DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Adam Ford Meyers
v
Box Tec Pty Ltd
(U2023/2878)

DEPUTY PRESIDENT O'KEEFFE PERTH, 27 JULY 2023

Application for an unfair dismissal remedy - Applicant unfairly dismissed - Reinstatement inappropriate - Compensation ordered.

[1] On 4 April 2023, Adam Meyers (the Applicant) made an application to the Fair Work Commission (FWC) under s.394 of the Fair Work Act 2009 (Cth) (FW Act) for a remedy, alleging that he had been unfairly dismissed from his employment with Box Tec Pty Ltd (the Respondent). The Applicant seeks compensation.

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 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 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.

When has a person been unfairly dismissed?

[5] 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.

The hearing

[6] There being contested facts involved, the Commission is obliged by s.397 of the FW Act to conduct a conference or hold a hearing.

[7] As required by s.399 of the FW Act, I have taken into account the views of the Applicant and the Respondent as to whether a hearing would be the most effective and efficient way to resolve the matter. Having done so, I considered it appropriate to hold a hearing.

Permission to appear

[8] Neither party sought leave to be represented and so I was not required to address this issue.

Witnesses

[9] The Applicant gave evidence on his own behalf.

[10] Mr Barry Dutton gave evidence on behalf of the Respondent.

Background

[11] The Applicant commenced employment with the Respondent on 2 March 2021. He worked as a sales representative for the Respondent, responsible for sales of cartons to various customers, including those in the Wine and Spirits industries. On 21 March 2023, the Respondent became aware that the Applicant had dealt with a customer order in a manner of which he disapproved. He raised this issue with the Respondent via an email, wherein he capitalised the Applicant's name, followed by several exclamation marks.

[12] The Applicant then responded to that email using the same structure for the Respondent's name and appending several exclamation marks. The Respondent did not find this acceptable and made a telephone call to the Applicant, which turned into a verbal altercation. The Respondent claimed that the Applicant resigned during this telephone call. The Applicant denied resigning during the call.

[13] The following day, a meeting was held between the Applicant and the Respondent and the Applicant's direct manager, Mr Mark Kerspien. At this meeting the Respondent put to the Applicant that he had resigned, but the Applicant denied resigning. The parties then discussed the previous day's issue with the customer order with the result that the Respondent declared that the Applicant no longer had an employment relationship with him. The Respondent then wrote to the Applicant advising him that, as per his contract, he would be on "garden leave" for a period of 30 days during which he would be required to deal with any work matters raised with him. On 4 April 2023, the Applicant lodged an application for relief from unfair dismissal with the FWC.

Submissions

[14] The Applicant filed submissions in the Commission on 15 June 2023 and, at the request of the FWC, corrected submissions on 19 June 2023. The Respondent filed submissions in the Commission on 28 June 2023.

[15] Reply submissions were filed by the Applicant on 6 July 2023.

Has the Applicant been dismissed?

[16] A threshold issue to determine is whether the Applicant has been dismissed from their employment.

[17] Section 386(1) of the FW Act provides that the Applicant has been dismissed if:

(a) the Applicant's employment with the Respondent has been terminated on the Respondent's initiative; or

(b) the Applicant has resigned from their employment but was forced to do so because of conduct, or a course of conduct, engaged in by the Respondent.

[18] Section 386(2) of the FW Act sets out circumstances where an employee has not been dismissed, none of which are presently relevant.

[19] It was contended by the Respondent that the Applicant had resigned his employment via a statement made during a telephone conversation on 21 March 2023, wherein the Respondent alleged that the Applicant had said "I will be very glad to leave".

[20] The Applicant, in his evidence, denied ever saying this or words to that effect. I note that he made a similar denial in the disciplinary meeting held on 22 March 2023. In his evidence, the Respondent continued to contend that the Applicant had said "I will be very

glad to leave" and claimed it had been said at least twice. Notwithstanding the conflicting evidence about what was said, the Applicant gave evidence, and the Respondent also conceded, that during the telephone call where this statement was alleged to have been made, the Applicant was in a state of agitation and clearly upset.

[21] In considering the issue of whether or not the Applicant resigned, I am mindful of the findings of the Full Bench in of the FWC in *Bupa Aged Care Australia Pty Ltd T/A Bupa Aged Care Mosman v Shahin Tavassoli*. In that case, the Full Bench observed as follows:

> *"Having regard to the above authorities and the bifurcation in the definition of "dismissal" established in s.386(1) of the FW Act, we consider that the position under the FW Act may be summarised as follows:*
>
> *(1) There may be a dismissal within the first limb of the definition in s.386(1)(a) where, although the employee has given an ostensible communication of a resignation, the resignation is not legally effective because it was expressed in the "heat of the moment" or when the employee was in a state of emotional stress or mental confusion such that the employee could not reasonably be understood to be conveying a real intention to resign. Although "jostling" by the employer may contribute to the resignation being legally ineffective, employer conduct is not a necessary element. In this situation if the employer simply treats the ostensible resignation as terminating the employment rather than clarifying or confirming with the employee after a reasonable time that the employee genuinely intended to resign, this may be characterised as a termination of the employment at the initiative of the employer.*
>
> *(2) A resignation that is "forced" by conduct or a course of conduct on the part of the employer will be a dismissal within the second limb of the definition in s.386(1)(b). The test to be applied here is whether the employer engaged in the conduct with the intention of bringing the employment to an end or whether termination of the employment was the probably [sic] result of the employer's conduct such that the employee had no effective or real choice but to resign. Unlike the situation in (1), the requisite employer conduct is the essential element.*[1] *"*

[22] I note the commentary in paragraph (1) regarding resignations given "in the heat of the moment". I find on balance of probabilities that the Applicant did use the words "I will be glad to leave Box Tec", but they were said by the Applicant in what both parties concede was an agitated state. Further, the Applicant's evidence is that he did not intend to resign. I accept that this is the case. In any case, I find that those words are sufficiently ambiguous such that they may have simply been the employee expressing his unhappiness regarding the situation as it then stood and referencing some future time when his employment would be at an end. Due to the factors outlined above and the Full Bench finding regarding resignations given in the heat of the moment, the Respondent cannot rely on the statement to claim there was a resignation.

[23] I am therefore satisfied that the Applicant's dismissal was given effect by the actions of the Respondent in the meeting of 22 March 2023. The Applicant has thus been dismissed within the meaning of s.385 of the FW Act.

Initial matters

[24] Under section 396 of the FW 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.

Was the application made within the period required?

[25] Section 394(2) requires an application to be made within 21 days after the dismissal took effect.

[26] It is not disputed and I find that the Applicant was dismissed from his employment on 22 March 2023 and made the application on 4 April 2023. I am therefore satisfied that the application was made within the period required in subsection 394(2).

Was the Applicant protected from unfair dismissal at the time of dismissal?

[27] I have set out above when a person is protected from unfair dismissal.

Minimum employment period

[28] It was not in dispute and I find that the Applicant was an employee of the Respondent, who commenced their employment with the Respondent on 2 March 2021 and was dismissed on 22 March 2023, a period in excess of 12 months which is the relevant period in this case.

[29] I am therefore satisfied that, at the time of dismissal, the Applicant was an employee who had completed a period of employment with the Respondent of at least the minimum employment period.

Applicant's annual rate of earnings

[30] It was not in dispute and I find that, at the time of dismissal, the sum of the Applicant's annual rate of earnings was $70,000. There were no amounts in accordance with regulation 3.05 of the *Fair Work Regulations 2009.* The Applicant's annual rate of earnings was therefore less than the high income threshold, which, for a dismissal taking effect on or after 1 July 2022 but before 1 July 2023, is $162,000.

[31] I am therefore satisfied that, at the time of dismissal, the Applicant was a person protected from unfair dismissal.

Was the dismissal consistent with the Small Business Fair Dismissal Code?

[32] Section 388 of the FW Act provides that a person's dismissal was consistent with the Small Business Fair Dismissal Code if:

(a) immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person's employer was a small business employer; and

(b) the employer complied with the Small Business Fair Dismissal Code in relation to the dismissal.

[33] It was not in dispute and I find that the Respondent is a small business employer within the meaning of s.23 of the FW Act, having fewer than 15 employees (including casual employees employed on a regular and systematic basis) at the relevant time.

[34] It is therefore necessary to consider whether the Respondent complied with the Small Business Fair Dismissal Code (the Code) in relation to the dismissal.

[35] In assessing compliance with the Code, it is first necessary to determine whether or not the termination was a "Summary Dismissal" or falls within the scope of "Other Dismissal". This matter was considered by a Full Bench in *Jeremy Ryman v Thrash Pty Ltd t/a Wisharts Automotive Services (Ryman).* In that matter, the Full Bench found as follows:

> *"If a small business employer has dismissed an employee without notice - that is, with immediate effect - on the ground that the employee has committed serious misconduct that falls within the definition in reg.1.07, then it is necessary for the Commission to consider whether the dismissal was consistent with the "Summary dismissal" section of the Code. All other types of dismissals by small business employers are to be considered under the "Other dismissal" section of the Code.*[2]*"*

[36] While not necessarily directly contending that the dismissal was a summary dismissal, the Respondent did claim in submissions that the Applicant could have been terminated immediately. For completeness, I will deal with this. The Respondent contended that summary dismissal was possible was due to the Respondent's characterisation of the Applicant's behaviour as "insubordination". In industrial parlance, insubordination is usually taken to mean a situation where an employee refuses to obey a lawful and reasonable instruction. That is not the case here. While the Respondent did not agree with the way the Applicant dealt with a particular matter, those concerns were raised after the fact and could not in any way be said to be instructions that were ignored. As such, I find that what the Respondent characterises as insubordination is better described as disrespect and I do not accept that it could have been the basis for summary dismissal.

[37] The findings of the FWC in relation to summary dismissals under the Small Business Fair Dismissal Code do not require the Applicant's guilt to be determined in such matters but

rather the state of mind of the Respondent. Specifically, did the Respondent believe, on reasonable grounds, that the Applicant was guilty. However, the suspicion clearly needs to be about an act, such as theft or assault, that would in usual circumstances warrant summary termination. While in this case the Respondent no doubt believed that the Applicant had been insubordinate and believed that was grounds for summary dismissal, I found above that the Applicant had been instead disrespectful and this would not in usual circumstances entitle summary dismissal.

[38] In addition, the evidence of the Respondent was that the Applicant was not dismissed without notice. Instead, the Applicant was paid notice, put on what the Respondent termed "garden leave" for the 30-day notice period, and required to deal with any queries relating to "work matters". Although there was some dispute between the parties as to how assiduously the Applicant had attended to such queries, this does not change the fact that he remained on "garden leave" for the 30-day period and therefore remained in employment for that 30-day period. It is clear therefore that, as per *Ryman*, the relevant section of the Code is "Other Dismissals". That section provides as follows:

> *"Other Dismissal*
>
> *In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job. The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement. The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations."*

[39] The termination of employment in this case seems to stem from two primary issues: the Respondent's views regarding the Applicant's performance and the breakdown in the employment relationship following the email and verbal altercations.

[40] The Applicant and the Respondent provided contradictory evidence as to the history of the Applicant's employment and the altercations that gave rise to the eventual termination. In terms of his employment, the Applicant's evidence was that he had never been adequately warned about or given any opportunity to rectify concerns with his performance. He denied ever having received a written warning and further claimed to have been unaware that his employment was at risk, having never been warned to that effect.

[41] The Respondent claimed in his evidence that the Applicant had been counselled on numerous occasions regarding errors he had made but conceded that he had never been warned that his employment was at risk. While the Respondent conceded that the counselling was mainly carried out on an informal basis, in evidence the Respondent claimed it was occasionally recorded in writing. By way of example, the Respondent cited a written warning over an error in cartons supplied to a particular customer. In his response evidence, the Applicant recalled the particular incident but claimed that he did not receive a written warning. I note that the alleged written warning was not submitted as evidence and, when

questioned on this document, the Respondent conceded that it was simply a general memo addressed to all employees explaining how to avoid making the same mistake in future.

[42] Under cross-examination, the Applicant conceded that he had been spoken to on several occasions about errors but maintained that none of these conversations amounted to formal counselling and that none came with a warning about potential termination of employment. In regard to the concerns raised on 21 March 2023 by the Respondent over the handling of an order, while I accept that the Respondent did have concerns and raised them with the Applicant, the Applicant was not given an opportunity to rectify the performance issue raised.

[43] In terms of the incident that led to the termination, it was the evidence of the Applicant that the Respondent had initiated the argument by sending him an email in which his name was capitalised followed by several exclamation marks. The email in question was submitted in evidence by the Respondent and confirms the Applicant's claim. However, the Respondent also submitted into evidence the response email from the Applicant, wherein the Applicant capitalised the Respondent's name followed by several exclamation marks. The Applicant claimed that his email had been sent with the full knowledge and approval of his direct manager, Mr Mark Kerspien. Following this exchange of emails, both parties agree there was a phone call from the Respondent to the Applicant. The Respondent claims that he told the Applicant that he was unhappy with the email and that the Applicant could not communicate with him in that manner. His evidence went on to claim that at this point the Applicant began to shout at him and accuse him of bullying. The Applicant's evidence was that the Respondent called him and immediately began shouting at him and abusing him and that he only raised his voice in response to significant provocation.

[44] There is no doubt that the Respondent's original email to the Applicant employs a tactic known as "shouting", where words are presented with all letters capitalised. The Respondent clearly knew that what he was doing was shouting, as it was his evidence that the intention was to express his frustration and he believed it was his right to shout at an employee. The Applicant claimed that his email response, wherein he shouted back at the Respondent, was simply mirroring the tone of the original email as a means of addressing what he regarded as inappropriate bullying behaviour. He claimed that, in addition, he had the imprimatur of his line manager to send the email. As Mark Kerspien himself did not give evidence, the evidence from both parties on this issue is no better than hearsay: the Applicant claims Mark Kerspien gave him the go-ahead to send the email, whereas the Respondent claims that Mark Kerspien did not see the email until the day of the disciplinary hearing. The only evidence from Mr Kerspien can be found at time stamp 1.05 of the audio file entered into evidence by the Applicant, wherein Mr Kerspien admits that he edited the email. The Respondent argued that Mr Kerspien, in the audio file, was only speaking about the heading of the email rather than its contents. I do not accept this characterisation. I find that the audio file makes it clear that Mr Kerspien knew, at the very least, that the Applicant was capitalising Mr Dutton's name. In any case, I am persuaded by the argument advanced by the Respondent that the ultimate responsibility for the email lay with the Applicant and so Mr Kerspien's level of involvement is not particularly relevant.

[45] As to the phone call, there is little consensus between the parties as regards its tone and content, save that the Applicant concedes that he did respond with aggression after

experiencing what he regarded as aggression from the Respondent and the Respondent does admit that at the end of the call he told the Applicant that he could "fuck off". It thus falls to the FWC to make a decision, on balance of probability, about the nature of this phone call and the part it may have played in the termination.

Findings

[46] In terms of the Applicant's performance, I find that the Applicant had been spoken to a number of times about errors he had made and that these conversations could be said to be performance counselling. However, I do not find that the Applicant had been given any written warnings or warned that his employment was at risk if there was not further improvement, and the Respondent can therefore not rely on those issues to justify termination. The Applicant also had no opportunity to address the final performance issue that arose on 21 March 2023 regarding Knotting Hill.

[47] In terms of the email exchange, I find that the Respondent's use of capitalisation was unwise and not consistent with contemporary expectations of management behaviour, particularly in light of the recent emphasis on addressing psychosocial hazards in the workplace. However, it was equally unwise of the Applicant to respond in kind. I make no judgment as to the involvement or otherwise of Mark Kerspien in the sending of the email: the Applicant should have exercised his own judgment as to whether the response he was considering was appropriate in the circumstances and likely to defuse or inflame the situation. Although it may be the case that there are higher expectations on managerial employees in terms of setting standards of behaviour, that does not suggest that when such standards fall short of expectations the employee ought to engage in tit-for-tat. However the nature of the behaviour by the Applicant in this instance, considered in context, is not such that it warranted termination.

[48] The final issue for consideration is the phone call. I find, on balance of probabilities, that Mr Dutton was the instigator of the agitation during that call. In the audio evidence of the interview of 22 March 2023 presented to the FWC, and in his own evidence, Mr Dutton is clearly highly agitated at what he regarded as disrespectful behaviour by the Applicant. It is clear that Mr Dutton believes it is his right as the owner of the business to behave in a particular way, such as shouting at employees, but will not accept any form of reciprocation of his aggression from an employee. He could see nothing wrong with his email wherein he shouted at the Applicant via capitalisation of his name and regarded it as his right and duty to correct an employee in this fashion. Having received an email that he regarded as impertinent and improper and a challenge to his managerial authority, it is reasonable to conclude, consistent with the Applicant's evidence, that he approached the telephone call made to the Applicant shortly after receiving the email in question in an aggressive mood.

[49] In making this finding I am also mindful of other behaviours in which the Respondent has engaged. At time stamp 2.33 of the audio evidence, the Respondent aggressively instructs the Applicant twice to "shut up" and at time stamp 4.26, again in an aggressive fashion, he advises the Applicant that it did not matter that he shouted at him, as he was entitled to do so as the owner of the business. It is also the case that I needed to caution Mr Dutton during the hearing when he became overly belligerent and aggressive with the Applicant during his cross-examination. As such, on balance of probabilities I find that Mr Dutton was indeed

aggressive towards the Applicant in the phone call. While this aggression was after a time mirrored by the Applicant, this was in response to the behaviour by Respondent which was of a kind which is clearly the antithesis of the standard of behaviour contemplated by the Worksafe WA Guidance Note on psychosocial hazards and which has no place in a modern work environment.

[50] In summary, I find that notwithstanding the discussions that the Respondent undertook with the Applicant, the Applicant was not warned that his employment was at risk due to performance issues and provided an opportunity to rectify the problems. In terms of the email response to the Respondent from the Applicant on 21 March 2023, I do not find that this warranted termination in the first instance and do not find that the Applicant was warned about this performance issue and given an opportunity to rectify the issue. Finally, I find that the Respondent bears most of the responsibility for the nature of the telephone conversation on 21 March 2023 such that there is no case for the Applicant to answer.

[51] Having found the above I do not find that the Respondent complied with the Small Business Fair Dismissal Code.

Was the dismissal a case of genuine redundancy?

[52] Under s.389 of the FW Act, a person's dismissal was a case of genuine redundancy if:

(a) the employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and

(b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

[53] It was not in dispute and I find that the Applicant's dismissal was not due to the Respondent no longer requiring the Applicant's job to be performed by anyone because of changes in the operational requirements of the Respondent's enterprise.

[54] I am therefore satisfied that the dismissal was not a case of genuine redundancy.

[55] Having considered each of the initial matters, I am required to consider the merits of the Applicant's application.

Was the dismissal harsh, unjust or unreasonable?

[56] 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.

[57] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.[3]

[58] I set out my consideration of each below.

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

[59] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"[4] and should not be "capricious, fanciful, spiteful or prejudiced."[5] 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.[6]

[60] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.[7] "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. 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."[8]

Findings

[61] As I found above, the Respondent did not have a valid reason related to capacity or conduct. In terms of conduct, I found that the email sent by the Applicant mirroring the tone of the Respondent was unwise but did not warrant termination. I found that such aggression as may have been used by the Applicant during the telephone call of 20 March 2023 resulted from the Respondent being inappropriately aggressive towards the Applicant in the first instance. As such, it would not justify termination. On the issue of capacity, I found that while there may have been issues raised with the Applicant in the past, none of these issues

was of sufficient concern to the Respondent so as to have attracted written warnings or a warning that the Applicant's employment was in jeopardy. In terms of the final performance issue wherein the Applicant was found to have not acted in accordance with the expectations of the Respondent, while I accept the Respondent was frustrated, I cannot accept that this issue was of such severity that it could possibly have warranted termination of its own accord.

[62] In all the circumstances, I find that there was no valid reason related to the Applicant's capacity or conduct.

Was the Applicant notified of the valid reason?

[63] Proper consideration of s.387(b) requires a finding to be made as to whether the applicant "was notified of that reason". Contextually, the reference to "that reason" is the valid reason found to exist under s.387(a).[9]

[64] As I am not satisfied that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances.[10]

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

[65] As I have not found that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances.[11]

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

[66] The Applicant did not seek to have a support person present and so this factor is not relevant to the present circumstances.

Was the Applicant warned about unsatisfactory performance before the dismissal?

[67] As noted in *Fastidia Pty Ltd v Goodwin*, a mere exhortation for an employee to improve their performance would not be a sufficient warning. A warning must:

- identify the relevant aspect of the employee's performance which is of concern to the employer; and
- make it clear that the employee's employment is at risk unless the performance issue identified is addressed.[12]

[68] As I found above, previous performance discussions with the Applicant have not been such that he was advised his employment was at risk if they were not corrected. The performance issue which gave rise to the email and phone exchanges was not an issue about which the Applicant had been warned. The matter was raised with the Applicant at the end of his employment and he was given no opportunity to address the issue.

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

[69] Neither party submitted that the size of the Respondent's enterprise was likely to impact on the procedures followed in effecting the dismissal and I find that the size of the Respondent's enterprise had no such impact.

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?

[70] Neither party submitted that the absence of dedicated HR specialists in the Respondent's enterprise was likely to impact on the procedures followed in effecting the dismissal and I find that such absence had no impact.

What other matters are relevant?

[71] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant. Neither party drew my attention to any other matters that may be relevant. While the seriousness of the misconduct is a matter that may be relevant, I have addressed this issue when dealing with whether there was a valid reason for termination.

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

[72] I have made findings in relation to each matter specified in section 387 as relevant to this matter.

[73] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.[13]

[74] Having considered each of the matters specified in section 387 of the FW Act, I am satisfied that the dismissal of the Applicant was harsh in that the gravity of the misconduct did not warrant termination and the employee was given no opportunity to remedy the performance issue identified on 21 March 2023.

Conclusion

[75] I am therefore satisfied that the Applicant was unfairly dismissed within the meaning of section 385 of the FW Act.

Remedy

[76] Being satisfied that the Applicant:

- made an application for an order granting a remedy under section 394;
- was a person protected from unfair dismissal; and
- was unfairly dismissed within the meaning of section 385 of the FW Act,

I may, subject to the FW Act, order the Applicant's reinstatement, or the payment of compensation to the Applicant.

[77] Under section 390(3) of the FW Act, I must not order the payment of compensation to the Applicant unless:

(a) I am satisfied that reinstatement of the Applicant is inappropriate; and

(b) I consider an order for payment of compensation is appropriate in all the circumstances of the case.

Is reinstatement of the Applicant inappropriate?

Submissions

[78] The Applicant did not seek reinstatement. Given the level of animosity between the Applicant and the Respondent and the size of the business, it is clear that the Applicant regarded reinstatement as impractical and inappropriate.

[79] The Respondent submitted that reinstatement is inappropriate because the employment relationship had broken down irretrievably.

Findings

[80] Given the submissions made by the parties and the conduct of the parties during the hearing, I find that it would be impossible for them to work together at any time in the future. As such, I consider that reinstatement is inappropriate.

Is an order for payment of compensation appropriate in all the circumstances of the case?

[81] Having found that reinstatement is inappropriate, it does not automatically follow that a payment for compensation is appropriate. As noted by the Full Bench, "[t]he question whether to order a remedy in a case where a dismissal has been found to be unfair remains a discretionary one…"[14]

[82] Where an applicant has suffered financial loss as a result of the dismissal, this may be a relevant consideration in the exercise of this discretion.[15]

Submissions

[83] The Applicant submitted that payment of compensation is appropriate because he had suffered financial loss and, as far as possible given that he would be travelling overseas, sought alternative employment but been largely unsuccessful. The Applicant made no other submissions on the issues set out in s392(2).

[84] The Respondent submitted that payment of compensation is not appropriate because it was the Respondent's view that the Applicant's failure to adequately pursue alternative employment and the extended period spent overseas following his termination weighed against an award of compensation. The Applicant made no other submissions on the issues set out in s392(2).

[85] In all the circumstances, I consider that an order for payment of compensation is appropriate because of the harshness of the termination and its impact on the Applicant.

Compensation – what must be taken into account in determining an amount?

[86] Section 392(2) of the FW 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 including:

(a) the effect of the order on the viability of the Respondent's enterprise;

(b) the length of the Applicant's service;

(c) the remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed;

(d) the efforts of the Applicant (if any) to mitigate the loss suffered by the Applicant because of the dismissal;

(e) the amount of any remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for compensation;

(f) the amount of any income reasonably likely to be so earned by the Applicant during the period between the making of the order for compensation and the actual compensation; and

(g) any other matter that the Commission considers relevant.

[87] I consider all the circumstances of the case below.

Effect of the order on the viability of the Respondent's enterprise

[88] Neither party made submissions on the issue of whether an order for compensation would have an effect on the viability of the employer's enterprise. I find that a compensation order would not impact the viability of the employer's enterprise.

Length of the Applicant's service

[89] The Applicant's length of service was two years and three weeks.

[90] I consider that the Applicant's length of service does not support reducing or increasing the amount of compensation ordered.

Remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed

[91] As stated by a majority of the Full Court of the Federal Court, "[i]n determining the remuneration that the Applicant would have received, or would have been likely to receive… the Commission must address itself to the question whether, if the actual termination had not occurred, the employment would have been likely to continue, or would have been terminated at some time by another means. It is necessary for the Commission to make a finding of fact as to the likelihood of a further termination, in order to be able to assess the amount of remuneration the employee would have received, or would have been likely to receive, if there had not been the actual termination."[16]

Findings

[92] I find that the Applicant would not have remained in the employ of the Respondent for an extended period. It was clear that the way the Applicant was doing his job did not sit well with the Respondent and I find that the Respondent would have continued to have issues with his performance. Further, the relationship between the parties had clearly deteriorated such that the Applicant had stated that he would be glad to leave. Although this comment was made in the heat of the moment, I find that it accurately reflected the Applicant's state of mind given his other evidence.

[93] In making this finding I am also mindful of the reality of the Respondent's business in that it is a small operation and the Applicant and the Respondent would have been working in close proximity and unable to avoid each other. As such, I do not consider that the employment relationship would have lasted beyond a further eight weeks, giving the Applicant a sum of $10,769.23. However, the Applicant received payment for what the Respondent termed "garden leave" equal to four weeks' pay. As such, this amount should be reduced to $5384.61.

Efforts of the Applicant to mitigate the loss suffered by the Applicant because of the dismissal

[94] The Applicant must provide evidence that they have taken reasonable steps to minimise the impact of the dismissal.[17] What is reasonable depends on the circumstances of the case.[18]

Submissions and Evidence

[95] The Applicant gave evidence that he had taken steps to minimise the impact of the dismissal by actively seeking other employment within "a week or two" of his dismissal. However, the Applicant gave evidence that, as he was declaring to prospective employers that he was travelling overseas for a period of several weeks, his efforts were hampered.

[96] The Respondent submitted that the Applicant had not taken reasonable steps to minimise the impact of the dismissal because of his overseas travel – a factor that the Respondent regarded as being beyond his control and one for which he should not be penalised.

Findings

[97] In making my finding, I am mindful that the overseas trip taken by the Applicant was not to go on holiday, but instead to visit a very close friend with a terminal illness. As such, his absence is understandable. However, I am also mindful of the submissions from the Respondent regarding the duty to mitigate loss and the extent to which the Respondent should be, effectively, liable for the Applicant's inability to secure alternative employment.

[98] As such, I find that while the Applicant took all steps reasonable in his particular circumstances, his extended overseas absence weighs against a general finding that he took reasonable steps to mitigate his loss. I will therefore apply a reduction of 12.5% to the compensation payable.

Amount of remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for compensation

[99] The Applicant's evidence was that he has not earned any remuneration from employment or other work since the dismissal.

[100] That evidence was not challenged by the Respondent.

[101] I am satisfied that the amount of remuneration earned by the Applicant from employment or other work during the period since the dismissal is zero.

Amount of income reasonably likely to be so earned by the Applicant during the period between the making of the order for compensation and the actual compensation

[102] The Applicant's evidence is he is not likely to earn any remuneration in the period between the making of the order for compensation and the payment of compensation. While he concedes he has gained employment, his evidence was that this was one day a week on a casual basis and his further evidence was that in five weeks he has had no shifts.

[103] That evidence was not challenged by the Respondent.

[104] I am satisfied that the amount of income reasonably likely to be earned by the Applicant between the making of the order for compensation and the payment of compensation is zero.

Compensation – how is the amount to be calculated?

[105] As noted by the Full Bench, "[t]he well-established approach to the assessment of compensation under s.392 of the FW Act… is to apply the "Sprigg formula" derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul's Licensed*

Festival Supermarket (***Sprigg***).[19] This approach was articulated in the context of the FW Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages*[20].”[21]

[106] The approach in *Sprigg* is as follows:

> Step 1: Estimate the remuneration the employee would have received, or have been likely to have received, if the employer had not terminated the employment (remuneration lost).
>
> Step 2: Deduct monies earned since termination. Workers' compensation payments are deducted but not social security payments. The failure of an applicant to mitigate his or her loss may lead to a reduction in the amount of compensation ordered.
>
> Step 3: Discount the remaining amount for contingencies.
>
> Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount he or she would have received if they had continued in their employment.

Step 1

[107] I have estimated the remuneration the Applicant would have received, or would have been likely to have received, if the Respondent had not terminated the employment to be $5,384.61 on the basis of my finding that the Applicant would likely have remained in employment for a further period of eight weeks but that this figure should be reduced due to the four weeks of payment already received. This estimate of how long the Applicant would have remained in employment is the “anticipated period of employment”.[22]

Step 2

[108] I have found that the amount of remuneration earned by the Applicant from the date of dismissal was zero and that the amount of income reasonably likely to be earned by the Applicant between the making of the order for compensation and the payment of compensation is also zero.

[109] Only monies earned since termination for the anticipated period of employment are to be deducted.[23] As this combined figure is zero, the amount remains $5,384.61.

Step 3

[110] I now need to consider the impact of contingencies on the amounts likely to be earned by the Applicant for the remainder of the anticipated period of employment.[24]

[111] I find that there are no relevant contingencies given that the anticipated period of employment is relatively short.

Step 4

[112] I have considered the impact of taxation but have elected to settle a gross amount of $5,384.61 and leave taxation for determination.

[113] Having applied the formula in *Sprigg*, I am nevertheless required to ensure that "the level of compensation is an amount that is considered appropriate having regard to all the circumstances of the case,"[25] including my findings that there should be a reduction of 12.5% for the Applicant's reduced efforts to mitigate his loss.

[114] As such, the figure of $5,384.61 is to be reduced by 12.5%, leaving the figure taking into account the issues in 392(2) of the FW Act at $4,711.54.

Compensation – is the amount to be reduced on account of misconduct?

[115] If I am satisfied that misconduct of the Applicant contributed to the employer's decision to dismiss, I am obliged by section 392(3) of the FW Act to reduce the amount I would otherwise order by an appropriate amount on account of the misconduct.

[116] As I found above, if there was misconduct on the part of the Applicant, it was at the lower end of the scale of misconduct and was such that it did not warrant termination. On that basis, I believe that a small deduction of 5% is appropriate. The figure of compensation is thus $4,711.54 less 5%, being $4,475.96.

Compensation – how does the compensation cap apply?

[117] Section 392(5) of the FW Act provides that the amount of compensation ordered by the Commission must not exceed the lesser of:

(a) the amount worked out under section 392(6); and

(b) half the amount of the high income threshold immediately before the dismissal.

[118] The amount worked out under section 392(6) is the total of the following amounts:

(a) the total amount of the remuneration:

(i) received by the Applicant; or

(ii) to which the Applicant was entitled;

(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and

(b) if the Applicant was on leave without pay or without full pay while so employed during any part of that period – the amount of remuneration taken to have been received by the Applicant for the period of leave in accordance with the regulations.

[119] The Applicant was not on leave without pay or without full pay during the 26 weeks immediately before the dismissal.

[120] There was no dispute and I find that the total amount of the remuneration received by the Applicant during the 26 weeks immediately before the dismissal was $35,000.

[121] There was no dispute and I find that the total amount of the remuneration to which the Applicant was entitled during the 26 weeks immediately before the dismissal was $35,000.

[122] The high income threshold immediately before the dismissal was $162,000. Half of that amount is $81,000.

[123] The amount of compensation ordered by the Commission must therefore not exceed $35,000.

[124] In light of the above, I will make an order that the Respondent pay $4,475.96 gross less taxation as required by law to the Applicant in lieu of reinstatement within 14 days of the date of this decision.

DEPUTY PRESIDENT

Appearances:

A Meyers, Applicant.
B Dutton, Respondent.

Hearing details:

Heard at Perth on 11 July 2023

Printed by authority of the Commonwealth Government Printer

<PR764669>

---

[1] Bupa Aged Care Australia Pty Ltd T/A Bupa Aged Care Mosman v Shahin Tavassoli [2017] FWCFB 3941 [47].

[2] Jeremy Ryman v Thrash Pty Ltd t/a Wisharts Automotive Services [2015] FWCFB [41].

[3] *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].

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

[5] Ibid.

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

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

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

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

[10] *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [2013] FWCFB 762, [46]-[49].

[11] *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [2013] FWCFB 762, [46]-[49].

[12] *Fastidia Pty Ltd v Goodwin* Print S9280 (AIRCFB, Ross VP, Williams SDP, Blair C, 21 August 2000), [43]-[44].

[13] *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].

[14] *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198, [9].

[15] *Vennix v Mayfield Childcare Ltd* [2020] FWCFB 550, [20]; *Jeffrey v IBM Australia Ltd* [2015] FWCFB 4171, [5]-[7].

[16] *He v Lewin* [2004] FCAFC 161, [58].

[17] *Biviano v Suji Kim Collection* PR915963 (AIRCFB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Lockwood Security Products Pty Ltd v Sulocki and Ors* PR908053 (AIRCFB, Giudice J, Lacy SDP, Blair C, 23 August 2001), [45].

[18] *Biviano v Suji Kim Collection* PR915963 (AIRCFB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Payzu Ltd v Saunders* [1919] 2 KB 581.

[19] (1998) 88 IR 21.

[20] [2013] FWCFB 431.

[21] *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFB 7206, [16].

[22] *Ellawala v Australian Postal Corporation* Print S5109 (AIRCFB, Ross VP, Williams SDP, Gay C, 17 April 2000), [34].

[23] Ibid.

[24] *Enhance Systems Pty Ltd v Cox* PR910779 (AIRCFB, Williams SDP, Acton SDP, Gay C, 31 October 2001), [39].

[25] *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFB 7206, [17].