[2023] FWC 3279

The attached document replaces the document previously issued with the above code on 7 December 2023.

Paragraph 11 has been updated

Associate to Deputy President Colman

Dated 3 April 2024

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Julian Treleani
v
Richtek Melbourne Pty Ltd
(U2023/9101)

DEPUTY PRESIDENT COLMAN MELBOURNE, 7 DECEMBER 2023

Application for an unfair dismissal remedy – whether applicant first promoted then demoted and dismissed – whether breach of contract – findings – application dismissed

[1] This decision concerns an application for an unfair dismissal remedy made by Julian Treleani under s 394 of the *Fair Work Act 2009* (Act). Mr Treleani commenced employment with Richtek Melbourne Pty Ltd (Richtek) as a roofer pursuant to a contract of employment dated 25 November 2022. In mid-December 2022, Mr Treleani was asked to *'come off the tools'* and perform sales work providing quotes to clients. He agreed, believing that he had been promoted to a new position. In August 2023, Richtek required Mr Treleani to return to roofing duties. He refused to do so. Mr Treleani considered that Richtek had repudiated his contract and that it had dismissed him within the meaning of s 386 of the Act. He says that the dismissal was unfair and seeks compensation.

[2] Richtek objects to the application on the ground that Mr Treleani was not dismissed. It denies that he was promoted in December 2022 and says that all roofers can be required to undertake sales and other work as part of their normal duties. Richtek contends that by August 2023, the sales work had become scarce and Mr Treleani was redeployed to roofing work. It says that this was not a demotion, but a direction to perform normal work under his original contract of employment.

[3] Section 396 requires that I decide four matters before considering the merits of the application. As to these, I am satisfied of the following: the application was made within the required 21-day period; Mr Treleani was a person protected from unfair dismissal; the dismissal was not a case of genuine redundancy; and any dismissal was not in accordance with the Small Business Fair Dismissal Code.

[4] Richtek provides roofing services to clients. At the start of his employment, Mr Treleani performed roof installation work. This was manual labour. Mr Treleani used his own tools as well as tools and equipment provided by the company. He drove a company van. He was paid an hourly base rate of $55.00. Mr Treleani gave evidence that in mid-December 2022, Jay Williams, Richtek's general manager, asked him whether he would be interested in getting *'off the tools'* and starting a *'new role'* as a quoting estimator. Mr Williams said that Mr Treleani

would receive 3% commission on all sales that he made, and that he would have key performance indicators (KPIs) of around $42,000 in sales per week and $170,000 per month. Mr Treleani's evidence was that he believed that he had been promoted from the role of roofer, performing hands-on installation work, to a commercial role involving quotes and sales. From that time on, Mr Treleani worked exclusively on quoting. He received training on quoting work. He continued to be paid $55.00 an hour, but now also received commission on sales, which resulted in an additional $600 to $1,200 in remuneration each week. Mr Treleani believed his contract had been varied and so he sold the tools that he had been using to undertake roofing work. He was identified on certain company documents, including in a national sales register, as a *'roofing quoter'*. Mr Treleani said that his understanding was that the positions of roofer and quoter (or estimator) were quite separate. The former was a labour-based trades role requiring a worker to have a complete set of roofing tools and to work on jobs completing roofing work such as installing sheets, gutters and downpipes. The quoter role was sales-based dealing directly with clients.

[5] Mr Treleani's evidence was that on 24 May 2023, Mr Williams asked him whether he would accept a lower base salary with a higher commission to perform the roofing quoter role. He declined this, preferring the safety of a higher base rate. Mr Treleani said that from around this time, the customer leads that Richtek would provide him drastically reduced. Whereas previously there had been 10 to 12 leads per day, now there were only around four a day. On 28 July 2023, Mr Treleani complained to Mr Williams about the lack of leads. Mr Williams said that Mr Treleani had been going home too early, and Mr Treleani replied that this was because there were no leads to go to.

[6] Mr Treleani said that on 19 August 2023, the company's state manager, Jarrod Byrne, told him that he was now being *'demoted'* back to the position of roofing installer, because for the previous two weeks he had not met his KPIs. Mr Treleani said that on 21 August 2023 he told Mr Byrne that he did not agree with the demotion and wanted to continue to perform the quoter role that he had agreed to the previous December. Mr Byrne said that the decision had been made, and that he was required to return the van that he had been using to perform the estimator role. Mr Treleani said in his evidence that he thought it was unfair that he was being sent back to do roofing work just because he had not met his KPI's for two weeks, when this was not his fault because the company had not provided him with sufficient leads.

[7] On 22 August 2023, Mr Treleani took paid personal leave. On 23 August 2023, he sent an email message to the company's chief executive officer, Phillip Richardson, stating that he considered his contract of employment to have been varied, that he had accepted the new position of estimator, and that the company's demotion of him to his previous role was a breach of his contract. He stated that he had sought legal advice, and that if the breach was not remedied by 24 August 2023, he reserved his right to accept the breach as bringing his employment to an end and to file an unfair dismissal claim. Mr Treleani said that Mr Williams later sent him an email stating that he would be happy to discuss the matter with him, however the company did not take any action to revoke his demotion.

[8] On 6 September 2023, Mr Treleani's lawyers sent a letter to Richtek stating that the company had been given an opportunity to remedy the breach of his contract, namely the term pursuant to which he was promoted to the role of estimator, as well as terms requiring him to be paid commission (he had not been paid commission for a certain period in August). The

letter stated that Mr Treleani considered that he had been dismissed and that he would be lodging an unfair dismissal application.

[9] Mr Richardson gave evidence that Mr Treleani had been employed as a roofer but that his contract of employment stated that his duties could be varied within his skills and knowledge. He said that all roofers receive sales-related training and that all workers are expected to provide quotes to customers. Some employees were employed as quoters. The company had different contracts for roofers and quoters, but that did not mean that roofers did not do quotes. Rather, the roofer contract contained some flexibility as to the work that employees could be required to perform. The roofer contract had a higher base rate than the quoter contract, but quoters had guaranteed commissions, whereas contracts for roofers stated that the company *could* provide commission payments to the employees, and that these would be agreed between the parties. Clause 5.3 of Mr Treleani's contract was such a term.

[10] Mr Richardson said that in May 2023, Mr Williams asked Mr Treleani whether he would like to go onto a quoter contract, which would mean that he would receive a lower base rate, but higher percentages for commission payments. Mr Treleani had declined this offer. Mr Richardson said that Mr Treleani had been doing quoting work, but had still been receiving the higher roofer base rate of $55.00 per hour (quoters receive an annual salary of $65,000, which on an hourly basis is much lower than the roofer wage of $55 per hour). He had also been receiving penalty rates, as well as commissions. He was in effect getting the best of both worlds. By August 2023 however, the quoting work had dried up. The company decided to deploy Mr Treleani back onto roofing work. Mr Richardson said that he thought the company was doing the right thing by Mr Treleani by keeping him employed and busy, and that the alternative would have been to make Mr Treleani redundant.

[11] Mr Richardson said that the company did not dismiss Mr Treleani. When the quoting work dried up, it expected him to do roofing work in accordance with his contract of employment. He doubted that Mr Byrne would have described the situation as a *'demotion'*, and said that he was not sure that Mr Byrne would have even known what a demotion was. Nevertheless, he accepted that he was not present during this discussion and did not know what words Mr Byrne might have chosen to use. Mr Richardson said that Mr Treleani was wrong to suggest in his evidence that there were different types of vans for roofers and quoters; the different van Mr Treleani drove from mid-December was simply a new vehicle and had not been kitted out like the previous van Mr Treleani had been driving. Mr Richardson said that contrary to Mr Treleani's evidence, the company had not replaced him with a newly hired quoter. The company had hired two new employees but they were roofers, not quoters.

Summary of submissions

[12] Mr Treleani contended that he was promoted to the new position of quoting estimator pursuant to an oral variation to his contract of employment that was agreed in mid-December 2022 during his conversation with Mr Williams, and that in August 2023, through Mr Byrne, the company purported to demote him back to his previous role of roofer, with a significant reduction in remuneration resulting from the loss of commissions. Mr Treleani said that the company had repudiated his contract by refusing to continue to employ him in the position of quoting estimator, and also by breaching terms entitling him to commissions. He submitted that he had been dismissed on the employer's initiative within the meaning of s 386(1)(a), or

alternatively had resigned from his employment but had been forced to do so by the repudiatory conduct of the company in purporting to demote him back to his old position.

[13] As to the merit of his unfair dismissal application, Mr Treleani said that there was no valid or other reason for his dismissal, and that he was not given notice of, or an opportunity to respond to, any reason for dismissal. To the extent that performance was a reason for his dismissal, he was not warned about it. He contended that in all the circumstances, once it was accepted that he had been dismissed, the Commission could only conclude that the dismissal had been harsh, unjust or unreasonable and therefore unfair.

[14] Richtek contended that Mr Treleani was never promoted, and that like all roofers employed by the company, he was expected to provide quotes and estimates for clients. In December 2022, Mr Treleani was asked to focus on this work. He and Mr Williams agreed on the commissions that would apply, as contemplated by clause 5.3 of his contract. His duties were simply altered, within the scope of the contract and based on the business needs at the time, from doing work as a roof installer to performing roofing quotes. Mr Treleani was later deployed back to the roof installation work when the quoting work dried up. The company contended that it had not dismissed Mr Treleani, nor had it forced him to resign. It had directed Mr Treleani to resume his roofing work. He refused and then took personal leave. He had not returned to work. He decided that he did not want to perform roofing work, which remained a fundament element of his job, and treated himself as has having been dismissed when this was not the case.

Consideration

[15] I make the following factual findings.

[16] First, I generally accept Mr Treleani's evidence about his conversation with Mr Williams in mid-December 2022. I accept that Mr Williams told Mr Treleani that he would be *'getting off the tools'*, that his new role would be that of quoting estimator, that he would be required to meet KPIs, and that he would receive a commission of 3% on sales. Mr Treleani said in his statement that Mr Williams asked him whether he wanted to come off the tools *permanently*, however I do not accept this. This was a conclusory statement. Mr Treleani did not quote this word in his witness statement, the way he quoted many other words. Further, during his oral evidence Mr Treleani said that he *'thought'* the change was permanent. Mr Treleani's evidence on this particular point is not persuasive. I have more confidence in Mr Treleani's oral evidence, and the direct quotations in his statement, than in the narrative in the witness statement which in this instance, and in several other places, contained conclusions.

[17] Secondly, I accept Mr Richardson's evidence that the company has separate contracts for roofers and quoters, and that roofers have a higher hourly rate, but quoters receive higher commissions. I also accept his evidence that the company expects roofers to undertake quoting work as part of their further duties under their contracts. Mr Treleani said that this was not his understanding, but Mr Richardson is the CEO and was a credible witness who has in my view a sound knowledge of the business and its contracts.

[18] Thirdly, as to the discussion between Mr Treleani and Mr Willians on 24 May 2023, I accept Mr Treleani's evidence about what Mr Williams said to him, but reject his understanding

of the significance of it. Mr Williams asked Mr Treleani whether he would accept a lower base salary and a higher commission; but Mr Williams was not *only* asking Mr Treleani to take a cut in base pay in return for higher commissions. He was asking whether Mr Treleani wanted to accept a quoter contract. As Mr Richardson said, quoters had lower base salaries, but higher commissions. This is a very common arrangement for sales-related work. If Mr Treleani had accepted Mr Williams' proposal, it would have changed his remuneration arrangements but also the basis of his employment. Mr Treleani declined the proposal. Understandably, he preferred to continue to receive $55.00 an hour, which was the roofer base rate, plus commissions on sales at 3% as agreed with Mr Williams in December.

[19] Fourthly, I accept the evidence of Mr Richardson that by August 2023 the quoter work was drying up. This is consistent with Mr Treleani's own evidence, which was that he was now receiving only around four leads a day, down from 10 to 12.

[20] Fifthly, I accept Mr Treleani's evidence that Mr Byrne told him on 19 August 2023 that he was being *'demoted'* back to the roofing work. I find it odd that Mr Byrne would use this word, because there is nothing in the nature of a roofer role that makes it a position of lower seniority than a sales role; the commissions might be higher but the base pay is lower. Mr Treleani seems somewhat enamoured of the sale role but I disagree with his lawyer's suggestion that the role of roofer was *'less prestigious'*. It was work of substance and importance undertaken by qualified tradesmen. In any event, the fact that Mr Byrne used the word *'demoted'* does not mean that he was correct to do so. Mr Treleani said that Mr Byrne told him that he was being sent back *'on the tools'* because he failed to make his KPIs for two weeks; but I find that the real reason was the reduction in quoting work that the company had experienced. This is consistent with the totality of the evidence, including that of Mr Treleani.

[21] Sixthly, I accept Mr Richardson's evidence that he believed the company was doing the right thing by redeploying Mr Treleani to roofing work. I accept that the company tries to keep its workforce employed rather than making employees redundant. This is why its contracts allow it to deploy employees on other work.

[22] I accept Mr Richardson's evidence that the alternative to Mr Treleani reverting to roofing work was redundancy. I also accept his evidence that the two new persons employed by the company were roofers, not quoters, and that the reason the company asked Mr Treleani to return the van was because the company wanted to use the van while he was on leave. Further, I find that Mr Treleani was not, as he suggested, *'blocked out'* of work systems; rather, as Mr Richardson explained, the company pays for these work systems based on a monthly licence fee, and if a worker is not using them, there is no point in the company paying the fee for that worker. Mr Treleani's access to these platforms was suspended when he went on leave.

[23] In my opinion Mr Treleani's discussion with Mr Williams in mid-December 2022 did not vary his contract of employment dated 25 November 2022. Clause 11.5 of Mr Treleani's contract states that the terms may only be varied by a written agreement signed by the parties. It also states that if the agreement is varied, all other terms continue to apply unless expressly replaced in writing. There was no written variation to the contract. Mr Treleani contended that the discussion with Mr Williams was an oral variation to the contract which superseded clause 11.5. I reject this. The evidence does not show that Mr Williams and Mr Treleani agreed to

dispense with the requirement that any variation be in writing, or that they agreed wholly to replace the earlier contract.

[24] Although I accept that Mr Williams told Mr Treleani that he would be going *off the tools* to do a quoting role, this was within the scope of the contract, clause 1.1(b) of which stated that the company could vary his duties provided they were consistent with his skills, knowledge and the scope of the position. Mr Treleani received certain training on quoting, however this was not in the nature of retraining. Quoting on work that he was technically familiar with was plainly a task within his skills and knowledge, and also the scope of the position. He was a qualified plumber employed as a roofer. From December 2022 he would focus on quoting clients for such work. Further, clause 3.1(b) of the contract stated that Mr Treleani could be required to perform other duties from time to time as required by the company. There is no Annexure A as contemplated by clause 3.1(a), but that does not affect clause 3.1(b). The scope of the other duties that might be contemplated by clause 3.1(b) would need to be read down by reference to what is reasonable; it could not sensibly accommodate any new tasks. But to have a roofer quote clients for roofing work is perfectly reasonable.

[25] Mr Treleani was told that he would have a new role but that did not mean he would have a new contract. His current contract of employment provided for him to be a roofer but allowed for other roles. Mr Williams and Mr Treleani agreed that he would be paid 3% commission on sales. But this was not a variation. It was a matter contemplated by clause 5.3 of the contract, which states that the employee may receive commissions from time to time, which are to be agreed between the parties. The structure of the roofer contract accords with Mr Richardson's evidence, which I accept, that the company wants its contracts to be flexible so that it can *'juggle'* its workforce and try to avoid making people redundant.

[26] Even if the discussion between Mr Treleani and Mr Williams in December 2022 brought about a variation to the contract, this was confined to the role and the company's performance expectations. The commission rate was agreed as contemplated by clause 5.3. The other terms of the contract continued to apply by virtue of clause 11.5. These other terms included the base rate provision ($55.00 an hour), but also clauses 1.1(b) and 3.1(b) – the company could vary his duties consistent with his skills, knowledge and the scope of the position, and he could be required to perform other duties from time to time. This covered roofing work.

[27] Mr Treleani said that text messages passing between him and Mr Richardson in August made no reference to his quoting work drying up, and that rather it was his performance or attitude that was called into question. But the fact that Mr Richardson had concerns about Mr Treleani's attitude and performance does not mean that the quoting work was not drying up. That the work was indeed drying is not in dispute. It was acknowledged by Mr Treleani in his evidence.

[28] The fact that certain documents referred to Mr Treleani as a roofing quoter does not alter the contractual analysis above. Mr Richardson said that he did not know who had described Mr Treleani as a quoter in the sales register. He did say however that trades workers, including roofers, can and do undertake quotation work.

[29] In my view, it is consistent with the above conclusions that Mr Williams sought in May 2023 to move Mr Treleani onto a quoter contract. Mr Treleani was receiving the higher base

rate of his roofer contract, as well as commissions on all of the quotes he was doing. True quoters were paid less than him. It also makes sense that Mr Treleani would decline the offer. He remained on these conditions, governed by his original contract and the agreed 3% commission payments, until the quoting work dropped off. When it did, the company required him to revert to his usual role performing roofing work.

[30] I do not accept that Mr Treleani was moved back to roofing work because he missed his KPIs in two weeks. To the extent that Mr Byrne suggested this was the case to Mr Treleani, I prefer and accept the evidence of Mr Richardson which was that the quoting work had declined and that the alternative to Mr Treleani going back on the tools was redundancy. Mr Richardson is the CEO. Although he is based in Perth and not Melbourne, the company is not a large one, and it is clear from Mr Richardson's evidence that he has a very good knowledge of the business that he runs.

[31] Mr Treleani evidently believed that his future lay in sales. He personally paid for an expensive sales course. He sold his tools. He was excited by the quoter work. However, the contractual position was that his original contract of employment continued to remain in place. He was performing the role of a quoter, with an agreed 3% commission, but governed by his roofer contract. That is why he continued to receive the higher rate of pay of $55.00 an hour. There had been no negotiation in December 2022 of a special quoter base rate for Mr Treleani. And even if there was a variation to his contract, the company retained the ability to deploy him on roofing work under clauses 1.1 and 3.1 of the original contract which continued to apply.

[32] If I had concluded that Mr Treleani's contract of employment was varied in mid-December, that this varied contract was repudiated in August 2023 by the company's direction that he return to roofing, and that the repudiation was a dismissal, I would nevertheless have concluded that his dismissal was not unfair. Given that the quoting work had dried up, a return to roofing represented reasonable redeployment in the circumstances. Mr Treleani was plainly qualified to do this work. He would receive the same base rate of pay. He would not likely receive commissions, but this was because the quoting work had become scarce.

[33] Even if a dismissal were to be regarded as unfair, I would have concluded that Mr Treleani should not be paid compensation. Section 392 requires the Commission to consider certain matters in assessing compensation, one of which is the remuneration that the applicant would likely have received had they not been dismissed (s 392(2)(c)). This requires the Commission to consider how long the person might have continued in their employment if the dismissal had not occurred. In this case, if the alleged repudiation and dismissal had not occurred, it is clear from Mr Richardson's evidence that Mr Treleani's notional position of quoter would have been redundant, and I consider that he would have been dismissed for this reason. Clause 9.1 of his contract would have entitled him to two weeks' notice of termination of employment. The Award would have required consultation about a major change such as dismissal for reason of redundancy, but in my view consultation could have been completed within a two week period. This would have been the outer limit of compensable loss.

[34] I would not have awarded two weeks' pay in compensation, because I am not satisfied that Mr Treleani took reasonable steps to mitigate his loss. I accept his evidence that he was depressed after losing his job, but without there being any medical evidence I do not accept that he was unable to apply for jobs. Later, when Mr Treleani did start applying for jobs, he did not

look for work as a roofer, because he no longer wanted to do this work. I consider this would have been his approach had he started to look for work straight after his dismissal. Not to look for such work limited Mr Treleani's chances of finding gainful employment. In the circumstances, I would not have considered it appropriate to award compensation.

[35] In conclusion, I find that Mr Treleani was not dismissed on the initiative of the employer, nor was he forced to resign. The company did not repudiate his contract by requiring him to return to roofing work. His original contract remained in effect. Mr Treleani ended the employment relationship, not the company. The unfair dismissal application is therefore dismissed.

DEPUTY PRESIDENT

Appearances:

M. Kriewaldt for the applicant
P. Richardson for the respondent

Hearing details:

2023
Melbourne with video link to Perth
30 November

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