DECISION

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

James Folwell
v
Primeline Contracting Pty Ltd T/A Hi-Trans Express
(U2019/12163)

COMMISSIONER CAMBRIDGE SYDNEY, 13 MARCH 2020

Unfair dismissal - dismissal for misconduct involving exceeding road speed limit - prior warnings for speeding - initial advice of dismissal conveyed by telephone - dismissal for valid reason but with defective procedure - on balance dismissal harsh - no remedy provided.

[1] This matter involves an application for unfair dismissal remedy made pursuant to section 394 of the *Fair Work Act 2009* (the Act). The application was lodged on 31 October 2019 and it was made by *James Folwell* (the applicant). The respondent employer is *Primeline Contracting Pty Ltd T/A Hi-Trans Express* (the employer or Hi-Trans).

[2] The application indicated that the date that the applicant's dismissal took effect was 16 October 2019. Consequently, the application was made within the 21 day time limit prescribed by subsection 394 (2) of the Act.

[3] Conciliation of the matter was conducted on 26 November 2019. However, the matter was not resolved, and it has proceeded to arbitration before the Fair Work Commission (the Commission) in a Hearing conducted at Sydney on 14 February 2020.

[4] At the Hearing, the applicant was represented by Mr P Battese who is the *Transport Workers' Union of Australia* (TWU) delegate for Hi-Trans. Although the application document indicated that the TWU represented the applicant, the Commission received correspondence dated 19 December 2019, from Mr Adam Grumley, Legal Officer of the TWU which stated inter alia, "*Mr Battesse* [sic] *will not be appearing as a representative of the TWU and has indicated that he will be self representing Jim Folwell*." Consequently, Mr Battese was considered to be an unpaid representative of the applicant, and he provided evidence as a witness, and then he called a further five witnesses including the applicant, to provide evidence in support of the unfair dismissal claim.

[5] Hi-Trans was represented by Mr D Murray from *Australian Industry Group* (AIG) who appeared together with Ms J Lam. Mr Murray introduced evidence from a total of four witnesses who were called on behalf of the employer, two of whom provided their evidence via video link from Adelaide.

Background

[6] The applicant commenced work with the employer in February 2015. The applicant was employed as a Line Haul Driver. The applicant performed long-distance truck driving duties associated with the operation of heavy combination vehicles comprising a prime mover and two trailers which are referred to as "B-doubles".

[7] The employer conducts a national road freight business with its Head Office located in Adelaide, and it operates branches in Adelaide, Broken Hill, Brisbane, Sydney and Melbourne and has agents in Perth, Darwin and Hobart. The applicant was engaged in work from the employer's Sydney premises. The employer has in excess of 192 employees.

[8] The prime mover vehicles operated by the employer are fitted with speed limiters which prevent the vehicles from accelerating above speeds of 100 kilometres per hour (kph). However, the vehicles can exceed the 100 kph limit when travelling downhill if the driver does not operate one or both of the braking systems so as to reduce the speed of the vehicle.

[9] The prime movers are also fitted with a global positioning system (GPS), and an engine control module (ECM) monitoring system which independently track the movement of the vehicle and provide location and speed data to the employer's Adelaide headquarters. These vehicle tracking systems record the location and speed of the vehicle and have specific alerts when the vehicle speed exceeds established limits. Consequently, the GPS and ECM vehicle tracking systems alert the employer's headquarters in any instance where the vehicle speed exceeds established limits such as initially, 106 kph, and a further alert is triggered at 116 kph.

[10] In March 2018, the applicant was issued a first formal warning in respect to excessive speed whereby the GPS and ECM monitoring systems recorded that the applicant had driven a vehicle at up to 116 kph near Berrima. In October 2018, the applicant was issued a second formal warning in respect to excessive speed whereby the GPS and ECM monitoring systems recorded that the applicant had driven a vehicle at up to 116 kph near Coolac.

[11] On the morning of 9 October 2019, the employer's National Linehaul Manager, Mr Craig Thomas, received an email alert that indicated that the GPS and ECM monitoring systems had recorded that the prime mover that the applicant was driving had reached a speed of 116 kph near Rainbow Flat. Shortly after receiving this email alert, Mr Thomas who works from the Adelaide headquarters, telephoned the applicant and asked him if he was aware that he had driven overspeed at 116 kph earlier that morning. The applicant said that although he thought that he may have gone overspeed he did not believe that he had travelled at 116 kph. Mr Thomas advised the applicant that he was immediately suspended from duty whilst an investigation would be conducted into the overspeed event. Further, the applicant was advised that, as part of the employer's investigation, he would be required to attend a telephone conference interview which would be held at 10:30 am on 11 October 2019, and the applicant could bring a support person to the interview.

[12] Shortly after 10:30 am on 11 October 2019, the applicant, who was accompanied by his support person Mr Battese, participated from Sydney in a telephone conference interview with Mr Thomas who was in the employer's Adelaide Head Office. During this interview, Mr Thomas made inquiries about the applicant's knowledge of his overspeed on the morning of 9 October 2019 which, according to the GPS and ECM monitoring data, showed that at about 3:45 am the prime mover that was being driven by the applicant had reached a speed of 116

kph for a period of about one minute. The applicant did not agree that he had reached a speed of 116 kph.

[13] The applicant and Mr Battese provided responses to Mr Thomas which offered various explanations for the overspeed incident and which included that; the applicant had disturbed sleep that created a fatigue problem; the applicant was driving an unfamiliar truck; the applicant was experiencing problems with his personal GPS system; and, that the speedometer in the truck was hard to see because of the applicant's driving position. Further, the applicant also told Mr Thomas that he had noticed that he had reached a speed of 103 kph and that the brakes on the truck were not operating with sufficient efficiency so as to slow the vehicle. In addition, as part of the defence for the applicant that was advanced by Mr Battese, he told Mr Thomas that the applicant had a substantial length of service with a good driving record for over five years.

[14] Mr Thomas concluded the interview by advising the applicant that he would remain suspended from duty whilst further investigation and consideration of the matter was undertaken by the employer. Mr Thomas subsequently conducted a further detailed examination of the GPS and ECM monitoring data which confirmed the overspeed incident. Mr Thomas then provided his direct manager, Mr Carl Hamilton, with the outcome of his investigation into the applicant's overspeed incident of 9 October 2019.

[15] Mr Hamilton had overheard the teleconference interview with the applicant on 11 October 2019, although he did not participate in the discussion. Mr Hamilton further considered the results that had emerged from Mr Thomas' investigation into the applicant's overspeed incident of 9 October and following discussions with the employer's General Manager of People, Safety and Culture, Ms Linda Marrone, he made the decision to dismiss the applicant.

[16] On the evening of 15 October 2019, Mr Hamilton telephoned the applicant and told him that his services were no longer required due to the overspeed incident. Mr Hamilton signed a dismissal letter dated 15 October 2019, which had been prepared by Ms Marrone and which was subsequently forwarded to the applicant. The letter of dismissal confirmed the earlier verbal advice provided by Mr Hamilton, and it referred to the overspeed incident of 9 October 2019 and the two previous overspeed incidents in March and October 2018. The letter of dismissal also advised that the applicant would be paid three weeks remuneration in lieu of notice of his dismissal.

[17] The applicant provided no evidence about his post dismissal activities regarding the pursuit of alternative employment and any other remuneration that he may have obtained since his dismissal. Mr Battese made submissions which advised that the applicant had made "*a lot of job applications that have been unsuccessful*" and as the applicant had no trade or tertiary qualifications, Mr Battese said finding other employment had been "*incredibly difficult*."

The Case for the Applicant

[18] The applicant was represented by Mr Battese. During the Hearing Mr Battese made oral submissions in addition to documentary material that he had filed on behalf of the applicant.

[19] The oral submissions made by Mr Battese were somewhat surprising as they contradicted significant aspects of the filed written submissions. Mr Battese commenced his oral submissions by stating: "*This whole matter, from the start, has never been about denial, by Mr Folwell.*" However, the written outline of submissions filed by Mr Battese on 17 January 2020 stated, inter alia: "*It therefore must be concluded that the termination of the Applicant's employment for the reasons alleged by the Respondent are capricious, fanciful and spiteful.*"

[20] Allowing for generous accommodation in respect to Mr Battese's inexperience as an advocate, it has nevertheless been very difficult to reconcile the conflicting positions that were advanced on behalf of the applicant regarding any challenge to the actual conduct of the applicant in respect of the overspeed incident, and any assertion as to whether that conduct represented valid reason for dismissal. It appeared that despite what was initially included in the written submissions filed on behalf of the applicant, there was ultimately an acceptance that the conduct of the applicant in respect of the overspeed incident on 9 October 2019, as was found by the employer, had occurred and was not denied.

[21] The oral submissions made by Mr Battese indicated that initially he and the applicant did not agree that the overspeed incident involved the applicant driving at 116 kph. Subsequently however any factual challenge to the conduct of the applicant during the overspeed incident of 9 October 2019 has been abandoned. Instead, the oral submissions made by Mr Battese sought to introduce what might be considered to be factors that should mitigate against any finding that the (now) unchallenged conduct of the applicant represented misconduct that would provide valid reason for dismissal.

[22] The mitigating factors that were initially mentioned in the written submissions made on behalf of the applicant were not all advanced or maintained by Mr Battese during the Hearing. For instance, the suggestion that the applicant was unfamiliar with the particular prime mover vehicle and that the vehicle did not have a means to warn of excessive speeding, were matters that escaped further mention in the oral submissions made by Mr Battese. Instead, Mr Battese summarised his submissions by stating:

> "*Mr Folwell has had a safe trip. He has tried to be the best he could be that proves that. We have got a one-minute part of a whole trip that he's obviously had an over-speed, and as I said, when we talk about the matter of fatigue, the brakes, not seeing the speedo, it's all accumulated in that over-speed.*"

[23] Mr Battese made further submissions which asserted that there were various procedural deficiencies including that the applicant was not given an opportunity to respond and that the applicant had been informed of his dismissal via telephone call. In addition, Mr Battese asserted that the applicant had an unblemished employment history in that he had retained all his full drivers licence points. Further, Mr Battese made submissions which asserted that the treatment of the applicant was inconsistent with the treatment of other employees and that the dismissal of the applicant was a disproportionate penalty in the circumstances.

[24] The submissions that were made on behalf of the applicant also asserted that the Commission should find that the dismissal of the applicant was harsh, unjust and unreasonable and that the primary remedy of reinstatement with an Order for lost pay should be made. Alternatively, it was submitted that a remedy of monetary compensation of the

maximum statutory amount should be provided as remedy for the alleged unfair dismissal of the applicant.

The Case for the Employer

[25] The employer was represented by Mr Murray from AIG. Mr Murray made oral submissions during the Hearing in addition to a written outline of submissions document that was filed on 3 February 2020.

[26] The oral submissions made by Mr Murray commenced by noting that the factual contest regarding the conduct of the applicant in respect of the overspeed incident and the whole argument about the accuracy of the GPS and ECM monitoring systems had been abandoned. Mr Murray made submissions which stressed the seriousness of the overspeed incident which he said involved a substantial overspeed in a vehicle weighing some 60 odd tonnes travelling on a public road. Mr Murray stressed that the applicant had two previous warnings for exactly the same issue.

[27] Mr Murray made further submissions in which he rejected all of the alleged mitigating factors which the applicant had attempted to rely upon as explanation for the overspeed incident. Mr Murray submitted that the suggestion that the applicant was unable to control the speed of the vehicle because of some alleged inefficiency with the braking system was untenable. Mr Murray stated that if there were problems with the braking system there would have been other occasions during the recorded trip undertaken by the applicant where the vehicle had exceeded the set speed limits. Mr Murray stated: "*So it's frankly untenable, and really a lie to say he was unable to control the speed at Rainbow Flat when he was able to control it everywhere else*."

[28] In further submissions, Mr Murray asserted that the other "excuses" advanced by the applicant were not credible. In particular, Mr Murray stated that the excuse that the applicant was too large a fellow to see the speedometer should be rejected because it was perfectly feasible for him to see the speedometer by merely moving his head.

[29] Mr Murray further submitted that any suggestion that the applicant had not been provided with procedural fairness should also be rejected. Mr Murray submitted that the applicant had been given ample opportunity during the meeting of 11 October to advance any explanation or defence in response to the unequivocal allegation put to him about his over speeding on the morning of 9 October 2019. Mr Murray submitted that all of the applicant's answers, no matter how fanciful, had been heard and considered by the employer.

[30] The submissions made by Mr Murray also stressed that the applicant had two previous warnings about overspeed misconduct. Mr Murray rejected any suggestion that there was any doubt or question about the two prior warnings given to the applicant as the evidence of Mr Thomas about these warnings was not challenged in any cross examination. Mr Murray stressed that the conduct of the applicant was dangerous, and it was clear that the employer had established that the applicant was driving heavy vehicles in a way that was negligent and unlawful.

[31] Mr Murray summarised his submissions by asserting that there was valid reason for the dismissal of the applicant which involved his serious misconduct despite repeated warnings. Further, Mr Murray submitted that the applicant had been dismissed following a

fair process and that he was informed of his termination by way of the usual means by which communications between the employer's headquarters in Adelaide and the Sydney premises were conducted. Mr Murray submitted that the dismissal of the applicant was neither harsh, unjust or unreasonable particularly in light of the gravity of the overspeed misconduct in the context of the applicant's track record. Mr Murray urged that the Commission should dismiss the application for unfair dismissal remedy accordingly.

Consideration

[32] Section 385 of the Act stipulates that the Commission must be satisfied that four cumulative elements are met in order to establish an unfair dismissal. These elements can be identified in s. 385 which is in the following terms:

> *"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."*

[33] In this case, there was no dispute that the matter was confined to a determination of that element contained in subsection 385 (b) of the Act, specifically whether the dismissal of the applicant was harsh, unjust or unreasonable.

[34] Section 387 of the Act contains criteria that the Commission must take into account in any determination of whether a dismissal is harsh, unjust or unreasonable. These criteria are stipulated as:

> *"(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and*
>
> *(b) whether the person was notified of that reason; and*
>
> *(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and*
>
> *(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and*
>
> *(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and*
>
> *(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and*

(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(h) any other matters that the FWC considers relevant."

S. 387 (a) - Valid Reason for the Dismissal Related to Capacity or Conduct

[35] In this case the applicant was dismissed as a direct consequence of his misconduct involving the overspeed incident that occurred at approximately 3:45 am on 9 October 2019. Although the actual misconduct of the applicant was initially disputed, subsequently any challenge to the actual overspeed incident and the applicant's misconduct, has been abandoned.

[36] The case advanced on behalf of the applicant has sought to introduce alleged mitigating factors that might provide some explanation for the misconduct of the applicant. The various factors that were introduced by and on behalf of the applicant as some form of explanation or mitigation in respect of the overspeed incident, have unfortunately, operated only to discredit the applicant and his representative.

[37] The various unfounded, spurious and unlikely propositions that were advanced by and on behalf of the applicant as some explanation or defence for his overspeed misconduct have only served to provide additional foundation for an understandable but very regrettable loss of trust and confidence in the applicant. There was no factual basis for the suggestions that the applicant was driving a vehicle that he was unfamiliar with, or that the vehicle did not have a device to warn of excessive speeding (albeit not an alarm), or that there was an issue with the brakes of the vehicle such that it would have contributed to the overspeed incident.

[38] Further, the applicant would only need to move his head to one side to see the speedometer if the radial arm of the steering wheel was blocking his direct vision. More alarmingly, the applicant had failed to log into the GPS system that was installed in the truck. The installed GPS system, once properly activated with the applicant logging in, would have provided an initial overspeed message at 106 kph, followed by a further overspeed message at 116 kph. In addition, the failure of the applicant to log into the installed GPS system has serious ramifications for potential avoidance of mandatory monitoring of heavy vehicle driver fatigue. The failure to log into the GPS system of itself, would be likely to represent sound, well-founded and defensible reason for the dismissal of the applicant.

[39] Upon careful contemplation of all of the evidence that was presented in this case, the misconduct of the applicant involving the overspeed incident of 9 October 2019, and as was found by the employer to have represented a critical infringement and gross breach of safety, has been established. The factors that were asserted to provide mitigation or explanation for the misconduct of the applicant either had no basis in fact or were plainly not sustainable. Therefore, there was valid reason for the dismissal of the applicant. The finding of misconduct made by the employer, has established sound, well-founded and defensible reason for the dismissal of the applicant.

S. 387 (b) - Notification of Reason for Dismissal

[40] The employer provided written notification of the applicant's dismissal in a termination of employment letter dated 15 October 2019. This letter represented documentary confirmation of the verbal advice of dismissal given by Mr Hamilton when he telephoned the applicant on the evening of 15 October 2019.

[41] Advice of dismissal should not be conveyed by telephone, text message or other electronic communication. Unless there is some genuine apprehension of physical violence or geographical impediment, the message of dismissal should be conveyed face to face. To do otherwise is unnecessarily callous. Even in circumstances where telephone, text message or other electronic communications are ordinarily used, the advice of termination of employment is a matter of such significance that basic human dignity requires that dismissal be conveyed personally with arrangements for the presence of a support person and provision of documentary confirmation at the time of dismissal.

S. 387 (c) - Opportunity to Respond to any Reason Related to Capacity or Conduct

[42] The employer provided the applicant with an initial opportunity to respond to the allegation of the overspeed incident when it arranged for the telephone conference interview held on 11 October 2019. Although it was understandable that the employer would have been unimpressed by the spurious factors that were offered in defence by the applicant and his representative, it acted prudently and properly when it undertook a further investigation regarding the matters raised by and on behalf of the applicant.

[43] Once it had further investigated and carefully considered all of the matters relevant to the overspeed incident, the employer decided to dismiss the applicant. Mr Hamilton, after having consulted with Ms Marrone, made the decision to dismiss the applicant.

[44] Mr Hamilton acknowledged that "*…informing someone or dismissing someone is a big decision*."[1] However, Mr Hamilton's decision to invoke dismissal in the manner that he did meant; firstly, that the applicant was denied an opportunity to plead or otherwise show cause as to why the decision to dismiss should be reconsidered; and secondly, the applicant suffered the unnecessary indignity of being advised of the termination of his employment via telephone call.

[45] In this instance, no evidence has been provided which might have established some reasonable explanation or mitigation for the applicant's misconduct. However, the absence of due process is a factor that may establish that the dismissal was hash or unreasonable. The procedural defects in this instance must be balanced against all other factors, particularly the existence of valid reason for dismissal.

S. 387 (d) - Unreasonable Refusal to Allow a Support Person to Assist

[46] There was no unreasonable refusal by the employer to allow the applicant to have a support person present to assist during the discussions relating to the dismissal. The employer facilitated the attendance of Mr Battese during the telephone conference interview held on 11 October 2019.

S. 387 (e) - Warning about Unsatisfactory Performance

[47] There was broadly uncontested evidence of two formal written warnings provided to the applicant about misconduct relating to overspeed incidents in March and October 2018. Clearly, the employer had been prepared to provide the applicant with some leniency, but this generosity could not extend to a third, verified, speeding event.

S. 387 (f) - Size of Enterprise Likely to Impact on Procedures

[48] The size of the employer's operation would not have been likely to have an impact on procedures surrounding the dismissal of the applicant.

S. 387 (g) - Absence of Management Specialists or Expertise Likely to Impact on Procedures

[49] The employer had management specialists that provided assistance with procedures. However, unfortunately the process that was adopted and which involved telephone advice of dismissal in the absence of any show cause opportunity, represented significant procedural errors.

S. 387 (h) - Other Relevant Matters

[50] The case that was advanced on behalf of the applicant suggested inter alia, that the treatment of the applicant whereby he was dismissed for a third overspeed incident, was inconsistent with the treatment of other employees. However, there was no sound evidentiary foundation to support findings of inconsistency in the treatment of the applicant in any comparable circumstances. Circumstances where other employees may have committed driving offences in their own vehicles and outside of work time, simply do not represent comparable circumstances.

Conclusion

[51] In this case the applicant was dismissed for misconduct. The misconduct occurred early in the morning of 9 October 2019, when the applicant permitted the heavy vehicle that he was driving to exceed the speed limit and travel at a speed of 116 kph for a period of about a minute. The employer characterised this misconduct of the applicant as a critical infringement and gross breach of safety. In the context of two prior formal warnings about almost identical overspeed incidents, the misconduct of the applicant has been confirmed.

[52] Consequently, the employer dismissed the applicant for valid reason relating to the applicant's conduct. The employer correctly characterised the misconduct as a critical infringement and gross breach of safety.

[53] However, the applicant was advised of his dismissal by way of a telephone call and he was denied an opportunity to show cause or make other representations to plead for reconsideration of the decision to invoke a penalty of dismissal. Consequently, the dismissal of the applicant involved clear procedural deficiencies and these errors in procedure must be balanced against all other relevant factors.

[54] In this instance, particular regard has been made for the safety implications associated with the particular nature of the repeated misconduct of the applicant. Further, the spurious defence provided by and on behalf of the applicant has operated to compound the misconduct

associated with the overspeed incident. However, notwithstanding the valid reasons for dismissal, the unnecessarily callous and undignified manner in which the applicant was advised of his dismissal during a telephone call, has meant that a finding that the dismissal of the applicant was harsh has become inescapable.

[55] Consequently, the dismissal of the applicant was harsh. Therefore, the applicant has succeeded in establishing that his dismissal was unfair.

[56] The question of remedy for the applicant's unfair dismissal must be considered. Having regard to the particular circumstances of this case, and in accordance with subsection 390 (3) of the Act, the Commission is satisfied that reinstatement of the applicant would be inappropriate, and further, the Commission considers that an Order for payment of any compensation would not be appropriate in all the circumstances of the case. In any event, if the Commission was considering any Order for payment of compensation, the amount would be reduced to zero in accordance with subsection 392 (3) of the Act.

[57] Therefore, the application for unfair dismissal remedy has been established such that the dismissal of the applicant was unfair, but the Commission has decided to make no Order to provide for any remedy.

<u>COMMISSIONER</u>

Appearances:

Mr P Battese appeared for the applicant.

Mr D Murray of the Australian Industry Group appeared for the employer.

Hearing details:

2020.
Sydney:
February, 14.

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[1] Transcript @ PN1093.