



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Benjamin Stebbeings

v

Discovery Holiday Parks Pty Ltd
(U2019/2956)

DEPUTY PRESIDENT BARCLAY

HOBART, 24 DECEMBER 2019

Application for an unfair dismissal remedy.

[1] This is an Application for an unfair dismissal remedy arising out of the termination of the Applicants employment with the Respondent on 25 February 2019.

[2] The parties are agreed that the Applicant does not seek reinstatement and that if I am to find that the Applicants dismissal was unfair that he is entitled to 16 weeks' pay by way of compensation.

Background

[3] The Respondent operates Holiday Parks including holiday parks in Tasmania. The Applicant was the manager of the Respondents holiday park at Hadspen in Northern Tasmania. He had been so employed from 22 November 2011 until his termination on 25 February 2019, a period of some 7 years and 3 months.

[4] Not long after the Applicant started as manager issues arose with neighbours, the Radley's. They made allegations that the Applicant was involved with illegal drugs and dealing with organised crime.

[5] Mr Simon Chadwick, the Applicants supervisor was notified of the allegations by the Applicant and spoke to the Radley's. Mr Chadwick formed the view that the Radley's were not really credible witnesses.¹ From that time the Applicant had little or nothing to do with the Radley's.

[6] As part of the Applicants employment conditions he was provided with accommodation at the holiday park. In January 2016 Tasmania Police together with Commonwealth border force officials attended the accommodation so provided for the purposes of undertaking a search regarding the purchase by the Applicant of a gun stock. The gun stock was a prohibited item. The Applicant was charged and convicted of an offence and fined \$600.00.

¹ Transcript PN 593 - 594

[7] During the search members of Tasmania Police located a liquid described by the Applicant as cannabis oil which he said he took for pain due to a neck injury suffered as a result of a motorcycle accident. The Applicant then disclosed to the police that he was growing cannabis plants to manufacture the cannabis oil. He accompanied the police to an address where a further search was carried out and 8 cannabis plants were located.

[8] The Applicant was subsequently charged and made many (up to 45) appearances in court where matters were dealt with or adjourned.

[9] Throughout this time Mr Chadwick was aware that the Applicant was appearing in court. He said however that he did not understand that the Applicant had been charged. It is clear however that the Applicant was charged in 2016 with 1 count of possessing a controlled plant or its products (minor offence) and one count of dealing with proceeds of crime.² The evidence did not make it clear what the second charge was about.

[10] In 2017 the Applicant was charged with 1 count of intentionally importing prohibited goods. This must be the gun stock for which the Applicant was fined \$600.00. It is to be inferred that the matter was not treated as particularly serious by the court as the maximum penalty was a period of imprisonment for 10 years or a fine of up to \$397,500.00 or both.

[11] By 2019 therefore the 2016 charges were outstanding.

Matters leading to the dismissal

[12] In January and February 2019 2 complaints were received by the Respondent alleging that the Applicant was involved in illegal activities involving drugs. One complaint was anonymous and the other made by the Ridley's.

[13] The Respondent undertook some investigations. The investigations revealed that the Applicant was appearing in the Supreme Court on the 2016 charges referred to above. This led to a show cause process. In the first instance Ms Watson (the Respondents HR Business Partner) and Ms Kelly (the Respondents Tasmanian state manager) telephoned the Applicant to advise that the show cause process would take place.

[14] Thereafter the Applicant spoke to Mr Wilckens the Respondents CEO. During this phone call the Applicant told Mr Wilckens of the police raid in 2016 and the subsequent charges. He did not however tell him of the conviction for importing the gun stock.

[15] Thereafter a show cause letter was sent to the Applicant. The show cause letter contained 9 "allegations" as follows:

- "1. On the 29th January 2019 the people and culture team received an anonymous voicemail message from a man claiming that you are dealing drugs in the park. The message played "my daughter stayed in your caravan park at Hadspen in Tasmania and

² Exhibit R3.5

your manager was selling her cocaine. Obviously, you guys condone this. You have a drug dealer in Hadspen -get rid of him!"

2. On the 13th February 2019 a lady by the name of Felicity called Head Office wanting to speak with the CEO Grant Wilkens about Benjamin Stebbeings.

3. The Regional Operations Manager, Jane Kelly returned Felicity's call and was told by Felicity that "Ben Stebbeings is involved in criminal activity and the dealing and manufacture of illicit drugs". She further stated that Ben Stebbeings was appearing in the Tasmania Supreme Court on Wednesday 20th February 2019.

4. Given the seriousness of the allegations an internal investigation occurred.

5. The Supreme Court of Tasmania made public a daily court list for the 20th February 2019.

6. You were listed (Benjamin Alexander Stebbeings) under the criminal jurisdiction for Bail Consent. (per attached).

7. At no point in time have you ever communicated your involvement in any civil or criminal matters to the Company.

8. The company is concerned that you have engaged in illegal activity on company premises (as you live in park and are provided with accommodation as part of your employment package)

9. Given the public nature of proceedings being brought against you it is alleged that you have brought Discovery Parks into disrepute.³

[16] It is to be noted that in fact only allegations 7 and 8 involve conduct on the part of the Applicant. The other matters are really a recitation of the history of the matter leading up to the issuing of the show cause letter.

[17] The Applicant was advised to respond to the allegations in writing by 25 February 2019. The Applicant then took advice from the lawyer who was representing him in the criminal matters. That advice was not to disclose anything about the charges and to tell his employer that they could contact him (the lawyer) for any further details.

[18] The Applicant responded to the show cause letter by email in which he essentially denied any wrong doing. He also suggested that sitting down and discussing the matter would resolve any issues for the Respondent.

[19] Subsequently a teleconference was held between the Applicant, Ms Watson and Ms Kelly. At his meeting the Applicant relied on his lawyer's advice and did not disclose any further information about the charges. He however advised that his lawyer was happy to talk to them. The Applicant otherwise added very little to his written response.

³ Show course letter contained 9 allegations

[20] There after the Respondent considered matters and proceeded to terminate the Applicants employment.

[21] The termination letter advised that the respondent decided that allegations 5 to 9 were substantiated.

The issues for determination

[22] At the hearing when evidence was taken the Applicants representative Mr Durkin, who appeared by permission, advised that the live issue was whether there was a valid reason and general harshness, unjustice or unreasonableness.⁴

[23] However by the time submissions were taken Mr Durkin relied on s. 387(c) of the *Fair Work Act 2009* in that he complained that the show cause letter was insufficiently particularised so as to provide the Applicant with a proper opportunity to respond to the allegations relating to his conduct.

Condiseration

[24] The Respondent summarises its position on valid reason as follows:

“36. The Respondent submits that there was a valid reason for terminating the Applicant's employment, namely:

- (a) the Applicant's conduct in failing to disclose his criminal charges and acting in a dishonest manner by deliberately deceiving the Respondent was a breach of
the Respondent's Code of Conduct and his employment agreement;
- (b) the Applicant did not disclose, as part of the show cause process, or at any stage during his employment, that he had been convicted of the criminal offence of importation of a prohibited item and that this constitutes a breach of the Respondent's Code of Conduct;
- (c) the Applicant failed to participate in the interview conducted as part of the show cause process;
- (d) the Applicant's conduct resulted in a breach of the duty of fidelity owed by the Applicant and caused a complete loss of trust and confidence; and
- (e) the Applicant's conduct caused Discovery Parks public embarrassment and brought its reputation into disrepute.

37. These reasons can broadly be broken down into two categories:

- (a) misconduct; and

⁴ Transcript PN 72 -75

(b) damage to the Respondent's interests and reputation.”⁵

[25] An issue said to be central to the matter is whether the Applicant told Mr Chadwick that he had been charged with criminal offences for which he was appearing in court. It is clear that Mr Chadwick knew that the Applicant was regularly appearing in court. He gave evidence that he did not understand the process in respect to criminal matters.

[26] He said of the issue:

“So you were being informed of matters that were before the court?---I suppose, if that's the way you want to put it. My understanding was, there'd been no charges laid and I did say to Ben, as far as I see, unless you've been charged with anything, you don't have to tell anybody. And then he was going to court, the matter had been - I wasn't aware he'd been charged when he was going to court.

I put it to you - - -

THE DEPUTY PRESIDENT: Didn't you think it was unusual that somebody would be going to court if they hadn't been charged?---Not really. I - to be honest with you, because it dragged on for so long I didn't - it sort of dropped off my radar a bit. No, I'm sorry, sir, I didn't.”⁶

“Okay. So under point 21 of your statement you say, "Ben never informed me that he'd been charged with anything"?---Yes.

You still maintain - - -?---Yes, I do not recall Ben telling me he'd been charged with anything.

So your curiosity wasn't taken up with the fact that he was being bailed and you didn't enquire any further?---I didn't think it - obviously there's a difference between bailed and adjourned, it means something different. I thought he was going to court and no charges had been laid against Ben and the matter had just been adjourned, whether you were getting more evidence or something was going on, I don't know.”⁷

[27] The Applicant maintained that he told Mr Chadwick he had been charged with offences. The evidence suggests that the Applicant advised Mr Chadwick each time he appeared in court. There appears to be approximately 45 phone calls between Mr Chadwick and the Applicant during the relevant time. The Applicant was adamant that he advised Mr Chadwick of the charges. Mr Chadwick, due to passage of time and the matter dragging on put it that his best recollection was that he was not told.

[28] On balance I find that the Applicant did tell Mr Chadwick he had been charged with offences. I am unable to find whether he specified what those offences were. I prefer the evidence of the Applicant in this regard. He was certain that he told Mr Chadwick about the

⁵ Respondents written closing submissions paragraph 36 and 37

⁶ Transcript PN586 – PN588

⁷ Transcript PN 611 - 613

charges. Mr Chadwick was not as certain that he was not told. I find it unusual that Mr Chadwick would not have made enquiries of the Applicant about why the matter was dragging on and what was happening if he had no understanding that charges were being dealt with. While Mr Chadwick is not legally trained, I also find it unusual that he would have no understanding that one does not attend court unless one has been charged with an offence. The Applicant was not shaken in cross examination.

[29] Whilst it is not necessary for me to consider this issue given my findings on disclosure of the charges, the Respondent says that failing to advise the Respondent of the nature of the charges was a breach of the Code of Conduct. I have found that he did. It is consistent with telling Mr Chadwick each time he went to court. However, I have reviewed the Code of Conduct. Relevantly the Code provides that an employee must be beyond reproach in matters of trust, honesty and confidentiality. Misconduct and unacceptable behaviour includes breaches of relevant laws and regulations.

[30] The Code also indicates that activities which adversely affect the Respondents reputation or could cause public embarrassment or bring the Respondent into disrepute are also behaviours which will not be tolerated.

[31] The Code does not require disclosure of charges. It impliedly requires disclosure of breaches of relevant laws and regulations. A charge is not a breach. A conviction is.

[32] Here the Applicant did not hide the fact that he was involved with the police. He told his supervisor that he was regularly appearing in court. I note Mr Chadwick did not raise any concerns notwithstanding the matter had been dragging on a long time. He also told Mr Chadwick of the gun stock incident although he may not have told him of the conviction.

[33] It is noted that the reasons for termination were that the Supreme Court made a daily list, that the Applicant was listed on it, that the Applicant had not communicated his involvement in criminal matters, that the Applicant was engaged in illegal activity on company premises and that the applicant had brought the Respondent into disrepute.

[34] It is noted the termination letter did not identify any analysis of evidence or the basis of the conclusions that these allegations were made out.

[35] It is to be noted of course that allegations 5 and 6 (the Supreme Court list matters) are not matters which were the responsibility of the Applicant. They were not allegations of conduct on the part of the Applicant. The Applicant had in fact disclosed his involvement in criminal matters. He told Mr Chadwick of the police raids and that he was appearing in court. The absence of particularisation means that the true complaint that the Applicant should have told the respondent of the charges was not properly raised in the allegation letter nor properly dealt with in the termination letter.

[36] The illegal activity about which the Respondent was concerned was not adequately explained in the allegation letter nor dealt with in the termination letter. The evidence of Mr Wilckens discloses that the concern was that the Applicant was consuming cannabis on the Respondents property. The Respondent submits that it was proper for the Respondent to infer that the Applicant was using cannabis on the Respondents premises. The allegations made by the Ridley's were that the Applicant was manufacturing and selling illegal drugs. There was

no allegation of use. Indeed the evidence of use emanates from the incident in 2016, some 3 years before.

[37] I do not accept that it was open to draw the inference that the Applicant was using illegal drugs on the Respondents premises. The Applicant was not charged with using a prohibited substance even though cannabis oil was found on his premises in 2016. It does not seem he was charged in respect to the cannabis oil. The offences disclosed in the Hearing History exhibit⁸ may well relate to the 8 plants.

[38] However there is something to the allegation found proved that the Applicants conduct in being charged brought the Respondent into disrepute. It is to be noted however that the allegation from Ms Ridley was of drug trafficking, an allegation found not to be substantiated.

[39] In considering this aspect of the matter I also take account of Mr Chadwick's opinion that the Ridley's were prone to exaggeration and of little credit. I also note there were no other notifications (save the anonymous allegation made at about the same time) which might suggest that the public generally were aware that the Applicant was linked to the Respondent and was the same man appearing in court.

[40] I note that there is an issue whether the Applicant advised Mr Chadwick of the fact of the conviction for the gun stock importation. The Applicant asserts he did. Mr Chadwick doubts that he was told.

[41] I find it is not necessary to decide that issue. Even if the failure to advise of the conviction was a breach of the Code termination for that matter would be harsh and unreasonable.

[42] The circumstances of the offending were relatively minor. This is reflected by the offending (ordering the item on the internet) and the small penalty imposed. Further there is no suggestion that anyone was aware of that offending and it could not be reasonably argued that it could lead to reputational damage to the Respondent.

[43] In respect to the issue of charges and the appearances in court, on balance taking account of the whole of the evidence I do not find there was a valid reason for terminating the Applicants employment on the basis that his conduct amounted to a breach of the Code of Conduct. He advised his employer of the 2016 incident and that he was charged with offences (although perhaps not the specific charges). He kept his employer apprised of his appearances in court. Whilst it may have been prudent to advise his employer of the nature of the charges, the Code of Conduct did not require it. It is also to be noted that as at the time of hearing the Applicant had not been convicted of any of the offences and maintained his innocence.

[44] I am left wondering whether Mr Chadwick should have told his employer of the charges and the appearances. It seems that he failed to tell his employer. Certainly Mr Wilckens. Ms Kelly and Ms Watson knew nothing about the charges or court appearance when Mr Chadwick did. That he may not have told his employer could be explained by the

⁸ Exhibit R 3.5

evidence of Ms Kelly where she noted that, during the investigation Mr Chadwick told her that the Applicant:

“...was appearing in court and that Ben was going to let him know the outcome of that”⁹.

It is open to find that Mr Chadwick as the Applicants supervisor was content with the situation that he was told when the Applicant appeared in court and would be told the outcome. Presumably Mr Chadwick would then have notified his employer of the outcome of the charges. The fact that Mr Chadwick has not told kept head office apprised of the situation does not fall at the feet of the Applicant.

[45] Again, even if I am wrong that the Applicant told his employer of the charges I regard the termination as harsh. The Applicant did not try to hide his involvement with the police, nor that he was appearing in court regularly. Whilst he may have failed to tell the Respondent of the nature of the charges it is notable that Mr Chadwick made no inquiries.

[46] Further the Applicant was a good employee. Mr Wilckens noted that the Applicant was “successful” hand been paid his bonuses and was trusted. He had been employed for over 7 years without any disciplinary matters. There was also no suggestion of any inappropriate conduct between 2016 and 2019 relating to police matters or indeed any other matters. The conduct which led to the police could be described as an aberration. Any reputational damage was limited.

[47] A sanction less than immediate termination of employment was appropriate.

Remedy

[48] As referred to above the remedy is agreed. I order that the Respondent pay the Applicant by way of compensation the equivalent to 16 weeks wages as agreed between the parties.



DEPUTY PRESIDENT

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⁹ PN 839

