DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Mr Craig Murimwa
v
David Jones Pty Ltd
(U2022/11248)

DEPUTY PRESIDENT CROSS SYDNEY, 5 MAY 2023

Application for an unfair dismissal remedy

[1] This decision arises from an application made by Mr Craig Murimwa (the Applicant) pursuant to s.394 of the Fair Work Act 2009 (Cth) (the Act) for relief in respect of the termination of his employment by David Jones Pty Ltd (the Respondent). The Applicant stated that he was advised of his dismissal, and the dismissal occurred, on 3 November 2022.

[2] The Applicant asserted that his dismissal was unfair and that the Respondent had no valid reason to terminate his employment. The Respondent, in their Form F3 Response, identified the following ground of jurisdictional objection to the Applicant's claim:

> *The Applicant would not be eligible for unfair dismissal remedies due to the irregular and sporadic nature of the casual employment over, but not limited to the past two years of employment, as shown in Annexure 1.*

[3] In the hearing of the matter the Applicant represented himself. The Respondent was represented by Mr A Thomas of Seyfarth Shaw, who appeared with permission, and without objection by the Applicant. In the Hearing the Applicant provided no witness statements and was cross-examined. The Respondent relied upon a statement from Ms Amanda Emsies, the Customer Orders Manager of the Respondent, now in the role of Online Manager at the Silverwater Distribution Centre for the Respondent. Ms Amanda Emsies was cross-examined.

Background Facts

[4] The Applicant commenced employment with the Respondent as a casual employee in November 2013. The Applicant's position was performing the role of warehouse work at the David Jones Fulfilment Centre in Silverwater (the Distribution Centre). He reported to Ms Emsies. The work involved the Applicant picking and packing for delivery of online orders made on the Respondent's website.

[5] Ms Emsies was in charge of overseeing and managing all day-to-day processes for the Respondents Online team at the Distribution Centre. Her position oversaw operational and

staffing matters. In Ms Emsies' statement, she noted that there are approximately 160 employees at the Distribution Centre, with close to 50% responsible for picking and packing. The Respondent estimates that the Distribution Centre executes 3,000-5,000 customer orders daily, with October, November, and December being the busiest months.

[6] All employees are given access to an app called 'Reflexis'. This app is used for the employees to enter their availability for upcoming shifts. In Ms Emsies' witness statement, she noted that at the commencement of employment for casuals, they are directed to update their Reflexis availabilities two-weeks in advance. Within the app, the option to select 'unavailable' requires casual employees to communicate the reason for their unavailability. The Respondent noted that the minimum requirement is for casual employees to be available for two days per week, though earlier in the relevant period that minimum requirement was three days per week.

[7] Whilst the Respondent holds the minimum requirement as a standard, there is fluctuation in the allocation of shifts. The allocation of shifts to casual employees is variable based upon the needs and demands of the Respondent at the time. The Respondent requires reasons for unavailability if a casual has been rostered but fails to attend the shift. The Respondent noted that its general approach towards uncontactable or unresponsive casual employees is to adopt the 'abandonment pathway'.

Failure to Attend Work

[8] In the first half of 2021, the Applicant was rostered to work 44 shifts but was absent for 19 of those shifts. In the second half of 2021, the Applicant was rostered to work 36 shifts but failed to attend 31 of those shifts.

[9] In 2022, the Applicant was rostered to work 38 shifts but failed to attend 30 of those shifts. The Respondent drew attention to the busiest months of October, November, and December 2021, where the Applicant was rostered to work 30 shifts and only attended 3 shifts. The Respondent attempted to contact the Applicant by way of telephone. The evidence of Ms Emsies was:

> *Given Craig's particularly low attendance record in October, November and December 2021 (showing up to only three out of 31 rostered shifts), I attempted to contact him by telephone on 4, 6, 11, 12, 13, 17, 18, 20 and 30 December 2021. I wanted to ascertain whether he wanted to be offered future shifts. He did not answer any of those calls, nor did he call me back.*

[10] The Applicant attempted to account for his failure to notify the Respondent by submitting:

> *The Applicant admits to failing to notify of his non-attendance at shifts on a small number of occasions. Where this occurred, it was because the Applicant had made an attempt to contact the business but could not get through on the phone.*

[11] Following the Applicants exceptionally low attendance record to shifts allocated in October, November and December 2021, Ms Emsies issued the following email on 11 January 2022:

Good afternoon Craig, I hope you are well.

I have attempted contacting you on numerous occasions and I have left voice messages for you to call me back or the phone doesn't ring at all.

I was told that you perhaps would call me, however I have not heard from you, hence why I am sending you an email hoping that this reaches you.

I have reviewed your availability that you have put into Reflexis, and you would have noticed that I have not approved these, as you have provided less than the minimum requirement of days to work.

We require 3 work days minimum in availability, this must not include a Sunday which we only work during Christmas.

Please update your availability for the current weeks that you have put into Reflexis for me to review, preferably before this Friday.

I await updates, thank you.

[12] There was no response from the Applicant. The Respondent then issued another email on 14 January 2022:

Can you confirm if you received the below email?

Please advise the availability for the next few weeks as the current availability in Reflexis does not meet our minimum requirements.

Should I not hear from you via phone or email I will escalate to HR, thank you

[13] The Applicant responded to the Respondents email on 17 January 2022:

Thanks for reaching out to me and hope you had a wonderful Christmas.

I could not update my availability on Reflexis as I could not access my account. My availability is as follows : Thursday to Saturday 05:00-10:00. My availability is limited as I have other commitments at the moment. In the past I have put my availability for more days but was only getting 1 day a week.

I am on holidays from the rest of January and will be ready to return start of February.

Thanks

[14] The Applicant submitted that around this time he had only inputted a '*short window of availability*' due to medical issues. He submitted:

The Applicant had intended the short window of availability to only be temporary. This was because the Applicant had recently suffered from an episode of pericarditis, which

is a heart condition. The Applicant wanted to work fewer hours on any given day so as not to exacerbate his condition.

[15] The Applicant relied on correspondence from Ropes Crossing Medical Practice to Professor Jane Bleasal dated 5 January 2023. That correspondence noted a diagnosis of recurrent pericarditis, with "Past History" events having occurred in March 2021, 14 May 2021, and 4 November 2022, being the date after dismissal.

[16] Also in evidence was a ledger of telephone calls to and from the Applicant regarding absences from work.[1] That ledger was voluminous but only listed one entry, on 1 April 2021, regarding his heart condition.

[17] The Respondent issued a follow up email on the same day being 17 January 2022 at 12:04pm:

Thank you for responding.

I have a few questions below that I need you to respond and email back:

With the availability you have provided we do not work 5-10am on Saturdays, are you able to better advise what hours you can do on Saturdays?

Also we tried contacting you on many occasions during December as you were rostered and you did not attend your shifts.

Can you explain why you were absent on the dates below?
11/12/2021
12/12/2021
13/12/2021
17/12/2021
18/12/2021
20/12/2021
24/12/2021

With this high absenteeism, and your limited availability, are you sure you can commit to attend shifts in future?

Moving forward Craig we will roster you according to your availability and the needs of the business. This may mean that you may only get 1 shift in a week.
Should you not be able to attend your shift you need to call the sick call line (02 9704 2758) prior to the shift commencing and advise reason for absence.
If you do not follow this process then we will have to take the next steps.

Enjoy your holiday and I eagerly await your responses, thank you.

[18] The Applicant did attend the first four shifts he was allocated in 2022, being 10, 11, 17 and 18 February. However, the Applicant failed to attend any of the following 21 rostered shifts. In an email to the Applicant on the 21 March 2022, the Respondent put the following:

How are you? We hope that you are well.
I just wanted to touch base with you in regards to your attendance.
I understand that you have been unwell of late and wanted to check in to see how you are doing.
Also I wanted to confirm that you will be attending your shifts this Thursday and Friday. Can you please advise.

Thank you and I hope to hear from you soon

[19] On 24 March 2022, the Applicant emailed the Respondent as follows:

I hope you are well! I am feeling much better thank you. Sorry, I was not be able to attend today. My car needs urgent fixing and managed to get an appointment tomorrow morning. Therefore, i will taking Friday 25 off.

[20] The Applicant was rostered for further shifts that same week and once again failed to attend with no reasonable excuse or notice. The Respondent issued a further email on 29 March 2022 stating:

I hope that you are well and that you have your car repaired.

Again I wanted to touch base in regards to your attendance, will you be onsite this week for your shifts on Thursday and Friday? Please advise

Has anything changed with your availability? If so can you please update Reflexis.

Thank you and hope to hear from you soon.

[21] The Applicant next attended work on 12 May 2022, and Ms Emsies stated that as the Applicant was actually present at work, two conversations occurred with him in person concerning his low attendance record. It was in these conversations that the Applicant conceded to the Respondent that he was working else-where in a full-time position. In her statement, Ms Emsies stated:

When Craig attended the DC to work on 12 May 2022, I had a discussion with him about his attendance record. During that conversation, he told me that he had a full-time job and, accordingly, was only available to work one day per week (being Saturday). I advised Craig that casual engagement depended on being available three days per week (which was the requirement at the time). The following exchange then took place:

> *Craig: If I make myself available three days per week, can you guarantee that I will work those shifts?*
>
> *Me: I cannot guarantee any shifts. I will roster according to the needs of the business.*

[22] The Applicant further conceded that he would update his availability on Reflexis as was the agreement following the above meetings. Ms Emsies reiterated that the Respondent needed him to be transparent about his availability, and requested he sign a copy of his absenteeism record, which at that time showed the Applicant had been rostered to work 27 shifts in 2022 but had only attended five of those shifts.

[23] On 26 May 2022, the Respondent issued a further email inquiring into why the Applicant had failed to update his availability on Reflexis despite agreeing to do so:

> *Hope you are well.*
>
> *It has been 2 weeks since you were last at work and when we had our discussion.*
>
> *When we talked to you we asked that you would update Reflexis with your availability to which you had agreed.*
>
> *In the last 2 weeks we have not seen any changes in your availability within Reflexis. Can you please put in your availability request for the next 4 weeks for us to review and schedule accordingly.*
>
> *Thank you*

[24] Further conversations were had with the Applicant asking for him to update his Reflexis availabilities. On 8 June 2022, the Respondent sent another email to the Applicant. In the email, the Respondent noted that the availability for the Applicant was automatically set to the same availabilities for the same month a year prior. The Respondent noted this inaccuracy and issued the following email:

> *Hi Craig,*
>
> *Can you please provide the latest availability within Reflexis*
> *We had a discussion on Thursday 2nd June and I requested for you to put in new availability to which you agreed.*
>
> *Please enter this as a matter of urgency as based on the current availability which was last entered into Reflexis and was approved was from June 6th 2021, which advises that your availability is as below.*
>
> | | |
> |---|---|
> | *Sunday* | *Fully Available* |
> | *Monday* | *Fully Available* |
> | *Friday* | *Fully Available* |
> | *Saturday* | *Fully Available* |
>
> *I have been rostering you based on your email sent to me in 17th January 2022 which advises you were available to work the below*
>
> | | |
> |---|---|
> | *Thursday* | *5am – 10am* |

Friday 5am – 10am
Saturday 5am – 10am

If this is your current availability please enter this into Reflexis so that I can approve. Moving forward we will be rostering you to the previous availability in Reflexis from 1 year ago and no longer to the email communication. We need for the current availability to be within Reflexis.

If you fail to present to your shift you need to call the sick call line and provide reason as to absence.

Thank you

[25] The ongoing attempts to contact the Applicant in order to ascertain his availabilities continued, and on 15 July 2022, the Respondent sent the following:

I hope you are doing well.

Are you able to provide an update with your availability.

In the last 2 availabilities that you provided you didn't meet the minimum requirement of 2 days.

Please provide a minimum of 2 days availability within Reflexis for the coming weeks ahead.

Thank you

[26] The Applicant did not respond to the above email. A further email was sent on 1 August 2022, as follows:

I hope you are well.

I wanted to touch base regarding my below email as I haven't heard back from you, nor has there been an update in your availability.

Can you please provide an updated availability with a minimum of 2 days.

Thank you

[27] The Applicant actually attended work on 24 September 2022, and another discussion in person was had regarding the requirement to have at least two days of availability entered into Reflexis. Ms Emsie stated the following:

Craig attended work for a rostered shift on Saturday, 24 September 2022. I had a discussion with Craig about the requirement to enter updated availability into Reflexis, which was two days per week. I told Craig that this was serious, and that failure to update his availability could result in termination of his employment.

Craig left work early on that day, after completing only 3.5 hours of his shift.

[28] The Respondent issued a further email, warning the Applicant of potential termination:

Thank you for your time today.

As discussed, your current availability is Saturdays only from the permanent availability entered on 14/06/2022, and since the start of June you have only completed 2 shifts where you left early for one of them.

You have not attended 4 rostered shifts since the start of June.

Due to operational requirements, we require employees to be available for a minimum of two days per week.

Can you please provide me with updated availability by no later than 2nd October 2022, indicating your available days of work, so that we can roster you on for work going forward?

Please note, currently the site is not operational on Sundays.

I note that should you fail to provide suitable availability to the business within the timeframe stipulated, it may result in reconsideration as to the provision of shifts going forward, and potentially result in the termination of your employment.

Please do not hesitate to reach out to me if you have any questions.

Kind regards

[29] The Applicant did not respond to the above email, and failed to attend another shift on 1 October 2022, to which the Applicant provided no reason for his non-attendance.

[30] The Respondent dispatched the Termination of Employment email on 3 November 2022:

The business has rostered you on for shifts since the start of the year in line with your provided availability, which you have failed to attend. In addition, on several occasions, you have failed to provide any explanation for your non-attendance. This occurred most recently on Saturday 1 October 2022.

In my recent conversation with you, I requested that you provide updated availability for the business's consideration, to enable it to roster you on for work accordingly. I requested that you provide this availability by no later than 2 October 2022. Unfortunately, you did not provide your availability before the requested date.

You subsequently advised the business on 3 October 2022 that you were available to complete a combined 7.5 hours' worth of work each week, across the hours of 9.30am – 1.30pm Wednesday and 7.30am – 11.00am Saturday.

This is inconsistent with business needs, which requires workers to be available to work for two full days per week.

Taking into account the operational requirements of this site, your availability no longer meets the needs of the business. Further, you have failed to comply with reasonable instruction on an ongoing basis by failure to notify the business of your non-attendance at shifts. As such, the business has determined that your employment with David Jones will cease effective 3rd November 2022.

[31] No further correspondence was exchanged between the Parties.

Balance of the Evidence

[32] The inconsistencies in the Applicants case were stark. Whilst he submitted in his Outline of Submissions that the reason for his unavailability was because he had recently suffered from a heart issue, the email of 17 January 2022 mentioned nothing of his medical problem but rather focused on his technical issues in accessing the Reflexis system. Additionally, the ledger of telephone calls to and from the Applicant regarding absences from work only listed one entry, on 1 April 2021, regarding his heart condition. It is also notable that he was working elsewhere, and that such work was not precluded by any medical condition.

[33] The Applicant failed to address in any detail the reasons as to why he did not respond to the Respondents repeated requests for status updates and relevant enquiries. His submission that he made attempts to contact the business but could not get through on the phone belied reality and was inconsistent with the email correspondence evidencing the repeated requests and the ledger of telephone calls.

[34] Where there is any divergence between the evidence of the Applicant and Ms Emsies, I prefer the evidence of Ms Emsies. Her evidence was clear, balanced, and supported by voluminous contemporaneous evidence. The Applicant, however, sought to provide unbelievable explanations for his repeated failures to engage with the Respondent. The Applicant's evasive behaviours and disregard for the Respondent's repeated emails and attempts to contact him, coupled with his low attendance record, evinced a lack of any desire to continue working for the Respondent.

Applicant's Submission

[35] The Applicant submitted that he worked as a regular casual employee at the Distribution Centre for almost nine years.

[36] The Applicant noted that Ms Emsies asked the Applicant to provide updated availability to the business. Following this, the Applicant updated his availability through the Respondent's rostering system administered through the Reflexis app. The Respondent's rostering system was sometimes not allowing the Applicant to log in to update his availability.

[37] The Applicant had availability of two days per week but limited his availability to a short window on each of the two days. The Applicant had intended the short window of availability to be only temporary. This was because the Applicant had recently suffered from an episode of pericarditis. The Applicant wanted to work fewer hours on any given day so as to not exacerbate his condition. As Covid-19 was running rampant in late 2021 to early 2022, the Applicant had to take necessary precautions working in high-risk environment, contracting the virus would have had devastating consequences.

[38] On 3 November 2022 the Applicant received a letter of termination from the Respondent. The Applicant admitted to failing to notify of his non-attendance at shifts on a small number of occasions. Where this occurred, it was because the Applicant had made an attempt to contact the business but could not get through on the phone.

[39] The Applicant submitted that he was not given an opportunity to respond to the reasons for termination, and not given any formal warnings in relation to his failure to attend shifts. Given all the circumstances, including the Applicant's significant length of service, the dismissal was harsh and unjust.

Respondent's Submissions

[40] The Respondent submitted that the Applicant was not protected from unfair dismissal because:

(a) his employment as a casual employee was not regular; and

(b) he had no reasonable expectation of continuing employment on a regular and systematic basis.

[41] The Applicant had no guarantee of being allocated any shifts by the Respondent, and in any event, in the six months prior to the termination of his employment, he rarely attended for work. His employment was highly irregular.

[42] Section 382 of the Act provides the circumstances in which a person is protected from unfair dismissal. Relevantly, a person will be protected from unfair dismissal if *"the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period"*.

[43] In the alternative the Respondent submitted the Applicant's dismissal was not unfair. He had an astounding record of absenteeism, and rarely contacted the Respondent to notify his managers of his absence. He routinely failed to update his availability for shifts, despite numerous lawful and reasonable directions to do so over an extended period.

[44] The Respondent noted it is critical that employees enter their availability accurately into Reflexis in order for the Respondent to plan its workforce requirements with certainty. The Applicant routinely failed to enter his availability into Reflexis, and in 2022, Ms Emsies directed the Applicant to enter his availability into Reflexis on 11, 14 and 17 January, 12 and 26 May, 2 and 8 June, 15 July, 1 August and 24 September.

[45] Despite agreeing with Ms Emsies on a number of occasions that he would update his availability on Reflexis, the Applicant either failed to do so, or did not do so in a manner that failed to accord with David Jones's requirements (being a minimum of three or, subsequently, two days availability per week). The Applicant was warned that a failure to update his availability may result in the termination of his employment.

[46] In the 12 months leading up to the termination of his employment, the Applicant attended the Distribution Centre for 11 out of the 62 shifts to which he was allocated.

Legislative Provisions

[47] Section 396 of the FW Act sets out those preliminary matters the Commission must consider prior to a consideration of the merits of an application:

> **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.*

[48] It was not in dispute, and I am satisfied that the Application was made within the statutory period required, the Respondent is not a small business such that the Small Business Fair Dismissal Code does not apply, and that the dismissal was not related to redundancy.

[49] Section 396(b) requires the Commission to determine if the person was protected from unfair dismissal.

[50] Section 382 of the FW Act deals with when a person is protected from unfair dismissal and states:

> **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

[51] Section 383 of the FW Act specifies the minimum employment period required to be met for a person to be eligible to make an application or unfair dismissal. The minimum employment period is 6 months ending at the earlier of when the person is given notice of unfair dismissal or immediately before dismissal or, in the case of a small business, 12 months.

[52] Section 384 of the FW Act deals with the period of employment and, in relation to a casual employee, states:

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) 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 as a <u>regular casual employee</u>; 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…

[Emphasis added]

[53] *"Regular Casual Employee"* is defined in s.12 of the Act as:

"regular casual employee": a national system employee of a national system employer is a regular casual employee at a particular time if, at that time:

(a) the employee is a casual employee; and

(b) the employee has been employed by the employer on a regular and systematic basis.

[54] The meaning of *"casual employee"* is provided by s.15A of the Act. In *WorkPac v Rossato*,[2] referring to citing *Hamzy v Tricon International Restaurants*,[3] the High Court observed:[4]

> *"Both before the Full Court, and in this Court, the parties accepted that the expression "casual employee" in the Act refers to an employee who has no "firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work".*

CONSIDERATION

Relevant Time for Determination of Nature of Employment

[55] In the Respondent's submission, the Applicant was required to be employed as a regular casual employee, and to have a reasonable expectation of continuing employment by the Respondent on a regular and systematic basis, in the six-month period from 3 May 2022 to the dismissal date of 3 November 2022.

[56] The Respondent acknowledged that the Applicant had approximately seven years of regular and systematic employment from the commencement of his employment,[5] but submitted that was irrelevant as s.383 provided the *"minimum employment period"* as being six months ending at the earlier of the following times:

(i) the time when the person is given notice of the dismissal; or

(ii) immediately before the dismissal.

[57] I reject the Respondent's submissions above, as pursuant to S.382 of the Act:

> *"A person is protected from unfair dismissal at a time if, <u>at that time</u>:*
>
> *(a) the person is an employee who has completed a period of employment with his or her employer <u>of at least</u> the minimum employment period; …"*
>
> [Emphasis added]

[58] The meaning of period of employment is set out in s.384, and the period of employment for the purposes of s.382(a) is determined by reference to s.384, not s.383. As the Full Bench observed in *Shortland v The Smiths Snackfoods Co Ltd*,[6](*Shortland*):

> *Moreover, it is more than tolerably clear that s.384 is concerned with how an employee's period of employment is calculated for the purposes of s.382(a). Section 384(2) draws a distinction between a period of service and a period of employment. It also draws a distinction between a period of continuous service and a period of service: a period of continuous service can be made up of a series of periods of service, some of which count towards the period of continuous service (ie. where the conditions in s.384(2)(a)(i) and (ii) are met) and some of which do not (ie. where one of the conditions in s.384(2)(a)(i) or (ii) is not met). It is clear from the language of s.384(2) that an employee may have series of contiguous periods of service with an employer that may*

count towards a single period of employment with that employer. Any given period of service in such a contiguous series of periods of service will count towards the employee's period of employment only if the requirements in s.384(2)(a)(i) and (ii) are met. Section 384(2) is concerned only with determining which periods of service in such a contiguous series count toward the employee's period of employment with the employer for the purposes of s.382(a).

[59] The Applicant had approximately seven years of regular and systematic employment from the commencement of his employment the Respondent, and that period *"counts"* toward the Applicant's period of employment. That employment continued until the dismissal on 3 November 2022, albeit on a less regular basis for approximately the last two years. Notwithstanding that less regular attendance at work, it is clear that the Respondent was continually in contact with the Applicant in order to secure his performance of minimum requirements up until a month before his dismissal.

[60] I find that the Applicant has met the relevant minimum employment period and is therefore a person protected from unfair dismissal.

Is the Dismissal Harsh, Unjust or Unreasonable

[61] In determining if the Applicant was unfairly dismissed it is necessary to determine if his dismissal was harsh, unjust or unreasonable. Section 387 of the Act sets out those matters to be considered by the Commission.

[62] Section 387 of the Act states:

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.

(b) Valid Reason for the Dismissal

[63] To be a valid reason, the reason for the dismissal should be sound, defensible or well founded and should not be capricious, fanciful, spiteful or prejudiced. However, the Commission will not stand in the shoes of the employer and determine what the Commission would do in the same position.

[64] In *Sydney Trains v Gary Hilder*[7] the Full Bench summarised the well-established principles for determining such matters[8]:

"The principles applicable to the consideration required under s 387(a) are well established, but they require reiteration here:

(1) A valid reason is one which is sound, defensible and well-founded, and not capricious, fanciful, spiteful or prejudiced.

(2) When the reason for termination is based on the misconduct of the employee the Commission must, if it is in issue in the proceedings, determine whether the conduct occurred and what it involved.

(3) A reason would be valid because the conduct occurred and it justified termination. There would not be a valid reason for termination because the conduct did not occur or it did occur but did not justify termination (because, for example, it involved a trivial misdemeanour).

(4) For the purposes of s 387(a) it is not necessary to demonstrate misconduct sufficiently serious to justify summary dismissal on the part of the employee in order to demonstrate that there was a valid reason for the employee's dismissal (although established misconduct of this nature would undoubtedly be sufficient to constitute a valid reason).

(5) Whether an employee's conduct amounted to misconduct serious enough to give rise to the right to summary dismissal under the terms of the employee's contract of employment is not relevant to the determination of whether there was a valid reason for dismissal pursuant to s 387(a).

(6) The existence of a valid reason to dismiss is not assessed by reference to a legal right to terminate a contract of employment.

(7) The criterion for a valid reason is not whether serious misconduct as defined in reg 1.07 has occurred, since reg 1.07 has no application to s 387(a).

(8) An assessment of the degree of seriousness of misconduct which is found to constitute a valid reason for dismissal for the purposes of s 387(a) will be a relevant matter under s 387(h). In that context the issue is whether dismissal was a proportionate response to the conduct in question.

(9) Matters raised in mitigation of misconduct which has been found to have occurred are not to be brought into account in relation to the specific consideration of valid reason under s 387(a) but rather under s 387(h) as part of the overall consideration of whether the dismissal is harsh, unjust or unreasonable."

[65] The Respondent submitted that a valid reason existed as the Applicant failed to update his availability for shifts, despite numerous lawful and reasonable directions to do so over an extended period, and he had a significant record of absenteeism. The Applicant admitted to failing to notify of his non-attendance at shifts, although he described it as occurring only a small number of occasions.

[66] I accept the evidence of Ms Emsies that it was critical that employees enter their availability accurately into Reflexis in order for the Respondent to plan its workforce requirements with any certainty, and that the Applicant routinely failed to enter his availability into Reflexis.

[67] Despite being directed ten times in 2022 to enter his availability in Reflexis, and agreeing on a number of occasions that he would do so, the Applicant failed to update his availability. I also accept that in the 12 months leading up to the termination of his employment, the Applicant attended the Distribution Centre for 11 out of the 62 shifts to which he was allocated.

[68] The Applicant's failure to update his flexibility, and attend rostered shifts, constituted valid reasons for his dismissal, and certainly justified his dismissal.

(c) Procedural Fairness

[69] The Respondent notified the Applicant of the reason for dismissal (s.387(b)), however the Respondent only did so in the Termination Email on 3 November 2022. Ordinarily, notification of the valid reason to terminate must be given to the employee before the decision to terminate is made. In *Crozier v Palazzo Corporation Pty Ltd*,[9] (Crozier) the Full Bench found:

As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170CG (3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment. Much like shutting the stable door after the horse has bolted.

[70] Although *Crozier* considered provisions in previous legislation, the principle in *Crozier* remains unchanged and continues to apply. I further note that in this matter the Applicant raised a complaint that he was not given the opportunity to show cause as to why his employment should not be terminated. Criticism could also be made of termination occurring by way of email as opposed to in person.[10]

[71] I do not consider, however, that in the particular circumstances of this case, I can make findings of lack of procedural fairness on the part of the Respondent. On the rare occasions in 2022, where the Applicant actually attended rostered shifts, the opportunity for in person meetings were taken. Two meetings were held on 12 May 2022, and on 24 September 2022, another discussion in person occurred, and Ms Emsies told the Applicant that his failure to update his availability on Reflexis could result in termination of his employment. The Applicant was on notice from that time of the consequences of his failure to update his availability. He left work that day after only completing 3.5 hours of his shift, and never attended work again thereafter.

[72] The Applicant was further put on notice later on 24 September 2022, when he received an email advising "*I note that should you fail to provide suitable availability to the business within the timeframe stipulated, it may result in reconsideration as to the provision of shifts going forward, and potentially result in the termination of your employment."*

[73] The Applicant did not respond to the above email, and failed to attend another shift on 1 October 2022, without providing a reason for his non-attendance. In those circumstances where the Applicant was simply, and repeatedly, disregarding clear directions for the Respondent and not attending rostered shifts, it was understandable that the Respondent concluded the Applicant's employment by email.

[74] The matter did not involve any concerns about the Applicant's performance and no warnings had been issued in this regard (s.387(e)), and neither party submitted that the size of the Respondent's enterprise or its access to human resource management specialists or expertise was likely to impact on the procedures followed in effecting the dismissal.

(d) Other Relevant Matters

[75] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant. I consider there is no basis to describe the dismissal as harsh. Quite to the contrary, I consider the Respondent went to extraordinary lengths to outline its requirements to the Applicant and allow him time, and repeated opportunities, to comply.

[76] I have rejected the Applicant's submission that his health was somehow a factor explaining his conduct, and note that the Applicant was simultaneously working elsewhere, and only once in the telephone ledger was his health referenced regarding his absences.

Conclusion

[77] I have made findings in relation to all matters specified in section 387 as relevant. I

must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable and therefore an unfair dismissal. While I have identified areas where procedural fairness issues arose, in the unique circumstances of this matter I do not apportion any weight to those circumstances, and do not consider that any further procedural fairness steps by the Respondent would have in any way affected the manner or occurrence of the dismissal.

[78] Overall, I do not find that the dismissal of the Applicant was harsh, unjust or unreasonable. While I note the Applicant had around nine years employment with the Respondent, I do not consider that factors weighs to any extent against the valid reason for his dismissal.

[79] The Application is dismissed.

DEPUTY PRESIDENT

Appearances:

Mr Craig Murimwa (Applicant)

Mr A Thomas (Solicitor at Seyfarth Shaw) Respondent Representative

Miss A Emsies (Witness for the Respondent)

Hearing details:

Final written submissions:

Case Authorities 3 April 2023

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<PR760872>

[1] Exhibit A2.

[2] [2021] HCA 23.

[3] (2001) 115 FCR 78 at 89 [38].

[4] [2021] HCA 23, at [32].

[5] Transcript PN 634 to 639.

[6] [2010] FWAFB 5709, at [12]..

[7] [2020] FWCFB 1373.

[8] Ibid at [26]

[9] (2000) 98 IR 137, at [73].

[10] *Gooch v Proware Pty Ltd T/A TSM (The Service Manager)* [2012] FWA 10626 (Cargill C, 20 December 2012).