DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Angele Chandler
v
Bed Bath N' Table Pty Ltd
(C2019/6120)

VICE PRESIDENT HATCHER
COMMISSIONER CAMBRIDGE
COMMISSIONER BOOTH

SYDNEY, 23 JANUARY 2020

Appeal against decision [[2019] FWC 6448] of Deputy President Mansini at Melbourne on 20 September 2019 in matter number U2019/2368.

Introduction and background

[1] Angele Chandler has lodged an appeal, for which permission to appeal is required, against a decision issued by Deputy President Mansini on 20 September 2019[1] (decision). The decision concerned an application made by Ms Chandler for an unfair dismissal remedy in respect of the termination of her casual employment with Bed Bath N' Table Pty Ltd (BBNT). The Deputy President determined that Ms Chandler was not a person protected from unfair dismissal because she had not completed the minimum employment period, and accordingly dismissed her application for want of jurisdiction. Ms Chandler contends in her appeal that she had in fact served the minimum employment period and the Deputy President erred in finding otherwise.

[2] The relevant aspects of the statutory scheme concerning unfair dismissal in Pt 3-2 of the *Fair Work Act 2009* (FW Act) are as follows. Section 390(1)(a) provides that the Commission must, relevantly, be satisfied that a person was "*protected from unfair dismissal*" at the time of being dismissed before it may make an order in the person's favour for an unfair dismissal remedy (reinstatement or the payment of compensation). Section 382(a) provides that the first of the two requirements that must be satisfied in order for a person to be "*protected from unfair dismissal*" is that the person in an employee who has completed a "*period of employment*" with the relevant employer of at least the "*minimum employment period*". Section 383(a) provides, in respect of an employer which is not a small business employer, that the "*minimum employment period*" is 6 months ending at the earlier of the time when the person is given notice of the dismissal or immediately before the dismissal. It is not in dispute that BBNT was not at the time of the dismissal a small business employer. Section 384(1) provides that an employee's "*period of employment*" with an employer is the period of

[1] [2019] FWC 6448

continuous service the employee has completed with the employer. Relevant to Ms Chandler's application, section 384(2)(a) provides:

> (2) However:
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> > (a) a period of service as a casual employee does not count towards the employee's period of employment unless:
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> > > (i) the employment as a casual employee was on a regular and systematic basis; and
> > >
> > > (ii) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis; …

[3] It was not in dispute before the Deputy President or in the appeal that Ms Chandler worked her first shift as a casual employee of BBNT on 25 June 2018, and worked her last shift 8 months and 3 days later on 28 February 2019. However BBNT contended that this did not count towards Ms Chandler's period of employment or satisfy the minimum employment period requirement because her employment was not on a regular and systematic basis and she did not have a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

The decision

[4] The evidence concerning the pattern of Ms Chandler's casual engagement over the period of her employment upon which the Deputy President principally relied in reaching the conclusion that she did is set out in Annexure A to the decision. That annexure contains BBNT's record of the calendar days, daily hours and weekly hours worked by Ms Chandler in each week from Thursday 5 July 2018 through to her last shift on Thursday 28 February 2019. The Deputy President found the material in the annexure to be "the most reliable and relevant source of evidence" in relation to the issue requiring determination. The Deputy President however took into account all the material before her, including Ms Chandler's own evidence, evidence given by co-workers of Ms Chandler and fortnightly wages data.

[5] On the basis of this material, the Deputy President stated the following conclusion relevant to s 384(2)(a)(i):

> "[19] I find Annexure A the most reliable and relevant source of evidence in this respect. An objective analysis of Annexure A, taking into account Ms Chandler's identified discrepancies, reveals no regularity of Ms Chandler's engagements over the period. Whilst Ms Chandler worked at least 3 days each week, Annexure A shows the number of days worked each week, the days of the week worked and the duration of the shift on each occasion varied significantly such that no pattern is able to be identified.
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> [20] The fortnightly wages data does not assist in identifying regularity or a system of engagements, providing a more general overview than the detail depicted by Annexure A. The evidence of other employees' hours worked also does not assist in determining regularity or system of Ms Chandler's engagements."

[6] In relation to s 384(2)(a)(ii), the Deputy President said (footnote omitted):

> "[22] Having found that the employment was not regular and systematic, there is no need to make a conclusion about any expectation of ongoing employment that Ms Chandler may have reasonably held during the period of her service as a casual employee. That said, much of the evidence focussed on this question and so it is appropriate to address it.
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> [23] Whilst I accept that the 3 individuals who gave evidence considered there to be a practice in the Essendon store of employing "main casuals" as distinct from "Christmas casuals" or "other casuals", the balance of the evidence does not support this conclusion. Even on these witnesses own accounts, there was nothing formal or specific to warrant a finding of a reasonable expectation in this respect.
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> [24] The Applicant's own admission in an email to the employer of 27 February 2019 is telling;
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> > 'With regards to rostering I understand that ALL casuals do not have guaranteed hours as well as casuals have a right to refuse any shift given the nature of the casual position without retribution.'
>
> [25] Further, the objective documentary evidence including employment contract, position description, workplace policies, rosters prepared in advance when compared with actual hours worked and pay advices does not support a finding that Ms Chandler had a reasonable expectation of ongoing employment."

[7] On the basis of the above findings, the Deputy President concluded that Ms Chandler had not served the minimum employment period and for this reason was not a person protected from unfair dismissal, and accordingly dismissed her application.

Submissions

[8] Ms Chandler submitted that the Deputy President erred in reaching this conclusion because:

- the Deputy President did not take into account that Ms Chandler, as part of a predominantly casual workforce, worked shifts allocated to her on a monthly roster based on prior indications of her availability for the month;
- the roster planned in advance for each month indicated that the employment was on a regular and systematic basis, with all casual shifts planned in advance except for some occasional additional shifts offered to cover for unreliable employees;
- the Deputy President also did not take into account that Ms Chandler had an ongoing contract of employment with BBNT;
- the records in Annexure A to the decision showed that Ms Chandler worked 3-4 shifts each week for 32 weeks with no break taken;

- BBNT engaged many longstanding casual employees on a regular and systematic basis with the expectation of ongoing employment;

- Ms Chandler's email of 27 February 2019 referred to in paragraph [24] of the decision was taken out of context;

- while the hours and days were varied, the employment itself was regular and systematic, but the Deputy President did not take this into account; and

- the rostering system and regularity of employment meant that Ms Chandler had an expectation of ongoing employment.

[9] Ms Chandler contended that the grant of permission to appeal would be in the public interest because the decision affected the rights of over 1700 casual employees engaged by BBNT and the decision was contrary to many previous decisions of the Commission concerning the circumstances in which casual employees could be characterised as working on a regular and systematic basis.

[10] BBNT submitted that:

- Ms Chandler had not demonstrated that the grant of permission to appeal would be in the public interest as required by s 400(1) of the FW Act;

- it was incorrect that the decision was disharmonious with other recent decisions of the Commission, and the fact that BBNT employed a significant number of casual employees was not rationally connected to the subject matter of the proceedings and did not make Ms Chandler's dismissal a matter of public importance;

- Ms Chandler had not demonstrated any significant error of fact in accordance with s 400(2);

- it was open to the Deputy President to take into account the email of 27 February 2019 as demonstrative of Ms Chandler's understanding as to the nature of her employment;

- the Deputy President's decision was a discretionary one, and it was impermissible simply to invite the Full Bench to re-decide the issue for itself;

- in finding that the material in Annexure A was the most reliable source of data as to Ms Chandler's roster, the Deputy President clearly took into account that Ms Chandler's employment was "*continuous and without breaks*", and otherwise made reference to Ms Chandler's photographs of monthly handwritten rosters and other records and data relied upon Ms Chandler;

- the Deputy President's finding that Ms Chandler's employment was not regular or systematic meant that there was no need for her to come to a conclusion about whether she had an expectation of ongoing employment pursuant to her contract of employment or on some other basis; and

- the Deputy President, consistent with authority, took into account all the relevant circumstances in determining that the employment was not regular or systematic, and the conclusion she reached was reasonably open to her.

Consideration

[11] It is apparent on the face of the decision that the Deputy President's determination as to whether Ms Chandler's casual employment was regular and systematic was attended by a significant error of principle. In her application of s 384(2)(a) to the facts of the case, the Deputy President proceeded on the basis that it was necessary to identify a consistent pattern of engagement in the number of days worked each week, the days of the week worked and the duration of each shift in order to be able to conclude that the employment was regular and systematic. We do not consider this to be the correct approach. In *Yaraka Holdings Pty Ltd v Giljevic*,[2] the Court of Appeal of the ACT gave consideration to the proper construction of s 11 of the *Workers Compensation Act 1951* (ACT), which for relevant purposes deemed as workers for the purpose of that Act casual workers if their "*engagement, under the contract or similar contracts, has been on a regular and systematic basis*" taking into account a range of matters including the contractual terms, the working relationship and all associated circumstances, the period or periods of engagement, the frequency of work, the number of hours worked, the type of work, and the normal arrangements for someone engaged to perform that type of work. Crispin P and Gray J observed that the concept of employment on a regular and systematic basis was drawn from the *Workplace Relations Act 1996*,[3] and went on to say (emphasis added):

> "[65] *It should be noted that it is the "engagement" that must be regular and systematic; not the hours worked pursuant to such engagement.* Furthermore, the section applies to successive contracts and non-continuous periods of engagement. It is true that subs (3) provides that, in working out whether an engagement has been on a regular and systematic basis, a court must consider, inter alia, the frequency of work, the number of hours worked under the contract or similar contracts and the type of work. However, these statutory criteria relate to the decisive issue of whether the relevant engagement has been on a regular and systematic basis. *The section contains nothing to suggest that the work performed pursuant to the engagements must be regular and systematic as well as frequent.*
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> …
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> [67] Connolly J was right to conclude that the absence of any contractual requirements for the respondent to work at set times or of any assumption that he be present on a daily weekly or monthly basis unless told otherwise did not preclude a finding that his engagements had been regular and systematic.
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> [68] The term "regular" should be construed liberally. It may be accepted, as the Magistrate did, that it is intended to imply some form of repetitive pattern rather than being used as a synonym for "frequent" or "often". However, equally, it is not used in the section as a synonym for words such as "uniform" or "constant". Considered in the light of the criteria in s11 (3)(a)-(g), we are satisfied that the pattern of engagement over the years from 1995 to 2002 satisfied this description.

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[2] [2006] ACTCA 6, 149 IR 339

[3] Ibid at [64]

[69] *Mr Rares argued that the course of engagement over these years had not been shown to have been systematic because it had not been predictable that the respondent would be engaged to work at particular times, on particular jobs or at particular sites. Again, that is not the test.* The concept of engagement on a systematic basis does not require the worker to be able to foresee or predict when his or her services may be required. *It is sufficient that the pattern of engagement occurs as a consequence of an ongoing reliance upon the worker's services as an incident of the business by which he or she is engaged*."

[12] Similarly, Madgwick J said (emphasis added):

"[89] … *a 'regular ... basis' may be constituted by frequent though unpredictable engagements and that a 'systematic basis' need not involve either predictability of engagements or any assurance of work at all*.

[90] The respondent's work for the appellant was certainly frequent enough to be termed 'regular' within an acceptable understanding of that term, which may, even in ordinary speech, be used to denote 'frequent'.

[91] Engagement under contracts on a 'systematic basis' implies something more than regularity in the sense just mentioned, that is, frequency. The basis of engagement must exhibit something that can fairly be called a system, method or plan (cf the definition of 'systematic' in the Macquarie Dictionary, revised 3rd edn, 2001)."

[13] The reasoning in *Yaraka Holdings* has been applied to the concept of casual employment on a regular and systematic basis in the FW Act. In *WorkPac Pty Ltd v Skene*,[4] the Federal Court Full Court favoured (without needing to finally adopt) the view that the construction in *Yaraka Holdings* should be applied to the definition of "*long term casual employee*" in s 12 of the FW Act (which includes a requirement that the employee has been employed "*on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months*").[5] The Commission in its own decisions has consistently applied *Yaraka Holdings* to s 284(2)(a), including in the Full Bench decisions in *Pang Enterprises Pty Ltd ATF Pang Family Trust v Sawtell*[6] and *Bronze Hospitality Pty Ltd v Janell Hansson*[7] as well as in numerous first instance decisions.

[14] By treating the degree of regularity in the pattern of hours worked by Ms Chandler as disclosed by Annexure A as the only or decisive consideration in the application of s 384(2)(a)(i) (rather than merely as one of a number of relevant considerations in the analysis), we consider that the Deputy President misconstrued the provision. This erroneous approach resulted in the Deputy President failing to take into account a number of matters which pointed to a different conclusion, including Ms Chandler's contract of employment and the rostering system adopted by BBNT.

[15] In respect of s 384(2)(a)(ii), we note that the Deputy President considered that there was no need to state a final conclusion about the application of this provision given her

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[4] [2018] FCAFC 131

[5] Ibid at [150]-[152]

[6] [2016] FWCFB 4438 at [15]-[17]

[7] [2019] FWCFB 1099 at [24]

conclusion in relation to s 384(2)(a)(i) but nonetheless went on to express a view about it. To the extent that it is necessary for us to consider this part of the decision, we would conclude that it is also attended by appealable error in at least one respect. The Deputy President treated as "telling" the excerpt from Ms Chandler's email of 27 February 2019 quoted in paragraph [24] of the decision. We take that to mean that the Deputy President regarded it as a relevant and significant, if not decisive, consideration in the analysis. We consider this to be incorrect. The excerpted passage did no more than set out the basic incidents of all casual employment. That could not be relevant or significant in determining whether Ms Chandler's casual employment was of a type to which s 384(2)(a)(ii) applied. Were the contrary the case, no casual employment could ever fall within s 384(2)(a)(ii).

[16] Because the decision was attended by appealable error in the above respects, we consider that the grant of permission to appeal would be in the public interest. The errors concern a question of the Commission's jurisdiction and the decision departed from well-established principles concerning the construction of s 384(2)(a) of the FW Act with the result that Ms Chandler has been deprived of the opportunity to litigate her unfair dismissal remedy application. Accordingly, permission to appeal must be granted in accordance with s 604(2). We uphold the appeal and quash the decision.

Re-determination

[17] We consider that the most efficient course is for us to re-determine the question of whether Ms Chandler is a person protected from unfair dismissal based on the evidence that was before the Deputy President.

[18] We conclude, in respect of s 284(2)(a)(i), that Ms Chandler's employment as a casual employee was on a regular and systematic basis. That it was *regular* in the sense of being frequent is amply demonstrated by the data in Annexure A to the decision. This shows that Ms Chandler was employed in every week the subject of the analysis until the termination of her employment, and in 30 of those weeks she was employed for 3 or 4 shifts in the week. The employment can also be characterised as *systematic* - that is, arranged pursuant to an identifiable system - for two fundamental reasons. The first is that, unusually, Ms Chandler's casual employment was the subject of a single and ongoing written contract executed on 15 June 2018. This contract had the following relevant features:

(1) Ms Chandler was engaged as a "*Casual Sales Assistant*", for which there was a detailed position description attached to the contract. Clause 2.1 identified the position description as containing Ms Chandler's job responsibilities and the primary duties she was required to carry out.

(2) Clause 2.2 required that Ms Chandler perform the duties and exercise the powers and functions assigned to her from time to time.

(3) Clause 2.2(d) required Ms Chandler "*at all times*" to protect and promote the reputation of BBNT and conduct herself in a manner which would not injure or impair its reputation or bring its good name into disrepute.

(4) Clause 3.1 provided that "*Hours of work will be offered to you depending on the operational needs of the business, your availability and your ability to perform your duties to the standard required by BBNT*". This provision

however operated subject to clause 3.5, which established "*blackout periods*" for peak trading from 1 December to 15 January, the weeks before and after Easter, and at sale, stocktake and/or catalogue times, and provided: "*Any casual employee taking leave during a blackout period will be on unauthorised leave and upon return, hours of work will not be guaranteed*".

(5) Clause 11.1, *Termination*, provided that employment under the contract would cease "*when there is no longer an operational need for your services; or you resign from BBNT, or you have not been rostered and/or worked for BBNT for a period in excess of four (4) weeks*".

[19] The terms of the contract demonstrate that Ms Chandler was employed to work in a particular position in BBNT's operational structure in accordance with a pre-established and ongoing framework of legal obligations. The second reason is that the evidence demonstrated that, for the most part, Ms Chandler's employment was the subject of a monthly roster system involving her having to indicate in advance her availability to work for the month in question and then working shifts in accordance with the roster that was subsequently prepared and posted. The copies of the monthly rosters which Ms Chandler provided to the Commission clearly demonstrate that this was a system which applied to her and the other casual employees at the store at which she worked.

[20] For similar reasons, we consider in respect of s 384(2)(a)(ii) that, during her period of service with BBNT as a casual employee, Ms Chandler had a reasonable expectation of continuing employment on a regular and systematic basis. That expectation was engendered by:

(1) the ongoing contract of employment which established a legal framework for the allocation of work to Ms Chandler in a particular position, effectively required her to hold herself available to work during "*blackout periods*", and continued until a prescribed termination event occurred;

(2) a monthly roster system, under which a roster was posted in advance of each month setting out the shifts that were allocated to Ms Chandler during the course of the month based on her prior indication of availability to work; and

(3) the frequency and amount of work that was allocated to Ms Chandler over the course of her employment.

[21] We therefore determine that Ms Chandler's period of service from the commencement of her employment until its termination counted towards her period of employment, that Ms Chandler therefore completed the minimum employment period, and therefore that Ms Chandler is a person protected from unfair dismissal.

Orders

[22] We order as follows:

(1) Permission to appeal is granted.

(2) The appeal is upheld.

(3) The decision ([2019] FWC 6448) is quashed.

(4) Ms Chandler's unfair dismissal remedy application (U2019/2368) is referred back to the Unfair Dismissal Case Management Team for allocation to and final determination by a Commission member on the basis of our finding that Ms Chandler is a person protected from unfair dismissal in respect of her employment with BBNT.

VICE PRESIDENT

Appearances:

A Chandler on her own behalf.
N Tindley, solicitor, on behalf of Bed Bath n Table Pty Ltd

Hearing details:

2019.
15 November.
Sydney.

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<PR716058>