DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Lefei Fasavalu

v

HD Projects Pty Ltd
(U2018/8734)

COMMISSIONER JOHNS MELBOURNE, 24 JANUARY 2019

Application for Relief of Unfair Dismissal – jurisdictional objection - whether employee was dismissed.

Introduction

[1] On 23 August 2018 Lefei Fasavalu **(Applicant)** made an application to the Fair Work Commission (**Commission**) pursuant to section 394 of the *Fair Work FW Act 2009* **(FW Act)** for a remedy in respect of the cessation of his employment with HD Projects Pty Ltd **(Respondent/Employer/HDP).**

[2] On 2 October 2018 HDP filed a response to the unfair dismissal application. In its reply HDP objected to the Commission exercising jurisdiction in relation to the matter on the basis that, it submitted, the Applicant was not dismissed. HDP confirmed its jurisdictional objection on 1 November 2018.

[3] Attempts at conciliation were attempted, but the matter remained unresolved.

[4] The matter was listed for a jurisdictional objection hearing on 29 November 2018. The Applicant failed to attend. The Respondent was represented by its Operations Manager, Don McInnes. Notwithstanding the non-attendance of the Applicant, Mr McInnes consented to the matter proceeding on the basis of the materials filed up until that point and having regard to the evidence given by him.[1]

[5] Consequently, in coming to this decision I have had regard to the following material:

a) the Form F2 – Unfair Dismissal Application,

b) the Form F3 – Employer Response to Unfair Dismissal Application,

[1] Transcript PN4

c) Bundle of payslips for the Applicant,

d) Earnings statement for the Applicant,

e) 30 October 2017 Letter of offer to the Applicant,

f) 23 – 28 August 2018 email chain (finishing with email from HDP payroll),

g) 24 July 2018 – 20 August 2018 timesheets for the Applicant,

h) 7 September 2018 text message from Habib Assi to Mr McInnes,

i) 10 September 2018 email from the Applicant to HDP payroll,

j) 26 October 2018 - Applicant's outline of argument: merits (and attachments including various screenshots of text messages),

k) 1 November 2018 – Respondent's objection to unfair dismissal application (and attachments).

Background

[6] The following matters were either agreed between the parties or not otherwise substantially contested. Consequently, I make the following findings of fact:

a) On 30 October 2017 pursuant to a letter of offer the Applicant commenced employment with HDP.

b) The Applicant described himself as a "Panel Installer". The Respondent described him as a labourer.

c) The Applicant was paid an hourly rate of $31.54. He was also paid a productivity rate of $3.50 per hour and a travel allowance of $35 per day. C+Bus superannuation contributions were made on the Applicant's behalf.

d) In August 2018 the Applicant worked as follows:

Date	Site	Time	Notes
Wed, 1 August	N/A	N/A	Annual leave
Thurs, 2 August	N/A	N/A	Annual leave
Fri, 3 August	N/A	N/A	Annual leave
Mon, 6 August	Wentworthville	6.48 – 9.33	Left early
Tues, 7 August	Hornsby	6.43 – 13.00	Left early
Wed, 8 August	Wentworthville	7.01 – 12.00	Left early
Thurs, 9 August	Wentworthville	6.51 – 12.00	Left early
Fri, 10 August	Allocated to Hornsby	Text sent re not coming in.	Sick leave

Date	Site	Time	Notes
Mon, 13 August	Allocated to Hornsby	Text sent re not coming in.	Sick leave[2]
Tues, 14 August	Miranda	6.54 – 12.02	Left early
Wed, 15 August	Allocated to Miranda	N/A	No show
Thurs, 16 August	Strathfield	7.00 – 12.00	Left early
Fri, 17 August	N/A	N/A	Initially allocated, but Applicant asked to be taken off (see below)

e) At 10:38 AM on Thursday, 16 August 2018 Mr McInnes sent a group text message to HDP employees (including the Applicant) stating that,

> "Folks
> Business has picked up and we are forecasting an increased workload until Xmas and beyond, we are also winning new jobs every month.
> We are recruiting more men, if you know of good workers or the good men that have worked with us before please get in contact with us… Thanks"

16 August 2018 text exchange between Mr McInnes and the Applicant

f) At 4:28 PM on Thursday, 16 August 2018 Mr McInnes sent a text message to the Applicant advising him that on 17 August 2018 he would be working at Turramurra, commencing at 7 AM.

g) At 4:37 PM the Applicant replied as follows,

> "Can you put me somewhere else, that's [too] far for me especially when I have to pick up my kids after school."

h) At 4:44 PM Mr McInnes responded "sorry… That is where the work is"

i) At 4:45 PM the Applicant replied "take the offer for tomorrow [then]"

j) At 4:46 PM Mr McInnes replied "You should resign then"

k) At 4:47 PM the Applicant replied "Maybe you should [then]"

l) At 4:50 PM Mr McInnes replied "Ok. I will advise payroll to terminate your employment"

m) At 4.57 PM the Applicant replied "On what ground you terminally my employment Don. I haven't had any warning"

n) The Respondent did not allocate the Applicant work in the week beginning 20 August 2018.

[2] Doctor's certificate dated 13 August to cover 10th and 13th.

o) Sometime the following week the Applicant received a phone call from a co-worker telling him that the internal allocation phone list had the word "resigned" next to his name.

p) At 7.45 PM on 23 August 2018 sent a text message to Mr McInnes as follows,

> "Hey Don, I [heard] that on the allocation that I have resigned but I never said that I resigned, so I will take HD [Projects] for unfair dismissal."

q) Later that day (Thursday, 23 August 2018) the Applicant filed the present application.

r) The Respondent did not allocate the Applicant work in the week beginning 27 August 2018.

s) The Respondent did not allocate the Applicant work in the week beginning 3 September 2018 (until 6 September 2018).

t) At 12.47 PM on Thursday, 6 September 2018 (i.e. 20 days after the Applicant's last shift and 14 days after he commenced his unfair dismissal application) the Respondent's Director, Clyde Daish, phoned the Applicant.[3] He asked the Applicant why he had not been attending work.[4] The Applicant explained the text message exchange between him and Mr McInnes. The Applicant says that Clyde told him that, as the allocator, Mr McInnes had no right to do what he did.

u) At 5:02 PM on Thursday, 6 September 2018 (i.e. 20 days after the Applicant's last shift and 14 days after he commenced his unfair dismissal application) the Respondent's Director sent a text message to the Applicant in the following terms,

> "Hey Lefi. Don is going to allocate you to a job tomorrow. I've asked him as first preference to keep you with the boys if possible, but second reference to a Western job. You are still on our system so we would love you to turn up and stick with the team. Let me know if there are any dramas"

v) At 5:08 PM the Applicant replied "hi Clyde, I will call you tomorrow so we can talk".

w) At 5:15 PM on Thursday, 6 September 2018 the Applicant received a text message from Mr McInnes allocating him to a job at Wentworthville the following day.

x) On 7 September 2018 the Project Manager sent an email to Mr McInnes and to HDP payroll. He wrote,

> "Lefie not in no txt or no call"

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[3] In the hearing before me Mr McInnes disclosed that he had not shown the Applicant's material to Mr Clyde Daish (i.e. the Respondent's Director) – Transcript PN52. However, that it is a matter for Mr McInnes. The Respondent had the opportunity to put on evidence to rebut what the Applicant submitted on 26 October 2018. It chose not to do so. I am therefore left in a position where I accept the uncontroverted evidence of the Applicant.

[4] It is to be noted that there had been no allocations made to the Applicant since 16 August 2018.

y) At 5:16 PM on Friday, 7 September 2018 the Applicant receive a text message from Mr McInnes allocating him to a job at Wentworthville the following day.

z) At 6:06 PM on Friday, 7 September 2018 the Applicant sent a text message to Mr McInnes. He wrote,

> "Don, don't send me any more allocation until I've spoken to Clyde.

aa) At 5.00 PM on Saturday, 8 September 2018 the Applicant again spoke with Clyde. He told him that because he had not been allocated work for 3 weeks he had secured another job. The Applicant wanted to access funds from the Australian Construction Industry Redundancy Trust (ACIRT). Clyde told him to send a letter to HDP payroll resigning.

bb) On Sunday, 9 September 2018 the Applicant receive a text message from Mr McInnes allocating him to a job at Wentworthville the following day (i.e. Monday, 10 September 2018).

cc) On Sunday, 9 September 2018 the Applicant sent an email to HDP payroll. He wrote,

> "I'm not sure if Clyde has spoken with you however I have resigned from HD Projects through Clyde.
>
> Thank you for everything you have done during my duration at HD Projects.
>
> If possible could you please provide me through this email with a separation certificate.

dd) The 9 September 2018 was read on 10 September 2018. This is the day that the Respondent contends the employment ended.

ee) Although the Applicant was engaged on a full-time basis to work 37 hours per week, over the 45 weeks that the Applicant was employed he averaged 32 hours per week (i.e. 4 days per week).

[7] The Applicant submits he was unfairly dismissed on 16 August 2018.

[8] In its F3 response the Respondent contended that there was no dismissal. They wrote,

"We thought he just didn't want to come to work. He regularly only worked a half day or did not show up at all.

Email dated 7/9/18 – allocated to work and did not show up.

2 days later payroll received his resignation."

[9] The Applicant seeks an Order that he be compensated for the 3 weeks that he was out of work. His average weekly earnings had been $1,009.28 per week. That is to say the

Applicant is seeking $3,027.84.

Protection from Unfair Dismissal

[10] An order for reinstatement or compensation may only be issued where the Commission is satisfied the Applicant was protected from unfair dismissal at the time of the dismissal.

[11] Section 382 sets out the circumstances that must exist for the Applicant to be protected from unfair dismissal:

> "382 When a person is protected from unfair dismissal
>
> A person is *protected from unfair dismissal* at a time if, at that time:
>
> (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
>
> (b) one or more of the following apply:
>
> (i) a modern award covers the person;
>
> (ii) an enterprise agreement applies to the person in relation to the employment;
>
> (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

[12] There is no dispute, and the Commission, as presently constituted, is satisfied, the Applicant has completed the minimum employment period, and that the Applicant earned less than the high income threshold. Consequently, the Commission, as presently constituted, is satisfied the Applicant was protected from unfair dismissal.

[13] I will now consider if the cessation of employment was unfair within the meaning of the FW Act.

Was the dismissal unfair?

[14] A dismissal is unfair if the Commission is satisfied, on the evidence before it, that all of the circumstances set out at s.385 of the FW Act existed. Section 385 provides the following:

> "385 What is an unfair dismissal
>
> A person has been *unfairly dismissed* if the FWC is satisfied that:
>
> (a) the person has been dismissed; and
>
> (b) the dismissal was harsh, unjust or unreasonable; and
>
> (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
>
> (d) the dismissal was not a case of genuine redundancy.
>
> Note: For the definition of *consistent with the Small Business Fair Dismissal Code*: see section 388."

Was the Applicant dismissed?

[15] A person has been unfairly dismissed if the termination of their employment comes within the definition of "dismissed" for purposes of Part 3–2 of the FW Act. Section 386 of the FW Act provides that:

> "386 Meaning of *dismissed*
>
> (1) A person has been *dismissed* if:
>
> (a) the person's employment with his or her employer has been terminated on the employer's initiative; or
>
> (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer."

Was Mr Fasavalu's employment terminated on HDP's initiative - s.386(1)(a)?

[16] A termination is at the employer's initiative when:

a) the employer's action 'directly and consequentially' results in the termination of employment, and

b) had the employer not taken this action, the employee would have remained employed.[5]

[17] There must be action by the employer that either intends to bring the relationship to an end or has that probable result.[6]

[18] The question of whether the act of an employer results 'directly or consequentially' in the termination of employment is an important consideration but it is not the only consideration.[7] It is important to examine all of the circumstances including the conduct of the employer and the employee.[8]

[19] In the present matter, at 4:50 PM on 16 August 2018 ("**4.50 pm Text**"), the person responsible for allocating work on behalf of the Respondent, Mr McInnes, sent a text to the Applicant stating, "Ok. I will advise payroll to terminate your employment". There after (for 20 days) the Applicant was not allocated any work. On 23 August 2018 the Applicant learned that the Respondent had recorded him as having resigned. He protested about that designation. He commenced and unfair dismissal application later that day. 2 weeks later the Respondent again allocated the Applicant work.

[20] Having regard to Mr McInnes' position the Applicant was entitled to rely upon the

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[5] *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* [1995] IRCA 645 (29 November 1995), [(1995) 62 IR 200 at p. 205]

[6] *Barkla v G4S Custodial Services Pty Ltd* [2011] FWAFB 3769 (Watson VP, O'Callaghan SDP, Cargill C, 8 July 2011) at para. 24, [(2011) 212 IR 248]; citing *O'Meara v Stanley Works Pty Ltd*, PR973462 (AIRCFB, Giudice J, Watson VP, Cribb C, 11 August 2006) at para. 23, [(2006) 58 AILR 100]

[7] *Pawel v Advanced Precast Pty Ltd*, Print S5904 (AIRCFB, Polites SDP, Watson SDP, Gay C, 12 May 2000)

[8] *O'Meara v Stanley Works Pty Ltd*, PR973462 (AIRCFB, Giudice J, Watson VP, Cribb C, 11 August 2006) at para. 23, [(2006) 58 AILR 100].; citing *Pawel v Advanced Precast Pty Ltd*, Print S5904 (AIRCFB, Polites SDP, Watson SDP, Gay C, 12 May 2000); *Mohazab v Dick Smith Electronics Pty Ltd* (No 2) [1995] IRCA 645 (29 November 1995), [(1995) 62 IR 200]; *ABB Engineering Construction Pty Ltd v Doumit*, Print N6999 (AIRCFB, Munro J, Duncan DP, Merriman C, 9 December 1996

4.50 pm Text as an indication that Mr McInnes would "advise payroll to terminate [the Applicant's] employment." Nothing in what the Applicant had texted before the 4.50pm Text could be characterised as the Applicant having resigned. He had not. There had been a smart-alec text from the Applicant suggesting Mr McInnes should resign. It no doubt annoyed Mr McInnes. So too the Applicant's poor attendance record and the times he left site early. However, common sense dictates that the Applicant was entitled to treat himself has having been sacked by Mr McInnes. The action of Mr McInnes (as the representative of the employer) was, therefore, the principal contributing factor which lead to the termination of the employment relationship.

[21] At the hearing Mr McInnes protested about this characterisation. The following exchange occurred[9],

> THE COMMISSIONER: So why wasn't the Applicant allocated any work in the weeks beginning 20 August, 27 August and 3 September?
>
> MR McINNES: Well, he wasn't allocated work because I took the assumption that he was resigning on that - or that he was resigning on 16 August, I think it was.
>
> THE COMMISSIONER: You had better explain that to me, because we have just gone through those text messages and on a plain English reading of them I'm struggling to understand how anyone could assume that he was resigning. Which part of what he says there tells you he is going to resign?
>
> MR McINNES: Well, when he said, "You should resign then."
>
> THE COMMISSIONER: Yes, he's saying you should. He is not saying, "I am", is he?
>
> MR McINNES: Mm-hm.
>
> THE COMMISSIONER: He is not saying, "I am resigning", is he?
>
> MR McINNES: Not based on that message, no.
>
> THE COMMISSIONER: Right. You say, "I will advise payroll to terminate your employment."
>
> MR McINNES: That is the impression that I had from that message at 4.47.
>
> THE COMMISSIONER: But you're clearly communicating to him that it's your intention to terminate his employment. That's what those plain words mean, isn't it?
>
> MR McINNES: Based on that message, I thought he was resigning.
>
> THE COMMISSIONER: How could you possibly have?

[9] Transcript PN79 – PN96

> MR McINNES: Well, the language is - - -
>
> THE COMMISSIONER: He doesn't say anything about him resigning. You suggest to him he should resign. He doesn't say, "Yes", he doesn't say, "I'm resigning", does he?
>
> MR McINNES: I took the impression that he was resigning.
>
> THE COMMISSIONER: Then you communicate to him, "I will advise payroll to terminate your employment", not, "I will advise payroll that you have resigned." It doesn't say that, does it?
>
> MR McINNES: It doesn't, but it's indicating the same.

[22] Later the following exchange occurred[10],

> THE COMMISSIONER: …. if you got a text message from your boss saying, "I will advise payroll to terminate your employment", and then I didn't give you any shifts for three weeks, you would treat yourself as being sacked, wouldn't you?
>
> MR McINNES: No.

[23] Mr McInnes' response beggars belief. It is incredulous. No person in receipt of Mr McInnes' 4.50 pm Text (who was then not allocated work for nearly 3 weeks) would treat themselves as not having been sacked.

[24] Mr McInnes then sought to put the blame on the Applicant,

> MR McINNES: …. I mean, if he was of the view that his employment had been terminated, there was no - he knows the email address of payroll because his payroll slip gets emailed to him every week. He knows telephone numbers of the office. He knows telephone numbers of the directors. He knows telephone numbers of his manager. He also knows telephone numbers of his supervisor. At no stage in any of this since 16 August did he communicate to anyone.[11]

[25] The fact that the Applicant did not complain about Mr McInnes' conduct until he filed his unfair dismissal application on 23 August 2018 is no answer to the obvious conclusion that the 4.50 pm Text terminated the employment relationship.

[26] For these reasons I am satisfied that the Applicant's employment with HDP was terminated on the employer's initiative (s.386(1)(a)). Consequently, I am satisfied that the Applicant was dismissed (s.385(a)).

[27] It might be that, at a substantive hearing, the fact that the Respondent commenced

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[10] Transcript PN100 - 101

[11] Transcript PN117

allocating working nearly 3 weeks later is relevant to the question of remedy, but it does not deprive the 4.50 pm Text of its true character.

Was the Applicant forced to resign – s.386(1)(b)?

[28] Having determined that the Respondent dismissed the Applicant it is not necessary to determine if the purported resignation on 10 September 2018 was forced. However, out of completeness I should address the issue because it was a major contention of the Respondent that the Applicant voluntarily resigned on 9 September 2018 with effect from Monday, 10 September 2018.

Consideration

[29] In *Bupa Aged Care Australia Pty Ltd t/a Bupa Aged Care Mosman v Tavassoli*[12], a Full Bench of the Commission referred to a number of authorities dealing with "dismissal" under s 386(1). In relation to the operation of s.386(1)(b) the Full Bench held that,

> "[34] It is apparent, as was observed in the decision of the Federal Circuit Court (Whelan J) in *Wilkie v National Storage Operations Pty Ltd* , that "The wording of s.386(1)(b) of the Act appears to reflect in statutory form the test developed by the Full Court of the then Industrial Relations Court of Australia in *Mohazab v Dick Smith Electronics Pty Ltd (No. 1)* and summarised by the Full Bench of the Australian Industrial Relations Commission in *O'Meara v Stanley Works Pty Ltd*" (footnotes omitted). The body of pre-FW Act decisions concerning "forced" resignations, including the decisions to which we have earlier referred, has been applied to s.386(1)(b): *Bruce v Fingal Glen Pty Ltd (in liq)*; *Ryan v ISS Integrated Facility Services Pty Ltd*; *Parsons v Pope Nitschke Pty Ltd ATF Pope Nitschke Unit Trust*.
>
> ….
>
> [47] Having regard to the above authorities and the bifurcation in the definition of "dismissal" established in s.386(1) of the FW Act, we consider that the position under the FW Act may be summarised as follows:
>
> ….
>
> > (2) A resignation that is "forced" by conduct or a course of conduct on the part of the employer will be a dismissal within the second limb of the definition in s.386(1)(b). The test to be applied here 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 probably result of the employer's conduct such that the employee had no effective or real choice but to resign. Unlike the situation in (1), the requisite employer conduct is the essential element."
>
> ….
>
> [49] We do not consider it is particularly helpful in applying s.386(1) to refer to the concept of "constructive dismissal" - an expression nowhere used in the FW Act. In saying this, we acknowledge that the expression has been used in a number of the authorities and also in the passage from the explanatory memorandum earlier quoted. However, as explained by Greg McCarry in his 1994 article "*Constructive Dismissal*

[12] [2017] FWCFB 3941

of Employment in Australia", the concept of "constructive dismissal" in UK law was not a development of the common law, but rather a description of a statutory extension to the ordinary meaning of dismissal to encompass a situation where "the employee terminates the contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct". That is a much wider concept than just "forced" dismissal and is conducive of confusion, as McCarry warned:

> "If the forced resignation is now to be regarded as a dismissal, at least under some statutes, then so be it. But it is not and should not be called a "constructive dismissal", nor should that term come to be regarded as a separate concept in its own right, as may be happening. To regard "dismissal" as including constructive dismissal without the aid of a definition of extension is reading a lot into a statute by English and Australian standards of statutory interpretation, although as we shall see American courts have had no trouble doing just that. Moreover, unnecessary or loose use of the phrase "constructive dismissal" brings with it the inevitable, and erroneous, tendency to draw on English judicial pronouncements and examples which arise in the quite different situation adverted to earlier. Given the way the extended definition in England is to be interpreted, all kinds of breaches of contract and repudiatory conduct, as determined by the common law rules, can legitimately come within the statutory extension. There are good reasons for arguing that similar definitions should be inserted into our statutes, but at the moment they are not there. So care is needed that decisions on the English regime are not misunderstood or misapplied."

[50] In the different statutory context of the NSW unfair dismissal scheme in the Industrial Relations Act 1991, a Full Bench of the Industrial Relations Commission similarly warned in *Allison v Bega Valley Council*, in relation to forced dismissal, that the term "constructive dismissal" could "deflect attention from the real inquiry ... Did the employer behave in such a way so as to render the employer's conduct the real and effective initiator of the termination of the contract of employment and was this so despite on the face of it the employee appears to have given his or her resignation?" In the current statutory context of s.386(1), the breadth of the concept of "constructive dismissal" may cause confusion and deflect attention away from whether a dismissal within the meaning of paragraph (a) or paragraph (b) is being considered. That occurred in this case."

[30] I adopt the reasoning of the Full Bench. Consequently, it is necessary for me to focus on whether the Applicant was "forced to [resign] because of conduct or a course of conduct, engaged in by [HDP]" rather than exploring notions of "constructive dismissal". The onus is on the Applicant to establish that he was forced to resign: *Banda v Mrs Australia Pty Ltd (t/a 7-Eleven)*.[13]

[31] In the present matter the course of conduct engaged in by the Respondent included the following:

a) The 4.50 pm Text from Mr McInnes,

[13] [2017] FWC 5522

b) No work allocation for nearly 3 weeks, and

c) Mr Daish telling the Applicant that, in order to access ACIRT funds, he would need to resign.

[32] Having considered the evidence carefully concerning the events that occurred in the lead up to the Applicant's email resignation I have reached the conclusion that HDP's conduct did give rise to circumstances that amounted to a dismissal within the meaning of s.386(1)(b). HDP engaged in a course of conduct that forced the Applicant to resign. There was an absence of effective or real choice. There was a compulsion or inevitability in the resignation.

[33] Consequently, if I am wrong about my conclusion in relation to s.386(1)(a), I would find that the Applicant was forced to resign from his employment because of a course of conduct engaged in by HDP. The allocation made to the Applicant on 6 September 2018 is relevant to the question of any remedy that might be awarded to the Applicant. It could be characterised as an offer of re-employment, but it does not take away from the course of conduct already engaged in by the Respondent.

Conclusion

[34] The Commission, as presently constituted, is satisfied that the Applicant was protected from unfair dismissal, and that he was dismissed. Consequently, the Respondent's jurisdictional objection is dismissed.

[35] The matter will now be programmed for a substantive hearing to determine if the dismissal was harsh, unjust or unreasonable.

COMMISSIONER

Appearances:

Mr L Fasavalu – no appearance
Mr D McInnes for the Respondent

Hearing Details:
Sydney,
29 November
2018

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