I note that the company’s F3 response says that Mr Aliev used the words ‘I’ll have your liver’ however Mr Romano explained in evidence that he had completed the F3 based on his own summary of information and may have made mistakes (see PN497-505).

over Mr Tondorf's does not reflect adversely on Mr Tondorf's credit. Given Mr Aliev's accent, his words could have been misheard or misunderstood by Mr Tondorf.

[18] Secondly, I accept Mr Aliev's evidence that he did not believe that the statement was particularly offensive, and that, in his native Russian, the statement would not be taken that way.⁶ I also accept his evidence that he was 'amazed' that Mr Tondorf had reacted to the statement in the way he did.⁷ It was clear to me that Mr Aliev remained genuinely surprised at Mr Tondorf's reaction.

[19] Thirdly, I accept Mr Tondorf's evidence that he was very upset by the comment. This is consistent with Ms Davis' evidence that she found it extremely difficult to calm Mr Tondorf down and that he was demanding immediate disciplinary action against Mr Aliev. I also accept Mr Tondorf's evidence that he contacted the police about the matter.

[20] Fourthly, I find that Mr Aliev was close to Mr Tondorf when he made the comment, but not 'in Mr Tondorf's face'. Mr Tondorf was very upset by the remarks, which may have led him to perceive Mr Aliev to be closer than he was. But I consider that Mr Aliev was closer than several metres away, because it would have been hard for Mr Tondorf to hear him otherwise: Mr Tondorf's evidence was that Mr Aliev made the remark in a soft voice⁸ and in giving evidence Mr Aliev was also softly-spoken.

[21] Fifthly, I do not consider that, viewed objectively, the circumstances of the exchange between Mr Tondorf and Mr Aliev on 21 September 2018 would cause a reasonable person to apprehend a real threat to their life or safety. The words spoken were akin to a throw-away line, such as 'I'll knock your head off'. I appreciate that Mr Aliev's reference to Mr Tondorf's liver is unusual in the ear of a native English speaking person, and carries perhaps a somewhat sinister tone. But I do not accept that it could reasonably be thought that Mr Aliev was going to harm Mr Tondorf, let alone Mr Tondorf's family. Further, even if I had preferred Mr Tondorf's account of the words used by Mr Aliev, I would have found that the expression 'I will take your liver' or words to that effect could not reasonably be taken literally in the circumstances. It would plainly have been a metaphorical statement, conveying a negative or angry sentiment, not a literal statement reflecting an actual intention.

[22] Sixthly, Mr Aliev's statement to Mr Tondorf was inappropriate. In my view, the company was right to discipline Mr Aliev. Although I accept his evidence that he did not consider the remark to be particularly important and that he was amazed that Mr Tondorf took offence, the words must be viewed objectively, and so considered, it is understandable that Mr Tondorf was upset. Mr Aliev should not have spoken to Mr Tondorf in the way he did.

[23] Finally, I find that Mr Tondorf's employment with Impresa ended on 5 October 2018. This is the date Mr Tondorf gave in his email as the end of his two week notice period, and the day identified in Ms Davis' email as the deadline for returning company property. Although Ms Davis said in her message to Mr Tondorf that he would be paid 'in full in lieu of that notice', it is clear that she meant that the company would not require Mr Tondorf to work out his notice period.

⁶ PN682.

⁷ PN699 – PN701.

⁸ PN729 - PN730.

Consideration

[24] In light of these findings, I now consider Mr Tondorf's contention that he was forced to resign by the conduct of the company. In *Bupa Aged Care Australia Pty Ltd v Tavassoli*⁹ a Full Bench considered the authorities on resignation and their application to s 386 of the Act, and stated that, in considering whether a resignation is 'forced' for the purposes of s 386(1)(b), the test is 'whether the employer engaged in the conduct with the intention of bringing the employment to an end or whether termination of the employment was the probable result of the employer's conduct such that the employee had no effective or real choice but to resign.'¹⁰

[25] Mr Tondorf presented several arguments in support of his contention that he was forced to resign.

[26] First, Mr Tondorf contended that he feared for his life or his safety. I find it difficult to accept that he could have genuinely believed that his life or safety were at risk. But if he did hold this belief, I consider that there was no rational basis for it. Resignation was not the probable result of the company's conduct or that of Mr Aliev.

[27] Secondly, Mr Tondorf submitted that he did not believe that the company was taking his complaint seriously.¹¹ However, in my assessment, there was no reasonable basis for Mr Tondorf to have this belief. An hour and a half after Mr Tondorf made his complaint Ms Davis called him and said that the company was speaking to Mr Aliev and that it was considering disciplinary action. Later the same day, the company made the decision to suspend Mr Aliev without pay, finding that he had behaved inappropriately. Mr Tondorf said that he did not know that the company had taken disciplinary action against Mr Aliev. However, Mr Tondorf did not come to work on Monday 24 September; he submitted his sick leave certificate only with his resignation message shortly before 5.00pm that day. There was little opportunity for the company to give him an update before that time. Then, in Ms Davis' response to Mr Tondorf the next day, she told him that Mr Aliev had been suspended. Even if this was understood to mean 'suspended pending investigation', rather than suspended as a disciplinary sanction, as Mr Tondorf suggested, it is still clear that the company was taking the matter seriously, and Mr Tondorf should have appreciated this.

[28] A third and related contention of Mr Tondorf's was that he had no confidence that the company would properly deal with the matter. He referred to previous interactions that he had had with senior staff and the human resources department, in which various complaints were not attended to or satisfactorily resolved. One concerned a different complaint that Mr Tondorf had raised about Mr Aliev telling him not to enter a particular worksite, which Mr Tondorf characterised as bullying. Mr O'Gara said in his statement that he witnessed this incident and considered Mr Aliev's conduct to have been intimidating. Mr Tondorf referred to another complaint that remained unresolved, which related to an expense claim connected to his tools. I do not consider the evidence about these matters to establish a sound basis for Mr Tondorf to apprehend that his complaint about Mr Aliev would not be properly dealt with by the company. The nature of these other concerns tends rather to confirm that there was no

⁹ [2017] FWCFB 3941

¹⁰ At [47]

¹¹ PN31.

broader context to the words spoken by Mr Aliev on 21 September 2018 that would reasonably ground Mr Tondorf's fearing for his life or safety.

[29] Mr O'Gara said in his statement that he considered Mr Aliev to be a volatile person. The example he gave concerned an incident in 2016, in which Mr O'Gara said that he heard Mr Aliev say to the then production manager, Mr Buckley, that he was going to kill him. Mr Aliev denies saying this to Mr Buckley. I accept his evidence. Mr O'Gara was not party to the conversation in question and did not give details of the relevant context of the discussion. Further, Ms Davis gave evidence that Mr Buckley never made any complaint about Mr Aliev to the company. Shortly before the proceedings, Mr Tondorf sent to my chambers an email containing text, said to be an extract of an email from Mr Buckley, in which he refers to Mr Aliev's 'conduct towards (him)'. Exactly what is meant by this is not clear. Mr Buckley did not attend the Commission to give evidence, nor was an order sought requiring his attendance. There is no basis for me in the present case to give weight to equivocal hearsay evidence over the sworn and clear evidence of Mr Aliev, who was a credible witness.

[30] At the hearing, Mr Tondorf raised an additional reason as to why he had no confidence in the company taking action about his complaint, namely that, because Mr Aliev was a director of the company, he would suffer retribution for having made a complaint about him.¹² But no basis for this belief, if it was held, has been substantiated.

[31] Whatever misgivings Mr Tondorf might have had about how seriously the company would take his complaint, they were plainly unfounded. The company took immediate action to investigate his complaint and took quick and appropriate disciplinary action against Mr Aliev.

[32] In considering whether, as Mr Tondorf contends, the conduct of the company forced him to resign, it is relevant to note the sequence and timing of the key events. The comment made by Mr Aliev to Mr Tondorf occurred on the morning of Friday 21 September 2018. Mr Tondorf went home in the middle of the day. He did not come to work on the following Monday, 24 September 2018. He resigned at 4:57 pm on that Monday. Less than two full working days elapsed between Mr Tondorf's exchange with Mr Aliev and the email containing his resignation. It was, on any view, a hasty resignation. I note in this connection that Mr Tondorf did not contend that he resigned in the heat of the moment.¹³ His case was that he resigned because he was forced to do so.

[33] In the present case, there is simply no basis to conclude that the employer had any intention of bringing the employment to an end, or that the termination of Mr Tondorf's employment the probable result of the company's conduct or that of Mr Aliev. Mr Tondorf was not put in a position where he had no choice but to resign. Mr Tondorf knew on the Friday that the matter was being investigated and that the company was looking at disciplinary action. It is also relevant to note that already at 11.30 am on the Friday, Mr Tondorf told Ms Davis that he was intending to resign. Ms Davis told him that if he did resign it would be his choice. The fact that Mr Tondorf was flagging an intention to resign at such an early stage supports the company's contention that he simply *wished* to resign.

¹² PN818 – 819.

¹³ PN59 –60

[34] Finally, Mr Tondorf suggested in argument during the proceedings before me that Mr Aliev should have been immediately dismissed. I reject this contention. To do so would have been patently unfair to Mr Aliev. That the company acted as it did simply reflects the application of due process and a proportionate approach to disciplinary sanction.

[35] Taking all of these circumstances into account, I conclude that Mr Tondorf's resignation was of his own volition. He was not forced to resign because of the conduct of the company or the conduct of Mr Aliev. The company took immediate action to investigate Mr Tondorf's complaint. It took swift disciplinary action against Mr Aliev. It viewed his language, correctly in my view, as inappropriate, but not reflecting any genuine threat to Mr Tondorf's safety.

[36] Mr Tondorf was not dismissed on the initiative of the employer for the purposes of s 386. The company's jurisdictional objection is upheld and Mr Tondorf's unfair dismissal application is therefore dismissed.



DEPUTY PRESIDENT

Appearances:

Mr N. Tondorf for himself
Mr R. Romano for the Respondent

Hearing details:

2018.
Melbourne:
16 January.

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