DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal

Suzie Cheikho

v

Insurance Australia Group Services Limited
(U2023/2059)

DEPUTY PRESIDENT ROBERTS SYDNEY, 21 JULY 2023

Application for relief from unfair dismissal

[1] On 13 March 2023, Ms. Suzie Cheikho (the Applicant) made an application to the Fair Work Commission (Commission) under s.394 of the *Fair Work Act 2009* (Cth) (FW Act) for a remedy alleging that she had been unfairly dismissed from her employment with Insurance Australia Group Services Pty Limited (the Respondent). The Applicant seeks compensation arising from the circumstances of her dismissal.

When can the Commission order a remedy for unfair dismissal?

[2] Section 390 of the FW Act provides that the Commission may order a remedy if:

(a) the Commission is satisfied that the Applicant was protected from unfair dismissal at the time of being dismissed; and

(b) the Applicant has been unfairly dismissed.

[3] Both limbs of this section must be satisfied. I am therefore required to consider whether the Applicant was protected from unfair dismissal at the time of being dismissed and, if I am satisfied that the Applicant was so protected, whether the Applicant has been unfairly dismissed.

When is a person protected from unfair dismissal?

[4] Section 382 of the FW Act provides that 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.

[5] The Applicant was employed by the Respondent for a period of almost eighteen years which exceeds the minimum employment period. The Respondent accepted that the *IAG Enterprise Agreement 2020* applied to the Applicant's employment. It was not in issue that the Applicant was protected from unfair dismissal at the time of being dismissed and I am satisfied that that is the case.

When has a person been unfairly dismissed?

[6] Section 385 of the FW Act provides that a person has been unfairly dismissed if the Commission 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.

[7] The Applicant was dismissed on 20 February 2023 and lodged her application for relief on 13 March 2023 within the requisite time period.[1] The matters referred to at points (a), (c) and (d) above were not in issue. No jurisdictional issues arise with the application. Accordingly, the question of whether the Applicant has been unfairly dismissed will depend on whether the Commission is satisfied that the dismissal was hash, unjust or unreasonable within the meaning of s.385. Before turning to consider whether the Applicant has been unfairly dismissed, it is convenient to set out some of the factual background relevant to the proceedings.

Background

[8] The Applicant commenced employment with the Respondent on 16 May 2005. She had performed the role of Consultant, Outbound Comms Disclosure in the Direct Insurance Australia Outbound Comms Team since 2 January 2017. She was employed on a full-time basis and reported, most recently, to Ms Stacey Dennis (Ms. Dennis). Amongst other things, the Applicant's duties included responsibility for the creation and change of static insurance policy documents, ensuring static policy documents sent to customers complied with regulatory and legal standards by ensuring they were reviewed and signed-off by key stakeholders within the Respondent, ensuring that regulatory timeframes were met, assisting in the delivery of the regulatory policy communication strategy and folder management, mailbox management, JIRA management as per control testing guidelines, peer reviews, leave management, and work from home compliance.[2]

[9] According to the Respondent's evidence the Respondent is one of the largest insurers in Australia.[3] It operates in a regulated environment. Its employees are required to understand and comply with a complex legislative and regulatory framework.[4] Many of the Respondent's employees, including until the time of her termination, the Applicant, work remotely. In the latter part of 2022, the Respondent had a hybrid approach to working from home but was by this time recommending that employees start to attend work at the office. The Applicant chose to work to work from home on an almost permanent basis.[5]

[10] The Applicant was terminated on 20 February 2023 for what the Respondent alleges was misconduct. That misconduct involved the alleged failure by the Applicant to work as required during the period October to December 2022. The Respondent maintained that evidence of this failure was demonstrated by a review that the Respondent conducted of the Applicant's cyber activity for that period. The Respondent claimed that the report generated by this review which measured amongst other things, key-stroke activity, that is, the number of times the person physically presses a key on their keyboard, showed that the Applicant had significant periods where no or minimal keyboard activity was evident. The Applicant disputed the claim that she had not been working as required during this period.

Was the dismissal harsh, unjust or unreasonable?

[11] Section 387 of the FW Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission 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.

[12] I am required to consider each of these matters, to the extent they are relevant to the factual circumstances before me.[6] I set out my consideration of each below.

Was there a valid reason for the dismissal related to the Applicant's capacity or conduct?

[13] The Applicant submitted that there was no valid reason for the dismissal, that the Respondent had a premeditated plan to remove her from the business and that she was targeted due to her mental health issues.[7] The Applicant denied that the results of the review of her cyber activity in the October to December 2022 period reflected the reality of the work she was doing in that period.

[14] The Respondent submitted that there was a valid reason in that the Applicant failed to perform the inherent requirements of her role by failing to work during her designated working hours. The Respondent also maintained that the Applicant's failure to attend to her duties put additional pressure on her work colleagues such that the Respondent's managers were concerned that this was creating a work health and safety risk for those employees because they were taking on additional work given that the Applicant was missing deadlines and not communicating effectively.

[15] The Applicant provided limited evidence dealing with the issue of whether there was a valid reason for the dismissal. In her Application, the Applicant said in relation to the cyber review of her laptop computer, 'I just don't use this device. I doubt the data. I don't believe for a minute it's true.' In her written response to the allegations relating to alleged misconduct dated 8 February 2023 and relied on in the proceedings by the Applicant, the Applicant said to the Respondent:

> *I am writing to address the allegations. I have had a look at the data and tried to get an explanation for those missing hours and times and really can't recall why or how it's that low. I have tried to go through emails and messages to see if I can explain it.*
>
> *I have been going through a lot of personal issues which has caused a decline to my mental health and unfortunately I believe it has affected my performance and my work…*

[16] In her oral evidence the Applicant said that because she was not given a second monitor, she would use her television but 'run it through the laptop.'[8] When she was asked whether she was saying that the data relating to her computer activity was wrong because she was accessing the systems on her television the Applicant said:

> *No, no, no, I'm not saying it's wrong, I said that's some ways that I would access the data as well. And I don't know if that's the reason why it's wrong, but at the end of the day predominantly I'm using the laptop. Like I'm not using another device to log into IAG's system.*[9]

[17] The Applicant was also asked whether she always used her laptop to login to her work and answered that she also used her phone whilst accepting that predominantly, for most of her work she used her laptop.[10] She said that there were extended periods where she was just reading and checking the wording of documents and did not have to do anything else.[11] The Applicant said that she always started on time but accepted that she had 'a few things going on' because

of an injury and if she had to step out for medical appointments during working hours she would send a Teams message to let people know and make up the time afterwards.[12]

[18] The Respondent provided evidence from two managers, Ms. Prior, Executive Manager Operational Design and Delivery and Ms. Dennis, Lead Outbound Comms Disclosure. Ms. Prior was the manager, twice removed, of the Applicant. Ms Dennis was the Applicant's Direct Manager. In summary, Ms Prior's evidence was as follows:

(1) Ms Prior first became aware of concerns with the Applicant's conduct in October 2022. Ms Prior prepared a letter to the Applicant asking that she attend a meeting on 1 November 2022 to discuss those concerns.

(2) The concerns included the failure of the Applicant to deal with a task allocated to her for a period of 4 weeks resulting in a fine being imposed on the Respondent by the regulator ASIC and attending a Teams meeting with Ms. Dennis with the word 'Fuck' written across her hand.

(3) Ms. Prior issued a written warning to the Applicant dated 4 November 2022 arising out of the meeting of 1 November.

(4) Ms Prior became aware of further concerns with the Applicant's performance in the period September to November 2022 through Ms. Dennis and Ms Chavan.

(5) In December 2022, in response to these further concerns Ms. Prior put the Applicant on a performance improvement plan (PIP) to formalise the matter and to demonstrate what was expected of the Applicant.

(6) As part of the PIP process, in early January 2023 a review of the cyber activity of the Applicant was undertaken by the Respondent for the period 1 October 2022 to 16 December 2022.

(7) The review disclosed that:

(i) The Applicant failed to work her designated rostered hours (7.8 hours) for 44 working days out of 49 working days;

(ii) The Applicant failed to begin work at 7:30 am (her designated start time) on 47 working days out of 49 working days;

(iii) The Applicant failed to finish at or after 4:00 pm (her designated finish time) on 29 working days out of 49 working days;

(iv) The Applicant failed to perform any work (0 hours) on 4 days out of 49 working days; and

(v) during the days that The Applicant had logged on to work there was very low keystroke activity on her laptop, which indicated that she was not presenting for work and performing work as required.

(8) As a result of the review, Ms. Prior issued a letter to the Applicant dated 1 February 2023 asking the Applicant to attend a formal meeting on 2 February.

(9) Ms Prior (and Ms Dennis) met with the Applicant and a union support person from the Finance Sector Union on 2 February. At this meeting the Applicant said words to the effect of:

> *I cannot believe this data. Sometimes the workload is a bit slow, but I have never not worked. I mean, I may go to the shops from time to time, but that is not for the entire day. I need to take some time to consider this and I will put forward a response.*

(10) At the request of her union representative the Applicant was given additional time, until 8 February 2023, to provide a written response.

(11) On 8 February 2023 the Applicant provided a written response (reproduced in part at paragraph [15] above).

(12) The Applicant did not provide any evidence to demonstrate that she had been online and working throughout the periods of inactivity on the 44 of the 49 working days.

(13) On 10 February Ms Prior issued a letter to the Applicant inviting her to attend a further meeting on 13 February 2023 to 'show cause' why her employment should not be terminated.

(14) The Applicant provided a written response dated 14 February 2023 to the show cause letter.

(15) Ms. Prior and Ms. Dennis met with the Applicant on 20 February and terminated the Applicant's employment.[13]

[19] Ms. Dennis provided detailed evidence in her witness statement. She described performance issues with the Applicant dating back to April 2022. These included difficulties in meeting deadlines, being absent and uncontactable, missing meetings and a failure to lodge a product disclosure statement with the regulator. Ms. Dennis gave evidence that the Applicant was issued with a 'Letter of Expectation' on 6 June 2022 outlining concerns with the Applicant's conduct and performance. She said that in October 2022 a fine had been imposed on the Respondent by ASIC arising out of the Applicant's failure to lodge documentation with that body. She said that the Applicant was issued with a formal written warning in November 2022 and that by early December, in response to ongoing concerns about the Applicant's work, the Applicant was placed on the PIP.

[20] At some point in December 2022, Ms. Dennis asked the Respondent's cyber team to conduct a review of the Applicant's cyber activity from the period October to December 2022. A copy of the review report was provided as evidence. The report was in three parts. The first part related to the 'daily activity' of the Applicant. That recorded the first and last event on the

Applicant's computer on any given day. The second part gave details of 'hourly activity', that is user activity broken down by the hour. The third part of the report related to 'VPN activity' broken down by day. The report contains a number of qualifications including that in relation to VPN usage, an acknowledgment that many users do not use the VPN unless required due to bandwidth issues.[14]

[21] Ms. Dennis's evidence was that this review disclosed that the Applicant:

(a) averaged 48.6 keystrokes per hour for the period between 1 October 2022 to 31 October 2022 (**October Period**) and had 117 hours during working hours with 0 keystroke activity during the October Period;

(b) averaged 34.56 keystrokes per hour for the period 1 November 2022 to 31 November 2022 (**November Period**) and had 143 hours with 0 key stroke activity during the November Period;

(c) averaged 80 keystrokes per hour for the period between 1 December 2022 to 16 December 2022 (**December Period**) and had 60 hours with 0 key stroke activity during the December Period; and

(d) only exceeded 1,000 keystrokes in a one-hour period, being at 11:00 am on 10 June 2022 when 1,830 keystrokes were registered. 1,830 keystrokes amount to approximately half a page of text.[15]

[22] According to Ms. Dennis's statement:

> *To perform the inherent requirements of Ms Cheikho's role she would have to be working on her laptop, as Ms Cheikho's position required her to engage with various stakeholders via email and Teams. She was also required to access documents on IAG file drives and Sharepoint, and track progress of work on platforms such as Planner and Jira, which are all required to be accessed on an IAG laptop device as passwords need to be entered and the VPN (virtual private network) needs to be connected on the IAG laptop device. Ms Cheikho could not perform these tasks (which were an essential part of her Position) on any other device (including for example, her personal mobile device).*
>
> *As such, I would expect that there would be at a minimum more than 0 key stroke activity during each working hour (other than potentially where Ms Cheikho was attending a meeting where she may be focusing and contributing rather than typing on her laptop) and that as her role required data input and correspondence with various stakeholders, her key strokes per hour would be upwards of 500 key strokes per hour.*[16]

[23] Ms. Dennis said that the results of the cyber review were made known to the Applicant at a meeting on 2 February 2023 with the Applicant and her union representative. The Applicant was notified of the meeting by letter dated 1 February 2023 which set out that the meeting was to discuss allegations of misconduct. Details of the alleged misconduct identified by the cyber review were included in the letter. At the meeting, the Applicant requested time to respond to

the allegations in writing. The Respondent gave the Applicant until 8 February to provide a response and she did so by email dated 8 February.[17] No documentary evidence was provided by the Applicant to the Respondent to contradict the allegations that had been levelled against her.

[24] Ms. Dennis's evidence was that following receipt of the Applicant's response a 'show cause' letter[18] was sent inviting the Applicant to either attend a further meeting on 13 February or provide a further written response by the following day. The letter said that based on the available information, the Respondent's view was that the allegations had been substantiated, that the conduct constituted a breach of the Respondent's Code of Conduct and Ethics and that the Respondent's preliminary view was that the Applicant's employment should be terminated. The letter indicated that the purpose of the meeting was to invite the Applicant to show cause why termination of employment should not follow.

[25] The Applicant chose to provide a further written response.[19] The response included a letter of support from the Applicant's doctor dated 14 February 2023 which made reference to a diagnosis which had significantly impacted the Applicant's sleep, memory and day to day functioning. In relation to the central allegation of misconduct, the Applicant's response included the following:

> *In response to the OUTCOME OF FORMAL MEETING AND INVITATION TO SHOW CAUSE letter I would like to confirm a few of the points please see the following:*
> *…*
> *You "could not recall why or how [the data] it's that low" - I was confused and shocked when presented with the data. I do doubt the accuracy of the data presented and also confirmed I have used other devices other than my laptop to log in and complete work when I had system issues. I am sure I have been logging on time most of the days and if I was ever late I would log back on later to complete my hours.*
>
> *• You had gone through your emails and messages to try to explain it – I did experience a lot of system issues over the last few weeks of last year but I had advised of these errors. This is why I tried to retrieve emails to match dates up but was unsuccessful.*

[26] Ms Dennis's evidence[20] also went to other concerns with the Applicant's conduct relating to incomplete tasks that had come to light after the disciplinary process had commenced. These concerns were conveyed to the Applicant in writing.[21] It is not necessary to recount these issues in any detail.

[27] The Applicant's employment was ultimately terminated at a meeting between the Applicant, Ms. Prior and Ms Dennis on 20 February 2023.

'Valid Reason' – General Principles

[28] In order for there to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"[22] and should not be "capricious, fanciful, spiteful or prejudiced."[23] However, the 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.[24]

[29] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.[25] "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. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination."[26]

Findings

[30] The evidence demonstrates that in the period October to December 2022 the Applicant was not working as she was required to do during her designated working hours. The Applicant was given an opportunity to refute the allegation relating to the non-performance of her duties during the process she engaged in with her employer in February 2023. The evidence shows that she was unable to provide a credible explanation during that process. Nor was the Applicant able to do so in the course of these proceedings. In cross-examination the Applicant accepted that she had access to the systems and records of the Respondent from the time the allegations were put to her. This would have assisted the Applicant with any efforts she might have made to show that she had been working as required during the relevant period. However, there was little put forward by the Applicant that assisted her argument that the cyber records were inaccurate. The Applicant did not adduce evidence as to the work that she actually performed during the relevant period in October to December 2022. The Applicant asserted that on occasions she may have used other devices such as her mobile phone to perform some tasks. The evidence in this respect, such as it was, did not cast into any significant doubt the evidence provided by the Respondent, including the evidence of Ms. Dennis as to the need for the Applicant to use her laptop to do the range of duties required of her. In my view the evidence establishes that there were extended periods where the Applicant was not working as she was required to do in the October to December 2022 period. This constituted a valid reason for the dismissal of the Applicant.

Was the Applicant notified of the valid reason?

[31] Proper consideration of s.387(b) requires a finding to be made as to whether the applicant "was notified of that reason". In the context of the section, the reference to "that reason" is the valid reason found to exist under s.387(a).[27]

[32] 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,[28] and in explicit[29] and plain and clear terms.[30]

[33] The terms of the Respondent's letter dated 10 February 2023 make it plain to the Applicant that the Respondent's view at that point was that the Applicant had engaged in conduct in breach of the Respondent's Code of Ethics and Conduct, that the misconduct was viewed seriously and that the preliminary view of the Respondent was that termination of employment should follow. The purpose of the letter was to give the Applicant an opportunity to respond to the proposed termination and in this respect, the procedural fairness purpose of s.387(b) was met. In fact, the Applicant had been on notice of the allegation of misconduct since receiving the Respondent's letter of 1 February 2023. She had also been provided with a copy of the cyber data on which the allegation relating to the valid reason was based, by email

on 3 February 2023.[31] The Applicant was ultimately notified in writing on 20 February 2023, being the date of the termination of her employment, that she was being dismissed for reasons of misconduct. I find that the Applicant was notified of the valid reason for her termination.

Was the Applicant given an opportunity to respond to any valid reason related to their capacity or conduct?

[34] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.[32]

[35] The opportunity to respond does not require formality and this factor is to be applied in a common-sense way to ensure the employee is treated fairly.[33] Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements.[34]

[36] The Applicant submitted that she was at a disadvantage in that she did not have access to all of the material that the Respondent did relating to her work during the period in question. However, she accepted in cross-examination that she had access to the Respondent's information systems, including after the date the allegations were put to her on 2 February 2023 until the date of her termination. Notwithstanding any possible or perceived disadvantage, the Applicant did not seriously contend that she was not given an opportunity to respond to an any valid reason related to capacity or conduct.

[37] The Respondent submitted that the Applicant did have an opportunity to respond to any valid reason. The Respondent relied on the letters to the Applicant of 1 and 10 February which provided the Applicant with an opportunity to respond in person and in writing. The Applicant availed herself of the opportunity to provide a written response in both cases.

[38] I am satisfied on the evidence that the Applicant was made aware of the nature of the Respondent's concern about her conduct. In all the circumstances, I find that the Applicant was given an opportunity to respond to the reason for her dismissal prior to the decision to dismiss being made.

Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at any discussions relating to the dismissal?

[39] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, an employer should not unreasonably refuse that person being present.

[40] Subsection 387(d) does not impose a positive obligation on an employer to offer an employee the opportunity to have a support person:

> *"This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an*

employee the opportunity to have a support person present when they are considering dismissing them."[35]

[41] In this matter the Applicant had a union support person attend the meeting with her on 2 February 2023 but otherwise there was no evidence of any request for the presence of a support person by the Applicant. There was no unreasonable refusal by the Respondent to allow the Applicant to have a support person present to assist at any discussions relating to dismissal.

Was the Applicant warned about unsatisfactory performance before the dismissal?

[42] Warnings are plainly relevant when an employee is dismissed for unsatisfactory performance. In its consideration of equivalent provisions under the former *Workplace Relations Act 1996*, a Full Bench of the Australian Industrial Relations Commission concluded that a dismissal relates to unsatisfactory performance where it refers to "the level at which the employee renders performance, including factors such as diligence, quality, care taken and so on."[36] The Bench there recognised the potential for overlap between the concepts of unsatisfactory performance and misconduct, but pointed out that the misconduct in that case was in a different category to the type of unsatisfactory performance contemplated by the relevant section.

[43] Whilst there was evidence in this case that disclosed a history of unsatisfactory performance by the Applicant, including the fact that the Applicant was placed on a PIP in later 2022, the Respondent nevertheless characterised the ultimate reason for the termination as misconduct, that is the failure to attend work as required during October to December 2022, rather than unsatisfactory performance. I consider that to be a correct characterisation. The failure of the Applicant to attend to her duties in that period was not of a minor or incidental nature. It was on a scale and at a sufficient level of seriousness to constitute misconduct. In that event, the issue of warnings is not a relevant consideration here. I note that even if the dismissal were to be regarded as arising from a series of events considered to amount to unsatisfactory performance, the Applicant was put on notice or formally warned that her performance had been called into question including by correspondence dated 6 June, 31 October and 4 November 2022 and by the implementation of the PIP in December 2022.

To what degree would the size of the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?

[44] The Applicant made no submission in relation to this matter. The Respondent submitted that the size of its enterprise and its internal Human Resources Department meant that this was a 'neutral' consideration. I am unable to discern any matter under this heading that weighs in favour or against a conclusion that the dismissal was harsh, unjust or unreasonable. I find that the size of the Respondent's enterprise was not likely to impact on the procedures followed in effecting the dismissal.

To what degree would the absence of dedicated human resource management specialists or expertise in the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?

[45] It was not disputed that the Respondent had dedicated human resources specialists or expertise. The Respondent submitted that this was a neutral consideration. I find that the Respondent's enterprise did not lack dedicated human resource management specialists and expertise. There was no absence of such expertise that could impact on the procedures to be followed effecting the dismissal.

What other matters are relevant?

[46] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant.

[47] The effects of dismissal on the personal or economic situation of the dismissed employee may be taken into consideration under s.387(h) of the FW Act.[37] I am satisfied that the effects of the Applicant's dismissal on her personal and economic situation have been significant and adverse. The Applicant was dismissed in March 2023 and has not since been re-employed. The Applicant gave evidence, which was not contested, that she had experienced a number of personal traumatic setbacks, including family bereavements, particularly in the 18 months to 2 years prior to her termination, that had a serious negative impact on her. The Applicant also provided medical evidence as to the impact of these events on her mental health.

[48] The Applicant was first employed by the Respondent in May 2005. Aside from the most recent period, there was nothing to suggest that the Applicant had been anything other than a valued employee since that time. An employee's long and satisfactory work performance or history may be taken into consideration under s.387(h) of the FW Act and, depending on all the circumstances, may weigh in favour of a conclusion that the dismissal of the employee was harsh, unjust or unreasonable.[38] In my view the Applicant's long history of employment with the Respondent is a factor that weighs in her favour in this case.

[49] The Respondent submitted that as a large company in the insurance sector it had obligations to ensure that it was compliant with the regulatory framework within which it worked. It argued that the Applicant's acts and omissions had exposed it to penalties and posed ongoing risks to its clients and the public more broadly. It urged that these were relevant considerations in the overall assessment. To the extent that the Applicant's shortcomings may have contributed to an increased difficulty for the Respondent meeting its legal obligations, I am prepared take those matters into account although there was very limited evidence on this point relating to the October to December 2022 period.

Is the Commission satisfied that the dismissal of the Applicant was harsh, unjust or unreasonable?

[50] I must consider and give due weight to each finding under s.387 above as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.[39]

[51] The Applicant was dismissed for a valid reason of misconduct. I have little doubt that the factors underlying the Applicant's disconnection from work were serious and real. Her circumstances were all the more regrettable given the long period of satisfactory service she had given the Respondent. Nonetheless, having considered each of the matters specified in

section 387 of the FW Act and given appropriate weight to each of the findings relating to those matters, I am satisfied that the dismissal of the Applicant was not harsh, unjust or unreasonable.

Conclusion

[52] Given my conclusion that the dismissal was not harsh, unjust or unreasonable, I am not satisfied that the Applicant was unfairly dismissed within the meaning of section 385 of the FW Act. The Applicant's application is therefore dismissed.

DEPUTY PRESIDENT

Appearances:

Ms Suzie Cheikho for the Applicant

Mr Foren of Counsel for the Respondent

Hearing details:

In-Person in Sydney at 10:00am AEST on Monday, 10 July 2023.

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[1] s 394(2).

[2] Statement of S Dennis, Exhibit R2 [17] ('*Dennis*').

[3] Statement of H Prior, Exhibit R1 [3] ('*Prior*').

[4] Ibid [10].

[5] *Dennis* (n 2) [15].

[6] *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

[7] Applicant Email to Chamber with Chronology, Exhibit A1.

[8] Transcript PN 213 and 214.

[9] Transcript PN 265.

[10] Transcript PN 287-289.

[11] Transcript PN 216.

[12] Transcript PN 73.

[13] *Prior* (n 3) [16]–[43].

[14] *Prior* (n 3) Annexure 3.

[15] *Dennis* (n 2) [62].

[16] Ibid [63]–[64].

[17] Ibid Annexure 22.

[18] Ibid Annexure 23.

[19] Ibid Annexure 24.

[20] Ibid [84]–[87].

[21] Ibid Annexure 28.

[22] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

[23] Ibid.

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

[25] *Edwards v Justice Giudice* [1999] FCA 1836, [7].

[26] *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].

[27] *Bartlett v Ingleburn Bus Services Pty Ltd* [2020] FWCFB 6429, [19]; *Reseigh v Stegbar Pty Ltd* [2020] FWCFB 533, [55].

[28] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.

[29] *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

[30] Ibid.

[31] *Dennis* (n 2) Annexure 20.

[32] *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 (AIRCFB, Ross VP, Acton SDP, Cribb C, 11 May 2000), [75].

[33] *RMIT v Asher* (2010) 194 IR 1, 14-15.

[34] *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.

[35] Explanatory Memorandum, Fair Work Bill 2008 (Cth), [1542].

[36] *Annetta v Ansett Australia* Print S6824 (AIRCFB, Giudice J, Williams SDP, Cribb C, 7 June 2000), [16].

[37] *Ricegrowers Co-operative v Schliebs* PR908351 (AIRCFB, Duncan SDP, Cartwright SDP, Larkin C, 31 August 2001), [26].

[38] *Telstra Corporation v Streeter* [2008] AIRCFB 15, [27].

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