



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Angele Chandler

(Applicant)

v

Bed Bath n' Table Pty Ltd

(Respondent)

(U2019/2368)

DEPUTY PRESIDENT MANSINI

MELBOURNE, 20 SEPTEMBER 2019

Application for an unfair dismissal remedy – minimum employment period – less than 6 months' service – application dismissed

[1] This decision concerns an application by Ms Angele Chandler for an unfair dismissal remedy pursuant to s.394 of the *Fair Work Act 2009* (Act).

[2] I have determined that Ms Chandler is not protected from unfair dismissal because she did not complete at least the minimum employment period. Accordingly, the application is dismissed for want of jurisdiction. The reasons for this decision follow.

Context

[3] Ms Chandler accepted an offer of employment by Bed Bath n' Table Pty Ltd (Bed Bath n' Table) as a Casual Sales Assistant, on 15 June 2018.¹ The role was based at the Essendon store. She worked her first shift on 25 June 2018 and her last shift on 28 February 2019.² On 1 March 2019, Ms Chandler was dismissed.³

[4] On 4 March 2019, Ms Chandler made this application claiming that her dismissal was unfair and seeking reinstatement, an order for compensation and an apology.⁴

[5] The application did not proceed to conciliation conference pending the resolution of Bed Bath n' Table's objection, made on the basis that Ms Chandler had not completed the minimum employment period and therefore is not protected from unfair dismissal. A hearing was convened, following which each party sought to file further submissions in closing.⁵

¹ This is the date that she signed the contract of employment, Applicant's Submissions of 29 April 2019, Appendix 16 – Employment Contract.

² Agreed by the parties and confirmed at hearing conducted as a determinative conference (hereinafter referred to as hearing) on 31 May 2019.

³ Termination letter attached to the Application dated 4 March 2019 (Application).

⁴ Application.

⁵ Final Submissions were received on 12 and 14 August 2019.

Summary of relevant legal principles

[6] The Commission can only order an unfair dismissal remedy if the applicant was a person “protected from unfair dismissal” (s.390). This in turn requires the person to have completed a period of employment that is at least the “minimum period of employment” (s.382(a)).

[7] Section 383 provides that, if an employer is not a “small business employer”, the minimum employment period is 6 months, ending at the time when the person is given notice of the dismissal or immediately before the dismissal, whichever is earlier.

[8] Section 384(2) provides that a period of service as a casual employee does not count towards the employee’s period of employment unless the employment as a casual was on a “regular and systematic basis” *and* “during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis”.

[9] In *Bronze Hospitality Pty Ltd v Janell Hansson* a Full Bench stated that a particular period of service as a casual employee only “counts” towards the minimum employment period if the period of casual employment was regular and systematic and the employee had a reasonable expectation of continuing employment throughout that period.⁶ Further, the days on which a person worked and the hours worked on those days are relevant to the consideration of whether casual employment was regular and systematic, and also whether the person had a reasonable expectation of ongoing employment.⁷ Where nothing is said about the regularity or system of engagement, all of the circumstances are to be considered in order to ascertain whether s.384(2) is engaged.⁸

Consideration

[10] As Bed Bath n’ Table is not a small business, the minimum employment period is 6 months. The period from Ms Chandler’s first casual engagement to her last casual engagement (immediately before the dismissal) was 8 months and 3 days.

[11] However, Bed Bath n’ Table contends that Ms Chandler’s casual employment was not on a regular and systematic basis and that, during this period, she did not have a reasonable expectation of ongoing employment.

[12] Ms Chandler does not dispute that she was at all times engaged as a Casual Sales Assistant. As to her period of employment as a casual, Ms Chandler gave evidence that she considered her work in this period to have been regular and systematic and that she held an expectation, which she believed was reasonable, of ongoing employment.

[13] The Commission received evidence of Ms Chandler’s work records which shows days and hours of her engagements over the period 5 July 2018 to 28 February 2019.⁹ Ms Chandler

⁶ [2019] FWC 1099 at [29].

⁷ *Ibid* at [24].

⁸ *Ibid* at [33].

⁹ Electronic Time Sheets attached to the Employer’s Response dated 13 March 2019.

provided handwritten notes of identified “discrepancies” in that data (extracted in full at Annexure A).¹⁰

[14] Ms Chandler also submitted other materials including photographs of monthly handwritten rosters for the period July 2018 to March 2019. In evidence, she acknowledged that these rosters were prepared in advance and may have changed such that they do not necessarily reflect shifts (days or hours) actually worked.¹¹

[15] A summary of wages for each fortnight of the employment period which Ms Chandler prepared was also received in evidence.¹² Bed Bath n’ Table responded with a record of Ms Chandler’s fortnightly wages history generated from its payroll system for the same period.¹³ These records represent averaged information and are less specific than that at Annexure A.

[16] Bed Bath n’ Table produced additional documentary evidence including the Applicant’s offer of employment, position description, an extract from the Employee Handbook (with signed acknowledgement of understanding by Ms Chandler) and a series of emails leading to Ms Chandler’s dismissal.¹⁴

[17] Two additional witnesses gave evidence for Ms Chandler, Ms Daniella Papazoglou (Assistant Store Manager at the DFO Store, formerly employed at the Essendon store) and Ms Daniella Griffin (former Casual Sales Assistant at the Essendon Store).¹⁵

- Ms Papazoglou gave evidence of Ms Chandler’s performance, that she was allocated 20 to 25 hours per week or more and that although she was not responsible for rostering the Store Manager allocated hours to staff “to fit the needs of the company”. In her view, Ms Chandler was a “regular casual who was amongst a few others with regular hours”. She drew a distinction between a “main casual”, who is given base hours and consistency of 3 to 4 shifts per week, and other casuals. Her evidence was that there is no “official” distinction, nothing in writing, however in practice the difference goes to reliability leading to more rostered shifts as a main casual.
- Ms Griffin gave evidence of employment practices in the Essendon store, including a practice of employing “main casuals” vs. “Christmas casuals” which she described by reference to her own casual employment with Bed Bath n’ Table. However she was not able to identify any clear basis for or impact of this distinction.

Was the employment regular and systematic?

[18] Having regard to all of the materials before the Commission, including the evidence given at the hearing, I find no basis to conclude that Ms Chandler’s employment was regular and systematic.

[19] I find Annexure A the most reliable and relevant source of evidence in this respect. An objective analysis of Annexure A, taking into account Ms Chandler’s identified discrepancies,

¹⁰ Appendix 7, Applicant’s materials filed 29 April 2019.

¹¹ Appendix 5, Applicant’s materials filed 29 April 2019.

¹² Part of Appendix 7, Applicant’s materials filed 29 April 2019.

¹³ Respondent’s materials filed 6 June 2019.

¹⁴ Respondent’s materials filed 11 April 2019.

¹⁵ Witness Statements of Ms Daniella Papazoglou and Ms Jillian Griffin filed 29 April 2019.

reveals no regularity of Ms Chandler's engagements over the period. Whilst Ms Chandler worked at least 3 days each week, Annexure A shows the number of days worked each week, the days of the week worked and the duration of the shift on each occasion varied significantly such that no pattern is able to be identified.

[20] The fortnightly wages data does not assist in identifying regularity or a system of engagements, providing a more general overview than the detail depicted by Annexure A. The evidence of other employees' hours worked also does not assist in determining regularity or system of Ms Chandler's engagements.

[21] For completeness, it is noted that all of the evidence focused on the engagements from 5 July 2018 to 28 February 2019. Whilst no explanation was provided for the engagements worked in the period 25 June to 5 July 2018, on the weight of the evidence covering the remaining period that is before the Commission the result would not differ in any event.

Was there a reasonable expectation of ongoing employment?

[22] Having found that the employment was not regular and systematic, there is no need to make a conclusion about any expectation of ongoing employment that Ms Chandler may have reasonably held during the period of her service as a casual employee. That said, much of the evidence focussed on this question and so it is appropriate to address it.

[23] Whilst I accept that the 3 individuals who gave evidence considered there to be a practice in the Essendon store of employing "main casuals" as distinct from "Christmas casuals" or "other casuals", the balance of the evidence does not support this conclusion. Even on these witnesses own accounts, there was nothing formal or specific to warrant a finding of a reasonable expectation in this respect.

[24] The Applicant's own admission in an email to the employer of 27 February 2019 is telling;

*"With regards to rostering I understand that ALL casuals do not have guaranteed hours as well as casuals have a right to refuse any shift given the nature of the casual position without retribution."*¹⁶

[25] Further, the objective documentary evidence including employment contract, position description, workplace policies, rosters prepared in advance when compared with actual hours worked and pay advices does not support a finding that Ms Chandler had a reasonable expectation of ongoing employment.

¹⁶ Email correspondence attached to the Employer's Response dated 13 March 2019.

Conclusion

[26] For the above reasons, I find that Ms Chandler has not served the minimum employment period. For this reason she is not a person protected from unfair dismissal. Ms Chandler's unfair dismissal application is therefore dismissed.



DEPUTY PRESIDENT

Printed by authority of the Commonwealth Government Printer

<PR712451>

Annexure A

Appendix 7

- Hours worked on a weekly basis
- Discrepancies found with regards to hours that have not been adjusted at the time by Store Manager prior to approving daily hours as per Company Policy

Day	Date	Hours Type	Start	End	Break	Worked	Hrs
CHANDLER, ANGELE - 20947							001 364.25
							201 116.50
							202 107.00
							203 23.00
							207 0.75
							54 0.75
							55 3.25
Thu	06/07/18	WNORMAL	12:57 PM *	6:02 PM *	5:00		
Fri	06/07/18	WNORMAL	10:00 AM	5:03 PM * 1:00	6:00		11 hrs
Sat	07/07/18	WNORMAL	12:00 PM	5:00 PM *	5:00		
Mon	08/07/18	WNORMAL	12:00 PM	5:03 PM *	5:00		
Wed	11/07/18	WNORMAL	10:01 AM *	5:03 PM * 1:00	6:00		19.25 hrs
Thu	12/07/18	WNORMAL	10:58 AM *	1:10 PM *	2:15		mm 3hr shift.
Sat	14/07/18	WNORMAL	11:32 AM *	6:00 PM * 0:30	6:00		
Mon	16/07/18	WNORMAL	12:00 PM	5:00 PM *	5:00		16.75 hrs
Sat	21/07/18	WNORMAL	10:00 AM	6:00 PM * 1:00	7:00		
Sun	22/07/18	WNORMAL	11:00 AM	4:12 PM * 0:30	4:45		1/2 break for 5 shift?
Wed	25/07/18	WNORMAL	12:00 PM	5:00 PM *	5:00		
Thu	26/07/18	WNORMAL	10:00 AM	5:00 PM * 1:00	7:00		17 hrs.
Sat	28/07/18	WNORMAL	12:00 PM	5:01 PM *	5:00		
Mon	30/07/18	WNORMAL	12:00 PM	3:01 PM *	3:00		
Tue	31/07/18	WNORMAL	11:58 AM *	5:00 PM *	5:00		24 hrs
Wed	01/08/18	WNORMAL	12:00 PM	5:00 PM *	5:00		
Thu	02/08/18	WNORMAL	11:59 AM *	5:00 PM *	5:00		
Sat	04/08/18	WNORMAL	11:30 AM	6:00 PM * 0:30	6:00		
Mon	06/08/18	WNORMAL	12:00 PM	5:08 PM * 0:30	4:45		1/2 break for 5 shift?
Fri	10/08/18	WNORMAL	1:00 PM	6:00 PM *	6:00		20 hrs
Sat	11/08/18	WNORMAL	12:00 PM	5:00 PM *	5:00		
Sun	12/08/18	WNORMAL	11:36 AM *	5:10 PM * 0:30	5:15		1/2 break for 5 shift? o/t
Wed	15/08/18	WNORMAL	10:28 AM *	6:03 PM * 1:00	6:30		
Thu	16/08/18	WNORMAL	9:00 AM	6:02 PM * 1:00	8:00		26.5 hrs.
Sat	18/08/18	WNORMAL	10:00 AM	6:00 PM * 1:00	7:00		
Sun	19/08/18	WNORMAL	12:00 PM	6:02 PM *	5:00		
Mon	20/08/18	WNORMAL	12:03 PM *	5:00 PM *	5:00		
Wed	22/08/18	WNORMAL	12:00 PM	5:00 PM *	5:00		22.50 hrs
Thu	23/08/18	WNORMAL	12:00 PM	6:00 PM * 0:30	5:30		
Sat	25/08/18	WNORMAL	9:30 AM	5:30 PM * 1:00	7:00		
Mon	27/08/18	WNORMAL	12:00 PM	5:00 PM *	5:00		
Sat	01/09/18	WNORMAL	11:30 AM	6:30 PM * 1:00	6:00		17.25 hrs
Sun	02/09/18	WNORMAL	11:32 AM *	6:52 PM * 1:00	6:15		
Mon	03/09/18	Steektaking Hours	12:04 PM *	9:02 PM * 1:00	8:00		24.5 hrs
Tue	04/09/18	WNORMAL	1:01 PM *	6:01 PM *	5:00		
Sat	08/09/18	WNORMAL	11:33 AM *	5:30 PM * 0:30	5:30		1/2 break for shift O/T
Sun	09/09/18	WNORMAL	11:42 AM *	6:03 PM * 0:30	5:45		No adjusted by Store Mgr
Tue	11/09/18	WNORMAL	12:00 PM	4:00 PM *	4:00		
Fri	14/09/18	WNORMAL	11:59 AM *	5:00 PM *	5:00		16.5 hrs
Sun	16/09/18	WNORMAL	10:00 AM	6:35 PM * 1:00	7:30		
Mon	17/09/18	WNORMAL	12:00 PM	6:22 PM * 0:30	5:45		O/T.
Tue	18/09/18	WNORMAL	11:59 AM *	5:05 PM *	5:00		

* against Start or End time denotes that time was adjusted to closest 15 min when calculating hours worked

Day	Date	Hours Type	Start	End	Break	Worked	Hrs
Fri	21/09/18	WNORMAL	1:01 PM *	6:00 PM *		5:00	21.75hrs
Sun	23/09/18	WNORMAL	11:25 AM *	6:02 PM *	0:30	6:00	
Mon	24/09/18	WNORMAL	10:00 AM	5:00 PM *	1:00	6:00	
Tue	25/09/18	WNORMAL	12:00 PM	5:00 PM *		5:00	
Thu	27/09/18	WNORMAL	1:00 PM	6:00 PM *		5:00	33hrs
Fri	28/09/18	WNORMAL	10:00 AM	6:04 PM *	1:00	7:00	
Sat	29/09/18	WNORMAL	12:00 PM	5:00 PM *		5:00	
Sun	30/09/18	WNORMAL	12:00 PM	5:00 PM *		5:00	
Fri	05/10/18	WNORMAL	1:00 PM	6:15 PM *	0:30	4:45	1/2 shift 5hrs + OIT
Sat	06/10/18	WNORMAL	11:28 AM *	6:00 PM *	0:30	6:00	
Sun	07/10/18	WNORMAL	11:30 AM	6:00 PM *	0:30	6:00	16.75hrs
Thu	11/10/18	WNORMAL	9:00 AM	5:00 PM *	1:00	7:00	
Fri	12/10/18	WNORMAL	1:00 PM	6:09 PM *	0:30	4:45	1/2 shift 5hrs
Sat	13/10/18	WNORMAL	10:00 AM	6:00 PM *	1:00	7:00	18.75hrs
Mon	15/10/18	WNORMAL	9:00 AM	6:00 PM *	1:00	8:00	
Thu	18/10/18	WNORMAL	9:00 AM	6:00 PM *	1:00	8:00	29.50hrs
Sat	20/10/18	WNORMAL	11:32 AM *	6:02 PM *	0:30	6:00	
Sun	21/10/18	WNORMAL	9:29 AM *	6:00 PM *	1:00	7:30	
Mon	22/10/18	WNORMAL	11:58 AM *	5:04 PM *		5:00	
Wed	24/10/18	WNORMAL	12:02 PM *	5:04 PM *		5:00	15hrs.
Fri	26/10/18	WNORMAL	1:03 PM *	6:06 PM *		5:00	
Mon	29/10/18	WNORMAL	8:00 AM	4:59 PM *	1:00	8:00	
Fri	02/11/18	WNORMAL	11:06 AM *	4:04 PM *		5:00	20.25hrs
Sun	04/11/18	WNORMAL	9:56 AM *	6:15 PM	1:00	7:15	
Mon	05/11/18	WNORMAL	8:58 AM *	6:00 PM	1:00	8:00	
Tue	06/11/18	WNORMAL	12:00 PM	5:00 PM		5:00	18.00hrs
Fri	09/11/18	Normal Hours	1:00 PM	6:00 PM		5:00	
Thu	15/11/18	WNORMAL	11:59 AM *	5:16 PM *	0:30	4:45	1/2 shift 5hrs + OIT
Sat	17/11/18	WNORMAL	11:30 AM	6:00 PM	0:30	6:00	
Sun	18/11/18	WNORMAL	10:00 AM	1:08 PM *		3:15	14.0hrs
Tue	20/11/18	WNORMAL	1:00 PM	6:00 PM		5:00	
Wed	21/11/18	WNORMAL	12:30 PM	5:30 PM		5:00	13.hrs.
Fri	23/11/18	WNORMAL	1:00 PM	4:02 PM *		3:00	
Mon	26/11/18	WNORMAL	11:30 AM	6:17 PM *	0:30	6:15	
Tue	27/11/18	WNORMAL	8:00 AM	1:00 PM		5:00	15-25
Fri	30/11/18	WNORMAL	8:00 AM	12:00 PM		4:00	
Mon	03/12/18	WNORMAL	2:27 PM *	6:03 PM *		3:30	
Wed	05/12/18	WNORMAL	11:30 AM	6:02 PM *	0:30	6:00	
Sat	08/12/18	WNORMAL	11:30 AM	6:00 PM	0:30	6:00	27.5hrs
Sun	09/12/18	WNORMAL	11:28 AM *	6:02 PM *	0:30	6:00	
Sun	09/12/18	WNORMAL	11:30 AM	6:02 PM *	0:30	6:00	
Tue	11/12/18	WNORMAL	11:28 AM *	6:00 PM	0:30	6:00	
Wed	12/12/18	WNORMAL	11:29 AM *	6:05 PM *	0:30	6:00	
Sat	15/12/18	WNORMAL	11:29 AM *	6:10 PM *	0:30	6:15	24.25hrs
Sun	16/12/18	WNORMAL	11:24 AM *	6:29 PM *	1:00	6:00	
Tue	18/12/18	WNORMAL	11:28 AM *	6:15 PM	0:30	6:15	
Wed	19/12/18	WNORMAL	10:00 AM	3:00 PM		5:00	16.75hrs
Sat	22/12/18	WNORMAL	8:00 AM	2:00 PM	0:30	5:30	
Wed	26/12/18	WNORMAL	1:00 PM	8:00 PM	1:00	6:00	

* against Start or End time denotes that time was adjusted to closest 15 min when calculating hours worked

Day	Date	Hours Type	Start	End	Break	Hrs Worked	
Fri	29/12/18	WNORMAL	9:00 AM	6:00 PM	1:00	8:00	<input type="checkbox"/>
Sun	30/12/18	WNORMAL	11:31 AM *	7:15 PM *	1:00	6:45	<input type="checkbox"/> 20-15hrs
Tue	01/01/19	WNORMAL	12:00 PM	5:02 PM *		5:00	<input type="checkbox"/>
Tue	08/01/19	WNORMAL	8:57 AM *	2:03 PM *		5:00	<input type="checkbox"/>
Wed	09/01/19	WNORMAL	9:02 AM *	2:02 PM *		5:00	<input type="checkbox"/>
Fri	11/01/19	WNORMAL	11:00 AM	4:00 PM		5:00	<input type="checkbox"/> 27-hrs
Sun	13/01/19	WNORMAL	10:04 AM *	6:02 PM *	1:00	7:00	<input type="checkbox"/>
Thu	17/01/19	WNORMAL	9:01 AM *	2:01 PM *		5:00	<input type="checkbox"/>
Fri	18/01/19	WNORMAL	12:30 PM	5:30 PM		5:00	<input type="checkbox"/>
Tue	22/01/19	WNORMAL	1:00 PM	6:02 PM *		5:00	<input type="checkbox"/> 21 hrs
Sat	25/01/19	WNORMAL	11:28 AM *	6:00 PM	0:30	6:00	<input type="checkbox"/>
Tue	29/01/19	WNORMAL	9:00 AM	2:00 PM		5:00	<input type="checkbox"/>
Thu	31/01/19	WNORMAL	1:05 PM *	6:02 PM *		5:00	<input type="checkbox"/>
Sat	02/02/19	WNORMAL	11:30 AM	3:30 PM		4:00	<input type="checkbox"/> 18hrs.
Sun	03/02/19	WNORMAL	10:00 AM	2:00 PM		4:00	<input type="checkbox"/>
Thu	07/02/19	WNORMAL	12:01 PM *	5:02 PM *		5:00	<input type="checkbox"/>
Tue	12/02/19	WNORMAL	1:15 PM	6:15 PM		5:00	<input type="checkbox"/> 15hrs
Sun	17/02/19	WNORMAL	12:00 PM	5:00 PM		5:00	<input type="checkbox"/>
Tue	19/02/19	WNORMAL	11:59 AM *	5:02 PM *		5:00	<input type="checkbox"/> 10hrs
Thu	21/02/19	Normal Hours	12:00 PM	5:00 PM		5:00	<input type="checkbox"/>
Thu	28/02/19	WNORMAL	12:58 PM *	6:01 PM *		5:00	<input type="checkbox"/> 5 hrs.
Total Hours						620:30	