



## DECISION

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

**Vathana Pen**

**v**

**Octopus Fishing No.2 Pty Ltd**  
(U2022/6436)

COMMISSIONER SCHNEIDER

PERTH, 10 OCTOBER 2023

*Application for an unfair dismissal remedy*

[1] On 21 June 2022, Mr Vathana Pen (the Applicant) made an application in the Fair Work Commission (the Commission) under section 394 of the *Fair Work Act 2009* (the Act) for an unfair dismissal remedy against Octopus Fishing No.2 Pty Ltd (the Respondent).

[2] In the F3 Employer Response Form, the Respondent recorded that it has a jurisdictional objection to the application, namely that the Applicant was not dismissed at the initiative of the employer.

### **Background and Submissions**

[3] There is no dispute that the Applicant was engaged as a casual employee and was engaged as a Deckhand – Level 2.

[4] The Applicant commenced work with the Respondent on 12 April 2021.

[5] The Respondent has raised a jurisdictional objection that the Applicant was not dismissed at the initiative of the employer. The Respondent maintains their position that the Applicant was provided with the opportunity to accept shifts with the Respondent, however the Applicant had repeatedly refused this work.

[6] The Applicant was engaged to, primarily, work on board a fishing vessel. When undertaking his duties on board the fishing vessel, the Applicant was one of three crew members present. The usual crew assembly includes a Skipper and two Deckhands.

[7] During his employment with the Respondent, the Applicant primarily worked onboard the “Natural Selection” vessel, based out of Two Rocks in Western Australia. The Applicant also performed work onboard the “Midas Touch” vessel, based out of Lancelin in Western Australia.

[8] The Applicant raised a workplace complaint to Mr Jamie Shaw (Mr Shaw), Fishing Manager, on 27 March 2022. The complaint related to an incident onboard the Natural Selection, which occurred between the Applicant and the Skipper Mr Matthew Bigg (Mr Bigg).

[9] Reference to “lines” in this decision refers to commercial fishing lines that the crew would pull from the ocean.

[10] The incident arose when Mr Bigg advised the Applicant and another deckhand, Mr Jarrod Faull, that from now on they would be completing 14 lines rather than 12 lines as per previous requirements.

[11] The Applicant states that he then asked Mr Bigg if this is compulsory, as the Applicant was of the understanding that 12 lines were compulsory, and any additional lines were by negotiation and subject to an incentive.

[12] The Applicant submits that Mr Bigg made the following statements:

“you can look for another job where you can leave at 12 o’clock” and  
“I don’t want to have to fire you because you are such a good worker”.

[13] The Applicant took the above statements as amounting to a threat to his on-going employment with the Respondent.

[14] The Applicant then contacted Mr Shaw in relation to the above incident.

[15] On 28 March 2022, the Applicant met with the Respondent to discuss the workplace complaint. At the meeting, Mr Shaw was present on behalf of the Respondent and Mr Bigg was also in attendance.

[16] The parties are in dispute over the content of the discussion and the outcome of the discussions. The Applicant states that during the meeting, he became upset, did not feel like he could express his concerns, and left feeling that the matter was not resolved.

[17] The Respondent was of the belief that the matter had been discussed and resolved.

[18] It is not in dispute between the parties that, at the end of the meeting, the Applicant advised the Respondent he would be returning to Cambodia, due to a family emergency.

[19] There was no contact between the Respondent and the Applicant between 28 March 2022 and 20 April 2022.

[20] On 21 April 2022, the Applicant sent a text message to Mr Shaw which, in effect, outlined that he was not satisfied with the outcome of the meeting held on 28 March 2022 and was seeking that the Respondent formally investigate his complaint against Mr Bigg.

[21] The Respondent submits that the Applicant was never dismissed at the initiative of the employer, rather the Applicant, such is his right as a casual employee, declined further work with the Respondent.

[22] The Respondent submits that, although the Applicant remained unsatisfied with the outcome of the workplace investigation, the allegations put forward could not be substantiated.

[23] The Respondent submits that, at the time of the incident in question, there were only three people on board the vessel. The Respondent submits that the third individual who was on board did not witness the interaction in question between the Applicant and Mr Bigg.

[24] The Respondent submits that the Applicant made a decision of his own free will to not accept shifts with the Respondent and that the Respondent, at no stage, forced the Applicant to resign or acted in such a way which left the Applicant with no alternative but to resign.

[25] The Respondent confirmed to the Applicant that it would not force Mr Bigg to apologize to him, as the investigation was inconclusive, and the allegations were not substantiated.

[26] The Respondent confirmed to the Applicant that he was able to continue work with the Respondent's operation. However, the Applicant declined future work with the Respondent and again sought to raise the workplace complaint involving Mr Bigg.

[27] The Respondent outlined that, on 3 June 2022, the following email was issued to the Applicant which stated:

“Nothing has changed regarding the Company's position on this situation since our last discussion Friday the 20<sup>th</sup> of May.

Future emails will not be responded to.”

[28] The Respondent submits that the intent of this email was to confirm to the Applicant that the investigation was complete, and the Respondent would not continue to engage over a matter which it believed to be resolved.

## Legislation

[29] Section 385 of the Act provides as follows:

### “385 What is an unfair dismissal

A person has been *unfairly dismissed* if the FWC is satisfied that:

- (a) the person has been dismissed; and
- (b) the dismissal was harsh, unjust or unreasonable; and
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- (d) the dismissal was not a case of genuine redundancy.

Note: For the definition of *consistent with the Small Business Fair Dismissal Code*: see section 388.”

The meaning of “*dismissed*” is provided at section 386 of the Act:

**“386 Meaning of dismissed**

- (1) A person has been *dismissed* if:
  - (a) the person’s employment with his or her employer has been terminated on the employer’s initiative; or
  - (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.
- (2) However, a person has not been *dismissed* if:
  - (a) the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or
  - (b) the person was an employee:
    - (i) to whom a training arrangement applied; and
    - (ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement;and the employment has terminated at the end of the training arrangement; or
  - (c) the person was demoted in employment but:
    - (i) the demotion does not involve a significant reduction in his or her remuneration or duties; and
    - (ii) he or she remains employed with the employer that effected the demotion.
- (3) Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person’s employment, to avoid the employer’s obligations under this Part.”

[30] This decision deals only with the jurisdictional objection to be determined.

**Consideration**

[31] Central to the consideration in this case is the operation of section 386(1) of the Act. The word ‘*dismissed*’ is defined in section 12 of the Act as having adopted the meaning in section 386 of the Act. Section 386(1) of the Act reads:

“(1) A person has been dismissed if:

- (a) the person’s employment with his or her employer has been terminated on the employer’s initiative; or
- (b) the person has resigned from his or her employment but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.”

[32] This definition contains two elements. The first concerns termination on the *employer’s initiative* and the second, *resignation* in circumstances where the person was *forced* to do so because of *conduct or a course of conduct*. The two tests were explained by the Full Bench in *Bupa Aged Care Australia Pty Ltd T/A Bupa Aged Care Mosman v Shahin Tavassoli*.<sup>1</sup>

[33] In this matter, the Applicant does not claim that he resigned in the heat of the moment, nor does there appear to be special circumstances giving rise to any additional obligation of the Respondent to ensure the resignation was legitimate in that regard.

[34] In my assessment of the circumstances, the relevant test is that under section 386(1)(b) of the Act.

[35] Having determined that section 386(1)(b) of the Act is the relevant test for this matter, I now turn to consider the conduct of the Respondent and the decision of the Applicant. The line distinguishing conduct that leaves an employee no real choice but to resign from an employee resigning on their own initiative is a narrow one.<sup>2</sup>

[36] Having considered the submissions of the Applicant and the Respondent, the Commission must consider the conduct of the Respondent and whether any such conduct was of the nature which would leave the Applicant with no alternative but to resign from his employment.

[37] Having considered the submissions of the Applicant and the Respondent, I do not believe that the Applicant resigned in the heat of the moment or without consideration of his options.

[38] The incident between the Applicant and Mr Bigg occurred on 27 March 2022. The Applicant, following an extended period away from the workplace, returned from overseas and requested an investigation into the workplace incident.

[39] The Applicant held issue with Mr Bigg, his direct line manager, following the alleged verbal altercation on 27 March 2022. The Respondent attempted to mediate and resolve the issue between the Applicant and Mr Bigg in an informal manner, on 28 March 2022.

[40] The Applicant was then absent from the workplace of his own choosing from 28 March 2022 as he was attending to family matters overseas. The Applicant, on 22 April 2022, requested the Respondent complete a formal investigation in relation to his workplace complaint against Mr Bigg.

[41] The Respondent took action to try and address the Applicant's workplace complaint and commenced an investigation. The incident in question occurred onboard a shipping vessel, on which there were only three people onboard, the Applicant, Mr Bigg, and another deckhand.

[42] The Respondent advised the Applicant that the allegations he had made against Mr Bigg were not able to be substantiated. The Respondent then advised the Applicant that, as the allegations could not be substantiated, the Respondent would not direct Mr Bigg to apologize to the Applicant.

[43] I agree with the submission of the Respondent, regarding the intention of the emails to the Applicant following the completion of the investigation. I do not accept that the email was a notification of termination of employment.

[44] The Applicant was not satisfied with the outcome of the investigation, and, subsequently, rejected the opportunity for further work with the Respondent, such is the Applicant's right as a casual employee.

[45] I am not satisfied that the conduct of the Respondent left the Applicant with no other option but to resign from his employment. Rather, the Applicant was not satisfied with the outcome of the investigation and decided to forgo further work with the Respondent. I find that the Respondent took reasonable action to manage the workplace complaint of the Applicant.

[46] Accordingly, the Applicant was not dismissed from his employment. The end of the Applicant's employment did not come about at the Respondent's initiative due to its conduct.

[47] I am also satisfied that the Applicant did not resign in the heat of the moment or without consideration of his options.

### **Conclusion**

[48] Having found that the Applicant was not dismissed, the application is not within jurisdiction. Accordingly, the application before the Commission must be dismissed. An Order to this effect shall be issued.<sup>3</sup>



COMMISSIONER

Printed by authority of the Commonwealth Government Printer

<PR767024>

---

<sup>1</sup> [2017] FWC 3941.

<sup>2</sup> (1995) 62 IR 200, 206.

<sup>3</sup> [PR767025].