



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Jayson McKean

v

Red Energy Pty Ltd
(U2020/10766)

DEPUTY PRESIDENT COLMAN

MELBOURNE, 26 OCTOBER 2020

Unfair dismissal application – alleged forced resignation – requirement to work from home – refusal of employer to provide a home desk – no dismissal – application dismissed

[1] This decision concerns an application by Mr Jayson McKean for an unfair dismissal remedy pursuant to s 394 of the *Fair Work Act 2009 (Cth)* (Act). He contends that he was forced to resign from his employment as a ‘customer assist specialist’ with Red Energy Pty Ltd (company), and that his constructive dismissal was unfair. He seeks reinstatement and orders for the payment of lost wages. The company objects to the application on the basis that Mr McKean was not forced to resign or otherwise dismissed.

[2] Only a person who has been dismissed may make an application under s 394. Section 386 provides that a person has been dismissed for the purposes of Part 3-2 if the person’s employment has been terminated ‘on the employer’s initiative’ (s 386(1)(a)), or the person has resigned but ‘was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer’ (s 386(1)(b)). Mr McKean contends that he was forced to resign because, when in July 2020 the company directed him to work from home, it refused to pay for or provide him with a home desk to enable him to do so, and also refused to allow him to work from the office or take six weeks’ leave. The company says that this did not force Mr McKean to resign.

Background

[3] The facts are uncontentious. Mr McKean’s job required him to use a computer and speak to customers on the telephone. On 16 March 2020, the company sent an email notice to staff stating that they were now encouraged to work from home because of the COVID-19 pandemic. On or around 1 April 2020, Mr McKean’s manager, Mr Michael Burnside, told him that the company could allow him to work in the office at present, but that he should start making arrangements to be able to work from home. Mr McKean replied that he had recently moved to a new house and did not have furniture, including a table or desk to work from. Mr Burnside suggested that he look at second hand websites to procure one.

[4] On 8 May 2020, the company sent an update to staff about working from home. Later that day, Mr McKean sent Mr Burnside an email message, stating that he did not have

furniture in his house, and that he was under financial pressure due to medical expenses. He said that he was ill-equipped to work from home but that if the company would cover the cost of a desk, he would buy one. On 11 May 2020, Mr Burnside called Mr McKean and said that the company would not buy him a desk, but that he could continue to work from the office for the time being.

[5] On or around 1 June 2020, Mr Burnside said to Mr McKean that he needed to ‘sort out arrangements’ for working from home. Mr McKean replied that if the company could not properly facilitate his working from home, then his role was redundant. Mr Burnside told Mr McKean that redundancy was ‘not on the table’.

[6] On 7 July 2020, the Victorian government announced the reintroduction of stage 3 restrictions, which mandated that, where employees could work from home, they were required to do so. The same day, the company’s CEO, Mr Iain Graham, sent an email to all employees stating that unless there was an urgent need to come to the office, they were to work from home. On 8 July 2020, Mr Burnside spoke to Mr McKean and told him that he was required to work from home. Later that day, an official of Mr McKean’s union sent an email to Ms Stefanie Booker, the company’s human resources manager, stating that Mr McKean had been directed to work from home without being provided with ‘the appropriate equipment necessary to carry out his work from home, namely a desk’. The union requested a dialogue with the company about Mr McKean either being reimbursed for the cost of purchasing a desk or being allowed to continue to work from the office. On 9 July 2020, Ms Booker replied to the union, stating that in line with WorkSafe Victoria guidelines, the company was providing employees with all reasonable equipment and support necessary to work from home, including a laptop, headset, adjustable chair, ergonomic assessments, access to an occupational therapist, and online resources, but that the company would not be providing desks or reimbursement for purchasing them, as it was not fair and reasonable to do so. On 9 July 2020, the union replied to Ms Booker and proposed that, as Mr McKean already had an ergonomic chair and laptop, the company could simply buy him a desk instead.

[7] Contrary to the directions given on 7 and 8 July 2020, Mr McKean worked from the office on Friday, 10 July 2020. He then took leave on 13 and 14 July 2020. On Wednesday, 15 July 2020, Mr Burnside called Mr McKean and said words to the effect of ‘where are you at with getting a table?’ Mr Burnside told Mr McKean that he could not continue working from the office. Mr McKean replied that his union had written to Ms Booker about the matter. On both 15 and 16 July 2020, Mr McKean again worked from the office. On Friday 17 July 2020, Ms Booker and Mr Burnside spoke with Mr McKean and told him that he needed to comply with the company’s direction to work from home. Mr McKean then said ‘I understand that is your position.’ Later that day Mr McKean submitted an application to take six weeks’ leave, commencing on Monday, 20 July 2020. Mr Burnside checked the leave calendar, and then advised Mr McKean that his request could not be accommodated.

[8] On Monday, 20 July 2020, Mr McKean sent Mr Burnside an email stating: *‘I wish to advise that I am resigning from Red Energy effective immediately. I will leave my computer and headset in my old locker, which I will keep locked and surrender my security pass to the front reception staff’*. Mr Burnside replied to Mr McKean with an email accepting his resignation.

Submissions

[9] Mr McKean contended that the company's conduct, namely its refusal to provide or pay for a desk, or to grant him leave or allow him to work from the office, and its failure to consider his personal circumstances, left him no reasonable choice but to resign, and that the company ought to have realised this.

[10] Mr McKean submitted that the company's conduct contravened its duties under ss 21(1) and (2) of the *Occupational Health and Safety Act 2004 (Vic)* (OHS Act) because it failed to take reasonably practicable measures to maintain a safe working environment by expecting him to work from home without a desk. He said that the *Guide for Employers: Preparing for a Pandemic* (Guide) issued by WorkSafe Victoria requires employers to provide adequate resources for employees to support working at home, including 'technology and furniture' (section 4.3.2). Mr McKean said that since April 2020 the company had been aware that he did not have a desk and therefore could not work from home in a reasonable way. He said that the company's refusal to pay for or provide him with a desk, and its rejection of other alternative solutions, compelled him to resign.

[11] As to these alternatives, Mr McKean said first that he could have been allowed to work from the office. He said that the *Stay at Home Directions (Restricted Areas) (No 2) (Vic)* (Stay at Home Directions) issued under the *Public Health and Wellbeing Act 2008 (Vic)* contain an exemption for cases where it is not reasonably practicable to work from home, and that this applied to him. He further contended that his circumstances constituted an 'urgent need' to work from the office, and that he should have been allowed to do so, as Mr Graham's message to staff on 7 July 2020 had contemplated. Secondly, Mr McKean said that the company could have granted his request for six weeks' leave, and that it was unreasonable not to do so.

[12] Mr McKean submitted that his union had proposed reasonable solutions on his behalf but that the company had refused or ignored all of them. He said that the company contravened ss 35(1) and s 35(4) of the OHS Act by not consulting with him and his union about safety related matters and by failing to engage with him and the union about a suitable solution to the problem. Mr McKean said that, having been ejected from the office, with no safe place to work, and with all alternatives foreclosed, he had no choice but to resign.

Consideration

[13] I reject these contentions. Mr McKean's argument that he was forced to resign is entirely without merit. The simple fact is that instead of resigning, Mr McKean could have bought a desk. Mr McKean acknowledged that a desk can be purchased very cheaply, and that he could have afforded to buy one. He has since bought a table. Mr McKean believed however that he should not be required to spend his own money to buy a desk on which to work from home. It was a position of principle. However, whether the company should have paid for a desk is beside the point. On any reasonable view, the prospect of having to pay a small sum to buy a desk was not a matter that *forced* Mr McKean to resign. This fundamental point is sufficient to uphold the jurisdictional objection. I will nevertheless briefly address some of Mr McKean's contentions.

[14] First, the facts come nowhere near establishing that the company's requirement for Mr McKean to work from home constituted an occupational health and safety risk, let alone a contravention of s 21 or any other provision of the OHS Act. Secondly, the government Guidelines state that employers should provide 'technology and furniture', as examples of

‘adequate resources’ for employees to work from home. In my view, the materials that Ms Booker said the company would provide to Mr McKean to enable him to work from home were indeed ‘adequate resources’, having regard to the nature of his work. The Guidelines do not require the provision of ‘furniture’ as a matter of course. What is required will depend on the circumstances. I also note that the company did provide ‘furniture’ in the form of an adjustable chair. Thirdly, there is no basis to contend that it was ‘not reasonably practicable’ for Mr McKean to work from home for the purpose of s 8 of the *Stay at Home Directions*. It was reasonably practicable for Mr McKean to buy a desk. Fourthly, because he could have bought a desk, there was no need for him to work from the office, urgent or otherwise. Fifthly, the company did not act unreasonably in refusing Mr McKean’s request to take six weeks of annual leave. This was an excessive period to expect the company to grant as leave, particularly on such little notice. Mr McKean did not propose a shorter period of leave.

[15] It is patently not the case that Mr McKean was left with no reasonable choice but to resign. He freely chose to do so. His letter of resignation made no reference to compulsion, because none existed. Mr McKean had various alternatives. Most obviously, he could have bought a desk. He could have sought to borrow a desk from a friend (he could not borrow one from the company because it had no portable desks). He could have asked for a shorter period of leave. He could also have contacted WorkSafe about his safety concerns. In this regard, Mr McKean said that he decided instead to bring his application in the Fair Work Commission. That was his choice.

[16] I note for completeness that this is not a case where the employee resigned ‘in the heat of the moment’. While such cases can simply involve genuine resignation followed by a change of mind, there is sometimes a question as to whether, *objectively*, the employee could have been understood as intending to resign. But there is no such question in the present case. A reasonable person would have understood, as Ms Booker and Mr Burnside did, that Mr McKean meant what he said, and intended to resign.

[17] Mr McKean was not forced to resign from his employment because of conduct, or a course of conduct, engaged in by the company. He was not placed in a position where he had no reasonable choice but to resign. Nor was he otherwise dismissed on the employer’s initiative for the purpose of s 386(1). The company’s jurisdictional objection is therefore upheld, and Mr McKean’s application is dismissed.

[18] Finally, I note that Mr McKean repeatedly refused to comply with what was plainly a lawful and reasonable direction from the company that he work from home. In particular, on 17 July 2020, he responded to the direction of Ms Booker and Mr Burnside that he work from home by stating, defiantly, that he understood that this was ‘the company’s position’. In my opinion, the company would have been entitled to dismiss Mr McKean for failing to follow a lawful and reasonable direction. It did not do so. However, had I concluded that the company had dismissed Mr McKean, I would have found that it had a valid reason for the dismissal, and that the dismissal was not harsh, unjust or unreasonable, and therefore not unfair, having regard to all the circumstances and the matters in s 387.



DEPUTY PRESIDENT

Appearances:

J. McKean for himself

G. Simmons for Red Energy Pty Ltd

Hearing details:

2020

Melbourne

26 October

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