

[2023] FWC 2251

The attached document replaces the document previously issued with the above code on 25 October 2023.

An address contained in the letter extracted at paragraph [23] has been redacted.

Savannah Fea
Associate to Commissioner Riordan

Dated 26 October 2023.



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Mr Ravindra Singh

v

The Commissioner for Public Employment

(U2023/3410)

COMMISSIONER RIORDAN

SYDNEY, 25 OCTOBER 2023

Application for an unfair dismissal remedy

[1] On 20 April 2023, Mr Ravindra Singh (**the Applicant**) filed an application with the Fair Work Commission (**the Commission**) seeking a remedy for an alleged unfair dismissal pursuant to s.394 of the *Fair Work Act 2009* (**the FW Act**). The Applicant was dismissed by the Northern Territory Government, by way of a letter dated 6 April 2023, on the grounds that the Applicant had abandoned his employment in accordance with s.54 of the *Public Sector Employment and Management Act 1993* (**the PSEM Act**). The Respondent to the Application is the Commissioner for Public Employment, Northern Territory (**the Respondent**).

[2] The Applicant was employed as a Correctional Officer at the Darwin Correctional Centre (**DCC**) with the Department of the Attorney General and Justice (**referred to as AGD**), from 18 February 2013 until his dismissal. While the Applicant's termination letter was dated 6 April 2023, it was not delivered to the Applicant until 11 April 2023. The Respondent accepts that 11 April 2023 is the effective dismissal date. The Applicant's employment with the Respondent was covered by the *Correctional Officers (NTPS) 2017 – 2021 Enterprise Agreement* (**the Agreement**).

[3] The Applicant seeks reinstatement to his position with the Respondent.

[4] It is noted that in this decision, all correspondence and submissions filed by the Applicant have been inserted as originally typed, accepting that there is poor grammar and typographical errors.

Statutory Provisions

[5] The relevant sections of the FW Act relating to an unfair dismissal application are:

“396 Initial matters to be considered before merits

The FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:

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

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

381 Object of this Part

(1) The object of this Part is:

- (a) to establish a framework for dealing with unfair dismissal that balances:
 - (i) the needs of business (including small business); and
 - (ii) the needs of employees; and
- (b) to establish procedures for dealing with unfair dismissal that:
 - (i) are quick, flexible and informal; and
 - (ii) address the needs of employers and employees; and
- (c) to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.

(2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a “fair go all round” is accorded to both the employer and employee concerned.

Note: The expression “fair go all round” was used by Sheldon J in *in re Loty and Holloway v Australian Workers’ Union* [1971] AR (NSW) 95.

382 When a person is protected from unfair dismissal

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

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

384 Period of employment

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

(2) However:

- (a) a period of service as a casual employee does not count towards the employee’s period of employment unless:
 - (i) the employment as a casual employee was on a regular and systematic basis; and
 - (ii) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis; and
- (b) if:
 - (i) the employee is a transferring employee in relation to a transfer of business from an old employer to a new employer; and

- (ii) the old employer and the new employer are not associated entities when the employee becomes employed by the new employer; and
- (iii) the new employer informed the employee in writing before the new employment started that a period of service with the old employer would not be recognised; the period of service with the old employer does not count towards the employee's period of employment with the new employer.

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.

see section 388.

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."

Applicant's Submissions and Background to the Application

[6] The Applicant did not file a formal outline of submissions or a witness statement in these proceedings. Instead, the Applicant filed and relied on various documents including his application (Form F2), email chains and an Affidavit signed by him on 22 February 2023, which he provided to the Respondent on that same date. Relevantly, the materials filed by the Applicant provided as follows.

[7] In correspondence to the Commission on 31 May 2023, the Applicant provided:

- 1. My mental health leave was approved in October 2022.*
- 2. Centerlink medical certificate was provided in December 2022.*

3. On 13/1/2023 I was diagnosed with upper respiratory tract infection. Medical certificate provided. 18/1/2023 further testing for long COVID conducted.

4. February 22, 2023 Affidavit provided that I am still unfit to work and require treatment.

5. February 22, 2023 mental health leave application made again as requested by Kimberley.

However, no response received regarding my leave application on mental health grounds.

6. March 16, 2023 NT WorkSafe Medical Certificate provided.”

[8] Between mid-January 2023 and late February 2023, the Applicant and the Respondent engaged in email correspondence regarding the Applicant’s personal leave.

[9] On 14 January 2023, the Applicant wrote to the Respondent providing a medical certificate. As filed by the Respondent, this medical certificate was provided by Aventus Pampanga Clinic, Angeles City, dated 13 January 2023, and stated that Mr Singh was suffering an upper respiratory tract infection.

[10] On 3 February 2023, Ms Gemma Walsh, Acting Manager Rosters and Operational Support, Darwin Correctional Centre, provided a response which relevantly provided:

“Unfortunately we cannot accept this certificate at this stage as it does not state specific dates that you are unwell.

Can you please have an updated certificate sent through with the dates that you are unwell.”

[11] The Applicant responded on 5 February 2023 stating:

“I have been told by the medical center that is the type of medical certificate they issue here.”

[12] On 8 February 2023, Ms Walsh again wrote to the Applicant as follows:

“Hi Mr Singh,

I have been advised by Workforce Services that we unfortunately cannot accept this medical certificate.

Workforce Services have also advised that you are currently absent without authority unless you can provide a medical certificate with specific dates to advise you are unfit for duty.

Thank you

Kind Regards,

Gemma Walsh

Acting Manager Rosters and Operational Support

Darwin Correctional Centre”

[13] The Applicant responded on 12 February 2023, stating:

“Good morning all

As stated in my IME report by Psychiatrist Dr.Samuels that my treatment will be for approximately 24 months subject to the treatment plan of the Clinical Psychologist. At this stage Iam still awaiting my appointment with the Clinical Psychologist to develop my treatment plan for my treatment.

I was forced to take mental health leave last year October as the shift Senior Officers had asked me to perform duties against the Psychiatrist recommendations.I was also sent home by the Senior Officers on a number of occasions.This also contributed to my deteriorating mental health condition.

The exact dates can only be provided after the first appointment with the Psychologist.Iam still on the waiting list.

Further information regarding my Psychological treatment can be sought by Hunt and Hunt Lawyers Ms Pavey and Gallegar Basset Insurance company Mr Edwards about the approval and treatment of my Psychological treatment.

*With thanks
Ravi Singh”*

[14] On 15 February 2023, Ms Walsh responded as follows to the Applicant:

“Hi Mr Singh,

As per my email correspondence dated Thursday 9 February 2023, you have not provided a valid medical certificate and therefore, you are currently absent from work without authority and have been since 13 January 2023.

Although the treatment plans from your Psychologist and Psychiatrist are important, they do not inhibit your ability to provide a medical certificate. Similarly any legal matters will be dealt with in due course and have no bearing on you providing your work place with a medical certificate.

As per any ongoing injury or illness, a medical certificate completed by a registered medical practitioner (registered in Australia), which includes the start and end date of your absence is a requirement of your employment.

*Correctional Officer (NTPS) 2017-2021 Enterprise Agreement:
24.7 Documentation Requirements*

(a) An employee must apply for personal leave in the form required by the CEO as soon as it is reasonably practicable for the employee to make the application.

(b) Subject to clause 24.7(d), to assist the CEO to determine if the leave taken, or to be taken, was or is for one of the reasons set out in clause 24.2(a)(i)(sick leave) an

employee must, as soon as reasonably practicable provide the CEO with the following documentary evidence:

*(i) a medical certificate from a registered health practitioner; or
(ii) where it is not reasonably practicable for the employee to access a registered health practitioner to obtain a medical certificate for reasons that include because they reside in a remote or regional locality or for any other reason approved by the CEO, a statutory declaration may be submitted in writing detailing:*

A. the reasons why it was not practicable to provide a medical certificate; and

B. the reasons for, and length of absence.

A registered medical practitioner may need to provide medical certificates on a periodic basis (monthly certificates as an example).

There is no evidence to suggest that the provision of medical certificates would have any impact on anything mentioned in your response dated 12 February 2023.

Alternatively, you can provide a statutory declaration that meets all Australian legal requirements, this declaration must include the start and end date of your absence and an explanation of why it is not reasonably practical to obtain a valid medical certificate. Until a valid medical certificate or valid statutory declaration is received, you will be considered as absent from work without authority.

Can you please provide a valid medical certificate or a valid statutory declaration by close of business on Friday 17 February 2023.

Thank you

Kind Regards,

*Gemma Walsh
Acting Manager Rosters and Operational Support
Darwin Correctional Centre”*

(My emphasis)

[15] On 21 February 2023, the Applicant wrote to the Respondent providing his “*medical certificates and treatment plan*”. This included four annexures, being:

- A medical certificate dated 13 January 2023 from Aventus Medical Care Inc, Angeles City – diagnosing the Applicant with ‘upper respiratory tract infection’;
- A medical certificate dated 20 February 2023 from Aventus Medical Care Inc, Angeles City – diagnosing the Applicant with ‘upper respiratory tract infection’;

- A medical certificate dated 20 February 2023 from Philippine Heart Center – diagnosing the Applicant with ‘allergic rhinitis with post nasal drip’; and
- A note from St. Matthew’s Multi-Speciality Centre dated 20 February 2023, providing, apart from other notes, a chest CT scan.

[16] The Applicant further wrote to the Respondent on 21 February stating:

*“Attached please find my medical certificate.
This is the type of medical certificate provided by the medical professionals in the city
I’m currently in.”*

Annexed was a medical certificate date 21 February 2023, diagnosing the Applicant with “shortness of breath” and recommending two weeks’ recuperation.

[17] On 22 February 2023, the Applicant wrote to the Respondent providing an “Affidavit for [his] Psychiatric treatment”.

[18] Ms Kimberley Van Keulen, Senior Manager, Workforce Relations, Department of Corporate and Digital Development, responded to the Applicant by email on 22 February 2023, stating:

“Good afternoon Mr Singh

I am writing to you as I understand you have been corresponding with Ms Walsh of the DCC Rosters Unit, and Ms Walsh has now sought advice from Workforce Relations DCDD in regards to your current situation.

To confirm the advice I understand Ms Walsh has previously provided to you:

- *medical certificates issued by overseas medical practitioners cannot be accepted by the department as documentary evidence for the purposes of accessing personal leave.*
- *Evidence requirements set out in the Correctional Officers EA permit only Health Practitioners registered under the authority of a Federal, State or Territory law of Australia to issue valid medical certificates for personal leave purposes.*
- *Further to this, the certificates and documents you have provided have not made any assessment of:*

*o your fitness for work or certified you as being unfit for duties,
o diagnosis of a medical condition, illness or injury that in the medical practitioners opinion would affect your ability to perform duties, nor
o indicated applicable dates for which you would be considered to be unfit for duties.*

For these reasons, the certificates you have provided are not accepted and considered ineligible as supporting documents for accessing of personal leave.

Please provide response with your intention for making an appropriate application for leave or otherwise, by no later than close of business 23/02/2023.

Should we not receive response from you within this timeframe, we will consider that you do not intend to apply for an appropriate leave approval as required of you under your employment conditions, and formal action may need to be initiated to address your continued unauthorised absence, if the delegate considers that there are reasonable grounds.

Should you wish to discuss any of the above please give us a call or respond via email.

Kind regards

*Kimberley van Keulen
Senior Manager, Workforce Relations
Department of Corporate and Digital Development | Northern Territory Government”*

(Original emphasis)

[19] The Applicant responded to Ms Van Keulen on 22 February 2023 as follows:

“Good morning All

*Attached please find my Affidavit for my Psychiatric treatment plan.
I am still awaiting appointment with the Psychologist to develop my treatment plan. After which the exact dates for my commencement and completion of my Psychiatric treatment could be determined.
Therefore I would like to request leave on mental health grounds till my Psychiatric treatment is completed.
Looking forward to your assistance.*

*With thanks
Ravi Singh”*

[20] It is noted that as part of his materials, the Applicant has filed two different copies of an Affidavit sworn by him on 22 February 2023. The first provided as follows:

“I, RAVINDRA SINGH, Australian, of legal age, a resident of [redacted], Angeles City, after having been duly sworn to in accordance with law, depose and state THAT:

- 1. That I am the employee of NORTHERN TERRITORY GOVERNMENT, with the position of CORRECTIONAL OFFICER;*
- 2. Sometime on August 24, 2022, I took a psychological medical check-up before Dr. Mathew Samuel, a Psychiatrist Doctor in ROYAL AUSTRALIAN & NEW ZEALAND COLLEGE OF PSYCHIATRISTS (RANZCP).*

3. *That as per the results discussed to me by Dr. Mathew Samuel, I required to undergo psychotherapy, for at least 20 sessions a year, with EMDR and prolonged exposure. Psychotherapy will be about \$250.00 per session and should continue for the next two years. I am also required to undergo regular Psychiatric assessment, which will cost approximately \$300.00, every three months for the next two years, I am also required medications, such as an antidepressant like Valdoxan 25-50mg, costing about \$100.00 per month, and quetiapine, which will cost about \$60.00 per month, for the next two years. I will also benefit from attending a group programme for people who have been First Responders. These kinds of programmes run for four weeks and can cost approximately \$11,000.00;*
4. *As such, I am executing this Affidavit to attest to the truth of the foregoing and to support my application for whatever legal purpose it may serve;*

IN WITNESS WHEREOF, I have hereunto set my hand this February 22, 2023 in Angeles City, Philippines.

RAVINDRA SINGH
Affiant

SUBSCRIBED AND SWORN TO before me this February 22, 2023 in Angeles City, Philippines, affiant exhibiting to me his AUS Passport No. [redacted]...

ATTY. AGATHA ROSARIO M. AGUILAR
Notary Public for Angeles City”

[21] In the further or amended Affidavit also dated 22 February 2023, the Applicant provided:

“I, RAVINDRA SINGH, Australian, of legal age, a resident of [redacted], Angeles City, after having been duly sworn to in accordance with law, depose and state THAT:

1. *That I am the employee of NORTHERN TERRITORY GOVERNMENT, with the position of CORRECTIONAL OFFICER;*
2. *Sometime on August 24, 2022, I took a psychological medical check-up before Dr. Mathew Samuel, a Psychiatrist Doctor in ROYAL AUSTRALIAN & NEW ZEALAND COLLEGE OF PYSCHIATRISTS (RANZCP).*
3. *That as per the results discussed to me by Dr. Mathew Samuel, I required to undergo psychotherapy, for at least 20 sessions a year, with EMDR and prolonged exposure. Psychotherapy will be about \$250.00 per session and should continue for the next two years. I am also required to undergo regular Psychiatric assessment, which will cost approximately \$300.00, every three months for the next two years, I am also required medications, such as an antidepressant like Valdoxan 25-50mg, costing about \$100.00 per month, and quetiapine, which will cost about \$60.00 per month, for the next two years. I will*

also benefit from attending a group programme for people who have been First Responders. These kinds of programmes run for four weeks and can cost approximately \$11,000.00;

- 4. That I have not fully recovered and I am still unfit to work;**
- 5. That I haven't taken/conducted any of the procedure stated above;**
6. *As such, I am executing this Affidavit to attest to the truth of the foregoing and to support my application for whatever legal purpose it may serve;*

IN WITNESS WHEREOF, I have hereunto set my hand this February 22, 2023 in Angeles City, Philippines.

RAVINDRA SINGH
Affiant

SUBSCRIBED AND SWORN TO before me this February 22, 2023 in Angeles City, Philippines, affiant exhibiting to me his AUS Passport No. [redacted]...

ATTY. AGATHA ROSARIO M. AGUILAR
Notary Public for Angeles City

(My emphasis – amendments to the Affidavit)

[22] The Applicant also provided a copy of his 'Declaration of worker residing outside Australia – Proof of identity and incapacity' NT WorkSafe form, in which he relevantly declared that he was suffering from PTSD and Depression, which he stated was a result of him working as a correctional officer and for which he was receiving Psychotherapy treatment from Dr. Mathew Samuel.

[23] On 14 March 2023, Ms Gemma Lake, Chief Executive Officer, wrote to the Applicant foreshadowing an intention to terminate his employment:

“Dear Mr Singh,

Re: ABANDONMENT OF EMPLOYMENT - FORESHADOWED INTENTION TO TERMINATE EMPLOYMENT - SECTION 54 PUBLICSECTOR EMPLOYMENT AND MANAGEMENT ACT 1993

As Chief Executive Officer (CEO) of the Department of Attorney General and Justice (the department), I am writing to foreshadow my intention to terminate your employment with the department pursuant to section 54 of the Public Sector Employment and Management Act 1993 (the Act).

You are currently employed as an ongoing Correctional Officer (CO), with the department based at Darwin Correctional Centre (DCC).

You have been absent from the workplace on a combination of personal leave with pay, personal leave without pay, unapproved leave and recreation leave since 13 October 2022. You have not attended the workplace or performed the duties of your role since 10 October 2022. It is reported that you have now been absent from the workplace without permission since 13 January 2023, more than 20 working days.

Between 13 January 2023 and 20 February 2023, you have submitted five medical certificates from medical practitioners in the Philippines. The certificates you have provided, were not issued by a registered or licenced health practitioner under a law of a state or territory of Australia that provides for the registration or licensing of health practitioners (or health practitioners of that type) as set out the Correctional Officer (NTPS) 2017 - 2021 Enterprise Agreement (the Enterprise Agreement).

Ms Gemma Walsh, Acting Manager of Rosters and Operational Support at DCC, advised you via email on 3 February, 8 February and 15 February 2023 that these medical certificates could not be accepted as they as they did not meet the requirements of a medical certificate as set out in the Enterprise Agreement.

On 22 February 2023, Ms Kimberley Van Keulen, Senior Workforce Relations Manager from the Department of Corporate and Digital Development (DCDD) further advised you via email that these medical certificates could not be accepted.

*On 23 February 2023, you submitted a signed affidavit, listing your address as [redacted] Angeles City, Philippines, and refers to discussions with Your psychologist, Dr Mathew Samuel. **It is noted that this affidavit does not mention your fitness for work nor was it supported by any acceptable documentary evidence.** This affidavit confirms that you have taken up residence in the Philippines without notifying your workplace and without having made application for leave of any kind to cover your absence. It also indicates to me that you have no intention of returning to your duties as a CO with the department.*

At the time of writing this letter, you have been absent from the workplace for more than 10 consecutive days, and have failed to provide the department with a valid medical certificate or made a valid request for leave. As such, I consider your continued absence from the workplace without authority is in breach of the Northern Territory Public Sector (NTPS) Code of Conduct, and your ongoing employment obligations.

Section 54 of the Act provides that the CEO may terminate the employment of an employee in the department if the employee is absent from duty without permission for at least 10 consecutive working days.

Accordingly, in my capacity as CEO and for the purposes of section 54 of the Act, I am providing you written notice pursuant to section 54(2)(a)(i) of the Act, of my intention to terminate your employment in the Public Sector pursuant to section 54(1) of the Act, as you have been absent from duty without permission for at least 10 consecutive working days.

Opportunity to respond

Before I terminate your employment, I invite you to make a submission to me on why I should not terminate your employment. Your submission should be in writing and reach me within seven (7) calendar days of your receipt of this letter.

Once I have received and considered your submission (if any), I will advise you of my final decision.

Should you fail to respond within this timeframe, I will consider that you do not intend to respond, and I will proceed to determine this matter in accordance with my foreshadowed action.

Further Information

I enclose, for your information, a copy of the following:

- *Employment Instruction No. 3 - Natural Justice;*
- *Employment Instruction No. 12 - Code of Conduct;*
- *Extracts from Clause 24 & 25 of the Correctional Officer (NTPS) 2017 - 2021 Enterprise Agreement; and*
- *Section 54 of the Act - Abandonment of Employment*

Available Support

I appreciate that receiving this notice and dealing with the issues it raises may be difficult. If you would like support, the Employee Assistance Program (EAP) has a range of confidential and professional counselling services that I encourage you to access. You may also wish to seek advice and assistance from your union.

You may choose an EAP provider from the list below:

[redacted]

If you have any questions about the contents of this letter, please contact Darryl Griffiths, Workforce Relations Manager on [redacted].

Yours sincerely

Gemma Lake

Chief Executive Officer

*Department of the Attorney-General and Justice
14 March 2023”*

(My emphasis)

[24] On 15 March 2023, the Applicant responded with the following:

“Good day Ms Gemma

Attached please find my Affidavit which States I am still unfit to work.

Also further information to be considered:

I .a) I was forced to take mental health leave in October 2022 due to harassment and bullying by the OICs nightshift who asked me to leave the workplace on multiple occasions due to my mental illness. Therefore, I was denied to complete my shift at work and was told not to return to work until my treatment was completed.

b) My mental health leave was approved in October and I was told my personal leave, recreation leave had to be exhausted first after which I was to go on leave without pay on mental health grounds.

2. CORRECTIONAL OFFICER (NTPS) 2017-2021 ENTERPRISE AGREEMENT

24.7 Documentation Requirements

b)

i. a medical certificate from a registered health practitioner;

The above clause does not mention any specific country.

Therefore, my medical certificates submitted in January and February 2023 are valid as per the clause above as it was issued by a registered health practitioner.

3. On 22 February 2023 Ms Kimberley was sent the affidavit which States that I am still unfit to work.

I had also requested Ms Kimberley for my mental health leave.

However, I didn't get any response from Ms Kimberley regarding my Affidavit nor my mental health leave.

4. My medico legal report by Psychiatrist Dr. Mathew Samuel and my other medical reports have been previously submitted to the workplace.

5. The affidavit doesn't mention my migration status nor my intention of migration.

I'm still Australian citizen and have the right to return to Australia once my mental treatment is approved and paid by our Department Insurers.

6. I believe to have an intention to terminate my employment to avoid the liability and treatment cost of my mental illness is breach of natural justice and discrimination towards me with mental disability.

7. Our department's Insurers have organized another IME on March 22, 2023.

After which I'm advised a new mental health plan will be developed for my mental treatment.

Therefore I would like to request if my mental treatment plan and costs is paid for so I could recover from my mental illness and return to work.

*With thanks
Ravi Singh*

(My emphasis)

[25] The Applicant was dismissed by way of a written letter signed by Ms Gemma Lake, Chief Executive Officer, dated 6 April 2023:

“Dear Mr Singh,

Re: TERMINATION OF EMPLOYMENT – SECTION 54 PUBLIC SECTOR EMPLOYMENT AND MANAGEMENT ACT 1993

I refer to my correspondence dated 14 March 2023, in which you were advised of my intention to terminate your employment, pursuant to section 54 of the Public Sector Employment and Management Act 1993 (the Act). You were invited to make a written submission within seven (7) calendar days of the receipt of the letter as to why your ongoing employment should not be terminated.

I acknowledge your email of 15 March 2023, I have carefully considered all of the information you have provided. I note that you disagree with the advice provided to you in regards to the overseas medical documentation not being accepted for the purposes of granting you personal leave. You have also raised historical matters relating to disputed and contested workers compensation claims.

I reiterate that the department does not accept overseas medical certificates and other documentation. Under the Correctional Officers (NTPS) 2017 – 2021 Enterprise Agreement (the Agreement) the term Health Practitioner is broad and does not exclude overseas practitioners; however, as additional explanation, under clause 24.3 (f) – Definitions of the Agreement, “a registered health practitioner means a health practitioner registered, or licensed, as a health practitioner (or as a health practitioner of a particular type) under a law of a state or territory that provides for the registration or licensing of health practitioners (or health practitioners of that type)”, and by interpretation pursuant to the Acts Interpretation Act 1901 (Cth), the terms ‘State’ or ‘Territory’ are to be interpreted as meaning a State or Territory of Australia.

I also consider your assertion that you have not formally immigrated to an overseas country, and that you retain Australian Citizenship an insufficient explanation to resolve my concerns in regard to you having travelled and relocated overseas, without advising of your plans or seeking appropriate authority in advance of taking an extended leave of absence.

The other matters you raise in regards to contested workers compensation claims are handled separately to employment matters, as a personal legal matter for yourself and the Northern Territory Government’s insurer, Gallagher Bassett, and have no bearing on this process.

I do not accept your statement that this action is an attempt by the department at avoiding liability, the department will not be making agreement to compensate you for undocumented medical expenses. I suggest you seek your own legal advice on these matters.

I consider it unfortunate that you have not been able to provide any reasonable explanation as to your continued absence without authority, or as to why my foreshadowed action of terminating your employment should not be taken. I remain of the view that your continued absence without authority is of such a serious nature that you are unable to perform the duties of a corrections officer, and have effectively abandoned your employment.

In the absence of a reasonable explanation from you, I have relied on the information currently before me to make a determination. I now confirm my decision to terminate your employment pursuant to section 33 of the Act, effective from the date of this letter.

As an employee of the Northern Territory Public Sector, section 59(1)(b) of the Act affords you have the right to seek a review of my decision. Any such application must be lodged with the Public Sector Appeals Board within three months of your receipt of this letter. Any such appeal should be lodged with:

[redacted]

Available Support

I appreciate that receiving this notice and dealing with the issues it raises may be difficult. If you would like support, the Employee Assistance Program (EAP) has a range of confidential and professional counselling services that I encourage you to access. You may also wish to seek advice and assistance from your union.

You may choose an EAP providers from the list below:

[redacted]

If you have any questions about the contents of this letter, please contact Darryl Griffiths, Workforce Relations Manager on [redacted].

Yours sincerely

*Gemma Lake
Chief Executive Officer
6 April 2023"*

Respondent's Submissions

[26] The Respondent submitted that the Applicant's dismissal was not harsh, unjust or unreasonable within the meaning of s.387 of the FW Act. In support of its position, the Respondent relied on the following.

Legislation underpinning the termination

[27] The Respondent submitted that a CEO's functions are set out in s.24 of the PSEM Act as follows:

“24 Functions of Chief Executive Officers

(1) The functions of the Chief Executive Officer of an Agency are to manage, and provide strategic leadership of, the Agency.

(2) The Chief Executive Officer must exercise those functions in a way that:

(a) is responsive to government policies and priorities; and

(b) upholds the public sector principles; and

(c) complies with all applicable:

(i) laws (including the Employment Instructions); and

(ii) determinations and directions of the Commissioner; and

(iii) decisions of an appeal board.

(3) As part of performing those functions, the Chief Executive Officer is responsible for the following:

(a) directing the employees employed in the Agency;

(b) ensuring the Agency attains any objectives set by the appropriate minister;

(c) devising organisational structures and arrangements for the Agency;

(d) assigning designations to employees in the Agency and varying those designations in accordance with:

(i) award requirements; and

(ii) designation systems, standards and procedures determined by the Commissioner or, if no systems, standards or procedures have been determined, with the approval of the Commissioner;

within the limits of the amount that has been appropriated or is otherwise available for the remuneration of employees in the Agency;

(e) assigning duties to be performed by each employee in the Agency;

(f) devising and implementing employee performance management and development systems for the Agency;

(g) assisting employees in the Agency to undertake relevant training, education and development programs;

(h) devising and implementing financial and management plans for the Agency and monitoring the Agency's financial and administrative performance;

(i) devising and implementing record keeping and information management systems for the Agency;

(j) devising and implementing programs to ensure that employees have equal employment opportunities in accordance with the human resource management principle;

(k) ensuring the application in the Agency of appropriate occupational health and safety standards and programs.

(4) A Chief Executive Officer also has any other functions conferred under this or any other Act.”

[28] Section 54 of the PSEM Act, Abandonment of employment, provides:

“54 Abandonment of employment

(1) The Chief Executive Officer of an Agency may terminate the employment of an employee in the Agency if the employee is absent from duty without permission for at least 10 consecutive working days.

(2) The Chief Executive Officer must not take action under subsection (1) unless satisfied that:

(a) the employee:

(i) has been given written notice of the proposed action and the grounds for taking it; and

(ii) has been given a reasonable opportunity to show why the action should not be taken; or

(b) all reasonable steps have been taken to give notice as mentioned in paragraph (a) but without success.

(3) In this section:

***working day**, for an employee, means a day on which the employee is, in accordance with his or her conditions of employment, required to be at work.”*

(Original emphasis)

[29] Further, the Respondent relied on clause 24 of the Agreement, which sets out the provisions for the granting of personal leave. Clause 24.7(b) sets out the documentation requirements as follows:

“(b) ... to assist the CEO to determine if the leave taken, or to be taken, was or is for one of the reasons set out in clause 24.2(a)(i)(sick leave) an employee must, as soon as reasonably practicable provide the CEO with the following documentary evidence:

(i) a medical certificate from a registered health practitioner; or

(ii) where it is not reasonably practicable for the employee to access a registered health practitioner to obtain a medical certificate for reasons that include because they reside in a remote or regional locality or for any other reason approved by the CEO, a statutory declaration may be submitted in writing detailing:

A. the reasons why it was not practicable to provide a medical certificate; and

B. the reasons for, and length of absence.”

[30] The Respondent noted that ‘a registered health practitioner’ is defined in clause 24.3(f) as:

“... means a health practitioner registered, or licensed, as a health practitioner (or as a health practitioner of a particular type) under a law of a state or territory that provides for the registration or licensing of health practitioners (or health practitioners of that type); ...”

Background

[31] The Respondent submitted that between 31 May 2019 and 9 October 2021 Mr Singh lodged a total of 5 workers compensation claims. One of those claims, relating to a physical injury component was accepted, but all other claims for alleged psychological injuries were ‘disputed’ (not accepted) and all claims except that one have been closed.

[32] The Respondent noted that a claim arising from 21 February 2021 remains open as Mr Singh appealed the decision to dispute the claim which is likely to be heard in the Work Health Court sometime in 2024.

[33] The Respondent submitted that on 1 December 2022, Mr Singh provided a medical certificate used by Centrelink for their purposes and issued by Dr Vishal Kohli of Bakewell Medical Centre in Palmerston in the Northern Territory (NT) advising he was unfit for work from 1 December 2022 to 12 January 2023, and that the duration of the current functional impact of his condition is expected to be between 12 weeks and 24 months. **Dr Kohli further stated Mr Singh had a diagnosis of PTSD and was unable to work in his current workplace, due to anxiety, depression and insomnia. The Respondent submitted that this medical certificate was accepted and the Applicant’s leave approved.**

(My emphasis)

[34] The Respondent submitted that on 14 January 2023, Mr Singh, emailed the Rosters and Operational Support Team DCC a ‘medical certificate’ issued on 13 January 2023 by Aventus Medical Care Inc, located overseas in Malabanas, Angeles City Pampanga, Philippines, diagnosing a respiratory tract infection and pneumonia and stating Mr Singh should ‘extend bed rest for 5 more days’. The Respondent submitted that this ‘medical certificate’ was not from a Registered Health Practitioner as required under the Agreement.

[35] The Respondent submitted that as a result of this correspondence, it was identified that Mr Singh was living overseas.

[36] The Respondent submitted that three emails followed on 3, 8 and 15 February 2023 from his employer to the Applicant advising the Applicant that his medical certificate did not comply with requirements under the Agreement for it to be accepted, that as a result he was absent without authority and requesting that the Applicant provide a valid medical certificate.

[37] As to the Applicant's reply correspondence and the Applicant's reference to an IME, the Respondent submitted that no IME had been requested by AGD for Mr Singh relating to his employment. The Respondent submitted that the Applicant's reference to an IME, along with a reference to Hunt & Hunt Lawyers and Gallagher Bassett, which the Respondent explained was his lawyer and the NT Government's Workers Compensation Insurer, indicate the IME related to his workers compensation claim from February 2021 that was rejected and that he had appealed. The Respondent submitted that this is a separate matter to the abandonment of employment process.

[38] The Respondent submitted that in response to the employers' email of 15 February 2023, the Applicant responded twice on 21 February 2023 providing 3 medical documents in the first and another in the second. The Respondent noted that all of the medical certificates were issued from the Philippines on 20 February 2023 and 21 February 2023 and, consequently, none were from a "registered health practitioner" and therefore were invalid.

[39] The Respondent noted that the Applicant further emailed an 'Affidavit for my Psychiatric treatment' dated 22 February 2023. The Respondent submitted that the 'Affidavit' was sworn in the Philippines, referred to the Applicant's workers compensation appeal matter, and did not provide any other material as required by the Agreement to support his personal leave.

[40] The Respondent submitted that the employer emailed the Applicant again on 22 February 2023 expressly advising him that:

- (a) his overseas medical certificates did not comply with the requirements of the Enterprise Agreement;
- (b) requesting he provide a response with his intention for making an appropriate application for leave or otherwise, by no later than close of business 23/02/2023; and
- (c) that should a response within the timeframe not be received, it would be considered that he did not intend to apply for an appropriate leave approval as required under his employment conditions, and formal action may need to be initiated to address his continued unauthorised absence, if the delegate considered that there were reasonable grounds.

[41] The Respondent noted that on 22 February 2023, the Applicant responded again attaching an 'Affidavit for his Psychiatric treatment plan', and advising that he was still awaiting an appointment with the Psychologist to develop his treatment plan.

[42] The Respondent submitted that "*despite the clear request from the employer, Mr Singh's response did not include a valid medical certificate or advice of his intention to make an appropriate leave application*".

[43] The Respondent submitted that as the Applicant had been away since 14 January 2023 and had not provided a valid medical certificate, the CEO considered he was on an unauthorised absence and to have abandoned his employment. The CEO therefore wrote to the Applicant on 14 March 2023, advising him that as he had been absent from duty without permission for at

least 10 consecutive working days, it was considered that he had abandoned his employment and foreshadowed terminating his employment under s.54 of the PSEM Act. The Respondent noted that before making a final decision, the CEO invited the Applicant to make a submission, within 7 days, on why his employment should not be terminated.

[44] The Respondent submitted that the Applicant responded on 15 March 2023 and, despite being previously advised the Affidavit was not a valid medical certificate because it was not from a “*registered health practitioner*”, again provided a copy of the Affidavit dated 22 February 2023 stating it “*states I am still unfit to work*”. The Respondent submitted that the Applicant argued the Agreement did not state a specific country and therefore his certificates of January and February were valid. The Respondent noted that the Applicant further referred to his workers compensation appeal matter, which the Respondent submitted was unrelated to the abandonment of employment process.

[45] The Respondent submitted that after carefully the Applicant’s submission and all of the information available to her, the CEO wrote to the Applicant on 6 April 2023 advising that, in the absence of a reasonable explanation from him as to his continued absence without authority, her foreshadowed termination of his employment for abandonment of employment was confirmed effective from the date of the letter.

[46] The Respondent relied on Ms Lake’s witness statement to correct the typographical error contained in the Applicant’s termination letter, as it contained a reference to s.33 of the Act (Termination of fixed period or casual employment) when it should have referred to s.54 (Abandonment of employment). The Respondent relied on Ms Lake’s submission that this error is not material to the process, as it was clear that s.54 was being contemplated and the Applicant made submissions on that basis.

Consideration of the dismissal within the context of s.387 of the FW Act

[47] The Respondent accepted that the Applicant was a person protected from unfair dismissal at the time of his dismissal. The Respondent addressed the relevant criteria for harshness as follows.

Valid Reason

[48] The Respondent relied on Ms Lake’s witness statement as demonstrating that there was a valid reason for dismissing the Applicant as he had abandoned his employment, and s.54 of the PSEM Act provided for dismissal.

[49] The Respondent relied on Ms Lake’s witness statement as demonstrating that the medical documents provided by the Applicant did not meet the requirements of the Agreement, that he was advised or requested on 5 occasions of the need to provide a valid certificate and the form it must take and that, despite this advice and requests, over a period from 3 February 2023 through to 6 April 2023 the Applicant did not provide any valid medical certificate(s).

[50] The Respondent submitted that in the circumstances, the CEO had no alternative other than to apply s.54 of the PSEM Act to terminate the Applicant’s employment on the basis that he had abandoned his employment.

Notified of the Reason

[51] The Respondent submitted that the Applicant was notified by the CEO of the reason for considering his dismissal on 14 March 2023 and was provided an opportunity to respond within 7 days.

Opportunity to Respond

[52] The Respondent submitted that, as above, the CEO provided the Applicant the opportunity to respond to the foreshadowed intention to terminate his employment, and he did so in a written response of 15 March 2023.

Support Person

[53] The Respondent submitted that there was no request by the Applicant to meet to discuss the proceedings and therefore the question of whether there was an unreasonable refusal by the employer to allow a support person to assist at any discussions relating to the dismissal does not arise.

Unsatisfactory Performance

[54] The Respondent submitted that the dismissal did not relate to the Applicant's performance, and only arose on the basis of the Applicant abandoning his employment.

Size of the Employer's Enterprise and Dedicated Human Resource Management Specialists

[55] The Respondent acknowledged that the Northern Territory Public Sector is a large employer, with dedicated Human Resource specialists, and has the capacity to manage its human resource procedures.

Any Other Matters

[56] The Respondent did not raise any additional matters to which the Commission should have regard, however, repeated its submission that the medical and other evidence relied on by the Applicant does not meet the requirements under the Agreement.

[57] In conclusion, the Respondent submitted that it:

“(a) lawfully terminated the Applicant's employment pursuant to section 54 of the Act;

(b) had a valid reason for the termination; and

(c) provided the Applicant with procedural fairness and ‘a fair go all round’”.

Applicant's Submissions in Reply

[58] The Applicant elected not to file any submissions in reply and relied on the materials already filed.

Written Closing Submissions

[59] Due to issues with the Applicant's connection at the Microsoft Teams Hearing, both parties were directed to file written closing submissions.

Applicant's Closing Submissions

[60] The Applicant failed to provide a formal written closing submission, and instead filed correspondence as follows:

1. An email chain from February 2023, in which the Applicant provided his 'Affidavit for his Psychiatric treatment plan' to Ms Van Keulen. In this forwarded email chain, the Applicant also made the following submission:

"Enclosed please find the email from Ms Kimberley where February 23 is when I'm supposed to be submitting my intention of leave application.

On the February 22 I have requested leave on mental health grounds for my psychiatric treatment to be completed.

However, I didn't get any response from any of the email receipts below namely, Ms Kimberley, DC human resources, Sheeba David, David Gordon, Darryl Griffiths and Gemma Walsh.

I also submitted my Affidavit as an alternative to my medical certificate on February 22.

Again I didn't get any response from anyone mentioned above if it was ok.";

2. An email chain from 15 March 2023, in which the Applicant had provided his amended Affidavit to Ms Lake, in response to the CEO's show cause letter dated 14 March 2023; and
3. An email chain from Shine Lawyers dated 16 March 2023, noting an IME for the Applicant would need to be rescheduled and asking that he complete an NTWorkSafe 'Declaration of worker residing outside Australia' form.

Respondent's Closing Submissions

[61] The Respondent submitted it had taken into account the Applicant's closing materials.

[62] The Respondent submitted that, arising from the hearing, in relation to the validity of the Applicant's 'Affidavit' submitted on 22 February 2023, the following matters should be taken into consideration by the Commission.

[63] The Respondent submitted that in accordance with clause 24.7(b) of the Agreement, to assist the CEO to determine if the leave taken is 'sick leave', an employee must, as soon as practicable, provide the CEO with:

“(i) a medical certificate from a ‘registered health practitioner (defined as one registered, or licensed, as a health practitioner under a law of a state or territory) or,

(ii) where it is not reasonably practicable for an employee to access a registered health practitioner to obtain a medical certificate for reasons that include because they reside in a remote or regional locality or for any other reason approved by the CEO, a statutory declaration may be submitted in writing detailing:

A. the reasons why it was not practicable to provide a medical certificate; and

B. the reasons for, and length of absence.”

[64] The Respondent submitted that once received, the CEO will consider the statutory declaration, determine if it meets the above requirements and then determine if leave should be approved. The Respondent submitted that a statutory declaration might meet all of the literal requirements of clause 24.7 but still not be approved. It provided, for example, that an employee could advise the reasons for the leave were because they had the ‘flu’ but sought to have 6 months on leave. The Respondent submitted that in such cases, the employee would be expected to provide further medical evidence from a registered health practitioner to support the injury/ illness and absence period. **The Respondent submitted that because of the variety of circumstances that might arise, each statutory declaration must be considered on its own merits.**

(My emphasis)

[65] The Respondent submitted that under the requirements to exercise discretion, a public sector officer must apply their mind and judgement in a way that is logical, defensible and free from accusations of abuse of power and, consequently, the longer the period of leave requested in a statutory declaration and the less specific the reasons given for the leave requested, the more rigor that will be required to assess the application. It submitted that in essence, to be valid, a statutory declaration must meet the following elements:

“(i) it must not have been reasonably practicable because the employee resides in a remote or regional locality (the reference is to a remote or regional locality is to a remote locality in the Northern Territory (NT) as listed in Determination 8 of 2015 and a regional locality that is not a remote locality or Darwin or Alice Springs (ie. Katherine and Tennant Creek) (Attachment A). A remote or regional locality does not include the Philippines; or

(ii) any other reason approved by a CEO; and

(iii) the reasons why it was not practicable to provide a medical certificate must be justifiable in the circumstances; and

(iv) the reasons for the absence must be clear and considered in light of the length of the absence requested; and

(v) the length of the absence must be clear and consistent with the reasons for leave.”

[66] The Respondent considered the Applicant's Affidavit, assessed against the required elements, and submitted:

“(i) The reason is not because the Applicant resided in a remote or regional locality in the NT.

(ii) Notwithstanding, the CEO allowed the Applicant to submit a statutory declaration for other reasons.

(iii) It does not specify why it was not practicable to provide a medical certificate.

(iv) In terms of reasons and length of absence, it indicates he had discussed a matter with Dr Mathew Samuel on 24 August 2022 who Mr Singh claims advised he required psychotherapy for at least 20 sessions a year for the next 2 years, regular Psychiatric assessment every 3 months for the next 2 years and that he will also benefit from attending a group programme that runs for 4 weeks. It also contains a number of costs of treatments.”

[67] The Respondent submitted that it is relevant to note that the check-up occurred on 24 August 2022 some 6 months before the Applicant submitted the Affidavit and there is no indication that he cannot work while he is receiving treatment. The Respondent submitted that the Affidavit appears to indicate the Applicant should be available between his treatments (ie. 20 psychotherapy sessions plus 4 Psychiatric assessments totally 24 days out of 260 working days in a normal year).

[68] The Respondent submitted that due to the lack of specificity in the Affidavit, the CEO exercised her discretion to not accept it and advised the Applicant it did not mention the Applicant's fitness for work and was not supported by any acceptable documentary evidence, in her letter of 14 March 2023. The Respondent submitted that following this advice, the Applicant was free to seek a medical certificate from a “*registered health practitioner*” but chose not to do so.

[69] Further, the Respondent submitted that whilst the Applicant made no particular submissions, the Applicant appears to argue that it was not reasonably practicable for him to obtain a medical certificate from a registered health practitioner. The Respondent submitted that this argument is not sustainable as there are a number of ways in which the Applicant could have obtained a medical certificate from an Australian Registered Health Practitioner, including:

“(i) Ringing his doctor or a Medical Practice in Darwin (or anywhere in Australia) explaining his circumstances and asking them for an appointment (the phone number can be obtained on the world wide web);

(ii) As in (i), but emailing;

(iii) Requesting advice from his Medical Practitioners in the Philippines about how it might be achieved.

(iv) 'Googling' using the world wide web and he is likely to have come across options for obtaining 'online medical certificates' from a medical practitioner based in Australia."

[70] The Respondent submitted that the Applicant has not provided any evidence that he attempted any of the above.

[71] The Respondent submitted that whilst any of the above may have resulted in a valid medical certificate being issued, it is likely that it would have been of a much shorter duration than the period the Applicant seems to believe he applied for, as Registered Medical Practitioners in Australia exercise their judgement based on evidence, and thus replicating the CEO's need to apply rigor to an affidavit that was lacking the necessary detail and any supporting medical evidence.

[72] The Respondent submitted that in all of the circumstances, the CEO properly applied her discretion to not accept the Affidavit.

[73] The Respondent submitted that whilst it continues to rely on previous submissions that any dealings between the Applicant and the Government's workers compensation insurer relating to a disputed claim from 2021 are irrelevant to the Applicant's unfair dismissal claim and that the certificate in question the Applicant refers to was not from a Registered Health Practitioner as required, in relation to the Applicant's claim that the employer requested he provide the NT Worksafe certificate, the Respondent referred to document 'MF4'.

[74] The Respondent noted that in his final submissions, the Applicant has again provided a copy of an email from his lawyers, Shine, which includes an email from Chris Osborne at Hunt and Hunt (who are acting for the Government's Workers Compensation Insurer, Gallagher Bassett in a disputed workers compensation claim dating back to 2021) to Shine. The Respondent submitted that clarification of the purpose of Hunt and Hunt's email to Shine was sought and Hunt and Hunt advise:

"(a) This correspondence was sent to the Applicant's solicitors in the circumstances of litigation;

(b) It is up to the Applicant, with advice from those solicitors, as to what, if anything, is provided or what, if any action is taken as a result of such correspondence;

(c) It is not unusual in a disputed workers compensation matter that the worker keeps the employer updated with medical certification and, in this case, such would need to be from overseas; and

(d) Whether or not this Applicant chose to provide such certification, is a matter for him and his legal team."

[75] As a further matter arising from the hearing, the Respondent submitted that in relation to the effect of Mr Singh being successful in his workers compensation appeal against the NT Government's insurers decision to reject a claim the Applicant lodged in 2021 (the Respondent

understands a court date has been listed for May 2024), this may entitle Mr Singh to receive past and possibly future medical expenses but his termination of employment on the grounds of abandonment of employment under s.54 of the PSEM Act will not be affected.

[76] Therefore, the Respondent submitted in conclusion that the CEO:

“(a) lawfully terminated the Applicant’s employment pursuant to section 54 of the Act;

(b) had a valid reason for the termination; and

(c) provided the Applicant with procedural fairness and ‘a fair go all round’.”

Applicant’s Closing Submissions in Reply

[77] In response to the Respondent’s Closing Submissions, the Applicant filed submissions by email as follows:

*“Good morning all
Enclosed please find my response*

5.

iii) In October 2022, I was forced to take mental health leave as I wasn't allowed to complete my shift and I was asked to go home by the Senior Officers at my workplace.

Senior Workforce Manager Ms Kimberley didn't advise of any discrepancy in the Affidavit.

Amended affidavit on March 15 was also provided states that I was unfit to work.

March 16 , 2023 NT WorkSafe medical certificate was provided.

My IME report was submitted to the workplace in 2022 .

Centrelink medical certificate on December 2022 states that the duration of the current functional impact of this condition is expected to be including a temporary exacerbation of a permanent condition to last 13 weeks up to 24 months.

b) I was asked by rosters to provide an alternative to medical certificate which was an affidavit as a statutory declaration is unavailable in the Philippines.

b) I) - iv) advice on how to obtain a medical certificate from Australian Registered Health Practitioner while overseas was not provided to me.

6. *NT WorkSafe Medical certificate was provided on March 16, 2023.*

7. *Termination of employment on the grounds of abandonment is unfair as the Senior Officers from my workplace forced me to take mental health leave in October 2022 as I was refused to complete my shift on multiple occasions and was sent home.*

8. *The CEO didn't have all the information to make an informed decision.*

*With thanks
Ravi Singh*

[78] The Respondent provided a short reply to the Applicant's Closing Submissions in Reply, by email, as follows:

"While Mr Singh's final submissions do not appear to raise any new issues, for the avoidance of doubt, the 'amended affidavit' of 15 March 2023 that Mr Singh refers to was provided by Mr Singh to the CEO on 15 March 2023 in response to the CEO's letter of 14 March 2023 seeking Mr Singh's submissions about whether he should be terminated or not. Consequently, it was considered by the CEO in making her final decision on 6 April 2023."

Consideration

[79] I have taken into account all of the submissions that have been provided by the parties and I have attached the appropriate weight to the evidence of the witnesses.

[80] It is not in dispute and I find that the Applicant is protected from unfair dismissal, submitted his application within the statutory timeframe, was not made genuinely redundant and did not work for a Small Business.

[81] When considering whether a termination of an employee was harsh, unjust or unreasonable, the oft-quoted joint judgement of McHugh and Gummow JJ in *Byrne v Australian Airlines (Byrne)*¹ is of significance:

"It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted."

[82] In analysing *Byrne*, a Full Bench of the Australian Industrial Relations Commission in *Australian Meat Holdings Pty Ltd v McLauchlan (AMH)*² held:

"The above extract is authority for the proposition that a termination of employment may be:

- unjust, because the employee was not guilty of the misconduct on which the employer acted;*
- unreasonable, because it was decided on inferences which could not reasonably have been drawn from the material before the employer; and/or*

- *harsh, because of its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct*".

[83] I now turn to the criteria for considering harshness as provided in s.387 of the Act.

Section 387(a) - Valid Reason

[84] The meaning of the phrase "valid reason" has been universally drawn from the judgement of Northrop J in *Selvachandran v Peteron Plastics Pty Ltd*:³

"In broad terms, the right is limited to cases where the employer is able to satisfy the Court of a valid reason or valid reasons for terminating the employment connected with the employee's capacity or performance or based on the operational requirements of the employer. ..."

In its context in s 170DE(1), the adjective "valid" should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s 170DE(1). At the same time the reason must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must "be applied in a practical, commonsense way to ensure that" the employer and employee are each treated fairly...".

[85] In *Rode v Burwood Mitsubishi*,⁴ a Full Bench of the Australian Industrial Relations Commission held:

"...the meaning of s.170CG(3)(a) the reason for termination must be defensible or justifiable on an objective analysis of the relevant facts. It is not sufficient for an employer to simply show that he or she acted in the belief that the termination was for a valid reason."

[86] The Respondent advised the Applicant that he was absent without approval. The Respondent acted in accordance with the relevant jurisprudence in providing the Applicant with an opportunity to show that he had not abandoned his employment. It is not in dispute that the Respondent was not satisfied with the Applicant's attempts to prove that he had not abandoned his employment. I have taken this into account.

[87] I am satisfied that the Agreement required the Applicant to provide a certificate from a doctor registered to practice in Australia. It is not in dispute that the Applicant's medical certificates did not comply with this requirement. I have taken this into account.

[88] Alternatively, the Applicant had the opportunity to provide a statutory declaration (I note that the Applicant provided a signed and witnessed Affidavit). The Respondent was not

satisfied with the content of the Applicant's statement, because it lacked important and relevant information. I have taken this into account.

[89] I am satisfied that the Respondent was of the view that the Applicant was being deliberately vague and misleading. The Applicant did not appear to accept the advice of the Respondent in relation to the veracity or appropriateness of his medical certificates. I have taken this into account.

[90] Based on the issues identified above, I am satisfied and find that the Respondent had a valid reason to terminate the Applicant.

Section 387(b) - Notified of the Reason

[91] The Applicant was notified of the reason for his dismissal in the 'Foreshadowed Intention to Terminate Employment' letter of 14 March 2023 and in his Termination Letter dated 6 April 2023. I have taken this into consideration.

Section 387(c) - Opportunity to Respond

[92] The 'Foreshadowed Intention to Terminate Employment' letter provided the Applicant an opportunity to respond, and he availed himself of this opportunity. I have taken this into consideration.

Section 387(d) - Any refusal of a support person

[93] It is not in dispute that no meetings occurred between the parties in the lead up to the Applicant's termination on the basis that the process was conducted via correspondence, due to the Applicant being overseas. I have taken this into account.

Section 387(e) - Unsatisfactory performance

[94] The Applicant was not dismissed for unsatisfactory performance but on the grounds of abandonment of employment in accordance with s.54 of the PSEM Act. I have taken this into account.

Section 387(f) - Size of Employer

[95] It is not in dispute that the Respondent is a large employer. I have taken this into account.

Section 387(g) - Dedicated HR specialists

[96] The Respondent has a dedicated team of experienced HR specialists. I have taken this into account.

Section 387(h) - Any other matter

[97] I note that the Applicant is not legally trained and is self-represented. In his Affidavit, the Applicant identifies that he is an Australian citizen living in the Philippines. Further, that he consulted a Dr Mathew Samuel on 24 August 2022, who advised the Applicant that he would need to undergo psychotherapy treatment for 2 years. The Affidavit was witnessed by the Notary Public for Angeles City in the Philippines on 22 February 2023 (see paragraphs [20] and [21] above). I have taken this into account.

[98] In response to a question from me, Ms Lake agreed that the Applicant had undertaken a “*reasonable effort*” in providing a statutory declaration in accordance with clause 24.7(b)(ii) of the Agreement. Ms Lake testified that she made the decision not to accept the Affidavit of the Applicant on the basis that there were no supporting documents attached to the Affidavit from the Applicant’s treating medical practitioners. I have taken this into account.

[99] It is not in dispute that the Applicant submitted a number of medical certificates from locally qualified medical practitioners in the area where he was residing in the Philippines. One of those certificates indicated that the Applicant was suffering from a throat infection, not a long term psychological illness. I have taken this into account.

[100] The Applicant submitted an Affidavit on 22 February 2023, however, it was deficient in its content. The Applicant did not provide any information in relation to the length of time he would actually be off work. The report relied upon by the Applicant was five months old and did not indicate whether the Applicant would be able to resume work whilst undergoing his treatment. Such a scenario is an unrealistic restriction on any employer. The Applicant needed a relevant and current opinion from an Australian doctor to satisfy the provisions of the Enterprise Agreement. The Applicant failed to comply with the Enterprise Agreement. Section 381(2) of the FW Act equally applies to the employer. The provision affords the parties “a fair go all round”. The actions, or lack thereof, of the Applicant, forced the Respondent’s hand in relation to his dismissal. I have taken this into account.

[101] Further, it would appear that the Applicant had not commenced any of the recommended treatment, which is required for the Applicant to return to work. I have taken this into account.

Conclusion

[102] The Respondent was incredibly patient with the Applicant. Poor telecommunication service can only be used as an excuse for a limited number of occasions. If the Applicant was serious about his employment, then he should have ensured that he had the appropriate level of communication service to participate with the employer, let alone the Commission. If he did not understand the emails from the Respondent, then he should have said that in an email or made a call from his mobile to the Respondent. For the Applicant to keep submitting unacceptable doctor’s certificates was inappropriate and frustrating behaviour.

[103] I have previously found that the Respondent had a valid reason to terminate the Applicant. My analysis of s.387(b) – (h) of the FW Act has not altered my view.

[104] I am satisfied that the Applicant has received his statutory entitlement to a fair go and had abandoned his employment by not complying with the provisions of the Agreement, despite numerous requests and warnings from the Respondent.

[105] As a result, I find that the Applicant has not been unfairly dismissed.

[106] The Application is dismissed.

[107] I so Order.

COMMISSIONER

Printed by authority of the Commonwealth Government Printer

<PR765872>

¹ (1995) 185 CLR 410.

² (1998) 84 IR 1.

³ (1995) 62 IR 371.

⁴ PR4471.