



EX TEMPORE DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Daryl Martin

v

Green VIC Pty Ltd
(U2019/8276)

COMMISSIONER PLATT

ADELAIDE, 3 DECEMBER 2019

Application for an unfair dismissal remedy.

[1] The following decision, now edited, was issued during proceedings conducted on 3 December 2019.

[2] Mr Daryl Martin has lodged an application pursuant to s.394 of the *Fair Work Act 2009* (the Act) in relation to the termination of his employment with Green VIC Pty Ltd (Green VIC), which his Form F2 - Unfair Dismissal Application advised took effect on 10 July 2019. Mr Martin was employed as a crane driver at the Realm Construction site, a 39-storey residential development in Adelaide due for structural completion in November 2019 and opening in March 2020.

[3] Mr Martin was advised in writing that he was summarily dismissed on 10 July 2019.

[4] On 16 September 2019, Green VIC lodged a Form F3 - Employer Response, which did not raise any jurisdictional objections but contended that Mr Martin was dismissed due to his conduct which was contended to be wilful and/or deliberate and inconsistent with the continuation of his employment contract. The conduct included numerous allegations of refusing to perform 'lifts' without reason, failing to work reasonable overtime and leaving the site without reason. It was alleged that on 6 July 2019 Mr Martin shut down the crane and left site at noon without telling anyone or seeking permission.

[5] The matter did not resolve at conciliation and was allocated to my Chambers.

[6] On 10 October 2019, a Directions Conference was conducted. Mr Martin was represented by the Ms Barnes-Whelan from the CFMMEU, Green VIC was represented by counsel with permission Directions were issued for parties to file submissions and statements which were duly filed.

[7] The hearing was conducted at 10.00am on 3 December 2019. Mr Wheelahan (of Counsel) represented Green VIC at the hearing, permission having been granted to Green VIC pursuant to under s. 596(2)(a) of the Act on the basis of complexity and efficiency.

Evidence

[8] Mr Martin provided a statement¹ and gave evidence. Mr Martin accepted that the Crane Operating Manual² and CFMMEU guidelines³ stipulated a 72km/h gust wind limit for the crane installed at the Realm site. Mr Martin also referred me to a SafeWork SA publication⁴ which restated the gust limit but qualified it by also stating that a crane driver should not operate it when they considered it unsafe. Mr Martin did not have a memory of any of the specific occasions when he determined that the crane would not operate. In his statement Mr Martin referred to obtaining permission to cease operating the crane, his evidence did not support this assertion. It appears that Mr Martin unilaterally determined when the crane would be operated. Mr Martin contended he took photos of the cranes windspeed indicator and texted them to his Supervisor. Mr Martin was unable to produce copies of those text images as he had lost or damaged his phone. No other witness produced the text messages referred to. Mr Martin submitted data from the Bureau of Meteorology detailing windspeeds for the relevant periods. None of this data indicated that the windspeed exceeded 72 km/h. Mr Martin was unable to give definitive evidence of the loads he was lifting (and thus why a lift would have been unsafe) on a particular day. Surprisingly Mr Martin has no recollection of his conduct on 6 July 2019 which led to his dismissal four days later.

[9] Mr Yates worked with Mr Martin as a Rigger/Dogman. He also submitted a statement and gave evidence. His evidence about Mr Martin seeking permission to cease operating the crane did not correlate with Mr Martin's oral evidence. Mr Yates advised that if the weather prevented work (e.g. high winds) the procedure was to wait four hours to see if the condition abated, and only then to leave site.

[10] Mr Jadidi (Realm Project Manager) gave evidence that the Project had one crane and that Mr Martin was engaged to operate the crane and work reasonable overtime as directed. Mr Jadidi advised that crane operation was integral to the efficient operation of the site and achievement of project deadlines (or in default penalties and liquidated damages). Mr Jadidi accepted that post November 2018 he did not raise any specific concerns about Mr Martin's performance with him. On 6 July 2019 Mr Martin left site (allegedly due to high winds) and did not return - this was the straw that broke the camel's back and resulted in Mr Martin being summarily dismissed.

[11] Mr Kitikos was employed by Green VIC. Mr Kitikos held the view that Mr Martin was deliberately conducting himself in a manner which resulted in a loss of site efficiency. This included refusing to lift form tables if the wind was over 20 km/hr, leaving site on Fridays at 3.00pm which required another crane operator to be used, not undertaking lifts after 4.30pm and not remaining on site after a high wind incident for 4 hours, together the 6 July 2019 incident.

[12] Mr Rabica is Project Manager for Oracle Structures, which is responsible for the structure of the Realm Project. Mr Rabica gave evidence about the importance of the crane operation as to the timeliness of the construction project and Mr Martin's refusal to work overtime at the end of the day on a number of occasions and delays which occurred as a result of lifts not being performed in wind conditions as recorded by him.

Submissions

[13] The parties made written submissions. At the hearing Green VIC submitted that Mr Martin's conduct was a valid reason for dismissal and further that it constituted serious and wilful misconduct and he was entitled to be dismissed without notice.

[14] Mr Martin contended his action did not constitute serious misconduct, that there was no valid reason and that he was not afforded procedural fairness, and that the failure to pay notice, rendered the dismissal harsh, unjust or unreasonable.

Consideration

[15] I accept that the crane limit was 72km/hr and also that the operator needed to ensure it operated safely.

[16] Mr Martin's evidence was not convincing, he was unable to provide me with sufficient detail that despite the wind gust not exceeding the crane specifications that the crane would be unsafe to operate. He had no recollection about the events of 6 July 2019. Accordingly, I prefer the evidence of the other witnesses as to the event that occurred on that day.

[17] Green VIC described Mr Martin's conduct by leaving site at noon on Saturday 6 July 2019 without reason or permission as giving a two fingered salute to Green VIC. I accept that description. It appears to me that Mr Martin's conduct was wilful and deliberate.

[18] Mr Martin did not explain his action on 6 July 2019, nor show any contrition or remorse. Mr Martin did not provide any evidence which if advised to Green VIC would have explained his conduct.

[19] I turn now to the s.387 of the Act criteria.

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

[20] I find that Mr Martin's conduct in leaving the worksite on 6 July 2019 without permission or good reason, was in contravention of his employment obligations and was a valid reason for dismissal. I further find that Mr Martin's conduct taken in context of the project represented wilful or deliberate behaviour which was inconsistent with the continuation of the contract of employment and thus the sanction of summary dismissal was an appropriate one.

Was the Applicant notified of the valid reason?

[21] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,⁵ and in explicit⁶ and plain and clear terms.⁷

[22] Mr Martin was not notified of the reason prior to his dismissal.

Was the Applicant given an opportunity to respond to any valid reason related to their capacity or conduct?

[23] Mr Martin was not given an opportunity to respond. However based on his evidence at the hearing there was nothing he put that explained his conduct, nor was any remorse or contrition shown.

Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal?

[24] This is a neutral consideration in the circumstances.

Was the Applicant warned about unsatisfactory performance before the dismissal?

[25] As the dismissal did not relate to unsatisfactory performance, this factor is not relevant to the present circumstances.

To what degree would the size of the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?

[26] Green VIC is a large business, its size does not appear to have impacted on the procedures followed to effect the dismissal.

To what degree would the absence of dedicated human resource management specialists or expertise in the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?

[27] Green VIC does not appear to have dedicated human resources specialists, but accessed external advice.

What other matters are relevant?

[28] Section 387(h) of the Act requires the Commission to take into account any other matters that the Commission considers relevant. There are no other relevant factors in this matter.

Is the Commission satisfied that the dismissal of the Applicant was harsh, unjust or unreasonable?

[29] I have made findings in relation to each matter specified in s.387 of the Act as are relevant.

[30] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.⁸

[31] Having considered each of the matters specified in s.387 of the Act, I am satisfied that the dismissal of the Applicant was not harsh, unjust or unreasonable.

Conclusion

[32] Not being satisfied that the dismissal was harsh, unjust or unreasonable, I am not satisfied that the Applicant was unfairly dismissed within the meaning of s.385 of the Act. The Applicant's application is therefore dismissed. An Order⁹ reflecting this decision will be issued.



COMMISSIONER

Appearances:

E. Barnes-Whelan of Counsel on behalf of the Applicant.

P. Wheelahan of Counsel on behalf of the Respondent.

Hearing details:

2019.

Adelaide:

December 3.

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<PR714833>

¹ Exhibit A1.

² Exhibit R1.

³ Exhibit R2.

⁴ Exhibit A2.

⁵ *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.

⁶ *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

⁷ *Ibid.*

⁸ *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* PR915674 (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]–[7].

⁹ PR714834.