



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Ms Robyn Zahner

v

Charter Mercantile Agency Pty Ltd

(U2021/2761)

COMMISSIONER HUNT

BRISBANE, 14 JUNE 2021

Application for an unfair dismissal remedy – whether applicant meets minimum employment period – respondent’s jurisdictional objection dismissed.

[1] On 1 April 2021, Ms Robyn Zahner made an application pursuant to s.394 of the *Fair Work Act 2009* (the Act) alleging she was dismissed from Charter Mercantile Pty Ltd T/A Charter Mercantile Agency (the Respondent) and the dismissal was harsh, unjust or unreasonable.

[2] In her Form F2 application, Ms Zahner stated that her employment with the Respondent commenced on 1 September 2020 and came to an end on 15 March 2021. The Respondent does not dispute these dates.

[3] In the Respondent’s Form F3 Employer Response, the Respondent did not raise any jurisdictional objections to the application.

[4] The application was allocated to my chambers for progressing to hearing of the substantive application, and directions were issued on 29 April 2021 for filing of materials by both parties addressing merits. Taking into account that Ms Zahner appeared to have approximately 6.5 months’ service, and the Commission did not have before it any information as to any absences Ms Zahner might have had during this period of time, including any potential shut down over the Christmas period, a further direction was issued by my chambers on the same day requesting the Respondent file and serve a list of any of Ms Zahner’s absences from work.

Relevant legislation

Initial matters

[5] Under section 396 of the Act, the Commission is obliged to decide the following matters before considering the merits of the application:

- (a) whether the application was made within the period required in subsection 394(2);

- (b) whether the person was protected from unfair dismissal;
- (c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;
- (d) whether the dismissal was a case of genuine redundancy.

When is a person protected from unfair dismissal?

[6] Section 382 of the Act provides that a person is protected from unfair dismissal if, at the time of being dismissed:

- (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
- (b) one or more of the following apply:
 - (i) a modern award covers the person;
 - (ii) an enterprise agreement applies to the person in relation to the employment;
 - (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

Minimum employment period

[7] Section 383 of the Act defines the meaning of "minimum employment period". Section 384 relevantly provides:

"384 Period of employment

(1) An employee's period of employment with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee.

(2) However:

(a) a period of service as a casual employee does not count towards the employee's period of employment unless:

(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; and

(b) if:

(i) the employee is a transferring employee in relation to a transfer of business from an old employer to a new employer; and

(ii) the old employer and the new employer are not associated entities when the employee becomes employed by the new employer; and

(iii) the new employer informed the employee in writing before the new employment started that a period of service with the old employer would not be recognised;

the period of service with the old employer does not count towards the employee's period of employment with the new employer.”

[8] If the minimum employment period has not been met the application must be dismissed.

Jurisdictional objection made by the Respondent

[9] Subsequent to the directions being issued, the Respondent wrote to my chambers on 5 May 2021, raising an objection that Ms Zahner had not met the minimum employment period of six months required to bring an unfair dismissal application. The Respondent stated that it had calculated the number of shifts worked by Ms Zahner, and in the relevant period it stated she had not worked enough shifts to meet the minimum period.

[10] I instructed my Associate to send reply correspondence, copied to all parties, outlining how the minimum employment period is calculated for the purposes of the Act. With reference to the Commission's Unfair dismissals benchbook, the Respondent was advised that a 'month' means a calendar month and therefore for the undisputed period of Ms Zahner's employment from 1 September 2020 to 15 March 2021, it appeared she had met six months and two weeks of service unless there were any excluded periods pursuant to s.22 of the Act.

[11] The Respondent was therefore directed to provide any evidence, if it could, of more than approximately two weeks of unauthorised or unpaid absence such that it would cause Ms Zahner's service to fall below six months. The Respondent was directed to provide these further submissions by 18 May 2021, and Ms Zahner was directed to file any reply materials by 21 May 2021.

[12] The parties were advised that the matter would be determined on the papers, unless any request was made for a hearing to be convened. Ms Zahner confirmed that she was content for the matter to proceed on the papers, and no objections or otherwise were raised by the Respondent. I therefore proceed to determine the minimum employment period objection on the papers.

Submissions and Evidence of the Respondent

[13] In response to the further directions, the Respondent re-submitted its earlier submissions addressing only the number of shifts worked by Ms Zahner in the relevant period.

[14] The Respondent filed two annexures, the first being a word document containing scanned timesheets of Ms Zahner covering the period from 1 September 2020 to 15 March 2021, and the second an excel spreadsheet totalling 110 worked shifts, which the spreadsheet provided was ‘2 weeks & 4 days under 6 months’. The Respondent did not file any written submissions or witness statements in support of this annexed material, however in its initial filing of these annexures, the Respondent had provided:

“Review of our attendance time sheets reveals the Applicant was actually 2 weeks and 4 days under her 6 month probation period.

Attached are the following records.

1. Excel summary of time sheets
2. Time sheets completed by the Applicant

In the interest of simplification, any hours worked in a given shift is counted as one day.

The number of shifts required in the 6 month period 1/9/2020 to 28/2/2021 excluding public holidays amounted to 124.

By the date of termination, 15/3/2021, the Applicant had attended only 110 shifts, a difference of 14 days.

The Respondent therefore attest the Applicant did not meet the minimum employment period of 6 months and requests the case be dismissed.”

[15] Reply correspondence was provided to the Respondent, and copied to all parties, outlining that the material filed in response to the further directions was the same as that already filed by the Respondent on 5 May 2021. The Respondent was advised it had failed to address s.22 of the Act as directed, and that it was not a matter for the Commission to investigate matters on behalf of a party.

[16] The Respondent was allowed a further period until 26 May 2021 to file any evidence and submissions addressing whether Ms Zahner had more than approximately two weeks equivalent of unauthorised or unpaid absence that would cause her service to fall below six months. It is noted that Ms Zahner was directed to file any materials in reply by 28 May 2021.

[17] On 25 May 2021, the Respondent provided correspondence to my Chambers that it had found no further evidence and relied only on the ‘full service record’ of Ms Zahner, as submitted.

Submissions and evidence of Ms Zahner

[18] Ms Zahner did not file any submissions or evidence in response to the Respondent’s jurisdictional objection.

Consideration

[19] Pursuant to s.396(b) of the Act, I must first determine whether Ms Zahner was a person protected from unfair dismissal. This decision does that, and I have not traversed any merit arguments between the parties.

[20] The application was made within time, noting it is uncontested that 15 March 2021 is considered the date Ms Zahner's employment was terminated at the initiative of the Respondent.

[21] There are no Small Business Fair Dismissal Code considerations necessary, nor is it case of genuine redundancy.

[22] It is not contested that Ms Zahner earned less than the applicable high-income threshold.

[23] The initial question, therefore, is to determine if Ms Zahner served the minimum employment period.

Calculation of length of service

[24] In determining Ms Zahner's length of service, there has been no dispute that she commenced with the Respondent on 1 September 2020, and was notified of and dismissed on 15 March 2021. This is a period of 6 months and two weeks, and meets the minimum employment period required under the Act.

[25] The spreadsheet provided by the Respondent detailed daily hours of work and absences for the entire period. I note that from 20 November 2020, Ms Zahner went from working five days per week to working four days per week. Each Friday she did not work, nor was she required to work. I do not consider that the Fridays she was not required to work constitute a period of unauthorised absence, unpaid leave or unpaid authorised absence. Simply, she worked four days per week, however as each week rolled around, all seven days of the week counted towards her period of continuous service. Service does not stop on account of the weekend or the Friday not required to be worked.

[26] I do not consider that any public holidays which fell within her period of service and which she was not required to work constitute a period of unauthorised absence, unpaid leave or unpaid authorised absence.

[27] I determine the following dates or times do not count as service for the purposes of s.22 of the Act:

Date	Note	Period of absence
(a) 6 October 2020:	Away	1 day
(b) 9 October 2020:	Away	1 day
(c) 12 October 2020:	One hour absence	1 hr
(d) 13 October 2020:	Three hour absence	3 hrs
(e) 21 October 2020:	Two hour absence	2 hrs
(f) 4 November 2020:	30 minute absence	0.5 hrs
(g) 5 November 2020:	Three and a half hr absence	3.5 hrs
(h) 6 November 2020:	Away	1 day

(i) 31 December 2020:	Away	1 day
(j) 4 January 2021:	Away	1 day
(k) 20 January 2021:	Away	1 day
(l) 21 January 2021:	Away	1 day
(m) 17 February 2021:	Away	1 day
(n) 18 February 2021:	One hour absence	1 hr
(o) 25 February 2021:	Away	1 day
(p) 3 March 2021:	Six and a half hr absence	6.5 hrs
(q) 4 March 2021:	Away	1 day

[28] By the nominal date of Ms Zahner reaching six months' service, that being 28 February 2021, she had a total of nine single day absences and a further period of part-day absences as follows:

$$1 \text{ hr} + 3 \text{ hrs} + 2 \text{ hrs} + 0.5 \text{ hrs} + 3.5 \text{ hrs} + 1 \text{ hr} = 11 \text{ hrs}$$

[29] Ms Zahner usually worked a 7.5 hour day, and therefore I find that by 28 February 2021, she had a total of 9 days plus 11 hrs of absence which is equal to 10 days, 4 hrs. For Ms Zahner to reach a period of six calendar months, she would need a further 10 days, 4 hrs from 1 March 2021 for which she was employed and not on leave provided for at s.22 of the Act.

[30] Ms Zahner continued to be employed between the period 1 – 15 March 2021, in which all days are to be counted, including the weekends and the Fridays she was not required to perform work. I note that Ms Zahner was dismissed on the morning of 15 March 2021, so only the morning period until she was dismissed would count towards a period of continuous service. I calculate the period 1 March 2021 until the dismissal took effect on the morning of 15 March 2021 to be a period of 14.4 days.

[31] The only periods not to be included are the 6.5 hours she was absent on 3 March 2021, and the full day period she was absent on 4 March 2021.

[32] I am satisfied that 14.4 days, less the absence at [31] is greater than the period of 10 days, 4 hours that Ms Zahner required to have six months' continuous service by the time the dismissal occurred on 15 March 2021. If Ms Zahner had been dismissed on or around 11 March 2021 when she last performed substantive work, I would not have been satisfied that she would have had six months' continuous service. In effect, the days of the weekend of 13 and 14 March 2021, noting that she was still employed up until the morning of 15 March 2021 assisted Ms Zahner in reaching the minimum employment period.

Conclusion

[33] I determine that Ms Zahner was employed by the Respondent for a period of more than six months, and therefore has completed the minimum period of employment pursuant to s.383(a) of the Act.

[34] For that reason, I am satisfied that Ms Zahner was, pursuant to s.382 of the Act, a person protected from unfair dismissal. The Respondent's threshold jurisdictional objection to the application is dismissed.

[35] Accordingly, the application is to proceed before the Commission.



COMMISSIONER

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