DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Antony Gabrynowicz
v
G + Gracin
(U2019/13859)

COMMISSIONER PLATT ADELAIDE, 1 MAY 2020

Application for relief from unfair dismissal – Small Business – whether Small Business Fair Dismissal Code requirements met – was dismissal harsh, unjust or unreasonable – application granted – compensation awarded.

Summary

[1] Mr Antony Gabrynowicz has lodged an application pursuant to s.394 of the *Fair Work Act 2009* (the Act) seeking a remedy for an alleged unfair dismissal by his former employer, G + Gracin.

[2] Ms Rosanna Kulonja and Ms Chantal Cavallaro are the joint-proprietors of G + Gracin which is a Restaurant which trades as Panini Kitchen. It is not in dispute that G + Gracin is a small business employer within the meaning of s.23 of the Act.

[3] Prior to his dismissal, Mr Gabrynowicz was employed as a casual Chef since October 2015 and had not received any formal warnings about his performance. Mr Gabrynowicz had been the subject of some informal discussion about his work performance. Mr Gabrynowicz was dismissed on 2 December 2019 after he did not attend for work at 6.00am having slept through his alarm.

[4] Mr Gabrynowicz contends he was dismissed shortly after 7.00am. G + Gracin contends that Mr Gabrynowicz was dismissed at 1.50pm having not arrived at work by that time.

[5] I have found that:

- Mr Gabrynowicz is a person who is protected from unfair dismissal pursuant to s.382 of the Act;
- G + Gracin did not comply with the Small Business Fair Dismissal Code;
- The method in which the dismissal was effected was procedurally unfair; and
- Having considered the criteria in s.387 of the Act the dismissal was harsh.

[6] Applying the principles in *Sprigg v Paul's Licensed Festival Supermarket*[1] and taking into account Mr Gabrynowicz conduct, I have determined to award compensation in the amount of $988.20.

[7] My detailed reasons for this decision, which was delivered on transcript on 30 April 2020, follow.

[8] As neither party was represented, the proceedings were conducted by way of a Determinative Conference by telephone conference (due to the COVID-19 pandemic) on 30 April 2020.

[9] Mr Gabrynowicz submitted a statement (which included submissions)[2] and provided payslips which advised of his post dismissal earnings.[3] Mr Gabrynowicz also gave evidence.

[10] G + Gracin submitted an outline of submissions,[4] a statement[5] from Ms Chantel Cavallaro (Co-proprietor) a statement[6] of Ms Rosanna Kulonja (Co-proprietor), payslips of Mr Gabrynowicz,[7] a copy of a roster for the period which included the date of dismissal,[8] a copy of a termination letter dated 2 December 2019[9] and a copy of the Form F3 Employer Response which contained details of text messages between Ms Kulonja and Mr Gabrynowicz on 2 December 2019 and the timing of phone calls. Ms Kulonja and Ms Cavallaro gave evidence.

[11] As can be expected in statements prepared by self-represented parties, some of the material contained in the statements was hearsay or opinion evidence or more suited to submissions, I have attached appropriate weight to each category. In addition, some references were made to the confidential conciliation process - I have not had regard to this information.

[12] On 2 December 2019, Mr Gabrynowicz was rostered to commence work at 6.00am. He slept in and was sent a text message by Ms Kulonja at 6.38am. A telephone conversation was held at 7.08am. There is a dispute about what was said on that phone call. Mr Gabrynowicz contends Ms Kulonja said 'don't bother coming in' and this statement had the effect of dismissing him. Ms Kulonja contends she said 'leave it with me and I will get back to you' and sent a text message at 7.36am asking 'what time will you be in today'. Mr Gabrynowicz did not respond suggesting that he went back to sleep and was not aware of this message until he woke up that afternoon. At 1.50pm he advised Ms Kulonja that he would come past work after he collected his daughter from school. Mr Gabrynowicz contended that this was in order to collect his things as he had been dismissed.

[13] Shortly after 1.50pm, Ms Kulonja sent a text advising Mr Gabrynowicz that he was no longer required at G + Gracin. This was confirmed in an email sent at 2.26pm from Ms Kulonja and Ms Cavallaro.

[14] Other than a brief discussion at about 7.08am, there was no formal process where Mr Gabrynowicz was advised of the allegations, the prospect of dismissal, and invited to respond. Mr Gabrynowicz did not seek the involvement of a support person.

[15] G + Gracin contends that throughout Mr Gabrynowicz's employment it raised with him issues concerning his work performance including preparation of product costings and

retail prices, food ordering practices, the standard of hygiene in the kitchen and dry store, departing work before his tasks were completed and his general attitude.

[16] On one occasion Mr Gabrynowicz was advised that if he continued to over order meat that everyone will lose their jobs.

[17] Mr Gabrynowicz was given an opportunity at the hearing to respond to these matters. I observed that Mr Gabrynowicz would generally make a denial and then when pressed made some concessions as to his conduct whilst not agreeing with the totality of the conduct alleged. In submissions, Mr Gabrynowicz made a fantastic submission that he was a 'model employee' despite his evidence conceding to a range of performance issues.

[18] Ms Kulonja and Ms Cavallaro conceded that Mr Gabrynowicz was never advised that his ongoing employment was at risk owing to their concerns about his performance.

[19] I found that Ms Kulonja and Ms Cavallaro answered questions in a forthright manner, advising of facts prejudicial to their interests and making concessions when pressed on topics.

[20] Mr Gabrynowicz's version of the conversation at 7.08am on 2 December 2019 does not support it being characterised as a dismissal. Having considered the competing evidence, and answers given to probing questions, I have preferred the evidence of Ms Kulonja and Ms Cavallaro over Mr Gabrynowicz where it was in conflict and particularly in respect to the previous work performance allegations and the conversation at 7.08am on 2 December 2019.

[21] I find that Mr Gabrynowicz was not dismissed in his conversation with Ms Kulonja at around 7.08am on 2 December 2019.

[22] I accept the evidence that Mr Gabrynowicz's performance was less than required over a long period of time.

[23] It is unfortunate that G + Gracin did not raise their concerns in a manner which would be reasonably expected to warn Mr Gabrynowicz that his employment was in jeopardy. I accept that Mr Gabrynowicz has not slept in before.

[24] Whilst Mr Gabrynowicz was engaged as a casual employee, it was not disputed that his employment was regular and systematic. Mr Gabrynowicz contended that he was not a genuine casual employee, however, I do not have sufficient information to express a view on this topic. If Mr Gabrynowicz's employment is not correctly described as 'casual', he may have an entitlement to notice. Such a claim remains available to Mr Gabrynowicz.

[25] I find that Mr Gabrynowicz had been employed as a casual employee on a regular and systematic basis since October 2015 working on average 37.5 hours per week (as per his roster) and had a reasonable expectation of continuing employment by the employer.

[26] Mr Gabrynowicz's length of service exceeds the minimum employment period required provided by s.383 and s.384 of the Act.

[27] I find that Mr Gabrynowicz is a person protected from unfair dismissal pursuant to s.382 of the Act.

[28] Section 385 of the Act defines unfair dismissal, stating that:

> "385 What is an unfair dismissal
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> A person has been unfairly dismissed if the FWC is satisfied that:
>
> (a) the person has been dismissed; and
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> (b) the dismissal was harsh, unjust or unreasonable; and
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> (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."

[29] I am satisfied that Mr Gabrynowicz was dismissed and that it was not a case of genuine redundancy. I now consider compliance with the Small Business Fair Dismissal Code (Code).

[30] Section 388 of the Act states:

> "388 The Small Business Fair Dismissal Code
>
> The Minister may, by legislative instrument, declare a Small Business Fair Dismissal Code.
>
> (1) A person's dismissal was consistent with the Small Business Fair Dismissal Code if:
>
> (a) immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person's employer was a small business employer; and
>
> (b) the employer complied with the Small Business Fair Dismissal Code in relation to the dismissal."

[31] The Code as declared is set out as follows:

> "The Code
>
> Summary Dismissal
>
> It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of

theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.

Other Dismissal

In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job. The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement. The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.

Procedural Matters

In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity. A small business employer will be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to Fair Work Australia, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements."

[32] G + Gracin appropriately conceded that Mr Gabrynowicz's conduct did not fall within the definition of gross misconduct.

[33] I now consider the 'Other Dismissal' provisions of the Code. The evidence before me was that Mr Gabrynowicz was dismissed as a result of his unsatisfactory work performance. The key issue here is whether G + Gracin met its obligation to warn Mr Gabrynowicz '….that he …. risks being dismissed if there is no improvement.' The statement made to Mr Gabrynowicz that if he continued to over order meat that everyone will lose their jobs is not in my view a sufficient warning to meet this requirement. There was no other evidence of any warning in relation to performance.

[34] I find that the dismissal was inconsistent with the Code.

[35] I now consider if Mr Gabrynowicz's dismissal was harsh, unjust or unreasonable.

[36] Pursuant to s.387 of the Act, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

"(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."

Valid reason - s.387(a)

[37] Notwithstanding its formulation under a different legislative environment, I have adopted the definition of a valid reason set out by Northrop J in *Selvachandran v Peteron Plastics Pty Ltd*[10] which requires the reason for termination to be "sound, defensible or well founded."

[38] Mr Gabrynowicz did not attend for work in accordance with his obligation. Whilst a single short period of lateness will not normally provide a valid reason, in this case the Applicant did not attend for work for a lengthy period after he realised he had slept in. Having rejected his assertion that he thought he had been dismissed at 7.08am, it appears to me that Mr Gabrynowicz in going back to sleep took a cavalier attitude to his attendance at work. This represents a valid reason for his dismissal particularly when his important role in the small business is considered.

[39] The other work performance issues raised by G + Gracin, whilst not minor, were never escalated to the point where the discussion could be regarded as disciplinary in nature. The issues were not mentioned in the termination correspondence. In the circumstances I do not accept that they provided additional valid reasons for the dismissal. They are relevant to the consideration of how long the employment would have continued but for the dismissal.

Notification of valid reason - s.387(b)

[40] An employee protected from unfair dismissal must be advised of a valid reason for termination prior to the decision being made.[11]

[41] Mr Gabrynowicz was advised of his lateness on 2 December 2019. He was not advised that G + Gracin was considering dismissing him as a result. There was no additional communication prior to sending the dismissal text and email. He was not advised of previous issues in respect of his work performance which was a factor in the decision to dismiss. This factor weighs in favour of a finding that the dismissal was unfair.

Opportunity to respond - s.387(c)

[42] Mr Gabrynowicz was advised that he was late for work in a telephone call at 7.08am and a short discussion ensued. Mr Gabrynowicz was not invited to respond to the proposal that he would be dismissed prior to being advised of his dismissal by text message later in the day. This factor weighs in favour of a finding that the dismissal was unfair.

Unreasonable refusal to allow for a support person - s.387(d)

[43] No request for a support person was made noting that the circumstances did not facilitate the making of such a request. This is a neutral factor.

Warnings relative to unsatisfactory performance - s.387(e)

[44] Mr Gabrynowicz was not subject to any prior disciplinary process but had been spoken to about deficiencies in his work as they occurred. This factor weighs in favour of a finding that the dismissal was unfair.

Size of the employer's enterprise s.387(f)

[45] I have made allowances for the fact that G + Gracin was a small business and its proprietors were clearly not experienced in the performance management process.

Absence of dedicated human resources support - s.387(g)

[46] G + Gracin did not have access to dedicated human resources support.

Other matters considered relevant - s.387(h)

[47] There were no other matters that were relevant.

Was the dismissal unfair?

[48] The Explanatory Memorandum to the Act[12] explains the approach of the Commission in considering the elements of s.387:

> "FWA must consider all of the above factors in totality. It is intended that FWA will weigh up all the factors in coming to a decision about whether a dismissal was harsh, unjust or unreasonable and no factor alone will necessarily be determinative."

[49] In *Byrne and Frew v Australian Airlines Pty Ltd*,[13] the following observations made by McHugh and Gummow JJ are relevant to my conclusion:

> "It may be that the termination is harsh but not unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its

consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted."

[50] Having considered each of the factors detailed in s.387 of the Act, I have concluded that the dismissal of Mr Gabrynowicz was harsh.

Remedy

[51] The relevant provisions of Division 4 of Part 3-2 of the Act state:

"Division 4—Remedies for unfair dismissal

390 When the FWC may order remedy for unfair dismissal

(1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:

(a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and

(b) the person has been unfairly dismissed (see Division 3).

(2) the FWC may make the order only if the person has made an application under section 394.

(3) the FWC must not order the payment of compensation to the person unless:

(a) the FWC is satisfied that reinstatement of the person is inappropriate; and

(b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

Note: Division 5 deals with procedural matters such as applications for remedies.

…

392 Remedy—compensation

Compensation

(1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

Criteria for deciding amounts

(2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:

(a) the effect of the order on the viability of the employer's enterprise; and

(b) the length of the person's service with the employer; and

(c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and

(d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and

(e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and

(f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and

(g) any other matter that the FWC considers relevant.

Misconduct reduces amount

(3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. Disregarded

(4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

Compensation cap

(5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:

(a) the amount worked out under subsection (6); and

(b) half the amount of the high income threshold immediately before the dismissal.

(6) The amount is the total of the following amounts:

> (a) the total amount of remuneration:
>
> (i) received by the person; or
>
> (ii) to which the person was entitled;
>
> (whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and
>
> (b) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations."

[52] The prerequisites contained in ss.390(1) and (2) have been met in this case.

[53] Mr Gabrynowicz did not seek reinstatement (partly as a result of his loss of trust in the employer) and I am satisfied that reinstatement is not appropriate in this case.

[54] Section 390 of the Act makes it clear that compensation is only to be awarded as a remedy where the Commission is satisfied that reinstatement is inappropriate and that compensation is appropriate in all the circumstances.

[55] I now turn to whether compensation in lieu of reinstatement is appropriate.

[56] The Full Bench in *McCulloch v Calvary Health Care Adelaide*[14] confirmed, in general terms, that the approach to the assessment of compensation, as undertaken in cases such as *Sprigg v Paul's Licensed Festival Supermarket,*[15] remains appropriate.

[57] Section 392(2) of the Act requires the Commission to take into account all of the circumstances of the case including the factors that are listed in paragraphs (a) to (g). Without detracting from the overall assessment required by the Act,[16] it is convenient to discuss the identified considerations under the various matters raised by each of the provisions.

The effect of the order on the viability of the employer - s.392(a)

[58] G + Gracin did not contend that an order of compensation would impact the viability of the employer.

The length of Mr Gabrynowicz service with the employer - s.392(b)

[59] Mr Gabrynowicz was employed by G + Gracin for just over four years.

The remuneration Mr Gabrynowicz would have received, or would have been likely to receive if he had not been dismissed - s.392(c)

[60] This involves, in part, a consideration of the likely duration of Mr Gabrynowicz's employment in the absence of what I have found to be an unfair dismissal. G + Gracin were scheduled to close for two weeks over the Christmas New Year Period. Mr Gabrynowicz was dismissed approximately three weeks before the scheduled close down.

[61] In my view Mr Gabrynowicz's work performance and poor relationship with the proprietors are significant issues that would have significantly impact upon the continuation of the employment relationship.

[62] In the circumstances it is reasonable to assess compensation in this matter on the basis that Mr Gabrynowicz would have remained in employment for a further period of one week (37.5 hours).

[63] I have not included any notice requirement in the consideration on the basis that the evidence before me suggests that Mr Gabrynowicz was engaged as a casual employee (albeit regular and systematic).

The efforts of Mr Gabrynowicz to mitigate the loss suffered by him because of the dismissal - s.392(d)

[64] Mr Gabrynowicz was successful in finding employment from 22 January 2020 at a rate of pay similar to that received prior to his dismissal.

Remuneration earned by Mr Gabrynowicz during the period between the dismissal and the making of the order for compensation and the amount of any income likely to be earned by him during the period between the making of the order for compensation and the actual compensation - ss.392(e) and (f)

[65] Mr Gabrynowicz has earnt $9,929.08 in the period since 22 January 2020. He is not presently working as a result of the COVID-19 pandemic. I have not taken these earnings into account as they fall beyond the period I have predicted the employment will continue.

Any other matter that the FWC considers relevant and the remaining statutory parameters - s.392(g)

[66] There are no other relevant matters.

Reduction for misconduct - s.392(3)

[67] Mr Gabrynowicz's conduct in going back to sleep after being advised that he was late for work represents a cavalier attitude to his attendance. The impact on the small business restaurant was significant and would have been known to him. In my view this represents misconduct and I have discounted the award by 10%.

[68] There are no other relevant matters .

[69] In accordance with s.392(4) of the Act, I make no allowance for any shock, distress or humiliation that may have been caused by the dismissal.

[70] The maximum compensation limit in this case would be the lesser of 26 weeks remuneration or half the amount of the high-income threshold immediately before the dismissal.[17] The amount of compensation awarded is less than that limit.

[71] The compensation confirmed below is also appropriate having regard to all of the circumstances of this matter and the considerations specified by the Act.[18]

[72] I award compensation in the amount of $988.20 (calculated at $29.28 x 37.5(hours) less 10%) to be paid with 28 days. Taxation is to be paid on the amount.

[73] An Order[19] reflecting this Decision will be issued.

COMMISSIONER

Appearances:

A Gabrynowicz on behalf of the Applicant.

R Kulonja and C Cavallaro on behalf of the Respondent.

Hearing details:

2020.
Adelaide:
April 30.

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<PR718717>

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[1] (1998) 88 IR 21

[2] Exhibit R1

[3] Exhibit R2

[4] Exhibit R3

[5] Exhibit R2

[6] Exhibit R3

[7] Exhibit R4

[8] Exhibit R5

[9] Exhibit R6

[10] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at 373

[11] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137

[12] *Explanatory Memorandum to the Fair Work Bill 2008*

[13] *Byrne and Frew v Australian Airlines Pty Ltd* [1995] HCA 24

[14] [2015] FWCFB 873

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[15] (1998) 88 IR 21. See also *Bowden v Ottrey Homes Cobram and District Retirement Villages Inc T/A Ottrey Lodge* [2013] FWCFB 431

[16] *Smith and Others v Moore Paragon Australia Ltd* (2004) 130 IR 446

[17] Section 392(5) of the Act

[18] *Smith and Others v Moore Paragon Australia Ltd* (2004) 130 IR 446 at par [32]

[19] PR718718