DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Janet Margaret Stace

v

Complete Office Supplies/Complete Office Staffing Pty Ltd
(U2022/8856)

COMMISSIONER SCHNEIDER PERTH, 23 OCTOBER 2023

Application for an unfair dismissal remedy

[1] On 31 August 2022, Mrs Stace (the Applicant) made an application to the Fair Work Commission (the Commission) under section 394 of the *Fair Work Act 2009* (Cth) (the Act) for a remedy, alleging that she had been unfairly dismissed from her employment with Complete Office Staffing Pty Ltd (the Respondent). The Applicant seeks compensation.

[2] The Respondent objects to the application on the grounds that the Applicant was not dismissed at the initiative of the employer.

Background

[3] The Applicant was previously engaged by Quick Corporate Australia Pty Ltd, the Applicant commenced with Quick Corporate Australia in June of 2016.

[4] The Respondent purchased Quick Corporate Australia Pty Ltd, and the Applicant's employment was transferred to the Respondent on 1 October 2021.

[5] The Applicant was engaged as an Account Manager and her employment was governed by the *Commercial Sales Award 2020* (the Award).

[6] The Applicant decided to not receive the COVID-19 vaccination and, because of this decision, was stood down by the Respondent on 28 February 2022.

[7] The Applicant remained on stand down until the date of her termination, which the Respondent asserts was a repudiation by the employee.

[8] The matter was subject to a Hearing before the Commission to traverse the Respondent's objection and the merits of the matter.

[9] At the Hearing, the Applicant gave evidence on her own behalf.

[10] The following witnesses gave evidence on behalf of the Respondent:

- Ms Anne-Marie Gerbasi (Ms Gerbasi), General Manager People and Culture.
- Mr Daniel O'Halloran (Mr O'Halloran), Commercial Director.

[11] This decision concerns both the objection and the merits of the matter.

[12] As required by the Act, I will first consider the objection prior to considering the merits of the matter.

Legislation - Objection

[13] 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."

[14] 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."

[15] I will now deal with the Respondent's objection.

Consideration – Objection

[16] 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."

[17] 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*.[1]

[18] Most applications in which an objection on the grounds of no dismissal is raised concern matters in which the employee has resigned.

[19] In this matter, the Applicant does not claim that she 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.

[20] The Applicant also does not claim that she resigned as a result of any conduct of the Respondent. What is clear, in this matter, is that the Applicant did not resign. Neither party asserts such a fact.

[21] The Respondent instead asserts that she repudiated her contract and therefore her termination was not at the initiative of the Respondent.

[22] The Respondent submits that the Applicant was not dismissed from her employment with the Respondent at its initiative.

[23] The Respondent submits that the Applicant's decision to not be vaccinated against COVID-19 meant that the Applicant could no longer meet the inherent requirements of her employment with the Respondent and that by doing so the Applicant had repudiated her contract of employment.

[24] The Respondent submits that, had the Applicant complied with the vaccination policy, she would have been allowed to return to the workplace immediately.

[25] On 18 July 2022, the Respondent communicated with the Applicant, by letter, to confirm that the Respondent was providing the Applicant one week to confirm if she would receive the COVID-19 vaccine or else the Respondent:

> "… may have no choice but to accept the Applicant' repudiation of her contract of employment on the basis that she can no longer perform the inherent requirements of her position."

[26] On 16 August 2022, the Respondent confirmed, in writing, to the Applicant it had accepted the Applicant's repudiation of her contract of employment.

[27] The Respondent submits that, for the purposes of section 386(1)(a) of the Act, there has been no dismissal at the initiative of the Respondent and therefore the application should be dismissed.

[28] The Applicant submits that the Respondent failed to provide her with procedural fairness, by asserting she had repudiated her contract of employment and did not provide her with the ability to respond to this.

[29] The Applicant submits that, at no time, did she repudiate her contract of employment with the Respondent. The Applicant submits that she remained ready, willing, and able to perform her duties for the Respondent at all times.

[30] The Applicant submits that she took measures to engage with the Respondent in relation to her return to the workplace, including:

- After contracting and recovering from COVID-19, seeking confirmation if she could return to the workplace.

- Seeking confirmation that once the Western Australian State Government mandates were removed on 10 June 2022 if she could return to the workplace.

- Requesting the Respondent to consider alternatives to the stand down, to allow the Applicant to continue to perform her duties.

Conclusion

[31] It is helpful to note the following from Moore J in the decision of *Grout v Gunnedah Shire Council*:

> "A principal purpose, if not the sole purpose, of Div 3 is to provide an employee with a right to seek a remedy in circumstances where the employee did not voluntarily leave the employment. An employee may do some act which is the first in a chain of events that leads to termination." [2]

[32] Having considered the submissions by the parties, I am not satisfied that the Applicant was not dismissed from her employment.

[33] Having considered the submissions and evidence, I am not satisfied that the Applicant's dismissal was not at the initiative of the Respondent.

[34] From the evidence on hand, it is clear that the Respondent set a deadline and stated that it would accept her repudiation and **terminate** her employment.

[35] The Respondent initiated this process, set the parameters, and made a conclusion regarding the Applicant's ongoing employment.

[36] It is clear that the Applicant did not wish to end her employment and, after what the Respondent deemed was a valid reason arose, it was terminated by the Respondent.

[37] The Applicant did not abandon her employment, resign, or otherwise.

[38] The circumstances of this matter are all too familiar and have been the subject of many unfair dismissal decisions in the past, all clearly a dismissal at the Respondent's initiative.

[39] I am not satisfied that the Applicant's conduct satisfies the test for repudiation. Instead, it is clear that the Respondent identified a reason which it believes gave rise to the right to terminate the Applicant's employment.

[40] I am therefore satisfied that the Applicant has been dismissed within the meaning of section 385 of the Act.

Legislation - Merits

Preliminary matters

[41] The Act requires that I determine several initial matters before considering the merits of the Applicant's application. Following my findings above regarding the dismissal of the Applicant, I am satisfied that none of the usual preliminary issues require attention.[3]

When can the Commission order a remedy for unfair dismissal?

[42] Section 390 of the 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.

[43] Both limbs must be satisfied.

[44] 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.

[45] As has been established, I am satisfied that the Applicant is protected and therefore I must now consider the second limb.

[46] Section 387 of the Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust, or unreasonable, the Commission must take into account several criteria.

[47] Section 387 of the Act reads:

"**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."

[48] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.[4]

Consideration - Merits

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

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

[50] 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.[7]

[51] The Respondent maintains that the Applicant was not dismissed at its initiative.

[52] However, in the alternative (which is now relevant in light of my findings above), the Respondent submits that it held a valid reason for the termination of the Applicant.

[53] The Respondent submits that there are two valid reasons for dismissal in the present matter, being:

- the Applicant's failure to comply with a lawful and reasonable direction; and
- the Applicant's inability to perform the inherent requirements of their role because they were unvaccinated and therefore not able to enter the workplace or customer work sites.

[54] The Applicant's position requires her, as part of the inherent requirements of her role, to conduct regular face to face in person customer visits/meetings with customers in her specific portfolio.

[55] As set out in the Position Description, the Applicant was required to:

"Regularly visit customers within your portfolio in order to conduct required business meetings (ie: quarterly reviews, customer health checks, etc)"

[56] All external sales representatives of the Respondent are required to conduct these face-to-face external sales meetings three days out of the five working days.

[57] The remaining two days are to be spent in the office conducting meetings, training, upskilling, and liaising with colleagues of the Respondent.

[58] The Respondent relies upon the decision *in Jovan Jovcic and Filip Markovic v Coopers Brewery Limited* (*Coopers*),[8] where the Commission agreed that two valid reasons for dismissal, despite the lack of public health orders and the applicants' religious objections, consistent with the reasons asserted by the Respondent in this matter.

[59] The Respondent submits that it had immunocompromised and pregnant employees within its workplace, supporting its conclusion to maintain the vaccination policy.

[60] The Respondent also submits that the State Government, and its customers, had declarations which prevented the Applicant from attending their work sites to complete her role.

[61] Further, the Respondent notes that the majority of the Applicant's clients were within high risk (as it relates to COVID-19) industries.

[62] The Respondent has provided evidence outlining the steps it took in the consultation process prior to and following the implementation of the vaccination policy.

[63] The witness statements provided on behalf of the Respondent detail the sessions held in consultation with employees and the Respondent's process of addressing employee feedback.

[64] The consultation process began prior to the Applicant's employment with the Respondent.

[65] Nevertheless, it is clear that the Applicant was involved in a portion of the workforce consultation process.

[66] Both parties have submitted documents to which they attest are a list of the Applicant's clients.

[67] These lists differ from each other and were a notable point of contention at the Hearing.

[68] Mr O'Halloran conceded that there were likely issues in the way the data that formed the Respondent's list was extracted and, due to the time elapsed since the Applicant's termination, it was likely that the list was not entirely reflective of the Applicant's client list during her employment.

[69] However, Mr O'Halloran noted that the allocation of clients was very transient and that client lists were constantly changing.

[70] Mr O'Halloran also noted that many of the Respondent's clients were still enforcing vaccination requirements for attendance and, due to the constantly changing client allocations, this reinforced the Respondent's position on continuing to enforce its policy.

[71] The Respondent notes that there were some clients in the aged care industry within the Applicant's client list.

[72] The nature of the industries of the clients allocated to the Applicant are, to some extent, disputed. However, it is clear that there are a minority that operate within vulnerable health care sectors.

[73] The Applicant submits that there was no valid reason for dismissal as she was ready and willing to return to work.

[74] Further, the Applicant submits that she was not consulted adequately prior to the implementation of the policy.

[75] The Applicant submits that the Respondent did not undertake any due diligence to confirm its understanding of access restrictions at the time of her termination.

[76] The Applicant also notes that the Respondent opted to terminate her following an extended period of stand down and questions why more time or care was not taken.

[77] The Applicant submits that the State Government mandates had significantly relaxed just prior to her termination. Therefore, the Applicant believes that there were little to no restrictions on her ability to access the majority of her clients' work sites.

Findings

[78] I agree with the Applicant regarding the status of the State Government orders at the time in question. The Respondent's submission, that there were Public Health Orders in place at the relevant time, is misleading.

[79] Prior to the Applicant's dismissal, the State Government had eased its vaccination requirements and advice, so that the majority of workers in the state would not have to provide proof of vaccination. This change did not extend to workers in several high-risk sectors (e.g., healthcare).

[80] Despite the, in part, revocation of the State Government's vaccination requirements, employers are still able to implement and enforce vaccination policies in appropriate circumstances. This has been established by the Commission before.[9]

[81] It is necessary to look at the circumstances of the matter and the application of the policy as it relates to the employment in question.

[82] In this matter, it would appear that enforcing a vaccination policy in the office supplies industry may be difficult to defend.

[83] I note the Respondent's submissions regarding having several vulnerable employees in the workplace. However, noting the minimal evidence supporting the importance of this in the decision to continue enforcement of the policy, and the Applicant's duties within the office forming the minority of her tasks, I am not satisfied on this alone that the implementation of the policy would be reasonable.

[84] The primary issue here is the Applicant's need to access customer worksites to complete the inherent requirements of her position. In this regard, I note the evidence of Mr O'Halloran, and the very apparent issue posed by constantly changing client allocations.

[85] It is clear that the Respondent has a large client base, many of whom enacted their own vaccination proof for entry requirements during this period and extended notices to the Respondent regarding such requirements.

[86] The Applicant was required to access the work sites of a range of clients, frequently changing, who had their own access requirements.

[87] An employee with a non-vaccinated status would understandably frustrate the ability of the Respondent to allocate clients and adequately service its customers. This, understandably, would result in significant attention to maintain and limited ability to allocate clients to said employee.

[88] In addition to the Respondent's repeated review of the policy and the existence of vulnerable employees within the workplace, I am satisfied that the application of the policy, and the direction to follow it, to the Applicant was reasonable in the circumstances where the Respondent's clients maintained their own restrictions.

[89] I am also satisfied that the consultation process prior to the implementation of the policy was adequate, considering the circumstances and relevant instruments related to this matter.

[90] The Applicant was unable to comply with the Respondent's vaccination policy which rendered her unable to perform the inherent requirements of her position. I am, therefore, inclined to conclude that there was a valid reason related to the Applicant's capacity or conduct.

[91] **However**, I am not satisfied that I can come to such conclusion on the evidence before the Commission.

[92] At the Hearing, the Applicant questioned Mr O'Halloran regarding what steps the Respondent made to confirm the entry requirements of her clients prior to her termination.

[93] Mr O'Halloran was unable to confirm any specific steps regarding the Applicant's clients, stating that the Respondent was in continuous contact and seeking updates from its clients pertaining to any access restrictions.

[94] Although I accept this evidence of Mr O'Halloran, and his assertion that many clients did (at some point in time) have access restrictions, it is not clear what information supported the Respondent's decision <u>at the time of termination</u>.

[95] I am not satisfied that such unclear information should have formed the basis for the decision to terminate an individual's employment.

[96] Further, the Applicant attests that the large majority of her clients had removed any vaccination restrictions at the time of her termination and has supplied a document of her own notes in support.

[97] I note that, after the Respondent sent the repudiation letter, a month had elapsed before the Applicant was terminated. During this period, a more substantial amount of time had

passed since the State Government had relaxed vaccination requirements before the Applicant was terminated.

[98] During this time, individual businesses would have increasingly started to relax their own policies.

[99] There is no evidence before the Commission that would satisfy me that the Respondent undertook any checks to ensure the information it relied upon to terminate the Applicant was up to date and reflective of its clients' reactions to the relaxed directions.

[100] Rather, I am satisfied that the Respondent did not have complete information on which to conclude that the Applicant was unable to access the majority of the clients' worksites.

[101] In such circumstances, the application of the policy and the direction for the Applicant to comply with it becomes highly questionable.

[102] Further, such information reflects that the Applicant was not, as confidently as the Respondent asserts, unable to fulfil the inherent requirements of her position.

[103] I am not satisfied that the existence of a couple of clients, out of many on the Applicant's client list, who operated in the aged care industry, that the Applicant *may* have been restricted from accessing, would lead to a finding that the reason was defensible.

[104] On assessment of the material before the Commission, I am not satisfied that the reason for the Applicant's termination, in light of the issues just mentioned, was valid.

[105] Accordingly, I am not satisfied that the reason was well-founded, sound, or defensible. Therefore, there is no valid reason as it related to the Applicant's capacity or conduct.

Was the Applicant notified of the valid reason?

[106] Proper consideration of section 387(b) of the Act 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 section 387(a) of the Act.[10]

[107] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,[11] and in explicit[12] and plain and clear terms.[13]

[108] The Applicant had been on notice regarding her failure to become vaccinated for an extended period of time.

[109] On 18 July 2022, the Respondent issued a letter to the Applicant, this letter contained the following:

> "Accordingly, unless you demonstrate proof of vaccination for COVID-19, or a reasonable attempt on your behalf to receive a COVID-19 vaccination, by 5pm on Monday 25 July 2022, we will consider your actions as amounting to a repudiation of your contract of employment with COS due to an inability to perform the inherent requirements of Your Position.

> In this instance and your failure to rectify this repudiation of the Contract, may result in COS accepting the repudiation of your contract and your employment will be terminated with immediate effect".

[110] Although it is clear that the Applicant was aware of the reason that resulted in her dismissal prior to it taking effect, the notification is not in the plainest terms.

[111] As the Respondent has painted this dismissal as a repudiation by the Applicant, it is reasonable to conclude that such correspondence is not the most unambiguous notification of impending termination.

[112] It appears the letter issued by the Respondent would have made clear to the Applicant that, if she did not become vaccinated, she would be terminated.

[113] The Applicant was notified of the *Respondent's reason,* but the notification was deficient.

[114] However, it should be noted that, as I concluded there was no valid reason related to her capacity or conduct, the Applicant *could not* have been given the opportunity to respond to such reason.

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

[115] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity.

[116] An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.[14]

[117] The opportunity to respond does not require formality and this factor is to be applied in a common-sense way to ensure the employee is treated fairly.[15]

[118] Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements.[16]

[119] The Applicant was aware of the reason relied upon by the Respondent for her dismissal and, prior to the termination process, had engaged in conversations regarding her vaccination status and the implications of it with the Respondent.

[120] Following the Respondent's letter (quoted above), the Applicant was provided with a week to provide either a confirmation of vaccination or a notification of intention to receive vaccination.

[121] The Applicant was then terminated a month after the letter was sent.

[122] It appears that the Applicant had an opportunity to respond to the *Respondent's reason*.

[123] However, I wish to note that the Respondent's decision to only engage by letter, especially noting the issues identified in that letter (above), was poor form in the circumstances.

[124] Further, it should be noted that, as I concluded there was no valid reason related to her capacity or conduct, the Applicant *could not* have been given the opportunity to respond to such reason as required by the Act.

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

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

[126] There is no positive obligation on an employer to offer an employee the opportunity to have a support person:

> "This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them."[17]

[127] The Applicant was stood down from employment with the Respondent on 28 February 2022.

[128] Following the stand down the communication between the parties was conduct either online or by email.

[129] There is no evidence that the Respondent refused the Applicant the ability to have a support person present at any relevant meetings.

[130] However, I note, it appears there were no verbal or face to face meetings in the immediate lead up to the Applicant's dismissal.

[131] In all the circumstances, I find that the Respondent did not unreasonably refuse to allow the Applicant to have a support person present at discussions relating to the dismissal.

Was the Applicant warned about unsatisfactory performance before the dismissal?

[132] As the dismissal did not relate to unsatisfactory performance, this factor is not relevant to the present circumstances.

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

[133] 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?

[134] The Respondent has an internal human resource function as well as external legal support.

[135] I find that the Respondent's enterprise did not lack dedicated human resource management specialists and expertise.

What other matters are relevant?

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

[137] In the circumstances of this matter, the following circumstances have factored into my final consideration:

- The Applicant's age, experience in the industry, and the nature of the industry;
- The way in which the Respondent framed the termination as a repudiation; and
- The apparent lack of due diligence prior to enacting the termination.

[138] The Applicant has noted that the opportunities in the office supplies industry, at her level of expertise, are limited.

[139] The Applicant had significant tenure in the industry, over two decades, most recently having worked at the company acquired by the Respondent, leading to her employment with them.

[140] The Applicant was an older, skilled, and experienced professional in this field and, understandably, due to the size of the industry and her age, would face difficulty finding comparable employment upon termination and greater risk of financial detriment.

[141] As has been touched on throughout this decision, the Respondent has made the questionable choice of framing this termination as a repudiation.

[142] The term *repudiation*, and the full legal definition of that term, would not be known to many Australians.

[143] The Respondent's use of the term in actioning, what is clearly, a dismissal leads me to believe that the process followed was not consistent with best practices.

[144] Further, the letter sent to the Applicant, explaining it was entirely her fault and the Respondent was simply helpless without her immediate action, was likely confusing and only added to the difficulty of the circumstances the Applicant found herself in.

[145] The Respondent's choice to frame the termination as a repudiation has led to circumstances in which the Applicant was not as informed or involved in her termination process as one would usually expect.

[146] I am not satisfied that the Respondent took all reasonable steps to ensure that the termination of the Applicant, in the circumstances, was the most appropriate course of action.

[147] It is clear that the Respondent is unable to properly defend the basis of its decision, noting that, in the Commission's view, the strongest factor in favor of such decision was the Applicant's inability to access client work sites.

[148] In the circumstances, considering the Applicant's age, nature of the industry, issued in the procedure followed, and the lack of due diligence from the respondent, I am not satisfied that the Applicant's termination was fair.

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

[149] I have made findings in relation to each matter specified in section 387 of the Act as relevant.

[150] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust, or unreasonable.[18]

[151] I have found that the reason for dismissal relied upon by the Respondent, although logical on the face of it, was not valid as it is not well-founded, sound, or defensible.

[152] The Respondent, in the circumstances, should have taken greater care in ensuring the conclusion it came to was correct and action taken as a result necessary.

[153] I am not satisfied, on the evidence before me, that the Respondent took any care in ensuring that the reason for the Applicant's termination was valid.

[154] At such a time when the country was adjusting to increasingly relaxed restrictions, and following an extended period of stand down, it is questionable why the Respondent did not take greater care or time and seemingly rushed a decision to terminate an individual's employment.

[155] In framing the termination as a repudiation, the Respondent has clouded the process in a layer of confusion for the average person. This choice, in turn, led to issues in the way the Applicant was notified of her termination and could have hindered her ability to participate in the process.

[156] Had the Respondent terminated the Applicant at an earlier date, and she was in fact unable to access the majority of client work sites, the conclusion would likely be different.

[157] At the point in time the Applicant was terminated, and in the circumstances of this matter, the dismissal was not fair.

Conclusion

[158] Due to the reasons outlined above, I am satisfied that the dismissal of the Applicant was harsh and unreasonable.

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

[160] Directions for a hearing on remedy will be issued in due course.

COMMISSIONER

Printed by authority of the Commonwealth Government Printer

< PR767493>

---

[1] [2017] FWCFB 3941.

[2] (1994) 125 ALR 355, 371.

[3] The application was made within the relevant time period (s.394(2)). As I have found above, the Applicant was dismissed at the initiative of the employer (s.386). The Applicant is a person protected from unfair dismissal as; the Applicant did not earn over the high-income threshold, the Applicant's employment was subject to a Modern Award, and it is not disputed that the Applicant has served the minimum employment period (s.382). The Applicant's dismissal was not a case of genuine redundancy (s.389). The *Small Business Fair Dismissal Code* is not applicable (ss.385; 388(1)), as the Respondent has confirmed it had more than 12 employees at the time of the dismissal. Additionally, the Hearing was held in compliance with section 397. The Respondent requested permission to be represented at the Hearing, to which the Applicant objected, and was granted permission with reasons provided at that time.

[4] [2011] FWAFB 7498, [14]; PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

[5] (1995) 62 IR 371, 373.

[6] Ibid.

[7] (1996) 142 ALR 681, 685.

[8] [2022] FWC 1931.

[9] [2023] FWC 1083, [78].

[10] [2020] FWCFB 6429, [19]; [2020] FWCFB 533, [55].

[11] (2000) 98 IR 137, 151.

[12] Print Q3730 (AIRC, Holmes C, 6 October 1998).

[13] Ibid.

[14] Print S5897 (AIRCFB, Ross VP, Acton SDP, Cribb C, 11 May 2000), [75].

[15] (2010) 194 IR 1, 14-15.

[16] (1995) 60 IR 1, 7.

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

[18] (2002) 117 IR 357, [51]. See also PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; [1999] FCA 1836, [6]–[7].