[2023] FWC 15 [Note: An appeal pursuant to s.604 (C2023/557) was lodged against this decision.]

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Brett Steed
v
Active Crane Hire Pty Ltd
(U2022/4290)

DEPUTY PRESIDENT BOYCE SYDNEY, 25 JANUARY 2023

Application for an unfair dismissal remedy – sleeping on duty - valid reason for dismissal – absence of procedural fairness – dismissal harsh, unjust, unreasonable – reinstatement inappropriate – compensation appropriate in all the circumstances - matter programmed to determine quantum of compensation to be ordered

Introduction

[1] Mr Brett Steed (**Applicant**) has filed a Form F2 application (**Application**) for an unfair dismissal remedy with the Fair Work Commission (**Commission**) alleging that he was unfairly dismissed (within the meaning of s.385 of the *Fair Work Act 2009* (**Act**)) by his former employer, Active Crane Hire Pty Ltd (**Respondent**).

[2] By way of its Form F3 Employer Response, the Respondent says that the Applicant was dismissed for unsatisfactory performance (sleeping on duty), and otherwise denies that the Applicant was unfairly dismissed.

[3] At the hearing, Mr Adam *Grumley*, Legal Officer, Transport Workers' Union, appeared on behalf of the Applicant, and Mr Hermann *Buchberger*, Managing Director, appeared for the Respondent.

Evidence and submissions

[4] At the hearing, the Applicant relied upon the following evidence:

(a) Witness Statement of Mr Brett Steed, undated and filed 13 July 2022;[1]

(b) Reply Witness Statement of Mr Brett Steed, undated and filed 17 August 2022;[2] and

[1] Exhibit A1.
[2] Exhibit A2.

(c) Further Witness Statement of Mr Brett Steed, undated and filed 14 September 2022.[3]

[5] The Applicant also relies upon his submissions dated 13 July 2022, 17 August 2022, 30 November 2022, and 14 December 2022.

[6] The Respondent relies upon the following evidence:

(d) Witness Statement of Mr Chadd Fuller, Yard Manager, dated 1 August 2022;[4]

(e) Witness Statement of Mr Peter Hunt, General Manager, dated 2 August 2022;[5]

(f) Witness Statement of Mr James Hagerty, Manager of Logistics, dated 1 August 2022;[6] and

(g) Witness Statement of Mr Herman Buchberger, Managing Director, dated 1 August 2022.[7]

[7] The Respondent also relies upon its submissions dated 2 August 2022, and 7 December 2022.

Factual findings

[8] Based upon the evidence relied upon by both parties at the hearing, I make the findings set out in the paragraphs that follow.

[9] The Applicant commenced employment with the Respondent on 8 December 2020.[8]

[10] The Applicant was employed by the Respondent as a Truck Driver and General Yard Hand (there was roughly a 50/50 split between these two roles).

[11] The Applicant's 2021 Performance Review was unexceptional. He received both positive and negative feedback in respect of same.

[12] By way of letter dated 8 April 2022, the Applicant was dismissed by the Respondent for unsatisfactory work performance, more specifically, sleeping on duty (**Termination Letter**). The Applicant's term of employment with the Respondent was around 16 months.

[13] I accept the evidence of Mr Fuller and Mr Hagerty that they witnessed the Applicant asleep in a truck in the Respondent's truck yard on 7 April 2022 between 2.30pm and 3.00pm.

[3] Exhibit A3.
[4] Exhibit R1.
[5] Exhibit R2.
[6] See PN477 of transcript.
[7] Exhibit R4.
[8] Form F3, Item 1.2; Respondent's Submissions dated 2 August 2022 at [3].

[14] I reject the evidence of Mr Hunt, Mr Fuller, Mr Buchberger, and Mr Hagerty to the extent that they assert that the Applicant was stood down (by Mr Hagerty) on 7 April 2022 pending arrangements being made for a meeting or discussion to occur in relation to the Applicant sleeping on duty and/or his dismissal.

[15] I accept the evidence of the Applicant that he was dismissed (verbally) by Mr Hagerty at or around 3.00pm on 7 April 2022 (i.e. shortly after he was witnessed sleeping on duty). This was subsequently confirmed in the Termination Letter dated 8 April 2022.

Relevant law regarding unfair dismissal

[16] Section 385 of the Act qualifies a claim for unfair dismissal:

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

[17] The parties are not in dispute as to the following:

(a) The unfair dismissal application was made within the period required by s.394(2) of the Act.

(b) The Applicant is a person protected from unfair dismissal within the meaning of s.382 of the Act.

(c) The Applicant was "dismissed" by the Respondent within the meaning of s.386 of the Act.

(d) The Small Business Fair Dismissal Code (as provided for in s.388 of the Act) does not apply.

(e) The Applicant's dismissal was not a case of genuine redundancy within the meaning of s.389 of the Act.

[18] I accept and make findings consistent with the foregoing position of the parties.

Whether the Applicant's dismissal was harsh, unjust, and/or unreasonable

[19] Section 387 of the Act provides what matters must be taken into account in determining whether a dismissal was harsh, unjust or unreasonable.

> "**387 Criteria for considering harshness etc.**
>
> 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".

[20] The terms "harsh", unjust" and "unreasonable" are to be given their ordinary meaning.

s.387(a) — Whether there was a valid reason for the Applicant's dismissal which is related to his capacity or conduct

[21] An employer bears the persuasive onus of establishing that there was a valid reason for an employee's dismissal.[9]

[22] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded", and should not be "capricious, fanciful, spiteful or prejudiced".[10] Further, the

[9] *Allied Express Transport Pty Ltd v Anderson* (1998) 81 IR 410, at 412; *Yew v ACI Glass Packaging Pty Ltd* (1996) 71 IR 201, at 204.
[10] *Selvachandran v Peteron Plastics Pty Ltd* [1995] IRCA 333; (2000) IR 371, at 373.

Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.[11]

[23] Where the dismissal relates to conduct, the reason for dismissal may be valid because the conduct occurred and justified dismissal. However, the reason may not be valid because the conduct did not occur, or it did occur but did not justify dismissal.[12] The question of whether the alleged conduct took place, and what it involved, is to be determined by the Commission on the basis of the evidence in the proceedings before it.[13] The onus of proof in relation to misconduct rests with an employer, and the standard of proof is based upon the balance of probabilities (the more serious an allegation, the higher the burden upon an employer to prove that allegation).[14]

[24] Where a dismissal relates to capacity (i.e. where the reason is associated or connected with the ability of the employee to do the job),[15] and there is a dispute as to an employee's requisite capacity, it is for the Commission to resolve that dispute as a matter of fact.[16]

[25] The Applicant asserts in his evidence that was not asleep on duty on 7 April 2022. In this regard, the Applicant says that he was simply resting in a truck in the yard due to inclement weather. He removed his wet shoes, put the heater on, and "sat on the bed" in the truck cabin so as to escape and shelter from a "torrential downpour" of rain between 2.00pm and 3.00pm that day. The Applicant's evidence is that he was just about to get out of the truck (as the rain had "slowed down") when Mr Hagerty opened the truck door.

[26] Whilst I accept the evidence of Mr Fuller and Mr Hagerty that they personally each witnessed the Applicant lying down asleep in the bed of the truck cabin, the real issue is that the Applicant had no reason to be resting up or escaping the rain in the truck. In this regard:

a) the Applicant's conduct (in taking shelter in the truck from rain) is contrary to the Respondent's inclement weather procedures;

b) there is always work to do indoors if work in the yard cannot be performed due to bad or unsavoury weather;

c) there is an undercover table and chairs where employees can rest if they are not working in the yard; and

d) the Applicant did not notify his supervisor or any other employee working that day that he was removing himself to the truck.

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[11] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, at 685.

[12] *Edwards v Justice Giudice* (1999) 94 FCR 561; (1999) 169 ALR 89; [1999] FCA 1836, at [7]; *Gelagotis v Esso Australia Pty Ltd* [2018] FWCFB 6092, at [117]; *Titan Plant Hire Pty Ltd v Van Malsen* [2016] FWCFB 5520, 263 IR 1, at [28].

[13] *King v Freshmore (Vic) Pty Ltd* Print S4213 [2000] AIRC 1019, at [23] to [24].

[14] *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Evidence Act 1995* (Cth), s.140.

[15] *Crozier v AIRC* (2000) 50 AILR 4-488*;* [2001] FCA 1031, at [14].

[16] See more broadly: *Jetstar Airways Ltd v Neeteson-Lemkes* [2013] FWCFB 9075; *CSL Limited v Chris Papaioannou* [2018] FWCFB 1005.

[27] Both parties sought to tender or otherwise rely upon rainfall data to show that the rainfall at the time that the Applicant was found in the truck was heavy (in the case of the Applicant) or mild or non-existent (in the case of the Respondent). I consider such evidence unreliable in that I do not consider that I am in a position to make a positive finding either way. That said, whatever the rainfall was at the time that the Applicant was found in the truck, it does not change the findings I have made in paragraph [26] above.

[28] I find that there was a valid reason to dismiss the Applicant from his employment. This leans toward a finding that the Applicant's dismissal was not harsh, unjust and unreasonable.

s.387(b) - Whether the Applicant was notified of the valid reason; and s.387(c) - Whether the Applicant was given an opportunity to respond to any reason related to his capacity or conduct

[29] Proper consideration of s.387(b) of the Act requires a finding to be made as to whether the Applicant "was notified of that reason" and given an opportunity to respond to same.

[30] Contextually, the reference to "that reason" is the valid reason found to exist under s.387(a) of the Act.[17] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment, and in explicit, plain and clear terms.[18]

[31] In order to be given an opportunity to respond for the purposes of s.387(c), the employee must be made aware of allegations concerning the employee's conduct so as to enable them to respond to the allegations and must be given an opportunity to defend themselves. As Justice Moore has stated in *Wadey v YMCA Canberra*[19] (**Wadey**):

> "the opportunity to defend, implies an opportunity that might result in the employer deciding not to terminate the employment if the defence is of substance. An employer may simply go through the motions of giving the employee an opportunity to deal with allegations concerning conduct when, in substance, a firm decision to terminate had already been made which would be adhered to irrespective of anything the employee might say in his or her defence. That… does not constitute an opportunity to defend."[20]

[32] Whilst the Applicant was advised of the reason (valid reason) for his dismissal (sleeping on duty), he was not given an opportunity to respond or raise issues of mitigation (in the *Wadey* sense) before the decision was made to dismiss him. This leans toward a finding that the Applicant's dismissal was harsh, unjust and unreasonable.

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[17] *Bartlett v Ingleburn Bus Services Pty Ltd* [2020] FWCFB 6429, at [19]; *Reseigh v Stegbar Pty Ltd* [2020] FWCFB 533, at [55]; *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, at 151.

[18] *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998). See also *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), at [41]; *Read v Gordon Square Child Care Centre Inc* [2013] FWCFB 762 (Acton DP, Deegan C and Gregory C), at [46] to [49].

[19] [1996] IRCA 568.

[20] Ibid.

s.387(d) — Whether there was any unreasonable refusal by the Respondent to allow the Applicant to have a support person present to assist at any discussions relating to dismissal

[33] As noted by a Full Bench of this Commission, "[t]he subsection is not concerned with whether or not the employee was informed that he or she could have a support person present".[21]

[34] There were no substantive or relevant submissions made by either party regarding s.387(d) of the Act. I therefore consider this criterion to be a neutral consideration in determining whether the Applicant's dismissal was harsh, unjust or unreasonable.

s.387(e) — Whether the Applicant was warned about that unsatisfactory performance before his dismissal

[35] A warning for the purposes of s.387(e) of the Act must clearly identify:

- the areas of deficiency in the employee's performance;
- the assistance or training that might be provided;
- the standards required; and
- a reasonable timeframe within which the employee is required to meet such standards.[22]

[36] In addition, the warning must "make it clear that the employee's employment is at risk unless the performance issue identified is addressed."[23] In order to constitute a warning for the purposes of s.387(e), it is not sufficient for the employer merely to exhort their employee to improve their performance.[24]

[37] Whilst the Termination Letter refers to the Applicant's unsatisfactory work performance, the reality is that the Applicant was dismissed for reasons of conduct (i.e. sleeping on duty). I therefore consider this criterion to be a neutral consideration in determining whether the Applicant's dismissal was harsh, unjust or unreasonable.

The degree to which the size of the Respondent's enterprise would be likely to impact on the procedures followed in effecting the dismissal (s.387(f)); and 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 (s.387(g))

[38] The Respondent employs some 45 employees. There is no evidence to suggest that the size of the Respondent's enterprise likely impacted upon the procedures it followed in effecting the Applicant's dismissal.

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[21] *Jurisic v ABB Australia Pty Ltd* [2014] FWCFB 5835, at [84].
[22] *McCarron v Commercial Facilities Management Pty Ltd t/a CFM Air Conditioning Pty Ltd* [2013] FWC 3034, at [32].
[23] *Fastidia Pty Ltd v Goodwin*, Print S9280 (AIRCFB, Ross VP, Williams SDP, Blair C, 21 August 2000), at [43] to [44].
[24] Ibid.

[39] The absence of a dedicated human resource management specialist does not relieve an employer of extending an appropriate degree of courtesy to its employees "even when implementing something as difficult and unpleasant as the termination of a person's employment".[25]

[40] Neither party put forward substantive or relevant submissions that go directly to either of the criterion under ss.387(f) and (g) of the Act. I treat both of these criterion as neutral considerations in this case.

s.387(h) - Any other matters that the Commission considers relevant

[41] Procedural fairness is one factor that the Commission may take into consideration under s.387(h) of the Act when deciding if a dismissal has been harsh, unjust or unreasonable. It concerns the decision-making process followed or steps taken by a decision maker, rather than the actual decision itself.[26] Ordinarily, procedural fairness requires that an allegation be put to a person and that they be given an opportunity to answer it before a decision is made.[27] Further, although s.387(d) of the Act does not require an employer to inform an employee that they may have a support person present, that matter may be relevant in all the circumstances and taken into account under s.387(h).[28]

[42] The Respondent went to great lengths in its evidence to suggest that whilst it sought to engage in a procedurally fair process to dismiss the Applicant, the Applicant chose not to engage in that process. In this regard, each of the Respondent's witnesses sought to portray the Applicant's dismissal on 7 April 2022 as a stand down, and gave evidence that the use of the words "finish up" on 7 April 2022 meant finish the shift that day, not finish the employment relationship. I completely reject this evidence.[29] It is wholly contrary to the words of the Termination Letter, and the contemporaneous objective documentary and other evidence that was unchallenged during the proceedings.[30] Significantly, the Respondent's witness statements were not prepared individually, but together, meaning I give the evidence contained in the Respondent's witness statements, going to the issue of procedural fairness, no weight.[31]

[43] Having regard to the fact that the Applicant was dismissed on the spot shortly after he was found to be sleeping on duty, his dismissal evinces a total absence of procedural fairness. This leans toward a finding that the Applicant's dismissal was harsh, unjust and unreasonable.

Was the Applicant's dismissal unfair?

[44] I have made findings in relation to each of the criterion specified under s.387 of the Act (as relevant). I have also considered and given due weight to each of the criterion as a

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[25] *Sykes v Heatly Pty Ltd t/a Heatly Sports* PR914149 (AIRC, Grainger C), at [21].
[26] *Telstra Corporation v Streeter* [2008] AIRCFB 15, at [27].
[27] *Kioa v West* [1985] HCA 81, at [22] (per Wilson J). See also at [11] per Gibbs CJ.
[28] *Jurisic v ABB Australia Pty Ltd* [2014] FWCFB 5835, at [84].
[29] Transcript, PN263-PN284; PN453-PN467, PN608-PN629, PN671-PN684, PN691-PN692, PN702-PN708.
[30] See, for example, Transcript, PN677-PN679 (the Applicant was asked to hand in his keys and clean out his locker on 7 April 2022); PN706 (the Applicant did not return to work after 7 April 2022); PN263-PN284 (contemporaneous notes).
[31] Transcript, PN920-PN923.

fundamental element in determining whether the Applicant's dismissal was harsh, unjust or unreasonable.[32]

[45] In relation to the criterion set out under s.387 of the Act, I have found that:

(a) the Respondent had a valid reason to dismiss the Applicant from his employment;

(b) the criteria under ss. 387(c) and 387(h) weigh in favour of a finding that the Applicant's dismissal was harsh, unjust and unreasonable; and

(c) other relevant criterion are neutral considerations.

[46] In view of the foregoing findings and conclusions, I find that the Applicant's dismissal was unfair (i.e. harsh, unjust and unreasonable within the ordinary meaning of those terms).

Remedy

[47] The Applicant seeks reinstatement, or in the alternative, compensation for lost earnings up to the statutory limit prescribed by s.391 of the Act.

[48] I am satisfied that reinstatement of the Applicant to the Respondent's employ is inappropriate. The Applicant has denied that he was asleep on duty on 7 April 2022. Despite these denials, I have found that he was asleep. The Applicant has shown no contrition or remorse for his conduct. There is clear animosity between the Applicant and the Respondent's management. Had the Respondent effected the Applicant's dismissal in a procedurally fair manner, it is unlikely that I would have found his dismissal unfair. The issue of remedy therefore turns to whether compensation should be awarded, and if so, its quantum.

[49] In the facts and circumstances of this case, I consider that an award of compensation to the Applicant to be an appropriate remedy for his unfair dismissal.

[50] Section 392(2) of the Act requires all of the circumstances of the case to be taken into account when determining an amount to be paid as compensation to the Applicant in lieu of reinstatement:

"**392 Remedy—compensation**

…

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

[32] *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, at [51]. See also *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), at [92]; *Edwards v Justice Giudice* [1999] FCA 1836, at [6] to [7].

(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".

[51] Any amount determined under s.392(2) is to be reduced by relevant payments (excluding leave entitlements) made to the employee upon termination (in this case, 2 weeks' notice was paid to the Applicant), and may be further reduced (including to nil) if the employee's misconduct is found to have contributed to an employer's decision to dismiss the employee (s.392(3)). An award of compensation is not to include any amount for shock, humiliation, distress or other analogous hurt, caused to the employee as a result of the manner of their dismissal (s.392(4)).

Calculation of compensation

[52] Evidence was not tendered during the hearing by the Applicant in relation to the matters specified under s.392(d) and (e) of the Act. Nor do I have evidence from the Respondent in relation to the total amount of remuneration specified by s.392(6) of the Act. The matter will therefore be programmed (via further directions) to enable the parties the opportunity to engage with these matters by way of evidence and written submissions prior to any order for compensation being made.

DEPUTY PRESIDENT

Appearances:

Mr Adam *Grumley*, Legal Officer, Transport Workers' Union, appeared on behalf of the Applicant.

Mr Hermann *Buchberger*, Managing Director, appeared for the Respondent.

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