



# DECISION

*Fair Work Act 2009*  
s.394—Unfair dismissal

**Mr John Grief**

v

**Penguin Composites Pty Ltd**

(U2023/2298)

COMMISSIONER HARPER-GREENWELL

MELBOURNE, 6 July 2023

*Application for an unfair dismissal remedy – minimum employment period.*

[1] On 20 March 2023, Mr John Grief made an application to the Fair Work Commission (**Commission**) pursuant to s.394 of the *Fair Work Act 2009* (Cth) (**the Act**) for a remedy in respect of his dismissal by Penguin Composites Pty Ltd (Penguin Composites) on 2 March 2023.

[2] Penguin Composites objected to the application on jurisdictional grounds being that Mr Grief had not served the minimum employment period required under s. 383 of the Act and accordingly is not a person “protected from unfair dismissal” under s. 382.

[3] Mr Grief relies on three distinct periods that he submits should be considered as a period of continuous employment for the purposes of meeting the minimum employment period in order to be a person protected from unfair dismissal as required under the Act. The first period relied on by Mr Grief is an unpaid internship that he was required to undertake as part of his Engineering Degree. The second being an unpaid period from sometime around mid-March 2022 to 28 July 2022 during which Mr Grief concentrated on his professional development and development of his intellectual property. The third period referred to by Mr Grief is work performed under a signed a contract for a “fulltime fixed-term Graduate Placement role” working on the Robot Optimisation project which he commenced on 19 September 2022.

[4] On 25 November 2022, Mr Grief took a period of unauthorised unpaid leave. Mr Grief remained on unpaid leave until he was dismissed from his employment on 2 March 2023 at the initiative of the employer. The dismissal took effect immediately. Mr Grief submits his dismissal was unfair and that the internship, period of unpaid work and his unauthorised absence should be counted as continuous service satisfying the minimum employment period for the purpose of being a person is protected from unfair dismissal in accordance with s. 382 of the Act.

[5] A hearing was held before me by video conference on 22 June 2023. I granted permission for Penguin Composites to be represented taking into account the complexity of the matter.

[6] Mr Grief appeared and gave evidence on his own behalf. Ms Alicia Bird, Human Resources-Administration Manager, appeared and gave evidence for Penguin Composites.

### **Statutory Framework**

[7] Section 396 of the Act requires that the following matters be decided before the merits of the application may be considered:

#### **“396 Initial matters to be considered before merits**

The FWC must decide the following matters relating to an application for an order under Division 4 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 (**the Code**);
- (d) whether the dismissal was a case of genuine redundancy.”

[8] Section 382 of the Act provides that a person is protected from unfair dismissal only if they have completed the required minimum employment period.

#### **“382 When a person is protected from unfair dismissal**

A person is *protected from unfair dismissal* at a time if, at that time:

- (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.

[9] If a person has not completed the relevant minimum employment period they are unable to make an unfair dismissal remedy application.

[10] Section 383 of the Act, which is set out below, provides different minimum employment periods depending upon whether or not the employer is a small business employer.

**“383 Meaning of minimum employment period**

The minimum employment period is:

- (a) if the employer is not a small business employer—6 months ending at the earlier of the following times:
  - (i) the time when the person is given notice of the dismissal;
  - (ii) immediately before the dismissal; or
- (b) if the employer is a small business employer—one year ending at that time.”

[11] Section 384 of the Act provides as follows:

**“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
- ...”

**The cases presented**

[12] Mr Grief submits he commenced an unpaid internship on 16 November 2021 as a requirement of his undergraduate Engineering Degree with the University of Tasmania. Mr Grief completed his internship on 22 February 2022 which on completion concluded his university studies.

[13] Mr Grief gave evidence that after completing his internship he pursued his own interests for the purposes of developing his own professional skills and intellectual property. During this period Mr Grief produced several reports he had developed. Mr Grief gave evidence that Penguin Composites had not directed him to produce the reports and they were not provided to

Penguin Composites because they formed part of his personal portfolio and his intellectual property. Mr Grief's evidence is that the period from the conclusion of his internship until his commencement being 19 September 2022 was not covered by an employment contract and that he was not charging Penguin Composite for the work he had performed. Mr Grief submits that his internship should be recognised as the first period of employment and recognised as continuity of service for the purposes of him being a person protected from unfair dismissal under section 382 of the Act.

[14] Sometime after completing his internship Mr Grief began contract negotiations with Penguin Composites with the view to obtaining full-time employment. Mr Grief's evidence included a document titled "Contract Statement" dated 25 June 2022. In his "Contract Statement" amongst other things Mr Grief states the following;

*"Casual Hours I am satisfied with the salary offered, but require a casual work schedule with no maximum or minimum hours. I will sometimes be working at home on my Engineering and Composites practice as well as pursuing opportunities to develop I.P. as it arises. Nominally I will not be claiming a salary for this work and the opportunity to deploy new capabilities in the normal course of my work at Penguin Composites will be satisfactory compensation for the sharing of my efforts.  
....."*

[15] In his "Contract Statement" Mr Grief expresses concern about commencing employment whilst working on developing his own intellectual property. Mr Grief states that he has made "good steps" towards achieving his aims and until his project was completed his work would remain voluntary. Mr Grief concludes the "Contract Statement" represents his "enterprise bargaining" and should be treated as a "memorandum of understanding".

[16] It is not in contention that on 29 July 2022 Mr Greif signed a contract of employment which was witnessed by Ms Bird. The contract provides that Mr Grief would commence employment with Penguin Composites on 19 September 2022 in a project placement role as a Graduate Engineer. Ms Bird submits the start date was set to accommodate Mr Grief's request for further time to work on his own development.

[17] Mr Grief's evidence is that during the second period between the completion of his internship and the commencement of his employment as a Graduate Engineer on 19 September 2022 he had access to Penguin Composites facilities, however he largely worked from home developing his own intellectual property. During this second period, Mr Grief had taken periods of absence at his own initiative and was not required to seek permission from Penguin Composites. Although Mr Grief's evidence is that he was unpaid during this period, and was working to develop his own intellectual property, he submits the second period should be recognised as continuous of service for the purposes of being a person protected from unfair dismissal under section 382 of the Act.

[18] Penguin Composites submits on 25 November 2022, Mr Grief was making foam to pour into a mould that would set and then be used on a robot to cut out moulds. Mr Ben Conroy, Defence Engineer noticed that Mr Grief's ratios were incorrect and provided him with feedback. Mr Grief is alleged to have responded stating that he knew what he was doing because this is what he had been studying. Mr Grief was subsequently directed by the Operations Manager to listen to the Defence Engineer. In response Mr Grief is alleged to have thrown the trowel he was using on the ground which bounced and hit the wall spreading foam onto a colleagues

clothing. Penguin Composites submits later that day Mr Grief attended the office of Mr John van der Woude, CEO returning his key and stating, "I'm done".

[19] On 30 November 2022, Mr Greif sent an email to Ms Bird attaching a document titled "Industrial Grievance". In his "Industrial Grievance" Mr Grief states the following;

*"On Friday AM 25/11/22 a wages strike was announced to Alicia, the H.R.Executive. It was simply stated that no payslips would be submitted until further notice. The intention was to raise awareness of the industrial action and detail the grievances at the earliest opportunity of my schedule. This document details those grievances that need to be addressed satisfactorily before any payment for work done is re-commenced. At this juncture, three ordinary days will not be billed for, in this way the issue underlying the grievances are declared to be intractable, has cost me money and will continue to cost me money until losses become un-viable to further sustain". (sic).*

[20] Mr Grief claimed the conduct of the Defence Engineer hindered the progress of the project he was working on and that he would not return to work until the Defence Engineer was removed from the project and that he should only work directly in conjunction with the CEO.

[21] On 1 December 2022, Ms Bird responded in writing stating that she had forwarded Mr Grief's complaint to the "HR Consultants" for advice and would respond as soon as possible. Ms Bird subsequently met with Mr Grief on 7 December 2022. Ms Bird's evidence is that Mr Grief refused to return to work unless he could have nothing to do with the Defence Engineer and his employment contract was amended to state that he would work independently of everyone other than the CEO. Mr Grief threatened to resign if his request to work independently was not met.

[22] On 12 December 2022, Mr Grief sent another email to Ms Bird attaching a document he titled "Exit Report". The Exit Report outlines Mr Griefs version of the events that occurred on 25 November 2022. In his email Mr Grief states the following;

*"Hi Alicia.*

*I have noted your response to our meeting on 7 December 2022, could you please consider my Exit Report and stand by for me to raise the matter with the Fair Work Commission as I will proceed in a controlled manner".*

[23] On 13 December 2022, Ms Bird emailed Mr Grief seeking clarification as to his intentions and advising that he was on unauthorised leave of absence. Ms Bird cautioned that if Mr Grief continued with his unauthorised leave of absence his employment may be terminated.

[24] On 16 December 2022, Ms Bird again emailed Mr Grief informing him that his complaint relating to the incident that occurred on 25 November 2022 had been investigated. Mr Grief was informed his requested amendments to his employment contract had been declined as the business could not accommodate him working independently from the Engineering team.

[25] On 9 February 2023, Ms Bird sent an email to Mr Grief noting that he was still absent from the workplace on unauthorised leave and requested he confirm his intentions regarding his employment.

[26] On 10 February 2023, Mr Grief responded to Ms Bird by reply email stating;

*“Hi Alicia,  
My primary intention is to return to work when the Defence Engineer is removed from the robot project. His involvement was misbegotten from the standpoint of my contract, in the wording that covers whom I am taking directives from, to wit, the executive level. Having an ‘advisor’ goes against the intentions of the agreement and, as I have outlined in my reports, clearly oppositional. I am only seeking to have all duties of my project, other than what is the duties to the executive returned to my responsibility.”(sic)*

[27] On 17 February 2023, Ms Bird sent a letter to Mr Grief inviting him to attend a disciplinary meeting regarding his unauthorised absence and failure to return to work. Mr Grief attended the meeting on 21 February 2023. Ms Birds evidence is that Mr Grief refused to return to work and advised her that he would be taking legal action against Penguin Composite for breach of contract.

[28] After considering Mr Grief’s responses Penguin Composites made the decision to dismiss Mr Grief. Mr Grief was notified in writing that his dismissal was to take effect on 2 March 2023. From the 25 November 2022 until the date of his dismissal Mr Grief remained absent from the workplace on unauthorised, unpaid leave. Mr Grief had not provided any medical evidence for his absence and relied on his statement of “Industrial Grievance” and his grievance as reasons for his unauthorised absence.

[29] Mr Grief submits that his absence from the 25 November 2022 until the date of his dismissal was a lawful absence provided for in his contract of employment and therefore the third period should be considered as continuous for the purposes of him being a person protected from unfair dismissal under section 382 of the Act.

## **Consideration**

[30] Mr Grief relies on three distinct periods he says should be taken into account to establish that he meets the minimum employment period required to make an Unfair Dismissal Application. Those employment periods Mr Grief submits the Commission should consider as being continuous in nature are;

1. The unpaid internship from 16 November 2021 to 25 February 2022 (the First Period)
2. The unpaid self-directed learning from mid-March to September 2022 (the Second Period)
3. The Graduate Engineer project placement role from 19 September 2022 to 2 March 2023 (the Third Period).

### *The First Period*

[31] Mr Grief argues his internship counts towards a period of employment with Penguin Composite. It is not in dispute that Mr Grief’s Internship was governed by an Internship Agreement. Although the Internship Agreement submitted as evidence was unsigned Mr Grief did not challenge its legitimacy or submit that the Commission should not rely upon its contents.

[32] The Internship Agreement sets out in detail the purpose of contractual relationship for an Engineering Internship position which was to be undertaken on a voluntary basis by the Intern, Mr Grief.

[33] The Internship Agreement specifies the internship is for a fixed period of 12 weeks. The Internship Agreement further specifies that whilst engaged as an Intern, Mr Grief was not entitled to receive a salary, or any other benefits associated with employment. The Internship Agreement specifies it is not intended to create an employment relationship.

[34] Mr Grief evidence was consistent with the terms of the Internship Agreement. He did not receive a salary or other statutory entitlements during his internship engagement with Penguin Composites. Mr Greif's evidence is that he was required by the University of Tasmania to complete an internship as part of his undergraduate degree.

[35] The contractual terms of the Internship Agreement evidence Mr Grief's role during the First Period to be an internship position, was not paid and not intended to create an employment relationship. This is consistent with Mr Grief's own evidence. I am not persuaded that Mr Grief was an employee at the time he was completing his unpaid internship with Penguin Composites. Therefore, the First Period does not count towards his service with Penguin Composites as he was not an employee as defined by section 13 of the Act. It stands to reason that the Internship is not a period of employment that can be relied on by Mr Grief for the purposes of the statutory minimum employment period required to make an unfair dismissal application. If my findings are wrong on this matter, for the reasons set out below if I was to take the time Mr Grief was engaged as an intern into consideration, Mr Grief still has not served the minimum employment period under section 383 of the Act and accordingly is not a person protected from unfair dismissal under section 382 of the Act.

[36] The Second Period Mr Grief seeks to rely on to satisfy the minimum employment period under section 383(a) of the Act is an unpaid period from mid-March 2022 to September 2022 (Second Period). During the Second Period Mr Grief conducted research to advance his own professional development and to gain his own intellectual property. Mr Grief produced reports he had written that he sought to rely on as evidence of an ongoing employment relationship. Mr Grief's oral evidence was that he had produced the reports at his own initiative as part of the development of his own capabilities and that the reports were not produced at the direction of Penguin Composites. Further, Mr Grief had at no stage provided the reports to Penguin Composites. Mr Grief did not receive any monetary compensation. Mr Grief's evidence outlined his desire to develop his capabilities which informed his decision to not be engaged as an employee during the Second Period. In his "Contract statement" dated 25 June 2020, Mr Grief states that he has been working independently to develop his capabilities and sought to negotiate terms of an employment contract for future employment.

[37] The evidence before me does not support a finding that for the Second Period Mr Grief was a national systems employee in s far as he was employed by a national systems employer (as described in s.14 of the Act). Therefore, the Second Period cannot be relied on to establish that Mr Grief has met the minimum employment period under section 383(a) of the Act.

[38] I find that Mr Grief commenced employment with Penguin Composites on 19 September 2022. Mr Grief commenced a period of unauthorised leave of absence on 25 November 2022.

[39] Section 384 provides that an employee’s period of employment is the period of continuous service with the employer. The ordinary meaning of ‘continuous service’ is the period of unbroken service by an employee with an employer.<sup>1</sup> The meaning of ‘continuous service’ is however affected by section 22 of the Act. The effect of section 22 is that certain periods (e.g. unauthorised absence and certain unpaid periods of leave) do not count towards the length of the continuous service.

[40] Mr Grief submits that clause 9.3 of his employment contract provides for the taking of unpaid leave at any time and that the provisions of the contract supersede any company policy in relation to absenteeism. Clause 9.3 of Mr Grief’s employment contract provides the following:

“Unpaid leave may be taken in order to further professional development. Any work done in this time is not covered in this contract. There is an expectation of dialogue before and during these periods of disengagement from paid work. This dialogue will serve to guide both parties to a path of mutual benefit.”

[41] Whilst it is not necessary for me to make a finding on whether the disputed contract term is a provision that allows Mr Grief to take unpaid leave at his own initiative. I make the following observations. Clause 9.3 provides for an agreement to take unpaid leave for the purposes of further professional development. Mr Grief took unauthorised unpaid leave as a form of protest against being supervised by the Defence Engineer in the course of his work, and not for the purpose of further development. Irrespective of the interpretation of clause 9.3 a period of unpaid leave does not count towards an employee’s length of service for the purposes of s.382.

[42] Section 382 of the Act provides that a person is protected from unfair dismissal if they have completed at least the minimum period of employment. Mr Grief commenced his employment with Penguin Composite on 19 September 2022. Mr Grief took an unauthorised period of unpaid leave from 25 November 2022 until his dismissal which took effect on 2 March 2022. Therefore, Mr Grief continuous service that counts for the purposes of the minimum employment period is 2 months and 6 days.

[43] Section 383 of the Act sets out the minimum employment period being 6 months as Penguin Composite is not a small business employer. For the reasons set out above, I am satisfied that Mr Grief has not completed the required minimum employment period.

[44] As Mr Grief has not completed the required minimum employment period under the Act the application has no reasonable prospects of success. Consequently, the application is dismissed. An order dismissing Ms Grief’s application will be issued with this decision.



COMMISSIONER



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<sup>1</sup> *Holland v UGL Resources Pty Ltd* [\[2012\] FWA 3453](#) at [20]